

ADR and a different approach to litigation

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The Hon. Marilyn Warren AC,
Chief Justice of the
Supreme Court of Victoria

Mr. President, distinguished guests, ladies and gentlemen.

Your presence here this morning is indicative of the awakening of litigators and judges in Victoria in the last 20 years.

And so I say “Sleepers Wake! Reform is upon you.”

In the past, judges heard the cases that came before them. They were generally non-interventionist. Settlement discussions occurred very late – usually in the corridors of the courts, at the very court door itself. Case listing functioned on a rudimentary principle that a reserve list would be set, everyone would wait around and use the time to talk, probably settle and the judge would work through the list.

The inefficiencies and inadequacies of the approach were apparent. But all players continued to function that way because that was the way things had always been done.

By the mid 1980’s the Victorian higher courts experimented with this new concept of mediation in building cases lists. However, the concept was not new. In fact it was ancient. Yet it was new to a system based on the Anglo-Saxon concept of justice which is innately adversarial.

The Primary ADR method employed in Victoria has been mediation. It has been extraordinarily successful. It is now accepted as part of the justice system. In the Supreme Court of Victoria, no civil case except for Magistrates’ Court & VCAT appeals and judicial review matters, goes to trial without at least one round of mediation. The technique has resulted in the court’s contested matters sitting at about five per cent of its filed civil cases.

How do we know of the extent of the success of mediation? On 1 April the Victorian Attorney-General will launch a report on mediation in the Victorian Supreme and County Courts. It is a useful document. It will demonstrate some of the success of mediation although because of the constraints on the methods of measuring the success, the full picture is not revealed, at least scientifically. Nevertheless, I commend the report and welcome its release. It will provide an opportunity for Government to restate its

commitment to ADR. It will enable all involved in litigation – judges, lawyers and government and court staff to pledge to a simple proposition: the keeping of cases away from the courtroom by facilitating just, cost effective and expeditious mechanisms to resolve disputes.

I would wish to say that mediation in the Supreme Court continues to meet that proposition, especially through the service provided by the Associate Judges. The soon to be launched Government report is to be augmented by anecdotal evidence of judges, particularly in the commercial sector. This area is not analysed in the report, but, we have seen settlement after settlement come forward in long and complex litigation, including cases that were estimated to last for as much as six months – let me cite some examples:

- the Biota pharmaceuticals case before Justice Whelan.
- the BHP case before Justice Byrne.
- the Opes Prime litigation (which spread not only in the Federal Court but also the Supreme Court).
- the Gunns case before Justice Bongiorno.

The saving to Government has not been measured. It has been extraordinary. The next phase of the Government's work on the community value of ADR will be to investigate the long complex cases that have settled and measure the saving. If I take the Biota case with an estimate of up to six months. The saving calculated by an appropriate multiplier factor applied to judge time, court staff time, trial resources, IT, paper and power together with saving to the community and the Victorian economy is dramatic. The calculator produces a number with many zeros.

Which leads me into the expectations of the community and the Government and the utilisation of court resources. Traditionally, courts heard the business that came before it. The legal profession and the judiciary assumed government would continue to fund more judges, court resources and buildings as needed. The attitude was that if a citizen had a dispute with another citizen it would be determined by a wholly government funded service that took as long as it was necessary to determine the dispute. The attitude was quite wrong.

No longer can we, who are players in litigation, believe it is up to government to continuously fund courts in the traditional way. The onus is on us to behave creatively.

And so to ADR .

We know mediation is a well established success. It is now time to reflect on how mediation might be more adaptive and successful.

Judicial experience tells us that in litigation it is a bit like picking fruit. We need to pick the “mediation peach” when it is ready – too early it will be hard to penetrate the fruit; too late it is over-ripe. The judicial art is to time the “sweet moment”. Some postulate ADR and mediation as part of pre-action protocols. Certainly, the English experience does. It will depend on the dispute. Small, single issue cases will lend themselves to early mediation. Larger cases may involve parties who need some contestation, some showing of the mettle before they are ready.

In my experience forcing parties to mandatory mediation early is arbitrary and often clumsy. It may backfire and lead to the parties turning their backs on mediation. This is where intensive judge management and docketing will provide the synergy to produce the mediation peach and the sweet moment.

State courts do not provide pure judge management in all cases. In the Supreme Court we provide a range of management models so that litigators may find the model that suits their case. The asbestos cases, for example, are intensively managed before the same associate justice and prepared for trial in weeks, sometimes if the death of the plaintiff is very imminent, even days. In the new Commercial Court the direct, intensive oversight by the same judge from issue to conclusion will place the judge in the position to say ‘when’. Previously, in the Commercial List, the judges altered the system of setting the pre-trial filing timetable, including an order for mediation and the fixing of the trial date all together at the end of the interlocutory process. The judges changed that slightly. They ordered everything in, importantly, the witness statements, so each side knew what the other would say, and then mediation occurred. No trial date was set until after that informed mediation. The refinement was highly successful. The

experience demonstrates that we need to constantly review how we apply mediation to maximise the picking at the sweet moment.

