

## Law Council of Australia — Multi-Door Symposium

# Perspectives on Court Annexed Alternative Dispute Resolution

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I thank the Standing Committee on Alternative Dispute Resolution of the Law Council of Australia for its invitation to participate in this important Symposium. I do not make this presentation as an expert in alternative dispute resolution ("ADR"), but rather offer some perspectives of a personal nature based in part on my own experience. It is necessary also, I think, to say something about the distinctive character of the judicial function which is not to be treated as one among a number of dispute resolution techniques.

The concept of the multi-door courthouse, from which the Symposium takes its title, is said to have originated with a paper given by Professor Frank Sander of Harvard University in 1976<sup>1</sup>. The occasion was a conference named in honour of Professor Roscoe Pound. Professor Pound had delivered a famous paper in 1906 entitled "The Causes of Popular Dissatisfaction with the Administration of Justice"<sup>2</sup>. As Professor Sander explained, in an online

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<sup>1</sup> Sander, "Varieties of Dispute Processing", in Levin and Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future* (1979).

<sup>2</sup> Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice", American Bar Association Report of 29:395, reprinted in Federal Rules Decisions 35:273 (1964).

dialogue in 2008, Pound had not been well treated and received when he delivered his famous lecture. Sander said<sup>3</sup>:

They had felt bad about it since then and wanted to have a broad conference dealing with various issues of dissatisfaction with the legal system, one of which was dispute resolution but also many others – criminal cases, civil cases, and so on.

In the course of his 1976 address, Professor Sander referred to the tendency to assume that courts are the natural and obvious dispute resolution forum but observed that there were a variety of processes that might provide more effective forms of conflict resolution. Sander's comments have been described as "a blueprint for the drastic changes that were to occur in the years after 1976 in how the courts in the US and around the world administered justice, approached case backlogs, and revolutionized how disputes are resolved"<sup>4</sup>.

The key questions raised by Professor Sander and which are raised by the multi-door concept, are:

1. What are the significant characteristics of the mechanisms of dispute resolution?

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<sup>3</sup> Hernandez-Crespo, "A Dialogue between Professors Frank Sander and Marina Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse", (Working Paper, 2008) available at <http://ssrn.com/abstract=1265221>.

<sup>4</sup> Gray, "Creating History: The Impact of Frank Sander on ADR in the Courts", (2006) 22(4) *Negotiation Journal* 445 at 446.

2. How can those characteristics best be utilised to develop rational criteria for determining which cases can best be handled by which dispute resolution process.

The factors to be considered in determining the appropriate dispute resolution mechanism included:

1. The nature of the dispute.
2. The relationship between the disputants.
3. The costs, taken as a reference both to the amount of the claim and the cost of pursuing it.
4. Speed, being a reference to the desire for quick resolution and the need for urgent intervention.

In proposing those factors it has been said that Sander laid the ground work for integrated case-screening mechanisms and diversion to ADR<sup>5</sup>.

The term 'multi-door court' was not coined by Professor Sander. He himself used the label 'Comprehensive Justice Centre' to describe a court providing access to a range of ADR facilities. However, the American Bar

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<sup>5</sup> Ibid, at 446.

Association published an article about his talk in one of its Journals and, as he put it<sup>6</sup>:

On the cover, they had a whole bunch of doors, and they called it the multi-door courthouse.

The essence of the concept of the multi-door court, as Professor Sander explained it in 2008, was<sup>7</sup>:

... to look at different forms of dispute resolution – mediation, arbitration, negotiation, and med-arb, (a blend of mediation and arbitration). I tried to look at each of the different processes and see whether we could work out some kind of taxonomy of which disputes ought to go where and which doors are appropriate for which disputes. That is something I have been working on since 1976, because the thing about the multi-door courthouse is that it is a simple idea, but not simple to execute, because to decide which cases ought to go to what door is not a simple task. That is something we have been working on.

