

FIVE REASONS WHY JUDGES SHOULD CONDUCT SETTLEMENT CONFERENCES

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Judges conduct settlement conferences in civil disputes in many parts of the world. This is an important feature of judicial work in many jurisdictions. In Australia, the role of judges and their relationship with Alternative or Appropriate Dispute Resolution ('ADR') processes and, in particular, their role in judicial settlement conferencing processes conducted within the civil justice setting, has been the subject of some discussion in recent years. This article explores the evolving nature of the relationship between courts and ADR and more specifically comments on the nature of the judicial function and its relationship with ADR, before discussing the role of judges in relation to judicial settlement conferences. The reasons why judges should conduct settlement conferences are considered in the context of changing court and societal trends and objectives, the skills and attributes of judges, the objectives of the civil justice system and the important role that judges can play in this form of court integrated ADR.

I INTRODUCTION

Within Australia, the role of a judge in hearing civil and commercial disputes has changed considerably in recent years. As many theorists and judges have pointed out — the modern judge does not resemble the judge of the early 20th century. The judge of the 21st century, at least in Australia, is likely to be involved in managerial judging, concerned about who controls litigation and may even be mildly interested, if not committed, to notions of therapeutic jurisprudence. In addition, judges are likely to be aware of, and may even be engaged in, ADR. In countries beyond Australia, this engagement has been developed even more. As noted in North America:

A new age in civil litigation has dawned ... The traditional role involving neutral, detached, and passive judges, who look to adversaries in private-party civil actions ... has given way to proactive judges who direct disputes

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† Parts of this article draw upon: Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 3rd ed, 2008); Tania Sourdin, 'Facilitative Judging' in Tania Sourdin (ed), *Alternative Dispute Resolution and the Courts* (Federation Press, 2004); Tania Sourdin, 'Facilitating Dispute Resolution within Courts' (Paper presented at the International Conference of the Presidents of the Supreme Courts of the World, Abu Dhabi, United Arab Emirates, 24 March 2008) (This paper was also presented in an early draft form at the Non-Adversarial Justice Conference held in Melbourne in May 2010).

toward resolution, increasingly through court-mandated hearings beyond their own courtrooms and judicially managed settlements.¹

The changing role of judges in respect of the settlement, rather than the adjudication, of disputes and the introduction of judicial conferencing processes, have been prompted in part within Australia by a changing policy and legislative approach to ADR.² In this regard, the new strategy can be viewed as evidence of a more evolved relationship between courts and ADR. The differing relationship between courts, policy-makers, ADR and the philosophical approach to ADR, varies greatly and has produced a range of integration strategies within Australia (which may appear in combination in some courts and tribunals):

1. Pre-litigation or pre-filing ADR — either supervised or unsupervised by courts and tribunals, falling within the ‘shadow of the court’ and often involving mandatory strategies.
2. Self referred litigation related ADR — where courts and tribunals are not involved and may be unaware that parties are using external ADR processes.
3. Court connected ADR — involving referral to ADR processes which might be conducted by external or internal practitioners.
4. Court integrated ADR — involving judicial and quasi judicial officers within courts and tribunals using ADR processes to resolve and manage disputes (processes may include settlement conferences, mediation or concurrent evidence approaches). This integration may involve facilitative judging, judicial settlement conferencing or other similar forms of ADR.

Each approach can be of assistance in supporting effective dispute resolution within our society. Ensuring that each of the approaches are fostered and developed whilst also ensuring that court hearings are available and accessible to those disputants who are unable to resolve their dispute, is one important objective of the broader dispute resolution system, which incorporates traditional court-based adjudication as well as ADR.

The development of protocols relating to assessment and screening, standards in relation to disputant power imbalance as well as obligations and requirements in respect of the style of disputant and representative engagement, have primarily been directed at supporting the referral to ADR processes outside the court system. Increased funding of ADR programs that are external to the courts, increased mandatory pre-filing ADR and an increased focus on ADR obligations have also been directed at supporting options outside the courts in the family dispute area and in selected civil dispute resolution areas.

Many of these changes occurring in the ADR area signal a shift away from a multi-door court model where ADR is utilised largely within courts, towards a more

1 Jeffrey A Parness, ‘American General Jurisdiction Trial Courts: New Visions, New Guidelines’ (2006) 55 *University of Kansas Law Review* 189, 189.

2 See *Supreme Court Act 1986* (Vic) s 24B which makes specific reference to judicial resolution conferences and supports this judicial role.

evolved multi-option model where ADR options are available within and outside courts and at all points in the life cycle of a dispute. The extension of court related ADR processes, as well as the closer integration of ADR approaches and judicial practice through ADR processes such as judicial conferences, are also responsive to this multi-option approach, which supports ADR use at a range of levels.

This article focuses on the reasons why this extension is appropriate and why judges should undertake settlement conferencing work in the civil justice context — not why they shouldn't — though the author accepts that there are issues with judges conducting settlement conferences that have been articulated elsewhere.³ In addition, it is not suggested that there are strong reasons to support judicial mediation⁴ — as distinct from judicial settlement conferencing.

In this regard, 'mediation' in this article is regarded as a separate and distinctly different process from judicial settlement conferencing. This approach accords with the definition and description of mediation in the Australian National Mediator Standards, as part of the National Mediator Accreditation System ('NMAS'). Judicial settlement conferencing ('judicial conferencing') is defined in this article as a process where:

A judge, who has been trained in interest based negotiation and conferencing processes, chairs a meeting of the parties and/or their representatives to discuss issues in dispute, develop options, consider alternatives and either attempt to reach an agreement or plan case management approaches or both. The process may be facilitative and advisory and the judge does not meet separately with the parties or their representatives although a judge may meet with all representatives in the absence of the parties.⁵

This definition, in keeping with variations in current judicial conferencing practice, is silent as to the location of the conference meeting. Notably, there can be significant variations in practice. For example, in some judicial conferences, a meeting may be held in open court (with or without transcript) or in a private meeting room. In addition, some judges may absent themselves from discussion relating to settlement options whilst others may not.

The above definition is also silent as to the topic of judicial disqualification. Some judges may disqualify themselves from hearing or dealing with a matter automatically after conducting a conference, others may continue to hear a matter 'with consent' and others still (particularly if the meeting has been held in open court) may continue to have a role in hearing the matter.

3 There are some reasons why judges should not engage in settlement conference work and more specifically in mediation. These reasons have been well articulated in: National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction — A Report to the Attorney-General* (Commonwealth of Australia, 2009) 104; Chief Justice Marilyn Warren, 'Should Judges Be Mediators?' (Paper presented at the Supreme & Federal Court Judges' Conference, Canberra, 27 January 2010).

4 Whilst a number of commentators have written on the topic of judicial mediation, there has been less focus on the notion and process of judicial conferencing.

5 This definition has been developed by the author and used by her in judicial education programs conducted by the author for the Judicial College of Victoria.

Perhaps the two most important features of the definition of judicial conferencing above are, first, that the judge does *not* hold a private meeting with each of the parties and their representatives (this is, of course, a common feature of most forms of mediation) and second, that the process is mainly facilitative but may have an advisory component (mediation under the NMAS assumes that a facilitative process will be used although there is scope in defined circumstances for a blended process).⁶

Using this definition of judicial conferencing and accepting some of the variations within it, why should judges conduct settlement conferences? There are at least five reasons why judicial conferencing should take place and these are set out below.

