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The monthly newsletter on dispute resolution

contents

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Court ordered ADR

# Sanctions for the recalcitrant lawyer and party

*Grant Dearlove*

## Introduction

If one was writing a paper of this nature a decade ago, one might be required to explain the definition of alternative dispute resolution (ADR). Back then, the swinging 1980s were drawing to a close. The pursuit of justice, as entertained by corporate Australia and the public at large, could only be obtained after a sometimes arduous, costly, and time consuming journey through the hallowed halls of our judicial system.

However, the 1990s saw a return to conservatism. Purse strings were tied. Our banana republic endured the recession it had to have.[1] Those seeking justice could no longer afford to pay lawyers the hefty sums they demanded. As Sir Laurence Street said in 1987, 'We are, I believe, rapidly approaching a stage where the professional legal costs of litigation will become prohibitive.'[2] Even more infuriating to litigants were the delays experienced in obtaining justice. Court backlogs increased the pressure on our judges.[3]

To counter these problems an alternative solution was required. It was demanded. It came through the mechanism of ADR.[4] ADR can take many forms.[5] The virtues of ADR have been extolled in the monographs and dissertations of many legal luminaries,[6] so much so that they need not be reiterated here.

Traditionally, the ADR process was voluntary and did not involve the courts.[7] However, the process was seen as such an important tool in the administration of justice[8] that the legislature empowered the courts with the ability to order parties to participate in the process.[9] This is called 'court annexed ADR'.[10]

Court annexed ADR, like ADR generally, has its detractors[11] and its supporters. Despite meritorious arguments for or against the process, one thing is clear, and that is it is here to stay. For instance, in Queensland the *Courts Legislation Amendment Act 1995*[12] amended the various State Court Acts,[13] instilling in the court jurisdictions the power to order ADR. The intention of the legislature can be found in the policy objectives of the Courts Legislation Amendment Bill, which said:

> The primary policy objective of this Bill is to provide an opportunity for litigants to participate in ADR processes within the court system, to resolve their disputes more quickly and cheaply than by proceeding to trial. In the case of mediation, that resolution can be achieved by agreement. The ADR process is to be used in mediation and case appraisal.

History demonstrates[14] that the courts are quick to sanction those parties who disobey rules, are in contempt of the court processes, and who lack respect for the court's power. Recalcitrant parties are punished expeditiously. Now the courts have power to order ADR, it will be intriguing to observe how the courts deal with parties or lawyers who treat court annexed ADR with less ➢

The ADR Bulletin

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➢ respect than it is intended to engender. Having already acknowledged that the traditionally 'voluntary' nature of ADR has been changed by court annexed ADR, it will be interesting to observe whether the courts will sanction recalcitrants of the ADR process in a similar fashion to which courts have traditionally dealt with parties that breached its rules and orders. The purpose of this dissertation is to explore that scenario by:

(1) examining the conduct of parties and their lawyers that would warrant court sanction;
(2) considering the spirit and ethics of ADR;
(3) examining the role of the mediator or case appraiser in dealing with recalcitrants and reporting their conduct; and
(4) examining the nature of sanctions and their imposition.

There will be emphasis on court annexed ADR in Queensland.[15]

## Conduct of parties or their lawyers that would warrant court sanction

The conduct of a party or a party's lawyer that would warrant sanction could include some of the following.

### *Failure to attend*

A party who is ordered to participate in ADR and refuses or fails to attend should be sanctioned. In Queensland, a party that fails to attend at the ADR process is said to have impeded it.[16] Such an overt act of disrespect for the process unquestionably warrants punishment.

### *Fishing expeditions*

Regrettably, many litigators use ADR as an adversarial tool to gain an advantage in the litigation rather than as a means of resolving the dispute. Such parties unashamedly use ADR as a fishing expedition. This can take many forms. Through the careful use of interrogation (in the nature of cross-examination at a case appraisal or a question and answer session at a mediation), a party can use the process to ascertain weaknesses in an opponent's case. It can be used to test the demeanour or frailty of material witnesses or decision-makers. It can be used for fact finding and accumulating undisclosed information that may not have been available through interlocutory processes such as discovery or interrogatories. It may be utilised to test an opponent's susceptibility to admissions or to ascertain how vigorously a point of law will be contested or whether it will be conceded. Certainly many of these circumstances arise in the ordinary course of ADR. It is when the information is used to gain an advantage, rather than for the purposes of resolving the dispute, that problems arise.

### *Fraud cases*

In personal injuries actions and insurance fire claims, fraud is prevalent. Evidence of fraud or suspicion of it, through video surveillance[17] or documentary evidence, is usually concealed from the suspected party. If evidence of fraud is disclosed to the suspected party at the ADR process, an insurer can place itself in a vulnerable position. A fraudulent party that knows of the existence of such evidence may choose to change its case, or tailor its testimony around the evidence. In extreme cases, it may dispose of evidence. The debate as to whether such evidence should be disclosed at the ADR process and whether the failure to do so warrants sanction has been the subject of judicial commentary in recent times.[18] This will be discussed later.