He justified the connection of ADR to the courts by quoting from the bank robber, Willie Sutton. When asked why he robbed banks, Sutton said:

That's where the money is.

Similarly, the court is where the cases are. It was therefore natural, so he said, to have the court as one door of the multi-door courthouse. On the other hand, that institutional proximity was not essential to the vision.

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<sup>6</sup> Crespo, op cit, at 8.

<sup>7</sup> Crespo, op cit, at 8.

The concept of court-annexed ADR is well established and worthy of development in a way that better integrates the various options and provides a principled basis for their connection to the judicial process. I must, however, express a reservation about the use of the 'multi-door courthouse'. It is the courts and only the courts which carry out the adjudication function involving the exercise of judicial power. Their special position as the third branch of government is made explicit in the Commonwealth Constitution and is a matter of convention in the States. Importantly, the courts are not to be seen simply as one species of provider among a number of providers of ADR services.

Turning to the content of the 'multi-door courthouse' concept, pilot projects under that title were set up in the United States in Tulsa, Houston and Washington DC in 1985 with the support of the American Bar Association's Standing Committee on Dispute Resolution. Other pilot programs were set up in New Jersey and in Cambridge, Massachusetts in the 1980s<sup>8</sup>. The nature of the programs was described in an article by Ericka Gray as follows<sup>9</sup>:

The programs were designed to function as an integral part of the administration of the courts and to divert cases to the most appropriate 'door' using screening criteria suggested by Sander and further developed in each project. Unlike individual court-annexed dispute resolution programs, the multi-door model provides a coordinated approach to dispute resolution with intake and referral operating under one centralized program, rather than independently. Flexibility, which

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<sup>8</sup> Gray, op cit, at 446.

<sup>9</sup> Gray, op cit, at 446.

enables each system to adapt the multi-door concept, has been a hallmark of these programs.

The idea has spread to other countries. Close to our shores, the website for the Subordinate Courts of Singapore states that they offer a multi-door courthouse service. On that website the court user is invited to explore the alternatives of conciliation, mediation and electronic ADR before pursuing a court action. Electronic ADR involves two parties submitting to online mediation.

In Australia, the movement of the Land and Environment Court towards a multi-door courthouse has been described and discussed comprehensively by Justice Brian Preston a speech published in two parts in the *Alternative Dispute Resolution Journal* in 2008<sup>10</sup>. The Family Court of Australia had also undertaken trials of a scheme similar to that of the multi-door courthouse concept in the late 1990s under the title 'Integrated Client Services'. These developments can be seen against the recent history of the development of court-annexed ADR.

Court-annexed ADR, and specifically court-annexed mediation, has become a well established feature of the Australian judicial system since the 1990s. The idea of court involvement and specifically judicial involvement in the resolution of disputes before they went to hearing is not novel.

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<sup>10</sup> Preston, "The Land and Environment Court of New South Wales: Moving towards a Multi-Door Courthouse", Pt 1: (2008) 19 *Alternative Dispute Resolution Journal* 72; Pt 2: (2008) 19 *Alternative Dispute Resolution Journal* 144.

The English County Court Judge and legal novelist, Henry Cecil, in one of his 1970 Hamlyn Lectures entitled 'Public Image of the Judges' said<sup>11</sup>:

In civil cases an interview with the judge and counsel may be particularly useful to enable them to arrive at a fair settlement satisfactory to both sides. It is perfectly true that the public is not present at those negotiations but neither is the public present when counsel or solicitors are discussing a case between themselves to arrive at a settlement.

In connection with settlement discussions with the judge in divorce cases he said<sup>12</sup>:

In the result, I have never known of a civil case where an interview between the judge and counsel did any harm to either of the parties or to the public.

Professor Marc Galanter wrote an article in 1986 setting out a concise but comprehensive history of judicial involvement in ADR in the United States, going back at least as far as the early 1920s. The pragmatic philosophy that informed judicial involvement was explained by an early experimenter, Judge Lauer of the Municipal Court in New York who said:

It is the duty of the court, as I see that duty, to stop the fight if possible before the fighters are seriously hurt. This can be attempted by an effort to adjust the dispute or differences of the contending parties.

