DISTRICT COURT OF WESTERN AUSTRALIA

SUBMISSION IN RESPONSE TO THE NADRAC ISSUES PAPER ON

ALTERNATE DISPUTE RESOLUTION IN THE CIVIL JUSTICE SYSTEM

15 May 2009

The Court has not provided an answer to each question, only those on which a meaningful comment can be made from the perspective of a Court.[1]

2. About ADR - Questions

2.1 To what extent is there a need for greater consistency in the use of ADR terms? How could this be achieved? What are the risks +/- of greater consistency in the use of terms?

The use of 'alternate dispute resolution' or ADR as the defining terminology reflects, probably unconsciously, a continuing view that any dispute resolution process other than by judicial determination is 'alternate'. It also perpetuates the view that ADR is a precursor to judicial determination. The use of the tag 'alternate' in 'alternate dispute resolution' does not reflect the fact that what may have been alternate in the past, is in fact now mainstream. The WA District Court is perhaps typical of a modern court in that only a very small percentage – about 2% - of actions commenced in the Court are resolved by trial. From a purely statistical perspective, determination by trial has in effect become the 'alternate' means of resolving dispute, against the mainstream means of a negotiated outcome or summary determination. It is more appropriate to describe the entirety of dispute resolution as a dispute resolution process, where parties can move in and out of a particular process at any time.

---

1 Where appropriate, a reference to 'court' should be read as including 'tribunal' and a reference to 'judge' should be read as including 'tribunal member'.

2.2 How does inconsistent use of ADR terms affect consumers and referral to ADR processes by courts, lawyers and others?

Inconsistent terminology means that parties may come to an ADR process with different expectations as to the process. The use of consistent terminology would reduce the risk of this occurring, especially if coupled with education and information initiatives to increase general community understanding about ADR processes.

Any inconsistencies between the common use of a process tag and the particular use in the court can be ameliorated by the pre ADR process when the nature and type of the process to be used can be clarified.

Also, it may be that particular ADR programs will have their own descriptions of particular processes. For example, the WA District Court uses the terms: 'pre-trial conference',' special appointment pre-trial conference' and 'mediation conference'.

2.3 What are the advantages and disadvantages of adopting common process models for ADR processes, adopting standard definitions or adopting statutory definitions?

The question presumes there does not already exist a common process model. The National Mediation Practice Standards, LEADR, IAMA all state a process model which in essence have a common process;

- *pre mediation meeting*
- *agenda setting*
- *articulating issues and needs*
- *generating options*
- *post mediation.*

However whilst within each model there is elements of a common process, there is no unified process. Nor should there be. Experienced dispute resolvers will not use one process during the course of a mediation, or from mediation to mediation, but may adopt a number of approaches. The essence of the mediation process is its flexibility. To define a common process may result in the loss of an essential aspect of mediation.

In most ADR conferences in the WA District Court, the plaintiff's lawyer, defendant's lawyer and defendant's representatives are very familiar with the court's processes. To undertake a general mandatory introduction for all participants is a waste of time. Rather, the introduction is tailored to needs of the one person not familiar with the process, being the plaintiff.

Again, in the WA District Court context, in some cases the parties will be close to a settlement when they call for the assistance of a Registrar. The Registrar may then use a truncated process to home in on the remaining areas of disagreement and facilitate a resolution.

3. Promoting public awareness — Questions

3.1 To what extent is there a need to improve the understanding of ADR and its differing processes in the general community? How might this be achieved?

In a court setting, the relevant part of the general community is those people who are parties to existing litigation or who are contemplating commencing litigation in the particular court. In the WA District Court the vast majority of non-professional litigants (ie excluding insurance representatives and the like) are represented by legal practitioners who are familiar with the practices and processes of the court. They are the primary means by which their clients understand the ADR program offered by the court.

