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Facilitating the resolution of disputes before tribunals

Presented by

Tania Sourdin

Professor of Law and Conflict Resolution

La Trobe University

LA TROBE LAW



La Trobe University
City Campus, 215 Franklin Street
Melbourne VIC 3000 Australia
Telephone: +61 3 9285 5201
Facsimile: +61 3 9285 5231
Email: profstudy@latrobe.edu.au
Web: www.latrobe.edu.au/law

ABN 64 804 735 113

Facilitating the resolution of disputes before tribunals

Tania Sourdin

**Professor of Law and Dispute Resolution
La Trobe University, Melbourne**

This paper considers the role of tribunal members and their relationship with Alternative Dispute Resolution (ADR) processes. The article firstly describes the evolving nature of the relationship between courts, tribunals and ADR and then more specifically, comments on the nature of the tribunal member function and the relationship with ADR before returning to issues associated with the broader objectives of a combined ADR/ tribunal system. The discussion is undertaken to explore two questions – first, to what extent are ADR processes currently separated from member functions – and second, how can ADR skills and techniques be used to support the tribunal system including the determinative function?

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Introduction

The relationship between courts, tribunals and Alternative Dispute Resolution (ADR) processes has undergone a significant evolution in recent years and a range of ADR techniques are now linked in some way to every court and tribunal system within Australia. 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. This evolution has sparked comment and debate about the role of courts and judges, as well as the role of ADR processes in the context of civil justice.

At the same time, the tribunal system has experienced what can best be described as massive growth. Often, ADR processes used in tribunals are conducted by tribunal members and hybrid processes, such as med/arb, can be an essential component of the dispute management system. This 'blending' within the tribunal system has, in

contrast, attracted little comment – compared to attempts made to ‘blend’ process use within courts.

In respect of Courts it has been noted by the Australian Law Reform Commission (ALRC, 1997) in its review of the federal system of litigation, that 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. Theorists who adopt this view consider that settlement of disputes, and the use of dispute resolution processes other than court-based trial, weaken the foundations of the judicial and social systems (Fiss, 1984). These concerns have not been voiced in relation to the tribunal system which is often perceived to have different and additional objectives (see discussion later in this paper).

The ALRC also noted that the Constitution provides that the court system plays an integral role in the government of democratic societies. Courts are intended to 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”’ (ALRC 1997, referring to Fiss, 1994). This perspective suggests that ADR processes should be conducted separately and independently of the litigation and court system. Arguably however, tribunals do not play such a pivotal role in the creation and explanation of law and therefore concerns about maintaining independence between ADR and tribunal processes are not as relevant.

More recently, ADR and the courts have been perceived as engaged in an increasingly interdependent partnership (Werdegar, 1996). From this perspective, to be successful in increasing access to dispute resolution, the courts need to continue to articulate and enforce the substantive law and to set appropriate legal parameters for ADR, for example, in relation to the finality of private dispute resolution, and the confidentiality and admissibility of mediation communications (McCarthy, 2001).

Another perspective is that ADR has 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. The view that mediation should be used more readily by courts and tribunals has attracted considerable support in Australia. Recently, Australian courts have indicated that some ADR processes are of central importance in the court function. The Chief Justice of the Supreme Court of New South Wales has noted, ‘Mediation is an

integral part of the Courts adjudicative processes and the “shadow of the Court” promotes resolution.’ (Spigelman, 2001)

Currently, when disputes do end up in the court system, there is evidence that they are increasingly subject to differing litigation and ADR oriented arrangements. In the Federal Court in Australia, for example, mediation by court staff is used to settle relatively large numbers of disputes. Registrars may be involved in mediations, conciliations, case conferences and hearings. This is often the case in state courts (for example, in Western Australia) and in the Federal Court, where registrars conduct most mediations. In the Family Court and the Administrative Appeals Tribunal (AAT), registrars or other senior staff may also conduct conciliation conferences that may resemble forms of ‘advisory’ facilitation. Conferences in which court officers act in a ‘facilitative’ rather than an adjudicative manner can contribute to case management, as well as settlement, by encouraging the parties to better define the issues that require resolution.

In courts, rather than tribunals, the integration between ADR and a court may invite a closer consideration of the judicial function and role. For example, tribunal members and judges may use facilitative processes when encouraging settlement – these may vary from a discussion of the ‘issues’ and a suggestion that settlement be attempted to judges or members providing a preliminary view (an evaluation) on issues that have been raised and the evidence that may be required. Other judges and tribunal members may use facilitative processes and techniques of summary and reframing when conducting concurrent evidence (‘hot tub’) processes or when involved in specialist ‘problem solving’ courts. Tribunal members may also follow a more proscribed mediation process model. However, often the tribunal use of such processes is unexplored – particularly in the context of the tribunal role and function.