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<sup>11</sup> Cecil, "Public Images of the Judges" in Cecil (ed), *The English Judge*, (1970) at 66.

<sup>12</sup> Ibid, at 66.

He saw settlement as a means of reducing the delays associated with litigation.

One of the American judges evidenced a hands-on approach bordering on the coercive which was exemplified in the statement attributed by Galanter to a judge in Columbia County in the 1950s:

I exert all the pressure I can, short of giving the impression that I am prejudiced or that I would take it out on anybody if a trial is found necessary, and short of actually compelling any party to act against his well-considered judgment.

The involvement of judges in encouraging settlement as an incident of the litigation process has become well entrenched. By the time that Professor Galanter wrote, it had become the established position in the United States federal judiciary that it was appropriate for the judge to be an active promoter of settlements. The Federal Rules of Civil Procedure in 1983 provided, in r 16, that the court had a discretion to direct attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for a number of purposes including well established case management objectives and also for 'facilitating the settlement of the case'. The publications issued by the Federal Judicial Centre in 1990 included:

1. Settlement Strategies for Federal District Judges (1986);
2. the Judge's Role in the Settlement of Civil Suits; and
3. the Role of the Judge in the Settlement Process.

Many judges in the federal courts were concerned with the obvious pitfalls in the involvement in pre-trial negotiations of the trial judge. This led them to develop an informal practice of asking a judge not assigned to the case to hold the settlement conference. That process became institutionalised in a number of US federal courts. In some District Courts the settlement process was largely left to magistrates. The involvement of judges was more a matter of personal discretion.

There was evidence in surveys carried out in the 1980s of wide public and professional support for judicial involvement in the settlement process. In 1990, Senator Biden, as Chairman of the Judiciary Committee of the US Senate, introduced the Judicial Improvements Bill which became the *Judicial Improvements Act 1990* (US). The Act embodied a principle of judicial responsibility for case management. It required the establishment by each US District Court of a Civil Justice Expense and Delay Reduction Plan. In s 473 the Act spelt out the elements required of such plans including the following:

For all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer:

- A. explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation.

By sub-s (6) of s 473 the plan was required to provide for authorisation to refer all appropriate cases to ADR programs that might have been designated for use in a District Court or that the Court might make available including mediation, mini trial and summary jury trial.

The use of pre-trial conference systems in Australia was discussed in the 1984 Report of a project undertaken by the Australian Institute of Judicial Administration under the title 'Delays and Efficiency in Civil Litigation'. There was a pre-trial conference system in New South Wales and Victoria. In my home state of Western Australia, similar conferences had been conducted for some years in the District Court, largely in personal injury litigation. None of the Australian State procedures had involved judges. The AIJA Report did indicate that there was provision in Canada for judicial participation on the basis that the judge presiding at the settlement conference would not try the action<sup>13</sup>.

The Federal Court of Australia at an early stage commenced conducting pre-trial settlement conferences using its Registrars as an adjunct to listing for trial. In the early 1990s, O 10 r 1(2)(g) was introduced into the Federal Court Rules. The Court was empowered to:

order that the parties attend before a Registrar or a Judge in confidential conference with a view to reaching a mediated resolution of the proceedings or an issue therein or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter or otherwise to shorten the time taken in preparation for and at the trial.

Section 53A of the *Federal Court of Australia Act 1976* (Cth), which was enacted in 1991, empowers the Court to refer proceedings, any part of them, or any matter arising out of them to a mediator or an arbitrator for mediation

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<sup>13</sup> Supreme Court Rules of Ontario, r 244.

or arbitration in accordance with the Rules of the Court<sup>14</sup>. Referrals can be made to a mediator without the consent of the parties. However, a matter could be referred to arbitration only by consent<sup>15</sup>. An arbitrator may refer matters of law to the Court<sup>16</sup>. Words said or admissions made at conferences conducted by a mediator under s 53A are not admissible in any court<sup>17</sup>. Section 53C provides:

A mediator or an arbitrator has, in mediating or arbitrating anything referred under section 53A, the same protection and immunity as a Judge has in performing the functions of a Judge.

