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Editorial

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In her article in this issue, Joanne Staugas refers to the important issue of the role of judges in ADR. Her comments arise out features of the 1998 ADR pilot programme operating in South Australian courts but are of broader significance to ADR developments.

Whatever views readers may have on this question, there seem to be some realities of which any debate needs to take account.

The first reality is that judges in many courts in Australia have had some involvement in ADR for many years. This involvement often arises out of modern case management systems and gives to judges and other court personnel the discretionary power to refer matters to ADR, sometimes over the objections of the disputing parties. Some judges at least have experience, if not expertise, in this modern judicial function. In other jurisdictions, such as New Zealand, they have had a more active involvement in ADR for many years.

The second reality is that many of the arguments against judicial involvement in ADR are based on untested assumptions about the legitimacy of the court system in the eyes of its users in particular, and the population as a whole. Thus it is often claimed that the public wants judges to adjudicate disputes and not to facilitate their settlement, and that the incorporation of ADR into court processes will be confusing and affect the courts' credibility. These are all plausible assumptions, but in the Australian context they have yet to be proven through survey studies of what consumers of judicial services and other citizens do expect and do not expect of the courts.

The third reality is that as ADR diversifies over the years it becomes less easy to make blanket claims about judicial involvement in ADR and more necessary to speak of their levels of involvement in specific forms of ADR. Staugas criticises the South Australian system for allowing judges to act as mediators in matters coming before their courts, but even if one agrees with her view that this is inappropriate, the question can still be asked in relation to other forms of ADR. Thus no one would doubt the qualifications of judges in relation to case appraisal, as opposed to mediation, though there may still be policy arguments against their involvement in that ADR process. Even mediation is now recognised as having a number of different models and styles, rendering it less easy to make sweeping generalisations about the role of judges in its operation.

This is not to say that judges should be involved as mediators or in other forms of ADR. There are many very serious practical and policy arguments as to why they should not be. However it is important to be asking the correct questions when approaching a controversial area such as this.

In this regard it is appropriate to refer to the Australian Law Reform Commission questions on this topic in its Issues Paper 25, `ADR — its role in federal dispute resolution', which is part of its review of the adversarial system of litigation in this country. Law reform bodies are often criticised for asking the wrong questions, namely closed or rhetorical questions which do not lead to open-ended assessments of the particular issue. This is how the Issues Paper defines the problem on this topic:

- Q 3.22 Should federal judges mediate disputes?
- Q 3.23 Is conciliation that does not involve `private sessions' appropriate for federal judges?
- Q 3.24 Should ADR processes be used more frequently by the federal judiciary? If so, under what circumstances and in what types of disputes?

While the first two questions are of the closed and restrictive type, the third comes closer to what is appropriate to ask in this area of ADR.

It is hoped the Staugas article and the Issues Paper will give rise to a debate in future issues of the Bulletin about this important matter.