

COURTS LEGISLATION AMENDMENT BILL 1995

EXPLANATORY NOTES

TITLE

Courts Legislation Amendment Bill 1995.

POLICY OBJECTIVES

The primary policy objective of this Bill is to provide an opportunity for litigants to participate in ADR processes, within the court system, to resolve their disputes more quickly and cheaply than by proceeding to trial. In the case of mediation, that resolution can be achieved by agreement.

The ADR processes to be used are mediation and case appraisal.

The policy objective is advanced by providing a framework for ADR processes within the court system. That framework consists of:

- The conferral on the court of a power to refer disputes to ADR processes and receive the parties' submissions on the proposed referral.
- The establishment of the procedures at ADR processes.
- The ability to impose sanctions on a party who impedes an ADR process, that is, a party who fails to attend or participate or fails to pay any required amount.
- Provisions designed to protect the integrity of the ADR processes, e.g. provisions ensuring confidentiality.

FUNDAMENTAL LEGISLATIVE PRINCIPLES

The Bill is consistent with the fundamental legislative principles. The operation of the *Judicial Review Act* has been excluded in relation to certain

administrative decisions, but an alternative review process has been included.

Decisions of a case appraiser have been excluded from judicial review.

CONSULTATION

This Bill was initially developed and recommended by the Litigation Reform Commission. The Litigation Reform Commission conducted consultation with the Queensland Law Society, the Queensland Bar Association and Lawyers Engaged in Alternative Dispute Resolution.

DESCRIPTION OF PROVISIONS

PART 1—PRELIMINARY

Clause 1. This states the short title of the legislation—the *Courts Legislation Amendment Act 1995*.

Clause 2. This clause provides for the commencement of the Act on a day fixed by proclamation.

PART 2—AMENDMENT OF THE SUPREME COURT OF QUEENSLAND ACT 1991

Clause 3. This clause provides that this Part amends the *Supreme Court of Queensland Act 1991*.

Clause 4. This clause inserts in s.3 of the *Supreme Court of Queensland Act 1991* definitions of ‘ADR costs’, ‘ADR convenor’, ‘ADR dispute’, ‘ADR process’, ‘case appraisal’, ‘case appraiser’, ‘dispute’, ‘mediation’, ‘mediator’, ‘party’, ‘referring order’, ‘Supreme Court Acts’ and ‘Supreme Court Jurisdiction Act’.

Clause 5. This clause omits existing s.75(6) of the *Supreme Court of Queensland Act 1991* and substitutes a provision that Rules of Court (other than rules under s.32) may not be made under an Act, and a regulation may not be made under this Act, unless a report and recommendation from the Litigation Reform Commission, or one of its Divisions has been obtained.

Clause 6. New Part 7A—ADR Processes and Part 7B—Rules of Court are inserted.

Clause 100A. This clause states the object of Part 7A.

Clause 100B. The expression ‘ADR process’ is defined. In relation to Division 6 of Part A the expression ‘ADR process’ includes all steps involved in an ADR process, including, pre-mediation and post-mediation sessions.

Clause 100C. This clause defines mediation as a process under the rules under which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication.

Clause 100D. This clause defines case appraisal as a process under the rules under which a case appraiser provisionally decides a dispute, and provides that a case appraiser’s decision is not binding on the parties until the time prescribed by the rules for filing an election to go to trial has passed and the Court by order gives effect to the decision.

Clause 100E. This clause provides that the Senior Judge Administrator, in consultation with the Chief Justice, may approve or refuse to approve a person as a mediator.

Clause 100F. This clause provides that the Senior Judge Administrator, in consultation with the Chief Justice, may approve or refuse to approve a person as a case appraiser.

Clause 100G. This clause provides for the Registrar to keep a register of information about ADR processes in any form the Registrar considers appropriate; however, the register must contain the name and address of each mediator and case appraiser (other than a judge), other information prescribed under the rules, and other information decided by the Senior Judge Administrator.

Clause 100H. This clause ensures that parties may, by consent, opt into the ADR scheme created by the Bill.