The differing relationship between courts, policy makers and ADR, and the variation in their philosophical approach to ADR, contrast greatly and produce a range of integration strategies (that may appear in combination in some courts and tribunals):

1. Pre-litigation ADR – either supervised or unsupervised by courts and tribunals and 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 and tribunal connected ADR – involving referral to ADR processes – such processes might be conducted by external or internal practitioners
4. Court and tribunal integrated ADR – involving judicial and quasi judicial officers within courts and tribunals using ADR processes to resolve and manage disputes (processes may vary from settlement conferences,

mediation or concurrent evidence approaches) – this integration may involve facilitative adjudication.

This paper explores the two approaches of tribunal connected and tribunal integrated ADR in the context of the function of tribunals and members by considering developing trends and concerns in these areas before focussing upon the broader objectives of judicial, court and ADR processes.

Tribunal connected ADR

In any discussion of tribunal related ADR processes it must be emphasised that many disputes that have the potential to become tribunal ‘matters’ are resolved *before* entry into the tribunal system. Those that end up in the tribunal system have often passed through a complaints or dispute resolution process that is external to the tribunal.¹¹

Commenting upon ADR processes within tribunals is difficult as such a vast range of processes operate across jurisdictions and they have often been introduced to achieve different objectives (for example, many processes have been introduced to assist in case management²). However, there are some general observations that can be made. For example, one characteristic of most any ADR processes and systems that operate *outside* the tribunal system are staffed by those external to the tribunals (for example, through referral to mediators or other ADR practitioners who are engaged by disputants rather than the Tribunal), while systems that operate within the tribunal system tend to be staffed by members, special appointees or tribunal staff.

There are other observations that can be made about ADR processes within tribunals. For example, hybrid processes – such as med/arb are used more frequently in tribunals than is the case in Court environments. It is not unusual for a tribunal member or equivalent to use conciliation processes and skills before determining a dispute. Also, tribunal members, unlike judges, are often expected to have ADR skills and knowledge and may be required to use ADR in a range of ways.

The impact of the growth in ADR process use that has occurred over the past decade has also differed in courts and tribunals. For example, it has been suggested that

ADR use has led to a decline in litigation commenced within courts. In 2002, it was suggested that the Queensland Supreme Court was prepared to 'compete for more business' by offering to fast track large commercial cases.³ There is also some evidence that the Australian court workload (both civil and criminal) is declining – despite population increases.⁴ This is somewhat surprising as throughout the 1980s it had been predicted that a massive litigation increase was due to occur. However, any decline in court based litigation has not been echoed by a decline in tribunal activity. Arguably, any decline in court based litigation in many Australian courts can, at least partially, be attributed to shifts in jurisdiction that have resulted in increased tribunal activity.

Clearly the varying perspectives regarding the relationship between courts, tribunals and ADR have led to considerable variation in court connected ADR usage amongst courts and tribunals, and within jurisdictions. Some forms of ADR appear to be more acceptable than others in different jurisdictions. Some forms will be conducted by 'external' practitioners (often legal practitioners who act as arbitrators or mediators), and others by 'internal' staff (such as registrars). 'In-house' ADR processes are seen as desirable by many key commentators. For example, a past Chief Justice of the High Court has commented upon the benefits of in-house processes. Whilst another commentator has added that, 'it is vital that third parties continue to claim that they are independent of the disputants. The best way to do this is for them to be officers of the court.' (Ingleby, 1991)

However, this is not a view supported by Sir Laurence Street (1991, 1997) who has noted in respect of courts that,

'A court that makes available a Judge or a Registrar to conduct a true mediation is forsaking a fundamental concept upon which public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of the court by one party, in which the dispute is discussed and views expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the courts observe.'

In addition, there have been concerns expressed about the relationship between internal mediators and judicial officers. Issues about bias have been raised. For example, in *Ruffles v Chilman & Hamilton* (unreported Western Australia Supreme Court, Full Court judgment, date 19 May 1997), 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.' (Spencer, 1997)

The 'internal or external' discussion has also been linked to the role of lawyers in ADR processes. For example, there are concerns that in the United States, ADR has been 'captured' by the legal profession and that this situation may occur within Australia:

'...ADR was just another stop in the 'litigotiation' game which provides an opportunity for the manipulation of rules, time, information and ultimately, money.