The understanding of actual or potential litigants can be improved by:

- *Educating practitioners*
- *Pre-litigation protocols requiring conferral or the parties to consider ADR and certify that this has occurred.*
- *Brochures and website material, perhaps coupled with an obligation on a lawyer to provide the brochure to their client at particular points in the life of the action.*

4 Provision of ADR Services — Questions

4.1 What are the benefits and drawbacks of court based ADR?

A significant benefit of court based ADR is that a court is able to compel the parties to participate in an ADR process. If a claimant wishes to participate in ADR as an alternative to litigation, and the party resisting the claim does not wish participate in ADR, the claimant cannot compel participation (with limited exceptions such as industry schemes like the Financial Ombudsman Service[2]*).*

Other benefits of Court based ADR include that:

- *It gives the parties the opportunity to avoid the cost and time delays associated with judicial determination at trial.*
- *It ensures that, even in the litigious process, the parties retain a degree of control in the outcome.*
- *It can allow the parties to more accurately define the issues in dispute, reducing the cost of and delay to trial.*
- *The ADR process can be seamlessly integrated into the court's issue definition and factual discovery processes.*

The availability of court based dispute resolution processes fulfils the community's expectation in relation to access to justice. A court based dispute resolution process enables parties to have ready access to the courts' facilities, so that their matter has the potential to be resolved quickly, efficiently, and in a cost effective way.

---

[2] See generally its website: http://www.fos.org.au/centric/home_page.jsp.

4.2 How effective are the existing ADR services available in courts and tribunals prior to a final hearing?

A measure of the effectiveness of the existing ADR services in the WA District Court is that in 2008 only 2.6% of finalisations were through determination by trial.

What is not shown by the statistics is the ability, through a dispute resolution process, to narrow the range of issues, thereby reducing the cost of and delay to trial. For example, in a personal injuries case, liability may be admitted or a percentage of contributory negligence agreed. In a commercial case, say for defective work done under a building contract, the cost of the rectification work can be agreed, leaving the judge to determine liability at trial.

Another dimension of effectiveness is the ability of an ADR program to facilitate a negotiated outcome earlier in the life of the action than may otherwise have been the case. A particular outcome to be avoided is the door-of-the-court settlement on the day of the trial, By this time the parties will have spent considerable expense in getting the case ready for trial. Also, a settlement at this stage will given the court no ability to use the trial time allocated, thereby depriving another litigant of the opportunity to use the trial time.

4.3 To what extent should judges or other court staff encourage disputants to use ADR (where not required by legislation)?

In the WA District Court, it is mandatory for all cases commenced by writ to have at least one ADR conference or one form or another.

Judges and Registrars encourage disputants to participate the ADR program at the earliest stage practicable. It is not unusual for the parties to be encouraged to participate in a second or third mediation conference during the life of the case. Even during the course of a trial a judge has ordered the parties have another attempt a mediating a resolution.

4.4 What role should courts have in facilitating or providing ADR?

In the WA District Court, only a small percentage of cases are finalised by judicial determination at trial (2.6% in 2008). ADR is thus rapidly becoming the mainstream method of dispute resolution. Courts thus have a role to ensure litigants have access to high quality, cost effective ADR programs as an integral part of their overall case management program. The guiding principle should be that every civil action should have the benefit of an ADR conference as early as practicable in the action. The objective of a court ADR program is to ensure that the cases which settle do so at as early a stage as practicable, with as least effort and expense as practicable.

There are at least three indicia of a high quality Court mediation program. They are:

- *Experienced mediators.*
- *Purpose designed facilities.*
- *An evaluation / intake process which seamlessly integrates the mediation program with the overall case management program of the Court.*

This last point about integration is designed to ensure that the case proceeds to mediation at the earliest practicable opportunity. The ability of a court to integrate mediation with its issue definition and factual discovery processes is a strength which assists in the amicable resolution of many cases. For example, it may be that during the course of a mediation conference it becomes apparent that the documents of a third party – perhaps a mutual former accountant – contain critical information. In the Court setting, the parties are able to suspend the meditation, obtain an order requiring the third party to produce documents to the Court, inspect the documents and then recommence the mediation.

4.5 To what extent might low cost, efficient court ADR services be a disincentive for disputants to use other ADR services before commencing proceedings? What could be done to overcome that?

It is difficult to see how the existence of low cost, efficient and high quality court ADR services is a disincentive to use other ADR services. Other ADR services rely on the consent of all parties. If the parties are willing to use ADR, they will probably use ADR both before commencement, and during the course of litigation. The issue is more likely to be lack of cost effective quality, alternatives to court ADR, especially in commercial cases.

If court processes are seen as a disincentive for disputants to use other ADR services, then the solution is ensure that the non-court ADR processes are of equal quality and efficiency, and have competitive cost structures, having regard to the cost risks inherent in commencing litigation.

Even if the existence of low cost, efficient court ADR services is a disincentive for disputants to use other ADR services, this is no reason for the courts to cease offering a low cost, efficient and high quality ADR program. Low cost, efficient and high quality ADR services need to be offered by court if for no other reason than to be available for disputes in which one or more party does not wish to participate voluntarily in ADR.

