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Integrating ADR and Court Processes in Australia

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Introduction

1. As the Australians here will know, today is Australia's national day, celebrating the foundation of the colony of New South Wales by the British government in 1788. Australia is now a federation consisting of six states, being New South Wales and five other former colonies, together with two self governing territories. As a consequence, there are nine parliaments in Australia. Each state and territory has its own parliament, which makes laws for that state or territory. In addition, the federal parliament makes laws that apply throughout Australia, but only with respect to the subject matters specified in the Constitution.

2. In addition, there are nine court systems within Australia. Each state and territory has its own Supreme Court, which is a superior court of record. Most of the states also have an intermediate District or County Court, which are inferior courts of limited jurisdiction and all states and territories also have a Local or Magistrate's Court. The jurisdiction of the state and territory courts is restricted territorially. The most populous state is New South Wales and the Supreme Court of New South Wales is the largest and busiest of the Supreme Courts. In addition, there is a federal judicial system consisting of the Federal Court of Australia and the Federal Circuit Court of Australia. The Federal Court of Australia corresponds in terms of status and standing with the Supreme Courts of the states and territories in that it is a superior court of record. The Federal Circuit Court corresponds with

the District and County Courts of the states in that it is an inferior court of limited jurisdiction.

3. The State Supreme Courts and the Federal Court are all trial courts, as well as being appellate courts. The Supreme Court of NSW has a permanent Court of Appeal, which is constituted by three or more judges. It has jurisdiction to hear appeals from decisions of single judges of the Supreme Court, as well as other inferior NSW courts. Three or more judges of the Federal Court constitute a Full Court of the Federal Court. A Full Court has jurisdiction to hear appeals from single judges of the Federal Court, as well as from the Circuit Court and other tribunals.

4. At the pinnacle of both systems sits the High Court of Australia, which was created by the Constitution and hears appeals from the intermediate appellate courts of the federal system and the state and territory systems. Appeals to the High Court, however, can only occur with the leave or permission of the High Court itself. Thus, although the High Court has original jurisdiction in certain limited cases, it is not a trial court and alternative dispute resolution (**ADR**) is of no real relevance to the work of the High Court.

5. It follows from what I have said that, when speaking of court processes in Australia, it is necessary to be specific as to the system under consideration. In particular, in considering the integration of ADR and court processes, it is necessary to consider separately the position of the state and territory courts, on the one hand, and the federal court system, on the other. The great majority of significant commercial litigation in Australia takes place in either the Supreme Court of New South Wales or the Federal Court of Australia. For practical purposes, it is necessary to consider only the Supreme Court of New South Wales and the Federal Court of Australia. Each has its own statutes and rules. Both have rules in reasonably similar terms dealing with ADR processes and have published practice notes for the benefit of the profession.

6. When faced with such various means of ADR after proceedings have been commenced, a judge will have several discretions to exercise. The first is whether

to endeavour to have the parties engage in an ADR process. The second is to choose the appropriate process. The third, which requires a delicate judgment, is to decide when to raise the matter of an ADR process with the parties.

Whether to Employ ADR Processes

7. The cost of providing courts and judges to resolve disputes between citizens and between the state and citizens is not small, and executive governments and legislatures are forever seeking ways to reduce the cost. In particular, ADR processes are favourably supported because they relieve executive governments of the burden of the cost of providing for the administration of justice. Further, ADR has the potential to save the parties significant costs, as well as time.

8. In 2011, an attempt was made to avoid unnecessary recourse to the courts. The intention was to introduce a pre-litigation protocol similar to that in force in England from 1999, although Lord Jackson recommended against a global approach. The federal parliament enacted the *Civil Dispute Resolution Act 2011* (Cth) (**the Dispute Resolution Act**), a statute that is somewhat controversial, as I shall explain. The statute has the stated object of ensuring that, so far as possible, people take genuine steps to resolve disputes before instituting civil court proceedings.[1] Similar provisions were enacted by the parliament of New South Wales, but while the provisions commenced for a short time, they were soon postponed. In 2013, they were subsequently repealed, at least for as long as is necessary for an evaluation of the Dispute Resolution Act to be undertaken. Nevertheless, the Dispute Resolution Act continues as an inconvenient burden for litigants in the federal system. That can be significant in circumstances where the jurisdictions of the Federal Court and the Supreme Court are concurrent, which they are in many commercial areas.