### *Pig-headed lawyers*

Many lawyers are not in tune with the principles of ADR. As proctors of the court, they view their clients' objectives as being best served by judgment of the court. These antiquated traditionalists see ADR as nothing more than an obstacle that must be quickly hurdled on the way to trial. Due to their combative nature, litigation lawyers have to match their wits and egos with their colleagues. As in all specialist professions, this often leads to jealousy and even resentment. A self-centred egotistical lawyer will find it difficult to resolve a dispute with a colleague they do not like, or perhaps even resent, if they have to make a concession to that lawyer, or if it is in their client's interests that the dispute be resolved with that lawyer. Lawyers who fall into this category are more concerned with their own interests and egos than with their clients. Regrettably, in our profession such beasts exist[19] ➢



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➢ — an example can be found in the decision of *Gannon v Turner*.[20] The decision is only an interlocutory ruling, but it has received some acclaim from members of the judiciary.[21]

In *Gannon v Turner*, solicitors for parties in a personal injuries dispute consented to a court annexed mediation. At the mediation, counsel for the plaintiff:

- attended the mediation half an hour late;
- produced seven forensic medical reports that had not previously been disclosed to the mediator or the defendant as the Court Rules prescribed;
- produced a lengthy accountant's report that had never previously been produced or disclosed;
- refused to provide particulars of the plaintiff's claims for the various heads of damage when requested by the mediator, saying, 'That is not the way I do things'; and
- remonstrated with the mediator when requested to be reasonable.

Due to the conduct of the plaintiff's counsel, the mediation was abandoned at the election of the mediator. The disgruntled defendant applied to the court for an order that counsel for the plaintiff, or alternatively counsel's solicitors or client, pay the defendant's costs relating to the aborted mediation. After examining the intention of court annexed mediation and what conduct impedes the ADR process, his Honour Ford J held:

> ... one would have to construe this legislation in the way that it is suggested and in particular if one looks at the purpose of the legislation on the ADR process, it relies upon the goodwill of the parties and the co-operation of the parties in providing material and being responsible for reasonable expense. Now, accepting what is in the affidavit, and as I say, there is nothing to the contrary at this stage, I find that there was not, in a real sense, participation by the plaintiff or his legal advisers in the process, in the mediation which occurred ...

The dispute was adjourned to the civil list for trial. After this order, it resolved. This is, in one way, regrettable, as the profession would have been better served had the dispute been determined on its merits and a Queensland court given some indication as to the sanctions it would impose upon lawyers for this type of conduct.

### *Greedy lawyers*

Lawyers are the subject of much criticism in our community, especially when it comes to the rendering of professional fees. The criticism is mostly unjustified, but occasionally it is warranted. A lawyer who is more concerned with his or her hip pocket rather than his or her client's is one that should not be practising. However, they exist. To this species of precipitous fee generating litigator, ADR has two perspectives. First, it acts as another interlocutory stage in the proceedings which can be used to build the costs.[22] Alternatively, as most of the costs in litigation are generated during the discovery phase and trial preparation, ADR serves only as an impediment to reaching this very prosperous stage. These lawyers should be sanctioned. However, their motives are virtually impossible to prove. A breach of their duty to their client may be equally difficult to prove, especially in circumstances where their advice is shrouded in solicitor/client privilege and the decision to proceed to trial is a matter of judgment.

### *Ulterior purpose*

There may be several other sinister reasons why a party would use the ADR process for an alternative purpose. If there is a power imbalance,[23] a financially stronger party may use the process and its accompanying expense for the purpose of draining the funds of a poorer litigant.[24]

ADR may be used as a delaying tactic.[25] For instance, a corporate entity may use ADR to delay the ultimate result of litigation to dissipate and liquidate its assets, so that when judgment is rendered against it, it is nothing more than an insolvent shell.

These tactics are morally questionable. However, it would be extremely difficult to prove the intention of a party or its lawyers for the purpose of imposing a sanction.

### *Stubborn clients*

A decision to resolve an action by ADR is the prerogative of the client. So long as that client acts reasonably in the ADR process, it would be impossible to impose a sanction on a party that seeks a court determination rather than an alternative one.

