"Use Of Alternate Dispute Resolution in Commercial Disputes Seminar"
T.C. Beirne School Of Law
Customs House
"ADR and the Law"

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The Hon P de Jersey - Chief Justice of Queensland

The Uniform Civil Procedure Rules commenced on 1 July 1999. They constitute rules applicable to all three courts in the State stream, the Supreme Court, the District Court, and the Magistrates Courts. The rules are largely uniform in their application to the three courts, although some difference was of course unavoidable. Those rules substantially replicate the procedure previously set out for the utilisation in the Supreme Court of the mechanisms of alternative dispute resolution. I wish to speak particularly this morning of our experience of them.

As you know, interest in ADR flourished in the United States of America in the 1980 s, largely as a reaction to clogging of court lists leading to unacceptable delay and expense in the adjudication of claims. ADR took on the character of a new industry in the US, with resort to so called "private judging" which followed a more flexible approach to the resolution of claims, focussing on consensus more than adjudication. Eventually, the courts themselves resorted to this new philosophical approach, formally providing for the reference of cases to ADR outside the courthouse, although frequently retaining a substantial link - as with "court annexed arbitration". Cost penalties were imposed, for example, where parties who rejected an appraiser s recommendation and chose to litigate, obtained a less favourable ultimate determination.

The Judges of the Supreme Court were familiar with these developments elsewhere. By the late 80 s in Queensland, civil litigation was stagnating. Cases often took years to progress from commencement to conclusion. So called "case management" was in its infancy, and the philosophical changes necessary to ensure its effectiveness were yet in a state of gestation. In one area on the civil side, the Court was, however, performing well, and that was with the "commercial causes" lists, the A list for traditional commercial cases and the B list for building cases. Those cases were subjected to regular review and proceeded with comparative speed. But they accounted for only a small proportion of the Court s overall civil list. For present purposes, the history of those lists is significant in one particular respect.

For years our rules of court had obliged the parties to personal injuries litigation in particular, to conduct what were called "compulsory conferences". By the late 80 s, those conferences had become perfunctory, rarely occurring in any meaningful sense. In the result, cases frequently settled at the court door, with inexcusable dislocation of hearing lists and waste of judge time. It was judicial frustration at this wastage which led many judges to the view that the practising profession was ignoring a fundamental obligation - to ensure that only those cases which could not settle were taken to trial. To change that attitude again necessitated a cultural shift, for to that point opening negotiation was still regarded by many as implying that the client had a weak case. And so in the commercial court, we restored a focus on negotiation. The commercial causes judge would direct the parties to discuss their differences, face to face, and when I held that position, I frequently descended myself into the well of the court and led the discussion. The success rate was surprisingly high, including often the settlement of major complex litigation. My own conclusion was clear: restoring a proper focus upon the negotiation of differences could substantially help litigants, saving time and money and angst; and incidentally substantially resolving congestion in the court lists.

And so in 1991, the *Supreme Court of Queensland Act* was amended formally to enshrine the applicability to our regime of the processes of ADR. A number of provisions were introduced with these stated objectives: to provide an opportunity for litigants to participate in ADR processes in order to achieve negotiated settlements and satisfactory resolutions of disputes; to introduce ADR processes into the court system to improve access to justice for litigants and to reduce cost and delay; to provide a legislative framework allowing ADR processes to be conducted as quickly, and with as little formality and technicality, as possible; and to safeguard ADR processes, by ensuring that they remain confidential, and by extending the same protection to participants in an ADR process as they would have if the dispute were before the Supreme Court.

Then followed a series of legislative provisions, beginning with provision for the accreditation of persons called ADR "convenors". The statute envisaged mediation, a completely consensual process, and case appraisal, where there would be provisional adjudication of disputes which the parties may or may not choose to accept. The legislation provided for the accreditation by the court of mediators and case appraisers. The ADR processes took place outside the court. The parties might agree to a process or the court might require it. The detail of the procedure to be adopted would be substantially up to the convenor. The court would facilitate the implementation of the negotiated settlement as necessary. There was to be an obligation of confidentiality on the convenors, and they, together with the other participants, were to enjoy an immunity comparable with that of judges. Admissions made during ADR processes could be given in evidence at the subsequent court hearing, but only if the parties agreed.