9. Under the Dispute Resolution Act, an applicant who institutes civil proceedings in the Federal Court of Australia or the Federal Circuit Court of Australia must file a

[1] Section 3.

genuine steps statement at the time of filing the application.[2] A genuine steps statement must specify the steps that had been taken to try to resolve the issues in dispute between the applicant and the respondent in the proceedings or the reasons why no such steps were taken.[3] Certain proceedings are excluded from that requirement. Under s 7, a respondent in proceedings who is given a copy of a genuine steps statement that has been filed by an applicant must also file a genuine steps statement before the hearing date specified in the application. The genuine steps statement filed by the respondent must state that the respondent agrees with the genuine steps statement filed by the applicant or, if the respondent disagrees, specify the respect in which and reasons why the respondent disagrees. The Dispute Resolution Act provides that a lawyer acting for a person who is required to file a genuine steps statement must advise the person of the requirement to do so and must assist the person to comply with the requirement.[4]

10. However, under s 10, a failure to file a genuine steps statement in proceedings does not invalidate the application instituting the proceedings, a response to such an application or the proceedings themselves. One might ask, therefore, what purpose is achieved by the provisions. The answer is that the Court may, in performing functions or exercising powers in relation to civil proceedings before it, take account of whether a person who was required to file a genuine steps statement did so and whether such a person took genuine steps to resolve the dispute.[5] In particular, in exercising the discretion to award costs, the Court may take account of whether a person who was required to file a genuine steps statement, did so, and whether such a person took genuine steps to resolve the dispute.[6]

11. The Dispute Resolution Act provides that a person is to be treated as having taken genuine steps to resolve a dispute if the steps taken by the person in relation to the dispute constitute **a sincere and genuine attempt to resolve the dispute**, having regard to the person's circumstances and the nature and circumstances of the

[2] Section 6(1).
[3] Section 6(2).
[4] Section 9.
[5] Section 11.
[6] Section 12.

dispute.[7] Steps that could be taken include notifying the other person of the issues that are or may be in dispute and offering to discuss the issues with a view to resolving the dispute, responding appropriately to any such notification, providing relevant information and documents to the other person and considering whether the dispute could be resolved by a process facilitated by another person, including an ADR process.[8]

12. One difficulty with the provisions is that there is no real sanction for failing to comply with them. Indeed, there have been instances, at least in the Federal Circuit Court, where, far from the provisions preventing unnecessary litigation, disputes have arisen as to whether the provisions of the Act itself have been properly complied with. Thus, the Dispute Resolution Act can generate, and has generated, its own adjectival or collateral disputes, without creating any real benefit. That is because, even in the absence of the Dispute Resolution Act, it would always be within the inherent jurisdiction of the Court to take into account, in the exercise of its discretion as to costs, whether or not a party had taken genuine steps to resolve the dispute. The statutory formalisation of such genuine steps by the creation of the concept of a "genuine steps statement" in reality adds little beyond creating scope for further disputation. .

Which ADR Process is Appropriate

13. There are various forms of forms of ADR, including:

- Mediation
- Arbitration
- Referral to a referee
- Conciliation
- Neutral evaluation
- Case appraisal
- Expert appraisal

[7] Section 4(1A).
[8] Section 4(1).

The first three are of most interest in the present context.

14. Litigation in the Supreme Court of New South Wales is regulated by the *Supreme Court Act 1970* (NSW) and the Supreme Court Rules 1970 (NSW), together with the *Civil Procedure Act 2005* (NSW) and Uniform Civil Procedure Rules 2005 (NSW), which apply to all courts in New South Wales. Those provisions recognise ADR processes. The *Civil Procedure Act* provides specifically for the mediation of proceedings and the non-binding arbitration of proceedings. The Uniform Civil Procedure Rules deal separately with mediation, arbitration and referrals to referees.

15. Proceedings in the Federal Court of Australia are regulated by the *Federal Court of Australia Act 1976* (Cth) and the Federal Court Rules 2011 (Cth). The provisions of the *Federal Court of Australia Act* and the Federal Court Rules specifically authorise arbitration, mediation and alternative dispute resolution processes, as well as the referral of questions to a referee. Part VB of the *Federal Court of Australia Act*, which was inserted not long before the *Civil Dispute Resolution Act* was enacted, provides that the overarching purpose of the civil practice and procedure provisions of the Act is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. ADR processes are regarded as essential to the achievement of the overarching purpose.

