

USE OF ADR IN NEW SOUTH WALES AND IN THE LAND AND ENVIRONMENT COURT

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Introduction

I will not deal in detail in my short oral presentation with information easily available not only on the Land & Environment Court's (LEC) ever-improving website, and in its 2009 Review (pp 18-20), but also in the Attorney General's opening address and in what the Chief Judge said at the anniversary dinner.

In those materials you will also find statistics on the increasing use of our ADR options and our very encouraging success rates. In terms of ADR there is also useful LEC material in Rock and Kitty Pring's excellent study "Greening Justice" (see sec.3.9 pp 61-72).

ADR in the sense of **alternative** DR has been part of the LEC from its birth. In its constant efforts to ensure **appropriate** DR, the court offers conciliation, external or internal mediation, and neutral evaluation, and has statutory power to order mediation or refer to a referee. We have a proactive triage and case management approach, and are developing an even more sophisticated "multi-door court house". Many of our decision-makers have achieved NADRAC accreditation, and have undergone extensive ADR training. Our in-house ADR working group draws ideas and inspiration from work done elsewhere, such as that of Judge Wright in Vermont.

Both State and Federal Attorneys have signified deep commitment to promoting ADR, and we have happily provided comments on various discussion documents they have published in recent times.

We have enjoyed very strong support from the NSW Attorney and his department, and have put forward to them some quite modest legislative and administrative enhancements for our ADR capacity. We understand those amendments and improvements can be expected reasonably soon.

My thesis is that ADR is no longer "over there"; it is "everywhere" in our work. In what follows I have sought to provide some relevant history and background regarding ADR in the LEC, and to place it in a broader ADR context.

Background

Societies like Australia, based on the Westminster system of government and on the common law, have long debated how they might better address the resolution of private and public disputes than by our very traditional, adversarial, oral-based, and formal court system.

The environment, land use, and regulated planning systems are broad canvases, and, to ensure just and sound outcomes, they clearly require more than the classic adversarial processes.

Alternatives

In the American literature the words “mediation” and “conciliation” would appear to be interchangeable. A dictionary of terms and nuances illustrating definitional differences appears on page 61 of “Greening Justice”.

In Australia we use “mediation” only where the “independent neutral” brought in to assist in the resolution of the dispute does only that – acting as a chairperson or facilitator, expert in managing DR processes, that person encourages dialogue by asking open questions, and generating options, to identify and serve the underlying interests of the disputants. We use “conciliation” where we expect that independent person to display, and use proactively, his/her expertise, not only in DR processes, but also in the subject matter of the dispute itself.

Australian DR practitioners expect both techniques to demonstrate the “chemistry” achieved by opening up communication between disputants, but we usually distinguish between the two.

In so far as the LEC follows its various DR processes, there has been regular political and industry pressure to take review functions outside the court system altogether, but such alternative, “bureaucratic” systems often expose themselves to allegations they deny natural justice (or procedural fairness), and their work can end up in the court anyway.

Having “alternatives” available requires a choice to be made as to the most “appropriate” technique to be adopted in a particular case or particular circumstances – what Harvard’s Professor Sander called “fitting the forum to the fuss”. The task of making that choice of process falls to parties, but increasingly falls to the court or tribunal.

The NSW package in context

I was privileged to be a government MP when the LEC was established as part of a “package” of legislative changes in the planning/environment (P&E) area. It was designed to be a trendsetter, and remains, as the Attorney said on Wednesday, a “beacon” in the field of dispute resolution.

“ADR” was not a well-known term in 1979-80, but “conciliation” was, because of our long-established industrial relations regimes.

The government which established the court had taken office in 1976, and had already – before the 1979 package – established user-friendly consumer claims tribunals and community justice centres, alongside the existing chamber magistrate and public solicitor services, to keep people out of the mainstream court system as much as possible.

That movement from courts to tribunals for so much everyday disputation meant a huge growth in the use of ADR – the enabling statutes for tribunals generally state their objects to be “just, cheap and quick” resolution of disputes, and provide for more informal processes (exclusion of the rules of evidence, providing for the tribunal to inform itself by non-traditional means, etc), so ADR has been very much to the fore in the tribunal world.

In 1979 the community was also actively examining “no fault” insurance options in the burgeoning litigation area involving damages for personal injury suffered as a result of provable negligence in the use of motor vehicles. (Substantial compensation had been available for more than 50 years on a “no fault” basis for injuries suffered at work, and separate damages proceedings could be brought in the civil courts in cases of negligence).