Sections 53A, 53B and 53C were introduced by amendment to the Act in 1991<sup>18</sup>. Sections 53AA and 53AB were introduced in 1995.

The bulk of court-annexed ADR in the Federal Court is by way of mediation. There have been experiments from time to time with other forms of ADR. These have included early neutral evaluation and mini-trials. The extent of judicial involvement was limited and there was certainly debate in the 1990s about the appropriateness of judges becoming engaged in court-annexed mediation.

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<sup>14</sup> *Federal Court of Australia Act 1976 (Cth)*, s 53A(1).

<sup>15</sup> *Federal Court of Australia Act 1976 (Cth)*, s 53A(1A).

<sup>16</sup> *Federal Court of Australia Act 1976 (Cth)*, s 53AB.

<sup>17</sup> *Federal Court of Australia Act 1976 (Cth)*, s 53B.

<sup>18</sup> *Courts (Mediation and Arbitration) Act 1991 (Cth)* (No 113 of 1991).

In 1990, I attended the Harvard University Summer School program on negotiation which was conducted by Professor Roger Fisher, the co-author of the well known book 'Getting to Yes'. The Fisher and Ury course offered a coherent and intellectually attractive methodology for negotiation which could readily be transposed to mediation. This was called 'principled' or 'interests-based' negotiation. It required the parties to identify the interests which they each sought to advance, and to identify the interests of the other party. It required consideration by each party of the best alternative to a negotiated agreement (BATNA) which that party could hope for. It required the development of options for resolution which made reasonable allowance for the interests of each side, subject to criteria of legitimacy, judged by reference to fairness of outcome.

When I returned to Australia, I engaged in judicial mediation in two matters by way of experiment. This was on the basis that if the matters went to trial they would be dealt with by another judge.

In one of the matters, involving an action for misleading or deceptive conduct, I held ex parte meetings with the parties on either side. In the end, I formed the impression that the major benefit of these ex parte meetings was to allow each party to vent about the other in the presence of an authority figure. I recall reading somewhere that ex parte venting can pave the way to resolution. I don't recall that venting led to any such outcome in that case.

Another mediation of much greater complexity did lead to a resolution, but only by changing its shape part way through. One of my fellow judges in Perth referred a matter to me for mediation which involved litigation between the Commissioner of Taxation and an importer of CD-Roms containing software programs for amusement arcade games. A large number of these

CD-Roms had been imported under a variety of agreements with the overseas suppliers. There were about 120 agreements involved. The question in dispute between the Commissioner and the importer/taxpayer was the extent to which the 'royalty' arrangements in relation to the CD-Roms fed into the assessment of sales price for the purposes of the *Sales Tax Assessment Act* 1992 (Cth).

At the initial mediation conference attended by senior counsel and their clients, it became apparent that what the parties were really seeking was a sense of the strength and weakness of their respective cases. The matter was then converted to an early neutral evaluation. After some preliminary written material supplied by each side, and specimens of the various categories of agreements, a date was fixed at which counsel made oral submissions over a period of about four hours. The submissions related to the interaction between the pricing provisions of a number of specimen contracts and the relevant provisions of the *Sales Tax Assessment Act*. At various points in the process, I expressed a provisional view on the proper construction of the contract and its interface with the *Sales Tax Assessment Act*. I entered the disclaimer that this was simply a provisional opinion and that another judge, after trial, might come to a different view.

Six weeks after that process the matter was completely resolved. I asked for some frank feedback. The written responses I received from counsel indicated that the process had contributed significantly to the settlement.