Clause 100I. This clause provides that the Court may require the parties

or their representatives to attend before it to enable the Court to decide whether the parties' dispute should be referred to an ADR process. The clause further provides that the Court may make a referring order referring the dispute for mediation or case appraisal, and that the Court may take the following matters into account when deciding whether to refer a dispute to case appraisal—whether the costs of litigating the dispute are likely to be disproportionate to the benefit gained, the likelihood of a case appraisal producing a compromise or an abandonment of a claim or defence, and other circumstances.

Clause 100J. This clause provides that if a referring order is made the parties must attend before the ADR convenor appointed to conduct the ADR process, and not impede the ADR convenor in conducting and finishing the ADR process within the time allowed under the referring order. This clause further provides that if a party impedes an ADR process, the Court may impose sanctions against the party, including, for example, by ordering that any claim for relief by the defaulting party is stayed pending further order and by taking the party's action into account when awarding costs in the proceeding or in another proceeding between the parties.

Clause 100K. This clause provides that at a case appraisal the case appraiser must decide the procedure to be used, and may adopt any procedure that will in the case appraiser's view enable a sound view of the likely outcome of the dispute to be reached, and must finish the case appraisal as quickly as possible. The clause contains a proviso that the case appraiser may in special circumstances receive evidence, examine witnesses and administer oaths to witnesses who have been lawfully called before the case appraiser. It provides that the court may at any time give directions about procedure to be used at the case appraisal.

Clause 100L. This clause provides that a person may not be subpoenaed to appear at a case appraisal without an order of the Court. It provides that a person may not be subpoenaed to appear at a mediation. Further, a person subpoenaed to appear at a case appraisal must not be compelled to answer a question, or produce a document that the person could not be compelled to answer or produce before the Court.

Clause 100M. This clause provides that if at any time the Court is of the opinion that a party to an ADR process is unable to pay that party's percentage of costs because of the party's financial circumstances, the Court may make an order appropriate in the circumstances, including an order that

the reference to the ADR process be cancelled, or that the referring order be revoked and another referring order made.

Clause 100N. This clause provides that if the parties agree on a resolution of their dispute or part of it at a mediation, the agreement must be written down and signed by or for each party and by the mediator, and that such an agreement has the same effect as any other compromise.

Clause 100O. It is provided that as soon as practicable after the end of a mediation, the mediator must file a certificate in the prescribed form.

Clause 100P. It is provided that as soon as practicable after the end of a case appraisal, the case appraiser must file a certificate in the prescribed form and the decision (if any).

Clause 100Q. This clause provides that a party may apply to the Court for an order giving effect to an agreement reached after mediation; however that party may apply for the order only after the mediator's report is filed with the Registrar.

Clause 100R. This clause provides that a party may apply to the Court for an order giving effect to a case appraiser's decision after the time prescribed for electing to go to trial has passed. A party may apply before that time has passed, if all parties agree.

Clause 100S. This provides that an ADR convener must not without reasonable excuse disclose information coming to the convener's knowledge during an ADR process, and provides a maximum penalty of fifty penalty units, that is \$3,000.00. The clause provides that it is a reasonable excuse to disclose information if the disclosure is made with the agreement of all parties to the ADR process, or for this Part or for statistical purposes without revealing the identity of a person about whom the information is relevant, or for an inquiry or proceeding about an offence which has taken place during the ADR process, or for a proceeding founded on fraud that is alleged to be connected with the ADR process, or under a requirement imposed under an Act.

Clause 100T. This clause provides that in performing the functions of a mediator or case appraiser an ADR convenor has the same protection and immunity as a judge performing the functions of a judge; that a party or a party's lawyer or agent appearing in an ADR dispute has the same protection and immunity the person would have if the dispute were being heard in court; that a witness attending an ADR dispute has the same

protection as a witness attending before court; and that a document produced at or used for an ADR dispute has the same protection during the ADR dispute as if it were produced before the court.

Clause 100U. This clause provides that evidence of anything said, or any admission made at an ADR process about the dispute is not admissible in any “civil proceeding” in the court or in any other civil proceeding; however, “civil proceeding” does not include a civil proceeding founded on fraud.