4.6 What are the advantages and disadvantages of requiring court provided ADR services to meet the same standards as private and community based services?

Court based ADR services should at least meet the same standards as private and community based services. Court based ADR tends to be mandatory, meaning that one or more of the parties may be an unwilling participant. This imposes a greater obligation on courts to ensure that their mediators, practices and facilities are at leading practice standards.

One possible disadvantage of requiring court based mediators to be accredited is that there is the possibility of conflict between the independence of a court and the discipline processes required of a Recognised Mediator Accreditation Body. The WA Supreme and District Courts have resolved this tension by becoming a RMAB themselves, with the discipline function being carried out by the respective Chief Judicial Officer (if necessary in the context of the relevant public sector employment legislation).

Ultimately, the issue is one of competition. Disputants who are willing to participate in ADR will choose the service provider which they perceive to offer the best prospect of successful resolution. The elements of competition include cost, timeliness, complexity and flexibility of procedures and, perhaps critically, perceived quality of mediators.

Judicial dispute resolution

4.7 What are the advantages and disadvantages of judges conducting ADR processes? In particular, what are the advantages and disadvantage of judges conducting mediation (as described under the National Mediator Accreditation System)? Are there particular cases where direct participation by judges in ADR is more appropriate?

The disadvantage of judges conducting court based ADR is that it blurs a role differentiation. Where Registrars are used as mediators, the role differentiation remains clear – the Judges make a formal determination of the dispute, whereas the Registrars assist and facilitate the parties to resolve their dispute. However, it may be that for some litigants, Registrars are viewed as being the same as a Judge, in the sense that it is the 'Court' who is doing the mediation. This perception might also arise out of the Registrar's interlocutory decision making role in the litigation process.

An advantage of a judge conducting ADR is that their experience and the respect in which they are held may mean that the parties take the mediation more seriously that if conducted by a Registrar or an external mediator. However, the flipside is that the Judge might never be perceived as having put aside their judicial power in the process, in order to act as a facilitative mediator.

If judges were to conduct mediations, there would be a need to ensure that they were appropriately trained and experienced in ADR.

4.8 To what extent is it an advantage of judicial involvement that it improves the chances of resolution? Why might this be the case? To what extent might this have negative consequences?

In matters where a pure question of law, or the construction of a contract there could be an advantage in having a judge mediator. In that case the judge could well give an indication of their thinking, in the manner of a non binding expert opinion. However, almost axiomatically, the judge then ceases to be a neutral facilitator. In other respects it is better, in terms of cost and

access to justice, that judges remain the determiner of disputes by imposing a decision.

Court officer provided ADR

4.11 What are the advantages and disadvantages of having court staff such as registrars provide ADR services? What role might be most appropriate?

All Registrars in the WA District Court are trained in mediation – either through the Harvard School or LEADR. The Registrars also participate, regularly, in professional development, and are nationally accredited.

The advantage of having a Registrar is that the mediation is conducted within the context of ongoing litigation. In the WA District Court, ADR is regarded as a process and not a single event. Thus the mediation Registrar can adjourn a mediation to enable another Registrar to make orders in relation to discovery or expert evidence. When those matters have been dealt with, the parties can then come before the mediation Registrar and again participate in the dispute resolution process. This procedure enables matters to be resolved either very quickly, where there is a commercial imperative, or to come to a conclusion as the issues are narrowed, evidence to deal with those issues is obtained, and the parties come together again. The advantage there is that behind the mediation Registrar stands the Court process to assist in the gathering of information to enable the parties to come to their own decision.

4.12 What are the advantages and disadvantages of courts engaging specialist ADR practitioners to provide ADR? What are the advantages and disadvantages of courts engaging ADR practitioners with particular expertise, e.g. accounting, engineering, psychology, etc?

The optimal position would seem to be to allow the court the flexibility to use its own specialist ADR practitioners or to allow the parties to engage outside ADR practitioners as the case requires. One difficulty with the Court engaging specialist external ADR practitioners is cost. The rules of the WA District Court provide that the Court cannot force a party to use an external mediator which the parties will have to pay for, unless they agree. By contrast, there are minimal if any court fees for ADR conferences before a Registrar of the court.

