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Alternative Dispute Resolution, Case Management and the Rule of Law

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Australians have the right of access to the courts, where they can afford it? Yes, that's trite. After all access to the courts is guaranteed by Magna Carta, the Australian constitution and the Rule of Law (unless the High Court refuses special leave). Well perhaps it was, but that's no longer quite so obvious. The Rule of Law (RL) is currently being challenged by the conjoint twins of case management (CM) and alternative dispute resolution (ADR).

ALRC - Managing Justice Report

It all started, as they say, with the access to justice movement in the 1990s. Among many developments at this time, the federal Attorney-General asked the Australian Law Reform Commission to investigate and report on the federal civil justice system. Its final report was banded down in 2000 (ALRC Report 89, Managing Justice) but in the intervening period the dogs had stolen the bones - in every jurisdiction in the country CM and ADR had already begun to change the civil litigation system.

- Case management - a system in which judges and court officials closely manage and supervise civil litigation and make discretionary orders on time lines, exchanges of information, mandatory referral to ADR (see below), and so forth.
- ADR - processes other than litigation, such as conciliation, case appraisal mediation or arbitration, used to resolve disputes and often incorporated into the case management systems (see above) of courts and tribunals.

The following cases provide a basis for discussing how CM and ADR are challenging some of the basic assumptions of our justice system and the RL.

The case of the stipendiary magistrate and the Sunday paper

(aka Barrett v Queensland Newspapers Pty Ltd v Queensland Newspapers and others [1999] QDC 150 (19 July 1999).

The plaintiff, a Queensland magistrate, had sued a publisher for defamation, alleging that an article 'He's Too Soft' implied that the magistrate treated criminal offenders too lightly and was responsible for a high crime rate in the Hervey Bay area.

The defence of the newspaper and other defendants revolved around fair comment and qualified protection. Pleadings (which is the process of the plaintiff and defendant indicating the arguments and issues they intend to present in the litigation) had closed and discovery and inspection had been completed (this is the process of the parties indicating what relevant documents they have in their possession) and the defendant applied for a referral order to mediation in terms of the relevant CM rules.

The defendants argued that, given the complexity of the dispute and the prospect of a jury trial, a hearing time of 10 days would be required. Preparation for a complicated lengthy trial would be 'expensive' and the defendants wanted a reasonable compromise before incurring extensive costs. The defendants submitted that a mediation would only take a single day and result in extensive savings.

The plaintiff, unobligingly, opposed the application, submitting that defamation was not suitable for ADR. It was argued that the defendant was not likely to accept liability, that more than one day's mediation would be required to deal with the complexities, that issues of credit would not be resolved, that the pursuit of exemplary damages (damages that are in excess of actual loss in a case of behaviour that justifies a punishment aspect to court decision) made it problematic, and that 'defamation trials rarely settle at mediation'.

The judge (who as a barrister had previously done a mediation workshop at a well-known university) was faced with a common phenomenon where ADR is available under CM and referrals can be made over the objections of one or more parties - what factors should be taken into account in exercising the judicial discretion?

For Samios DCJ there was no established case law on the matter, though Legal Eagle was to reveal subsequently what a wealth of jurisprudence was developing.

There was, however, the relevant legislation. Its purpose was to make ADR available to litigants so that they could achieve 'negotiated settlements and satisfactory resolutions of disputes.' However the legislation and rules provided no guidance on factors to take into account when deciding whether to make a referral. Nevertheless the court held that the statutory scheme allowed it to have a 'pre-disposition' to refer to mediation if one party sought an order.

The court first reflected first on the following matters:

- The extent to which the interests of litigants other than the present parties could be considered. The defamation trial would dominate the two week circuit sitting in Hervey Bay, requiring other matters to go on hold before being heard. Not only did Samios DCJ regard this as a relevant consideration but he went on to endorse the merits of routine mediation of all matters so that those capable of mediated resolution would not stand in the way of those requiring court adjudication. (No reference to the R of L here.)
- The extent to which the discretion maker could take account of the prospects of success (or failure) at mediation. Here Samios DCJ held that this might be inappropriate, on the basis that even where one party was strongly opposed to it and there were grounds for being dubious about success, mediation still provided the best opportunity for dispute resolution, better than settlement on the steps of the court.