Rules 313 to 351 of the *Uniform Civil Procedure Rules* now make detailed

provision with respect to these matters. Beyond what I have generally mentioned already, they contemplate, for example, the Registrar s referring a dispute to ADR, a reference to which a party may object, leading perhaps to the Court s reviewing the referring order. In other words, the Court may refer a dispute of its own motion, although of course a party may apply for an order - or the parties may agree to refer off their own bat. Costs are borne initially proportionally among the parties, subject to any later agreement or appraisal which is accepted.

The rules make detailed provision about mediation and appraisal. There is no need for me to go through the detail of all those provisions now. I will mention that the rules about mediation cover the need to inform the mediator sufficiently, contemplate the completion of a mediation within 28 days of the order, oblige the parties to cooperate, and entitle the mediator to seek independent expert advice provided that is disclosed to the parties and there is appropriate arrangement with relation to costs. Similar provision is made with respect to case appraisal. A party dissatisfied with the result of an appraisal may within 28 days elect to proceed to a trial or hearing in the court. The rules contemplate that if such a challenger secures an ultimate result not more favourable, then that challenger pays all the costs.

Now how does this work in practice? The Supreme Court Registrar currently maintains a list which includes 131 accredited case appraisers, 185 mediators and 21 venue providers. Most of the mediators and appraisers are lawyers, and ordinarily, to secure accreditation, they must have completed an accepted course of practical training in the art. In applying for accreditation, they are also required to disclose the fees they would levy for their conduct of the process.

In recent years, the Court has proactively required mediation or case appraisal in all personal injuries actions, upon entry for trial; in all cases transferred to our supervised case list - broadly speaking, covering cases likely to require a trial or hearing of more than five days duration; and in all cases transferred to the Supreme Court from the District Court. In addition, of course, parties frequently now follow an ADR process of their own motion. When notified of the Court s compulsory referral, parties will respond: sometimes, notifying that they have already resolved their disputes; sometimes consenting to mediation or appraisal; in other cases, lodging a dispute resolution plan, with a series of appropriate steps structured to foster the best process to resolution; or stating a reason why reference to ADR is inappropriate. In the last case, a judge with a deputy registrar will consider the objection, and the objection may be listed for review by a judge, although these cases frequently then resolve anyway.

Last year, that is to 30 June 1999, a total of 11,406 initiating documents were filed in the Supreme Court at Brisbane. Of that total of 11,406, 3,149 were writs. Bear in mind that only a very small fraction of cases proceed to court determination by trial or hearing. Last year only 90 trial judgments had to be delivered. Most cases resolve by one means or another. Referral notices were sent in 79 cases. Objection to ADR was lodged in only 12 of those cases. Orders referring to

mediation were made in a total of 304 cases, and of those, 198 were by consent and 106 otherwise by court order. Of the 304 mediations, about half, 142 were certified as settled. Orders for case appraisal were made in 44 cases, and of those 44, 23 by consent and 21 otherwise by court order. 29 were certified as settled. In 9 cases, a party elected to go to trial. All still await trial.

One current practical problem experienced by the Senior Judge Administrator is that the setting down for trial of cases on the callover list, otherwise apparently ready for trial, is being disrupted to some extent by there being unresolved or outstanding ADR orders; in other words, compliance with some ADR orders has itself become subject to some delay, and that is obviously unacceptable. We are closely monitoring this, and in fact setting down now regardless.

One question often raised is what particular sorts of cases are apt for referral to ADR: which are most likely to benefit if referred? I would answer this, frankly, by saying "most of them". I was as Commercial Cases Judge frequently pressed with the contention that strongly contested fraud cases were not good candidates for mediation, and I tend to agree with that. Likewise the so called test case, where the resolution of a difficult question of construction of a contract or legislation, for example, is likely to have a wider effect. But most other cases, including difficult commercial cases, should ordinarily benefit from mediation and the like, given goodwill on both sides, and an effective mediator should be able to foster that. There were some good examples provided recently by Lord Mustill, whose expertise in the field of commercial arbitration is well known: cases "where the bitterness of the dispute outweighs its real significance, and the parties need to be led gently back to a sense of proportion; where there is a genuine dispute, but it has been exacerbated by obstinacy or resentment, and where a judicial process is likely to make things worse; where there is no obviously right answer, and all the parties are wrong to some degree and must be made to see it; where the dispute is too complicated to be assimilated reliably by busy decision makes within a client corporation, and where neutral participation, whether interventionist or simply facilitative, can give the decision-maker both the control of the dispute and a reliable basis on which to make decisions; where the dispute arises in the course of a continuous relationship, which ought if possible to be kept in being, but which would be fractured by orthodox litigation" (Dyson J: "Case Management and Alternative Dispute Resolution in England and Wales", a Paper given at the Third Worldwide Common Law Judiciary Conference, Edinburgh, July 1999).