....ADR has become just another battleground for adversarial fighting rather than multi -dimensional problem solving.'⁵

Other commentators have noted that there has been little focus upon the role that lawyers play in ADR. Instead, a 'dominant popular view' has emerged that 'lawyers magnify the inherent divisiveness of dispute resolution' (Gilson and Mnookin, 1994). This view has also found favour in some parts of Australia as legislators seek to minimise the role of lawyers (and courts) in some types of disputes. However, such a view is not the only view of the role of lawyers. Many lawyers, and others (Wade, 1995), have indicated that lawyers can play a very useful and constructive role in resolving disputes (Gilson and Mnookin, 1994).

Concerns about the location of ADR processes are also related to the 'privatisation' of dispute resolution and the increasing trend to foster dispute resolution processes outside the courts. The implications of this trend have been questioned in the United States. There, concerns have been expressed about arresting the development of legal precedent, the erosion of the central role of the courts and the civil justice system becoming a second-class system as wealthier litigants use private adjudication 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').

Interestingly each of these issues present in a different manner in the tribunal system. Arguably public perceptions of the tribunal function are different. Lawyers may not be involved in the tribunal process (and their involvement may be discouraged through cost and other sanctions) and often ADR processes within tribunal are ordinarily paid for by the state (rather than the disputants) so that 'cost shifting' concerns are not relevant.

Court integrated ADR – ADR and judicial practice

Views about the relationship between ADR and the judicial role and practice have evolved in recent years. Much discussion has focussed on perspectives that are similar to those raised in respect of the role of courts. However views have also

focussed on the nature of the judicial function and the constitutional impediments that may prevent a judge from undertaking an ADR process. Again, with tribunals such impediments do not exist.

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 (DeGaris, 1994). This key issue in debates 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 (Landsman, 1988). It is not considered so radically separate from adjudication but as part of the same process. Litigation and negotiation are not viewed as distinct but as continuous processes (Rogers, 1987). It has been said that,

‘Most 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.’(Galanter, 1996)

In the United States it has been noted that there is increasing pressure upon courts and judges to do ‘more’ to resolve cases and to actively pursue settlement (Resnik, 1994). Some commentators have suggested that litigation has been transformed so that, ‘... “the trial” has ceased to be the centrepiece of litigation’ (Glasser and Roberts, 1993). In Canada (Landerkin, 2002), judges are actively engaged in Judicial Dispute Resolution (JDR) which draws upon mediation skills and processes. Alexander (2003) has suggested that civil law countries are more likely to enable the judicial and mediator role to be blended and combined and this may reflect on recent developments in inquisitorial processes.

Tribunals do not generally maintain a rigid distinction between negotiation and litigation processes and also adopt more flexible and facilitative processes in hearings. Also, active promotion of settlement by members is not perceived to be fraught with danger (as it might be with judges) although there are still risks that parties may be pressured to settle by members who have formed an impression of a dispute based on incomplete evidence. Concerns about integrity and impartiality may be reduced if parties are not permitted to meet with a tribunal member separately (see discussion below) (Street, 1991), a procedure that can occur in United States courts and in other countries.⁶

Judges as mediators – differences with the tribunal function

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 focussed on this issue. This discomfort may not arise when judges adopt a ‘facilitative role’ – essentially where no private sessions take place with litigants or their advisers. There is however, little recognition of the considerable flexibility and diversity that currently occurs in terms of judicial practice.

The discomfort with 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 – essentially creating, explaining and applying the law. However this perspective is neither uniform nor fully articulated. For example, Chief Justice Spigelman 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 (Spigelman, 2001). This approach would appear to be consistent with some other jurisdictions within Australia. However, in contrast, in the tribunal system, tribunal members are more likely to act as mediators and there is no policy direction to suggest that they should not. Indeed, possessing ADR skills is often an essential requirement for appointment.

In both the Australian Federal Court and AAT, judges and members can and have acted as mediators.⁷ 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 conducted mediation conferences.⁸ In the AAT, only members have conducted mediations. Where judges or members conduct mediation they generally will have no further involvement in the dispute should the matter fail to resolve (see bias below). In contrast, in some other jurisdictions such as New Zealand where judges commonly mediate disputes, a different approach has emerged. For example, the legislation governing the ADR program in the New Zealand Environment Court provides that commissioners who act as mediators may continue to act as a commissioner provided the parties and the member agree that it is appropriate for the member to do so.⁹ In other jurisdictions, such as Canada, forms of judicial mediation or JDR (Judicial Dispute Resolution) are well accepted in some jurisdictions. In these jurisdictions, judges chair processes that may resemble mediation and do not go on to hear those disputes.

Second, in the United States the discomfort with combining 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' (Brunet, 2003) sit uncomfortably with facilitative and other models of mediation that are focussed upon 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' – these may range from assertive 'arm twisting' to gentle suggestions from the bench. Other judges may incorporate facilitative processes as part of a hearing process – for example, concurrent evidence approaches may utilise an expert conclave that may or may not be 'chaired' by a judge (Downes, 2003).

