

Legal Affairs
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Mediation to go mainstream

With the legal system increasingly recognising that prolonged litigation helps few people, it's time to change the paradigm of dispute resolution, writes **Rob Hulls**.

There is change afoot in the way we resolve disputes in Victoria. For too long, our legal system has been shaped around the fist on the table, an adversarial process that turns potentially resolvable disagreements into protracted conflicts. Of course, for over 30 years now, arbitration, mediation and other forms of what has been traditionally known as "alternative dispute resolution" (ADR) have offered just that — an alternative.

However, what we must begin to recognise is that this term itself is defined in relation to the adversarial system. We need to change this paradigm. We must of course acknowledge that one of our most fundamental rights is to have our day in court if we so choose. Nevertheless, increasingly the legal system is conceding that parties rarely benefit from prolonged litigation and we must build on this recognition to shift our understanding of "alternative" dispute resolution into an engagement with "appropriate" dispute resolution.

Obviously a limited form of mediation at a quasi-judicial level is not new to Australia, judicial registrars in federal jurisdictions being an integral part of Federal Court and Family Court procedure. However, I am aware of the Victorian Supreme Court's interest in the Canadian model and in using judges to "shadow" cases and step in to mediate where appropriate and I am giving consideration to whether Victoria can lead the charge for fully fledged judicial mediators within our court system.

We must not, however, limit our imagination. Rather than launch an attack and then detour into mediation, our first port of call should be the most appropriate

dispute. We must shun the knee-jerk reaction, the writ or letter of demand, opting instead for a more conciliatory and constructive way of initiating resolution.

A straightforward way of doing this may be to make mediation compulsory before filing, rather than leaving it to be ordered by a court or tribunal once the battle lines are already drawn. This would no doubt frustrate the flamboyance of countless practitioners who enjoy the gothic drama of throwing down the gauntlet on behalf of their client.

Whether we go down this path or not, we must also begin to think about ways to defuse disputes before they escalate. This means

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dealing with them when they arise, going straight to the source, rather than waiting until they are propelled into the orbit of the court and tribunal system.

All over Victoria, consumers are demanding more efficiency and less cost and, in the wake of one too many damaging mega-litigations, corporate clients are pushing to resolve disputes away from the media spotlight, opting for risk management and engaging lawyers to ward off trouble. Clearly, sophisticated consumers are exercising their expanding range of choices in a competitive legal and business market.

But what about those people who are not sophisticated consumers? It is perhaps ironic that the benefits of appropriate dispute resolution have, on the whole, been limited to the more privileged spheres and, while highly paid executives mediate and conciliate away in boardrooms around the country,

interactions or collisions with the law, arise in the context of disadvantage.

The Bracks government knows the social, economic and health problems of disadvantage are exacerbated by legal problems associated with debt, injury, tenancy and consumer status, neighbour disputes and employment. We believe ADR should not be the bastion of privilege, and we are building on existing services and creating new ones at the coalface.

That is why we have funded and legislated for new ADR programs run by Victoria Legal Aid, the organisation that deals with the manifestations of disadvantage. This is also why seven community legal centres around the state have received additional funding and why, in the 2006-2007 financial year there will be an extra \$300,000 distributed to such centres. This is also why we fully support the Dispute Settlement Centre of Victoria, which conducts about 700 mediations annually.

These are just some of the ways we can shift our focus to make dispute resolution of all forms more appropriate, and more meaningful — taking it out of the courtroom and into the community.

We have to be smart and imaginative about the use of ADR. It is no use just tacking it on as an afterthought, while leaving the prevailing system unchanged. We must rethink the way we approach the resolution of all disputes and, in doing so, we shouldn't underestimate the challenge ahead.

■ *Rob Hulls is the Victorian Attorney-General. This is an edited version of an article from the latest national newsletter of the Institute of Arbitrators &*