ADR in planning and environment matters: four things you need to think about

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All about me

In 2007, I was appointed the first ADR Registrar of the Planning & Environment Court in Queensland. It was to be a 12-month trial, as few in the profession had any confidence that ADR would work or catch on.

The position of ADR Registrar was made permanent at the end of the trial and the Registrar continues to provide free ADR services to any party that requests them.

I left the role of ADR Registrar in 2009 to become a member of the newly created Queensland Civil and Administrative Tribunal (QCAT). QCAT's environmental jurisdiction is much more limited than its sister tribunals as it has no planning jurisdiction. However, from its inception, ADR was a critical element of its operations.

I am currently the Acting President of the Land Court of Queensland. All land valuation appeals with a value of less than $5 million are referred to a preliminary conference, a type of short form mediation. The Court also conducts a quasi-ADR process – Court Managed Expert Evidence (CMEE) which is part case management, and partly an exercise in issues reduction both by the expert and the parties.

With that background in mind, here is my listicle:

1. People do, or will, live work and play in the land which is the subject matter of the dispute.
2. ADR may not produce the best result, but it should produce a better result.
3. Price is what you pay; value is what you get.[1]
4. There is no substitute for a skilled ADR practitioner with subject knowledge.

People do, or will, live work and play in the subject matter of the dispute.

The most effective ADR process is one that focusses on interests, not money or the legal principle.

If you are acting for a developer/miner/resuming authority, your client's focus will be on cost and profit. Unless the other side is a commercial enterprise – perhaps a rival developer – those matters will be of little interest to them.

Increasingly, companies are required to demonstrate Environmental, Social and Governance ('ESG') credentials and to act responsibly. ESG principles often coincide with the interests of your client's opponent.

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[1] Warren Buffet, letter to partners, 20 January 1966, in Warren Buffett Speaks (2007).

ESG is hard to acquire and easy to lose. Even if ADR does not result in a settlement, good faith bargaining and an understanding of the interests of your opponent can enhance ESG.

The best way to prepare for effective ADR is to put yourself in the shoes of your opponent. Would you like to live next door to the proposal? How will the proposal affect the neighbours, the community, strategic cropping land, recreation facilities, biodiversity, housing pressures?

Entering ADR with a "*take it or leave it*" attitude, or a focus only on a financial solution, can negatively affect the efficacy of ADR and, ultimately, your client's ESG. While a party to ADR may be bound to keep the discussions confidential, there is nothing to stop a party saying, "*they didn't listen*" or "*they weren't interested*" as opposed to "*we all tried really hard to find a solution but there are some things that we had to leave to a Court to resolve*".

ADR may not produce the best result, but it should produce a better result

Experts in the P&E jurisdiction that feared ADR would require them to compromise so that the result was not as good as a Court determination (which was in accordance with the strict requirements of a planning scheme/legislative code).

There are several problems with an expert having a view like this:

- What is "*best*" is often not viewed through an objective lens. The "*best*" solution for an expert engaged by a developer is often the cheapest or gives the best profit margin. It is not necessarily the best solution for the community.
- There is a risk of expert advocacy, rather than expert neutrality.
- Planning schemes allow for "acceptable solutions"; designs that do not strictly meet planning requirements but allow a balanced decision in the public interest based on an assessment of the merits of an application having regard to established policy and other relevant considerations.
- Courts have interpreted "acceptable solutions" broadly:
  …development that differs from that encouraged by the planning controls, or that fails to comply with benchmarks set in a planning scheme, does not necessarily result in haphazard development. Development may differ from the planning controls but be compatible with, ancillary to or designed to complement the planning outcome sought by the planning controls, or otherwise advance the needs of a community in a particular area without undue adverse town planning consequence, because of its own merits and the combination of facts and circumstances relevant to it. This underscores the importance of flexibility in the decision-making process.[2]

Personally, I would rather have multiple experts working cooperatively towards a solution that meets their professional obligations and the demands of the site than a non-expert judicial officer (and I include myself here) choosing which of an expert's views should be accepted.[3]

Price is what you pay; value is what you get

There are three questions to ask when considering access to ADR:

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2 *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46; [2020] QPELR 328, 336-7 [20]-[22]

3 *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16; [2019] QPELR 793, 806 [51]

- Should it be free?
- Should it be compulsory?
- Should it be annexed to/provided by a court?

Should it be free?

Most Court-annexed ADR is offered free of charge. The P&E ADR Register's services are free. QCAT's Compulsory Conferences are free. The Land Court Preliminary Conference is also free.

