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Developments in Commercial ADR: Attorney-General's Department's Perspective

Ian Govey

David Syme

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Abstract
The purpose of this article is to provide an outline of developments in ADR from the perspective of the Australian Commonwealth Attorney-General's Department. It is illustrative of how far ADR has come in recent years that it permeates so many areas of policy and legislation.

Keywords
alternative dispute resolution, role of the Commonwealth, Attorney-General's Department

DEVELOPMENTS IN COMMERCIAL ADR: ATTORNEY-GENERAL'S DEPARTMENT'S PERSPECTIVE[+]

By Ian Govey and David Syme[*]

Introduction

The purpose of this article is to provide an outline of developments in ADR from the perspective of the Australian Commonwealth Attorney-General's Department. It is illustrative of how far ADR has come in recent years that it permeates so many areas of policy and legislation.

Much of ADR emphasises the informal resolution of disputes directly by the parties themselves. Within this environment the role of governments is, and probably needs to be, limited. However, governments do have important functions in promoting and developing ADR through:

- developing policy, legislation and regulation on ADR
- providing or funding ADR services directly
- facilitating the development of ADR by industry
- representing Australia's interests in international forums considering ADR, and
- Commonwealth agencies themselves being potential parties in disputes.

While most commercial ADR is covered by State and Territory jurisdictions, some key areas of Commonwealth ADR responsibility are:

- information security/telecommunications
- trade law
- consumer affairs and small business, and
- native title.

Because of the focus on commercial ADR, this article does not cover the area of ADR in which the Department has the most direct and extensive involvement, namely

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* Ian Govey is the General Manager, Civil Justice and Legal Services Division, Attorney-General's Department. David Symes is the Director of Secretariat, National Alternative Dispute Resolution Advisory Council.

family law. The other major area not covered in this article is dispute resolution in the industrial relations system.

Commonwealth as a policy setter and legislator

National Alternative Dispute Resolution Advisory Council (NADRAC)

The National Alternative Dispute Resolution Advisory Council is a key policy body on ADR. Established in 1995, its charter is to provide 'consistent and coordinated advice to the Attorney-General on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision'. NADRAC is an independent body comprising ADR experts from a range of fields including commercial ADR, family and community ADR, courts and academia. Its current chair is Professor Laurence Boulle.

NADRAC's key priorities are promoting the quality of ADR practice, addressing issues of court-based ADR, responding to increasing diversity in ADR, and promoting effective ADR research, evaluation and data collection.

In the past 12 months NADRAC has finalised its report on standards for ADR, developed a preliminary list of criteria for court referral of matters to ADR, consolidated general principles for court ADR, undertaken consultation in relation to ADR definitions, commenced consideration of on-line ADR, and held discussions with key agencies to promote improved ADR research and data collection. It has also continued its work in relation to ADR in small business disputes.[1]

The recommendations in NADRAC's report on standards,[2] launched by the Attorney-General in June 2001, is of particular interest to ADR practitioners and service providers. The report favours a self regulatory framework in which ADR service providers develop standards within the context of their own work. The report does, however, recommend that providers adopt and comply with a code of practice which takes account of some essential elements of service quality. It also recommends that compliance with such a code form part of any agreement between the government and providers for the delivery of ADR services. The Government is currently considering the report.

NADRAC's work has identified some significant challenges for ADR policy. Its standards report noted two principles underpinning the development of ADR. The first principle is recognition of the diverse contexts in which ADR is practised (the

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1 For references to all these projects see the Nadrac web-site, nadrac@ag.gov.au.

2 National Alternative Dispute Resolution Advisory Council *A Framework for ADR Standards* Canberra, Commonwealth of Australia (April 2001).

diversity principle). The second is the promotion of consistent practice in ADR (the consistency principle).

NADRAC's challenge has been to balance these two principles. It notes that innovative forms of ADR are being practised in an increasing range of contexts by diverse service providers. The use of technology, such as on-line communication, is an example of this diversity. While diversity and choice is to be encouraged, the continued development of ADR, and its acceptance by the community, requires a degree of consistency.