II JUDGES SHOULD CONDUCT JUDICIAL CONFERENCES IN ORDER TO BE RESPONSIVE TO THE NEEDS AND PREFERENCES OF DISPUTANTS

Research in Australian courts that has considered litigant preferences for different forms of dispute resolution has found that a sizable proportion of litigants who end up in a full judicial hearing are satisfied with the process they experience.⁷ They may not necessarily be satisfied with the outcome, but litigants can be as satisfied or almost as satisfied with the hearing processes as they are with forms of ADR such as mediation. However, litigants who proceed to a full judicial hearing often express significant dissatisfaction with the cost of litigation and the delays experienced. In addition, as the federal government report *A Strategic Framework for Access to Justice in the Federal Civil Justice System* has noted, many litigants cannot afford either to commence or to continue with court proceedings. Research on the demographics of those using the higher civil court system suggests that many disputants will not access higher courts because the system is too complex, costly or confusing.⁸

It is for these reasons, that policy-makers and others are increasingly supporting pre-litigation or pre-filing forms of ADR. However, it is also accepted by policy-makers and commentators that having an accessible, efficient and effective court system, where individuals and others can exercise their rights, is an essential component of our democratic society that supports the rule of law. As a result, many ADR processes are designed to support the resolution of disputes that are within courts, thus enabling the resolution of disputes at a range of levels.

6 See s 2(7) of the NMAS Practice Standards: Tania Sourdin, 'Australian National Mediator Accreditation System — Report on Project' (Report, NMAS, September 2007) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134622>.

7 See Tania Sourdin, *Evaluating Mediation in the Supreme and County Courts of Victoria* (Department of Justice, 2008) 117–19; See also research comparing dispute resolution processes in the Supreme and District Courts of NSW in Tania Sourdin and Tania Matruglio, *Evaluating Mediation — New South Wales Settlement Scheme 2002* (La Trobe University, University of West Sydney, 2002) 63–7.

8 See Access to Justice Taskforce, Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) Part 1, ch 2.

Why then, if there is a plethora of ADR options that already exist outside courts and through court referral mechanisms, should judicial settlement conferencing be supported? One of the major reasons is that this form of ADR can provide additional opportunities for litigants to achieve fair outcomes at a more proportionate cost. In addition, judicial conferencing processes may offer litigants an experience of the court system that supports better understanding of the courts and also supports the future interests and relationships between disputants.

In our multicultural society it may also be that disputants expect and appreciate judges taking on this broader role in relation to dispute resolution. In this regard, it is clear that in many countries litigation has often been combined with forms of mediation and judges have for many years combined adjudicative, advisory and facilitative functions, in relation to societal and individual needs. The combining of functions also appears to be more readily acceptable in many European countries where inquisitorial rather than adversarial systems operate in the civil and criminal setting.⁹

In some countries the ‘combining’ of functions has been the subject of spirited debate that has been focused on court objectives as well as a close examination of the role of courts and judicial officers. In such countries the relationship between courts and ADR processes has undergone a significant evolution in recent years. In Australia there has also been a significant evolution with a range of ADR processes now linked in some way to every court and tribunal. Within Australia, as in Canada and many European countries, there have also been fundamental shifts in the judicial role and a small number of judges have embraced ADR as integral to the judicial function and the broader objectives of the justice system.

Judicial conferencing in this context involves a redefinition of the judicial role in response to changing societal needs. In this regard, whilst the judicial role does not require judges to be ‘popular’, should judges respond in some way to changing expectations about their role and the way in which they communicate with the public? There is a real distinction that can be made between ‘popularity’ and ‘responsiveness’, as the latter means that the judicial role must always reflect on and be responsive and attentive to changing social needs.

The debate about whether these shifts are appropriate has tended to focus on the role of the judicial function within society. For example, as noted by the Australian Law Reform Commission (‘ALRC’) in its review of the federal system of litigation, some commentators consider that the objectives of adjudication — rule making and determination — and the more general objectives of dispute resolution (broadly defined) are not compatible.¹⁰ Theorists who adopted this view more than two decades ago considered that the settlement of disputes and

9 See, eg, Gefördert von der Klosterkammer Hannover, *Court Annexed Mediation Project in Lower Saxony* (2002) Mediation <<http://www.mediation-in-niedersachsen.de/English/english.html>>. Notably, judges undertaking this work cannot offer advice ie ‘[w]hen acting as judge-mediators, the participating judges may neither adjudicate the disputes nor offer legal advice’: at 4.

10 Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No 20 (1997) 10.

the use of dispute resolution processes other than court-based trial could weaken the foundations of judicial and social systems.¹¹

The ALRC, in its inquiry into the adversarial system in the late 1990s, also noted that constitutional theory provides that the court system plays an integral role in the government of democratic societies.¹² Courts provide an open forum to which citizens may come to assert or establish legal rights and to receive an enforceable determination of these rights. The process is subject to review through public scrutiny and a hierarchy of appellate courts. Courts therefore provide a medium through which law is created, explained and applied. From this perspective, ADR processes and proceedings can be seen as ‘threatening the essential role of judges which is “not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to values embodied in authoritative texts such as the Constitution and statutes”’.¹³ This perspective suggests that ADR processes should be conducted separately and independently of the litigation and court system.

However, arguably judicial conferencing, at least in its more public forms (where meetings are held in open rather than behind closed doors) does not threaten core values relating to the transparency of judicial proceedings that are found in the *Constitution* and elsewhere (this subject is discussed in greater detail in Reason III B below). At the same time, judicial conferencing may enable judges to more closely attend to litigant needs and expectations about their role — that is, the redefined judicial role may include that of a facilitator who will listen to discussion and assist parties to resolve their differences if at all possible. This redefined role may attend to and reflect societal views of an ‘ideal judge’.

Integrated forms of ADR may also have an important role to play within courts in increasing litigant satisfaction and promoting a more positive cooperative culture within courts, as well as helping courts deal with their caseloads. In a similar vein, ADR approaches within courts can promote the voice of the disputant and enhance satisfaction and acceptance of courts and outcomes. Canadian commentators, Professor Andrew Pirie and the Hon Hugh Landerkin, state:

A cultural sea-change is occurring in our court systems today. With ever-increasing court filings, the party-party controlled adversarial model of dispute resolution is losing its controlling sway. Courts everywhere now appreciate the positive influences that conflict analysis and management can have on their processes. Additionally, courts recognize what social psychologists have discovered in the recent past: the greater the voice given

11 Owen Fiss, ‘Against Settlement’ (1984) 93 *Yale Law Review* 1073.

12 Australian Law Reform Commission, above n 10, [3.5].

13 *Ibid* [3.8], citing Owen Fiss, ‘Against Settlement’ (1984) 93 *Yale Law Journal* 1073, 1085.

to disputants in court litigation, the greater the satisfaction and acceptance of the results from court systems, regardless of what the results may be.¹⁴

Judicial conferencing can provide disputants with a greater opportunity to speak and be heard than more conventional litigation processes where more formal and less responsive conversational rules apply. Enabling disputants to participate and be heard is important in terms of whether a dispute is resolved or not and in terms of whether there is compliance with outcomes. There is some evidence that, in general, settlements that are reached as a result of ADR processes are more likely to be complied with and be 'lasting'. On this basis, and provided that the judicial conferencing process is facilitative, it may be that the outcomes that are reached as a result of the conferencing are not only more satisfying but are more likely to be 'effective' in that they will be lasting.

Some commentators have suggested that judges should conduct settlement conferences because the work that comes before courts has changed and there is a 'crisis in the authoritative judicial order, as the classical system is proving to be less ideal for, or even ill-suited to, a growing percentage of disputes brought before it.'¹⁵ This view suggests that courts need to change and explore additional processes in order to be responsive to the forms of litigation that exist today.