## Spirit and ethics of ADR

Parties who participate voluntarily in ➢

'ADR may be used as a delaying tactic. For instance, a corporate entity may use ADR to delay the ultimate result of litigation to dissipate and liquidate its assets, so that when judgment is rendered against it, it is nothing more than an insolvent shell. '

➢ ADR process do so to achieve an expeditious, cost effective 'win/win'[26] result for all parties. In a process that is voluntary, parties enter the process cognisant of the spirit that is required to achieve the primary objective of resolution. With court annexed mediation, the involuntary nature of the exercise sometimes requires the court to remind the parties of the spirit in which it should be conducted. In Queensland, parties can consent to the process by filing a consent order.[27] They can be referred to ADR by the court unilaterally of its own volition,[28] or a party can motion the court for an order that the dispute be referred to ADR. No matter what the circumstances, the parties must not impede the ADR process[29] and they must not fail to participate in the process.[30] If the ADR process is a mediation, then the rules[31] prescribe that 'parties must act reasonably and genuinely in the mediation'. It is incumbent upon the parties to co-operate and act in the spirit of the process. It is important to consider ethics in court annexed mediation. A party who is not desirous of ADR, but who is ordered to participate, should still act ethically. This consideration is important when considering any sanction the court may impose.

The Queensland *Solicitor's Handbook*[32] contains the guide to professional conduct. It describes one of the duties of every practitioner as 'to observe the ethics and etiquette of the profession and at all times act and conduct him/herself in a dignified and responsible manner consistent with the standing of the profession'.[33]

> These general rules may have application to ADR in a number of ways, including on the one hand the duty of a solicitor to ensure that any ADR activities undertaken comply with the requirements as to integrity, independence, and standards; or on the other hand perhaps to ensure that in acting in the best interests of the client, the solicitor is aware of all appropriate dispute resolution procedures available to the client and that the client in turn is properly advised about those procedures so that an informed decision can be made.[34]

The duties of a lawyer are owed to the law, court, public, profession, client and opponent.[35]

When considering a lawyer's duty to the court, Justice Williams, in his text *Harrison's Law of Conduct of the Legal Profession in Queensland,*[36] said that 'a lawyer's main business is to do the best he can for his client, but it is also his function to assist the court'. That includes giving the court positive assistance and refraining from obstructing the administration of justice.[37] Therefore, a lawyer who impedes the ADR process could be construed as breaching their duty to the court.

Secondly, there is the lawyer's duty to their colleague in the ADR process. 'A lawyer's duty to support his client's cause gives him no liberty to use unfair tactics or to make himself an instrument of malice.'[38] Acting in a cantankerous manner or using the ADR process for an ulterior purpose could well constitute a breach of this duty. However, perhaps the most important duty in the process is that owed to the client. That includes a proper explanation of the process:

> Allied with the potential duty on lawyers to follow client's instructions with regard to mediation is a duty to explain mediation to a client, although in the categorisation of duties, this requirement should really be seen as a professional standard, rather than a strict ethical requirement.[39]

The relationship between a solicitor and their client is a fiduciary one based upon trust and confidence, and within the bounds of legitimate conduct, the lawyer must align themselves entirely to their client's cause.[40] A lawyer who conducts a case in self interest, or for fee generation, or to boost their own ego, could easily be said to have breached the duty owed to the client.

'The relationship between a solicitor and their client is a fiduciary one based upon trust and confidence, and within the bounds of legitimate conduct, the lawyer must align themselves entirely to their client's cause. A lawyer who conducts a case in self interest, or for fee generation, or to boost their own ego, could easily be said to have breached the duty owed to the client.'

## Role of the mediator or case appraiser in dealing with recalcitrants and reporting sanctions

An ADR convenor[41] who is required to deal with a recalcitrant party or lawyer is placed in an invidious position. Such a situation will test the metal of even the most experienced convenor. For instance, it is not always easy to discern that the ADR process is being used for a purpose other than that for which it was ordered. Senior lawyers can disguise their motives through posturing, acquiescence, or even theatrics. A convenor may not be alert to these subtle nuances or preconceived agendas initiated by a party. Conversely, ➢

➢ there will be overt acts of disregard for the process which are blatantly obvious.

If the ADR process is a mediation, there are a number of recognised mechanisms the mediator can employ to restore respectability and spirit to the process. These strategies include such things as private caucuses, reality testing, identifying interests, generating options and so on. Even a pre-mediation conference may be beneficial. On the other hand, a case appraiser who is required to provisionally decide the dispute is constrained in what they can do when dealing with a recalcitrant. The only option available to a case appraiser in those circumstances would be to give an adverse decision against one of the non-conforming parties, who has no respect for the decision in any event.

If respectability cannot be restored to the process and the convenor feels that it is being used for a purpose other than ordered, or a party or their lawyer's conduct is unbecoming, the convenor is best served by abandoning the process. To continue in such circumstances is counter-productive to the purpose and spirit of ADR. In fact, the Supreme Court Rules specifically provide for the abandonment of any ADR at the convenor's discretion.[42]

So if a convenor is confronted with a recalcitrant party who warrants the court's sanction, what role does the convenor play in the sanction? An explanation of the Queensland Supreme Court Rules demonstrates the potential for this issue to become potentially complex. It is necessary to consider the convenor's position.