Free ADR can be a powerful incentive for parties to engage in the process. It is particularly attractive to self-represented parties with limited means who are geographically or philosophically linked to the subject matter of the dispute.

Free ADR is also a good way to introduce ADR in a community/profession that is resistant to change generally and ADR particularly.

Free ADR is not a good idea if one of the parties is not approaching ADR in good faith. That is, it is not a good idea where ADR is being used as a means of delaying a Court decision or where it is simply viewed as "*tick and flick*" to get to the next step in the Court process.

Free mediation is also not a good idea where the parties are arguing about a multimillion-dollar development, a development where there is a substantial profit to be made, or where at least one of the parties is a major corporation. Public resources should not be used to create a situation where ADR is simply a "*rich man's plaything*".[4]

Free ADR is not necessarily a good idea in a mature ADR "*market*". If demand exceeds the capacity to provide ADR, there is a risk that the ADR offered will not be as useful to the parties. As an experienced mediator/ judicial officer has said: "severe time constraints can warp mediation processes and participants' behaviour".[5]

A perusal of the mediation diary for the current Planning & Environment Court ADR Registrar shows that he will accept two mediations per day, at 10 am and 2 pm. Resumed mediations and/or conferences are also limited to a half day. There is a limit to what can be achieved in such a short time frame. Complex disputes with many issues will not settle in a half day mediation and mediating a complex dispute in half day tranches has obvious disadvantages. Many ADR practitioners can tell you stories of disputes that "*almost settled*" until one side went home and spoke to a person (often a neighbour) who had not been present throughout the negotiations, did not have access to all of the documents before the parties, was not a lawyer but who provided very strong advice about the wisdom of the settlement.

Should it be compulsory?

The first President of QCAT wrote:

> The widespread use of ADR was necessary to enable the Tribunal to meet its objectives and to stop it disappearing under the volume of hearings. That would not have been possible if we had relied on parties to elect compulsory conferencing.[6]

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4 See also *Zombie Mediations*, Dr Rhain Buth (2015) ADRJ 104

5 Hon. Kristena LaMar, 'I think I blew it' (2011) 17(3) American Bar Association Dispute Resolution Magazine 12.

6 QCAT - Picayune Justice, or the Age of Aquarius? A talk presented to the Judges of the Supreme Court of Queensland Annual Conference - 10 August 2010.

Despite the appellation, Compulsory Conferences are now not compulsory at QCAT. A combination of overwork and under-resourcing has forced QCAT to require Compulsory Conferences only in those jurisdictions where there is the greatest "bang for the buck". These jurisdictions include administrative review, anti-discrimination, child safety, civil, disciplinary, education and limited guardianship matters.[7]

ADR in the Planning & Environment Court was not compulsory when I took on the position of ADR Registrar. It was, however, "robustly" endorsed by the Bench such that it was a brave practitioner who refused to accept a referral to me.

Now, any draft order provided to the Court must include a dispute resolution plan.[8] Dispute resolution plan is defined as "a plan directed towards the narrowing and, if possible, resolution by agreement of the issues in dispute." Interestingly, a dispute resolution plans need not include a referral to ADR.

I believe that compulsory referral to ADR is necessary when introducing ADR to a jurisdiction and/or sceptical practitioners. Once a jurisdiction is mature, and has seen the benefits of ADR, then parties should be free to consider whether, and when, ADR is appropriate. However, I am mindful of these words I wrote in 2011[9]:

> Experience and research have demonstrated that cultural change is not effected, or embedded, overnight.
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> ADR has featured in many pieces of legislation over the past decade but the take up has been slow or non-existent. The *Children and Young Persons (Care and Protection) Act (NSW)* was enacted in 1998. In 2008, Justice Wood of the New South Wales Supreme Court wrote: Notwithstanding that the Children and Young Person's Care and Protection Act specifically provides for ADR, the Inquiry has been consistently informed that in practice, there is no real form of ADR operating in the care jurisdiction.