In addition, it has been suggested that there is a growth in litigation and that courts need to adapt to be able to cope with this growth. It is arguable whether there has been a growth in civil litigation, although many researchers have suggested that the matters that are now litigated tend to be more complex and may involve larger numbers of parties. In this regard, judicial conferences may assist judges in dealing with these more complex disputes and enable issues to be narrowed and defined. It is also clear from research conducted in other jurisdictions that a judge's involvement in settlement discussions is likely to improve chances of resolution,¹⁶ which may address problems of delay.

Others argue that judicial time should be reserved for adjudicative work. This argument suggests that judges are, on the whole, a scarce resource within Australia, whilst private mediators (some of whom are former judges) are often available to do ADR work without delay (and without public cost). In this regard, judicial settlement conferences may be viewed in a more favourable light than mediation because the judicial conference process may not cost litigants as much as private mediation (though they may still need to pay for their legal representatives) nor take as long as it may tend to be more focused on legal rights and interests and therefore may not impact upon judicial time in the same way that mediation work

14 Judge Hugh Landerkin and Andrew Pirie, 'Judicial Dispute Resolution 2001: A Space Odyssey or Modern Reality Check' (Paper presented at the Asia Pacific Mediation Conference, University of South Australia, 29 November–1 December 2001), cited in Valerie Danielson, *Judicial Dispute Resolution, an Examination of the Court of Queen's Bench Judicial Dispute Resolution Program* (Masters Thesis, Osgoode Hall Law School, York University, 2007) 30 n 93.

15 Louise Otis and Eric H Reiter, 'Mediation by Judges: A New Phenomenon in the Transformation of Justice' (2006) 6(3) *Pepperdine Dispute Resolution Law Journal* 351.

16 Danielson, above n 14, 68 n 238, citing James A Wall Jr and Dale E Rude, 'The Judge's Role in Settlement: Opinions from Missouri Judges and Attorneys' [1988] *Journal of Dispute Resolution* 163, 164–5.

may. Conferences may also clearly save judicial and litigant time and costs by assisting courts to respond to the changing nature of litigation within our courts and by enabling judges to assist unrepresented litigants and disputants in complex matters to identify, narrow and discuss issues.

Justice Bruce DeBelle has suggested that courts may become redundant and that if they do not 'equip themselves with techniques to resolve disputes by means in addition to litigation ... there is a risk that courts, not external mediators, will be seen as alternative dispute resolvers.'¹⁷ This perspective draws upon the very different ADR environment that exists within Australia where ADR is prevalent outside the courts and is used to resolve a significantly greater number of disputes than those that proceed to a hearing. This concern is related to a fear that in the absence of integrated ADR processes such as judicial conferencing, the central role of the courts will be eroded and the civil justice system will become a second class system as wealthier litigants use private adjudication and external ADR rather than slower public adjudication. These issues have generally been discussed in the context of ADR processes that include and focus upon private adjudication (or 'rent-a-judge') processes.

Each of these views assumes that courts need to adapt and use innovative processes such as judicial conferencing to ensure that judges and courts remain relevant to and responsive to the needs of disputants and society. Other commentators have suggested that more integrated court-based ADR work is essentially compatible with the changing nature of our society and recognises that disputants from different cultures may have different expectations of court-based processes and the judicial role.

III JUDICIAL SETTLEMENT CONFERENCES SUPPORT AND ARE COMPATIBLE WITH CIVIL JUSTICE OBJECTIVES

As noted previously, one recurring issue in relation to the integration of ADR and the litigation system is related to whether judicial conferencing processes are generally compatible with civil justice objectives. The ALRC identified five key objectives of the federal civil litigation system in performing the roles of rule making, determination and dispute resolution in Australia.

Clearly, judicial conferences may assist with the objective of dispute resolution. However, one issue is whether the conferencing processes can prevent or have a detrimental impact on other important civil justice objectives. For example, the increasing use of judicial conferencing processes may mean that the number of disputes that proceed to trial, allowing a public articulation of values, is reduced. However, is this objective relevant when the reality is that most civil disputes

¹⁷ Justice Bruce DeBelle, 'Should Judges Act as Mediators' (Paper presented at the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1-3 June 2007), citing Henry Jolson, 'Judicial Determination: Is It Becoming the Alternative Method of Dispute Resolution?' (1997) 8 *Australian Dispute Resolution Journal* 103, 104.

are resolved through processes such as negotiation (structured or not) prior to entry into the court system? Also, conferencing processes may be used to support case management functions while others may be blended with adjudicative functions.¹⁸ These differences mean that judicial conferencing processes can be complementary to the specific objectives of adjudicatory processes¹⁹ as well as support trial processes and the public articulation of precedent in respect of significant issues.²⁰

What are the objectives of the civil justice system? Both the ALRC and the National Alternative Dispute Resolution Advisory Council ('NADRAC') have developed objectives in the past decade. The question is whether judicial conferences meet and support these objectives. Each objective is considered in the context of judicial settlement conferences below.

A Objective 1 — The Process Should Resolve or Limit the Dispute

This objective has been proposed by NADRAC in respect of ADR processes.²¹ No similar objective can be found in the work of the ALRC. This perhaps recognises that adjudicatory systems may not resolve disputes but merely settle or determine them. The focus of most adjudicatory systems is not on resolving underlying causes of conflict or tension. In this sense, the broader adjudicatory framework and litigation system is not oriented towards resolving disputes but rather towards settling or determining them. The objective also responds to the use of ADR processes as part of a case management approach where processes are used to ensure that issues that may proceed to a hearing are defined, mapped and procedurally prepared.

There is no research as yet within Australia that tests how or whether judicial conferences meet this objective. However, some research from both Canada²² and New Zealand²³ suggests that judicial conferencing can assist in settling disputes and narrowing any remaining issues. Judicial conferencing may be more focused

18 See, eg, *New South Wales Supreme Court Rules 1970* (NSW) pt 72 — referral to a referee may take the place of part of a dispute.

19 Cyril Glasser and Simon Roberts, 'Dispute Resolution: Civil Justice and its Alternatives' (1993) 56(3) *Modern Law Review* 277.

20 However, such criticisms and the fundamental differences between the role of many ADR processes and traditional trial adjudication highlight important issues about whether there are any disputes that ought to be tracked into adjudicatory processes and not referred to judicial conferencing. In the United States, debate has also focused upon the vacating of court judgments with the consent of parties. This feature of the system has attracted concern in appellate and lower courts in the United States, where litigants are perceived to be overturning the courts' authority. See Judith Resnik, 'Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century' (1994) 41 *UCLA Law Review* 1471.

21 NADRAC, *A Framework for ADR Standards* (Attorney-General's Department, 2001) 13–14.

22 Danielson, above n 14.

23 See Judge Colin Doherty, 'The Context and Methodology of Judicial Settlement Conferencing in New Zealand' (Paper presented at the Judicial College of Victoria Workshop JDR Skills: Judicial Settlement Conferencing, Melbourne, 9–10 October 2009).

on settlement, rather than the broader concept of resolution, however, as a process it still appears to support this first objective.

B Objective 2 — The Process Should Be Considered by the Parties to Be Just (or Fair)

The ALRC has noted that one criterion or objective could be that the process be ‘just’. It has also noted that the term ‘justice’ resists easy definition. There are a number of separate aspects of justice that can be considered. Firstly, justice can be considered by reference to external criteria — distributive justice. Secondly, justice can be measured by reference to the parties’ own evaluation of the process — procedural justice. The consistent application of rules and procedural requirements to the passage of a dispute through the litigation system may result in ‘just’ or ‘fair’ process or adjudication, whereas participation by the parties (not necessarily their legal representatives) may be essential to ensuring that parties *perceive* the process and outcome as just or fair (for example, via ADR processes such as judicial conferencing).