In Queensland, it is clear that an ADR convenor should have no part to play in a court's decision to sanction a party. Confidentiality is paramount to all aspects of the process, even the conduct of a party to the process.[43] In fact, the convenor that breaks that confidentiality has committed an offence punishable by a maximum fine of $3000.[44] In the context of a mediation, the Queensland Supreme Court Rules provide that 'parties must act reasonably and genuinely in the mediation process'.[45] Despite this rule, a mediator is required at the conclusion of the mediation to file a certificate in the appropriate form that the mediation is complete. However, it is curious to note that 'the certificate must not contain comment about the extent to which a party participated or refused to participate in the mediation'.[46]

A case appraiser's role in the process is analogous to that of a mediator, albeit slightly more complex. The case appraiser must uphold the requirements of confidentiality and file a certificate at the conclusion of the appraisal with a decision. It is interesting to observe that the case appraiser:

(1) may only give a decision that could have been given in the dispute if it had been decided by the court;
(2) cannot punish for contempt;
(3) must give a decision in writing (it may contain reasons but these are not compulsory); and
(4) has the same power as the court to award costs.

Armed with these powers, it would seem that a case appraiser confronted with a recalcitrant lawyer or party may award costs against that party if they believe the court would. In exercising that discretion in relation to costs, it is conceivable the case appraiser could well give reasons which may include a description of the unsatisfactory behaviour or conduct of a party or lawyer. If a party elected to reject the appraiser's decision and proceeded to court, it is highly conceivable that the appraiser's decision would be read by the judge at the ultimate determination. In these circumstances, the conduct of the recalcitrant would be brought before the court, which could issue a sanction. The case appraiser that chooses to adopt this tack should not forget the requirements of confidentiality. The reporting of the recalcitrant through the case appraiser's reasons and costs order would seem to be a legitimate way of reporting the matter to the court. The concept is interesting and not without its complexities. It, like many other intricacies of the court annexed ADR in Queensland, has not yet been the subject of judicial interpretation.

Apart from the peculiarity that pertains to the position of case appraiser, it is quite clear that the intention of ADR is to maintain confidentiality and, as an overriding general philosophy, an ADR convenor should never play any role in the sanctioning of a recalcitrant party or lawyer. The convenor should remain ➢

'If respectability cannot be restored to the process and the convenor feels that it is being used for a purpose other than ordered, or a party or their lawyer's conduct is unbecoming, the convenor is best served by abandoning the process.'

➢ neutral and removed from any dispute.

The appropriate way to bring the issue of a sanction to the court's attention is by the evidence and complaint of a disgruntled party or its legal representatives.

## Nature of sanctions and their imposition

### *Penalising the party with costs*

The court has an unfettered discretion to award costs. An award of costs may serve to penalise a recalcitrant party. Examples of such a costs order exist. For instance, in *Quasch v Mustafa*[47] a personal injuries dispute was referred to arbitration (a process not dissimilar to case appraisal). At the arbitration the defendant insurer withheld video evidence of the injured plaintiff. At the subsequent trial the evidence was produced with devastating effect. The court's assessment of the plaintiff's damages was less than the assessment at arbitration. In those circumstances the Court Rules provided the plaintiff should be penalised for costs. The court in its discretion, however, ordered the insurer to pay all of the plaintiff's costs. In holding that the decision not to introduce certain critical evidence at the arbitration was relevant to the costs order at the conclusion of the proceedings, Kirby J held:

> Of course I can understand the forensic reasons behind the decision of the appellants not to exhibit their film before the arbitrator. But if the party elects that course, it cannot later expect to benefit from it … As a matter of principle, to secure the operation of arbitration proceedings as the Act appears to contemplate (as a true alternative to a hearing in the District Court and to relieve the Court of the burden of hearings) the failure of appellants to show their film has a consequence. There has been a considerable waste of public and private time and costs. The process of settlement which is the object of Pt 19A, Rule 9 of the *District Court Rules* to promote is frustrated. At least in the circumstances of this case, where the films were obviously most significant, the failure to show them before the arbitrator should have costs consequences. Those consequences are sufficient to sustain an order of this court proving otherwise than Pt 19A, Rule 9(6) would have ordinarily required.

*Quasch*'s case was upheld in the later decision of *MacDougall v Curlevski*.[48] In that case, a personal injuries dispute was referred to arbitration. The defendant called no evidence whatsoever. The arbitrator found in favour of the plaintiff. The defendant obtained an order for re-hearing. At the re-hearing the defendant called a material witness whose evidence was so powerful the trial judge dismissed the plaintiff's action. In those circumstances the plaintiff would ordinarily be required to pay the defendant's costs, that order having followed the event. Counsel for the plaintiff however, submitted that had the defendant called evidence at the arbitration, the arbitrator would have found for the defendants and the dispute gone no further. The defendants argued that they had taken a forensic decision not to call any witnesses so as not to show their hand if the matter went before a judge. The judge accepted the plaintiff's submissions and ordered the successful defendant to pay the losing plaintiff's costs.