And this view from the bench:

> So, about 10 years ago, I made the mistake of persuading the Court to adopt a rule that required parties to participate in some form of ADR if their case hadn't resolved in the nine months after filing. I hadn't foreseen how this new system would play out.
> My judicial colleagues, thinking they could push counsel into more responsible case development practices, refused to continue trial dates beyond a year unless the parties had engaged in an ADR process.
> The part of the pretrial amoeba that regrouped, however, was not counsel's approach to pretrial case development, but the form of their participation in ADR. It was easier to "show up and salute" at one of my settlement conferences than it was to conduct the investigations, do the discovery, and file the motions that might be necessary to get a case

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7 Queensland Civil and Administrative Tribunal, *Compulsory conferences* (Web Page, accessed 9 August 2023) , https://www.qcat.qld.gov.au/going-to-the-tribunal/types-of-proceedings-old/compulsory-conferences#:~:text=Compulsory%20conferences%20are%20a%20dispute,education%20and%20limited%20guardianship%20matters.>

8 Planning and Environment Court (Queensland), *Practice Direction 2 of 2020*.

9 Acting President Peta Stilgoe, 'You Can Lead a Horse to Water - and you can make it drink' *Presented to the American Bar Association ADR Conference Colorado,* March 2011.

> really prepared for trial. So attorneys began showing up for my settlement conferences armed with only the most cursory information and declared they were ready neither for negotiation nor trial. They even began leaving their clients at home.[10]

In my view, the solution to backsliding in the use of ADR is not to make it compulsory but to regularly re-examine the role of ADR in the pre-hearing procedures, to refresh the way it is offered, and continuously confirm its efficacy. The last task should not be left to the courts or judiciary alone; if you have a good experience in ADR, you should be urging others to follow your example.

Should ADR be court annexed/court provided?

There has been some criticism of Judge-led ADR. Here is a sample:

- There are substantial disparities within a single court in how judicial officers conduct settlement negotiations;[11]
- Settlement conference judges are widely perceived as being less interested than many mediators in the finer arts of getting your client to "yes", of enhancing your client's sense of personal empowerment over the resolution of the case;
- Many Judges and lawyers believe that such strong, direct and evaluative statements and techniques are necessary to achieve the goal of getting as many cases settled as possible;[12] and
- The environment is inherently coercive in a settlement conference conducted by a judge, at least if the Judge would have some power over the case if it continued to trial.[13]

There are also statements of support. Again, here are some examples:[14]

- It is both a pleasure and a relief to have someone willing to listen to your case and try to help you resolve it, even for a limited period of time, at no additional expense. That's the cheaper part;
- The long and varied experiences of the sitting trial judge can be invaluable to today's "trial" lawyer, especially the trial lawyer who hasn't had many trials or who is not intimately familiar with the venue;
- Getting to the point;[15]
- *Pro se* parties appreciate a Judge's input, not only about the law, but also about ways of interacting and of considering things that will help them avoid some of the draining difficulties that have characterised their recent pasts;[16]
- The combination of a Judge's status and authority with a mediator's skill, time, and patience is a dynamite combination in the right case;[17] and

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10 Hon. Kristena LaMar, 'I think I blew it' (2011) 17(3) *American Bar Association Dispute Resolution Magazine* 13.

11 Hon. John C. Cratsley, 'Judges and Settlement So Little Regulation with So Much at Stake' (2011) 17(3) *American Bar Association Dispute Resolution Magazine* 6.

12 Gregory Brown, 'My Case in Balance: Musings of a Trial Attorney' (2011) 17(3) American Bar Association Dispute Resolution Magazine 8.

13 Hon. Stephen Crane, 'Judge Settlements Versus Mediated Settlements' (2011) 17(3) *American Bar Association Dispute Resolution Magazine* 22.

14 Ibid.

15 Ibid.

16 Hon. Kristena LaMar, 'I think I blew it' (2011) 17(3) *American Bar Association Dispute Resolution Magazine* 14.

17 Claudia Bernard, 'Is a Robe Ever Enough? Judicial Authority and Mediation Skill on Appeal' (2011) 17(3) *American Bar Association Dispute Resolution Magazine* 17.

- Some litigants might be ready much faster to make the emotional transition to being open to settlement if they have been able to speak their peace, directly or through their lawyer, to a real Judge.[18]

Whether you agree or disagree with Judicial ADR, a judicial officer conducting ADR should be properly trained and eligible for accreditation.

In Courts with few judicial officers (such as the Land Court of Queensland) mediation by a judicial officer creates problems down the track if there are insufficient judicial officers to hear the case, or an appeal from the primary decision. In those Courts, judicial officers should not conduct ADR. Otherwise, I am on the fence about this issue.

Most commentators agree that a judicial officer who conducts a mediation or settlement conference should not then go on to hear the dispute if it doesn't settle. There are some exceptions to this rule; a judicial officer may determine the case if the parties agree and the judicial officer has not been privy to any confidential information from only one side of the dispute (i.e. has not conducted private sessions with the parties).