Returning to the factors relevant to the exercise of the discretion, Samios DCJ held that in the circumstances of the present case the following were relevant:

1. The fact that he could not conclude that mediation would not be successful (note the double negative).

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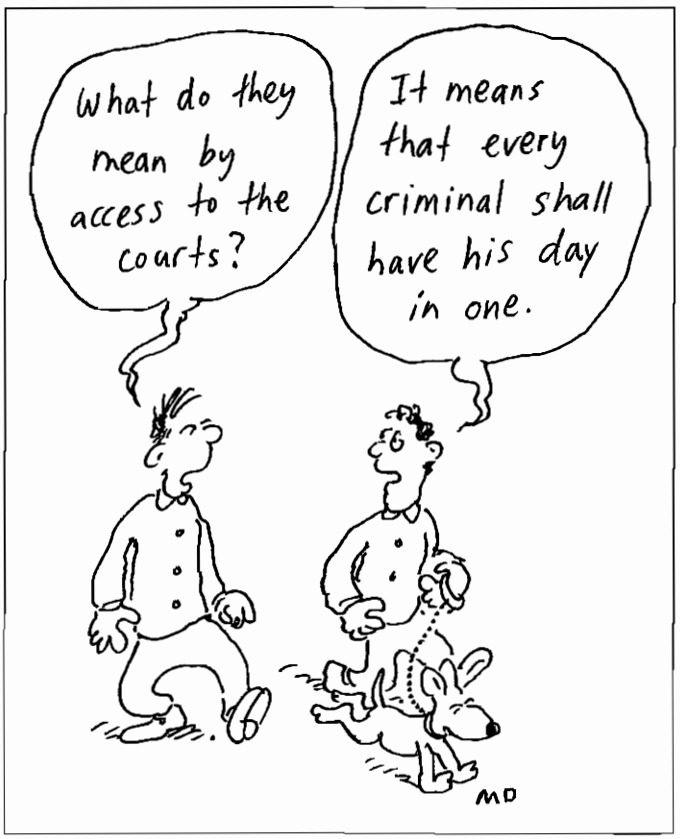
2. That the trial might take longer than 10 days and detract from court time available to others.
3. That three of the four parties were supportive of mediation.
4. That the second defendant, without admitting liability, had agreed to pay the plaintiff's share of the mediator's fee and venue costs.
5. That the application was made early in the action when substantial costs would be saved by all parties.
6. hat there were risks in litigation, even for the party opposing the referral order.
7. That a skilled mediator might be able to assist the parties, despite the difficulties inherent in the case.

In the light of these factors the referral order to mediation was made.



The case of the lawyer and the Gambling Man

(aka Waterhouse v Perkins & Ors [2001] NSWSC 13 (25 January 2001). This case arose out of the publication of a book entitled *The Gambling Man,* which made regular appearances on the defamation list of the New South Wales Supreme Court.

Again the defendant applied for a compulsory mediation order, obligingly offering to pay the costs of the mediation, and the plaintiff opposed it. The defendants argued that there would be an all issues jury trial, with an estimated hearing time of six weeks. Part of the plaintiff's reluctance to accept mediation centred around the fact that the defendants had nominated the proposed mediator. Counsel for the plaintiff suggested that even if the defendants suggested the Archangel Gabriel they would not accept mediation. In fact the defendants were offering neither the archangel's services, nor even those of a mere archbishop.

Levine J (who had not attended the course referred to above) noted the plaintiff's submission that an important ingredient of the remedy in a defamation action is public vindication. He held, however, that it was at least 'theoretically possible that the outcome of a mediation conducted in good faith by all parties could be a mechanism for the public vindication of the plaintiff. It might not necessarily be so, but to say it is impossible is quite ingenuous'.