So the innovative approaches envisaged for the LEC were part of a pattern. Anything was viewed as at least potentially a better option than full-blown adversarial litigation, conducted along traditional formal lines.

The three most relevant Ministers involved in framing and implementing that package of P&E reform in 1979-80 (Premier, Attorney General, and P&E minister) brought to bear their very similar industrial relations practice experiences, and the package included the establishment of our court, a superior-level court, not legally a tribunal, and the formulation of a very different dispute resolution regime for its subject matter.

The inaugural (1980) rules and practices of the court even now remain trailblazers, with which other courts are still catching up nearly 30 years later. For a start, our decision-making Commissioners (who, until 1998, were known as Conciliation and Technical Assessors) do not have to be lawyers. They were expected from the outset to make decisions, or be helpful to Judges in doing so, and were expected to practise “ADR”, before the term was in general use.

Subsequently, ADR has been actively promoted by successive State governments –

- I established (as Attorney General) the ACDC in 1986, as much as an economic development imperative as an ADR-based reform;
- various Premiers over time directed their governments’ agencies to have ADR clauses in public contracts;
- the current government promoted it heavily in respect of the Olympics held here in 2000; and
- although mediation is traditionally seen as a voluntary process, outside the court system, my non-Labor successor as Attorney, John Hannaford, provided for mandated ADR in all court statutes.

While many judges turned to ADR on retirement, and did well, the government gradually began appointing ADR-minded lawyers with established mediation practices and reputations to the bench, including myself in 1997.

Workers Compensation reform

In 2001 the Government appointed me to head a major reform of the State's Workers Compensation system which was being strangled by the burden of the transaction costs involved in its highly litigious – and adversarially litigious – dispute resolution systems.

The specialist court long dedicated to workers compensation disputes (the NSW Compensation Court) was abolished altogether – largely because it had not embraced necessary reforms like the LEC had pioneered – and the work of two other large trial courts (damages cases brought in the Supreme and District Courts) was seriously cut back.

The full story of workers compensation reform must await another day, but most of the disputes in that field came to be dealt with by the Workers Compensation Commission (WCC) through professional dispute resolvers (misleadingly called simply “arbitrators” in the legislation, but all mediation-trained, and mostly lawyers) who practise a blended conciliation-arbitration approach, regulated by “therapeutic justice” principles, and supervised by a user-friendly internal appeal system. The LEC's rules, practices, and procedures inspired and informed much of what I put in place in the WCC itself.

What we successfully implemented at the WCC was a process which moved seamlessly from a neutral evaluation or expert appraisal (of all the material to be relied upon by the parties), through an assisted negotiation phase (trying to remove or clarify those matters blocking a settlement – but not a “mediation” as we understand it, because there are no private sessions/caucuses with individual parties), then into, if needed, a strongly proactive conciliation (from which there is no escape or retreat).

The WCC process focuses on the end from the very beginning. Parties must file **all** their evidence at the outset of proceedings and the expectation is a telephone conference within a month, for which all involved will have examined the evidence.

In the WCC's DR system the relevant statute (in s 355) mandates that the neutral try to get a settlement, and, if one is not achieved, proceed, without any possibility of disqualification for bias or prejudice, to determine the dispute.

ADR was not seen in that workers compensation field, but is no longer seen anywhere, as only a “diversion option” – it is now integral to a civilised system of justice. Several of my original group of WCC dispute resolvers have since been appointed to various benches.

The LEC now

The challenges of a modern justice system are to get disputing parties to question the strengths and weaknesses of their adopted positions, and to ensure that their representatives are frank with them.

ADR processes are designed to keep the disputants totally in charge of their dispute and its solution.

The LEC and its empowering legislation separate our merits review work from our judicial review (or administrative law) work, and in the merits work the court functions like a tribunal, and makes administrative, rather than strictly judicial, decisions.

Nonetheless, the court's work arises generally from disputes brought to it by citizens or government bodies, and is not executive, investigative, or advisory in character.

Prior to 1980 most of the court's current business went before either the old Land and Valuation Court (which was a separate and superior court, housed for convenience within our State Supreme Court), or various tribunals and review bodies which the LEC brought together (the Local Government Appeals Tribunal, Clean Waters Appeal Board, and Valuation Boards of Review).