There is no doubt that our enthusiastic use of ADR in the Supreme Court has led to a clearing of the lists to the point where we can now offer trial dates at a very early stage following readiness for trial. By the end of June 1999, there were only 77 cases on the civil callover list awaiting the allotment of trial dates, by contrast with as many as 300 only three years earlier; and by June 1999, parties ready for trial could expect the allotment of dates within approximately four months.

A decade ago, I penned a short piece for the Australian Law Journal about the

then embryonic development of alternative dispute resolution in Australia. At that time, at least on my own assessment, lawyers were especially concerned about the trend: they feared a reduction in court work. Courts were themselves suspicious: some saw ADR as a challenge to what was, traditionally, the only acceptably fair method of lawful dispute resolution involving a third party adjudicator or facilitator - that is, by a court of law. In November 1988 I had spent some days attending an ADR conference in Baltimore. Impressed by the extent to which ADR had become established in the United States, I sought by the ALJ article to encourage some greater understanding here, and to reassure both lawyers and courts. The pejorative dismissal of ADR by many, at that stage, was as a piece of "gimmickry".

Ten years on, the trend is of course very firmly established in Australia. Lawyers have discovered another worthwhile professional avenue: courts willingly accept a reduction in their workloads. But the basis for the acceptance which has developed is not limited in that rather self-centred way. There is, I believe, general acceptance now of the desirability of the process, from the aspect of the parties in dispute, and in the public interest, especially the goal of limiting acrimony and fostering continuing commercial relationships - quite apart from a reduction in costs.

I hope I have sufficiently demonstrated today that through our utilisation of these processes in the Supreme Court ,we have helped both litigants and the court process itself. Obviously enough, utilisation of these mechanisms has greatly assisted in the "culling" of our lists. We are now, as you have seen, in a position to be able to give assured early treatment to cases which must be resolved by trial or hearing within the court.

I should betray some latent concern about whether it is right that we expect litigants engaging in ADR at court direction to do so effectively at their own expense: there is a peculiarity about that process - those disputants pay the mediator, whereas the State pays the judge. There may be a question whether we are thereby properly fulfilling our Charter. I have not yet formed a definite view on that matter, but raise it as a query.

It is also suggested from time to time that courts should run these systems fully in-house. If we are obliged to provide a full online dispute resolution service within the court, then it follows that we might be criticised for embracing this external facility. But I am not convinced of these things. This extra judicial process may fairly be characterised as something appropriately complementary to the Court s traditional approach.

There would, further, be considerable practical difficulty were we to seek this adjunct entirely within the court system, comparably with, for example, the Industrial Relations Commission, where the commissioners carry out settlement conferences as well as the final hearings. On orthodox theory, judges could not properly conduct conferences and then go on to conduct any necessary trials,

allowing that that would be inconsistent, ultimately, with the need to encourage settlements through frank exchanges. I am also not sure that conducting mediation on that regular basis would be consistent with a proper appreciation of the judicial role, and the need to preserve the authority of the office. Also, as has often been said, good judges do not necessarily make good mediators.

And so, the possible question of costs aside, I am content to have mediations and appraisals conducted outside the court by appropriately qualified and experienced experts.

When I was appointed Chief Justice in February 1998, I spoke publicly of my personal commitment to ADR, and to the way the Court was fruitfully employing its mechanisms. My views were to that point in any event quite well known. I believe that my own commitment to this approach is shared generally by my colleagues. After 18 months in this role, and having experienced a much closer view of the overall operation of the system, I have to say that I am absolutely convinced of the desirability of our approach, with relation primarily of course to the interests of the litigating public, and ultimately, addressing the issue of principal concern: enhancing access to justice.