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FEDERAL COURT OF AUSTRALIA

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Dear Sir/Madam

Alternative Dispute Resolution

Thank you for the opportunity to provide a short note to the inquiry into alternative dispute resolution (ADR).

The discussion paper raises a number of interesting and important questions about ADR in Victoria. I have sought to limit my comments to those particular questions that relate to the Courts and ADR.

ADR in a Court context

Courts are traditionally recognised as institutions where disputes are resolved through judicial intervention and determination. What is often not immediately obvious is the extent to which modern, innovative courts rely on ADR mechanisms to assist and complement the determination process.

Increasingly Courts are being asked to actively manage the cases that come before them to ensure that disputes are resolved efficiently. These calls come not only from those who fund the Courts but also from their users. The finite resources available to Courts has fuelled the necessity to find improved efficiencies in case management, measured against performance standards, without compromising the principles of access to justice or judicial independence. Further, with the increased sophistication of society, there is a recognition of the value of co-operative dispute resolution by parties. As the social centre for dispute resolution, courts are a natural place to look for the development of this facility.

The introduction of the Individual Docket System (IDS) in the Federal Court of Australia (the Federal Court) in 1997 has significantly influenced the management of cases within the Court. The Court now sets its own performance criteria against time standards for the delivery of judgments and for completion of cases from commencement. Mediation and other ADR options available to the Court have become important tools to assist in meeting performance criteria.

The IDS has enhanced the ability of judges to scrutinise and manage their cases. Judges are assisted in this task by the Federal Court Rules which provide for a range of possible ADR options. These allow judges to craft sophisticated case management approaches to refine the issues in dispute and thus identify which issues require judicial adjudication.

The rules of the Federal Court provide for:

- case management conferences (order 10 rule 1(2)(h)) before a registrar with a view to satisfying the registrar that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken, or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter, or otherwise to shorten the time taken in preparation for and at the trial;
- conferences of experts (order 34A rule 3(2) convened by registrars to identify the matters and issues about which their opinions are the same and those where their opinions differ;
- early neutral evaluation (order 10 rule 1(2)(a)(xx)); and
- mediation (order 72).

Native title claims are one particularly complex type of litigation in the Federal Court. It is not unknown for a claim in Victoria to have 400 respondent parties. There may be issues in dispute among the applicant group that must be resolved before there can be meaningful settlement discussions with respondents. Where native title matters go to hearing the nature of the issues being litigated can lead to expensive, lengthy hearings at multiple remote locations.

The Gunditjmara People's application for native title determination was a matter that, following a variety of ADR initiatives at various stages, was resolved by agreement between the parties. Along the path to resolution the parties had been involved in mediation conducted by the National Native Title Tribunal, an early evidence hearing focused on providing evidence to enliven further mediation, a conference of experts, numerous case conferences before registrars of the Court and further mediation by the Court. While resolved by agreement I have no doubt that if agreement had not been reached the hearing would have been significantly shorter and more focussed as a result of the Court's ADR interventions.

Mediation

The Federal Court has provided a court annexed mediation service since 1987. Matters referred to this service are mediated by registrars of the Court. The Court also regularly makes orders referring matters to mediation by an external mediation service provider.

Recently I had the opportunity to articulate my view of the role of mediation within courts. In *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474 at [53] I noted:

> *The successful conclusion of this proceeding by agreement of the parties also reflects the development of the court system in Australia. The system is designed as an instrument of our society to resolve disputes. In times past the emphasis has been on the provision by courts of judicial determination of disputes as the single means to achieve that end. But it has become more and more recognised that judicial determination is but one means of dispute resolution. A greater role is now given to dispute resolution by mediation and other methods such as early neutral evaluation. The advantages of parties to disputes taking control and responsibility for outcomes rather than leaving the results in the hands of judges are well recognised. Some*

disputes are particularly appropriate for assisted dispute resolution. Many native title cases fall within this category because the issues raised often concern the very identity, beliefs, culture and history of people. It is unlikely that an enforced resolution of such issues by judicial determination will be accepted or durable.

The worldwide trend is towards the development of courts with many doors. One door leads to judicial determination, but other doors lead to other forms of dispute resolution. Unless the courts in Australia continue to reflect this development they will gradually decrease in relevance as the social institution for dispute resolution. The conclusion of this case using sophisticated techniques of assisted dispute resolution is a sure mark that this court embraces the modern concept of a court with many doors.

Timing

It has been my experience that the timing of an ADR intervention is critical to the prospects of resolution of a dispute. The individual circumstances of a dispute will dictate the appropriate ADR initiative and when it should be employed.

In 2001, I presided over the Tampa dispute which attracted considerable public attention and discussion in a highly charged emotional environment. What is not widely known is the critical role that ADR played allowing the dispute to be heard at all. On 26 August 2001, 433 people, mostly Afghani, were rescued at sea in international waters near Christmas Island and taken on board the MV Tampa.