If judicial mediation is unavailable or impracticable, the next best alternative is a panel of ADR practitioners trained and accredited by the Court.

When the UCPR was introduced in Queensland in 1999, both the Supreme and District Courts invited practitioners to nominate for those panels. When I was appointed Registrar in 2007, I undertook a review of the panels. Many of the nominees were no longer eligible: they had been appointed to the Bench, retired or even died.

Ideally, a panel of ADR practitioners should consist of people who have a special skill or interest that relates the to the jurisdiction of the Court. Appointment to the panel should be for a limited term, the Court should offer regular opportunities to continuing professional development and the ADR practitioners should be subject to a complaints procedure. In this way, the Court has confidence in the currency, skill and professionalism of ADR practitioners to whom it may refer disputes for ADR.

A skilled ADR practitioner with content knowledge

Who should you choose as your ADR practitioner? Early proponents of ADR took the view that mediation was best chaired by a person with excellent soft skills; adept at listening, reframing, defusing conflict and ensuring that interests not positions were the meat of negotiation.

A natural progression from that view was that lawyers made bad ADR practitioners and that psychologists, social workers and the like were better choices, even if they have no relevant content knowledge.

My experience, both as a participant in ADR and chair of many ADR processes, is that parties want both from their ADR practitioner. This is my checklist for choosing an ADR practitioner who is likely to assist you and your client in securing an acceptable outcome:

- The ADR practitioner should be accredited and have demonstrated ADR skills. Many judicial officers decide to start a mediation practice on retirement. Sitting sphinx-like on the bench,

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[18] Hon. Stephen Crane, 'Judge Settlements Versus Mediated Settlements' (2011) 17(3) *American Bar Association Dispute Resolution Magazine* 22.

receiving submissions, issuing orders and pronouncing judgment are not activities that necessarily equip a person for life as an ADR practitioner.

- Choose your practitioner to fit the dispute and your client. Does your client need an empath or someone with gravitas? Does your client respond to nudges, or do they need a dose of reality?
- Gravitas is not everything; content knowledge is more important. I am not a fan of the judicial mediation trick of swanning into a room, announcing the decision and leaving at least one party in tatters, however, there is sometimes a need for straight talking.
  A practitioner can only do that if they know what they are talking about, who they are talking to, and have the respect of the room.
- A lawyer is not always the best mediator. A planner or valuer might have the comprehensive content knowledge required to assist the parties. A person astute in business might have the capacity for lateral thinking that enables parties to think differently.
- Don't discount co-mediation. If you know of a great mediator who lacks content knowledge, why not spend a bit extra and pair them with a knowledge content expert? They can work with each other, learn from each other and be better individual mediators in the future.

Conclusion

Essentially, my listicle can be broken down to three 'takeaways' for practitioners looking at, or are subject to, ADR: be prepared, be creative and be nimble.

Be prepared

Practitioners must prepare thoroughly to participate effectively in ADR. If you treat ADR as a 'tick and flick' exercise you will be doing your clients an injustice.

Prepare your clients. Make sure you take them through the BATNA and WATNA.

Nothing will replace a skilled ADR practitioner with content knowledge combined with parties who are prepared and open to reaching a resolution.

Be creative

Be creative in in who you choose to conduct the ADR process and the best ADR process for the dispute.

Once in the ADR process, continue to be creative, crafting solutions which best meet the parties' needs. One of the real benefits of ADR is that parties can find a solution which perhaps a Court could not impose in judgment.

As I always say, at least one person will walk away from a Court decision unhappy. Often all parties are unhappy. An effective ADR process is one where all parties walk away being able to live with the result.

Be nimble

Finally, parties should be nimble in their approaches to ADR.

Sometimes I find that lawyers confuse their role, and prepare as if soldiers ready to *'die on their hill'* – this approach isn't constructive. The best approach to ADR (and the one which is mostly likely to result in a satisfactory outcome) is one which is flexible, allows the client to hear what the other side might say, consider it, and act on that information. There is no point arguing a technical point, or standing firm on a legal nicety, if it impedes discussion. Often the key to a resolution is finding the interest, or the emotion, that has informed the other side's decision to litigate.

If it becomes clear that a dispute will not resolve through ADR, do not dismiss the value of spending time to narrow the issues of the dispute – while the dispute may still go to trial, the benefits of shorter and cheaper trial cannot be overstated.

While these two points seem conflicting, an experienced ADR practitioner will know when to change gears from *'settling everything*' to *'settling a few things'*.