The decision was appealed. By majority of the Court of Appeal, the appeal was dismissed. The relevant passage is found in the decision of Cole JA, who stated:

> It is contrary to the intention and spirit of the legislation to which I have referred, enacted to reduce delay and reduce costs, that a party should act otherwise than by conducting the arbitration as though it were, as it is intended to be, a hearing of the action. That means that a party should call its evidence. If it does not do so and additional costs are thus involved, it can be expected that judges in exercising their unfettered discretion regarding costs of the hearing, and of the arbitration, will have regard to the factor of additional costs that are incurred.

It is not proposed to descend into a debate about the merits of *Quasch* and *MacDougall*, other than to suggest that they demonstrate the court's willingness to punish with costs a party that does not participate properly in the ADR process. There is no reason why costs could be ordered against a recalcitrant in any other perceived circumstance that abuses the process.

'[The cases of] *Quasch* and *MacDougall* … demonstrate the court's willingness to punish with costs a party that does not participate properly in the ADR process. There is no reason why costs could be ordered against a recalcitrant in any other perceived circumstance that abuses the process.'

### *Penalising the solicitor with costs*

As the court's discretion to order ➢

➢ costs is absolute, it is open for a court to sanction a recalcitrant solicitor for breaching their duty to the court, client or their colleague by disrespecting the ADR process. It should be remembered, however, that costs orders against lawyers are unorthodox. Only in cases of gross disrespect would the court be moved to make such an order. As to the conduct of the lawyer that would warrant sanction, Lord Wright said in *Myers v Elman:*

> The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such nature as to tend to defeat justice in the very cause in which he is engaged professionally … The matter complained of need not be criminal. It need not involve petulation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which is a solicitor's duty to ascertain with accuracy may suffice … The order is not merely punitive but compensatory. The order is for the payment of costs thrown away or lost because of the conduct complained of …[49]

In *Edwards v Edwards* Sachs J held:

> It is, of course, axiomatic, but nonetheless something which in the present case should be mentioned, that the mere fact that the litigation fails is not reason for invoking the jurisdiction; nor is an error of judgment; nor even if the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of Lord Maugham, to 'a serious dereliction of duty' something which justifies according to other speeches in that case, the use of the word 'gross'.[50]

The issue is put in perspective by Drummond J, who said in *Re Bendeich*:

> Lawyers should know that, so long as they are not guilty of either professional misconduct or gross, as opposed to mere, negligence in the way they conduct their client's case, they will not be exposed to any personal liability to pay either the costs of their own or those of the opposing litigant.[51]

What amounts to a serious dereliction of duty will vary from case to case and there are many variations on this theme.[52] In serious cases of dereliction of duty and gross neglect for the court's process, it is open for the court to sanction a lawyer representing a party to the ADR process if his conduct warrants it.

### *Abuse of process*

To charge a party participating in ADR with abusing the court's process, certain criteria must be demonstrated.

The position in relation to abuse of process was been appropriately summarised by Lord Denning when he said:

> In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time and harm is done, they will give damages against the wrongdoer.[53]

A party which predominantly uses court proceedings and procedures to achieve an ulterior and improper purpose other than which it was designed to achieve is said to have abused the court's process.[54]

It is the predominant purpose of the litigation which is the relevant criteria, and it is not necessary for the improper purpose to be the sole purpose before abuse of process can be established.[55] It is important to distinguish between the motive for a proceeding and the purpose of the proceeding, because it is the purpose of the proceeding rather than the motivation for it which establishes the abuse.[56]

A party that abuses the court's process is liable for damages in tort.[57] Process constituting an abuse can also be stayed.[58] In cases where ADR was used to delay litigation to allow a party to dispose of its assets, to bleed dry a poorer litigant, or to generate legal fees, it is not inconceivable that a court could be convinced that the process was being abused through ADR.[59]

### *Contempt of court*

The law of contempt of court is a distinct and distinctive regime of ➢

'It is important to distinguish between the motive for a proceeding and the purpose of the proceeding, because it is the purpose of the proceeding rather than the motivation for it which establishes the abuse.'

➢ substantive and procedural rules, developed primarily within the common law, whereby persons who engage in conduct tending to interfere with the administration of justice may be subjected to legal sanctions, chiefly of a penal nature.[60]

Contempt has been described as a branch of the law 'capable of adaptation and expansion to meet fresh needs'.[61] It can take many forms.[62] In the context of parties or lawyers abusing the ADR process, it would be necessary to consider the species of contempt for disobedience of the court order for ADR.

In the past, parties have been held the subject of contempt sanctions for breach of rudimentary orders for discovery or production of documents,[63] interrogatories, and subpoenas to attend court and produce documents.[64] Why then, should a breach of an order that the parties act reasonably and genuinely[65] in a mediation be any different? In extreme cases of disobedience, the court's sanctions for contempt can include a sentence of imprisonment, the imposition of a fine, an order to sequestrate the assets of a contemptor, or the grant of an injunction restraining the conduct that amounts to contempt.[66] The most likely sanction for contempt of an order to participate reasonably in ADR is likely to be a costs order against the recalcitrant party on the appropriate costs scale.[67] Although it would be a sad day that saw a recalcitrant party to the mediation process charged with contempt, parties and lawyers should be cognisant of the court's powers to make such orders.