16. In many cases, it will be apparent from the nature of the proceedings as to which ADR process is appropriate. For example, some years ago, I was involved in proceedings brought in the Supreme Court of New South Wales against Aeroflot. Aeroflot declined to submit to the jurisdiction of the Court on the basis that it was an instrumentality of the USSR, as it then was. However, counsel for Aeroflot indicated to the Court that Aeroflot would be prepared to participate in a private arbitration. Accordingly, the proceeding was referred to arbitration and the judge appointed himself as arbitrator. The arbitration then continued in the same courtroom with the assistance of court staff, but in the absence of the public.

When to Raise the Prospect of ADR Process

17. When raising the possibility of ADR processes with parties to proceedings, I have often received the response that the parties have had settlement discussions, but they are so far apart that mediation would be pointless. Experience tells that that is not a valid basis for resisting mediation. On the other hand, I have always been reluctant to order mediation where one of the parties firmly opposes it, notwithstanding that both the Federal Court and the Supreme Court have power to direct mediation without the consent of the parties.[9]

18. One must bear in mind that mediation is likely to achieve a satisfactory result only if the parties engage in the mediation in good faith. Sometimes, of course, the parties put up a show of resisting a direction to mediate, in order to avoid any suggestion that by offering to mediate they are displaying weakness. There are occasions where, notwithstanding that the parties resist reference to mediation, that is precisely what they want. That is to say, they want the Court to make them mediate. If one of them suggests mediation, that might be perceived by the other side as a sign of weakness.

19. The most difficult question for a judge is deciding when it is appropriate to raise mediation with the parties and to impose that process upon them. If one raises the matter too early in the preparation of the proceedings, the issues will not have been properly formulated and the mediation may lead nowhere. On the other hand, in a complex case, if the direction to mediate is left too long, the costs that are incurred in the meantime can sometimes create a barrier against compromise. In a complex case, at least limited discovery may be desirable before requiring the parties to engage in mediation or in any other ADR process. On the other hand, discovery is a notoriously expensive and time-consuming exercise and if it is permitted to go too far, the costs barrier is raised.

Mediation

20. Under the *Civil Procedure Act*, mediation is defined as a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.[10] If it considers the circumstances appropriate, the Court may refer any proceedings before it or any part of any proceedings, for mediation by a mediator and may do so either with or without the consent of the parties to the proceedings concerned.[11] It is the duty of each party to the proceedings that have been referred for mediation to participate, in good faith, in the mediation.[12] The Court is authorised to make orders to give effect to any agreement or arrangement arising out of a mediation session (defined as a meeting arranged for the mediation of the matter).[13] On any application for an order to give effect to any agreement or arrangement arising out of a mediation, any party may call evidence, including evidence from the mediator and any other person engaged in the mediation, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.[14]

21. The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to a mediation session or a document or other materials sent to or produced to a mediator, or sent to or produced at the Court or the Registry of the Court, for the purpose of enabling a mediation session to be arranged.[15] Further, evidence of anything said or of any admission made in the mediation session is not admissible in any proceedings before any court or other body and the document prepared for the purpose of or in the course of or as a result of a mediation session is not admissible in evidence in any proceedings before any court or other body.[16]

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[9] See *Federal Court of Australia Act 1976* (Cth), s 53A(1A); *Civil Procedure Act 2005* (NSW), s 26(1).
[10] Section 25.
[11] Section 26.
[12] Section 27.
[13] Section 29(1).
[14] Section 29(2).
[15] Section 30(2).
[16] Section 30(4).

22. A mediator to whom the Court refers proceedings has, in the exercise of his or her functions as a mediator in relation to those proceedings, the same protection and immunity as a judicial officer of the Court has in the exercise of his or her functions as a judicial officer.[17]

23. The Federal Court Rules provide that, if an order referring a proceeding to mediation does not nominate a mediator, the Registrar will, as soon as practicable after an order for a mediation is made, nominate a person as the mediator and notify the parties of the name and address of the mediator, the time, date and place of mediation and any further documents that any of the parties must give to the mediator for the purposes of the mediation.[18] Mediation must be conducted in accordance with any orders made by the Court.[19] If part only of a proceeding is the subject of a mediation order, the mediator may, on the conclusion of the mediation, report to the Court in terms agreed between the parties.[20] If the mediator considers that mediation should not continue, the mediator must terminate the mediation and report to the Court on the outcome of the mediation.[21] If the parties reach an agreement at a mediation, the parties may file consent orders.[22]

