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# Extending the courts' shadow over ADR

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# The ADR Bulletin

The monthly newsletter on dispute resolution



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### General Editor



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Information contained in this bulletin is current as at June 2001.

### ADR and the courts

## Extending the courts' shadow over ADR

*Laurence Boulle*

### Introduction

There are increasingly close structural links between the courts and ADR procedures in Australia. This is resulting in the courts becoming more involved in the defining and redefining of ADR processes as 'satellite' litigation occurs around dispute resolution issues. This causes a deepening of the shadow of the law being cast over mediation, case appraisal and other alternatives to litigation. The long term implications of these trends remain to be seen.

This is the first of a series of articles which this Bulletin will carry on ADR and the courts.

### Exposing the frauds?

Mediations are among the great frauds to be perpetrated upon long suffering litigants in personal injuries actions. They are the 'emperor's new clothes' of modern dispute resolution. Contrary to popular belief, they propagate delay; they result in the incurring of expense out of all proportion to their worth; and they raise hopes and expectations where none are there to be raised.

In by far the greater majority of cases, nothing more is or would be achieved at a mediation than was or would have been achieved in a settlement conference.

These views were expressed in written and verbal form by counsel for the plaintiff in *Justin Trelour v J H McDonald Pty Ltd* District Court of Queensland, 26 March 2001 (QDC 053 of 2001). The chronology of this dispute resolution episode is of some significance and is outlined below.

• In June 1998 the plaintiff had been injured at his workplace where he was

employed as a sheet metal worker. He alleged that he had sustained a lumbar disc prolapse which was occasioned by the negligence, or breach of statutory duty, of the defendant.

- In August 2000 a compulsory conference, as is required by the Workcover legislation in Queensland, was held by the parties and in the absence of a settlement each party made a final written offer of settlement, again as statutorily required.
- In September 2000 the plaintiff's claim was filed and four months later he served a statement of loss and damages on the defendant. There followed a series of communications and steps in the litigation process in quick succession. They were characterised by a sense of urgency from the plaintiff's legal advisors and no serious delays from those of the defendant.
- On 23 January 2001 the plaintiff delivered to the defendants a request for a trial date. Two weeks later the plaintiff's solicitor indicated in a communication that his client was anxious to proceed with the action and an extension of time was granted for signing the request. Unfortunately, there was an alleged error in the time granted for the extension which somewhat muddled the waters for the advisors and may have precipitated the plaintiff's next actions.
- By 15 February the plaintiff had responded to the defendant's request for further and better particulars and further expression was given in correspondence to his frustration over the 'perpetual delays' in the matter. ➤



## Editorial Panel

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- ▶ On 22 February, while the defendant was still seeking to amend its defence, the plaintiff applied to the District Court for an order that a request for a trial date be dispensed with or, alternatively, that the signature of the defendant to a request for a trial date be dispensed with (Rules 467 and 469 of the *Uniform Civil Procedure Rules*). The defendant filed a cross-application that proceedings be referred to ADR, by way of mediation to take place before 30 April 2001.
- On 19 March the defendant invited the plaintiff to participate in mediation, the costs of which would be met by the defendant, and if the matter did not settle, a request for a trial date would be executed. The plaintiff advised that he would not participate in a mediation unless the defendant was prepared to offer more than the final offer referred to above and only if the matter was immediately entered for trial. These conditions were not accepted and the applications were heard by Robertson DCJ on 26 March. It was on this occasion that counsel for the plaintiffs made the dramatic submissions referred to above.

In making its decision on the applications the Court referred to the 'general philosophy' of the relevant legislation and rules, which revolves very much around the saving of costs for the clients and shortening the waiting lists of the courts. The relevant sections of the *District Court Act 1967* (Qld) provide that the objectives of the ADR provisions are to reduce cost and delay, and to allow for ADR processes to be conducted quickly, with little formality and technicality, and in confidence. These are similar to the statutory objectives encountered in much contemporary Australian legislation which somewhat reduce the expectations of ADR to little more than an exercise in efficiency.

