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ADR in Western Australian courts

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Developing ADR in the courts

ADR in Western Australian courts

The Hon David K Malcolm

SPECIAL ISSUE on ADR in WESTERN AUSTRALIA

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Alternative dispute resolution has been part of the process of making the work of the courts more efficient and improving access to justice. In WA, developments such as the increase in the number of statutes that provide for mediation, the amendments to the *Supreme Court Act 1935 (WA)* inserting provisions relating to court annexed mediation,¹ and the recommendation of the Western Australian Law Reform Commission (in the *Review of the Criminal and Civil Justice System in Western Australia*) that a Mediation Act be enacted, have highlighted the increasing use of mediation to achieve the policy objectives of the civil justice reform and ADR movements.²

Case management is the response of the judiciary to the litigation explosion. Increases in litigation without a corresponding increase in the necessary resources has led to an exponential rise in the twin evils of modern litigation, namely excessive delays and costs. These in turn lead to injustice and a denial of access to the courts.

A technique which has assumed increased significance and popularity as a case management tool in the Supreme Court is mediation. New rules of court governing the procedures for the fast tracking of particular cases were introduced into the Supreme Court of WA on 23 February 1990.³ They provided for a special list of 'expedited causes' to be kept by the Principal Registrar.⁴

Expedited list

One of the most innovative aspects of the new rules governing the expedited list was the power given to the Expedited List Judge to direct, at any time and on any terms that were thought fit, that the parties confer on a 'without prejudice' basis for the purpose of either resolving completely, or at least narrowing the points of difference between them.⁵ Mediation was expected to be a significant event in these unique procedures designed for this judge managed list, and it was the first time that the rules of the Supreme Court of WA had made provision for court ordered mediation. Even where cases are not settled in mediation, in many instances the number of issues of dispute between the parties has been reduced, which reduces the length of any eventual trial.

In the absence of any other order, the mediation conference was required to take place as directed. Each party was obliged to attend and if the party was 'not a natural person, a representative of that party familiar with the substance of the litigation and with authority to compromise it, and the solicitor or counsel, if any, representing each party' was also to attend.⁶ Within two weeks of the conclusion of the conference the rules obliged the plaintiff to lodge with the Associate to the Expedited List Judge a report signed by or on behalf of each party confirming that the conference had occurred as directed and recording the substance of any



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resolution or narrowing of the points of difference between the parties as a result of the conference.⁷

As well as ordering the parties to mediate, the Expedited List Judge could order that experts, whose reports had been exchanged, consult on a 'without prejudice' basis for the purpose of narrowing any points of difference between them and identifying the remaining points of difference.⁸ This process proved very fruitful and there were rarely any instances of mediation between experts where at least some of the issues in dispute were not narrowed, or resolved, with consequential shortening of the trial.⁹

The expedited list procedure, and in particular the availability of court annexed mediation as a pre-trial process of great versatility and benefit, found favour with many of the legal practitioners practising in the jurisdiction and it was not unknown for parties to apply for admission to the list solely to use the mediation process to explore options for a prompt resolution of the dispute. Nor was the opportunity to use the process to narrow the issues in dispute overlooked.

Because the Expedited List Judge had power to make the mediation order at any time and on any terms that they thought fit, enormous flexibility was introduced into the trial process, to the advantage of the parties (especially when the mediation conference resolved their dispute at an early stage and before the matter had been fully got up for trial) and for the benefit of the Court. Whenever mediations occurred, at least some trial time was saved. Indeed, one of the objects of ordering mediation was to prevent delay caused by defective pleadings,¹⁰ although all aspects of the dispute could, of course, be discussed with the object of reducing the length of trial and the cost of the dispute overall.

Mediation in practice

A combination of the popularity of mediation and its record of success in managing fast track cases soon led to it being introduced to the entire civil list, including the corporations list. As a procedure, it was thought to be too good not to be exploited as a case management tool. The trigger to apply

mediations to the entire civil list came when the delay in hearing trials in the civil list exploded. At the end of 1992 there were 209 civil cases awaiting trial with an estimated hearing time of 700 days. The expected delay from entry for trial to trial was 19 months. Unless remedial steps were taken, it was estimated that the delay would blow out to 24 months by the end of 1993. This was not only an embarrassment to the government of the time as well as the Court, but delays of this magnitude had the potential to affect the ability of the Court to deliver just results when witnesses were attempting to give evidence about events which had occurred 10 or more years earlier.

In February and March 1993 I called over 228 cases in the civil list. As a result the list was reduced to 184, of which 105 were referred to voluntary mediation. Some 70 per cent of these cases settled at or after mediation. This resulted in a saving of 155 court days.

The 'Case Flow Management Powers of the Court'¹¹ introduced in 1993 gave the Court the power, at any time of its own motion, on notice to the parties, or upon the hearing of a summons for directions or on any other application, to review any progress of the proceedings and make whatever orders or directions it considers to be necessary to lead to the efficient and timely disposal of any action in a manner that it considers just and expedient.¹² Included in those powers is the power to order mediation.

Any mediation so ordered is court annexed. The mediation conference may be conducted by a mediation registrar appointed by myself or a person I approve to be a mediator.¹³ There is a proviso, however, in that the Court may not, without the consent of the parties, direct that a conference take place where a party becomes liable to remunerate a mediator.¹⁴ Thus, a court ordered mediation that is also court annexed need not increase the court fees payable by any of the parties. The experience so far has been that almost all parties opt for mediation by a mediation registrar and the usual order nominates a mediation registrar unless the parties otherwise elect. Because of the success of the mediations conducted

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under the expedited list umbrella, the case management rules making mediation orders available in any case in the civil list have been positively embraced by the local profession.