Subsequently, the Federal Court in Perth sponsored an early, neutral evaluation pilot program using senior counsel as the evaluators. The relevant

counsel agreed that in any case they took on they would charge a fixed fee not exceeding a specified amount which, I think, was \$1,200.

The uptake of the early neutral evaluation pilot scheme was slow, and over a period of two or three years only a small number of cases were submitted to it. It was a small scale pilot without any significant administrative support.

In South Australia, two of the resident judges used mini-trials as a form of ADR on the basis that the judge seized of a particular matter in his docket would refer it, where appropriate, to another of the judges in the Registry to conduct a mini trial. The process, where it was used, seems to have been reasonably successful.

The use of judges as mediators has led to some controversy in Australia, with strong views being offered on both sides of the debate. Sir Lawrence Street was particularly outspoken in his criticism of it.

Appointment to judicial office does not necessarily mean that a person is skilled in mediation or any other ADR mechanism. Moreover, appointment to judicial office means commitment to a core function, involving the application of specific skills acquired over a long period of time. The diversion of those skills into mediation may be a waste of resources when there are trained Registrars, ADR professionals or other court officers who could do the same job, and possibly do it better.

On the other hand, I do not think it is necessary to be doctrinaire about the matter. There may be some cases in which judicial mediation would be appropriate, but that facility should be reserved for exceptional cases. The

example I mentioned earlier, with its legal and factual complexity was a case in which judicial skills were useful. Even in that kind of case, it is probably preferable to use a retired judge, if one is available, rather than a serving judge.

There is no doubt that sometimes litigants take ADR processes more seriously where there is judicial or curial involvement. But that may reflect a failure to understand that the formal authority of the judge in the adjudicative role has no function in mediation processes.

This proposition is reflected in an interesting phenomena associated with the 1998 amendments to the *Native Title Act* 1993 (Cth). When the *Native Title Act* was enacted, it required that the President of the Tribunal be a serving judge. In 1998, I proposed to the Government that the Act should be amended so that there be no requirement that the President be a serving judge. The primary service offered by the Tribunal was mediation of native title claims. There was an arbitral role in respect of the grant of mining tenements on lands affected by registered native title claims. However, even that role did not require a serving judge. The amendment to remove the requirement that the President of the Tribunal be a serving judge was accepted by the Government, but was opposed in the Senate. The Opposition of the day asserted that this change would represent a down-grading of the Tribunal. In the event, the amendment was passed. My successor as President was an experienced legal practitioner in the field who had also sat on the Land Rights Tribunal in Queensland. He was not a serving judge.

An analogous issue has arisen in the native title field in relation to the respective roles of the Tribunal and the Federal Court in the mediation of native title claims. Without delving into the intricacies or the rights or wrongs

of the policy question, the position proposed in the Bill is that mediation functions be carried out by both the Tribunal and the Court, albeit subject to the overall control and supervision of the Court. The Court's own officers may provide mediation services in connection with native title matters. The two functions are complementary. However, the availability of mediation by Federal Court officers at critical points in the litigation may be a factor which will remind parties that they are not involved in a process that will drag on forever, but one in which the Court itself, through the use of its mediation services, is prepared to take a direct role. Again, as with judicial mediation, I do not think it is desirable to be doctrinaire but to have available a menu of options so that parties may select, or the court may direct, that which best suits the circumstances.

In the area of judicial case management, there is certainly room for a degree of judicial supervision of procedural negotiations prior to trial. As a trial judge in the Federal Court from time to time I supervised case management conferences designed to find the best way forward on procedural issues arising in connection with complex multi-party litigation. The case management conference, at which directions can be made by the judge, is conducted around a conference table rather than with parties standing up and down successively at the bar table. The 'psychological landscape' of this kind of meeting is quite different from that in the court. There is a premium on reasonableness and the development of pragmatic solutions to the problems that have to be dealt with before the matter can be ready for trial. Sometimes normal solutions can be developed to deal with particular issues.