Proceedings were commenced by the Victorian Council for Civil Liberties (the VCCL) and a solicitor, Eric Vadarlis, seeking compliance with obligations which they argued that the respondents had under the *Migration Act* 1958 to bring the rescuees aboard the Tampa to Australia. Alternatively, they sought relief in the nature of habeas corpus compelling the respondents to release the rescuees from unlawful detention.

The case required an urgent hearing and commenced on a Friday evening and continued over the weekend. During the hearing on the Sunday, the Solicitor General for the Commonwealth stated that the Commonwealth had instructed that it would be seeking an undertaking as to

damages. In response, the VCCL and Eric Vadarlis explained that they were not able to give such an undertaking.

The issue of the undertaking as to damages created a vexing problem as to whether the merits of the application could ever be heard. Not to impose an undertaking as to damages would have been debatable. On the other hand, I had concerns that, if the Commonwealth persisted, the case would end because of the inability of the applicants, representing voiceless people on the sea, to provide the undertaking. The most vulnerable would then be unable to make their application for failure to afford the legal system. I was concerned that this should not happen if possible. It was important for public confidence in the judicial system that the merits of the application be heard.

As it transpired, a Registrar of the Court was sitting in Court and it occurred to me to refer the matter to mediation. I raised the issue with the parties at about 6pm. Neither the VCCL nor the Commonwealth agreed. Given my concerns, I nonetheless referred the matter to mediation. Despite the initial reluctance, at 9.45pm the parties reached an agreement in principle, which was announced the following morning.

In essence, the agreement was that the rescuees on the Tampa would be taken to the HMAS Manoora and taken to PNG but that the case would be fought as if that transfer had not occurred. If the respondents were unsuccessful and the Court ordered that the rescuees be returned to Australia, the respondents would comply with the order. That agreement saved the case. It allowed it to be fought on the merits.

A more recent example of how ADR interventions, deployed at critical moments, can complement and assist the management of matters to judicial adjudication occurred in the Blue Wedges matter. In January 2008 Blue Wedges Inc filed an application for review of the decision of the Minister for the Environment, Heritage and the Arts that has the effect of allowing dredging in Port Phillip Bay. The matter was set down for hearing, allowing time for the parties to prepare, on the basis that the Port of Melbourne Corporation (the Second Respondent) would give Blue Wedges 24 hours notice of its intention to commence dredging operations. Approximately 10 days before the hearing was to commence the Port of Melbourne Corporation gave notice of its intention to commence dredging the next day. As a

result Blue Wedges filed an urgent injunction application seeking to restrain the Port from acting on the Minister's approval in any way.

In considering whether to grant an injunction the Court must consider matter which would not have been directly relevant to the matters to be considered in the application for review of the Minister's decision. This could conceivably have led to seemingly conflicting decisions in the injunction and review matters, which, in a case attracting considerable media attention, could have led to public confusion and reduced confidence in the Court. I raised the possibility of mediation with the parties who did not object although at least one party raised reservations.

The injunction application was referred to mediation before the District Registrar who was able to commence the mediation immediately. Some few hours later I was informed that the parties had reached agreement that would allow dredging to commence in areas that were not of concern to Blue Wedges Inc. In making orders giving effect to the results of the mediation I was caused to comment:

> *And in making those orders I want to congratulate the parties, in particular on the effort they have put into achieving what seems on the face of it to be a creative and sensible resolution of this interlocutory application. I have no doubt that the solution is much better than any one which I could have arrived at by applying the strictures of the law, and the parties will be much easier able to live with this than an involuntary judgment of the court.*
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> *The co-operation of the parties reflects an adoption of part of what I see as a revolution in the law in embracing alternative dispute resolution. The issue that faced the parties was a vexed and difficult one, one that is very traditionally the area of the court intervening on an interlocutory basis and, as I see it, so often in a most unsatisfactory way, and I say that for the reasons I gave earlier today when I referred the matter out to mediation; namely, that when the court intervenes in such a way it does so necessarily, in a superficial view of the material, and it can often be that interlocutory injunctions are granted where the final relief is denied, and that always seems a quaint conundrum to the public, even if lawyers can explain it quite easily to themselves.*

Compulsory mediation

In 1997 the Federal Court of Australia Act was amended to insert subsection 53A(1A) which provides that referrals to mediation may be made by a judge with or without the consent of the parties. As the above *Tampa* example shows, it is my experience that a party's disinclination to attend mediation or other form of ADR is not determinative of the outcome. Many times where I have ordered parties to attend mediation over a party's objections I am later told that the parties have reached agreement to settle and the parties have expressed their satisfaction with the process.

Measurements of success

Statistics provided in the Court's 2006-2007 annual report indicate that since its introduction in 1987 a total of 4,358 matters have been referred to mediation. In the five years to 30 June 2007, the average number of matters filed with the Court was 5316 with an average of 317 matters referred to mediation each reporting year.