Evaluating dispute resolution processes

With its available resources, the Supreme Court of WA has been able to control its case flow using differing management techniques for the three main case types, that is, fast track, long cause and standard, employing mediation as the unifying procedure, but using it for a variety of purposes, ordering it at the most expedient times, and achieving both traditional and novel results.

It has been found that there is no ideal time for mediation, although for each case there will be a perfect time for some form of mediation to occur. The Court offers consensual mediation orders but has discovered that orders made without objection from the parties, or at the request of only one of the warring factions, can achieve equally productive results.

The Court has taken advantage of its registrars to conduct mediations and to manage some of its cases, avoiding confusing the role of mediator and adjudicator. Because of their knowledge of the Court, their experience as taxing officers and their legal training, registrars can assist mediations with objective advice about the cost of pursuing the litigation, signal any procedural difficulties, suggest remedies to the mutual advantage of the parties and identify any legal points about which there can be no dispute.

The Supreme Court of WA has developed its own procedures and protocols governing the communication of what occurs at mediations to the trier of fact and it has ruled that costs sanctions may bite where failure to cooperate affects the length of the trial.¹⁵

In its turn, the legal profession has demonstrated considerable skill operating in the conciliatory atmosphere of mediation. They have adapted to their new role in this part of the litigation procedure and have been seen to perform miracles for their clients,

often serving their client's best interests to greater benefit than would be gained at trial.

There is no perfect system of civilised dispute resolution, and defects in the process of mediation, for whatever reason it may be ordered, can always be identified. Thus, where mediation does not resolve the issue that it was hoped to address and a trial eventuates, the parties may find that it has added to their expense. It may also leave the parties feeling exposed and vulnerable, particularly where a trial occurs, despite attempted mediation. Where the relative strength of the parties is unequal, the weaker party may be overborne by the stronger, despite the mediator's best efforts, resulting in a potentially unfair though perhaps much cheaper resolution. Problems may also arise from the attempt at alternative resolution, leading to fresh litigation and further expense.

Unscrupulous parties may attempt to use the process for improper purposes, such as delay, testing the credibility of opposing witnesses or as a fishing expedition. Parties may also acquire the (generally incorrect) perception that their lawyer is pressing them to settle, perhaps leading to a partial breakdown in the solicitor-client relationship.

Experience has shown, however, that the positive effects tend to outweigh these negatives: the ultimate in efficiency is achieved; judge days are saved; and expense to the parties and the Court is reduced. There tends to be greater party satisfaction caused by the knowledge that the dispute has been resolved on their own terms and on their own initiative. Parties are no longer captive to the caprices of the trial process and the vicissitudes of litigation, nor are they then likely to be swept into the appeal process.

Court annexed mediations, as they operate in the Supreme Court of WA, allow the parties to air their grievances in a court environment and in the presence of a court officer. They can have their say and then demonstrate their magnanimity or compassion (especially where their relationship may be ongoing) by suggesting options to compromise. Moreover, by opening the lines of communication between the parties during the mediation process, the real reason for the dispute and the

original motivation of the parties to go to war is much more likely to be revealed and subsequently addressed. Often, the true cause of complaint between parties never surfaces at trial; but at mediation the opportunities for the parties to speak to each other can sometimes flush it out, for the benefit of all concerned.

Conclusion

Even if the mediation does not resolve the dispute completely, lawyers are still able to seize the opportunity of using information gained during the mediation to run a more efficient trial. Mediations tend to help the parties to focus on the real issues in dispute, which means that the lawyers can streamline their client's case, focus their energies on the genuine areas of contention, listen to the opposition's point of view, gain a better understanding of the relative strengths and weakness of the parties' claims, and make suitable concessions in order to either gain ground or shorten the trial to the advantage of everyone concerned.

In addition to the benefits already mentioned, the success of mediation and of the case management system in particular, has stemmed the need for additional judicial resources. It has not, however, eliminated that need. The Court has had no additional judicial resources since November 1996. The caseload of the Court has greatly increased since this time and both judges and registrars can no longer cope with the increased workload. There is currently an unanswerable case for the appointment of an additional judge and two more registrars. ●

The Hon David K Malcolm AC is the Chief Justice of WA. This article is based on a presentation to the NADRAC forum held in Perth on 12 June 2002.

Endnotes

1. *Courts Legislation Amendment Act 2000* (WA).
2. Carroll R 'Trends in mediation legislation: "all for one and one for all" or "one at all"?' *University of Western Australia Law Review* (2002) 30(2) p 167.

3. *Rules of the Supreme Court 1971* (WA) O 31A.

4. Rule 1.
5. Rule 10(1).
6. Rule 10(2)(a) and (b).
7. Rule 10(2)(c).
8. Rule 10(4).

9. Where the parties had also filed witness statements prior to the mediation with the opposing experts, in accordance with one of the standard directions orders, the likelihood of being able to find points of agreement was generally increased. For further discussion about the use of witness statements in the expedited list, see Ipp D 'The expedited list of Western Australia' (1992) 1 JJA 210.

10. See *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137 at 140.

11. *Rules of the Supreme Court 1971* (WA) O 29.

12. Rule 2.
13. Rule 2(r).
14. Rule 2(ra).

15. Other sanctions may also apply, although there have been few judicial rulings on point.