It is often said that mediation and other processes are viewed as ‘more fair’ by disputants. However, the view that disputants do in fact perceive the mediation process as more fair has been the subject of debate. According to some studies, ‘procedures are viewed as fairer when ... “process control” is vested in the disputants.’²⁴ However, other research has identified additional relevant features.²⁵

In terms of judicial conferencing, one issue that arises in relation to this objective is whether judges who conduct settlement conferences should comment if, in their view, any settlement reached is unfair. This issue has previously been considered in a study assessing the role of Australian federal court judges in dispute settlement. The study found judges to be undecided on the issue of whether or not their participation in a settlement process produced a fair resolution of disputes. Of interest, however, was the finding that the majority of judges in that study believed that the judge ‘should take no action’ and ‘should not inform the parties if he or she considers the settlement agreement unreasonable.’²⁶

Many supporters of judicial conferencing would suggest that having a judge conduct the process may make the process seem ‘more fair.’ In particular it could be suggested that outcomes may be fairer if judges do make comments on the reasonableness of any proposed settlement. From the perspective of a litigant, there may be an expectation that any settlement has the imprimatur of a judge and that therefore, distributive or substantive issues will have been considered. Notably, judicial conferencing, as compared to judicial mediation, has some additional

24 Robert J MacCoun, E Allan Lind and Tom R Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts* (Rand, 1992) 100.

25 See Tania Sourdin and Nicola Balvin, ‘Mediation Styles and Their Impact: Lessons from the Mediation in the Supreme and County Courts of Victoria Research Project’ (2009) 20(3) *Australasian Dispute Resolution Journal* 142.

26 Annesley H DeGaris, ‘The Role of Federal Court Judges in the Settlement of Disputes’ (1994) 13 *University of Tasmania Law Review* 217, 229.

safeguards to support the attainment of procedural and distributive justice. In particular, in mediation, parties may meet separately with the mediator.²⁷ This is not the case in many judicial conferencing models. This means that the view of the judge as to the reasonableness or otherwise of a settlement is not influenced by matters raised in private and in the absence of the other party which may have an impact upon whether participants consider the process to be ‘fair’.

C Objective 3 — The Process Should Be Accessible

The ALRC noted that the concept of accessibility implies that:

- appropriate dispute resolution processes exist and are available
- barriers to participation in the process, such as cost, are reduced or serve to channel parties into more appropriate forms of dispute resolution
- parties and their advisers understand the process, their role in the process, and the reasons for the outcome.²⁸

Within Australia, the various dispute resolution processes that are available to individuals and organisations are funded differently and access to processes is limited by a variety of other factors including geography, gender, employment and information availability. The different funding arrangements mean that much of the ADR system is not funded or supported by the government structures. Judicial conferencing can provide litigants with an accessible form of ADR, particularly if there are no cost access issues. In the higher courts of Victoria, for example, where much of the ADR work is done by the professionals at a professional cost, judicial conferencing can provide an alternative to a more expensive self-funded private ADR system. Knowledge and understanding of judicial conferencing processes can also assist judges to promote other forms of ADR and educate litigants and their representatives in ADR use more generally, which in turn could be said to promote access by supporting a better understanding of litigation and dispute resolution.

D Objective 4 — The Process Should Use Resources Efficiently and Promote Lasting Outcomes

The ALRC has noted that:

Efficiency can be viewed from a number of perspectives including

- the need to ensure appropriate public funding of courts and dispute resolution processes that avoid waste

²⁷ Sourdin, above n 7.

²⁸ Australian Law Reform Commission, above n 10, 10.

- the need to reduce litigation costs and avoid repetitive or unnecessary activities in case preparation and presentation
- the need to consider the interests of other parties waiting to make use of the court or other dispute resolution process.²⁹

Efficiency can also refer to long-term gains, rates of compliance and reducing the broader costs of unresolved conflict (for example loss of profit and loss of opportunity costs). Using broader notions of efficiency, judicial conferencing processes can arguably meet efficiency objectives more readily than conventional litigation or non-integrated processes. In addition, even if judicial conferencing may increase public expenditure, it may decrease private expenditure as well as direct and indirect costs over time. The ALRC also proposed an objective that '[t]he process should be timely.' The ALRC has said that timeliness relates to minimising:

- the delay between the commencement of proceedings and the hearing of the dispute having regard to the complexity and features of the dispute
- the time taken to resolve the dispute once the resolution process has commenced
- the time which parties, their legal representatives, witnesses, judicial officers and others must devote to the process.³⁰

To some extent timeliness is also related to the effective use of resources. However, judicial conferencing may reduce delay in referral. The conferencing process may also result in faster referral to external as well as internal ADR. Research concerning mediation in the Supreme and County Courts of Victoria suggests that there could be considerable efficiency benefits to both the parties and courts.³¹

E Objective 5 — The Process Should Achieve Outcomes That Are Effective and Acceptable

The ALRC proposed that 'the process should be effective', which can be compared with the NADRAC core objective: 'achieves acceptable outcomes'. These objectives are clearly interrelated as unless an outcome is accepted by the parties, and in any broader context, it is unlikely to be effective. This is also related to the objective noted by NADRAC in respect of lasting outcomes.

The ALRC has noted that:

Effectiveness implies that

²⁹ Australian Law Reform Commission, above n 10, [3.14].

³⁰ Ibid [3.15].

³¹ Sourdin, above n 7.

- the process should ensure, or at least, encourage a high degree of compliance with the outcome
- at the conclusion of the process, there should be no need to resort to another forum or process in order to finalise the dispute
- the process should promote certainty in the law.³²

It may be that effectiveness can be judged by a range of sub-criteria when one considers judicial conferencing processes as compared to traditional adjudicatory processes. However, one key issue is whether these processes promote compliance and certainty. Compliance with outcomes is often perceived as a significant advantage of facilitative dispute resolution processes such as mediation.³³ Processes that support agreement making are often more likely to promote compliance although this can be closely linked to the quality of the ADR process.³⁴

In terms of promoting certainty in the law there are a number of issues that some commentators have raised about judicial mediation (rather than judicial conferencing). One fear is that judicial mediation could impact negatively upon perceptions of the court and promote uncertainty, as the relationship between judges and litigants could be inappropriate and could lead to situations where undue influence might arise.

The lack of private meetings in judicial conferencing processes can mean that these issues are far less likely to surface than in a mediation setting. However, issues relating to 'hidden influence' and the relationship and the extent of any conversation between judges who may conduct a conference and those who may hear a dispute, may be relevant. In this regard, there have previously been concerns expressed about the relationship between internal court-based mediators and judicial officers.

In *Ruffles v Chilman & Hamilton*,³⁵ an application was made for the trial judge to disqualify himself on: 'The basis that the plaintiff was of the opinion that because of comments made by the Deputy Registrar (following an unsuccessful mediation), the trial judge had already judged the case.'³⁶ In this regard, it is clear that judges who conduct judicial conferences that are not held in open court, must be trained in and alert to the obligations and ethical issues that can arise in judicial conferencing. In many respects these are similar to the obligations that apply when they are conducting sensitive hearings or those within a closed court. In some ways, these conventions, obligations and requirements prepare judges for

32 Australian Law Reform Commission, above n 10, [3.16].

33 There are many research reports that touch on this topic. The initial research on this topic that is most widely reported is Craig McEwen and Richard Maiman, 'Mediation in Small Claims Court — Achieving Compliance through Consent' (1984) 18 *Law and Society Review* 1, 11.

34 Sourdin and Balvin, above n 25.

35 (1997) 17 WAR 1 ('*Ruffles v Chilman*').

