



President's Message

Ian Nosworthy, President

I am delighted to be able to inform you that in South Australia the Supreme and District Courts have agreed to institute a process of, in appropriate cases, referring matters to mediation before independent mediators paid for by the parties. This is a new initiative, and will commence from 1 December 2003. It is an extremely important and very welcome decision.

The new initiative follows the success in South Australia of a pro bono mediation scheme which has long operated successfully in its Magistrates' Court, and a previous pilot mediation program in the Supreme and District Courts of the State.

However, the introduction of the new scheme has followed some local debate about access to the Courts. It is, of course, essential to avoid either the impression or reality that only those who have the benefit of legal aid or who are wealthy litigants can afford to go to Court.

In the access to the Courts debate, views have been expressed across the spectrum, including the view expressed in a ten year review of the Supreme Court reference out system in New South Wales, where former Chief Judge Gyles of the Commercial Division said:-

"Perhaps most important, lawyers and litigants must recognise that it is not and never has been the position that all litigants are entitled to have a judge decide all issues of fact and law arising in a dispute, and decide them according to the rules and practices governing traditional litigation." (1996 12 BCL 85 at 94).

South Australian judicial sentiment has tended towards providing relatively open access to the Courts of this state. However, what must also be recognised in any such debate is that most general, commercial and injury litigation, which otherwise proceeds through the Court system, does not have any special feature which prevents it from being amenable to mediation or other ADR. Indeed, in a very high proportion of those cases, the contrary position applies. In those cases, procedures which have the potential to end the dispute quickly and save the parties both time and costs, maybe preserving a relationship or two along the way, are much preferable to the bruising encounter of litigation fought to the end.

Notwithstanding these views, it is always necessary when analysing statistics on settlement outcomes from ADR to remember that at least some part of such outcomes, when a matter is on the path to litigation, may be attributable to the fact that there are times when a matter is not sufficiently "mature" to permit settlement. If ADR is attempted too early, when

blood pressure is raised and “matters of principle” abound, there may be little benefit from asking one party to see the other’s point of view. However, in time, appropriate ADR may achieve what was formerly impossible.

Key features of the South Australian Court Referred Mediation Scheme include the following:-

1. A panel of mediators will be nominated by the Presidents of the Law Society, the Bar Association and IAMA.
2. A database will be prepared identifying the specialties and experience of panel members.
3. Fees for mediators may not exceed the Masters’ Guide to Counsel Fees.
4. Mediators are not required to be legal practitioners, provided they are “suitably qualified”. IAMA accreditation is recognized as suitable.
5. The proposal contemplates that the mediation will be conducted within four to five weeks of referral, and completed within about eight weeks.
6. The preliminary mediation conference may be held at facilities including the Courts.
7. The Court Mediation Officer will collect feedback and the Courts will monitor the success of the scheme.

Like most good schemes, the present scheme is an exercise in simplicity and convenience. I hope that it will be well supported by the profession and the public. I would be delighted to hear the views of our members about the efficacy of similar schemes in other states. Frequently, there will be new ideas embodied in such schemes as they develop, and our Journal is a good forum for exchanging ideas and improving ADR for the benefit of all. I invite your input.