The settlement rates of cases referred to mediation since 1997 has averaged 55 per cent. Settlement rates are not the only criteria by which mediation should be evaluated. As a direct result of mediation, many matters which do not settle proceed to trial with the issues more clearly defined or on the basis of agreed facts settled by the parties with the assistance of the mediator. In some instances the parties also agree that the Court should only be asked to determine liability or quantum. In the *Newcastle Waters* native title claim in the Northern Territory the Court's ADR interventions resulted in the applicant's lay evidence being reduced to one day. These types of results mean savings in costs to the parties and the Court.

Even where a case does not settle at mediation and proceeds to judicial determination, parties may come away from the process with new insight into the conduct that led to the dispute. If this insight results in future changes in behaviour that reduce the risk of further litigation, participation in mediation has been a success.

Appellate mediation

Since 2006 the Court conducted appellate mediation in Victoria under the leadership of the Chief Justice and myself and supported by the District Registrar. The appellate mediation program involves a number of steps undertaken before and during the call over. Before

callover Court staff review the files and contact the parties to identify matters potentially suitability for mediation. At callover the Chief Justice discusses the substance of the appeal with each party and prospects for mediation. Registrars are in attendance to discuss mediation with parties, if any matters are referred. 18 matters have been referred for appellate mediation to date. Three matters continue in mediation while in 6 cases mediation has resulted in complete settlement of the matter.

In an address to the Law Institute of Victoria in November last year, Justice Maxwell, President of the Court of Appeal, described progress in reducing the unacceptable delays in the Court of Appeal, part of which involved the promotion of appellate mediation:

> *We have introduced appellate mediation. Justice Tony North of the Federal Court alerted me to the possibility soon after I was appointed, drawing my attention to a marvellous book describing the well established practice of appeal mediation in the Federal Courts of Appeal in the United States.*
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> *We have had six appeal mediations already. Five of the appeals have settled. Three of the mediations followed from directions hearings which I convened, where I proposed mediation to the parties. In none was there any resistance to the idea. Another followed a referral to mediation by Chernov JA, after the hearing of the substantive appeal had had to be adjourned. Most recently, Master Cain settled a case where both appellants and respondents were unrepresented. Both sides were very unhappy with what had occurred at trial, and the mediation went some way to restoring their faith in the justice system.*

Private and court annexed mediation

In my view, there is a place for both private and court annexed ADR. In Australia, court annexed ADR is conducted by specially trained registrars and masters. Judges mostly do not conduct mediation, although there are some exceptions. Where judges do conduct mediations, my observation is that it reflects personal qualities that they have. Judges who are philosophically attuned to mediation and are skilled, attract an enormous amount of work. It is of course, fundamental, that the judicial officer acting as mediator has no role in decision making in relation to that case.

The prevailing view among judges is that mediation is not a role that should be undertaken by a judge. Judges generally do not want to conduct mediation and I consider that they are generally ill equipped to do so. The daily work of judges is generally counter to the methodology of mediated resolutions. There are also some constitutional questions that may arise.

There are advantages in having court officers act as ADR service providers. The rate of referral of matters to ADR within the court is not only dependent on the attitude of the judge and parties to ADR but also on availability of skilled ADR practitioners who have the confidence of the court and the parties. The responsibility for training court annexed mediators rests with the court which can monitor the quality of the services being provided.

The cost to parties associated with court annexed mediation are generally lower than the cost of external mediation. In the Federal Court parties pay per mediation and so, where mediation occurs across a number of days, not an irregular occurrence, no additional costs are incurred.

Court officers are generally more readily available than private mediators in cases where urgent mediation is required. The availability of mediation facilities within the court and a court officer to mediate means that matters may be dealt with immediately if necessary.

In the case of the Federal Court, the registrars who mediate are familiar with the procedures of the Court and often with the practices of particular judges. Additionally, registrars are taxing officers and can give parties information on the Court's estimate and taxation of costs procedure that may assist them in mediation.

A further advantage of court annexed mediation is that if the matter does not settle, the court officer may make directions or orders to further manage the matter to resolution. Such a course would not be available if the matter went to private mediation, possibly resulting in the increased costs associated with an additional appearance before a judge.

Accreditation

Mediation services can only be effective where the mediators are skilled and act professionally and where users have confidence in the mediation services. I have long been an advocate for the development and maintenance of mediation skills within the Court.

The Court has participated in national consultations around accreditation standards for mediators. The Registrar, Mr Warwick Soden, is a member of NADRAC, the Commonwealth Attorney General's ADR advisory committee. In late 2007 the Court made the decision to adopt the Australian National Mediator Accreditation Approval and Practice Standards. Since 1 January 2008 the Court is a Recognised Mediator Accreditation Body and in May and June 2008 will run specially designed courses to accredit its registrar mediators. These courses, designed to compliment the context in which Federal Court mediation services operate, will ensure registrar mediators possess the skills and knowledge necessary to achieve the national accreditation standard. From 1 July 2008 the Court will only use non-accredited mediators in exceptional circumstances.

Justice A M North