NADRAC emphasises that proper assessments should be made about referrals to ADR, especially within mandatory settings. NADRAC's work in proposing criteria for identifying matters for referral to ADR aims to assist courts and other referrers to develop guidelines on the use of ADR.

Effective and consistent data collection is necessary in order to assess the quality of ADR services, the extent of their usage, and the relative effectiveness of different forms of ADR for different disputes and client groups. The lack of empirical data is a major hindrance in the development of good policy on ADR. NADRAC's work on ADR research, evaluation and data collection has aimed to encourage relevant bodies to collect such data.

NADRAC's review of its ADR definitions[3] is directly relevant to the topic of commercial dispute resolution. NADRAC has argued that consistency in terminology on ADR enables consumers to make informed choices about the nature of their participation in ADR, and underpins research standards and policy development. It has consulted with courts, policy advisers and ADR providers on the issues of ADR definitions and processes and hopes soon to publish an updated definitions paper.

Legislation

Many recently introduced legislative reforms make explicit reference to the use of ADR, such as arbitration, mediation, conciliation and conferencing processes. At least 30 separate statutes throughout Australia make provision for mediation alone.

The ADR provisions of the Federal Magistrates Service and the proposed Administrative Review Tribunal have received significant attention. These initiatives have been designed to provide less formal, cheaper, quicker and more accessible forms of justice. The use of various forms of ADR is clearly central to achieving these goals.

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3 National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution Definitions* Canberra, Commonwealth of Australia (1997).

Of particular interest to the business sector is the *Privacy Amendment (Private Sector) Act 2000,* which came into effect on 21 December 2001. The Act establishes a national co-regulatory scheme for the handling of personal information by private sector organisations. The complaint-handling process in the *Privacy Amendment (Private Sector) Act* is designed to enable people to have their complaints dealt with simply, quickly, at low cost and without red tape. It is designed to enable most complaints to be resolved through conciliation and mediation, rather than through an adversarial court process. The process for handling and investigating complaints mirrors that which has applied and worked well in the Commonwealth public sector since 1989.

In the first instance, complaints are to be directed to the organisation concerned. If the complainant and the organisation are unable to resolve the matter between themselves, the complainant can request that an independent person investigate the complaint to determine whether there has been an interference with their privacy. Where the organisation concerned is subject to an approved privacy code that includes a mechanism for handling complaints, the independent investigator will be an adjudicator nominated under the code. Where the organisation is not subject to an approved privacy code, the Federal Privacy Commissioner will handle the complaint.

Commonwealth as ADR service provider: ADR in courts and tribunals

Commonwealth courts and tribunals are, of course, independent bodies operating within their own legislative frameworks. Outside the family law area, ADR is provided through the Federal Court of Australia, the National Native Title Tribunal and the Administrative Appeals Tribunal. In addition, ADR is an important part of the process used to resolve complaints made to the Human Rights and Equal Opportunity Commission.

Commercial matters

Many disputes in these areas involve commercial interests. For example, administrative appeals may relate to matters such as taxation, licensing or regulation, and corporations matters. Face to face and telephone conferences are the most common form of ADR assistance in the AAT (approximately 11,000 conferences were conducted in 1999–2000), but some formal mediations are also conducted.[4] The Human Rights Commission conciliates a large proportion of the matters referred to it, and many of the parties involved are commercial entities.

The Federal Court's jurisdiction covers many commercial matters which may benefit from the court's Assisted Dispute Resolution program. A total of 2,030 matters have

4 Administrative Appeals Tribunal *Annual Report 1999–2000*

been voluntarily referred to mediation since the commencement of the program in 1987.[5] Mediation may be conducted by registrars or referred to external mediators.

Native Title

Native title matters invariably involve complex multilateral negotiations between indigenous groups, business and commercial interests and governments. The *Native Title Act 1993* provides a process for the recognition and protection of native title. To provide certainty and to facilitate the resolution of native title matters, there is a comprehensive framework of programs and processes set up under the Act to manage and administer native title.

While native title applications will still take some time to be resolved, more native title applications and issues relating to development on areas of land subject to native title are being resolved by less adversarial means, in particular, through Indigenous Land Use Agreements (ILUAs) and Federal Court consent determinations – a move the Government encourages.

