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Revisiting the mediation referral order

Laurence Boulle

This is the third in an occasional series on the impact of court decisions on the development of ADR. The first two casenotes were published in ADR 3(10) and 4(2).

This casenote refers to the Federal Court decision in *ACCC v Lux Pty Ltd* [2001] FCA 600 (24 May 2001), involving a vacuum cleaner, a zealous seller, a disabled purchaser and the corporate regulator. The most significant feature of this case is the way the Court dealt with the applicant's argument that its public interest functions made it inappropriate for the ACCC to negotiate a settlement of the litigation.

The ACCC brought a motion to set aside an earlier order, which had not been entered, that the parties be referred to mediation. It had originally applied to the Federal Court for certain declarations in respect of the respondent. These related to the supply of a vacuum cleaner to a complainant who was illiterate and intellectually disabled and to marketing the vacuum cleaner to other potential customers with diminished mental capacities.

It is in terms of s 53A of the *Federal Court of Australia Act 1976* (Cth) that the Court can make a referral order to mediation and, as is now the case in all Australian jurisdictions, the referral can be made without the consent of the parties. Unlike most other statutory schemes, that of the Federal Court makes some attempt to define mediation in its indication that 'a mediation conference must be conducted … as a structured process in which the mediator assists the parties by encouraging and facilitating discussion between the parties so that … they may communicate effectively with each other about the disputes'. This 'definition', with its focus on discussion and communication, was referred to and had some influence in the judgment.

In the Federal Court, mediation referral orders are made at a directions hearing for which no transcript is made. At such a hearing the ACCC had proposed directions on no fewer than 15 matters, including the conducting of a conference at which the parties' experts would use their best endeavours to reduce the points at issue between them. The Court made an additional order to the effect that the matter be referred to mediation after the experts' conference.

In the present application the affidavits disclosed a substantial factual dispute over the circumstances surrounding the mediation referral. The ACCC's counsel indicated that he had strongly opposed a mediation order on the basis that the parties had previously attempted to discuss settlement without success. Counsel for Lux Pty Ltd indicated that the applicant had not strongly opposed the referral but had indicated, in response to a query from the judge, that the respondent's solicitors were not prepared to talk. Inevitably this factual skirmish, about who said what and what was meant by it, was not going to be resolved in the application under discussion.

In dealing with the application RD Nicholson J first referred to the fact that the 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 — referred to in the literature as *scoping* mediation.[1] The referring court, in other words, had engaged in some disputes system design. Despite the order, however, the meeting of experts had not been called by the designated day. 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 ➢

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➢render mediation inappropriate.

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

First, the *complainant had an intellectual disability* and could be vulnerable in mediation. This argument of a power imbalance carried no weight in the Court's reckoning. This was partly because the complainant argued in favour of mediation, inter alia on the grounds that it was not in the interests of her well-being to be involved in court proceedings. The Court was receptive to the view that mediation could have the positive effect of avoiding the pressure on a person such as the complainant with her limited mental capacities being called as a witness in court proceedings in another State. Like the design argument referred to previously, this one did not hold sway.

Second, 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, referred to below) and that it could not be inferred that the respondents would not attempt to reach a mediated settlement. 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. These are subsidiary objectives of mediation which the Court took account of in rejecting this argument from the applicant.

The third factor which, it was argued, made mediation inappropriate was the *identity of the applicant*, the ACCC, whose functions are to ensure compliance with the *Trade Practices Act 1974* (Cth). This, it was argued, creates a public interest best served by allowing courts to exercise their judicial functions 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, particularly where the ACCC had articulated what it expected of the litigation in the light of legal advice rendered on the strength of its case. As always, however, the 'public interest' is an unruly horse, pulling in different directions at the same time. Thus the judgment refers to the Commonwealth Attorney General's 'Directions on the Commonwealth's obligations to act as a model litigant' which attempt to balance the need for government agencies to avoid litigation wherever possible with their obligations to discharge their statutory functions, sometimes through the prosecution of proceedings. Both will be legitimate ways of pursuing the public interest in appropriate circumstances. In the circumstances of the *Lux* case, the Court did not regard the ACCC's acknowledged public interest responsibilities as sufficient to render mediation inappropriate. This was because a requirement to mediate would not necessarily be contrary to the functions of the applicant in that mediation could 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 judgment also refers to the curial interest in having matters settled without the need for a hearing. Again, the applicant's argument was not of sufficient weight to avert mediation.

' … there is also little doubt that in certain circumstances public authorities will not feel free to compromise on their statutory obligations and this could be a compelling consideration in refusing an order to mediate.'

Fourth, one party (the applicants) was now *resisting the referral to mediation*, which is a commonplace factor in these kinds of decisions. Nowadays this resistance is rendered less cogent a factor by the reality that all such legislation reflects the view that mediation can still be productive even with a reluctant participant. Here Nicholson J suggested that 'effective communication about the dispute' as referred to in the 'definition' of mediation entailed 'the possibility that they might reach agreement'. While the argument was not developed it does endorse the vision of mediation as a multifunction process with several objectives other than settlement. This final argument, based on the applicant's own attitude, was also rejected.

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

Despite its rather quaint referral to *The Macquarie Dictionary*'s definition of mediation (as though it did not have a 20 year history in this country) the judgment of Nicholson J displays a good appreciation of its functions and purposes. While there is more to the mediation process than merely 'communicating effectively' it does have the broader objectives referred to in the judgment. It is also in keeping with mediation experience that it is not necessary for defendants to admit liability, in whole or part, before a mediation can be successful. In this sense the judgment reflects the wisdom of mediation experience.

However, there is also little doubt that in certain circumstances public authorities will not feel free to compromise on their statutory obligations and this could be a compelling consideration in refusing an order to mediate. Indeed, Nicholson J conceded that mediation is not appropriate in all cases. What is needed in the future is continual refinement of the factors which courts can take account of in the exercise of this important discretion and some tentative indications of how these factors might be weighed against one another. ●

Laurence Boulle, General Editor.

Endnotes

1. Boulle L *Mediation: Principles, Process, Practice* Butterworths Sydney 1996.