

No Longer the Detour: ADR and the Smart Road to Justice

The Hon Rob Hulls MP¹

Acknowledgments

Traditional custodians, people of the Kulin Nation;
Distinguished Guests, one and all.

With challenge comes opportunity – no doubt many will offer this simple truth during the course of the next two days – equally no doubt with more authority than me.

Nevertheless, just as the convergence of global recession and climate change gives us a window to a new kind of economy; so too the convergence of recession and a legal system creaking under the weight of the adversarial tradition presents a unique chance to resolve our disputes differently.

For too long we've relied on the ego and gothic drama of the adversarial tradition – writs at 20 paces and horsehair flying, litigants watching anxiously from the sidelines. Yet most of us want to address our differences quickly, cheaply, and in a way which maintains relationships.

How is it, then, that we've allowed ourselves to develop an addiction to this form of advocacy? Why are we so attached to epic submissions, the thumping of ruffled chests and further and interminable particulars when all we were ever asked to do was help solve people's problems?

This is, after all, what the law is – a system charged with solving people's problems, keeping them safe from violation and tyranny; and regulating their interactions with each other. Surely it's common sense, then, that we should find the earliest, cheapest, fairest and most common sense way of meeting these obligations? Instead, however, we allowed our legal system to barrel resolutely down the adversarial path, fuelling the suspicion that the law was a mechanism designed only for the privileged.

Well, those days are over. More and more people across the international legal system are acknowledging that the future lies down another route – that, plainly and simply, the future of justice lies in Appropriate Dispute Resolution.

That's why Victoria's Government has allocated \$17.8 million over 4 years for a range of initiatives which include:

- Judicial mediation in the Supreme and County Courts;
- Expansion of community-based ADR services into regional Victoria;
- Diversion of non-family violence related intervention order applications to mediation;
- Establishing a Mediation List conducted by Associate Judges in the Supreme Court;

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- Community and Civil mediation pilots in the Magistrates' jurisdiction;
- Creating an ADR Directorate to implement programs; nurture relationships and reduce previous fragmentation.

I'd like to talk to you today, then, about how – from community-based to court-based ADR – these initiatives signal a new vision for Victorian justice; and how the legal profession; business; the community sector *and* private mediators are crucial to the realization of this vision.

Community based ADR

Obviously, a Government has an obligation to build strong and resilient communities. This in turn demands that it helps prevent or resolve disputes before they become litigious.

It's upon us, then, to promote the most efficient and affordable way of dealing with problems between people who share life in a close community. That's why \$14 million of our ADR allocation is focused on community initiatives, delivered through the Dispute Settlement Centre of Victoria. This includes a push into regional Victoria – a reflection of our recognition that communities are made stronger by their ability to resolve their own disputes.

Rolling out through Victoria's 5 regions, residents will not only find alternatives to costly and stressful court-based dispute resolution, they will benefit from using local knowledge, local agencies and local solutions – all through a process which gives them a greater level of participation and greater ownership of the result.

Community mediation through the courts

Once a dispute does reach the realm of the courts, there are still opportunities for it to be quickly resolved outside the litigation process. The Neighbourhood Justice Centre (NJC) and Corio/Norlane community mediation projects are court annexed and provide a locally meaningful way of resolving disputes in neighbourhoods prone to high incidence of disputes and intervention orders.

Meanwhile, through the Broadmeadows Magistrates' Court Mediation Pilot, the DSCV is mediating contested civil proceedings under \$10,000, with around an 80% settlement rate! Such is the pilot's success that it's been extended to proceedings under \$40,000; and to Sunshine court.

Crucially, however, the pilot has changed hearts and minds, in many ways the real agenda. After initial fears it would jeopardise business, barristers are revelling in the fact that court attendances now involve an *appearance*, as those cases that remain in the list are more likely to run.

Court based ADR

Leaders throughout the court system, of course, are *always* searching for more efficient ways to resolve disputes. From early neutral evaluation by judges; case conferences; Associate Judge mediations and increased judicial management; through to potential consideration of using ADR in criminal matters – the opportunities abound.

We were conscious, however, of a lack of information around ADR use in the higher Courts, which is why we commissioned a report that, as well as high satisfaction, also found room for improvement, including training to ensure quality; and ensuring that referrals were made much earlier.

What is encouraging, however, is that gains have already been made – the fact that just 7 of 101 matters finalised in the Commercial List in 2007/08 were tried to judgment being one example. The

ADR momentum has taken on a life of its own and we'll work with the courts on the report's recommendations to encourage its pace.