Again with ADR practitioners with specialist skills (eg accountants), the optimal position would seem to be for the court to have this power to use in appropriate cases. The same funding issues would apply, unless the court had a budget for specialist ADR practitioners in appropriate cases.

5. Referral and assessment — Questions

5.2 To what extent is there a need to enhance the understanding of ADR amongst court staff and judicial officers? How might their information and referral functions be enhanced?

In the WA District Court, the judiciary and court staff know and understand the benefits of dispute resolution processes. Registrars manage the intake process for ADR as an integral part of the overall case management program. When appropriate, a Judge will refer a matter to mediation – either by a private mediator or a court based mediator - as part of the case management by the Judge, or even during the course of a trial.

6. Barriers and incentives — Questions

6.1 What are the barriers to the use of ADR before civil proceedings are commenced? To what extent, do they apply generally to all forms of ADR? To what extent do they apply to all types of disputes? Why? How can they be overcome?

A substantial barrier to the use of ADR before civil proceedings are commenced is where one or more parties are unwilling to participate in an ADR process. One way this can be overcome is to increase the range of ADR services available so that there are more alternatives available to those who are sceptical about ADR – see the comments below. Another way is to have a form of pre-action protocol requiring a potential litigant to raise the issue of ADR with the potential defendants. At least then the use of ADR has been considered. The plaintiff would then to certify to the court as part of the commencement process that this conferral has occurred. There could be costs sanctions if this conferral did not occur.

Another substantial barrier to ADR before civil proceedings are initiated is the lack of knowledge by the parties of the issues involved and the strengths and weaknesses of their case. The lack of knowledge may be as to the nature of the claim or defence, relevant documentation or expert's reports. An example is an action for breach of a restraint of trade clause following the sale of a business. In this type of case, it is difficult for the potential plaintiff to obtain information about the extent of profits made by the vendor in breach of the restraint of trade. Here the court's information gathering processes can be used to provide the information which the plaintiff requires to assess its claim. Armed with this information, the plaintiff can then participate in a court annexed ADR process, at which the defendant is required to attend and participate in good faith.

Another barrier is the absence (at least in Western Australia) of commercial dispute resolution centres, offering ADR services, outside the courts. There are certainly mediators available and parties willing to use their services. What seems to be missing is some form of program to give the process

institutional credibility. The four core elements of such a program would seem to be:

- *Program sponsorship by the Government or a leading business organisation (such as the Chamber of Commerce) from which referred credibility can be derived.*
- *A purpose designed neutral venue.*
- *The selection or endorsement of a cadre of professional mediators (or other dispute resolvers).*
- *A fee structure which makes it cost effective for most levels of commercial dispute.*

The Singapore Mediation Centre is an example in point.[3]

6.2 What are the barriers to use of ADR after civil proceedings have been commenced? To what extent do they apply generally to all forms of ADR? To what extent do they apply to all types of disputes? Why? How can they be overcome?

In the WA District Court there are no legal or practical barriers to some form of ADR after civil proceedings are imitated. On the contrary, it is in practice mandatory for all civil actions to have some form of ADR conference prior to trial.

There is no legal or practical barrier to an ADR conference being held very early in the life of the action. A mediation conference could be held with only the writ and memorandum of appearance having been filed. The two forms of ADR used are mediations and pre-trial conferences. The pre-trial conference process has many of the hallmarks of a 'mediation' process within the NADRAC definition. It is a process by which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The Registrar acts as a third party to support participants to reach their own decision. It is a facilitative, not a determinative, process.

There are barriers to the use of other forms of ADR, for example, early neutral determination. The barrier is that there is no power in the rules of Court to order the parties to participate in this form of ADR. The barrier can be overcome by amendment to the rules of court.

One conceptual barrier is that once litigation is commenced, some parties (and legal advisers) can become entrenched in their positions and it becomes harder to promote reconciliation. This is particularly so where there is a element of relationship breakdown surrounding the claim (eg where family members or 'mates' are litigating about a business failure). It is less likely to be an issue in a transactional case, for example, where a person injured in a motor vehicle accident claiming under the compulsory insurance scheme.

---

3 See generally its website: http://www.mediation.com.sg/.

6.3 To what extent and in what ways is the culture of the legal profession a barrier to greater use of ADR? Why? What could be done to remove this barrier?

In the experience of the WA District Court, whilst the culture of the legal profession may have been a barrier to the use of ADR in the past, it is much less of an issue now. Practitioners on both sides of the litigious fence see the advantage of a mediated settlement, in particular where the costs of litigation have a real risk of blowing out of all proportion to the amounts in dispute. Indeed, many practitioners view see trial as a last resort to be used only when intractable difficulties arise between the parties.