24. In a particularly complex case, mediation of particular aspects of the proceedings is not inappropriate. I have, on occasion, in such a case, directed mediation of pleading disputes, where it is clear that the plaintiff has a good cause of action but there is a dispute as to the precise issues raised by the pleadings. That has proved successful on a couple of occasions. Mediation of discovery disputes is also a very useful exercise in the appropriate case. It is essential, however, for the Court to be on top of the issues before being able to determine the questions for mediation. Even if mediation does not result in a complete resolution of the dispute, it can often lead to a narrowing of the issues where sensible counsel are involved on both sides.

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[17] Section 33.
[18] Rule 28.21.
[19] Rule 28.22.
[20] Rule 28.23.
[21] Rule 28.24.

25. Court-annexed mediation (that is, mediation occurring as a result of referral by a court) is provided for in both the State and federal systems. Thus, most of the registrars of both the Supreme Courts and the Federal Court are qualified mediators. They act as mediators without significant cost to the parties where a judge refers a matter to mediation by a registrar. Accordingly, in smaller matters, the parties will prefer such court annexed mediation because the costs will be lower. The court has a discretion as to whether to direct such a mediation at the public expense.

26. An important question concerns the extent to which judges should participate in mediation. In some instances, judicial management of complex cases is an instance of mediation in one sense. For example, in my 16 years as a trial judge, I presided over any number of discovery and pleading disputes. However, in no more than a handful of those cases was I required to give a decision with reasons. Rather, I engaged in a process that might be described as mediation in open court. That is to say, I facilitated discussion between the parties with the object of determining precisely what discovery was required and why and what the objection to that discovery was. In the vast majority of cases, it was possible to accommodate both sides by a little compromise. Such a process requires the presence of counsel who are to conduct the case and often a reasonably senior representative of the client.

27. Participation by judicial officers in a true mediation, however, has difficulties. Clearly, if a judicial officer participates in the mediation, that officer could not be the trial judge, if the mediation fails to achieve a complete settlement. Information that would otherwise be inadmissible or would not be tendered could come to the attention of the judicial officer such that he or she would be compromised as trial judge. Retired judges, however, are playing a significant role in mediation. One can have some comfort in appointing a mediator who is known to have judicial experience in managing disputes.

[22] Rule 28.25.

Arbitration

28. Part 5 of the *Civil Procedure Act* deals with the arbitration of proceedings. Under s 38, the Court may order that proceedings before it in respect of a claim for the recovery of damages or other money or in respect of a claim for any equitable or other relief ancillary to a claim for the recovery of damages or other money be referred for determination by an arbitrator. Before making such an order, the referring court must give such directions for the conduct of the proceedings before the arbitrator as appear best adapted for the just, quick and cheap disposal of the proceedings. However, the referring court may not make such an order if cause is otherwise shown why the proceedings should not be so referred.

29. Under s 39 of the *Civil Procedure Act*, the issues in dispute in referred proceedings are to be determined by the arbitrator on the evidence adduced by the arbitrator. The arbitrator must record the arbitrator's determination of the proceedings and the reasons for the determination, by an award in writing signed by the arbitrator. The arbitrator must immediately send the award to the referring court. An arbitrator may not make a determination that could not have been made had the proceedings been heard and determined by the referring court.

30. If an award is expressed to be made by the consent of all of the parties, it is final and conclusive and is taken to be a judgment of the referring court on the date on which it is received by the referring court. In any other case, it is taken to be a judgment of the referring court at the expiration of 28 days after it is sent to all of the parties.[23] A person aggrieved by an award may apply to the referring court during that period for a rehearing of the proceedings by the court.[24] The referring court must order a rehearing of proceedings the subject of an award if an application for rehearing is made before the award takes effect.[25] In the absence of a direction to the contrary, the rehearing is to be a full rehearing.[26] Thus, in effect, the result of an arbitration is not necessarily binding.

[23] Section 40.
[24] Section 42.
[25] Section 43(1).