Clause 100V. This clause provides that the Senior Judge Administrator, in consultation with the Chief Justice, may revoke the approval of a person as a mediator or case appraiser; however, the Senior Judge Administrator must give the person a statement of reasons for the revocation.

Clause 100W. This clause provides that an appeal lies to the Court of Appeal, by leave of that Court, against a refusal to approve or the revocation of the approval of a person as a mediator or case appraiser.

Clause 100X. This clause provides that the Governor-in-Council, with the agreement of two or more judges, may make Rules of Court under this Act or any other law conferring jurisdiction on the court (jurisdiction laws). This clause does not affect s.32 *Supreme Court of Queensland Act 1991*.

Clause 100Y. This clause provides that a rule of court made under a jurisdiction law before the commencement of this Act is of the same authority, force and effect as if it were an Act, and must be judicially noticed, and cannot be questioned in any legal proceeding. The first sub-clause is expressed to apply to an existing rule made under a jurisdiction law from the day the rule commenced.

Clause 7. This clause inserts a new clause 110 providing that the *Reprints Act 1992*, section 43, must be used in the next reprint of the Act.

Clause 8. This relocates Part 9 as Part 7C.

Clause 9. This clause inserts schedules to the Act. The first is entitled “Subject Matter for Rules”. The first schedule lists various matters as to which Rules of Court may be made. The second schedule lists Supreme Court Acts and Supreme Court Jurisdiction Acts.

PART 3—AMENDMENT OF THE DISTRICT COURTS ACT 1967

Clause 10. This provides that this Part amends the *District Courts Act 1967*.

Clause 11. Section 4 of the *District Courts Act 1967* is amended by inserting definitions of ‘ADR costs’, ‘ADR convenor’, ‘ADR dispute’, ‘ADR process’, ‘case appraisal’, ‘case appraiser’, ‘dispute’, ‘District Court jurisdiction Act’, ‘mediation’, ‘mediator’, ‘party’, ‘referring court’, ‘referring order’ and rules.

Clause 12. A new part 6A, ADR processes is inserted in the *District Court Act 1967* after Part 6.

Clause 91A. This clause states the object of Part 6A.

Clause 91B. The expression ‘ADR process’ is defined. In relation to Division 6 the expression ‘ADR process’ includes all steps involved in an ADR process, including, pre-mediation and post-mediation sessions.

Clause 91C. This clause defines mediation as a process under the rules under which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication.

Clause 91D. This clause defines case appraisal as a process under the rules under which a case appraiser provisionally decides a dispute, and provides that a case appraiser’s decision is not binding on the parties until the time prescribed by the rules for filing an election to go to trial has passed and a District Court by order gives effect to the decision.

Clause 91E. This clause provides that the Chief Judge may approve or refuse to approve a person as a mediator.

Clause 91F. This clause provides that the Chief Judge may approve or refuse to approve a person as a case appraiser.

Clause 91G. This clause provides for the Registrar of the Supreme Court to keep a register of information about ADR processes in any form the Registrar considers appropriate; however, the register must contain the name and address of each mediator and case appraiser (other than a judge), other information prescribed under the rules, and other information decided by the Senior Judge Administrator.

Clause 91H. This clause ensures that parties are able by consent to opt into the scheme established by the Bill.

Clause 91I. This clause provides that the Court may require the parties or their representatives to attend before it to enable the Court to decide whether the parties' dispute should be referred to an ADR process. The clause further provides that the Court may make a referring order referring the dispute for mediation or case appraisal, and that the Court may take the following matters into account when deciding whether to refer a dispute to case appraisal—whether the costs of litigating the dispute are likely to be disproportionate to the benefit gained, the likelihood of a case appraisal producing a compromise or an abandonment of a claim or defence, and other circumstances.

Clause 91J. This clause provides that if a referring order is made the parties must attend before the ADR convenor appointed to conduct the ADR process, and not impede the ADR convenor in conducting and finishing the ADR process within the time allowed under the referring order. This clause further provides that if a party impedes an ADR process, the Court may impose sanctions against the party, including, for example, by ordering that any claim for relief by the defaulting party is stayed pending further order and by taking the party's action into account when awarding costs in the proceeding or in another proceeding between the parties.

