INAUGURAL MEETING OF THE INTERNATIONAL JUDICIAL DISPUTE RESOLUTION NETWORK 18 MAY 2022

SHARING OF EXPERIENCES IN THE JUDICIAL DISPUTE RESOLUTION PROCESS - INTRODUCTION ON BEHALF OF FEDERAL COURT OF AUSTRALIA

Speaking Notes – Justice Katrina Banks-Smith

1 I will start with a very brief outline of the role of the Federal Court of Australia.

2 The Court is a Commonwealth court, created by the *Federal Court of Australia Act 1976* (Cth), and is a superior court of record.

3 There are currently 54 Federal Court judges located across Australia. We are supported by judicial registrars who have certain delegated powers under the Act.

4 Today we have judges, including our Chief Justice, and senior judicial registrars from our Court participating in this meeting, and that reflects the fact that whilst judges are responsible for the day to day management and determination of cases in their docket, judicial registrars play an important role in dispute resolution, and I will explain that a little more, shortly.

5 There are two important factors that guide dispute resolution in the Federal Court.

6 The first is that although the Court might be considered predominantly a commercial court, it has a broad jurisdiction - covering corporations and commercial matters but also industrial relations, human rights and migration, taxation, arbitration, admiralty, intellectual property, defamation and native title jurisdiction. Any dispute resolution regime must be flexible enough to recognise the different priorities that might direct outcomes in those very different fields. An obvious example - a commercial dispute that is in essence 'just about money' might be simpler to resolve by a compromise than a dispute about, for example, recognition of native title rights that requires an assessment of spiritual, cultural and language connections to land. And yet our dispute resolution regimes regularly achieve outcomes in most of our diverse practice areas.

7 The second factor guiding dispute resolution is that the *Federal Court of Australia Act* expressly provides that civil practice and procedure in the Court has an overarching purpose. That purpose is to facilitate the just resolution of disputes according to law and as quickly,

inexpensively and efficiently as possible. Parties to a civil proceeding before our Court are obliged by the Act to conduct proceedings in a manner consistent with that overarching purpose.

8 The presence of the overarching purpose has provided a hook on which to hang all manner of proactive case management techniques, from simplified concise statements instead of pleadings, to limited document disclosure regimes that replace old-style discovery.

9 But I will turn to dispute resolution tools. The Court recognises and supports parties who wish to participate in private mediation. The Court will also facilitate the referral of particular issues in a proceeding to a referee for determination, particularly complex or technical accounting or scientific issues. The Court supports the domestic and international arbitration communities, including by fast-tracking resolution of disputes that may arise under those respective regimes.

10 But on the ground, by far the most common and effective tool is court-ordered mediation.

11 So how does that proceed?

12 Matters in our Court are allocated to a docket judge who is generally responsible for the matter until completion. The docket judge will case-manage the proceeding, engaging early with the issues and talking with the parties about the correct order in which to approach steps in the litigation, how to make individual procedures more efficient, and how the proceeding might be conducted in a manner suited to the particular case.

13 Importantly, the Court has the power to order the parties to mediation. It can be ordered early. It can be ordered late. It can be ordered several times. Even if there is little hope of the whole of a dispute being resolved, a mediation might narrow issues and still reduce trial time and the number of issues that the Court has to ultimately determine.

14 Our model does not involve mediation by judges. We are fortunate to be supported by judicial registrars who are experienced, specialised and accredited mediators. Generally a judge in the course of case-managing a matter will refer it as a whole (or refer particular issues that arise) for mediation before a judicial registrar, and the judicial registrar then takes control of that process. The judicial registrar contacts the parties about timing and practical matters such as who is to attend and participate, and whether there is value in position statements or similar.

15 The judicial registrar also has the power to conduct the mediation as they think fit, and this might mean adjusting how it proceeds as the mediation progresses. For example, they can

include counsel, exclude counsel, have several meetings, have separate meetings - they may call the parties back on additional days and so on.

16 Experience and specialisation is key. There are judicial registrars with expertise in employment, tax, intellectual property, class actions and so on.

17 To return to the contrast between a native title dispute and a complex commercial dispute, native title disputes have many moving parts and particular sensitivities that must be observed. We have judicial registrars who are specialists in native title and have worked in the field for many years. Sometimes their mediations proceed over many days and in different venues.

18 Their skill set might be quite different to that required in juggling the expectations of parties in a mediation of adversarial commercial litigation. In commercial disputes, some experience in complex commercial litigation will assist a registrar in identifying the regulatory, contractual or other pressure points that might assist in finding common ground.

19 That is not to minimise the value of lateral thinking - we have seen some outstanding results when a judicial registrar with experience in one field has ventured into a different field. As with judges, there is an expectation that judicial registrars will try to deal with whatever dispute is allocated to them, and creativity and common sense are encouraged.

20 Judges have an expectation that judicial registrars will prepare for and persevere with mediations. There should be nothing perfunctory about the process. Mediation is not just one step in a list of steps in trial preparation to be ticked off. A real commitment to trying to secure a resolution is expected.

21 After the mediation occurs, the judicial registrar reports to the docket judge but in a limited fashion - no confidential information is exchanged and usually the report does little more than say whether or not the mediation was successful. If it was unsuccessful, the judge's case management continues, and the judge will conduct any necessary trial.

22 So it can be seen that case management and mediation are intimately linked under our statutory regime, and that is our experience. Parties expect and anticipate that they will be referred to mediation if they are involved in proceedings in our Court, and the culture of case management facilitates that course.

23 The resolution rate for mediations conducted by judicial registrars hovers at around 50-60%.

24 We wondered whether COVID-19 might impact on that rate. Traditionally mediations are conducted in person but, as with everything in recent years, we needed to embrace change, and despite some reservations, experience indicates that on-line mediations could be conducted successfully and in fact we found that the clearance rate has not been materially different.

25 And a final comment - we embrace the principle reflected in the draft best practice guide to the effect that effective dispute resolution enhances access to justice by allowing judges to manage their case load fairly and efficiently. Access to justice for the community is enhanced with an increase in court availability. Access to justice for each party is enhanced, in that costs and risk are reduced. Viewed in that way, court-supported dispute resolution is now an indispensable part of the litigation environment and we are pleased to be involved in this network.