Where judges conduct or integrate ADR processes into hearing processes, the issues raised may be different from issues that relate to registrars and other court staff conducting such processes within Courts. It has been suggested that disputants regard the involvement of such persons in a different manner and that their independence and neutrality has an impact upon the perceptions that are formed of the process. Certainly Justice Spigelman has indicated that this may be of concern and has noted that in the Supreme Court of New South Wales, 'no judicial officer descends into the arena in the way feared by Sir Laurence.' (Spigelman, 2001)

Meeting privately with the parties

In terms of judicial mediation, it may be that what causes most concern is any suggestion that a judge meet privately with a party in dispute. In this regard, it may be that settlement conferences involving all parties (and where no 'private' session takes place – as in mediation) do not raise such concerns. Sir Laurence Street has stated,

'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.'
(Street, 1997)

The notion of judges acting as 'evaluators' or chairing conventional settlement or conciliation conferences may therefore be acceptable to those who consider that mediation is inconsistent with the judicial role. An early and frank appraisal by a judge can assist to prompt settlement in some disputes. It has been suggested that this may be desirable in some kinds of matters provided that the judge or member has no further contact with the dispute and that certain standards are observed (Moore, 2003). A trial of alternative judging practices that involves a form of judicial conferencing is being undertaken in the Family Court in Parramatta, Sydney (from 2004).

The judicial function – constitutional impediments

Other commentators have also focused on the constitutional impediments to judges operating as mediators.¹⁰ Such arguments have focused on the nature of mediation and the constraints on judges that arise as a result of Chapter III of the Constitution. Essentially, it is said that the 'incompatibility principle' or condition may arise '...in the performance of non judicial functions of such a nature that the capacity of judge to perform his or her judicial functions with integrity is compromised or impaired.' (Moore, 2003)

In exploring the constitutional impediment argument in relation to judicial mediation, Justice Michael Moore has concluded that, 'At the heart of the judicial function is the resolution of disputes or controversies' (Moore, 2003). Justice Moore has also noted that, '...existing authority points to the procedural requirements deriving from Chapter III attending only to the exercise of judicial power not any other function a judge may perform.' In any event, a consideration of the incompatibility doctrine requires a consideration of the underlying purpose of the doctrine – to ensure that the fundamentals of separation of powers are not undermined (Moore, 2003). 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 an examination of these issues indicates that the judicial role may not be undermined by judges acting as mediators.

However, it is fair to say that in Australia, there is no consensus on the issue of whether the judicial role can or should include the role of 'mediator'. Strong views have been articulated – however, such views have been overtaken by practice, particularly in tribunals where members may be more likely to use facilitative techniques or in courts where judges may blend facilitative and adjudicative functions.

Natural justice and bias

Where judges do act as mediators (in most jurisdictions), they are unlikely to proceed to 'hear' the case or a related dispute (see below). However, even with this limitation, concerns about the judicial role and whether it can include mediation are often expressed. An exploration of cases concerning bias and natural justice and the role of judges in mediation suggests that these concerns are unfounded.

What constitutes bias? The situation appears clear where adjudicatory processes take place. In court proceedings in Australia, judicial comments before or during the trial about the credit of witnesses will often raise an inference of bias (*R v Watson; ex parte Armstrong (1976) 136 CLR 248*), as will excessive intervention in the parties' conduct of the litigation.¹¹ These determinations may have meant that arbitrators are reluctant

to 'enter into the fray' and intervene to prevent proceedings from continuing for too long or to prevent a party pursuing a topic that is clearly irrelevant. However, 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.' (*Vakauta v Kelly* (1989) 167 CLR 568, 571.)

Similarly, Kirby P, then President of the New South Wales Court of Appeal, indicated that contemporary civil litigation requires greater judicial intervention and this should not be seen as opening judges to accusations of 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. In part, it is simply a reflection of the heightened willingness of judges to take greater control of proceedings for the avoidance of injustices that can sometimes occur from undue delay or unnecessary prolongation of trials ... The conduct of criminal trials, particularly with a jury, remains subject to different and more stringent requirements.' (*Galea v Galea* (1990) 19 NSWLR 263, 281-282.)

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 calling or questioning witnesses by the judge are also recognised in some jurisdictions as acceptable practices to ensure just outcomes and to expedite trials.¹²

Recently, issues associated with a judge mediating a matter and then proceeding to hear that matter or a related dispute have been specifically considered. In the *Duke Group (in Liq) v Alamein Investments Ltd and ors* [2003] SASC 272, 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.' However, His Honour 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. It is for that reason that Rule 56A.05 of the Supreme Court Rules provided:

"56A.05 A judicial officer who has presided over a mediation in an action shall, ipso facto, be disqualified from thereafter hearing or determining the action or any issue arising in the course thereof which is directed to be tried separately."