One cultural issue is perhaps a reluctance to use ADR processes outside the court as an alternative to court action where the lawyers are not able to negotiate a dispute. This could be removed by requiring pre-litigation conferral about ADR and/ or formalising some of the ADR processes outside the court perhaps by the creation of mediation centres (see the answer to question 6.1).

6.4 To what extent and in what ways is the adversarial nature of the civil justice system a barrier to greater use of ADR? Why? What could be done to remove this barrier?

In the experience of the WA District Court, the adversarial nature of litigation is not of itself a barrier to dispute resolution. If a party's solicitor is adopting an adversarial approach, it is the skill of the mediator to deflect that and focus on the process of the mediation. It is rarely the case that either party's solicitors or counsel are so adversarial that the parties themselves cannot be engaged.

6.5 What changes to cost structures and civil procedures could be made to remove practical and cultural barriers to the use of ADR, both before commencing litigation and throughout the litigation process?

The cost scale in WA provides allowances for informal conferences where reasonably held after the commencement of litigation.

If there is a pre-action protocol requiring conferral about mediation, then the cost scales could include work done as part of the conferral process, as well as work done in any ADR process that took place as a result of the conferral.

6.6 To what extent is the cost of ADR services, or inability to recover costs for ADR, a barrier to early use of ADR? What could be done to remove any barrier?

It has not been the experience of the WA District Court that the cost of ADR services in actions commenced in the court is a barrier to resolution of matters. There is no specific fee charged by the Court for a mediation conference using one of the Court's Registrars (though there is a fee charged for entry for trial and for the filing of a chamber summons seeking orders for the listing of a mediation conference).

6.7 How might the use of the draft model mediation clause at Attachment D assist in overcoming barriers to the use of ADR? How might the use of such a clause be encouraged? Would it be helpful if such a clause were implied into all contracts?

If the parties to a contract agree to have a mediation clause in their contract then one of the main barriers to the use of ADR is overcome – the unwillingness of one party to participate in the process. However, the clause does leave open the prospect of an argument that the participation by a party was not in good faith, especially given the cost consequences of not complying with the obligation to mediate. The mediator may then have to give evidence as to the manner in which the representatives of a party conducted themselves.

One problem with the draft model mediation clause is that it does not allow for the situation where there is a pure question of law involved, or where there is a dispute on the construction of a contract which may have large implications. Such a clause requires the parties to undergo a dispute resolution process simply to move to the next step. There should at least be the ability for the parties to agree not to use the mediation process.

Another problem with the draft mediation clause is that there should be an ability of the party raising the claim to commence court action (without cost consequences) if the other party does not respond to the notice in clause 2 within, say, 7 days of service. The process in clause 3 should only be adopted once the other party has responded to the notice and there is a dispute about the identity of the mediator and/ or the process to be used.

As a matter of principle, a clause of this kind should not be implied into all contracts. This is because it would take away one of the important hallmarks of the mediation process being the voluntary participation of the parties. It would seem more appropriate to ensure that high quality, cost effective, ADR processes are available to parties contemplating litigation, leaving compulsory participation in dispute resolution processes (both judicial determination and ADR) to the court system.

6.8 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR before commencing litigation?

One strategy is to use pre-action protocols. There could be cost consequences of a failure to comply with the protocols. This strategy is used by the Subordinate Courts of Singapore in medical negligence claims.[4]

6.9 What strategies could be pursued by litigants, lawyers, tribunals, courts or government that would provide incentives to use ADR during litigation?

---

4 [4]Singapore Subordinate Courts. Practice Directions, rule 151A, Appendix FA, available online at http://app.subcourts.gov.sg/subcourts/page.aspx?pageid=4433.

The case management program of the WA District Court has a major focus on ensuring that the case has the benefit of ADR as early as possible in the litigation process. Rather than provide incentives, the District Court makes participation mandatory, retaining flexibility as to when in the litigation the ADR occurs and the form of the ADR process.

6.10 What are the advantages and disadvantages of creating costs consequences for parties who do not attempt ADR? What form might these take? (See also discussion of mandatory ADR below).

