Mandated ADR – A New Statutory Emphasis

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Thank you for inviting me to share this occasion with you.

Your chairman suggested that it would be an appropriate venue for some comment on recent amendments to the Supreme Court Rules. Those amendments, in turn, reflect amendments to the statutes governing the various trial courts of this State, which came into operation on 30 September 1966.

It is fair to say that there has, in the recent past, been growing public concern that our traditional system of adversary litigation has not been serving the community well.

You will recall that, shortly after he recently assumed office as current President of the Law Society of South Australia, David Meyer caused something of a stir when he published an article titled *Curbing the Warrior Mentality* in the Law Society Bulletin. Quoting Abraham Lincoln and Warren Burger as authorities for his propositions, he sought to make the points that the true function of the legal profession, in relation to contentious matters, should be to gain an acceptable result, with the smallest possible cost to the client, in the shortest possible time; and that the role of the lawyer, in seeking to achieve those aims, ought to be to persuade clients to settle disputes by means other than adversary litigation.

Not unexpectedly, this seemingly radical pronouncement attracted a good deal of comment in both the print and electronic media, which picked up his points that:

- it was important for both the public and lawyers to pursue formal processes of litigation as a last resort, rather than being the first course of action;
- the present climate of spiralling costs and in-built delays are rapidly making court processes irrelevant to most members of the community; and
- despite attempts by the courts to achieve the opposite result, litigation was, generally speaking, becoming increasingly complex, in the technical sense; and too much time and money were wasted on technicalities.

It was particularly refreshing to note that, in the course of a media interview, Mr Meyer deprecated the fact that there did not seem to be a genuine desire on the part of both lawyers and clients to settle arguments by informal processes. He commented that an apparent desire to have one's day in court seemed to be the pervasive attitude. He felt that an entrenched problem was that many lawyers seemed to feel that any indication of an early willingness to initiate settlement negotiations would be perceived, by client and opponent alike, as a distinct sign of weakness.

I have reflected on these expressed thoughts (many of which appeared under a print media heading *Lawyers hit over 'warrior mentality'*) because, I would submit, they (and the responses to them) indicated, in very clear terms, both the nature of an initial problem to be addressed and some obviously fundamental responses which will need to be developed to address it.

It seems to me that, at the present time, both the courts and the practising profession have painted themselves, or been painted, into a cultural corner from which there is an imperative need to escape – but from which escape will require some radical surgery on current professional and community mores.

There can be no doubt that there are many enlightened and forward-thinking members of both the bench and the profession who, in recent years, *have* striven to refine litigation processes and promote ADR initiatives, in an endeavour to render those processes more economic and efficient. However, it is equally true to say that their collective efforts have met with only limited success.

One must pose the question "Why is this so?" because, to define this problem is to go a long way towards identifying necessary remedial action.

It must, I think, be recognised that, so far as the practising profession is concerned, there are several dynamics involved.

First, the bulk of current practitioners were trained and have practised in the context of a professional culture in which the 'normal' method of dispute resolution has been the traditional process of adversary litigation before the courts. It has not, until relatively recent times, been the situation that the concept of ADR has been widely discussed by, or even regarded as a normal area of involvement of, the practising lawyer.

Moreover, this has, for many years, been coupled with a parallel general ignorance, on the part of the community at large, of what ADR processes are available and what advantages will attach to a resort to them.

It is fair to say that considerations of this type recently led to the passage of the amendments to the *Supreme Court Act,* the *District Court Act* and the *Magistrates Court Act,* which, as I have said, came into operation on 30 September last. All three now have common provisions, which enable a court to mandate ADR processes, including power to refer questions in civil proceedings for investigation and report by an expert referee.

These provisions have been enlivened, in the Supreme Court, by the making of the present Rule 76 of the Supreme Court Rules. The essential concepts of that Rule are –

- Mediation and arbitration may be conducted either by a judicial officer, or some other suitably qualified person.
- Specific guidelines are prescribed for the conduct of mediations.
- The broad mode of conduct of arbitration is also prescribed; and appropriate powers are conferred on arbitrators.
- Suitably qualified expert referees may, upon appointment, exercise powers akin to those conferred by the *Commercial Arbitration Act* and are, specifically, empowered to conduct any investigation in such manner as is most conducive to its speedy disposal; and may inform their mind in such manner as thought proper, without being bound by the rules of evidence.