ILUAs are binding agreements provided for in the Act as an alternative to statutory and judicial processes. ILUAs are an alternative to costly and time consuming formal native title procedures. They provide a means of resolving a wide range of native title matters through negotiation with native title holders and were made possible by changes made to the Act by the Government in 1998. To date, 26 Indigenous Land Use Agreements have been registered with the National Native Title Tribunal. We understand that further agreements have been lodged for registration and update required are under way.

The Government has recognised that a coordinated approach needs to be taken in resourcing the native title system and that coordination of resources is essential in order to ensure that all parts of the system operate efficiently and effectively. In 2000-01 a review of the native title system found that the demands on the system are greater than originally predicted and matters are taking longer to resolve than expected.

To manage this increased demand, which is expected to peak by 2004, the Commonwealth is injecting an extra $86 million over the next four years to ensure the system's effective operation. The additional funding will go to the National Native Title Tribunal and the Federal Court to enable the speedier resolution of native title applications, and to the Aboriginal and Torres Strait Islander Commission and the Attorney-General's Department to support participants in the native title process.

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5 Federal Court of Australia *Annual Report 1999–2000*

This will ensure that each element of the native title system has sufficient resources available to enable it to respond flexibly to the needs of both indigenous and non-indigenous parties. A review of the funding requirements of the system will occur prior to the 2003–04 Budget.

Commonwealth as facilitator

Industry ADR schemes

Successive governments have emphasised the need for industries to rely on self-regulation, rather than on government mandated or legislated schemes, in settling disputes. Nevertheless, in a self-regulatory environment, government plays a significant facilitative role in assisting industries to establish industry dispute resolution schemes.

Since 1990 various industries have set up dispute resolution schemes to deal with customer disputes. All schemes encourage customers to resolve their complaints in the first instance with the member of the industry concerned. Industry members are expected to have their own complaints handling procedures in place to deal with those complaints, but if they cannot be resolved, the customer can take the complaint to the industry dispute resolution scheme.

Current schemes include the Telecommunications Industry Ombudsman, the Energy Industry Ombudsman (Victoria), the Energy and Water Ombudsman (New South Wales), the Electricity Ombudsman (Tasmania) and the South Australian Electricity Ombudsman. They also include various financial disputes schemes such as the Australian Banking Industry Ombudsman, the General Insurance Enquiries and Complaints Scheme, the Financial Industry Complaints Resolution Scheme, the Insurance Brokers Dispute Facility and the Credit Union Dispute Reference Centre.

Most schemes use investigation and conciliation processes to attempt to resolve disputes. In most cases where a resolution is not reached by conciliation, the scheme provides for a determination, up to a specified dollar limit, which is binding on the industry member concerned but not on the customer.

Other industries have set up schemes to resolve disputes which involve referral of a complaint to a private mediator or arbitrator for resolution.

Benchmarks for industry dispute resolution schemes have been developed through Treasury's Office of Consumer Affairs,[6] but schemes are established and operated by the relevant industry.

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6 Consumer Affairs Division, Commonwealth Department of the Treasury (1997)

Codes of practice

Most industry codes of practice include dispute settling procedures. An example is the Franchising Code of Conduct which is a mandatory rather than voluntary code. Under this code disputes between franchisors and franchisees are referred to the Office of the Mediation Adviser (a private body contracted by the Government) who then appoints a mediator for the dispute. Recent amendments to the Code which come into effect from 1 October 2001 make specific provision for terminating mediation. NADRAC last year made a submission to the Franchising Policy Council in relation to the ADR provisions of the code. The submission is available on NADRAC's web-site.

International role

International Legal Services Advisory Council

International Commercial Dispute Resolution has been a major focus for the International Legal Services Advisory Council (ILSAC) chaired by the Hon. Sir Laurence Street, AC KCMG QC.

ILSAC, which was established by the Federal Government in 1990, is an advisory council which provides a consultative forum for private and public sector interests on issues relevant to international legal services and reports to the Attorney-General. The Department provides the secretariat for the Council.

Past activities have included promoting measures to enhance the international performance of Australia's commercial dispute resolution centres and services. Issues have included the role of the Australian legal profession and opportunities to improve the marketing of Australia's competence in this area.