For Levine J the issues relevant to the referral discretion was:

- The matter had been running for 10 years and was unlikely to be heard soon;
- The hearing would be of at least six weeks in duration;
- The defendants were concerned about the extent of costs accruing;
- The plaintiff was concerned about vindication and mediation could provide it;
- The defendants have offered to pay the costs of the mediator and the venue;
- The plaintiff need only pay for his legal costs during the mediation;
- The total cost of mediating compared to litigating the matter could not be considered to be a disproportionate diversion of resources;
- Parties are obliged to act in good faith, therefore, the potential outcome should be viewed positively when compared against litigation; and
- There is no rational reason for not ordering mediation in this case (note, again, the double negative).

In the light of these factors it was ordered that the whole of the proceedings be referred to mediation.

The case of the vacuum cleaner, a zealous seller, a disabled purchaser and the corporate regulator

(aka ACCC v Lux Pty Ltd [2001] FCA 600 (24 May 2001)).

Here the court had to deal with the applicant's argument that its public interest functions made it inappropriate for the ACCC (Australian Consumer and Competition Commission) to negotiate a settlement of the litigation. It had originally applied to the Federal Court for certain declarations in respect of Lux Ltd. These related to its supply of a vacuum cleaner to a complainant who was illiterate and intellectually disabled, and to its marketing to other customers with diminished mental capacities.

In dealing with the application to set aside the original mediation referral order, RD Nicholson J first referred to the fact that a mediation originally ordered was designed to follow on from a meeting of experts at which they were intended to reduce the points at issue. The mediation would benefit from and further assist in reducing the points in issue. The meeting of experts, inexplicably, had not been called. For Nicholson J this was 'an important consideration', in that the purpose of the referring order could no longer be served. However this was not a conclusive consideration and did not on its own render mediation inappropriate.

The judgment went on to deal with other arguments as to why mediation might be inappropriate, namely:

- The fact that the complainant had an intellectual disability and could be vulnerable in mediation, as she was in buying appliances - the power imbalance argument. This argument carried no weight in the court's reckoning. On the contrary, it felt that mediation could have the positive effect of avoiding the pressure on a person with limited mental capacities being called as a witness in court proceedings.

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- The fact that there were many disputed facts and issues, the respondents had not admitted liability and there would be negligible prospects of success at mediation. Here the court indicated that it was the applicant which was attempting to impose preconditions on the mediation (necessitated by its public interest functions) and that it could not be inferred that the respondents would not attempt to reach a mediated settlement (note that double negative yet again).
- The argument that mediation had limited prospects of success also carried little weight. Here it was suggested that mediation could still be productive if it resolved only some of the issues, or even led to a reduction in the costs of litigation.
- The fact of the identity of the applicant, the ACCC, whose functions are to ensure compliance with the Trade Practices Act. This, it was argued, creates a public interest best served by allowing courts to decide where alleged breaches of the legislation have occurred. Nicholson J acknowledged that this was not an inappropriate consideration in relation to whether the court should revoke the earlier mediation order. However, in the circumstances of the vacuum cleaner case, the court did not regard the ACCC's public interest responsibilities as sufficient to render mediation inappropriate. This was because in mediation the ACCC could still investigate the prospects of any admissions by the respondent of their liability. It could also investigate the making of public declarations, consideration of the issues defined by the experts in their conference, and consideration of whether the parties could agree on the issues for trial so as to preclude the complainant from giving evidence.
- The fact that one party, the applicants, was now resisting the referral to mediation. Here Nicholson J suggested that 'effective communication about the dispute' entailed 'the possibility that they might reach agreement'.

  In the result it was held that the mediation should proceed, once the conference of experts had been held.

  And the story continues...
- It is not in every case that judges make referral orders against the wishes of the parties. In *Morrow v chinadotcom* [2001] NSWSC 209 (28 March 2001) there were two commercial parties with legal advisers and the necessary advice on the pros and cons of ADR processes; if they did not see the value in ADR then Barrett J felt there would be little advantage in forcing them to pay lip service to it - it could be an exercise in futility.
- Likewise in *Harrison v Schipp* [2002] NSWCA 27 (15 Feb 2002) Mason P declined to make an order where the parties were 'staring each other down like nineteenth century gunfighters' where the opposing party would have to bear additional costs and the prospects of a mediated settlement were not very high.
- In *Higgins v Higgins* [2002] NSWSC 455 (20 May 2002) the court emphasised that in exercising their discretion to refer courts would, without any predisposition, take account of a very wide range of relevant factors (in this case, too, no referral order was actually made.)
- In *Li v Salmon Constructions Pty Ltd* [2002] QBT 26 (26 Feb 2002) costs were ordered against the party who failed to comply with directions to attend mediation without reasonable excuse and where there was unreasonable disadvantage to the consenting party.

