JUDGES' CHAMBERS
COURT OF APPEAL
SUPREME COURT
210 WILLIAM STREET
MELBOURNE, 3000

TEL: (03) 9603 6111
FAX: (03) 9670 8408

16 November 2007

Mr Johan Scheffer MLC
Chair
Victorian Parliament Law Reform Committee
Parliament of Victoria
Spring Street
East Melbourne VIC 3002

Dear Mr Scheffer

Inquiry into Alternative Dispute Resolution

Thank you for your letter of 13 September 2007 inviting the Court to provide a submission to the Committee's inquiry into Alternative Dispute Resolution. The Chief Justice has referred your letter to me and asked me to respond on behalf of the Court as the Chair of the Court's ADR Committee.

The Supreme Court of Victoria has advocated the use of ADR mechanisms for many years and continues to explore innovative ways in which the Court can support the resolution of legal proceedings through ADR.

I attach an updated exerpt from the Court's submission to the Victorian Law Reform Commission's Civil Justice Review dealing with ADR. This contains information about the Court's use of ADR and in particular the recent introduction of mediations by Masters.

If there is any further assistance or information the Court can provide please contact Claire Downey on 9603 6053.

Yours sincerely

The Hon Justice Kellam AO

23. Are there particular procedural changes that should be implemented for the purpose of facilitating early settlement of civil claims? If so, what should those changes be?

24. Are there any processes that parties should be required to engage in to facilitate early settlement of civil claims? If so, what should those processes be?

25. Is there a need for judicial officers, court officers or others to play a more proactive role in facilitating:

- resolution of pre-trial issues without the need for hearings and judicial determination of such issues;
- early settlement of cases?

If so, what particular changes should be implemented?

The Court's commitment to and current use of ADR

The Court considers a flexible pattern of appropriate ADR mechanisms, both private and court-based, to be an indispensable feature of a modern system of justice. Many cases, even ones where mediation or other ADR has previously failed, are definitely able to be settled if the right form of ADR is available at the right time. This can be as late as the start of or during a trial. The cost savings to the parties and the community, and the other advantages of ADR, are indisputable. As the Court now knows this to be so, it considers it has a positive responsibility to try to make ADR available or bring settlement about, in part or in whole, in all appropriate cases. Of course many cases by their very nature require judicial determination. But it is never too late in a case to try ADR. Many cases – even ones previously seen to be unsuitable – can be successfully subjected to ADR, following appropriate direction by the judge. There is scope for a significant expansion of ADR in its various forms as it operates in litigation in the Court, but extra resources will be needed if it is to reach its full potential.

The Supreme Court has a long history of support for ADR. Referral to mediation has formed a integral part of the Court's case management practices for many years. There are also a number of dispute resolution aides provided for in the Rules which can be categorised as a form of alternative dispute resolution.

Private mediation

Private mediation is the predominant mode of ADR which the Court orders as part of the management of cases. Mediation is generally ordered after

discovery is complete to allow parties to be in a better position to evaluate their own and their opponents case. However, in appropriate cases mediation may be ordered at an earlier stage.

In 1990 the *Supreme Court Act 1986* was amended to extend the Court's rule making power to allow for orders to be made compelling parties to engage in mediation (s 25(1)(ea) *Supreme Court Act 1986*).

Rule 50.07 of the *Supreme Court (General Civil Procedure) Rules 2005* provides for proceedings to be referred by the Court to a mediator with or without the consent of parties. The mediator's role is to 'assist the parties to reach a settlement of the proceeding or settlement of that part of the proceeding referred to the mediator' (r 50.07(3)) Parties generally select their own mediator. However, in some instances the Judge or Master managing the proceeding may suggest to the parties or even order that the mediation be conducted before a particular mediator or a mediator with particular qualifications.

The mediator is generally ordered to report to the Court whether the mediation has concluded but is not permitted to provide any further information to the Court (r 50.07(4) and (5)).

