

NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL

Alternative Dispute Resolution in the Civil Justice System

Response by the Acting Chief Federal Magistrate on behalf

Of the Federal Magistrates Court of Australia

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Introduction

Consistent with its statutory obligation, the Federal Magistrates Court places significant emphasis on dispute resolution processes and recognises the benefits of alternative dispute resolution. At the first court event, the Federal Magistrate will make an assessment as to whether the matter is a suitable one for a dispute resolution process, and make an early identification of the issues in dispute.

Mediation is the dispute resolution process usually adopted to resolve disputes in general federal law proceedings. The Court is able to order mediation with or without the consent of the parties while an order for arbitration can only be made with the consent of the parties (see ss.34,35, *Federal Magistrates Act 1999*). Most mediations are conducted by Registrars of the Federal Court who have no advisory or determinative role in regard to the content of the dispute or its outcome. Mediation is considered to fulfil a dual function of not only potentially settling and finalising the matter but also as a means by which the parties can be assisted to identify and reduce the issues in dispute, or to eliminate procedural arguments. Accordingly, early mediation is encouraged by the Court.

In family law matters there is a greater range of dispute resolution processes including:

- family counselling;
- family dispute resolution;
- post separation parenting programs;
- conciliation and joint conferences;
- non-privileged appointments with family consultants;
- family reports.

Family law dispute resolution services are provided both internally and externally via family consultants employed by the court(s), private psychologists and social workers, and community based providers. Some services are confidential and others are non-privileged/reportable. In addition the *Family Law Act 1975* now requires parents to attempt to resolve parenting issues through family dispute resolution before they file an application for a parenting order.

The Court adopts an individual docket system with the aim of:

narrowing of issues;

fewer events;

better identifying cases suitable for alternative dispute resolution procedures; and

enabling the judicial officer to take an active role in the management of the case with the aim of promoting settlement as the preferred outcome.

The docket system facilitates individual judicial case appraisal and is seen as an essential component of the case management process of the Court. It recognises the individual needs of the matter in dispute and allows the judicial officer the flexibility of adopting a dispute resolution process most appropriate for the case.

While the focus of the current inquiry is directed at ADR in proceedings other than family law matters, the Issue Paper does refer to ADR in the family law context by way of example. As a Court with extensive jurisdiction spanning family and general federal law jurisdiction, we note the wider relationship focus that ADR must play in family law proceedings, and caution against seeking to emulate processes adopted in such proceedings as a template for civil litigation generally. Of real significance in all areas of the jurisdiction is the importance of early case evaluation by a judicial officer and a commitment to 'up-front' individual docket management.

About ADR

There appears to be a variety of terms being used that intend to denote ADR processes which contributes to confusion amongst litigants and professionals alike as to the understanding of the processes employed. A common language and definition is encouraged and supported with the aim of achieving consistency in the use of ADR terms. There needs to be greater consistency and uniformity so that litigants can understand the different processes and the benefits that can be achieved through ADR

Provision of ADR Services – Court Services

The greatest benefit of ADR is usually when it is available early in the disputation or litigation process when the personal investment in the dispute is the least and the financial costs are still low. The benefits of ADR can be eroded the longer the litigation and the closer to final hearing it is offered. Early identification of the suitability of ADR and the issues in dispute is one of the benefits of the individual docket management approach.

Court-based ADR can have distinct benefits in providing disputants with information about the Courts, its case management and processes which may not be as readily available to private ADR practitioners. The ‘in house’ ADR practitioner may be perceived by some disputants as having greater authority and may therefore be able to gain the confidence of the disputant more readily. Quality assurance, professional development and review, skills training and education can often be achieved more effectively in house. It can add to the status and perception of the court as being more attuned to the consumer need. While the current fees for in-house mediation may not be seen as a disincentive, an amendment to enable mediation fees to be recoverable if settlement is achieved through mediation, may assist in the resolution of a matter at mediation. On the question of cost however, such mediations represent a cost to the Court which is not recovered in full or at all (given the current level of fees and existence of exemptions) that is otherwise shifted to the litigant where external practitioners are engaged. Further the use of ‘in house’ ADR practitioners does not assist in the

development, training and gaining experience of a larger number of providers which demand in the marketplace in future might require.

Judicial officers should encourage disputants to use ADR to ensure that the disputants have been given that opportunity and option and to underscore that ADR is accepted as a viable and legitimate option in settling disputes. However, it needs to be noted that some matters require a judicial decision and where that is the case, should proceed to final hearing without delay or undue pressure for ADR assisted resolution.

In general federal law, the Court sees great benefit in its discretionary power to order parties to attend ADR. Whilst the Court does not support the introduction of mandatory ADR processes, it is considered that courts should be obliged to investigate the merits of ADR with parties. The *Federal Magistrates Act 1999* currently provides, at section 22, a less rigorous requirement, namely:

the Federal Magistrates Court must consider whether or not to advise the parties to proceedings before it about the dispute resolution processes that could be used to resolve any matter in dispute.