The concept of the multi-door courthouse on one view goes beyond court-annexed ADR. At least symbolically, it appears to locate adjudicated

resolution as one of a number of options for dealing with disputes. It raises a number of issues:

1. Does the concept of the multi-door courthouse so blur the function of judges and other persons involved in ADR that it may compromise important public values associated with the adjudicative role?
2. Are there unacceptable risks associated with the involvement of judges in ADR? Should there be an absolute rule that judges do not get involved in ADR in their own courts, or is it simply a matter of risk management by limiting such involvement with a particular classes of case? If so, how are such cases identified?
3. What are the objectives of the multi-door courthouse system? If the system is designed to reduce load on the adjudicative process by increasing the percentage of cases filed in court which are resolved without the need for judicial involvement, what, if any, evidence is there to support the belief that such an outcome is likely?
4. If the reduction of use of judicial time is an anticipated outcome of the multi-door courthouse, does this foreshadow a reallocation of public resources from the judicial function to the ADR function?
5. Connected with the previous question, what criteria are there for measuring the benefits yielded by ADR which enable them to be assessed against the costs and the risks associated with implementing them? One of those risks includes the risk of additional costs arising out of delay in the litigation process when it is diverted into unsuccessful ADR.

6. To what extent, if any, can ADR play a role in case management by narrowing issues to be determined at trial and reducing resources which have to be devoted to the trial process?
7. To what extent does mandatory referral to ADR impose an unjustified burden on parties who have no prospect of resolving their dispute consensually and simply want to get on with the hearing and determination of their case?
8. What are the measures by which the quality of ADR services is assessed, and what are the mechanisms for ensuring quality control of those services in the multi-door courthouse?

The real questions of significance about court-annexed ADR in a multi-door courthouse involve the practical issue of matching particular cases to particular dispute resolution mechanisms. Of course the assessment process will be meaningless if the resources are not available to ensure that the services are able to be provided by suitably trained and qualified personnel.

Behind each door there may be questions of cost and delay. Where dispute resolution services are offered by court officials appropriately trained, then it may be that there is a better chance that they will be picked up and dealt with fairly quickly. The court officials will be on hand and available, subject to workload. Where private specialists are used on some kind of panel system, then it may be that there is more time involved in arranging for the availability of a private practitioner than when an officer of the court is used. Associated with all of this is the cost of the processes and the extent to which

failed referrals to ADR simply result in a larger impost or burden thrust on the parties even before the trial of the action.

The question of quality control is one of some difficulty. It is nevertheless necessary that evaluation techniques be developed and qualifications of court officers engaged in ADR and private ADR practitioners be maintained at a high level.

I referred earlier to the distinctive function of the judiciary which may raise a question about the desirability of co-locating a court institutionally with a range of ADR services so that it appears that the court is just another provider of dispute resolution services. A court does have an important function in the public interest. As Professor Fiss in his well known essay 'Against Settlement' observed<sup>19</sup>:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private arrangement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.

In my opinion, the term 'multi-door courthouse' may have the connotation that behind each door is a different mechanism for achieving the same or similar

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<sup>19</sup> Fiss, "Against Settlement", (1983-1984) 93 *Yale Law Journal* 1085.

outcomes. But there is no doubt that the door into a courtroom is rather unique.

In the Commonwealth Constitution it is the courts of the Commonwealth, including the High Court, and the courts of the States invested with federal jurisdiction which exercise federal judicial power. It is the third branch of government of which we speak. This is not just another provider of dispute resolution services in a market of different providers. The courthouse door is not just one door among many.

I support, and have long supported, the provision of court-annexed ADR services. It is not only an aid to the earlier resolution of litigation, but can also be used as a case management tool to help the parties reduce the matters in issue between them. Nevertheless, it is in the public interest that the constitutional function of the judiciary is not compromised in fact or a matter of perception by blurring its boundaries with non-judicial services. So long as the clarity of the distinction is maintained, and appropriate quality controls, including evaluative and cost-benefit assessments undertaken, then ADR has much to offer in connection with the judicial process.