

CHIEF JUSTICE OF WESTERN AUSTRALIA

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15 May 2009

Ms Serena Beresford-Wylie
Director NADRAC Secretariat
Robert Garran Offices
3-5 National Circuit
Barton ACT 2600

By email: nadrac@ag.gov.au

Dear Ms Beresford-Wylie

I refer to the request for submissions in response to the questions posed in the Issues Paper recently issued by NADRAC.

I am aware that the Registrars of this court have provided a response to the questions posed in Chapter 4 which are pertinent to their work as mediators. I have reviewed that response and agree entirely with its terms.

The purpose of this letter is to augment that response by addressing the questions posed in Chapter 4 relation to judicial mediation. I will address those questions in the order posed.

4.1 What are the advantages and disadvantages of Judges conducting ADR processes? In particular what are the advantages and disadvantages of Judges conducting mediation (as described under the National Mediator Accreditation System)? Are there particular cases where direct participation by Judges in ADR is more appropriate?

Over the last few years Judges of this court have conducted mediations in relation to cases before the court. However, until recently, only two Judges of the court were qualified as mediators, inhibiting our capacity to provide Judge mediators. It must be said that until now, judicial mediation has been exceptional. However, as a result of recent appointments to the court, there are now five Judges who are trained as mediators, and I expect that the numbers of mediations conducted by Judges will increase.

Because of the value placed upon our limited judicial resources, it is likely that judicial mediation will still remain the exception, rather than the norm.

There are I think two main advantages in judicial mediations. The first is that a judicial mediator obviously has a certain additional gravitas in the eyes of the parties, and his or her comments are likely to be given more weight. Although the contemporary trend is in favour of facilitative mediation, rather than a more interventionist style in which a mediator expresses tentative views on the legal issues arising in the case, there are some cases in which a more interventionist style can be appropriate. Judge mediators are better suited to that style of mediation in those cases where that style is appropriate.

The second advantage is that there are a number of cases in which mediation can serve a number of very important purposes falling short of complete resolution of the case. Those purposes include identification of issues which can be agreed, and which therefore need not be tried, and the processes and procedures to be adopted at trial in order to minimise trial time, and make the trial more efficient. In those cases, a Judge who is, of course, experienced in the conduct of trials, is well suited to act as mediator.

The main disadvantage of judicial mediation is the consumption of limited judicial resources. However, the deployment of judicial resources to mediation can be cost effective if it achieves the settlement of a case that would not otherwise settle. The potential savings to the parties and the court are, of course, greater in longer and more complex cases, which tend to be the types of cases in which judicial mediation will be considered appropriate.

It will be apparent from the observations I have made, that the cases in which judicial mediation might be seen to be more appropriate are those where:

- (a) a more interventionist approach may be desirable;
- (b) the case is large and complex;
- (c) the case is one in which the trial process might be shortened and made more efficient by agreement on issues and procedures to be adopted.

4.8 To what extent is it an advantage of judicial involvement that it improves the chances of resolution? Why might this be the case? To what extent might this have negative consequences?

I think I have addressed the issues raised by this question in my answer to the preceding question. I can't presently conceive of any negative consequences of judicial mediation.

4.9 To what extent might the confidentiality of ADR be undermined if a Judge conducts it? What reporting requirements might apply?

I am quite unable to conceive of any reason why the confidentiality of ADR might be undermined if conducted by a Judge. The confidentiality regime relating to court-based mediation in Western Australia is governed by legislation - in our case, by the Supreme Court Act. The only record placed on the file after a mediation is in the briefest of terms, indicating whether or not the mediation has achieved resolution, and if not, whether the mediation is to be reconvened. That information is, of course, necessary for future case management.

4.10 To what extent are Judges' skills and experience suited to facilitative processes like mediation, advisory processes like conciliation and blended processes like con-arb? How might Judges' skills differ?

In Western Australia, the only experience we have had is of judicial involvement in mediation, and I have set out my views with respect to the utility of their skills in that area above. In relation to conciliation, there is no particular reason why a Judge would be any more effective than anyone else, except perhaps for the element of gravitas to which I have referred. So far as blended processes like con-arb are concerned, to the extent that forensic skills and experience are advantageous in those processes, obviously Judges are more likely to have those skills and that experience.

I trust these comments are of assistance and would, of course, be pleased to expand upon any of them upon request.

By way of a general conclusion, I would again endorse the observations made in the submission prepared by the Registrars of this Court. The Supreme Court of Western Australia has long experience in court-based mediation, and is completely committed to the continuation of that process. It is no exaggeration to say that without our court-based mediation programme, we would simply have been unable to deal with our case load with the same level of judicial resources, and our backlog would have grown to unacceptable dimensions. The steps we have taken to integrate mediation as an essential and indispensable part of an holistic case management process further enhance the utility and effectiveness of our court-based mediation programme.

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Our enthusiasm for mediation is such that about 2 years ago, we introduced a modified form of court-based mediation into our criminal list. It has been successful, and we are continuing the programme. The questions posed in the Issues Paper do not specifically address this type of process, but I would be pleased to provide information on it upon request.

Yours sincerely

A handwritten signature in black ink, reading "Wayne Martin". The signature is written in a cursive style and is underlined with a single horizontal line.

The Hon Wayne Martin
Chief Justice of Western Australia