31. If the Federal Court makes an order referring a proceeding, or part of a proceeding, to arbitration, a party may apply to the Court for an order nominating a person as arbitrator and for orders specifying the manner in which the arbitration is to be conducted, the time by which the arbitration is to be completed, how the arbitrator's fees and expenses are to be paid and how the arbitrator's report on the proceeding is to be reported to the Court.[27] If a proceeding has been referred to arbitration and an award has been made, a party to the arbitration may apply to the Court for an order that the arbitrator's award be registered.[28] There is a residual discretion as to whether to register an award. If such an order is made, the award has the force and effect of an order of the Court and accrues interest as on a judgment.[29]

Referees

32. The Uniform Civil Procedure Rules deal with referrals to referees by the Supreme Court and the Federal Court Rules deal with referral by the Federal Court to a referee. At any stage of the proceedings, the Court may make orders for referral to a referee appointed by the Court for enquiry and report by the referee on the whole of the proceedings or on any question arising in the proceedings.[30] The Court may appoint any person as a referee.[31] Thus, there is no requirement for a referee to be a lawyer. A judicial officer or other officer of the Court may not act as a referee otherwise than with the concurrence of the Chief Justice. The Court can give directions as to the remuneration of the referee including requiring a party to give security for the remuneration of the mediator.[32]

33. The Court may at any time and from time to time authorise the referee to enquire into and report on any facts relevant to the enquiry and report on the matter referred.[33] The Court may give directions for the provision of services of officers

[26] Section 43(5).
[27] Federal Court Rules 2011 (Cth), r 28.11(1).
[28] Rule 28.13(1).
[29] Rule 28.13(4).
[30] Rule 20.14.
[31] Rule 20.15.
[32] Rule 20.18.
[33] Rule 20.17.

of the Court and of court rooms and other facilities for the purpose of any referral.[34] Subject to any directions given by the Court, the referee may conduct the proceedings in such manner as the referee thinks fit.[35] The referee is not bound by the rules of evidence, but may inform himself or herself in relation to any matter in such a manner as the referee thinks fit.[36]

34. Each party must give the referee and each other party a brief statement of the findings of fact and law for which the party contends and the parties must at all times do all things that the referee requires to enable a just opinion to be reached.[37] The referee must make a written report to the Court on a matter referred, annexing the statements given by the parties and stating the referee's opinion on the matter and the referee's reasons for that opinion.[38] On receipt of the report, the Court must send it to the parties.[39] When a report is made, the Court may, on a matter of fact or law, or both, adopt, vary or reject the report in whole or in part.[40] The Court may also require an explanation by way of report from the referee and may remit for further consideration by the referee the whole or any part of a matter referred for a further report. Evidence additional to the evidence taken before the referee may not be adduced before the Court except by leave of the Court. The referee does not exercise judicial power because it is a matter for the Court as to whether and to what extent the referee's report is to be accepted. The hearing as to that question can be lengthy and complex. Thus, the report does not of itself quell the dispute between the parties.

35. In cases involving particularly technical issues, it may be appropriate to refer the whole of the proceedings or a particular question in the proceedings to a referee who has particular expertise in the relevant field. Some years ago, I was presiding in proceedings arising out of quite complex corporate structures established in connection with the financing of the acquisition of aircraft by Qantas and other international airlines. At the end of the proceedings, I ordered that one of the

[34] Rule 20.19.
[35] Rule 20.20(2)(a).
[36] Rule 20.20(2)(b).
[37] Rule 20.20(5), (6).
[38] Rule 20.23(1).
[39] Rule 20.23(2).
[40] Rule 20.24.

parties buy the shares in the corporate structures held by another party. A question arose as to the price to be paid for the shares. That raised quite complex questions as to the operation of financial markets throughout the world. I proposed that a referee acceptable to the parties be appointed to report on the value of the shares to be acquired. I suggested that the parties approach P.R.I.M.E. Finance to obtain names of appropriately qualified experts. The parties agreed that it was appropriate to appoint a referee to enquire. When they found that I was a member of the P.R.I.M.E. panel, they asked me to carry out the exercise. However, before the enquiry could begin, the parties reached a compromise and it was unnecessary for the referral to continue. The compromise was reached by negotiation, apparently without recourse to any particular ADR process.

Conclusion

36. In the two chief centres of commercial litigation in Australia, namely, the Supreme Court of NSW and the Federal Court, ADR processes are both varied in nature and relatively well enshrined. Though they do not always resolve, by themselves, disputes between parties, they can play an important role in relieving the parties (and the judicial system) of unnecessary time and costs. From the perspective of a judge, ADR can, when used judiciously and sensibly, be invaluable in streamlining the litigation process and in limiting the matters before a court to those that truly require judicial resolution.