

New South Wales Bar Association – ADR Workshop

13 August 2011 9.00am

(Introduction)

Chief Justice, distinguished guests, ladies and gentlemen.

It is my great pleasure to be at the Bar's annual ADR Conference this morning. My only quibble is that the "alternative" label might not be up to date.

The word Alternative is not treated as simply another word for choice; today it usually suggests a move away from the mainstream. That may have been the case 20 years ago with ADR, but not anymore.

What proportion of your working week are you spending in court compared to 20 years ago? How much preparation are you doing now for arbitration instead of litigation? And how many of your clients accept the idea of a binding determination – perhaps presided over by a

former High Court or Supreme Court judge - compared to 10 years ago.

There has been more movement in the civil rather than criminal sphere, but I'm sure the criminal lawyers present would also notice the changes involved with concepts such as circle sentencing, youth conferencing and the horse trading involved on the way to a guilty plea.

But both forums – criminal and civil – are essentially adversarial beasts. The lawyer can make all the suggestions he or she likes, but if a client wants their day in court there is not much we as lawyers can do about it.

OUR TWO SYSTEMS

In our criminal law system, a trial is conducted as a contest between the prosecution and the accused. Its focus on the state and the offender can mean that the interests of the other two important parties, the victim

and the community, are sometimes not fully accounted for.

In our civil law system, civil litigation is often conducted as a contest between two or more parties. While very few civil disputes are resolved by judicial determination, the parties are engaged in an adversarial process in which procedural rules generally remain focused on preparation for trial rather than alternative means of dispute management and resolution.

As Attorney General, I am committed to increasing the use of other, less adversarial and more consensual, means of dispute resolution in this state. The ADR Directorate, within my Department, is tasked with helping me do this.

Only a small minority of matters are ultimately determined by a court or tribunal. Unfortunately, a significant proportion of the cases that settle do so very late, either shortly before or during the hearing. By this

stage, typically, a vast quantity of time and money has already been spent.

(Movement towards consensual resolution)

A number of legislative initiatives have recently been embarked upon in jurisdictions across Australia, including New South Wales. Their purpose has been to encourage parties to take steps to resolve their disputes using consensual dispute resolution methods before having recourse to litigation.

However it is my observation that the inexorable march towards the primacy of consensual resolution of civil disputes started long ago.

For example, the expectation that the Crown would act as a model litigant is of ancient origin, but was first given voice in Australia by the High Court in 1912.

In *Melbourne Steamship v Moorehead*¹, Chief Justice Griffith was moved to express his surprise at a technical point of pleading taken by the Crown. The Chief Justice thought it was axiomatic that the Crown never takes technical points, even in civil proceedings. He went on to say:

I am sometimes inclined to think that in some parts—not all—of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.

More recently in 2008, the NSW Court of Appeal has said that as a model litigant, the Crown is expected to deal with claims promptly, not to cause unnecessary delay, to endeavour to avoid litigation wherever possible and not to resist relief which it believes to be

¹Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333 at 342 per Griffith CJ

appropriate.² Where the Crown is found to have fallen short from these entirely justified standards, special costs orders may follow.

Implicit in the older authorities concerning the Crown's obligations as a model litigant is the notion that those same obligations ***do not fall on others*** who seek justice from the courts.

However if it was ever true that an ordinary litigant was free to engage in the unmeritorious pursuit or resistance of claims, to occasion delay or to avoid early resolution, ***it is not the case now*** and has not been for quite some time.

The reality is that the public *expects actors within the community*, whether it be the Crown, corporations or individual citizens, to resolve their differences quickly and with the least possible expense.

²Mahenthirarasa v State Rail Authority of New South Wales (No 2) (2008) 72 NSWLR 273 at [22] per Basten JA.

The continual intervention by Parliament in the conduct of litigation can have the capacity to seem unduly intrusive. However it represents the interest the entire community has in an efficient system of justice.

As to this, I would recall the observations of Justice Heydon when his Honour was a member of this State's Court of Appeal. He said:³

...the conduct of litigation as if it were a card game in which opponents never see some of each other's cards until the last moment is out of line with modern trends. Those trends were developed because the expense of courts to the public is so great that their use must be made as efficient as is compatible with just conclusions. Civil litigation is too important an activity to be left solely in the hands of those who conduct it.

His Honour went on to make some possibly unkind remarks about the practices of what English refer to as 'the other side of Westminster Hall' - here we call it the

³Nowlan v Marson Transport Pty Ltd [2001] NSWCA 346 ; (2001) 53 NSWLR 116 at [26-31].