'In extreme cases of disobedience, the court's sanctions for contempt can include a sentence of imprisonment, the imposition of a fine, an order to sequestrate the assets of a contemptor, or the grant of an injunction restraining the conduct that amounts to contempt.'

### *Stay of proceedings*

A court has inherent jurisdiction to stay proceedings until the ADR process is completed properly. In Queensland, once the court orders ADR, the proceedings are automatically stayed until the ADR convenor certifies the process as finished or the court otherwise orders.[68] A recalcitrant who disrupts the ADR process so that it is incapable of completion risks the proceedings being stayed until it is properly completed. In many respects a stay in these circumstances is tantamount to a sanction.

## Conclusion

ADR is now considered a serious part of the court's process and administration. Parties or lawyers who do not treat it seriously or disrespect it are susceptible to court sanction. Due to the confidentiality restraints imposed on convenors, evidence of any misbehaviour is likely to emanate from a disgruntled party to the ADR process rather than the convenor. When that evidence is before the court, the court has jurisdiction to sanction a party or lawyer in several ways.

Although court annexed ADR is in its infancy, the judiciary is already starting to pronounce costs sanctions against recalcitrants. Whether the severity of these sanctions increases is a matter of circumstance and time, but due to the serious nature of the ADR process, it is inevitable.❖

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## Endnotes

1. Then-Treasurer Paul Keating declared Australia a 'banana republic' in May 1986 and declared the recession in November 1990; Burton T, 'A Political Life' *Australian Financial Review* 24 April1996.

2. Extract from speech at 1987 opening of Law Term Dinner by Sir Laurence Street, then Chief Justice of NSW.

3. In a 1985 Annual Report on the federal judiciary, US Chief Justice Burger lamented that 'federal judges are working longer hours and more days than ever before, but, like Alice in Wonderland, they cannot run fast enough even to stay in the same place'. In *Kimtominas v Attorney General of NSW* (1987) 24 A Crim R 456 the Court said: 'The District Court is faced with an avalanche of work … with which it has to cope. The fact that the plaintiff's trial has not reached and could not be reached on the occasions I have mentioned is a reflection of nothing but the overwhelming pressure on the Court'; quoted in Pengilley W, 'Alternative Dispute Resolution: the philosophy and the need' 1990 p 81 (May Edition). ➢

➢ 4. Initially an American concept which gained serious momentum in Australia in 1986 with the establishment of the Australian Commercial Dispute Centre, a non-court ADR service initiated by Sir Laurence Street.

5. Forms of ADR include arbitration, negotiation, mediation, conciliation, independent expert appraisal or determination, private judging and case appraisal.

6. See, for instance, Astor H and Chinkin C, *Dispute Resolution in Australia* Butterworths Australia 1992, and Gay R Clarke G R and Davies I, 'ADR — arguments for and against use of the mediation process' (1991) *7 Queensland University of Technology Law Journal* p 81, to name just two.

7. See classic definition of ADR.

8. It has been said that the legislature and judiciary alike have embraced ADR with 'unbridled enthusiasm' (see Dawson M, 'Non-consentual ADR: pros and cons' 1993 ADRJ 173).

9. 'Court adjunct mediation represents a significant departure from the communication on problem solving models of mediation … Court adjunct mediation is motivated primarily by the desire to reduce case load pressures on the legal system through the provision of inexpensive, quick and unintimidating forms of resolving disputes': 'The Sultans of Swap: defining the duties and liabilities of American mediators' (1996) 99 *Harvard Law Review*, 186-195, as extracted in Astor H and Chinkin C, above note 6, p 173.

10. Also called 'court adjunct', 'court ordered ADR' and 'court mandated ADR'. For the purpose of this article it will be referred to as 'court annexed ADR'.

11. Lord Woolf in *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* June 1995 advocated that more emphasis should be placed on voluntary as opposed to compulsory court ordered ADR on the basis that ADR is less effective when the parties do not choose it for themselves. An adequate synopsis of the *Access to Justice* report is contained in Cairns B C, 'Lord Woolfe's report on the Access to Justice: an Australian prospective' 1997 16 CJQ 98.

12. Commenced operation on 1 June 1995.

13. *Uniform Civil Procedure Rules 1999* (Qld).

14. Examples at how the courts are quick to sanction recalcitrant parties and lawyers are contained later in this paper.

15. Court annexed ADR in Queensland consists of one of two processes: mediation in the traditional sense, and case appraisal, where an independent party provisionally decides a dispute.

