

6-1-2002

ADR and government

Laurence Boulle

Bond University, Laurence_Boulle@bond.edu.au

Recommended Citation

Boulle, Laurence (2002) "ADR and government," *ADR Bulletin*: Vol. 5: No. 2, Article 5.

Available at: <http://epublications.bond.edu.au/adr/vol5/iss2/5>

This Article is brought to you by epublications@bond. It has been accepted for inclusion in ADR Bulletin by an authorized administrator of epublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

Current developments in ADR

ADR and government

Laurence Boule

In South Africa the national Government is preparing legislation on a novel provision in the country's 1994 Independence Constitution. Section 41(3) of the RSA Constitution provides:

An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

If a court is satisfied that these requirements have not been met, it may refer a matter before it back to the organs of state involved. The onus is on the organ of state approaching the court to establish that it has discharged its obligations.

Section 42(1)(b) of the Constitution requires the enactment of a statute which provides for appropriate mechanisms and procedures to facilitate settlement of inter-governmental

disputes. The Constitutional Court in a recent case between two governmental entities chided the national Government for not complying with its s 42(1)(b) obligations. The Government is responding to the Court's reproach.

UK survey results

In the UK the Lord Chancellor's Department has produced a report with the results of a major survey of court based ADR in the Central London County Court and in the Court of Appeal.

Since 1999 judges sitting in the Commercial Court (CC) have made ADR orders (orders) directing the parties to attempt ADR. This study assessed the impact of orders on the

progress and outcome of 233 cases. ADR was undertaken in little over half of the cases in which an order was issued, however a trend *towards* using ADR was observed throughout the period of the study.

The results of the survey indicate that where ADR was attempted:

- 52 per cent of matters settled;
- 5 per cent proceeded to trial;
- 20 per cent settled after the conclusion of ADR; and
- 23 per cent of cases remained live at the conclusion of the study.

Where ADR was *not* attempted:

- 63 per cent settled (20 per cent of these reported that settlement was the result of an order); and
- 15 per cent proceeded to trial.

Among the reasons provided for

... the Constitution requires the enactment of a statute which provides for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes.

failing to follow an ADR order were that the case was inappropriate for ADR, the parties were unwilling, the order was badly timed or that there was a lack of faith.

Overall, orders had a neutral or positive effect on settlement. Experience of successful ADR was overwhelmingly positive. Valued factors included the skill of the mediator, the ability of ADR to overcome 'logjams' and the delivery of cost savings in avoiding trial. Following *unsuccessful* ADR, practitioners noted the shortcomings of 'neutrals' and the undesirability of forcing unwilling opponents into ADR.

In the UK Court of Appeal parties are *invited* to engage in the Court of

Appeal (CA) ADR scheme. Despite the provision of free mediation services, voluntary uptake of invitations to enter ADR remained modest. Between November 1997 and April 2000 only 38 cases were mediated. Among the reasons given for refusing to mediate were that a judgment was required for policy reasons, that the appeal turned on a point of law and that the past history of the opponent mitigated against ADR.

Half of the CA cases mediated resulted in settlement, and 63 per cent of cases unsuccessfully mediated proceeded to trial, indicating that CA cases have special characteristics which require consideration when selecting cases for mediation. Again, there were concerns that parties were forced to

mediate. Generally, it was found that the profession remains cautious about the use of ADR. Overall, the need for a more selective approach was identified in encouraging ADR in the CA.

US code for third party neutrals

In the US the American Bar Association House of Delegates has recently adopted a new code of ethics for 'lawyer-neutrals'. It changed the rules to recognise the role of lawyers serving as third party neutrals and to clarify conflict of interest considerations for those who have served as arbitrators and mediators. The Model Rules of Professional Conduct now provide that in addition



to the role of a lawyer as an advocate for his or her client, a lawyer may serve as a third party neutral, a non-representational role helping the parties to resolve a dispute or other matter. The revised ethics rule also provides that when a situation warrants it, lawyers may need to advise their clients of ADR processes that may resolve their dispute rather than litigation.

Rule 2.4 provides that:

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

Under the rule, a lawyer-neutral is required to inform unrepresented parties in an ADR proceeding that the neutral does not represent them, and if confusion persists the lawyer-neutral

with which a disqualified lawyer-neutral is associated may not continue representing the client unless the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee for the service, and written notice is provided to all interested parties.

Finally, as regards the duty to inform, under the comments to revised Rule 2.1 a new responsibility is imposed on lawyers to inform parties of ADR options if the situation warrants it and the lawyer believes it would help them in resolving their dispute. Rule 2.1 defines the role of the lawyer as advisor, and the comments say that lawyers generally advise through answers to questions. However, when a matter is likely to involve litigation, it may be necessary to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

New NADRAC members

In May 2002 the Commonwealth

... when a matter is likely to involve litigation, it may be necessary to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

must 'explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client'.