‘the Bear Pit’ - but this is perhaps a topic for another occasion!

(Barristers’ obligation to advise of ADR)

An obligation to consider and advise clients about alternatives to fully contested adjudication is nothing new to barristers in this State.

As each of you in this room well knows, such an obligation has featured in the Barristers’ Rules since January 2000 (the old rules 17A and 17B), and is now replicated in rules 38 and 39 of the new Barristers’ Rules, which took effect on 8 August 2011. Of course, the same rules have applied to solicitors for many years as well.

(Section 56 of the *Civil Procedure Act*)

Further, an important milestone in the formal acceptance of contemporary views on litigation was achieved by section 56 of the *NSW Civil Procedure Act*, which

provides that the overriding purpose of the Act and of the court's rules is to facilitate the '*just, quick and cheap resolution of the real issues in dispute*'.

That provision, and cognate provisions and rules in other jurisdictions led the High Court in *Aon v ANU*⁴ to emphatically reject the idea that parties were free to conduct litigation at a speed and in a manner of their own choosing. It also meant an end to a favourite phrase of lawyers when conducted with a judge who wanted to move things along – “But Your Honour, JL Holding says ...”

(Efficient use of Court Time)

The efficient use of court time is, of course, a core duty of the profession. An understanding of that duty is no doubt at least partly responsible for other measures adopted by courts to regulate the way in which parties are required to attempt consensual resolution.

⁴ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175

I note, for example, that the *Queensland Personal Injuries Proceedings Act* imposes a pre-litigation regime of exchange of information, mandatory conferences and exchange of offers before proceedings are commenced. By all reports, that system has worked quite well.

The Federal Court's practice note on 'Fast Track Directions' requires parties to meet and confer and attempt to resolve their dispute in good faith before making any interlocutory application.⁵ If the parties are unable to resolve the dispute, any application about the issue must contain a certificate by the moving party's lawyer that the 'meet and confer' requirement was completed, though unsuccessful. Failure to so certify will result in the application being immediately refused.

Initiatives such as these impose little cost on litigants in comparison to the cost of fully adjudicated resolution.

In my view, techniques such as these are to be expected from a body of professionals dedicated to the resolution of disputes.

⁵ Federal Court of Australia, Practice Note CM 8, Fast Track, paragraph 5.2

(Part 2A of the *Civil Procedure Act*)

This now brings me on to the proposed Part 2A of the *Civil Procedure Act*. Part 2A, as you know, would require litigants to take 'reasonable steps' prior to commencing litigation, such as by:

- notifying the other side of the issues in dispute, and offering to discuss them
- exchanging information and documents critical to the resolution of the dispute
- taking part in ADR processes.

I strongly suspect that for the vast majority of the profession, these requirements constitute nothing more than 'business as usual'.

Leaving aside cases of genuine urgency or rare cases where giving notice to the other side might lead to

frustration of the dispute, it is difficult to identify any sound reason for a potential litigant refusing to engage in at least some of the steps envisaged by Part 2A.

However since I have come to office, concerns have been raised with me from a number of quarters.

Some of those concerns stem from a view that Part 2A is an intrusion into professional judgments about whether, or when, or in what manner a party should explore consensual resolution of a dispute.

More importantly however, concerns have been raised that the legislation has the potential to lead to a new battleground for dispute. A battleground for dispute about whether parties have acted 'reasonably', under pain of cost penalty. This is the so-called 'satellite litigation' phenomenon.

Remembering the way the Court of Appeal dealt with similar concerns in relation to the maintenance of unmeritorious proceedings in *Lemoto v Able Technical*

*Pty Ltd*⁶, I am confident the courts would ultimately place sensible limits on disputes in this area.

The overarching policy objectives of Part 2A, to reduce the demand on court resources by encouraging parties to resolve their disputes or to clarify the real issues in dispute, remain valid. But whether those objectives should be pursued right now – or after October 1 – in the manner suggested by the legislation has been a point of contention.

I would only suggest that you watch this space for developments in the next week. It may be that it would better to see how the Federal Court handles the transition – I know that is a view of the heads of jurisdiction in NSW - and to develop clear and pragmatic definitions of what should constitute “reasonable pre-litigation steps” for various classes of disputes.

Take defamation: a pre-action protocol for defamation matters already exists in the United Kingdom, where it has been positively evaluated.

⁶*Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300

(Increase of ADR in the NSW Supreme Court)

As I mentioned at the outset, as Attorney General I am not only committed to increasing the use of ADR as a pre-litigation step to *avoid* litigation. I am also committed to increasing its use a consensual dispute resolution method *within the context* of litigation.