Clause 91K. This clause provides that at a case appraisal the case appraiser must decide the procedure to be used, and may adopt any procedure that will in the case appraiser's view enable a sound view of the likely outcome of the dispute to be reached, and must finish the case appraisal as quickly as possible. The clause contains a proviso that the case appraiser may in special circumstances receive evidence, examine witnesses and administer oaths to witnesses who have been lawfully called before the case appraiser. It provides that the Court may at any time give directions about procedure to be used at the case appraisal.

Clause 91L. This clause provides that a person may not be subpoenaed to appear at a case appraisal without an order of the Court. It provides that a person may not be subpoenaed to appear at a mediation. Further, a person subpoenaed to appear at a case appraisal must not be compelled to answer a question, or produce a document that the person could not be compelled to answer or produce before the Court.

Clause 91M. This clause provides that if at any time the Court is of the opinion that a party to an ADR process is unable to pay that party's percentage of costs because of the party's financial circumstances, the Court may make an order appropriate in the circumstances, including an order that the reference to the ADR process be cancelled, or that the referring order be revoked and another referring order made.

Clause 91N. This clause provides that if the parties agree on a resolution of their dispute or part of it at a mediation, the agreement must be written down and signed by or for each party and by the mediator, and that such an agreement has the same effect as any other compromise.

Clause 91O. It is provided that as soon as practicable after the end of a mediation, the mediator must file a certificate in the prescribed form.

Clause 91P. It is provided that as soon as practicable after the end of a case appraisal, the case appraiser must file a certificate in the prescribed form and the decision (if any).

Clause 91Q. This clause provides that a party may apply to the Court for an order giving effect to an agreement reached after mediation; however, that party may apply for the order only after the mediator's report is filed with the Registrar.

Clause 91R. This clause provides that a party may apply to the Court for an order giving effect to a case appraiser's decision after the time prescribed for electing to go to trial has passed. A party may apply before that time has passed, if all parties agree.

Clause 91S. This clause provides that an ADR convener must not without reasonable excuse disclose information coming to the convener's knowledge during an ADR process, and provides a maximum penalty of fifty penalty units. The clause provides that it is a reasonable excuse to disclose information if the disclosure is made with the agreement of all parties to the ADR process, or for this Part or for statistical purposes without revealing the identity of a person about whom the information is relevant, or for an inquiry or proceeding about an offence which has taken place during the ADR process, or for a proceeding founded on fraud that is alleged to be connected with the ADR process, or under a requirement imposed under an Act.

Clause 91T. This clause provides that in performing the functions of a mediator or case appraiser an ADR convenor has the same protection and

immunity as a judge performing the functions of a judge; that a party or a party's lawyer or agent appearing in an ADR dispute has the same protection and immunity the person would have if the dispute were being heard before a District Court; that a witness attending an ADR dispute has the same protection as a witness attending before a District Court; and that a document produced at or used for an ADR dispute has the same protection during the ADR dispute as if it were produced before a District Court.

Clause 91U. This clause provides that evidence of anything said, or any admission made at an ADR process about the dispute is not admissible in any "civil proceeding" in the Court or in any other civil proceeding; however, "civil proceeding" does not include a civil proceeding founded on fraud.

Clause 91V. This clause provides that the Chief Judge, may revoke the approval of a person as a mediator or case appraiser; however, the Chief Judge must give the person a statement of reasons for the revocation.

Clause 13. This clause inserts a new clause 95A; which provides that an appeal lies to the Court of Appeal, by leave of that Court, against a refusal to approve or the revocation of the approval of a person as a mediator or case appraiser.

Clause 14. This clause omits s.101 and substitutes a new clause simplifying the procedure for making District Court Rules.

Clause 15. This clause inserts a new s.111, which saves existing rules of court and a new s.112, which ensures that when the District Courts Act is next reprinted, it is renumbered according to s.43 of the *Reprints Act 1992*.

Clause 16. This inserts a Schedule after s.110. The Schedule lists the matters as to which Rules of Court may be made.

