

OPENING ADDRESS
BY THE HONOURABLE T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
2011 ADVANCED ALTERNATIVE DISPUTE RESOLUTION
WORKSHOP
Westin Hotel Sydney, 13 August 2011

Attorney General, ladies and gentlemen. It is a pleasure to have this opportunity to welcome you to this Advanced ADR Workshop.

I am especially pleased to be able to address those of you who are practising barristers – after moving to the bench it is usually you who get to address me. Of course, on the bench I have the right to interject. I sincerely hope that none of you will choose to do that during my address this morning. However, consistent with the spirit of conciliation, which should exist at a Conference such as this, I will not object if you do so.

One of Lord Denning's more famous passages comes from the case of *Miller v Jackson*.¹ There is no need to provide a context for the case as Lord Denning's judgment speaks for itself. Lord Denning stated:

¹ [1977] QB 966 at 976.

“In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years ... Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built ... a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at week-ends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence,

I suppose, that the Lintz Cricket Club will disappear ... The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.”

Lord Denning was noticeably irritated by the zero-sum game created by this piece of litigation. The Court was asked to decide whether the neighbours could live in peace, or whether the town could continue its tradition of cricket. One wonders whether a more ‘enjoyable’ outcome might have been reached had this case been decided in the era of ADR, where both parties would have been encouraged to focus on their interests and come to a compromise before going to court.

Nowadays, ADR has reached all spheres of legal life. Although there are, of course, a wide variety of ADR mechanisms I will largely direct my remarks towards mediation given that a large portion of the audience is made up of mediators and barristers who engage in mediation. In some jurisdictions, mediation is a compulsory pre-cursor to commencing litigation; for example, in the family law jurisdiction, native title jurisdiction and unfair dismissal cases under the *Fair Work Act* 2009. In other jurisdictions courts may refer parties to mediation

with or without their consent. Despite the initial reluctance of some, involvement in mediation prior to the commencement of litigation, or at least shortly after its commencement, has provided significant benefits. 2009 statistic from the New South Wales Supreme Court demonstrated that 60% of cases referred to the mediation program settled during mediation.² Others no doubt settled between mediation and trial. The success of ADR has reduced the personal, financial and public costs of litigation by allowing parties to: maintain civil relationships while settling a dispute; settle disputes faster; narrow the issues in dispute even where settlement fails; and avoid placing unnecessary stress on the court system.

This workshop is timely, given that the Commonwealth's *Civil Dispute Resolution Act 2011* came into force on 1 August 2011 with the objective of encouraging parties to take 'genuine steps' before commencing certain proceedings in the Federal Court or the Federal Magistrates Court. The Act does not mandate the taking of any *particular* steps before proceedings are commenced. Rather, the Act requires a person to take steps that represent a 'sincere' and 'genuine' attempt to resolve the dispute. Failure to take genuine steps will not

² The Hon M Warren, 'Should Judges Be Mediators?' (2010) 21 *Alternative Dispute Resolution Journal* 77 at 78.

prevent a party from entering the court system but may have implications for costs orders, including costs orders against lawyers who have failed to comply with their duties under the Act. The amorphous nature of terms such as 'sincere' and 'genuine' mean that the extent of the requirements will need to be fleshed out. I am delighted to see that this workshop will focus heavily on the pre-litigation requirements under the new legislation. Discussion surrounding, for example, the difference between 'reasonable' and 'genuine' steps will undoubtedly provide you with a solid foundation for further practice in this area under the new regime.

The trend towards legislating to increase reliance on ADR makes it clear that ADR will continue to play a prominent role in dispute resolution into the future. The future relationship between ADR and the court system is less clear. There is no doubt that the ever-rising cost of litigation will make out-of-court dispute resolution mechanisms increasingly attractive. It remains to be seen whether this trend leads to a system of justice that *competes with* the court system, or a system of justice that is *integrated into* the court system. It is my sincere hope that the legal community – including mediators, lawyers and judges – makes every effort to ensure that ADR is integrated into court processes such

that it represents Additional and Appropriate (rather than Alternative) dispute resolution.

Since 1976, Professor Frank Sander's concept of a comprehensive justice centre – or multi-door courthouse – has played a large role in any discussion about ADR.³ Although this notion has firmly divided those in the dispute resolution industry into multi-door courthouse advocates and opponents,⁴ the differences between these two camps are not as significant as they sometimes appear. Both groups recognise that there will always be a role for courts in the resolution of disputes. Both groups also recognise that courts are not always the most appropriate place to resolve disputes.

In my view, to enhance access to justice and to minimise the costs of litigation, parties should turn their minds to the resolution of disputes outside of the court system before they enter it, or soon after doing so. Reflecting on the United States system, Justice Sandra Day O'Connor stated: 'The courts of this country should not be the places where

³ Frank Sander, 'Varieties of Dispute Processing' in Leo Levin & Russell R Wheeler (eds) *The Pound Conference: Perspectives on Justice in the Future* (1979) 65.