Under ILSAC's guidance an international commercial dispute resolution kit and flyer was widely distributed to Australian lawyers overseas and to organisations likely to influence the demand for Australian International Commercial Dispute Resolution Services. The kit, which was distributed in 1996, contained a handbook prepared within the Department with the assistance of the Council.

Last year the Department, in conjunction with ILSAC, received funding from AusAID under the APEC Support program for an alternative dispute resolution awareness and training project in Indonesia. The project involved a study tour for representatives of various organisations, followed by training in Indonesia. The Dispute Resolution

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Benchmarks for Industry-based Consumer Dispute Schemes.

Centre at Bond University was contracted to undertake the training which was received very enthusiastically. One of the organisations targeted for the training was the Jakarta Initiative Task Force which was charged with mediating between creditors and debtors. As a direct result of this one of the Bond University lecturers is being funded by USAID to assist the Task Force for 12 months.

On-line dispute resolution and e-commerce

An officer from the Attorney-General's Department co-chaired a joint conference of the OECD, Hague Conference Private International Law and the International Chamber of Commerce in December 2000, which considered on-line dispute resolution for business and consumer disputes.

Key points of consensus to emerge from this conference included the need to offer low cost ADR and the importance of impartiality of intermediaries. Issues identified for further exploration included the choice of ADR systems; whether ADR should be voluntary or mandatory; whether ADR should be binding or not, and compliance and enforcement of ADR outcomes. The conference noted that some issues, such as fraud, are clearly not suitable for ADR, but that high volume, low value, simple cases are suitable. Settling at the earliest stage was seen as important, as was ensuring flexibility and enabling access to different types of ADR.

The conference noted some significant limitations to automated ADR systems, such as 'blind-bidding', but also significant potential. Current systems are embryonic, but there is scope for their application in privacy protection. Automated systems appear to be tailored mainly to disputes that are purely monetary, high value (although this was disputed by some) and where there is a willingness to compromise. However, as the amount in dispute increases, the importance of procedural safeguards grows in relation to efficiency.

Problems in using ADR in privacy disputes include the asymmetrical nature of access to information (consumers need more information), the funding of ADR schemes (along with funding there is the effect on impartiality if a scheme is wholly funded by business) and the need for consumers to be able to put their arguments in their own language.

UNCITRAL Working Group On Arbitration

Background

The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 with a mandate to coordinate legal activities in order to promote the unification and harmonisation of international trade law.

In 1976 the commission it adopted the UNCITRAL Arbitration Rules, which have become widely known and used throughout the world in conducting arbitrations. The UNCITRAL Conciliation Rules followed in 1980. In 1985 the Commission completed its most ambitious commercial arbitration project when it adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law).

The Model Law is a comprehensive work that establishes an internationally agreed legal framework for the conduct of international commercial arbitration. There are currently 35 countries that have adopted legislation based upon the Model Law, including Australia.[7]

In the field of commercial arbitration, UNCITRAL has also sought to promote accession by States to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The current project

In 1999 UNCITRAL decided to review and discuss proposals for the improvement of international commercial arbitration. The decision to resume work on arbitration law was made in response to suggestions that further reform was required to address practical difficulties that had emerged in the time since the adoption of the Model Law and, more generally, to enhance legal certainty and predictability in the use of arbitration and conciliation.

The Commission entrusted work on this project to the Working Group on Arbitration. The Working Group commenced work in March 2000 and has met four times. The Working Group is composed of all States members of the Commission and is open to representatives of observer States and various international organisations.

The Attorney-General's Department is responsible for representing Australia at meetings of the Working Group and for consulting with professional bodies and practitioners on the matters raised by the project.

The Commission instructed the Working Group to concentrate upon the following topics relating to the Model Law:

(a) the requirement of written form for arbitration agreements
(b) the enforcement of interim measures of protection, and
(c) uniform rules on international conciliation.

UNCITRAL Model law on International Commercial Arbitration

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[7] The *International Arbitration Act 1974* gives the Model Law the force of law in Australia.