PART 4—AMENDMENT OF THE MAGISTRATES COURTS ACT 1921

Clause 17. This clause provides that this Part and the Schedule amend the *Magistrates Courts Act 1921*.

Clause 18. This clause amends s.2 of the *Magistrates Courts Act 1921* by introducing definitions of ‘ADR costs’, ‘ADR convenor’, ‘ADR dispute’, ‘ADR process’, ‘case appraisal’, ‘case appraiser’, ‘dispute’, ‘mediation’, ‘mediator’, ‘party’, ‘referring court’, ‘referring order’, ‘rules’, and ‘Small Debts Court’.

Clause 19. This clause inserts a new Part 5—ADR processes.

Clause 10B. This clause states the object of Part 5.

Clause 10C. The expression ‘ADR process’ is defined. In relation to Division 6 the expression ‘ADR process’ includes all steps involved in an ADR process, including, pre-mediation and post-mediation sessions.

Clause 10D. This clause defines mediation as a process under the rules under which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication.

Clause 10E. This clause defines case appraisal as a process under the rules under which a case appraiser provisionally decides a dispute, and provides that a case appraiser’s decision is not binding on the parties until the time prescribed by the rules for filing an election to go to trial has passed and the Court by order gives effect to the decision.

Clause 10F. This clause provides that the Chief Stipendiary Magistrate may approve or refuse to approve a person as a mediator.

Clause 10G. This clause provides that the Chief Stipendiary Magistrate may approve or refuse to approve a person as a case appraiser.

Clause 10H. This clause provides that the Registrar of a Brisbane Registry of the Magistrates Court nominated by the Chief Stipendiary Magistrate for the purpose must keep a register of information about ADR processes in any form the registrar considers appropriate; however, the register must contain the name and address of each mediator and case appraiser (other than a Magistrate), other information prescribed under the rules, and other information decided by the Chief Stipendiary Magistrate.

Clause 10I. This clause permits parties to refer their dispute by agreement to an ADR process. The parties must file a consent order.

Clause 10J. This clause provides that the Court may require the parties or their representatives to attend before it to enable the Court to decide whether the parties’ dispute should be referred to an ADR process. The clause further provides that the Court may make a referring order referring the

dispute for mediation or case appraisal, and that the Court may take the following matters into account when deciding whether to refer a dispute to case appraisal—whether the costs of litigating the dispute are likely to be disproportionate to the benefit gained, the likelihood of a case appraisal producing a compromise or an abandonment of a claim or defence, and other circumstances justifying a case appraisal.

Clause 10K. This clause provides that if a referring order is made the parties must attend before the ADR convenor appointed to conduct the ADR process, and must not impede the ADR convenor in conducting and finishing the ADR process within the time allowed under the referring order. This clause further provides that if a party impedes an ADR process, the Court may impose sanctions against the party, including, for example by ordering that any claim for relief by the defaulting party is stayed pending further order and by taking the party's action into account when awarding costs in the proceeding or in another proceeding between the parties.

Clause 10L. This clause provides that at a case appraisal the case appraiser must decide the procedure to be used, and may adopt any procedure that will in the case appraiser's view enable a sound view of the likely outcome of the dispute to be reached, and must finish the case appraisal as quickly as possible. The clause contains a proviso that the case appraiser may in special circumstances receive evidence, examine witnesses and administer oaths to witnesses who have been lawfully called before the case appraiser. It provides that the Court may at any time give directions about procedure to be used at the case appraisal.

Clause 10M. This clause provides that a person may not be subpoenaed to appear at a case appraisal without an order of the Court. It provides that a person may not be subpoenaed to appear at a mediation. Further, a person subpoenaed to appear at a case appraisal must not be compelled to answer a question, or produce a document that the person could not be compelled to answer or produce before the Court.

Clause 10N. This clause provides that if at any time the Court is of the opinion that a party to an ADR process is unable to pay that party's percentage of costs because of the party's financial circumstances, the Court may make an order appropriate in the circumstances, including an order that the reference to the ADR process be cancelled, or that the referring order be revoked and another referring order made.