16. See r 322 of the *Uniform Civil Procedure Rules 1999* (Qld).

17. In *Martin v Kennedy* (1992) 2 Qd R 109, the Court of Appeal Queensland held that an insurer did not have to disclose video surveillance to a plaintiff in a personal injuries action in its statement of expert and economic evidence disclosure statement required to be filed pursuant to the Rules. The decision was subsequently followed in *King v Nolan* (Court of Appeal, Queensland No 39 of 1991).

18. See *Quach v Mustafa* (unreported, NSW Court of Appeal, Kirby P, Sheller and Powell JJA, 15 June 1995), *MacDougall v Curlevski* (1996) 40 NSWLR 430, and the joint appeals in *Morgan v Johnson*: *Green v Lovatt, Gambrill v Cook Matter* [1998] NSWSC 367 (8 September 1998).

19. Lawyers were described by Pat Mullins in his article 'Case appraisal — a substitute for trial' *APPIIL Newsletter* April 1997 p 6 as bombastic and illogical: 'These lawyers have reputations that proceed them. They are the solicitors or counsel with whom no rational person can deal. The only persons they can convince of anything are (unfortunately) their clients. A mediation with one of these would test one's stamina and be an exercise in futility.'

20. (Unreported District Court Brisbane per Ford DCJ 28 February 1997).

21. Judge Charles Brabazon QC mentioned the decision in 'Alternatives to Litigation', one of three papers presented to the Queensland Law Society's Symposium 7-9 March 1997. It is also mentioned by Michael Liddy, Barrister-at-Law, in 'Changes in court procedures (including case management and case appraisal) — utility to management of insurance claims' 1997 Australian Insurance Law Association Conference, Sanctuary Cove.

22. This is one of the disadvantages of court annexed ADR suggested in Aster H and Chinkin C, above note 6, p 175.

23. See Gay R Clarke G R and Davies I, above note 6, p 92 para 25.

24. This is a disadvantage of court ordered mediation as discussed by Dawson M, above note 8, p 176. ➢

'"These lawyers have reputations that proceed them. They are the solicitors or counsel with whom no rational person can deal … A mediation with one of these would test one's stamina and be an exercise in futility".'

'"Undoubtedly lawyers, just as much as clients, enjoy a matter in which a 'win/win' result is achieved. In litigation, there is invariably one depressed losing lawyer, just as there is inevitably one depressed losing client."'

➢ 25. De Jersey CJ has said that '... use of delay merely to harass or maliciously injure the other side is impermissible and unethical. That applies to contentious as well as non-contentious business'; 'The Ethics of Delay', paper delivered at CLE 'Securities Intensive VII' Seminar Coolum 3 October 1993.

26. Warren Pengilley, in his article 'Alternative Dispute Resolution: the philosophy and the need', observed that:

Undoubtedly lawyers, just as much as clients, enjoy a matter in which a 'win/win' result is achieved. In litigation, there is invariably one depressed losing lawyer, just as there is inevitably one depressed losing client. ADR offers high job satisfaction to the lawyer in the same way that it offers high 'win/win' prospects to the client.

27. See r 318 *Uniform Civil Procedure Rules 1999* (Qld).

28. See rr 319 and 320 *Uniform Civil Procedure Rules 1999* (Qld).

29. Rule 322 of the *Uniform Civil Procedure Rules 1999* (Qld).

30. Rule 322(b) *Uniform Civil Procedure Rules 1999* (Qld).

31. Rule 325 *Uniform Civil Procedure Rules 1999* (Qld).

32. *Solicitor's Handbook* 1992 edition, Queensland Law Society Inc.

33. As above, p vii.

34. Brown H J and Marriott A L, *ADR Principles and Practice* Sweet and Maxwell London 1993, p 333.

35. Williams G N, *Harrison's Law and Conduct of the Legal Profession in Queensland* The Lawyers Bookshop Press, Queensland 1984.

36. As above, p 33.

37. As above, p 35.

38. As above, p 81.

39. Sammon G, 'The ethical duties of lawyers who act for parties to a mediation' 1993 *Australian Dispute Resolution Journal* 190 at 193.

40. Williams G N, above note 35, p 72.

41. A term used to describe an independent third party, such as a mediator or case appraiser, by the *Courts Legislation Amendment Act 1995* (Qld) s 4.

42. Rule 330 of the *Uniform Civil Procedure Rules 1995* (Queensland) allows a mediator to abandon a mediation if the mediator considers further efforts at mediation will not lead to a resolution of the dispute. Before abandonment, the mediator must inform the parties of his intention to abandon and give them an opportunity to reconsider their position. Rule 339(2) allows a case appraiser to decline to proceed further with a proceeding if the case appraiser so chooses.