36 David Spencer, 'Case Note' (1997) 8(4) *Australian Dispute Resolution Journal* 308.

the task of judicial conferencing and reduce the likelihood of a *Ruffles v Chilman* situation surfacing between judges.

IV JUDICIAL SETTLEMENT CONFERENCES ARE COMPATIBLE WITH AND SUPPORTIVE OF THE JUDICIAL ROLE

Many Australian judges appear to draw a distinction between acceptable pre-trial judicial activism, which facilitates negotiation by ensuring that the issues are clear and that all the evidence is on the table, and activism where the judge expresses opinions about the merits of the case before those merits have been adequately canvassed.³⁷ The key issue in discussions about active judicial management suggests there are limits on the extent to which judges can work towards settlement before trial.

Judicial activism in the settlement process appears to be more acceptable in the United States than in Australia.³⁸ In the United States, it is not considered so radically separate from adjudication but as part of the same process and '[l]itigation and negotiation are not viewed as distinct but as continuous³⁹ processes. It has been said that '[m]ost American judges participate to some extent in the settlement of some cases before them. Indeed, this has become a respectable, even esteemed, feature of judicial work.⁴⁰

In the United States it has been noted that there is an increasing pressure upon courts and judges to do 'more' to resolve cases and to actively pursue settlement.⁴¹ Some commentators have suggested that litigation has been transformed so that "'the trial" has ceased to be the centrepiece of litigation'.⁴² In Canada,⁴³ judges are actively engaged in Judicial Dispute Resolution ('JDR'), which draws upon mediation skills as well as mediation processes.

Maintaining a rigid distinction in Australia between negotiation and litigation processes may be counter-productive in that it presents a barrier to the adoption of more flexible and facilitative processes in litigation. However, active promotion of settlement by judges is perceived to be fraught with danger, including the risk that parties are pressured to settle by judges who have formed an impression of

³⁷ DeGaris, above n 26, 217.

³⁸ Stephan Landsman, American Bar Association, *Readings on Adversarial Justice: The American Approach to Adjudication* (West Publishing, 1988) 23.

³⁹ Andrew Rogers, 'Judges in Search of Justice' (1987) 10 *University of New South Wales Law Journal* 93, 104.

⁴⁰ Marc Galanter, 'The Emergence of the Judge as a Mediator in Civil Cases' (1986) 69(5) *Judicature* 257.

⁴¹ Resnik, above n 20, 1528–30.

⁴² See Judith Resnik, 'Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement' (2002) *Journal of Dispute Resolution* 155, 157; Glasser and Roberts, above n 19, 279. This notion is also linked with the vanishing trial concept that is explored in Robert Burns, *The Death of the American Trial* (University of Chicago Press, 2009).

⁴³ Hugh Landerkin and Andrew Pirie, 'What's the Issue? Judicial Dispute Resolution in Canada' (2004) 22(1) *Law in Context* 25.

the case based on incomplete evidence. One view is that public confidence in the integrity and impartiality of the courts may be reduced by judicial involvement in settlement discussions, particularly if parties are permitted to meet with the judge separately (see discussion below),⁴⁴ a procedure that may occur in United States and Canadian courts as well as other countries.⁴⁵

Whilst the view that mediation should be used more readily by courts and tribunals has attracted considerable support within Australia, there has not been widespread support of judicial mediation. However, Australian courts have been eager to indicate that ADR processes are of central importance to the court function. The former Chief Justice of the Supreme Court of New South Wales, for example, has noted that '[m]ediation is an integral part of the Court's adjudicative processes and the "shadow of the Court" promotes resolution.'⁴⁶ However, this positive view of mediation does not, as has been noted, extend to judicial mediation.

Often the issues relating to the relationship between ADR and the litigation system are framed by the question: 'should judges mediate?' There has been some discomfort within Australia about the notion of judges acting as mediators and discussion has often focused on this issue. This discomfort does not arise however when judges adopt a 'facilitative role' — essentially where no private sessions take place between litigants or their advisers and the judge.

The discomfort surrounding judges adopting a role as a mediator has arisen in response to a number of concerns. First, there is reluctance by some judges in some jurisdictions to mediate or even consider that mediation is part of an appropriate judicial function. This concern is reflected in a narrower view of the objectives of judicial processes — creating, explaining and applying the law. However this perspective is neither uniform nor fully articulated. For example, James Spigelman, former Chief Justice of the Supreme Court of New South Wales, anticipates that there will be no situations where judges of the New South Wales Supreme Court will be involved in mediations.⁴⁷ This approach would appear to be consistent with some other jurisdictions within Australia.⁴⁸ However, in contrast, in the federal jurisdictions, judges and tribunal members may be more likely to act as mediators and there has been no policy direction to suggest that they should not. Indeed, the Chief Justices' Council Declaration has stated that there are circumstances where it is appropriate for a judge to mediate.⁴⁹

44 Sir Laurence Street, 'The Courts and Mediation — A Warning' (1991) 2 *Australian Dispute Resolution Journal* 203, 203.

45 For example, Japan.

46 James Spigelman, 'Mediation and the Court' (2001) 39(2) *Law Society Journal* 2, [3].

47 Ibid [6].

48 Victoria is an exception where full judicial mediation protocols have been recently developed.

49 Spigelman, above n 46, 2.

For example, in both the Australian Federal Court and the Administrative Appeals Tribunal ('AAT'), judges and members can and have acted as mediators.⁵⁰ In the Federal Court, judges have also acted as evaluators. Registrars have largely conducted the mediations under the Federal Court program although judges have also (more rarely) conducted mediation conferences.⁵¹ In the AAT, only members, rather than other staff, have conducted mediations.⁵² Where judges or members conduct mediation, they will generally have no further involvement in the dispute should the matter fail to resolve.

Additionally, in the United States, the discomfort with the combining of judicial and mediator functions has arisen in response to the style of mediation adopted by some judges. 'Muscle', 'rhino' or 'rambo' mediation styles that involve a judge 'seeking to extract settlement offers that mirror the judge's analytical perception of the dispute'⁵³ sit uncomfortably with facilitative and other models of mediation that are focused on party self-determination and empowerment.

These concerns may be linked to other variations in the judicial role. For example, some judges may use 'settlement techniques' which may range from assertive 'arm twisting' to gentle suggestions in mediation processes. Whilst these concerns may also arise in relation to judicial conferencing, a number of factors suggest that they may not be as problematic. In judicial conferencing for example, judges undertaking conferencing training are normally required to consider the power that they may bring into the conferencing environment and the ethical issues that arise, and to use a model of conferencing that allows facilitative rather than evaluative processes. In addition, where conferences are conducted in an open court environment, these concerns may be alleviated by the capacity to make complaints about judicial conduct or to apply to set aside a settlement that has resulted from a conference.

A No Private Meetings with the Parties

In terms of judicial mediation, what causes most concern is the suggestion that a judge will meet privately with a party in dispute. In this regard, judicial conferences that involve all parties (and where no 'private' session takes place) do not raise such concerns. Sir Laurence Street has stated:

50 Other examples have occurred in the Australian state court system — the *Industrial Relations Act 1996* (NSW) provides for a member of the Commission, a judge, to conduct the mediation. The ALRC has noted that judges have acted as mediators in the Federal Court — see Australian Law Reform Commission, above n 10, 85 [9.17].

51 Michael Black, 'The Courts, Tribunals and ADR: Assisted Dispute Resolution in the Federal Court of Australia' (1996) 7 *Australian Dispute Resolution Journal* 138. The former Chief Justice of the Federal Court of Australia noted that 97 per cent of mediations conducted within the court have been conducted by registrars.