Clause 10O. This clause provides that if the parties agree on a resolution of their dispute or part of it at a mediation, the agreement must be written down and signed by or for each party and by the mediator, and that such an agreement has the same effect as any other compromise.

Clause 10P. It is provided that as soon as practicable after the end of a mediation, the mediator must file a certificate in the prescribed form.

Clause 10Q. It is provided that as soon as practicable after the end of a case appraisal, the case appraiser must file a certificate in the prescribed form and the decision (if any).

Clause 10R. This clause provides that a party may apply to the Court for an order giving effect to an agreement reached after mediation; however, that party may apply for the order only after the mediator's report is filed with the Registrar.

Clause 10S. This clause provides that a party may apply to the Court for an order giving effect to a case appraiser's decision after the time prescribed for electing to go to trial has passed. A party may apply before that time has passed, if all parties agree.

Clause 10T. This provides that an ADR convener must not without reasonable excuse disclose information coming to the convener's knowledge during an ADR process, and provides a maximum penalty of fifty penalty units. The clause provides that it is a reasonable excuse to disclose information if the disclosure is made with the agreement of all parties to the ADR process, or for this Part or for statistical purposes without revealing the identity of a person about whom the information is relevant, or for an inquiry or proceeding about an offence which has taken place during the ADR process, or for a proceeding founded on fraud that is alleged to be connected with the ADR process, or under a requirement imposed under an Act.

Clause 10U. This clause provides that in performing the functions of a mediator or case appraiser an ADR convener has the same protection and immunity as a Magistrate performing the functions of a Magistrate; that a party or a party's lawyer or agent appearing in an ADR dispute has the same protection and immunity the person would have if the dispute were being heard before a Magistrates Court; that a witness attending an ADR dispute has the same protection as a witness attending before a Magistrates Court; and that a document produced at or used for an ADR dispute has the same protection during the ADR dispute as if it were produced before a

Magistrates Court.

Clause 10V. This clause provides that evidence of anything said, or any admission made at an ADR process about the dispute is not admissible in any “civil proceeding” in the Court or in any other civil proceeding; however, “civil proceeding” does not include a civil proceeding founded on fraud.

Clause 10W. This clause provides that the Chief Stipendiary Magistrate may revoke the approval of a person as a mediator or case appraiser; however, the Chief Stipendiary Magistrate must give the person a statement of reasons for the revocation.

Clause 20. This clause inserts a new clause 11AF, after Part 6. Clause 11AF provides a right of appeal to the District Court against a refusal to appoint or the revocation of the approval of a person as a mediator or case appraiser.

Clause 21. This clause inserts a new clause 13C, which provides that the procedure for an appeal to the Magistrates Court, if not provided for by the rules, is as directed by the Magistrate.

Clause 22. This clause omits s.14 and inserts a new clause 14 providing that the Governor-in-Council may make Rules of Court under the *Magistrates Courts Act 1921* for a jurisdiction law and may make provision about the matters mentioned in the Schedule.

Clause 23. This clause inserts a clause 16, saving rules of court, made prior to this Bill.

Clause 24. This inserts clause 17 providing that the next reprint must be renumbered pursuant to s.43 *Reprints Act 1992*.

Clause 25. This clause inserts a Schedule after s.16. The Schedule specifies matters as to which Rules of Court may be made.

PART 5—AMENDMENT OF THE JUDICIAL REVIEW ACT 1991

Clause 26. This clause provides that this Part amends the *Judicial Review*

Act 1991.

Clause 27. This clause omits from s.3, the definitions of ‘GOC’ and ‘rules of court’. A definition of ‘rules of court’ is substituted.

Clause 28. This clause omits s.18 and inserts new clause 18 providing for the effect of the Judicial Review Act on other laws.

Clause 29. This clause omits s.55.

Clause 30. This clause omits Part 7.

Clause 31. This clause amends Schedule 1, Parts 1 and 2. Certain decisions made in relation to ADR processes are exempted from judicial review.

SCHEDULE 1 AND SCHEDULE 2

The schedules make minor amendments to the *District Courts Act 1967* and the *Magistrates Courts Act 1921*.