On the conflict of interest issue, Rule 1.12 provides that lawyers may not represent parties to a case if they have already served as an arbitrator, mediator or other type of neutral in the case, unless the parties agree otherwise.

Under the new rule:

A lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

The rule also provides that a law firm

Attorney General appointed three new members to the National Alternative Dispute Resolution Advisory Council (NADRAC).

Ms Lynn Stephen is co-ordinator of the Community Mediation Service in Bunbury, WA. This service deals with a range of neighbourhood and family matters. Ms Stephen has qualifications in nursing and health science, has completed a graduate certificate in family mediation and has undertaken other mediation training courses in Australia and the US. She has also received a Churchill Scholarship to study family mediation in the US and the UK. Ms Stephen was a member of the Family Law Pathways Advisory Group.

Mr John Spender QC was appointed Queen's Counsel in 1974 and has sat as an Acting Justice of the NSW Supreme

Court. He practised extensively in corporate and commercial law and other areas of litigation. He served four terms as a member of the Federal Parliament until 1990 and was Australian Ambassador to France between 1996 and 2000. Mr Spender has undertaken mediation training with LEADR, Bond University and Harvard Law School and is a mediator in private practice.

Associate Professor Tania Sourdin is currently Director, Academic Quality and Programs, in the College of Law and Business at the University of Western Sydney and is soon to take up a position as Professor, Law and Dispute Resolution, at La Trobe University. She is a member of the Administrative Appeals Tribunal and the NSW Fair Trading Tribunal and is a mediator with the NSW Retail Leases Dispute Unit. She has broad expertise in ADR and has published extensively in the area.

In addition, Warwick Soden, Principal Registrar of the Federal Court of Australia, has been reappointed as a member of NADRAC for a second three year term.

Federal Budget *Dispute resolution in the Family Court*

Once again the Commonwealth Budget reveals the extent to which ADR has become institutionalised. The 2002-03 Attorney General's Portfolio Budget identifies the sole outcome for the Family Court of Australia as 'serving the interests of the Australian community by ensuring families and children in need can access effective high quality services'. This outcome is achieved by reference to two output groups, Resolution (Mediated Agreements and Consent Orders) and Determination (Divorces, Interim Orders, Final Orders and Appeals).

These outputs reflect the Court's objective of providing cost effective assistance for parties to resolve disputes privately. Dispute resolution services offered by the Court include mediation in children's matters by Court counsellors and in property matters by Deputy Registrars. The Budget noted that the use of conciliation, counselling and mediation is strongly encouraged in appropriate cases in the Federal Magistrate's Court.

In respect of resolution the average cost of achieving mediated agreements was estimated as \$1132, with 75 per cent of total matters filed with the Family Court to be resolved through mediated agreement. The Court aims to achieve resolution within six months in 90 per cent of those matters resolved by mediated agreement. It was noted that 75 per cent of clients are 'satisfied' with the Court resolution process. Based on previous performance it is estimated that the Court will mediate agreement in 17,200 matters during the coming year.

National Native Title Tribunal

As regards the National Native Title Tribunal (NNTT) in its functions of furthering the 'recognition and protection of Native Title' the Budget encourages agreement in respect of:

- indigenous land use and access — the expected average price per mediated agreement is \$106,466, with 50 agreements anticipated;
- claimant, non-claimant and compensation — the average price is estimated at \$88,727 per mediated agreement with 107 agreements expected; and
- future acts — cost an estimated \$40,948 per mediation with 70 per cent of mediations concluded within eight months, with an overall total of 57 mediations.

The NNTT adjudicates in relation to certain types of future acts where the parties do not reach agreement.

Acting out

We always knew it, and now that it's on the internet we know it's true: mediation is theatre and the mediator is an active participant in the drama. By the time most conflicts are addressed in mediation (or in court) each party has a script, casting him or her self as the hero and the other as the villain. The accuracy of the historical facts are less important than the present reality, a dramatic recreation of the conflict. Into this drama comes the mediator, playing a number of roles: he or she is director, set designer, script editor, narrator and so on. If this has you thinking see Robert Benjamin's further insights at <www.mediate.com>. ●

Laurence Boulle, General Editor.

looseleaf

Available now

LexisNexis Butterworths publishes
looseleaf services:

- Australian Corporate
Finance Law
- Foreign Investment
Regulation in Australia
- Guidebook to Australian
International Taxation
- Law of Superannuation
in Australia
- Leslie's Equity and
Commercial Practice
- Management of the Australian
Law Practice
- Multimedia Contracts Handbook
- Phillips Fox Annotated
Insurance Law Statutes
- Product Liability Law & Practice

For further information visit
www.lexisnexus.com.au

LexisNexis Butterworths
Locked Bag 2222
Chatswood Delivery Centre NSW 2067
Ph: 1800 772 772
Fax: 1800 800 122
customer.relations@lexisnexus.com.au

LexisNexis[™]
Butterworths