The principle is based upon the need for public confidence in the administration of justice. 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: *Johnson v Johnson* (2000) 201 CLR 488 at [12] and *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [33]. 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.'

Justice DeBelle also made some instructive comments about his perception of the role and integrity of the court:

'In the result, I believe that what is at stake is the integrity of the Court engaging in two forms of dispute resolution and the public interest in upholding the integrity of the Court and public confidence in the Court. It is necessary to uphold public confidence in the integrity of the mediation process. It is equally important to uphold the public confidence in the integrity of the process of adjudication by the Court. It is important that nothing should occur which would suggest any breach of the obligation of confidence attaching to a mediation. Those who engage in mediation should be entirely confident that in no respect will anything said in confidence be revealed. Secondly, the public should have confidence in its judges knowing that, when they adjudicate issues, they are not influenced by anything which might have occurred in a mediation.'

Another concern from the profession appears to be that a mediator judge may reveal information to another judge (who is adjudicating) that was obtained in a private

session. This concern is somewhat surprising given that the same issue does not arise where judges excuse themselves from hearing a case on the basis of actual or perceived bias. Under those circumstances it has not been suggested that confidential information could pass between judges.

These concerns are also relevant in the tribunal setting. However, tribunal membership is often very different to that of a court. Ordinarily, tribunals will have a somewhat broader, eclectic and diverse membership (as compared to courts) and there may be a perception that there is less likelihood that confidential information (obtained in a mediation) will be passed on.

Decisional and advisory processes

There are other options to incorporate ADR processes into the determinative function that do not include actual mediation. For example, it is possible that mediation techniques can be grafted onto hearing processes. Some aspects of combining functions and processes appear to be more readily accepted than others. For example, expert forums (also known as concurrent evidence or 'hot tubs') are now relatively commonplace in some Australian jurisdictions. However, there has been little interest in the development of better decision-making models (particularly in the adjudicative setting) that could incorporate facilitative techniques.¹³

In a managerial setting there is considerably more emphasis upon decision-making although the emphasis is largely placed upon evaluating options through the use of a 'balance sheet' (where the decision-maker summarises gains and losses and the 'acceptability' of an option) and the role of personality and other factors in making a decision (Burns, 1997).

This approach can be contrasted with decision-making in traditional adjudicative settings. There, the emphasis is placed upon how evidence or information is gathered and the role of other decisions and precedent. Despite this emphasis, it may be that decision-making that takes place in the shadow of the court and tribunal system could be improved by reference to managerial decision-making processes. This emphasis is also relevant in the discussion of objectives – objectives that relate to conventional adjudication emphasising the importance of precedent setting and the development of law.

As judicial 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.¹⁴ As noted by the ALRC (ALRC, 1997) 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
- 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.” (ALRC, 1997)

Interest in inquisitorial processes in tribunals has largely focused on these deficiencies. Case management processes have also been developed to address these features. However, arguably facilitative processes could also be used to address some adversarial process shortcomings. Facilitative techniques can support a hearing process in a range of ways. As noted previously, there is also the possibility of adopting ‘blended’ dispute resolution processes that incorporate elements of ADR and conventional adjudication. In the changing tribunal system, for example, members may actively facilitate certain aspects of a dispute and adjudicate others.

This facilitative approach can take place within and before an actual hearing. For example, often decisional processes will require the decision-maker to sift through documentation and have knowledge about specific expert issues and content prior to the actual process of ‘hearing’ the dispute. The preparation and level of detail required by the decision-maker will vary greatly and depend upon such factors as the legislative framework, the party expectations and the review processes that are available. An additional focus on facilitative conference processes can assist in this preparatory work particularly in complex multi-party matters.

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 ADR techniques. The timing of questions can be an important issue in determinative processes. Although the processes are fundamentally different from

facilitative processes there may be issues where decision-makers interrupt with questions too early in the process. Often decision-makers who control both the process as well as the outcome are keen to ask questions during the introductory stages. However, this can be off putting to the participants who are likely to be anxious. Such an approach must also be balanced with natural justice requirements.¹⁵ 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. Recently, natural justice and bias concerns have been re-examined as judges and others have become increasingly involved in case management processes and intervention at trial.¹⁶ Facilitative process training often focuses on how questions can be asked and developed so that substantive issues are fully explored.