Another lateral approach we have tried in the Supreme Court is the application of mediation to civil appeals. The President of the Court of Appeal, Justice Maxwell started with this now over two years ago. The success has been outstanding. In a little over two years 46 appeals have resolved at mediation. Traditionally the view had been, “we have a judgment why should we mediate? Nothing has changed from the mediation at trial level, in fact we have been vindicated and are in an even stronger position”.

The thinking is misplaced. Circumstances have changed and, quite dramatically, by the time the trial judgment is known, costs ordered and appeal notice lodged. The landscape is quite different from the trial mediation. The parties have the benefit of tested evidence and the analysis of the judgment. They are in a better position to assess the risks and determine where potential interests lie. These days in the Court of Appeal, mediation at an appellate level is common. It is an excellent example of taking a model, mediation, that worked well making it adaptive and flexible to expand the benefits of mediation. Again, we do not yet have the saving measured but clearly appellate mediation is of keen value to the justice system.

If we are to be lateral, adaptive and flexible and ultimately resourceful, we need to look at using the ADR tools in a way not done before. Appellate mediations is an excellent example (and I suspect extremely innovative on the national scale). So what new ADR frontiers are there to encounter?

Much is said about judge led mediation. Let me clarify exactly what the description entails. It does not involve judges behaving in exactly the same way as a private mediator from the profession or the Bar. Judges cannot caucus or confer with individual parties on a separate or private basis – mediators ordinarily do that. For a judge it would jeopardise the independence and dignity of the judicial office. We know of litigation and threats of litigation against private mediators for allegations of negligence, bias, dishonesty and the like. It is essential that in an effort to alleviate pressures on court workloads we do not see the confidence of the community in the courts undermined.

Judicial involvement in ADR brings risks:

- there is the variable suitability of judges to take on the role (some would be quite unsuited);
- the resource intensive nature of ADR would impact on judges and court resources;
- the potential to undermine confidence in the judiciary if a judge meets with parties separately or makes evaluative statements on the basis of limited materials would be troubling;
- the potential perceptions of participants feeling pressured into settlement by virtue of the judicial presence; AND
- the risk that judges become witnesses in disputes over settlement agreements that fail.

Hence judge led mediation cannot be about judges acting in the same way as private mediators.

Nevertheless, there is an opportunity to be explored with judicial involvement – potentially a golden opportunity.

The Canadians have a system sometimes described as 'judicial dispute resolution'. I see this as an opportunity to be tried. We, I think, would describe the model as a judge led settlement conference. In such a situation:

- the parties would jointly request a judicial settlement conference;
- it would be confidential;
- a specialist judge would be allocated by the head of jurisdiction;
- the conference would form part of the normal judicial workload of the judge – it would not be an additional or extra-curricular activity
- the judge would have allocated preparation time, conduct a pre-settlement directions hearing and direct the materials to be provided;
- the judge would be precluded from hearing any subsequent hearing;
- orders giving effect to the settlement would be made by another judge other than the judge who presided at the settlement conference.

Subject to some resourcing from government and goodwill from the profession I believe we could experiment with settlement conferences involving judges in the Supreme Court. The new litigation laboratory – the Commercial Court would be a good starting point. We will see how it all develops. It has worked well in Canada and New Zealand.

There are other opportunities to explore ADR within the Victorian system – early neutral evaluation, mini trials and expert appraisal and other models. We really should try to think beyond the traditional mediation and arbitration models. One way would be to educate judges as to the full range of ADR tools that are available to them as part of their litigation toolkit. The Judicial College of Victoria has a role to play here.

A critical component of judicial involvement will be judicial immunity from suit. Government plans to deal with this legislatively.

All that said, the profession and the Bar need to set the context for a new attitude towards ADR. The younger generation of lawyers will embrace it – it is part of their educational background and training.

For the traditionalists there will be challenging moments – hence my call at the beginning – “Sleepers Wake?”

The awakening will come with the overriding obligations in civil litigation that flow from the Victorian Law Reform Commission Report on Civil Procedure. I chair an advisory committee, the precursor of the Civil Justice Council. The group is supporting overriding obligations for litigators and hopefully they will be embodied in legislation soon. Key aspects will be for the litigation lawyer

- to act honestly;
- to refrain from litigating for a collateral purpose;
- to facilitate the resolution of a proceeding;
- to co-operate with parties and the court; and significantly,
- to use reasonable endeavours to resolve the dispute including ADR.

The aim will be to facilitate “non adversarial justice”(as described by the Commission).

So if we take the success of mediation, expand and develop it, apply mediation and other ADR models in a culture of obligatory resolution and dispute minimisation and if we further apply mediation in a setting of judge control – through case management and, possibly, judge led dispute resolution something different will occur. We will see in Victoria a considerable shift away from the courtroom into the ADR suite. The benefits will be dramatic.

I believe we are poised here in Victoria to create a special service to the community through our ADR capability. It should not be overlooked that we have a highly skilled profession and Bar with over a quarter of a century experience in ADR. The quality of this service is augmented by the service of a number of retired judges who bring the dignity and gravitas of their former judicial office and experience to bear in ADR.

We tend to be quiet and modest here in Melbourne about our skills and capacities, ADR as much as any other. Perhaps the Institute, the Bar and the Government could join up to promote the quality of the ADR service available in this state supported by an excellent judiciary and court system. It is food for thought.

Meanwhile, we in the litigation context will continue to search out the creative opportunities that lie all about us.