52 National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution in the Civil Justice System, Issues Paper* (Commonwealth of Australia, 2009) 14 [4.16].

53 Edward Brunet, 'Symposium: Perspectives on Dispute Resolution in the Twenty-First Century: Judicial Mediation and Signaling' (2003) 3 *Nevada Law Journal* 232, 234.

I reiterate my acknowledgment of the usefulness of the conventional settlement or pre-trial conference conducted in open court in the presence throughout of both parties. This stands on a different footing. It does not infringe basic principles nor does it involve the grave threats inherent in a court mediation.⁵⁴

The notion of judges acting as ‘evaluators’ or chairing conventional settlement or conciliation conferences without private meetings and in open court, may therefore be acceptable to those who consider mediation to be inconsistent with the judicial role. An early and frank discussion chaired by a judge can assist in prompting settlement in some disputes. This can be desirable in many kinds of matters, provided that the judge has no further contact with the dispute and that certain standards are observed.⁵⁵

B There Are No Constitutional Impediments to the Judicial Function of Conferencing

Many commentators have focused on the constitutional impediments to judges operating as mediators.⁵⁶ Such arguments have focused on the nature of mediation and the constraints on federal judges that may arise as a result of Chapter III of the *Australian Constitution* and more particularly the case law that has interpreted the *Constitution*. There are two basic arguments made in relation to judicial mediation that will be considered below. First, that judicial mediation is incompatible with the *Constitution* and that this incompatibility doctrine impacts upon the function of judges such that they could never be permitted to mediate. Second, that though there may be incompatibility, specific legislative action may mean that judges can mediate while exercising mediation as a non-judicial function.

The characteristics of judicial conferencing make it far less likely that a constitutional impediment argument could be raised against it. In the alternative, if such an argument was raised in respect of legislation relating to non-judicial functions, it would be unlikely to succeed given that judicial conferencing does not offend constitutionally supported notions of a transparent, impartial due process where judges do not prejudge issues. As conferencing does not involve private meetings and is focused on facilitation rather than evaluation, it is arguably compatible with the judicial function.

The ‘incompatibility principle’ or ‘condition’ may arise ‘in the performance of non-judicial functions of such a nature that the capacity of a judge to perform his or her judicial functions with integrity is compromised or impaired.’⁵⁷ Justice Michael Moore has argued that while there may be a constitutional impediment

54 Street, above n 44.

55 Michael Moore, ‘Judges as Mediators: A Chapter III Prohibition or Accommodation?’ (2003) 14 *Australian Dispute Resolution Journal* 188, 190.

56 See Phillip Tucker, ‘Judges as Mediators: A Chapter III Prohibition?’ (2000) 11 *Australian Dispute Resolution Journal* 84.

57 *Grollo v Palmer* (1995) 184 CLR 348 (Brennan CJ, Deane, Dawson and Toohey JJ).

argument against judges mediating, '[a]t the heart of the judicial function is the resolution of disputes or controversies'.⁵⁸ Clearly there are some serious issues about whether or not the role of 'mediator' can be regarded as incompatible with the judicial function. The situation is even more complex when judicial conferencing is considered for the reasons noted above.

In addition, it is clear that in some Australian jurisdictions the issue of incompatibility will be influenced by specific legislation that enables judicial mediation. For example, in Victoria, judicial mediation and conferencing, as well as other forms of dispute resolution are expressly encouraged by legislation such as the *Civil Procedure Act 2010* (Vic). There are significant issues about whether there can be a question of incompatibility in these state courts given that there is a clear legislative direction supporting these wider forms of judicial dispute resolution and given that the issues relating to separation of powers doctrine may be very different in a state context.

In any event, a consideration of the incompatibility doctrine requires a consideration of its underlying purpose — to ensure that the fundamentals of the separation of powers doctrine are not undermined.⁵⁹ Justice Moore suggests that one has to consider the constitutional purpose of Chapter III as well as the objectives of the court system in examining these issues and concludes that the federal judicial role may not be undermined by judges acting as mediators. However, there is no consensus on the issue of whether the federal judicial role can or should include the role of 'mediator' within Australia or whether Chapter III of the *Constitution* requires that judges must exercise settlement functions in a particular way.

A constitutional impediment issue may not only relate to the use of private sessions (where one party is absent) and the impact that this may have on procedural and natural justice, but also to the location of a conference — for example whether the conference is held in an open court or a meeting room. This issue may be relevant to the consideration of the incompatibility doctrine as far as due process and judicial conferencing is concerned. However, court proceedings have historically been conducted in a range of settings and it is not the location that is relevant but the 'openness' of the process.

Clearly, judicial conferences may be less likely to offend any due process requirements if they are conducted in an open court (as is currently the case with some judicial conferencing processes in the County Court of Victoria). Unlike mediation, which is ordinarily conducted as a confidential and private process, judicial settlement conferences that do not involve private meetings with one or the other party can take place within an open court setting. Notably, in the decision of Gaudron J in *Re Nolan; Ex parte Young*, issues relating to due process and open inquiry were examined and 'open and public inquiry' was seen as an essential characteristic of procedural justice in terms of constitutional requirements. Her Honour noted that what was required was

⁵⁸ Moore, above n 55.

⁵⁹ *Ibid.*

open and public inquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.⁶⁰

Another factor that is relevant is linked more directly to the due process issue between the parties than the public importance of open proceedings and the protections that these may offer. In this regard, the interpretation of Chapter III of the *Constitution* ensures that both procedural rights and perhaps some substantive rights are protected. Procedural rights relate to appeal and related rights and also to natural justice issues. In *Leeth v Commonwealth*, Mason CJ, Dawson and McHugh JJ held:

It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.⁶¹

However, the interpretation of what is inconsistent is clearly not static. In hearings for example, proper intervention by a judge is now regarded as appropriate conduct as noted by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Johnson v Johnson*.⁶² There have been significant shifts in the judicial interpretation of what may be permitted in the context of case management and the articulation of the judicial role has been expanded to include significant levels of intervention by judges.⁶³

Recent case law and legislation in relation to permissible levels of intervention in respect of case management, suggest that the interpretation of the parameters of the judicial function may be influenced by overarching objectives, as defined in legislation, as well as by the changing nature of modern civil litigation. These factors make it less likely that judicial conferencing will be considered to be ‘inconsistent’, particularly if conferencing takes place in the context of judicial case management functions and also given the overarching objectives expressed in the civil procedure reforms that have been enacted federally and in a number of Australian states.

C There Are No Bias Concerns

The bias rule is focused on ensuring that decision-makers approach a dispute with a fair and unprejudiced mind. Conducting a settlement conference and then

60 *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496. McHugh J also noted that ‘[o]pen justice is the hallmark of the common law system of justice and is an essential characteristic of the exercise of federal judicial power’: *Grollo v Palmer* (1995) 184 CLR 348, 379.

61 (1992) 174 CLR 455, 470.

62 (2000) 201 CLR 488.

63 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 213 [99]. See also Justice Clyde Croft, (Speech delivered at the Commercial Court CPD and CLE Seminar — *Aon Risk Services Australia Ltd v ANU* [2009] HCA 27: What Does This Mean for Litigation and How Will it Affect Trial Preparation?, Owen Dixon Chambers, Melbourne, 19 August 2010) <<http://www.austlii.edu.au/au/journals/VicJSchol/2010/14.pdf>>.

hearing a matter could raise issues of bias and allegations that there has been a denial of natural justice.