Back to the Rule of Law

There is little doubt that there will be many more decided cases on this topic. We can only hope that they involve archbishops, drugs, gambling and the occult (though not all in a single case) to retain our interest.

From a practical point of view it is not easy, even with the best CM system, to ascertain whether a matter is suitable for generally ADR - and, if so, for what form of ADR in particular. However courts will continue to make judgments on the exercise of their discretion and a new jurisprudence will emerge. This is undoubtedly a good thing - reasoned judgments require judges to articulate their criteria for making discretionary referrals where there might otherwise be inarticulate premises, intuition and unreasoned decisions.

We can infer from the above cases a generally favourable endorsement by the courts of the mediation process and the skills of mediators, though this 'predisposition' is not founded in survey studies or other 'scientific' resources. We know from the cases that a party's objection to mediation will at times be overridden by the court and that in exercising their discretion courts will also look beyond immediate circumstances to factors such as the availability of court time and the needs of other litigants. Even parties wishing for vindication through the courts or with a mandate to uphold the public interest might be forced into ADR. Through the use of the 'jurisprudence of the double negative' the courts have provided a cautious suggestion that they will not be inclined not to prefer referral orders rather than refuse them.

On the other hand the cases show that in some situations the 'futility' argument will carry weight, and the courts certainly will not allow a defendant to use their spare cash to buy off the plaintiff into accepting a free mediation. The cases now provide us with lists of factors that the courts regard as relevant. As is the case with all of life's lists, however, it is the weight which is attributed to each factor that is important and so far there has been no indication as to how the weighting game will be played out.

None of the cases thus far examines the more fundamental issue concerning the right of plaintiffs to access the courts. This is a fundamental principle of the Rule of Law and due process of law, namely that all are equal before the law and are entitled to a disinterested determination by an interested judge. One may well ask whether these cases are, in a subtle way, changing something fundamental in our constitutional and justice systems? After all the courts are saying, without any double negative obfuscation, that the interests of some litigants must in certain circumstances give way to those of others. While it is a reality of the times that court resources are finite and no individual has an infinite claim on them, there is also little doubt that it will be argued in the future that this approach involves a preference for one party's 'constitutional right' to access the formal justice system over that of another.

The other interesting factor is the way in which courts are making some of the dispute resolution choices that have customarily been made by the actual litigants. In two of the above cases legally-advised lawyers, doubly conversant with the vicissitudes of litigation, were told, metaphorically, to pack their mediation kits and travel to the nearest mediator. This is not quite the freedom of choice philosophy that claims to operate in many other areas of social decision-

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making. Here part of the risk assessment about dispute resolution options is undertaken by the court, potentially in disregard of a litigant's own wishes, as it becomes the public sponsor of private settlement.

Of course it is true that a mediation referral order is not an absolute denial of access to judicial justice, it is merely a deferment of your 'day in court'. Nevertheless in some circumstances it could amount to the same thing. All this portends an important policy debate for the future - how should the paternal institution of the Rule of Law be reconciled with the modern twins of case management and alternative dispute resolution?

Glossary:

Mediation - a process of alternative dispute resolution where disputants assisted by a neutral person seek to isolate disputed issues with the aim of developing options and alternatives to reach a consensual agreement to accommodate the needs of the parties.

Conciliation - similar to mediation except the conciliator is expected to contribute his or her ideas during the process.

Arbitration - involves a voluntary submission of a dispute to a neutral third party who must determine it by making an award if it cannot be otherwise settled. The arbitrators award will normally bind the parties.