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Getting Ahead of the Game: Mediation in Civil Litigation

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The current state of play

The legislative framework

In the second reading speech of the *Civil Dispute Resolution Bill 2010* (Cth), the then-Commonwealth Attorney-General, the Hon R McCelland, said in respect of alternative dispute resolution processes:

> *… Launching into litigation is not always the best approach. Parties can benefit from exchanging information, narrowing the issues in dispute and exploring options for resolution that will lead to more matters being settled by agreement earlier on, before significant costs have been incurred and position become entrenched.*

The sentiment that 'alternative' forms of dispute resolution are beneficial for a plethora of reasons has been embraced by the Australian legal profession and, by the implementation of Court-ordered mediation and other non-curial processes across jurisdictions in Australia from at least the 1990s, has become a key aspect of the civil litigation process. For more than twenty years, mediation in particular has been acknowledged as "an integral part of the Court's adjudicative process".[1]

Those practicing in the area of civil litigation in the Supreme and Magistrates Courts of the Australian Capital Territory should be familiar with rule 1179 of the *Court Procedures Rules 2006* (ACT), which provides that:

> *The court may, by order, refer a proceeding, or any part of a proceeding, for mediation or neutral evaluation.*

As with all civil procedure provisions in our jurisdiction, the main purpose of rule 1179 is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.[2]

Appropriately, the Court's power to order parties to participate in alternative dispute resolution processes under rule 1179 is also incorporated into the 'Holy Grail' of civil litigation in this jurisdiction: *Practice Direction 2 of 2014*. The Practice Direction in the Supreme Court relevant states:

(a) at paragraph 41:

> *Unless the parties have already exhausted alternative dispute resolution processes or made their own arrangements, the Court will usually make orders to compel an appropriate form of alternative dispute resolution at the Listing Hearing.*

(b) from paragraph 43 to 45:

> *Parties to matters allocated a hearing date will generally be required to participate in formal alternative dispute resolution processes unless the parties can satisfy the Court that such procedures have been completed or are not appropriate. Parties are encouraged to agree between themselves to participate in a*

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[1] Council of Chief Justices of Australia and New Zealand, *Position Paper and Declaration of Principle on Court-Annexed Mediation* (1999).
[2] *Court Procedures Act 2004* (ACT), s5A.

> *mediation or other appropriate alternative dispute resolution procedures. However if they do not then the Court is likely to compel it.*
>
> *Where a case is estimated to take three or more days the Court will generally make a direction requiring the parties to participate in a mediation unless the parties have made arrangements to do so.*
>
> *In cases estimated to take less than three days the Court will generally make a direction requiring participate in a form of alternative dispute resolution unless the parties have exhausted alternative mechanisms for settling their dispute. This may take the form of a settlement conference, neutral evaluation or mediation. Where the Court directions a settlement conference it will direct that it be attended by the parties as well as lawyers representing each parties.*

(c) and, for the sake of completeness, from paragraph 46 to 48:

> *If a matter is settled prior to be listed for hearing parties should file any court documents necessary to give effect to the settlement in the registry.*
>
> *If a matter settles after it has been listed for hearing, practitioners are required to notify the associate of the judicial officer before whom it has been listed by email. If proceedings have not been listed before a particular judicial officer, practitioners should notify the Registrar that the proceedings have settled. If documents to give effect to the settlement have not already been filed, the Registrar or judicial offer will generally make a direction requiring settlement documents to be filed within a fixed period and will list the proceedings to ensure that any necessary documents have been filed.*
>
> *Until final orders are made or proceedings discontinued, the parties must attend Court on any occasion on which the proceedings are listed.*

The Practice Direction (*Amended* Practice Direction 2 of 2014) in the Magistrates Court also reflects this position.

In practice

Most matters which fall within the purview of the Practice Direction proceed through a somewhat standardised process of preparation for hearing. That is, the Court's supervision of civil litigation matters to ensure that an expedient and fair process is being followed sees litigants go through a process whereby:

(a) following pleadings being filed and served, the parties are called to a first directions hearing, which, together with the exchange of first directions hearing questionnaires[3], is the first opportunity for the Court, in collaboration with the parties, to form an understanding as to the likely progression of the matter and make directions and orders accordingly;

[3] Per paragraph 25(b) of the Practice Direction.