Issues associated with a judge mediating a matter and then proceeding to hear that matter or a related dispute have been specifically considered in Australia and are very different from the issues that emerge in respect of conferencing. In *Duke Group (in Liq) v Alamein Investments Ltd*⁶⁴ this issue was considered by Justice DeBelle, in relation to a successful application to disqualify himself from hearing a matter. The application related to a mediation conducted nine years prior to the court hearing that involved the same plaintiff and might involve similar issues in relation to fiduciary duties. His Honour had 'no memory of the details', but disqualified himself on the basis that '[a] reasonable bystander might apprehend that, in the course of meeting the directors separately, I might have received information which would cause me to have a view about the merits of the claim against the directors which might affect the exercise of my discretion...'

In considering issues relating to bias Justice DeBelle noted that:

When a judge acts as a mediator, the judge sheds, as it were, the judicial mantle for the duration of the mediation and acts in a manner inconsistent with the role of a judge by seeing the parties in private. In doing so, the judge acts in a manner contrary to the fundamental principle of natural justice that a judge must not hear representations from one party in the absence of the other. It is for that reason that the judge will not in any respect adjudicate in that action except with the consent of the parties... The judge is disqualified because a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. ... The fair-minded observer might apprehend that the judge has been told something by one party in the absence of the other and that information may affect his reasoning.⁶⁵

In terms of judicial conferencing, where no private meetings take place, it is unlikely that any similar type of issue in relation to bias could emerge, even if a judge went on to hear a case after conducting a facilitative (rather than evaluative) settlement conference, simply because discussions do not occur in the absence of one party.

However, it is possible that in terms of natural justice, issues could arise and could also trigger bias allegations if more evaluative conferencing were to take place. Natural justice requires that disputants should have a fair opportunity to put their case forward and respond to allegations made. However, even under these circumstances, provided the judge approached the issue in a tentative manner, it could be argued that the judge was merely exercising appropriate levels of intervention and had not prejudged issues. Also, provided that in the actual hearing appropriate responsive opportunities are given, it is questionable whether

64 [2003] SASC 272.

65 Ibid [23].

any denial of natural justice argument could be made out. In recent years, within the courtroom, the Australian High Court has made it clear that the bias rule should not prevent appropriate levels of intervention from occurring:

It seems to us that a trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case remained unknown, until they emerged as final conclusions in his or her judgment would not represent a model to be emulated.⁶⁶

Similarly, Michael Kirby, when President of the New South Wales Court of Appeal, indicated that contemporary civil litigation requires greater judicial intervention and this should not lead to accusations of judicial bias:

It has become more common for judges to take an active part in the conduct of cases than was hitherto conventional. In part, this change is a response to the growth of litigation and the greater pressure of court lists. ... In part, it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party then affected has no opportunity to correct or modify.⁶⁷

This relaxation in the bias rule has occurred as judges have increased their levels of participation in civil trials. Other forms of intervention, such as the calling or questioning of witnesses by judges, are also now recognised in many jurisdictions as acceptable practices to ensure just outcomes and to expedite trials.⁶⁸ Judicial conferencing, particularly the ‘in court’ versions, are merely an extension of this approach.

V JUDICIAL SETTLEMENT CONFERENCES CAN ADDRESS THE WORST EXCESSES OF ADVERSARIALISM

As determinative decision-making in Australia is largely based on an adversarial model, the ‘decision-maker’ may be restrained in terms of what can be considered or the options that can be produced.⁶⁹ As noted by the ALRC, the adversarial system of litigation is credited with having a number of counterproductive or inefficient consequences, for example:

- the system, due in large part to its emphasis on the final hearing, is about winning and losing — each party has responsibility for advocating its own case and attacking the other party’s case; this puts an emphasis on confrontation

⁶⁶ *Vakauta v Kelly* (1989) 167 CLR 568, 571 (Brennan, Deane and Gaudron JJ).

⁶⁷ *Galea v Galea* (1990) 19 NSWLR 263, 281–2.

⁶⁸ See David Ipp, ‘Judicial Intervention in the Trial Process’ (1995) 69 *Australian Law Journal* 365, 371–5. Recent legislation such as the *Civil Procedure Act 2010* (Vic) supports increased judicial intervention.

⁶⁹ See also Tania Sourdin, ‘Judicial Management and Alternative Dispute Resolution Process Trends’ (1996) 14(3) *Australian Bar Review* 206.

- the lawyer's role is partisan, although a lawyer has certain important ethical countervailing duties to the court, the lawyer has a duty to represent the interests of his or her client and may not be ethically accountable for the client's goals or the legal means used to attain them
- the judge is responsible for ensuring that the proceedings are conducted fairly — this makes judges sensitive about limiting the issues and arguments raised by parties and putting other controls on proceedings in case that is considered biased or unfair
- the judge is not responsible for how much evidence is collected, how many different arguments and points are put to the court or how long the proceedings take
- the judge adjudicates questions of fact and questions of law submitted to the court, but is not responsible for discovering the truth or for settling the dispute to which those questions relate.⁷⁰

Interest in so-called inquisitorial processes has largely focused on these deficiencies and civil procedure reforms in recent years have been directed at some of these overarching issues. Case management processes have also been developed to address these features of the system. However, arguably, additional facilitative processes can also be used to address adversarial process shortcomings. Facilitative techniques can support a judicial hearing process in a range of ways. They can, for example, assist in narrowing issues and supporting case management and interlocutory decision-making.

There is also the possibility of judges adopting 'blended' dispute resolution processes that incorporate elements of ADR and conventional adjudication. In the changing litigation system, for example, judges may actively facilitate certain aspects of a dispute through 'in court' public conferencing processes and adjudicate other aspects of the dispute. That process (which involves shifting from an adversarial approach to a more facilitative approach) could be used in a less blended form and could also support a decision-maker sifting through documentation as well as enhance their understanding about specific expert issues and content, prior to any actual process of 'hearing' the dispute. The preparation and level of detail required by the decision-maker and the capacity to utilise facilitative processes will vary greatly and depend upon factors such as the legislative framework, the party expectations and the review processes (if any) that are available.

During a hearing, the processes used can vary according to the circumstances and could involve a decision-maker adopting a facilitative stance and using many of the techniques of introduction, understanding and questioning more commonly regarded as conferencing techniques. Such an approach must also be balanced

70 Australian Law Reform Commission, above n 10, [1.7].

with natural justice requirements.⁷¹ The rules in relation to natural justice impact upon the way in which material can be presented to a decision-maker and also impact upon the nature and communication of decisions. Facilitative process training often focuses on how questions can be asked and developed so that substantive issues are fully explored. During a hearing, the capacity to shift to public conferencing processes may enable decision-makers to more thoroughly ‘test’ the issues with parties and adopt approaches that could support the development of settlement options.

One concern with adversarial court processes is related to the style of engagement of the judge. It had been said in the past that the role of a judge in an adversarial setting is to be aloof, disinterested in the outcome and uninvolved in the fray. This approach to hearing matters may result in judges appearing as unwelcoming and impatient with litigants. In fact, research by Mack and Anleu suggested that 90 per cent of litigants perceived magistrates on the bench to be businesslike and impersonal and that this approach was deliberately undertaken by magistrates so as to be consistent with appropriate levels of judicial neutrality.⁷² Judicial conferencing may support judges using more empathic interpersonal skills and communicating differently with disputants under certain circumstances.

Many would suggest that it is appropriate for judges to consider different communication modalities, provided that limitations and appropriate behaviours are discussed and developed. Indeed, this approach may be able to assist in addressing the judicial remoteness issues spawned by adversarialism that may undermine confidence in the courts.