Conduct and statements by parties at mediation are not permitted to be the subject of evidence unless all the parties who attended the mediation agree (s 24A *Supreme Court Act 1986* and r 50.07(7)).

The Court has the power to determine the remuneration of the mediator, and by what party or parties and in what proportion the remuneration is to be paid (r 50.07(8)). Generally parties agree on a mediator and the rate to be paid with the order providing for the mediator's fee to be divided equally between the parties in the first instance.

It is the Court's experience that a significant proportion of proceedings which reach that stage resolve at mediation or shortly after. However, there are currently no statistics available on this.

A research project on ADR in the Higher Courts is being formulated by the Department of Justice. Justice Bell is involved in the project.

Master mediation

In 2005 the Court introduced a pilot program of mediation by Masters of the Court pursuant to a new rule 50.07.1 which commenced on 10 October 2005.

> 50.07.1 Mediation by Master
>
> (1) Without limiting Rule 50.07(1), at any stage of a proceeding a Master may, with or without the consent of any party—
>
> (a) of his or her own motion; or
>
> (b) on the reference of a Judge—

order that the proceeding or any part of the proceeding be mediated by the Master.

(2) If a Master undertakes a mediation, the Master may give any direction with respect to the conduct of the mediation as the Master thinks fit.

(3) Except so far as the Master otherwise orders, an order for mediation under this Rule shall not operate as a stay of the proceeding.

(4) Except as all the parties who attend the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation.

(5) An agreement referred to in paragraph (4) may be made at the mediation or later.

Over 94 mediations have been conducted by Masters with over 58% resolving the proceeding in whole. 3.2% of cases settled after mediation, making the total success rate in excess of 60%. The estimated total trial time saved was 311 days. A number of successful mediations have been undertaken by Masters in cases upon appeal. The pressure of other work on Masters has prevented them form performing more mediations, which is regrettable.

Mediations by Masters has been limited to cases where there is an appearance of financial hardship on the part of one or more of the parties, urgent cases, where there has already been an unsuccessful external mediation and there remains the potential for issues to be narrowed or resolved by mediation. Restrictions of this kind have targeted the scarce resources of Masters at cases of most need. Many cases that could have benefited from Master mediation have not received that attention.

The success of the Master mediation rule has exceeded the expectations of the Court and demonstrated the capacity for this type of mediation to generate significant time and resource savings for the parties, and the Court.

Arbitration

Rule 50.08 provides for the Court to refer a proceeding to arbitration with the consent of all parties:

(1) At any stage of a proceeding the Court may, with the consent of all parties, order that the proceeding or a question be referred to arbitration.

(2) An arbitration ordered under paragraph (1) shall be conducted in accordance with and subject to the provisions of the *Commercial Arbitration Act 1984*.

(3) The Court may subject to the provisions of the *Commercial Arbitration Act 1984* by order made under paragraph (1) or at any time—

(a) give such directions and make such orders for the conduct of the arbitration as the parties may agree or as they might have agreed had the arbitration been made pursuant to an arbitration agreement;

(b) make such orders as to the remuneration of the arbitrator and the giving of security for such remuneration as it thinks fit.

This Rule differs from that in the County Court where the Court has the power to order parties to arbitration with or without their consent. The same amending Act which introduced the compulsory mediation power into the rule making power in the *Supreme Court Act 1986* amended the *County Court Act 1958* to give the Court a compulsory mediation and arbitration power.

Referrals to arbitration are not frequently made in the Supreme Court.

Special Referee

Rule 50.01 provides for referral of questions to a special referee either to decide the question or to give the referee's opinion with respect to it. In making an order under the rule the Court is to state the question referred and direct that the special referee make a report in writing to the Court stating, with reasons, the referee's decision or opinion. The Court may give directions as to the procedure for the reference including the attendance of witnesses and the production of documents be compelled by subpoena.