(a) Requirement of Written Form for Arbitration Agreements

Article 7 of the Model Law defines the term 'arbitration agreement' and provides that the agreement must be in 'writing' to be valid.

Article 7 is modelled upon Article II(2) of the New York Convention, but with a number of modifications to clarify some points of uncertainty in the interpretation of the 'writing' requirement under the New York Convention and to elaborate on what constitutes 'writing' for the purposes of the Model Law.

There has been growing concern in recent years at the lack of uniformity in the interpretation of both Article 7 of the Model Law and Article II(2) of the New York Convention by national courts and legislatures. In particular, there is concern that the adoption of a narrow interpretation of the written form requirement may conflict with current practices and the expectations of the parties involved in international commercial arbitration.

To address these concerns, the Working Group has decided that Article 7 of the Model Law should be amended to promote a broad and liberal understanding of the writing requirement and accommodate recent changes in arbitration practices.

The Working Group is proceeding on the understanding that, for a valid arbitration agreement to be concluded, it must be established that an agreement to arbitrate had been reached and that some written evidence of the terms and conditions of the agreement exists.

In addition, the Working Group has sought to develop a draft text that meets the following objectives:

- confirms existing liberal interpretations of the writing requirement,
- is flexible enough to accommodate changes in contract practices and communication technologies, and
- recognises various contract practices by which oral arbitration agreements are concluded by reference to written terms of an agreement to arbitrate.

The Working Group is also taking steps to promote greater uniformity in the interpretation of Article II(2) of the New York Convention. In this respect, the Working Group is developing a declaratory instrument that would recommend a uniform and liberal interpretation of this article.

(b) The Enforcement of Interim Measures of Protection

Article 17 of the Model Law provides that, unless otherwise specified by the parties, the arbitral tribunal has the power to order interim measures of protection in respect of the subject matter of the dispute.

At the time of drafting Article 17, a decision was made not to address the issue of court assistance in the enforcement of interim measures of protection ordered by arbitral tribunals. The reason for this was the concern by many States that a rule on the enforcement of interim measures of protection would be unacceptable to many States due to the effect it would have upon domestic rules of procedure. Consequently, the question of the enforcement of interim measures of protection remains governed by domestic laws. This is in contrast to the enforcement of arbitral awards, which is expressly provided for by Articles 35 and 36 of the Model Law (based upon the provisions of the New York Convention).

It is now widely recognised that interim measures of protection are increasingly found in practice and that the lack of uniform rules on the enforcement of interim measures has an adverse impact upon the attractiveness and effectiveness of arbitration as a method of settling commercial disputes.

The approach of the Working Group to these issues has been to develop draft text amending Article 17 of the Model Law to update the definition of 'interim measures of protection' and to include rules on the making of *ex parte* interim measures (ie without notice to the party against whom the measure is directed). It has also developed a new draft article concerned with the enforcement of interim measures.

There are a number of unresolved issues relating to these draft provisions. One issue is whether the Model Law should include a provision allowing for the making and enforcement of *ex parte* interim measures of protection, and whether and to what extent a court should have a discretion to refuse enforcement of interim measures.

These issues will be considered at the next meeting of the Working Group

(c) Uniform Rules on International Conciliation

In the last 15 years there has been an increased use of conciliation as a method of resolving international commercial disputes. The growth in the use of conciliation has prompted UNCITRAL to seek to develop draft uniform provisions on conciliation that would complement the UNCITRAL Conciliation rules.

The development of draft provisions has commenced notwithstanding that there is not yet a clear view on the nature of the instrument that the draft provisions will ultimately form. The Working Group is presently proceeding on the assumption that the provisions will take the form of a Model Law.

The draft provisions address a range of important issues relating to conciliation, including:

- guiding principles of conciliation
- disclosure of information by the conciliator to the parties
- the role of a conciliator in arbitration or court proceedings
- admissibility of certain evidence in subsequent judicial or arbitral proceedings
- effect of conciliation on the running of a prescription or limitation period, and
- the enforcement of settlement agreements.

The Working Group decided to leave the issue of enforcement to the law of each enacting State.