(b) beyond the first directions hearing, there is a period of approximately seven (7) months[4] in which the parties are required to comply with the Court's directions and orders, typically involving:

(i) the request and provision of better and further particulars;

(ii) the finalisation and close of pleadings;

(iii) completion of the discovery process, in which parties disclose all the documents they possess which are, either directly or indirectly, relevant to a matter in issue in the proceeding (with those documents properly classified and described in a list of documents) and inspect the documents disclosed by the opposing party or parties;

(iv) service of expert evidence in relation to liability and quantum (as necessary);

(v) service of expert evidence in reply, or supplementary expert reports (as necessary);

(vi) filing and serve of affidavit evidence (if required);

(vii) the administering of interrogatories or such other investigative devices created by the *Court Procedures Rules 2006* (ACT) (though admittedly a less-used tool in modern litigation); and

(viii) the filing of a listing hearing questionnaire (accompanied by, in the case of a plaintiff, the payment of hearing fees[5]); and

(c) following the period described in paragraph (b), the parties return to the Court for a listing hearing, on which occasion they are expected to inform the Court of any outstanding steps required to prepare the matter for hearing and to be ready to take both a mediation date and a hearing date.[6]

In addition to these steps, there are a host of variables that can impact the smooth progression of matters towards hearing, including (without limitation):

(a) interlocutory applications, which often halt the progress through other directions and require the re-timetabling of steps;

(b) non-compliance;

(c) limited availability of expert witnesses, and the extended time required for site inspections and appointments;

(d) the enormity of the task facing modern litigators in commercial litigation matters in which there are volumes of documents that fall within the ambit of the definition of "discoverable document" provided in rule 605 of the *Court Procedures Rules 2006* (ACT); and

(e) perhaps unsurprisingly, the inability of parties in dispute to work cooperatively to accomplish joint tasks.

The result when such variables coming into play (not to mention the many additional variables which arise in cases involving self-represented litigants) is often tumultuous period far exceeding seven (7) months in which parties already in dispute become increasingly acrimonious and significant costs are incurred (such significant costs that, in many cases, the costs have become an impediment to settlement and resolution at a mediation is increasingly unlikely).

Unintended effects

It is appropriate at this time to acknowledge that the Practice Direction goes a long way in increasing the efficiency with which matters progress through the Court and making clear the Court's expectations

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[4] Per paragraph 14(f) and 36 of the Practice Direction.
[5] *Court Procedures (Fees) Determination 2022 (No 2)*, Items 1103 and 1104 (Magistrates Court) and 1201 and 1202 (Supreme Court).
[6] A combination of dates which seems altogether counterintuitive given that the point of the first is to obviate the need for the second.

of parties in litigation. There are, however, two unintended effects that the Practice Direction has due to the manner in which alternative dispute resolution has been incorporated into it.

One takes the form of a criticism of the application of the Practice Direction by the Court: matters are often referred to mediation too late in the process.

The second is a criticism and warning directed at practitioners: do not 'go through the motions' of preparing a matter for hearing without giving careful thought to preparing the matter for mediation.

Criticisms and concerns

Application of the Practice Direction by the Court

The current practice of the Supreme Court and Magistrate Court Registrars and Deputy Registrars, in rightful and appropriate adherence to the express provisions of the Practice Direction, is to refer matters for mediation at the listing hearing (unless parties communicate their intentions to mediate privately or can demonstrate that they have already done so). It is appropriate that mediation is a "threshold" over which parties must cross in order to proceed to hearing, and so this practice within the listing hearing is a sensible one.

The issue, however, is that there is often a reluctance or refusal by the Court to make an order referring matters to mediation prior to a listing hearing, even where such orders are sought by consent of both parties. This appears to be a misapplication of the provisions of the Practice Direction or, alternatively, indicates that the way in which mediation is incorporated into the Practice Direction is not entirely appropriate. At its heart lies paragraph 43 of the Practice Direction (emphasis added)

> ***Parties to matters allocated a hearing date will generally be required to participate in formal alternative dispute resolution processes*** *unless the parties can satisfy the Court that such procedures have been completed or are not appropriate. Parties are encouraged to agree between themselves to participate in a mediation or other appropriate alternative dispute resolution procedures. However if they do not then the Court is likely to compel it.*

That is, parties are expected to take both a mediation date and a hearing date at the listing hearing (assuming prior mediation has not occurred), despite the fact that ultimately the latter becomes unnecessary if the former achieves its ultimate purpose.