Rule 50.04 provides:

> The Court may as the interests of justice require adopt the report of a special referee or decline to adopt the report in whole or in part, and make such order or give such judgement as it thinks fit.

The Court is empowered to determine the remuneration of a special referee, and by what party or parties and in what proportion the remuneration is to be paid either in the first instance or finally.(Rule 50.06).

While any question of fact or law may be referred by the Court to a special referee, references are usually made where some technical expertise is required. The rule is most often associated with building cases.

The following passage appears in *Williams* [50.01.05]:

> The court will not generally refer a question to a special referee on the application of a party where the opposing party opposes the reference. It will have regard to the desire of the other party that the question be determined by the court in the ordinary way, and will only order a reference if satisfied that this would better achieve the effective, complete, prompt and economical determination of the proceeding than would a conventional trial: *Abigroup Contractors Pty Ltd v BPB Pty Ltd* [2000] VSC 261; BC200003305. See also *AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd* [1982] VR 762 at 765. Abigroup, above, was a case in the Building List, where the rules (Ch II r 3.04(3)) authorise the court to

give directions considered conducive to the effective, complete, prompt and economical determination of a proceeding. See also Ch I r 1.14(1)(a).

In New South Wales the court has no predisposition to making or refusing an order for a reference depending on the wishes of one party: *Park Rail Developments Pty Ltd v RJ Pearce Assocs Pty Ltd* (1987) 8 NSWLR 123 at 129–30. See also *Najjar v Haines* (1991) 25 NSWLR 224 at 246.

Taking of accounts

The Court also has the power to order the taking of an account or making of an inquiry.

"52.01 Account or inquiry at any stage

(1) Except as provided in paragraph (3), the Court may at any stage of a proceeding make an order for—

(a) the taking of any account; or

(b) the making of any inquiry.

(2) Where the Court makes an order for the taking of an account, it may order payment of any amount found to be due on taking the account..."

Parties are to verify their account by affidavit with the account as an exhibit to the affidavit. The Rule is seldom used.

Other forms of ADR

There is scope to explore other types of ADR, in addition to the forms currently used by the Court, in particular advisory dispute resolution processes including:

- Early neutral evaluation
- Mini trials/case presentation
- Expert appraisal

It can be difficult in the ADR field to ensure that there is a common understanding of terms. The following descriptions of these processes are taken from the National Alternative Dispute Resolution Advisory Council booklet on Dispute Resolution Terms.

Advisory dispute resolution processes are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved.

Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation.

Case presentation (or Mini-trial) is a process in which the parties present their evidence and arguments to a dispute resolution practitioner who provides advice on the facts of the dispute, and, in some cases, on possible and desirable outcomes and the means whereby these may be achieved. See also mini-trial.

Early neutral evaluation is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute.

Expert appraisal is a process in which a dispute resolution practitioner, chosen on the basis of their expert knowledge of the subject matter (the expert appraiser), investigates the dispute. The appraiser then provides advice on the facts and possible and desirable outcomes and the means whereby these may be achieved.

Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

An alternative is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute'.

Mini-trial is a process in which the parties present arguments and evidence to a dispute resolution practitioner who provides advice as to the facts of the dispute, and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved. See also case presentation.

These definitions are not universal and there may be a number of variants of each.

Early neutral evaluation (ENE)

ENE is closely associated with California where it was pioneered. There are now ENE programs in a number of State and Federal Court districts. The ENE program in the southern District of California was evaluated as part of study

by the RAND Institute for Civil Justice of mediation and ENE programs introduced under the Civil Justice Reform Act of 1990. Under this program Magistrates conducted early neutral evaluations about four months after filing. It was estimated that 36% of cases reaching the ENE stage were settled as a result.[1] Other results of the evaluation of the costs and satisfaction of participants were considered unreliable indicators as the program was introduced together with a new system of case management which is likely to have also impacted on the results.