It will, at once, be appreciated that this is an important new development.

Let me say that it is our expectation that we ought not to have to make too many unilateral orders for too long. Hopefully, once the profession realises that we are really serious about ADR initiatives, it will rapidly come to accept that this ought to be a first port of call in any dispute resolution situation and will, as a matter of routine, seek appropriate references at the early stages of all contentious litigation.

If such a strategy *is* to succeed, then a number of issues will need to be addressed in the immediate future. These include:

- the identification of suitably qualified mediators and arbitrators covering the requisite range of areas of expertise;
- the development of a scheme of allocation of such persons to specific matters where there is no mutual agreement between the parties in that regard;
- the promulgation of some mutually acceptable basis of charging for work done by mediators and arbitrators; and
- the determination of issues as to what venues and support facilities can be made available and on what financial basis.

Each of these aspects will, of course, require appropriate consultation and discussion.

It is stating the obvious that the statutory strategy will not be accepted unless it can produce outcomes (in terms of speed, quality and cost) which are better than traditional adversarial processes before the courts.

In the sphere of arbitration and references to expert referees it seems to me that a critical consideration is the evolution of the truncated types of procedure of the nature envisaged by SCR 76.05. If this can be promoted and made to work efficiently and economically, then, in a short space of time, the system will sell itself.

However, in the short term, we clearly have a marketing task to discharge. That ought to be carried out, I would argue, as a joint exercise, by the Courts, organisations such as your Institute and the Law Society.

It is, I suggest, an exciting new challenge, as to which the Court certainly welcomes input and suggestions from you. If we can meet it, the community will be better served, the aims of your Institute will be satisfied and the Court will be freed up to get on with the residual hard core of cases which demand the full litigious treatment.

It is a curious situation that the scheme of court sponsored arbitration which is provided for by SCR 76 is not new. It was an optional procedure written into the Rules when the current caseflow management processes were developed some time ago. In our innocence we believed that it offered an efficient, economic and expeditious means of resolving many types of dispute – particularly those with commercial overtones. We thought that it would be highly attractive as an alternative to the traditional full form of litigation. However, in practice, the profession have avoided it like the plague, just as it has also been very luke-warm concerning early ADR generally.

Such an attitude is difficult to understand. It seems to reflect an inbuilt conservatism which tends to be the hallmark of the profession. In part, no doubt, it is the fear of the unknown. Whatever may be the reason, such a situation presents you with the task of selling your services to the profession on a basis which will promote change in the existing culture and render it clear that there are very real advantages to their clients by going down that path. It is, I suggest, no use simply sitting back and expecting this type of work to flow in your direction, merely because the statutes now provide a means of mandating it. Aggressive and effective promotion on your part will be vital.

Whilst the courts themselves will actively seek to explore alternative processes with litigants they will, at least in the immediate future, desire to persuade parties along the paths of righteousness, rather than be too heavy handed. Over time, they may need to become more pressing – particularly as, currently, there is an increasing realisation that traditional forms of litigation are not providing a realistic answer for most members of the community.

Much of the same can be said in relation to the new mandate for references to expert referees. An excellent formal framework for this – which is, in reality, merely a form of arbitration – now exists. However, the horses must not only be taken to the trough – they must also be persuaded to drink. Once again there are many practical advantages to be derived from an implementation of the reference system – but it will not readily get off the ground without a great deal of encouragement. The profession simply does not think in these terms at the present time.

At the risk of seeming tedious, I repeat, the future of these types of initiative lies very much in your hands. Not only must you be able to offer the relevant areas of expertise, with professionalism at an affordable cost, but you must get out into the marketplace and effectively promote your services.

So far as the courts are concerned, we need to have and maintain currently accurate lists of persons available and their fields of expertise, together with details of the bases of charges made for the work. This is an aspect as to which your Institute needs to keep in touch with us in an ongoing manner.

I do hope that you will effectively seize the nettle and work with us towards developing a partnership system of dispute resolution attuned to the needs of our community.