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Critical issues in ADR

ADR: Where did the 'alternative' go? A response

Michael Redfern

The December 2010 issue of *ADR Bulletin* carried an article by Cameron Green titled 'ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process'.

Might I by way of response, albeit limited, set out the substance of my submissions of 19 January 2007 to the Victorian Law Reform Commission in respect of its Civil Justice Review.

These submissions were also made to the NADRAC enquiry which lead to its report to the Attorney General of September 2009.

'I have practiced in the area of litigation since 1971.

My present practice is almost entirely in the area of commercial and retail tenancies and my involvement with litigation in this area is now pretty well limited to dealing with VCAT and the Small Business Commissioner's Office which handles pre-issue mediations under the provisions of the *Retail Leases Act 2003.*¹

Up until the enactment of the Retail Leases Act 2003 and the coming into effect of the mediation provisions by the Small Business Commissioner's Office under that Act my involvement with mediation was with VCAT under the Retail Tenancies Reform Act 1998 and the private conciliation and arbitration procedures provided for by the Retail Tenancies Act 1986.

The view I held up until the coming into effect of the *Retail Leases Act* 2003 was that it was desirable that proceedings be commenced and at least minimal pleadings and interlocutory procedures be

completed before it was desirable to proceed with a mediation so that the parties have a fairly clear idea of the case brought by each other and the documentation and evidence relevant to the issues in dispute.

As you will know, the mediation provisions of the *Retail Leases Act* 2003 require mediation to take place before proceedings are commenced and the participation in mediation is effectively compulsory at that stage because if a party does not participate in the mediation it is at risk of costs as a result of the provisions of section 92 of the *Retail Leases Act* 2003.

My experience with mediations conducted under the *Retail Leases Act 2003*, which is now quite extensive, is that the pre-issue compulsory mediation procedures under this Act have been very successful and have shown that there is a real value in pre-issue compulsory mediations.

I have found that parties who would otherwise be unwilling to participate in a mediation participate very fully, effectively and genuinely in compulsory mediations after they have overcome their initial resistance.

I have found that parties appear to be more willing to negotiate genuinely and effectively at the pre-issue stage and it seems to me that this is probably a result of the fact that proceedings have not been issued and, effectively, a contest commenced, lawyers have not had the opportunity to develop the adversarial attitude which is usually a part and parcel of the litigation process and which, inevitably, colours the parties' view of the matters in



dispute. As a result, the parties appear to be less antagonistic and appear still to be on reasonable terms with one another which can be used to advantage in the mediation process, the legal costs incurred are relatively small as a result of which there is less concern to maintain a position in order to justify the expense incurred and the parties appear to be more genuinely concerned to resolve their disputes.

This willingness to participate in a genuine attempt to resolve disputes appears to be more marked in the case of disputes between parties with ongoing relationships such as landlords and tenants which are the subject of disputes under the *Retail Leases Act 2003* and with which my practice is mainly concerned.

The success rate of mediations conducted by the Small Business Commissioner's office is very good and details can be obtained from the annual reports of the Small Business Commissioner which are worthy of a close reading. The mediations conducted by the Small Business Commissioner's office in which our firm has been involved as a representative of parties are settling at a rate in the order of 95%.

Costs quoted by us to a party involved in a dispute subject to a mediation conducted by the Small Business Commissioner's office are in the order of \$5,500.00 plus out of pocket expenses, we do not brief counsel to represent our clients at the mediations and we conduct the mediations ourselves. There is no fee on filing an application with the Small Business Commissioner's office and the only fee payable before the mediation by the client is in the order of \$95.00 which is one half of a mediator's fee for the first hour of the mediation, the other half is paid by the other party and the balance of the mediator's fee where the mediation proceeds longer than one hour is paid by the Small Business Commissioner's office.

I have found the mediation procedures as they are presently being conducted by the Small Business Commissioner's office to be one of the most innovative, effective and valuable procedures which it has been my experience to witness during my years in practice.

Generally I have found that the cost outlays to clients in participating in these procedures are, effectively, minimal, clients appreciate the ability to participate in the resolution of their own problems and their own dispute at such an early stage and where the disputes are resolved the goodwill generated in favour of the process, the Office of the Small Business Commissioner and the legal representatives is generally very high.

If you have not already studied the workings of the Small Business Commissioner's office in respect of these mediations I strongly recommend that you do so.'

Our quoted costs for these mediations are now in the order of \$6,500 plus out of pocket expenses and the Small Business Commissioner's Office is continuing its successful mediation operations.

In its report of 2008–09 the Small Business Commissioner's Office has reported that where formal mediation was conducted the success rate was 80.5%.²

The fee now payable by each of the parties to a Small Business Commission mediation is \$195.00

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Endnotes

- 1. For a description of the alternative dispute resolution provisions of the *Retail Leases Act 2003* (Vic) see Redfern M, 'The Mediation Provisions of the Victorian Retail Leases Act 2003' (2004) 15 ADRJ 261.
- 2. Office of the Victorian Small Business Commissioner, *Annual Report 2008–09*, p 26.

ADR RECENT DEVELOPMENTS

Book award

International and Comparative Mediation: Legal Perspectives

Nadja Alexander

On 11 January 2011, Nadja Alexander's book *International and Comparative Mediation: Legal Perspectives* (Wolters Kluwer Law and Business, The Netherlands, 2009) was honoured with the 2010 CPR Award for Outstanding Book in New York.

This international award recognises a published book that advances understanding in the field of ADR in an outstanding manner.

Of the book, Michael Leathes has said:

What marks this book out as exceptional, valuable, inspiring

and even myth-busting is its contemporary focus on the legal and regulatory issues surrounding the practice of mediation and the engaging way it is written and presented ... This is a really important contribution to the development of mediation throughout the world.

Eric van Ginkel has written that the book's 'depth and immense research make this a really invaluable addition to the (scarce) literature in the field of international mediation'.

The CPR Institute's Awards Program honours outstanding scholarship and practical achievement in the field of ADR.

David Bryson's review of *International and Comparative Mediation* appeared in the December 2010 issue of this bulletin. Refer to (2010) *ADR* 12(3) at 70-7. ●