VI JUDGES BRING UNIQUE SKILLS, UNDERSTANDINGS AND KNOWLEDGE TO A JUDICIAL CONFERENCE

Judges can also support effective conferencing processes because of the reasoning and analytical skills they possess. Research in Canada suggests that judges can have a significant impact upon participants and settlement because of the way that they conduct the conferencing process. Danielson has noted that a study of lawyers in Vancouver and work by Judge Wayne Brazil in the United States, explored the judicial behaviours and statements that promoted settlement in conferences.⁷³ According to Danielson, the study of Vancouver lawyers by Epp

71 For judicial pronouncements on the rule against bias, see *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Vakautu v Kelly* (1989) 167 CLR 568.

72 Kathy Mack and Sharyn Roach Anleu, ‘Judicial Demeanour: Implications for Public Confidence’ (Paper presented at the Confidence in the Courts Conference, Canberra, 10 February 2007) 11 <<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Confidence%20courts/papers/Mack&Anleu.pdf>>. A more developed version of this paper suggests that there is an implicit adoption of this approach: Kathy Mack and Sharyn Roach Anleu, ‘Performing Impartiality: Judicial Demeanour and Legitimacy’ (2010) 35(1) *Law & Social Inquiry* 137, 151.

73 Danielson, above n 14, 68, citing Wayne D Brazil, ‘Hosting Settlement Conferences: Effectiveness in the Judicial Role’ (1987) 3(1) *Ohio State Journal on Dispute Resolution* 1.

found a ‘carefully analytical, coolly logical approach’ by a judge to be the most effective in assisting parties to reach a settlement, but that the approach needed to be low key.⁷⁴ Danielson noted that lawyers want and expect the judge to come ‘well prepared, having a thorough understanding of the facts and relevant law. They want carefully considered input: both opinions and creative alternatives. They want an active, persistent judge.’⁷⁵ Danielson also stated that a judge who suggested parties ‘simply split the difference was useless’.⁷⁶ The Epp Vancouver study also found that lawyers considered judges to be useful in ‘highlighting evidence or law that the lawyers have misunderstood or overlooked.’⁷⁷

However, there is little information available about how litigants (rather than their lawyers) perceive judges undertaking this work. At present there is a concern that is essentially related to whether a judicial officer has the ‘right’ temperament and adequate skills to undertake a non-advisory process. In essence there is a fear that any judge will automatically revert to an advisory (rather than a facilitative) role when conducting a conferencing process and will do so regardless of stated process objectives.⁷⁸ This fear was apparent in consultations conducted for the development of the final version of the National Mediation Accreditation Scheme (‘NMAS’) in 2007.⁷⁹ In one consultation, involving a number of mediators, about basic training requirements, it was suggested that retired judges should be required to attend an extra day of mediation training for each year that they had sat on the bench.

It is clear that judicial conferencing training must be undertaken and must incorporate reference to the different ethical issues faced by judges and conferencing participants, as well as specific facilitative skills training.⁸⁰

Whether judges do have the appropriate skill set or can be trained to be good facilitators will doubtless continue to be the subject of debate. The debate also appears more heated when the issue involves retired judges and where there are concerns that mediation work that can be conducted by the broader legal

74 Danielson, above n 14, citing John A Epp, ‘The Role of the Judiciary in the Settlement of Civil Actions: A Survey of Vancouver Lawyers’ (1996) 15 *Windsor Yearbook of Access to Justice* 82.

75 Ibid 68, referring to John A Epp, ‘The Role of the Judiciary in the Settlement of Civil Actions: A Survey of Vancouver Lawyers’ (1996) 15 *Windsor Yearbook of Access to Justice* 82, 92, 112. Danielson notes that: ‘The Vancouver lawyer survey [Epp] asked the question: Does involvement by judges in the settlement process significantly increase the likelihood that settlements will be fair to all concerned? The results were mixed, with 40% agreeing, 27% not agreeing and 33% were unsure. The same question was posed in the 1982 Brazil Study of nearly two thousand American litigation lawyers, and the results ran in a ratio of 2–1 that a judicial presence would significantly impact the fairness of settlement’: at 63.

76 Ibid.

77 Ibid.

78 See Stacy Burns, ‘“Think Your Blackest Thoughts and Darken Them”: Judicial Mediation of Large Money Damage Disputes’ (2001) 24(3) *Human Studies* 227.

79 See Sourdin, above n 6, which describes the reporting process. The commentary on the Approval Standards highlights the issues involved in setting threshold training and educational requirements — see Tania Sourdin, ‘Australian National Mediator Accreditation System — Commentary on Practice Standards’ (Report, September 2007) <http://www.wadra.law.ecu.edu.au/pdf/Commentary%20PS_240907.pdf>. The comments were made in the confidential consultations process described in the Report and attended by individuals and representatives from around Australia.

80 Landerkin and Pirie, above n 43.

profession is being reserved for 'private judges'. With current and future sitting judges however, the topic is worth considering, not just in terms of training (and exclusion of judges who recognise that conferencing is not an area that they wish to pursue) but also in the context of future judicial appointments. If judges are to be engaged in such work should appointment criteria reflect a broader skill base? There are also significant issues about whether a person with strong skills in terms of decision-making is also able to have a high tolerance for ambiguity — a requirement in facilitative, non directive processes.

VII CONCLUSION

Judicial involvement in standalone ADR processes has been developed, extended and trialled in a range of countries around the world. Within Australia, it has been suggested that a tentative ADR approach be adopted that involves supporting judicial conferencing but limiting the role of judges in processes such as judicial mediation which may involve private meetings with the parties. It is clear that this shifting view of the judicial role and function will have a number of consequences. For example, the insertion of facilitative and advisory processes into the court system may influence judicial adjudicative processes. In turn, changes to the judicial culture may impact upon the development and delivery of facilitative and advisory ADR services as judges come to better understand and engage with ADR service delivery. These shifts may also promote a more accessible and efficient justice system that is more responsive to the needs of litigants and more effective in terms of promoting acceptable outcomes within a reasonable time frame and cost.

Including facilitative skills and adding conferencing to the judicial function and process may also encourage a mode of judging that enhances the way in which litigants and the community view courts and judges. One way in which this may also transform the legal system is by providing a different form of leadership.⁸¹ Facilitative or therapeutic approaches which are founded upon a more interest-based response to problem-solving, rather than solely considering issues from a rights-based adversarial perspective, may assist in transforming relations within court structures as well as changing the way that courts and governments are perceived within the broader community. Perhaps this shift can support a different style of behaviour. As King has noted, judicial officers can, for example:

model proper standards of behaviour for professional colleagues and other authority figures and highlight issues important to the community. As authority figures, to some degree judicial officers also model proper standards of behaviour for the wider community. In appeals, judges can demonstrate respect for professional colleagues and set an example by

81 See, eg, Michael S King, 'Problem-Solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership' (2008) 17 *Journal of Judicial Administration* 155.

using a less adversarial and more empathetic and effective approach to resolving problems.⁸²

Apart from these cultural, systemic and longer-term impacts, it is possible that a focus on the incorporation of facilitative skills in the judicial role will affect judges in a number of other ways. At present many judges are highly regarded as 'elders' who have knowledge and skills that ensure that disputes are appropriately explored and handled. Clearly the personal qualities of a decision-maker may influence perceptions of the adjudicative process and the broader civil justice system. At times, judges may feel constrained by their role and their limited opportunities for intervention. It may be that the new approach to judging will have an additional, more personal and immediate impact on some judges, litigants and lawyers and may lead to the development of more satisfying forms of legal practice for those who are disappointed with more gladiatorial approaches to conflict. This may be yet another reason for supporting and expanding judicial conferencing.

82 See Michael S King, 'Therapeutic Jurisprudence, Leadership and the Role of Appeal Courts' (2008) 30(2) *Australian Bar Review* 8.