In this regard, it is pleasing to note that in the last five years there has been enormous growth in the use of the NSW Supreme Court's mediation program, and in the use of mediation in NSW Supreme Court cases generally.

The use of the court-annexed program has nearly tripled - 719 mediations were listed in 2010, compared with 250 in 2005.

The overall use of mediation, including court-annexed and private mediation, has more than doubled. In 2010 there were 1142 cases receiving either a mediation

referral order or a timetable embodying mediation. This is compared with 517 in 2005.

This growth is real, and not merely a by-product of increased filings. When put into a proper context, overall mediation usage has grown by 134%. These are very positive results indeed.

In addition, since 2009 the Supreme Court has referred all Family Provision matters to mediation before considering the application, unless there are special reasons not to.

I was interested to hear the Chief Justice's comments on the future of ADR. His knack for getting to the heart of matter is well known - as are his stated goals of making justice more accessible and more affordable - and making full use of the technology to serve those ends.

(Increase of ADR in the NSW Children's Court)

Another jurisdiction in which there has been a significantly increased use of ADR in recent times is in the care jurisdiction of the Children's Court.

Some of you may practice in the care jurisdiction. Others are no doubt interested in developments that may prove to be of substantial benefit to the marginalised children and families involved in the care system as occurs when the Department of Human Services identifies a family in which a child or children are at risk of significant harm.

The ADR Directorate in my Department has been working closely with the Children's Court and the profession to further embed ADR into this jurisdiction.

This has been done through the introduction earlier this year of Dispute Resolution Conferences. Dispute Resolution Conferences occur once a care application

has been filed. They are available throughout NSW, and are conducted by Children's Registrars trained in ADR.

Essentially, Dispute Resolution Conferences are an ADR process which provides the child's family, Community Services, the child's lawyer, and other significant people, with an opportunity to discuss the child's safety, welfare and wellbeing in a safe and positive environment, and to agree on the action that should be taken in the child's best interests.

This collaborative process of decision-making is expected to lead to agreements that are better accepted by parties, and therefore more likely to be implemented. Even if the parties are unable to reach a final agreement, there is an opportunity to narrow the issues in dispute and encourage open communication.

While an extensive independent evaluation will be completed early next year, early reports suggest that the

Dispute Resolution Conference is a very positive addition to the care and protection landscape.

While not all Dispute Resolution Conferences or mediations result in agreement on all the issues in dispute, many parents do report that it is the first time that they have felt listened to. In some cases, it may be the first time that all the parties have sat down at the same table together to focus on the child.

The quantitative impact that the programs have had on the Children's Court's usual mode of operation will be further known with the conclusion of the independent evaluation, and we look forward to hearing more about this next year.

(Improving awareness of ADR amongst law students and practitioners)

In my view, one of the biggest issues in ADR development and uptake is achieving cultural change.

To this end, education not only in practical ADR skills but also about the benefits of ADR is vital both in the university setting and in ongoing professional education.

I am delighted to note that the ADR Directorate has facilitated communication with law schools and providers of practical legal training in NSW about the importance of ADR education and suggesting further ways to improve the breadth of ADR education in NSW and have received a number of very positive responses.

I will be working further with the ADR Directorate to maintain this flow of communication with education providers in order to support practices most likely to lead to cultural change that will benefit litigants and courts alike.

I also encourage the professional bodies to consider the importance of ADR awareness and skills training when setting out members' training requirements.

(Reporting on the use of ADR by Government Agencies)

In the interests of evidence-based decision making, I have recently asked all government agencies to begin annual reporting on their use of ADR, including details of expenditure on ADR, matters resolved through ADR and of why ADR was not used in other matters.

The reporting period began in July this year, and annual results will be compiled, analysed and reported on by my ADR Directorate.

This is the first time that NSW Government agencies have been asked to provide these details. It is an initiative that I hope will give us a clearer picture of the extent to which the NSW government is using ADR, including the extent which legal costs are reduced through greater use of ADR.

(Closing remarks)

The challenge for every sphere of business – and government - these days is to do more with less.

The law is no different; there is not a bottomless pit of money to fund our courts – and the sometimes drawn out litigation that is more a test of egos and financial strength than the law.

Any course of conduct that chooses consultation over confrontation is to be preferred. And that is ADR.

I can only hope that in coming years it won't be regarded as so "alternative"

Thank you for inviting me to address you this morning. There is an interesting day ahead of you and I will be interested to about the thoughts that emerge from the presentations and the comments that follow.