Commonwealth's Role as a Party

ALRC

The Government is currently considering the recommendations of the Australian Law Reform Commission report on the federal civil justice system.[8] Some of these recommendations are of particular relevance to the position of the Commonwealth as a party in disputes. The *Managing Justice* report recommended that:

- the Office of Legal Services Coordination (in the Attorney-General's Department) facilitate appropriate education and training programs to support dispute avoidance and management plans for government agencies and to promote awareness of the content and importance of the model litigant rules (recommendation 25),

- the Attorney-General's Department develop a best practice 'blueprint' applicable to dispute avoidance, management and resolution for federal government departments and agencies (recommendation 68), and

- each federal department and agency be required to establish a dispute avoidance, management and resolution plan, consistent with model litigant rules (recommendation 69).

Model litigant

The Legal Services Directions, which have been issued by the Attorney-General under the *Judiciary Act 1903* relating to the conduct of Commonwealth legal work by Commonwealth agencies, provide that agencies should 'endeavour to avoid litigation

8 Australian Law Reform Commission (2000) *Managing Justice.*

wherever possible'. Although the Directions do not specifically mention ADR processes, they can properly be seen as encouraging their use in appropriate cases.

As part of an overall review of the Legal Services Directions, the Department will be considering whether the Directions should be amended to contain express reference to the use of ADR by Commonwealth agencies.

Client service

The Commonwealth also plays a role in ADR as a supplier of services. Government has an obligation to those to whom it provides services to deliver effective communication, complaint handling and dispute prevention systems. Since 1997 Commonwealth agencies that provide services direct to the public have been required to develop service charters. These charters are required to cover key information about the agency's service delivery approach and the relationship the client will have with the agency. The information provided should include what the agency does, how to contact and communicate with the agency, the standard of service clients can expect, clients' basic rights and responsibilities, and how to provide feedback or make a complaint.

Internal disputes

Many Commonwealth agencies also have developed internal ADR processes to deal with grievances. The Department of Defence's ADR program is a prominent example.

Future challenges and opportunities

Global trends will see increased competition, not only between Australian ADR providers, but also between Australian and overseas providers, between different dispute resolution processes, and between the dispute resolution systems of different countries. These trends are likely to see governments increasingly adopting a facilitative, rather than a regulatory, role.

Progress in communication technology will make physical location less of an issue in choosing an ADR service. There are already many overseas ODR (on-line dispute resolution) providers, and one has recently started in Australia. Although at present these are mainly text-based or e-mail systems, it will not be too long before high bandwidth video-streaming over computers, or even mobile phones, becomes affordable, accessible and acceptable. On-line services can, of course, operate from anywhere in the world, so Australian clients may well seek out a known overseas name in preference to a local provider. Likewise, overseas clients may choose an Australian provider. It is of note that the American Bar Association is currently

exploring the possibility of an international branding or accreditation process for ODR providers.[9]

The challenge in Australia is to balance both healthy competition and cooperation between local providers, to ensure that the Australian ADR 'industry' (for want of a better word) is well positioned to take advantage of global opportunities.

Making choices between different dispute resolution procedures is likely to become a far more sophisticated process. Rather than choosing between ADR and court determination, future decisions may focus more on the type and style of process, or combination of processes, for what type of disputes and parties, and at what point in time. A future priority is to gain good empirical data about ADR to complement the intuitive judgments being made by practitioners on these issues.

Recent years have seen a trend towards justice as a marketable commodity. Judicial, legal and ADR services are exportable services. Moreover, an effective dispute resolution system creates a strategic advantage for a nation, both as an attractive place in which to do business and as a means to enhance so-called social capital. The challenge both for government and for ADR providers is keep adapting and innovating, but also to work together to ensure consistency in the quality of ADR.

As outlined in the introduction, the role of the Commonwealth government in ADR is rightly a limited one. Nevertheless, as NADRAC has pointed out, promoting and facilitating the development of ADR is a shared responsibility. The Attorney-General's Department looks forward to continuing to play an effective role as a policy maker, service provider, facilitator and international advocate.

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9 American Bar Association Task Force on E-commerce and Alternative Dispute Resolution (2001) *Draft Preliminary Report and Concept Paper*, www.law.washington.edu/ABA-eADR.