Much of the court's work, namely its merits work in classes 1-3, is in the nature of locally specific problem-solving.

Regrettably, in terms of the bulk of that work (ie planning appeals) few citizens take the opportunity provided by law for them to participate in the making of environmental planning instruments, only later to find not to their liking a development proposal (often completely within the contemplation of the instruments they could have influenced).

Under the court's own legislation (s 34) as it now stands, much of our work in planning appeals begins on site with a semi-formal conciliation hearing, and may move on (with the parties' agreement) to an expert determination or arbitration-type adjudication.

Section 34, unlike the WCC system, allows the parties some say in whether or not the same Commissioner who conducts the conference (on site, and/or in the court room) goes on to adjudicate, if the parties don't settle. Section 34 is a blended ADR process, into which the Commissioner can inject his/her relevant expertise, but it has some statutory restrictions. Nonetheless, if it does not conclude the dispute, it narrows the issues for final determination. That hearing can be held either on-site or in the courtroom.

When in practice as an ADR professional, I remained strict on the definitions, but open and flexible in negotiating with the parties the design of the process we would engage for the dispute.

If disputing parties outside a court system choose a blended process such as mediation-arbitration, or conciliation-arbitration, or something more complex involving other techniques, as in the WCC system, the resolver has to be skilled in when to "flick the switch" from one technique or phase to another to bring the matter to a conclusion.

I believe the LEC and other Australian courts will move more and more towards that model.

The challenges

In the court we have great faith in our use of ADR processes, but they are not without their challenges or obstacles:

1. The Chief Judge selects the Judge or Commissioner to do the case and the statute dictates how the process will run, but many customers of DR processes like to have some say in the choice of process, and of dispute resolver.
2. There are ingrained cultures to overcome:
 - the underlying hold the adversarial system has on Australians and their traditional institutions.
 - the innate human tendency to be positional, to advocate, and to “keep cards close to the chest”, rather than openly sharing information and options for resolution.
 - the overwhelming urge of legal representatives to keep their clients out of the heat of the dispute, effectively to “hijack” it, and dominate its solution. As Oliver Wendell Holmes observed, in this culture “it’s a rare litigant who recognises his case when it comes on for hearing”.
 - local government’s reluctance to delegate to someone the authority to compromise on its behalf, as a “model litigant” would be expected to do, despite the insistence of the court’s practice directions on participants’ authority to engage meaningfully in the court’s dispute resolution processes such as section 34.
 - enduring suspicion of Judges (as distinct from other officials of courts) doing mediation type work, as the Canadians now do, despite our experience of it every day in the industrial arena, and the similarity of much of the work Judges do every day in all arenas when performing case management duty.

We are slowly wearing down these counterproductive attitudes and cultures, and we in the LEC are resolved to continue to be innovative in our approach to our tasks.

ADR in crime

Although case management is now practised in crime, including in the LEC, the use of ADR in crime is not (yet) in our governing statutes.

There was resistance to this prospect in the early days of ADR’s onslaught on civil disputes, but in 1993 a New Zealand Maori juvenile crime judge spoke at an Australian ADR conference about the success in New Zealand of juvenile sentencing or “restorative justice” conferences involving offender, justice system and victim, and we have been making steady, but cautious, progress with such innovations, just as we have been refining “circle sentencing” techniques where indigenous citizens are involved.

The LEC’s criminal work is quite specialised, but, despite the absence of juries, and the strict liability nature of many of the offences we try, there has not been much action by way of penalty negotiation, leaving aside negotiating the terms of orders for environmental remediation and/or name-and-shame orders.

Yesterday, in Justice Latham's session, a question was asked about use in Canada of the term "mediation" to describe "plea bargaining" negotiations, and I thought it might be useful to share an experience I had in 2008.

I had a particularly complex and troubling case of contempt of court which ultimately resolved satisfactorily once I signified the acceptability to me of the amount of a fine upon which the Prosecutor and Defence settled as the appropriate level of penalty to impose, as part of an overall group of orders designed to conclude the litigation in which the contempt arose (see *Baulkham Hills Shire Council v Naklicki* [2008] NSWLEC 316 and 317).

So far as I know, the parties in that case engaged no neutral to help them reach that agreement, and I was not myself involved in the discussions, but that experience has made me curious as to how we might deploy ADR techniques in our criminal work, **without** infringing the rights of an accused.