43. ADR was first introduced into the Court's structure by the *Courts Legislation Amendment Act 1995* (Qld). Section 100S(1) of the *Courts Legislation Amendment Act 1995* provides that a mediator or case appraiser must not, without reasonable excuse, disclose information coming to the convenor's knowledge during the ADR process. It is reasonable excuse to disclose information pursuant to s 100S(2) of the *Courts Legislation Amendment Act 1995* if the disclosure is made:

(i) with the agreement of the parties;
(ii) for statistical purposes without revealing, or being likely to reveal, the identity of the person about whom the information relates;
(iii) through enquiry or proceeding about an offence happening during the ADR process; or
(iv) for proceedings founded on fraud alleged to be connected with or to have happened during the ADR process or under a requirement imposed under the Act.

44. See Pt 8 Div 6 of the *Courts Legislation Amendment Act 1995* (Qld).

45. See r 325 *Uniform Civil Procedure Rules 1999* (Queensland).

46. See r 331(2) *Uniform Civil Procedure Rules 1999* (Queensland).

47. Unreported, Supreme Court of NSW, Court of Appeal Kirby P, Sheller And Powell JJA, Sydney, 10 April 1995.

48. (1996) 40 NSWLR 430.

49. [1940] AC 282.

50. [1952] 2 WLR 956 at 694.

51. (1994) 126 ALR 643 at 648.

52. *White Industries v Flower & Hart (a firm)* (Federal Court of Australia, Queensland District, Goldberg J, 14 July 1998).

53. *Goldsmith v Sperrings Limited* [1977] 1 WLR 478 at 489.

54. The seminal case in Australia is that of *Williams v Spautz* (1992) 174 CLR 509.

55. See *Metall Und Rohstoff AG v Donaldson Lufkin and Jenrette* (1990) 1 QB 391 at 469.

56. See *Williams v Spautz* (1992) 174 CLR 509.

57. See *Hamer-Matthew v Gulabrai (No 2)* (1995) Aust Torts Reports 81-334.

continued on page 36 ➢

## Sanctions for the recalcitrant lawyer and party

➢ continued from page 34

58. Superior courts have an inherent right to stay proceedings which are an abuse of process — see *Clyne v Bar Association (NSW)* (1960) 104 CLR 186 at 201 and *Williams v Spautz* (1992) 174 CLR 509.

59. For a recent decision on abuse of process, but which does not involve ADR, see *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (Federal Court of Australia, Queensland District, Goldberg J, 14 July 1998).

60. *Laws of Australia*, 'Administration of Law and Justice', Ch 1 p 4.

61. *A-G (UK) v News Group Newspapers plc* [1989] Q B 110.

62. These forms include contempt in the face of court; by publication; by disobedience; by other forms of interference with proceedings (such as bribing a witness).

63. See *Re Bramblevale Ltd* [1970] Ch 128.

64. *James v Cowan; Re Botten* (1929) 42 CLR 305, *Ditfort v Calcroft* (1989) 98 FLR 158 (CA NSW).

65. Rule 325 *Uniform Civil Procedure Rules 1999* (Qld).

66. *Laws of Australia*, 'Administration of Law and Justice', paras 137-143.

67. See *Maff Investments Pty Ltd (in liquidation) v Fuller* (1991) 3 WAR 546.

68. Rule 321 *Uniform Civil Procedure Rules 1999* (Qld).

## Editorial: standards, standards, everywhere

Much activity is currently taking place on the issue of standards in Australian ADR. On 4 October 1999 Standards Australia published its ADR standard, *Guide to the prevention, handling and resolution of disputes* (AS 4608-1999). This document provides guidance to businesses on the prevention, handling and resolution of disputes. It deals with ways of preventing disputes from arising and of dealing with them early and efficiently when they do arise. The standard gives guidance on the alternative forms of dispute resolution, together with some suggestions on where it is appropriate to use each alternative. References are included to enable businesses to follow up in greater detail on the various aspects included in the standard; see <http://www.standards.com.au/> for more information on this document.

In Sydney, the Let's Talk initiative is the first non-commercial and non-proprietary network which allows ADR providers and practitioners to discuss areas of common interest. There are currently more than 12 constituent members. Let's Talk has developed a draft Professional Code of Conduct for Mediators and has invited comment on its provisions from the ADR community. It expects to publish the final draft of the Code in December 1999 in the expectation that this may be used by ADR practitioners throughout Australia. Those interested in the Code should contact the Australian Dispute Resolution Association, one of the organisations involved in the initiative, on (02) 9231 5822.

The Federal Government's National Alternative Dispute Resolution Advisory Council (NADRAC) will publish a discussion paper in early 2000 raising a range of issues relating to standards for facilitative, advisory and determinative ADR. As this is a discussion paper only, it will attempt to ask the appropriate questions about all aspects of standards, including their content, development, maintenance and enforcement. It will also solicit views from the ADR community on questions relating to accreditation and regulation in ADR. NADRAC's web page is at <http://law.gov.au/aghome/advisory/nadrac/nadracwork.htm>.

The *ADR Bulletin* will discuss these and other standards developments in future issues. ●

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