The current discretionary power of the Court to order the parties to attend ADR without consent is supported. This power is particularly helpful when a party's solicitor sees prospects for settlement but he/she cannot get instructions to talk to the other side. It is noted that even those areas of the jurisdiction such as human rights and unlawful termination where parties are required to engage in conciliation prior to filing proceedings in the Court, an order is made for mediation which not infrequently results in the matter settling without the need for judicial intervention. Mediators are well positioned to explore with parties the costs of losing and the often unrecoverable costs of winning if a matter proceeds to a judicial determination. It is also the case that even if a mediation does not result in resolution, it can assist to narrow the issues in dispute.

Provision of ADR Services – Judicial Dispute Resolution

As noted in the Paper, use of judges in ADR processes may be perceived as undermining the integrity of the judicial process. The role of the judiciary is to hear and determine

matters on the evidence before the Court according to law and to provide reasons. This is a transparent process that is open to the public and amenable to appeal. However, it is a rights based solution to disputes between parties. There is a diversity of views within the Court as to judicial dispute resolution. On the one hand it is argued that rights based processes determined by way of the adversarial system are inconsistent with the principles and practices associated with mediation. Mediation allows parties to negotiate from a basis that allows the exploration and consideration of the parties interests and needs, rather than only their rights. Parties are also able in a mediation to best craft a solution that may better meet their needs than a Court imposed determination. A mediator can assist the parties to explore and consider the weaknesses in their own position and explore and consider the strengths of the other party/ies and assist parties to approach the resolution of their dispute creatively and unfettered by limitation of the legal orders available to a Court. Those skills, experience and knowledge are necessarily different to those required for being a judicial officer.

On the other hand some see a limited role for the use of judges in ADR. In cases properly identified as suitable, where for example the parties are desirous of attempting mediation against the backdrop of a lengthy trial, the use of a judge to mediate can assist in a successful outcome. Of course, should the judge conducted mediation prove unsuccessful, the determination of the triable issues must be by another judge. Judicial mediations have been conducted across courts in Australia and overseas at the request of parties and with success without a diminution in the roles of judges in their traditional function of being determiners of fact and law. Those who would support judicial ADR suggest criteria need to be established to identify cases which are suitable for judicial mediation and that the judges selected to conduct mediations need to be competent in that field and suited by way of training, personality and experience.

Provision of ADR Services – Private, Community and Government-based ADR

There is a need to ensure that private and community-based ADR professionals are appropriately competent. This can be achieved through accreditation and registration requirements. It is advantageous for ADR professionals to have an understanding of the industry or field relevant to the dispute.

The use of privately-funded mediation should not be imposed on unwilling parties where court resources are adequate to provide the necessary service. When considering the potential for savings across the entire system, it is necessary to ensure that parties are not unfairly burdened with additional costs which may be beyond their means. However, in large disputes which could take some days of court time to hear, and where the parties can afford it, sending the parties to private ADR professionals may be reasonable. Various mechanisms can be devised to assist parties who are unable to agree on who the mediator should be. Otherwise, these matters should continue to be at the discretion of the judicial officer.

Referral and Assessment

Legal representatives play an integral role in ADR. They are a source of information and support for the client as well as being able to provide relevant rights based information and advice. The client is paying for such legal advice and is more likely to take the advice of the lawyer, than not. Throughout Australia barristers and solicitors are either required or encouraged to explore the benefits of mediation with clients. However, even in the face of practitioners who do not see the benefits of mediation, a Court can require the parties to attend a directions hearing at which the Court can explain the process and its benefits. For that reason, it is important that judicial officers also be well educated in the mediation process and its potential benefit to litigants.

ADR should be an integral part of the curriculum at University for lawyers to enhance their understanding of the process and ultimately, incorporate it into their practice. As with all professions, ongoing professional development and training is necessary and recommended.

Use of ADR Techniques

The Court considers judicial officers can play a significant role in the early assessment of matters and identifying those which are more likely to resolve by alternative dispute resolution processes. The early involvement of a judicial officer in litigation can have a positive impact on the efficient resolution of a dispute. There is often no reason why the

determinative process of the Court and the consensual process of mediation cannot run in parallel.

Data, Evaluation and Research

The Court supports wholeheartedly further research into and evaluation of ADR processes. The Court acknowledges that some of the raw data needs to be supplied by it. Appropriate funding should be maintained or provided to enable the courts to collect and interpret such data. A body external to the courts could be established to collect information across courts and tribunals and use such information to carry out necessary research and to provide a dialogue as between the courts and tribunals State and Federal of best practice on a general or individual jurisdictional basis.

Conclusion

The Court recognises the benefits of dispute resolution in resolving disputes and allowing parties to have some ownership of the process and the outcome. The Federal *Magistrates Act 1999* includes provisions which permit the Court to operate as informally as possible in the exercise of judicial power. In those matters where a judicial determination is required, ADR can be utilised to clarify the areas of dispute with the aim of better identifying those matters which need a judicial determination. Less adversarial processes and individual docket management enable the Court to make assessments as to those matters which are suitable for dispute resolution and therefore possible settlement, at an early stage of the litigation process.