Judicial mediation

The two words setting the legal community abuzz recently, have been 'Judicial Mediation'. Having returned from a trip to Canada roundly impressed with the Quebec Court of Appeal's Judicial Mediation program, I was determined that Victoria should enjoy the benefits of a similar scheme.

Quite simply, Judicial Mediation is the next frontier – using a Judge's authority and experience to help parties identify the issues at stake; yet allowing parties to remain in the court process if mediation proves unsuccessful.

Accordingly, the Government has developed legislation to establish the first Australian judicial mediation scheme – a two year pilot in the Supreme and County Courts – supported by an additional judge, judicial support staff and an ADR co-ordinator in each jurisdiction; along with ongoing training for the judiciary. It's expected that the pilot will achieve an additional 200 court-based ADR conferences in the Supreme Court and 300 in the County.

To spread the judicial mediation message, however, I invited its pioneer, former Canadian Justice of the Quebec Court of Appeal, Louise Otis, to Victoria. Justice Otis spent a week talking to representatives from the public and private sectors, the academy, courts and legal profession about the voluntary system she established. It allows litigants to meet with a judge in a mediation session to resolve their civil and commercial disputes and sees 80% of cases involved resolved in 1-2 sessions lasting 3 hours each.

Justice Otis describes the judicial mediator as an agent of reconciliation; process management; communication; reality; solution; and change – and Justice Otis herself was certainly all of these things. Her visit confirmed for me the absolute importance of judicial leadership in this field, a particular highlight being the Judicial Masterclass she conducted under the auspices of the Judicial College of Victoria. Feedback at the end of the Masterclass was overwhelming – those in doubt becoming fans once they heard the benefits detailed by one of their own.

Similarly, many in the legal profession and business sector abandoned any skepticism – or at least mild anxiety – they had harboured about judicial mediation; realizing that Judicial and private mediators are co-conspirators, rather than competitors. Having attended nearly 20 meetings and presentations, then, Justice Otis concluded that Victoria was ahead of the game in comparison to other international jurisdictions; and ready to take the next ADR step.

Cultural change and ADR pledge

We cannot do so, however, unless cultural change is our constant companion. This is not something we can assume, though, as there will always be those resistant to change – those who believe that legal skill is demonstrated only via biblical recitation of precedent; that the law's authority is measured only in proportion to its detachment.

I'm delighted, then, that the Chief Justice of Victoria has called on the legal community to embrace the possibilities of ADR and put to rest the tired proposition that it is simply endless public money that will free up court time and reduce delay. Instead, the Chief Justice has said, the onus is on the players in

litigation to behave creatively; while the head of Victoria's new Commercial Court, Justice Byrne, has poetically called on litigators to 'cut through the crap'.

I couldn't agree more. *Obviously* the role of Government is to provide the tools for a better system and a foundation on which to build it. It's for the trade's practitioners, however, – and those who support them – to seize these tools and craft better results for the public they are engaged to serve.

That's why, in partnership with the Law Institute, the Bar and Legal Services Board, we're exploring an ADR Pledge to be taken by firms committing to mediation as a first option, rather than the usual preludes to litigation.

Given it's usually lawyers to whom people turn with a problem, it's lawyers, then, who must first advise a client that going to court is not often their best option. An ADR pledge signals this acknowledgment; as well as an understanding that ADR can take the starring role, rather than be the understudy.

We're standing on a threshold, then, but we need to cross it together – to promote the benefits of both a legal system *and* an economy that resolve disputes as early, as cost effectively, and as appropriately as possible. This audience is uniquely placed to do this in that, rather than representing just one profession, you represent a breadth of influence almost unparalleled. As engineers, lawyers, architects, publishers, academics, and building consultants; as members of business and community boards, and sporting associations; and as experts in everything from maritime and construction to family law – you have an opportunity, perhaps unlike any other, to spread the word.

We want to support you in that task, of course; and, in responding to the Victorian Parliamentary Law Reform Committee's recent Recommendations on ADR and Restorative Justice, we will examine recommendations that all Government ADR providers be accredited under the NADRAC scheme; and the potential for national regulation.

The public is calling for a better system and not only will you be part of that system, but champions of it as well – whether dealing with an ASX listed company; or sharing your expertise with the community and public sectors.

All of us now recognize that the 'winner takes all' approach of recent global economic trends were unsustainable. So too, the 'winner takes all' flamboyance of the adversarial model cannot be our only device. Just as we cannot keep riding harder and faster on the same horse at our economic or environmental problems, nor can we keep throwing more and more public money at the adversarial door to reduce cost and delay.

We have to be smarter, more sophisticated than that. We have to be more creative, compassionate and just. After all, how we help resolve people's disputes in a time of economic hardship will be a measure of us – as Governments, as professionals, and as local and global communities.

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