While some ENE programs use judicial officers as the neutral evaluator, others use experienced attorneys. The Northern District of California program provides for Court to appoint evaluators with expertise in the substantial legal area of the lawsuit from a panel of practitioners admitted for at least 15 years. Written submissions are provider to the evaluator in advance of the session. Evaluators volunteer their preparation time and the first four hours of the session with a fixed hourly rate of $200 after that.

A study of the Northern District's program from 1988 to 1992 found high levels of satisfaction with the ENE program (about two thirds) and that most dissatisfaction related to the particular lawyer acting as the evaluator. Most participants surveyed believed it reduced the time to disposition. [2]

The benefits of ENE and the cases to which it is suited are discussed in JS Blackman 'Neutral Evaluation- A ADR Technique Whose Time Has Come' (1997)

Early neutral evaluation is also used in Australia.

Following the commencement of the *Administrative Appeals Tribunal Amendment Act 2005* on 16 May 2005 which broadened the Tribunals ADR powers, the Tribunal developed 'Process Models' for different forms of ADR including Neutral Evaluation.

Neutral evaluation is defined by the Tribunal as:

> An advisory process in which a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal, chosen on the basis of their expert knowledge of the subject matter, investigates the dispute and provides a non□binding opinion on the likely outcomes. Neutral evaluation is used when the resolution of the conflict requires an evaluation of both the facts and the law. The evaluation may be the subject of a written report which may be admissible at the hearing.

Neutral evaluation is also provided for in the *Administrative Decisions Tribunal Act 1997* (NSW) s 102.

---

[1] Kakalik et al, *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* (1996).

[2] JD Rosenberg and HJ Folberg, 'Alternative Dispute Resolution An Empirical Analysis' (1994) 46 *ADR Analysis* 1487.

Reference to neutral evaluation was found in courts legislation in NSW but has been removed with the introduction of the *Civil Procedure Act 2005* (NSW) and *Uniform Civil Procedure Rules 2005* (NSW) which refer to mediation only.

Part 4 of Division 4 of the *Uniform Civil Procedure Rule 1999* (Qld) provide a procedure for court referral to a case appraiser. The case appraiser's decision is deemed to be final unless a party elects to go to trial. If a party elects to go to trial they will incur costs penalties if they do not achieve a more favourable outcome. This differs from the for informal nature of other neutral evaluation schemes.

Mini trials/case presentation

The mini-trial is again a procedure with many variants. It has its origins in commercial disputes. In the context of litigation, processes have developed for judicial mini-trials. This can be similar to early neutral evaluation, but is more formal. After an abbreviated presentation of cases a non-binding determination is given, rather than an evaluation.

One model is found in Rule 35 the British Columbia Supreme Court Rules which provides for judicial mini-trial before a judge or master, who gives non-binding opinion on the probable outcome of a trial without hearing witnesses. The judge or master is precluded from presiding at trial.

Alberta also offered litigants a mini-trial procedure. This is described in the 1993 Discussion Paper by the Albert Law Reform Institute Civil Litigation: *The Judicial Mini-Trial*. The Court considers that judicial non-binding determinations are problematic and would not be appropriate.

Expert appraisal

Expert appraisal provides for an objective, independent and impartial assessment of disputed facts or issues by an expert appointed by the parties. Parties may agree for the appraisal to be binding. [3]

It is particularly suited to cases involving technical factual disputes or quantification disputes.

Conclusion

For these reasons, the Court recommends:

- the mediation function of the Court, in the form of Master led mediation, should be consolidated and extended, which would require additional resources;
- there should be an evaluation of alternative forms of ADR, other than mediation, which may appropriately be employed by the Court as part

[3] H Astor and C Chinkin, *Dispute Resolution in Australia* (2ed, 2002).

of it broader focus on externally provided ADR services as an integral part of case management. These may include early neutral evaluation, expert evaluation and other advisory dispute resolution processes which may give participants an indication of the relative strength of their case or defence.