The solution, in my view, is ultimately a simple one: make small changes to the civil litigation process which allow or encourage the Court, in collaboration with the parties to a dispute, to refers matters to mediation at the most appropriate time having regard to the specific matter. Increasing the flexibility of the timing for mediation and making the most of opportunities to collaborate with practitioners (such as first directions hearings and the first directions hearing questionnaire) will likely increase the changes of resolving matters, lower the number of matters which remain in Court until listing hearings (consuming the Court's resources) and encourage practitioners to seriously consider at what stage mediation would be most appropriate.

To briefly address the counter-point that is often made: *why don't parties just mediate privately?*

There are some benefits to Court-ordered mediations over arranging private mediation. Firstly, the cost associated with Court-ordered mediations is lower, causing the process to be more accessible (particularly for uninsured parties). Secondly, the oxymoron of Court-ordered mediation (which has been commented on broadly and many times) by its mere existence acknowledges that there are circumstances in which parties to a dispute are unwilling to voluntarily participate and so private mediation in many cases may not be possible and compulsion by the Court necessary.

Ultimately, however, irrespective of the availability of private mediation arrangements, the processes within the Court ought to publicly reaffirm norms and behavioural standards for private citizens, and thereby reflect best practice when it comes to seeking to resolve disputes by mediation at an early

stage. As the main purpose of civil procedure provisions is to facilitate the just resolution of disputes according to law *and* as quickly, inexpensively and efficiently as possible, then the Court and practitioners should be united in working to optimise the processes set out in the Practice Direction to meet these objectives, including in relation to the incorporation of mediation into the civil litigation procedure.

Application of the Practice Direction by practitioners

The issue of mediating at a late stage is not something that the Court is ultimately responsible for: after all, while it supervises the progresses of matters it is not responsible for the progression. At least part of the issue therefore falls squarely on the shoulders of practitioners.

The undesirable effect that the Practice Direction can have on practitioners is, simply put, that it can unintentionally promote a lack of thoughtfulness in relation to the conduct of litigation and, in particular, the stage at which mediation should occur.

In other words, solicitors become accustomed to 'going through the motions' of the 'standard process' set out in the Practice Direction, giving little thought to the appropriate orders having regard to the specific nature of and parties to the dispute and without stopping to consider at what stage a mediation may be most appropriate.

Notwithstanding the manner in which the Court is currently referring matters for mediation, this is something that we, as practitioners, can work to improve in our practice by asking simple questions of ourselves at an early stage of litigation matters (and regularly thereafter):

1. *Are the issues in dispute defined?*

2. *Do the parties have the evidence they need to assess the strengths and weaknesses of each parties' positions?*

If the answer to the above questions is 'yes', then it is likely a good time to explore a mediation (or make submissions to the Court about why it is an appropriate time to refer the matter to mediation).

If the answer to the above questions is 'no', then practitioners would do well to consider what steps need to be taken so that these matters can be quickly addressed. If the issues are not clear on the pleadings, ask further and better particulars of the other party, or (if necessary) bring an application to deal with the issues under the rules. If a lack of quantum evidence means that parties do not have a good understanding of the amount in dispute, then make obtaining that evidence the priority in the conduct of the matter (reflected in the orders that you seek) so that mediation can follow. If the extent of future treatment required is not clear, obtain an expert report which details the prognosis and future treatment needs.

If practitioners were to take a proactive approach to *prepare the matter for mediation at the earliest possible opportunity* rather than merely preparing the matter for hearing, prospects of resolving at settlement will be increased because:

(a) Costs are less likely to be a barrier to settlement; and

(b) Parties' positions at an earlier stage are less likely to be entrenched.

Final remarks

The ADR Committee in collaboration with the civil litigation committee are preparing submissions to the Court in relation to the earlier invention of ADR processes and proposed changes to the Practice Direction. In the meantime, however, we should be considering how we can get ahead of the game and be intentional in preparing our matters for mediation.

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