SUBMISSIONS OF THE WESTERN AUSTRALIAN DISPUTE RESOLUTION ASSOCIATION (WADRA) INC.

In response to the Law Council of Australia submission of 13 November 2013 paragraphs 336 to 341.

1. At paragraph 336 the Law Council suggests that there is a serious potential for parties with fewer resources to suffer disadvantage. This is much less so in ADR than in litigation before the Courts, where a party with few resources may be confronted by an organisation with the funds to employ Senior Counsel, wage what the Americans call "motions practice", ie constant interlocutory applications on procedural points and fight the case not merely at first instance but through State Appellate Courts and ultimately to the High Court of Australia. In an ADR situation, a mediator provides an opportunity for all parties to express their point of view and try to arrive at a solution which is satisfactory to all concerned.

2. The Law Council in paragraph 336 of its submissions suggests that there is a potential for more sophisticated parties to take advantage of another party's relative lack of knowledge about their legal rights and responsibilities. This pre-supposes that mediation is a process to determine legal rights and responsibilities, whereas in fact it is interest based rather than rights based. A solution in a mediation may well involve the parties agreeing to concessions which are quite outside the scope of any possible legal remedy. It is far easier for a more sophisticated party to take advantage of another party's relative lack of knowledge of points of law in litigation where the outcome may well depend upon those points of law.

3. The Law Council at paragraph 336 expresses concern that the confidentiality of ADR will result in the Courts having fewer opportunities to provide lengthy reasons for judgments to guide the legal profession and the community generally as to their legal rights and responsibilities. This

suggests that litigants have some sort of obligation to contribute financially to the maintenance of the legal system, whereas what they want to do is to resolve their disputes as quickly and cheaply as possible and in a manner which is as private and confidential as can be.

4. At paragraph 337 the Law Council complains bitterly that the secrecy of mediation outcomes violates fundamental tenets of justice which require openness, transparency and accountability. That may be true of the criminal law but is certainly out of place in any discussion about purely private remedies, where the parties have always been at liberty to reach solutions of their own and indeed are being encouraged by Courts everywhere to do so through the mediation process, which is not only faster and cheaper than fighting the case through the Courts but also affords the parties a degree of privacy, rather than having their affairs broadcast through the media.

5. No mediator would agree with the quotation cited by the Law Council at paragraph 338 of their submission, without attribution, that mediation is just about settlement. In all cases the mediator will try to assist the parties to reach a settlement which addresses their respective concerns and interests. Whether that settlement represents precisely what finding a Judge might have made after hearing the case at length or an Appellate Court might decide after reviewing the judgment at first instance is not a factor which a mediator or indeed the parties in a mediation would consider decisive. Indeed, it is hardly ever the case that the outcome of a mediation is the same outcome as would have been reached in a contested Court action since the parties generally pay their own legal costs and almost invariably make concessions in order to achieve settlement.

6. Also at paragraph 338 the Law Council talks about settlements achieved through oppression by the successful exercise of force. The Western Australian Dispute Resolution Association consists primarily of organisations which themselves have mediator members and there is no anecdotal support at all for this notion of oppression by the successful exercise of force. Where it is apparent to a mediator that one party is being

oppressed by the other through threats of force or other intimidation, the mediator will take action to end the mediation, but this would be a rare contingency indeed. Mediation is a much more likely avenue for an oppressed party to choose, being speedy, confidential and inexpensive, rather than confront the other party in Court with all the consequential delay, publicity and either the expense of legal assistance or the hazards of unrepresented litigation.

7. Reference to the protections of litigation is largely illusory. Mediation is, in the experience of mediators, a far superior venue for addressing the imbalance between parties than is litigation. In particular:

   (a) It is well known that the enormous expansion of discovery of documents in the field of litigation has been a major factor in the expense and delay involved in taking matters through the Courts. It would be a disaster to import this procedure into mediation, where neither the time nor the cost of an extremely detailed investigation into documents can be justified.

   (b) The economic power of parties is irrelevant in mediation. Both parties are on an equal footing and it is certainly not the experience of mediators that giant corporations fare better in mediations than they do in litigation. Strength of character may be a factor in open session, but in caucus a mediator has the opportunity to speak to parties individually and, in shuttle mediations, to avoid contact between the parties if that is the best means of achieving settlement.

   (c) Very occasionally indeed, mediators encounter a party who is so unreasonable that no settlement can be achieved. This results in the mediation being abandoned, with no settlement in view, such that the dissatisfied party either gives up or proceeds to litigation.

   (d) The objective of mediation is to achieve a settlement which addresses the interests and concerns of the parties. To take the attitude that a party to a mediation should not accept one dollar less

nor offer one dollar more than the party anticipates would be awarded after a protracted and expensive law suit (subject to further appeals) is not the objective in a mediation, where both parties must make concessions if the matter is to be resolved amicably.

(e) Parties participating in mediation do not always require legal or other advice, since in many instances the matter being mediated would simply not justify the expense. Community and neighbourhood disputes are typical of this. In disputes involving significant sums of money, parties have access to legal advice or representation (and they are often are represented in major commercial mediations) and the assistance of experts, in exactly the same way as they would have if they were litigants, represented or unrepresented, in a Court action.

(f) It is true that mediators do not provide legal advice to participants in mediation, but then neither do Judges or Magistrates. To the extent that legal representation is crucial in the view of a party (and it is a decision for the party, not the system) then legal representation will be obtained if a party considers that legal representation is necessary and affordable.

(g) The fairness of the settlement reached in a mediation is a matter for the parties and their advisers, both professional and lay, if any. The versatility of the mediation process leaves scope for parties' creativity and concessions in measures that suit their circumstances. This is justice, substantive, procedural and interpersonal justice, assessed by those best placed to assess it because they will be living it and informed by those who are educated to inform, where a party chooses to obtain advice.

8. In paragraph 341, the Law Council talks of the overriding necessity to reduce delay and costs "in the administration of justice". The Western Australian Dispute Resolution Association submits that the real question is how to reduce delay and cost in the resolution of disputes. Experience in its

introduction to mediation into our community has demonstrated that mediation is a quicker and less expensive means of relieving such disputes, as is manifest by the very widespread adoption of mediation as a dispute resolution process throughout the full range of Courts and Tribunals.

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