In addition, at hearing the identification of issues can also be crafted in a neutral way, as would be the case in a facilitative process, however, the issues will often also be determined by some external criteria such as legislation (that defines the legal rights). For example, issues that relate to future relationships or communication may not be dealt with in the substance of the decision (clearly such matters will be a central importance in relation to some decisions). The identification of the issues stage can be likened to the agenda-setting stage that is referred to in mediation literature. By breaking down the problem into the various components, the decision-maker ensures that all issues are dealt with. Many decision-makers currently 'test' the issues with parties and adopt approaches that can be described as 'inquisitorial'.

At the end stages of hearing a dispute, facilitative process approaches may also be useful in assisting to identify and express issues. For example, the analytical stage in adjudication will clearly involve a weighing up of relevant material. Unlike facilitative processes, this focus will usually be upon materials that are relevant to the determination of legal rights rather than needs or interests. However, the broader needs and interests can be considered to ensure that the decision that is made is crafted to ensure that the parties understand and appreciate that they have been heard.

In terms of the delivery and composition of a decision, facilitative techniques can be useful in ensuring that the decision is conveyed in a sensitive, serious and appropriate manner. The extent to which the decision refers to evidence or material put by various parties can also assist to determine the extent to which the parties accept the decision. This is not to deny that the substance of the decision is obviously important, however, it could be said that a good decision that is rendered in a poor manner may leave the parties with a less than favourable impression of the process and the outcome.

These issues have been largely unexplored in any research about judicial decision-making. Perceptions of litigants for example, may in part be formed by the quality of

the decision and the manner in which it is rendered. One relevant factor can be the timing of the decision – the ‘OJ’ factor.¹⁷ Other factors may relate to the personal attributes of the decision-maker or adviser and the way in which the decision is rendered. The degree of eye contact, the pitch and tone of the voice, whether the decision is rendered in person or ‘on paper’ may all be relevant factors in determining whether or not the decision will be accepted or complied with.

One area where blending the functions has been more actively developed is within the context of ‘problem solving courts’ (Phelan, 2004). In that context it is expected that a judge will adopt facilitative skills in order to ‘hear’ a dispute and explore options and community concerns. This is arguably the most notable example of ‘facilitative judging’ involving the incorporation of facilitative skills into the traditional judicial role.

Is ADR compatibility with tribunal objectives

As noted previously, one recurring issue in relation to the integration of ADR and the litigation system is related to whether court-integrated ADR use (rather than ADR referral by courts) is generally compatible with civil justice objectives. The ALRC identified five key objectives of the federal civil litigation system in Australia performing the roles of rule making, determination and dispute resolution. Within each objective there were variations and with some processes, for example, where adjudication takes place, it was suggested that there were additional general objectives such as ensuring the clear articulation of legislation or promoting certainty in the law (ALRC, 1997).

At a practical level, the issues are complex. Firstly, the increasing use of ADR processes may mean that although the number of disputes that proceed to trial allowing a public articulation of values is reduced, the reality is that most disputes are resolved through processes such as negotiation (structured or not) prior to entry into the court system. Secondly, the argument that all disputes entering the court system should be adjudicated fails to recognise the complex nature of many disputes and that the settlement of disputes occurs for many different reasons in the life cycle of a dispute. Also, dispute resolution processes vary widely in terms of the processes used and their timing. Some court-based processes may be used to support case management functions while others may be blended with adjudicative functions.¹⁸ These differences mean that ADR processes can be complementary¹⁹ to the specific objectives of adjudicatory processes (Glasser and Roberts, 1993).

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 supervised by court sanctions. In this regard, the fact that court approval is

required for certain settlements (whether mediated or not) in most jurisdictions, is an important matter to consider. For example, in matters involving children, *Damages (Infants and Persons of Unsound Mind) Act 1929* (NSW) s 4(a); some categories of matters in the Land and Environment Court (NSW); or, *Family Provision Act 1982* (NSW), Part 2 Division 1 ss 7-10, s 19 matters, approval of the court is required before a court can make orders.

In the United States, debate has also focused upon the vacating of court judgments with the consent of parties (Resnick, 1994). 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. These concerns have also been recognised by ADR practitioners. For example, mediators have recommended that certain categories of cases should not be the subject of mediation.

There are other issues about the role of dispute resolution processes. For example, the ALRC has noted that the Constitution provides that the court system plays an integral role in the government of democratic societies. Courts are intended to 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."'20

Some concerns about ADR processes are related to the 'privatisation' of dispute resolution and the increasing trend to foster dispute resolution processes outside the courts. The implications of this trend have been questioned in the United States. There, concerns have been expressed about arresting the development of legal precedent, the erosion of the central role of the courts and the civil justice system becoming a second class system as wealthier litigants use private adjudication 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').