The *Uniform Civil Procedure Rules* reinforce these objectives in their reference to the 'just and expeditious resolution of the real issues in civil proceedings at a minimum expense'. However, their reference to 'real issues' suggests at least a less legalistic approach to dispute resolution, and at best, a closer connection with the original philosophy underlying the development of ADR.

In relation to the applications under consideration, the plaintiff argued that the

costs of mediation (\$4000) would be much the same as the costs for the first day of trial and that no serious purpose would be served by going to mediation. The defendant pointed to the changed circumstances, including their amended defence and the disclosure of reports, which would make mediation more meaningful at this time.

The Court found the issue to be a 'finely balanced' one. In the end it declined to refer the parties to mediation on the grounds that the parties had attended a compulsory conference and made offers of settlement, that the matter was ready for trial, and that the trial would likely occur in mid-2001.

This episode invites a number of reflections about contemporary ADR in the context of the court system.

- It reinforces the modern reality of the interconnectedness of ADR and litigation, a now permanent feature of the common law system in Australia. ADR has developed into an alternative within litigation rather than an alternative to litigation, with numerous potential consequences flowing from the court's shadow over its operation and influence.
- It illustrates the continuing ambivalence in the court system about referrals to mediation. On one hand, the judge in this case indicated that he was 'reluctant to compel parties to attend mediation, particularly where the case is a relatively simple one'. On the other hand, all Australian jurisdictions now have the situation where judges can and do refer all manner of cases to ADR processes, often without any transparent criteria on which the discretion to refer is exercised.
- The case highlights the current paucity of information about ADR processes and, for that matter, about court processes, to substantiate claims such as those made by counsel. The Court commented on the fact that counsel had not provided the Court with 'any evidence or information to support his submission'. The fact of the matter is that there is very little hard survey evidence of how plaintiffs fare in mediation in comparison to litigation or settlements on the court steps. If the courts are to adjudicate on such matters, more than anecdote and 'say so' will be required as a basis for sound decision-making. ▶



- • It reinforces the view that mediation is being modified and transformed within certain subcultures. Although counsel's equation of mediation with a 'settlement conference' was made within the context of adversarial submissions to the Court, it is supported by anecdotal and experiential evidence that where the shadow of the law is strong, many mediations conducted by lawyer mediators resemble more an auction over dollars than an exploration of interests and outcomes. This is a matter of concern to the ADR community if it is a reality of most such mediations.
- It stands for a cautious judicial policy in favour of ADR. This is found in the reference to the objectives of relevant legislation and rules, and in the judgment referring to the 'strong view' of counsel on mediation as 'concerning'. Without rebuking counsel, the Court found itself unable to 'accept or adopt ... [his] general

submission in relation to mediation'. While this expression is very much based on statutory construction it is a welcome addition to other significant statements of judicial policy in favour of ADR.

On the facts of this case it is not surprising that the matter was not referred to mediation. Where litigation is being conducted in an expeditious manner as it was here, the case is simply less compelling, particularly if ADR is seen predominantly in terms of saving time and expense. There is indeed some irony in the fact that the rise of case management in the past decade has not only increased the occasions for ADR processes to be invoked, but it has also partly displaced the need for it. There are signs in some courts of a trend away from large scale reference to ADR processes — see for example the 1999-2000 Annual Report of the Supreme Court of Queensland, pp 35-39.

However, in making an order in favour of the plaintiff the Court by no means endorsed

the strong submissions of counsel referred to above. Nonetheless, the fact that these submissions could be made raises challenges for proponents of ADR and for the way in which various forms of ADR are practiced.

**Forthcoming decisions**

- In forthcoming issues of the *ADR Bulletin* there will be analyses of the following issues:
- judicial supervision of practitioner behaviour in mediation — *Studer v Boettcher* [2000] NSWCA 263; and
  - exercising judicial discretion in referring matters to mediation — *Morrow v Chinadotcom Corp* [2001] NSW 209; *Barrett v Queensland Newspapers Pty Ltd and Brennan and Ruddiman* [1999] QDC 150. ●

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