National Alternative Dispute Resolution Advisory Council

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Why isn't there more alternative dispute resolution by Commonwealth departments and agencies?

Presented by:

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For the last 22 years at AGS, Tom has concentrated on litigation and advocacy work. He was appointed AGS's Chief Counsel Litigation in 2002. He has appeared as counsel for the Commonwealth in many key cases before various courts and tribunals, including the High Court, the Federal Court, the Supreme Courts of the states and territories and the Administrative Appeals Tribunal. He has advised and appeared for the Commonwealth in various inquiries and commissions.

WHY ISN'T THERE MORE ALTERNATIVE DISPUTE RESOLUTION BY COMMONWEALTH DEPARTMENTS AND AGENCIES?

We are presently experiencing a re-invigoration of the whole topic of ADR.

Public statements and policy initiatives of the new Attorney-General have certainly contributed to that re-invigoration.

In addition, within both the public and private sector markets there appears to be an increasing general awareness of the downsides of litigation and the upsides of ADR.

Those gathered together in this room could, I suggest, readily list the generally accepted disadvantages of litigation. The list would include such matters as expense (which includes both direct legal costs and lost opportunity costs), delay, uncertainty and unpredictability, the absence of an ability to control the process and own the outcome. Conversely, those present could readily list the advantages of ADR. That list would include things such as reduced cost, timeliness, greater certainty and predictability in terms of both process and outcome, greater scope for 'whole problem' solutions (in the sense that ADR can focus on interests and expectations going beyond enforcement of strict rights).

Given that the shortcomings of litigation, and the advantages of ADR, can be so readily identified, it is timely (and hopefully useful) to ask 'Why isn't there more participation in ADR by government departments and agencies?'.

I should say, at the outset, that I do not avow any definite answer(s) to that question. I should also say that I am a litigator, not a mediator or, for that matter, an organisational psychologist. However, the single theme of my presentation is this: the answer to the question posed may possibly be found, in part, in various habits of thought which government clients and/or their legal advisers might subscribe to from time to time, whether consciously or unconsciously.

It is pretty clear that habits of thought concerning ADR have changed fairly dramatically in the last 16 or 17 years. I vividly recollect that the first forum I attended concerning ADR many years ago resulted in some senior members of the profession 'walking out' in silent protest. I mention this not to scoff at them because, in fact, they were well regarded, experienced practitioners who possessed great skills in litigation (including advocacy). They simply had a profound disrespect for ADR.

But what habits of thought, short of profound disrespect, might be influencing our own approach to ADR? When I say 'our' I mean all participants in the carriage of disputes on behalf of Commonwealth departments and agencies - such as agency heads, line-area managers, individual instructors, in-house lawyers, and external providers of legal services.

First, are we really asking ourselves the right question concerning ADR? Instead of asking 'Should this case be the subject of ADR?' it may be better to adjust the default settings and ask 'Is there any reason why this case ought to proceed to a litigated outcome without recourse to ADR?'.

This leads to a second and related question: are we expecting cases which are suitable for ADR to somehow select themselves? Do we operate on the basis that ADR-suitable cases are possessed of unmistakable markers or tell-tale footprints which we will be able to detect without close attention?

Another possibility is that we may find the win/lose paradigm more alluring than we care to admit. It is all too easy to reflexively disavow adherence to that paradigm. However, we may need, collectively, to face up to the fact that, from time to time, we do get distracted by obvious weaknesses in an opponent's case. Such weaknesses, particularly if they are considered to reflect adversely upon the overall credibility of a claimant, can be the 'slippery-slope' to perceiving them as wholly undeserving - thereby resulting in the subterranean strength of some aspect of their case being overlooked or marginalised in our minds. If claimants are too readily regarded as completely undeserving because, in some particular respect, they overreach, are unreliable, or even dishonest, a certain 'hardening of mindset' may intrude which causes us to eschew compromise in favour of a search, albeit unconscious, for vindication.

Another question which I think may be legitimate to ask is whether the 'partnering' dynamic which clients and their legal representatives aspire to might sometimes discourage either the client or the legal adviser from raising with the other the possibility of ADR (has Joe/Mary gone soft)? A related question is whether clients or their legal advisers may sometimes be reluctant to raise ADR with the claimant for fear that so doing will signal a lack of commitment or lack of confidence in the strength of the Commonwealth's case?

Might it also be possible that we sometimes succumb to thinking that because we have undertaken all reasonable efforts to directly negotiate a settlement with the opposing party, the involvement of a third party mediator is therefore unlikely to be helpful? I think we have to resist the temptation to see our own unsuccessful efforts at direct negotiation as a substitute for, or as excluding, ADR.

The next question I think we can usefully ask is whether some of us may, in fact, be more comfortable with litigation than ADR because, for instance, we know much more about litigation than we know about ADR? Do we really know enough about ADR to make an informed decision concerning it on a case-by-case basis? When was the last time we really explored the possibility of ADR in a particular case?

Might some of us also think, from time to time, that ADR is inapt or inappropriate in our particular field? For instance, a rule of thumb many years ago was that ADR was worthwhile to resolve commercial disputes but not administrative law disputes.

However, if the administrative decision which is the subject of challenge is one which can be revoked and re-made, the latitude for a negotiated settlement through ADR may be very wide indeed.

Finally, it is possible that some participants in Commonwealth litigation may, from time to time, overstate the nature and extent of so-called impediments to ADR. Certainly, it is true that there are special accountabilities and rules which apply to settlement of disputes involving Commonwealth departments and agencies, one example being the proscription against settlement of monetary claims on a purely commercial basis. Monetary claims must, under the Legal Services Directions, be settled in accordance with legal principle and practice, which requires the existence of a meaningful prospect of liability. However, that requirement should not be overstated. It does not mean that liability has to be more probable than not. The requirement is really directed to ensuring that spurious claims are not settled. Without descending to an exercise in arithmetic, I think that a meaningful prospect of liability could exist, depending on the circumstances, where there is only a 10-20% chance of a court finding in favour of a claimant. Of course, in such cases a settlement should reflect, in a sensible way, the strengths and weaknesses in the respective cases of the parties, as well as (i) the other matters set out in para [2] of Appendix C to the Legal Services Directions, and (ii) any other relevant considerations. In doubtful cases the Office of Legal Services Coordination should be consulted. I simply offer this as but one example of the fact that the Legal Services Directions do not require Commonwealth departments and agencies to 'set their jaw' against settling cases which involve a genuine and 'not insignificant' risk of liability being found.

To conclude, the days of active protest against ADR are hopefully long past. We now readily accept that there is a place for ADR. However, the place of ADR may be much larger than certain 'habits of thought' lead us to believe.

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