Debate about the role of courts and their objectives has also occurred in the context of problem solving courts and notions of integrated therapeutic justice. As Phelan (2003, 2004) has noted the emergence of problem solving courts has

'... challeng[ed] the nature of courts and represent[ed] something of a revolution in the way that courts might operate in modern, democratic societies. Problem solving courts are examples of courts working in partnership with other

agencies, both inside and out of conventional justice fields and with “the community” to produce better social outcomes.’

Arguably problem solving courts are grappling (at least in a more visible way) with an expanded perspective of the objectives of the litigation system. Other courts that are adopting less adversarial techniques such as the Family Court of Australia, in a voluntary trial of less adversarial approaches to children’s hearings, are focussed on promoting more satisfying, party and future focused outcomes may also prove a challenge to the more traditional perspective of judicial and court functions.

In the tribunal system however, the objectives of the system are often defined quite differently. Notably the most recent definition of Tribunal objectives in the AAT Act amendments, state that:

‘In carrying out its function, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.’

It was suggested in submissions made to the Senate Inquiry that commented upon these objectives (in respect of the AAT), that the focus should be on ‘fair and just’, and that ‘economical’ and ‘quick’ were not appropriate objectives for the AAT.

The Senate Committee, in rejecting this view, noted that the objects statement was similar in terms to statements included in legislation for the Migration Review Tribunal, the National Native Title Tribunal, the Refugee Review Tribunal and the Social Security Appeals Tribunal. Some submissions to the Senate Committee argued, however, that reviews conducted at the level of the AAT should not be constrained by terms that apply to lower tiers of review.

However, clearly tribunal objectives differ from those that are articulated for courts. Arguably these differing objectives support not only more inquisitorial and managerial processes but, they also support more facilitative processes and ‘blending’ of processes.

Conclusions

There are many options that are be presented by blending ADR skills and techniques with tribunal processes to enable that the tribunal system to meet a range of objectives and to promote a more responsive approach to litigant needs. Many tribunals have pursued the option of referral of cases to ADR processes such as mediation, arbitration and case evaluation or appraisal that are conducted separately from the determinative process. However, many tribunal members also have involvement in stand-alone ADR processes (such as mediation and evaluation).

Other options to integrate ADR involve tribunal members blending ADR skills and techniques with adjudicative processes, and a redefinition of the member role to incorporate the 'manager of process' and the 'facilitator of dispute resolution' (rather than dispute adjudication) role – that is, exploring the notion of the facilitative tribunal adjudicator.

Apart from cultural and longer-term impacts, it is possible that a focus on the incorporation of facilitative skills for tribunal members will impact upon the tribunal role in other ways. At present many members are well regarded as having the knowledge and skills that ensure that disputes are appropriately explored and handled. Clearly however, the personal qualities of a decision-maker may influence perceptions of the adjudicative process. It has been suggested in surveys of the legal profession that bullying, rude or arrogant behaviour by an adjudicator assists in forming very negative perceptions of a process. In the United States, the personal qualities and related attributes are sometimes referred to as 'dignitary process control features'. In Australia, this has also been referred to as the 'respect factor'. It may be that including facilitative skills as part of the tribunal member function and process will encourage a mode of hearing and adjudication that enhances the way in which litigants and the community view tribunals. However, regardless of whether it is the process or the person being examined, it is clear that what are sometimes referred to as 'respect' features include 'good people skills', and these are key areas of focus in most facilitative process skills programs.

In this regard, it is often said that mediation and other processes are viewed as 'more fair' by disputants. However, the view that disputants do in fact view 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' (MacCoun, Lind and Tyler, 1992). However, some recent researchers have identified additional relevant features. These features have been identified as 'dignitary process features' (MacCoun, Lind and Tyler, 1992) and relate to:

'... the manner in which the procedure is enacted, rather than with the distribution of control mandated by the procedure. Dignitary process features involve the belief that disputants are treated with respect and politeness and that the dispute is treated as a serious matter worthy of a dignified hearing. Field studies of procedural justice judgments have shown that dignitary process features are at least as important as control issues in determining whether a procedure is seen as fair.' (MacCoun, Lind and Tyler, 1992)

Some empirical studies, such as the National Consumer Council Report (1996, England and Wales), suggest that disputants may not only require someone who can approach their dispute in a serious, dignified and appropriate manner but may also prefer someone who sits down with them and 'helps them sort out their problems'

rather than the intervention of someone who 'tells them what to do'. The New South Wales study by the Justice Research Centre, *Plaintiffs' satisfaction with dispute resolution processes* (1997), described and evaluated in detail plaintiffs' perceptions of four dispute resolution procedures – trial, arbitration, pre-trial conference in the New South Wales District Court's Sydney registry and private mediation through the New South Wales Law Society mediation program. In that study, a clear preference for pre-trial conference and mediation was expressed (rather than a preference for arbitration or trial). In 2003, a study comparing mediation, between parties agreement, arbitration and trial in New South Wales also revealed high levels of satisfaction with mediation and trial rather than negotiation and arbitration (Sourdin and Matruglio, 2004). The primary differences in satisfaction related to perceptions about fairness, participation, and outcome.