⁴ See, for example, The Hon Justice Brian Preston, 'The Land and Environment Court of NSW: Moving Towards a Multi-Door Courthouse – Part 1' (2008) 19 ADRJ 72; NADRAC, *The Resolve to Resolve – Embracing ADR to Enhance Access to Justice in the Federal Jurisdiction* (2008) 68–72.

resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.⁵ While this statement is sound in principle, questions remain about the appropriate status given to courts in a dispute resolution system in which courts are seen as a last resort.

Although alternative means of settling disputes is often desirable, the court system should not be sidelined. I have significant reservations about a compulsory mediation process prior to litigation at least in superior courts. This is for a number of reasons. First, the statistics to which I have referred cast doubts as to its necessity. Secondly, there may be cases, particularly more complex ones, where the parties do not have a clear idea as to the merits of the other party's case and, therefore, cannot make a rational determination as to whether or not proceedings should be compromised. In such circumstances a mediation is unlikely to succeed and may perhaps lessen the prospect of a successful compromise rather than enhance it.

There are more fundamental problems. First, how is it determined that an attempt to resolve a matter has been sincere or genuine?

⁵ Cited by the State Bar of Montana:
<<http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=26>> accessed 10 August 2011.

Secondly, and related to this issue, how does the court consider that question? Are the parties entitled or compelled to waive communications made on a without prejudice basis or their privileged advice in order to determine questions of sincerity or genuineness? Thirdly, there is the danger that the requirement will be misused to frustrate a plaintiff in pursuing a legitimate claim. There is a significant danger of the evolution of satellite litigation involving costs and delays in investigating the mediation process.

Underlying what I have said is that it is fundamental to our system of administration of justice that parties have access to the courts to resolve their dispute. Anything which impedes this process should be viewed with considerable caution. That is not to decry the benefits of mediation, far from it. An ideal position, in my opinion, is one where parties are encouraged to take genuine steps to resolve a dispute before entering a courtroom if that course is appropriate in the circumstances but also where parties are not deterred from access to a court as an independent arbiter of disputes according to law.

The role of legal practitioners in dispute resolution has changed significantly since the introduction of ADR. Inevitably, there will be further changes to the role of legal practitioners. As has already begun

to take place, some will specialise in mediation, conciliation or arbitration. Some will specialise as referees or evaluators. Others will build a diverse range of skills in order to act as a facilitator, counsellor and advisor in some cases and as an advocate in others. I remain of the view that the bar has a vital role to play in this emerging situation. Persons best able to resolve disputes outside the court system are those not only with skill and training in mediation, but also a knowledge of how the system works, the ability to grasp facts quickly and understand the legal principles involved. These are the qualities which mark a good barrister.

Many of you here today are accredited mediators. You have an integral role to play in ensuring the continued success of ADR. It is to your credit that mediation has become such a popular dispute resolution mechanism. Clients choose to come to you because they know that the service you offer will be impartial, effective and efficient. Your independence and integrity is key to the maintenance of public trust in systems of dispute resolution that exist in conjunction with courts.

Irrespective, it is important that clients' lawyers and mediators work together. A recent study found that mediators generally believe that lawyers can have a positive influence on the process and outcome of

mediation.⁶ However, four out of ten mediators who engaged in a rigorous study in 2010 complained that lawyers lack a sufficient understanding of mediation.⁷ The mediators interviewed believed that lawyers should do four things:

- (a) become more educated about mediation;
- (b) advise their clients about the benefits of mediation;
- (c) support their clients by preparing them on how to productively engage in the mediation; and
- (d) facilitate settlement, for example, by ensuring their client has authority to settle and promoting settlement through their attitudes and communications with their clients.

In my experience most lawyers are willing to do these things. The integration of ADR training into Australian law schools will further lawyers' awareness of the things mediators think they should know.

⁶ Cheree Shefton, 'No Square Pegs in Round Holes: What Mediators Want Lawyers to Do in Mediation and How They Get It' (2011) 22 *Alternative Dispute Resolution Journal* 22.

⁷ Ibid.

Although lawyers are duty-bound to act in their clients' interests, lawyers have always been subject to an overriding duty to the court system through which their clients' interests are advanced. If lawyers adopt a similar approach to alternative dispute resolution the more effective it will be and the problems to which I have referred will be averted.

Given that lawyers are often referred to as the gatekeepers of the legal system, it is essential that lawyers understand the nature and role of alternative, or additional, dispute resolution when advising a client as to the appropriate legal recourse. The bar rules already require that clients be advised of the possibility of alternate dispute resolution. As mediators play an increasingly significant role in the resolution of disputes it is important that lawyers understand the objectives of mediators and mediators understand the perspectives of lawyers. It is wonderful to see a mix of barristers and mediators here today – this workshop will undoubtedly go some way towards improving any gaps in understanding between lawyers and mediators. Undoubtedly, the cross-pollination of ideas that occurs at a workshop such as this allows for more effective use of the alternate dispute resolution process. I hope that today will be the beginning of a longer period of cooperation and mutual understanding between mediators and other legal professionals, for the benefit of all those who have reason to access justice.

I am confident that this will be a very productive and informative workshop, allowing for meaningful exchanges between participants working in different areas. It is my pleasure to officially open the Advanced ADR Workshop for 2011.