By creating costs consequences before undertaking litigation again suggests a shift in thinking; that entering into the mediation process is no longer a voluntary act. In any event the cost consequences are already in existence through the use of Calderbank letters and formal offers under court rules which carry cost consequences (eg Rules of the Supreme Court 1971 (WA), Order 24A). In commercial matters, even the most litigious lawyer, will seek to protect their client's position by making Calderbank offers.

In some cases, the issues need to be clarified, and further information obtained, before one or other part is able to sensibly engage in a mediation. In a case like this, it may be of limited utility to engage in mediation prior to at least some of the litigation process occurring.

6.11 What are the advantages and disadvantages of requiring the courts or the legal profession to inform people and organisations in dispute about the ADR services that are available?

There can only be an advantage in ensuring that all parties are aware of the availability of ADR processes to resolve their dispute.

6.12 Would it be helpful to include any of these measures in legislation, court rules or other subsidiary legislation?

ADR process are already entrenched in the WA District Court Rules, along with a requirement to participate in good faith. To go further again assumes that entering into the ADR process is no longer voluntary. Once that concept is accepted, then the support for the mediation process must be also available i.e. an appropriate venue, suitably qualified mediators and a fee structure that makes the process accessible to the parties.

7. Use of ADR in government disputes — Questions

7.1 In what type of matter do/should Commonwealth agencies utilise ADR?

In the WA District Court, the Commonwealth (eg the ATO) is treated the same as any other litigant, and subject to the compulsory mediation program.

8. Use of ADR techniques — Questions

8.4 To what extent would it be useful to introduce:

- judicial case appraisal
- a dispute management judge, or
- increased use of round table case management conferencing?

The key to the ability of a Court to cost effectively resolve cases consistent with their obligation to do justice between the parties, is the ability for the Court to have a range of different case management processes available so that the optimal process can be used in each case from time to time. The range of case management processes should include the option of judicial case management, docket management by a Judge (in which the Judge conducts a series of case management hearings, including to determine any necessary interlocutory disputes) and round table case management conferencing. By way of example, the case management program in the WA District Court is flexible enough to encompass each of these three approaches, and each is used from time to time.

There are some problems with the ADR concept of judicial case appraisal. If the case of one or other party is strong, then it is open for the party to have the claim, or at least parts of it, determined through a summary judgment application or an application to strike out part of the claim as disclosing no reasonable cause of action. If the claim is not strong enough to be determined by summary judgment, it is dangerous for a judicial officer to determine it, even provisionally, as part of an ADR process. This is because it can undermine the reputation of the Court. Assume the issue is a damages assessment for a personal injuries case. The parties provide written and oral material for a judicial officer to appraise. The judicial officer appraises the likely damages award at between $100,000 and $120,000. The defendant has offered $50,000, and has done so under a formal court offer system which imposes cost consequences if the damages awarded at trial does not exceed this amount. The plaintiff hears the appraisal and rejects the offer. The defendant disagrees with the appraisal and does not increase its offer. At trial, the plaintiff is awarded $45,000. The plaintiff would be justifiably aggrieved by this process. The judicial appraisal process led the plaintiff to reject an offer which in hindsight was reasonable. It would be much more appropriate for the plaintiff to have been involved in a facilitative ADR process in which the mediator had led a discussion about the different scenarios which could occur at trial and the possible range of damages a Judge could award. It would then be for the parties to assess the risk of the damages award being more or less than the offers then being made. In the example quote above, if the plaintiff having had the benefit of an ADR discussion took the risk of rejecting the $50,000 offer and then did not exceed this amount at trial, there is no avenue for criticism at the court for misleading the plaintiff into thinking that the award would be higher. Ultimately, in the adversarial process, it is for the parties to rely on their own resources, advice and inquiries to determine the likely worth of their claim at trial.

An experienced mediator is able to ask questions of the parties, in both open and private sessions, which illuminate the strengths and weaknesses of each side's positions.

As to the concept of a 'dispute management Judge', it should be part of the ongoing continuous improvement program of a court to "regularly review court procedures to see whether there may be opportunities to enhance them by using techniques developed in ADR". In other words, the capacity to undertake this review should be integrated into the ongoing management program of the court, and not necessarily vested in a single appointed 'specialist'. ADR expertise is conceptually no different from information and communication technology expertise or cultural communication expertise– they are each disciplines which need to be seamlessly integrated into an ongoing continuous improvement program. Having said that, the court can and should draw on the experience of all its judicial officers in its ongoing continuous improvement program. It should also draw on external expertise across a multitude of disciplines as the need arises.