Each of these studies suggests that where possible, collaborative problem solving approaches should be used to resolve conflict. In addition, a focus upon the 'respect' features or 'dignitary process control factors' (that include appropriate personal skills) can arguably enhance all forms of dispute resolution – facilitative, advisory and determinative. The current integration of facilitative, adjudicative and adversarial processes in tribunals will provide additional opportunities for the impact of blending skills and process areas to be more fully explored and hopefully evaluated.

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¹ For example, in the New South Wales ADT, Retail Lease matters are primarily dealt with prior to ADT entry by an external agency (the Retail Lease Dispute Unit). Similarly, in most States, consumer disputes are likely to pass through a Department or agency that deals with consumer matters (for example, CAV in Victoria) before Tribunal entry.

² For a summary of case management schemes and their relationship to ADR processes, see T Sourdin, "13.4 Case Management" in 13 "Dispute Resolution, *The Laws of Australia* (Law Book Company, Sydney, 1993-).

³ (2002) 5(1) *ADR Bulletin* 16 referring to the *Brisbane Courier Mail* (16 April 2002).

⁴ See comparative figures representing distribution of court lodgments in Productivity Commission reports for 2002 and 2004 at <http://www.pc.gov.au/gsp/reports/rogs/2004/partc.pdf> and <http://www.pc.gov.au/gsp/reports/rogs/2002/partd.pdf> (16 January 2005).

⁵ See Australian Law Reform Commission, Issues Paper 25: *Review of the adversarial system of litigation. ADR – its role in federal dispute resolution* (ALRC, Canberra, June 1998 referring to Menkel Meadow, C (1991) "Pursuing settlement in an adversary

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⁶ For example, Japan.

⁷ 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.

⁸ MEJ Black (1996) 'The Courts Tribunals and ADR' 7 *Australian Dispute Resolution Journal* 138. His Honour has noted that 97% of mediations conducted within the court have been conducted by registrars.

⁹ S 268, Resource Management Act 1991 (New Zealand).

¹⁰ See P Tucker (2000) 'Judges as Mediators: A Chapter III Prohibition?' 11 *Australian Dispute Resolution Journal* 84.

¹¹ *Jones v National Coal Board* [1957] 2 QB 55; *Tousek v Bernat* (1959) SR (NSW) 203; see also A Rogers (1993) 'The managerial or interventionist judge' 3 *Journal of Judicial Administration* 96.

¹² See D Ipp (1995) 'Judicial intervention in the trial process', 69 *Australian Law Journal* 365, 371–372; G Davies and S Sheldon (1993) 'Some proposed changes in civil procedure: their practical benefits and ethical rationale' 3 *Journal of Judicial Administration* 111.

¹³ See also T Sourdin and T Davies (1997) 'Educating Judges about ADR' *Journal of Judicial Administration* 7, 22.

¹⁴ See also T Sourdin (1996) 'Judicial Management and Alternative Dispute Resolution Process Trends' 14 *Australian Bar Review* 3, 206.

¹⁵ 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; *Vakauta v Kelly* (1989) 167 CLR 568.

¹⁶ See M Moore (2003) 'Judges as Mediators: A Chapter III prohibition or accommodation?' 14 *Australian Dispute Resolution Journal* 188

¹⁷ This is a reference to the OJ Simpson trial in America where the jury verdict received much unpopular attention. The difficulty in accepting the jury verdict may relate in part to the speed of which was delivered to the Court and the public by the jury – it was delivered less than three hours after the long running case had closed.

¹⁸. For example, under Part 72 of the New South Wales Supreme Court Rules referral to a referee may take place of part of a dispute.

¹⁹. Karl Mackie considers that: "ADR has quietly slipped into the mainstream of legal practice. Over the past two decades ADR has become a cornucopia of processes,

procedures and resources for responding to disputes, all of which supplement rather than supplant traditional approaches to conflict". K J Mackie, 'A Handbook of Dispute Resolution: ADR in Action' (1991) Routledge, Great Britain, 1.

²⁰ALRC Issues Paper 20: Rethinking the Federal Civil Litigation System, (Sydney, November 1997) referring to O Fiss 'Against settlement' (1984) 93 Yale Law Journal 1073, 1085.