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# ADR and Expert Evidence options for a Regional Environmental Tribunal

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In this paper, I will raise some options for ADR and expert evidence procedures that might be adopted on a regional basis. I will draw on my experience of reforming the procedures of the Land Court of Queensland, a specialist court with jurisdiction for land, mining, environment, and indigenous cultural heritage disputes. I offer ideas for your consideration. I have no experience in introducing reforms at a regional level. That said, I am sure that many of the issues that I sought to address will be of concern to you, whether at a domestic or a regional level.

## The Land Court experience

### The objectives

The Land Court is a small specialist court with quite a diverse jurisdiction. We have 4 members and a Judicial Registrar. I was appointed President in August 2016, when there was a degree of public debate about our procedures, particularly in a controversial mine extension which had involved more than 100 days of hearing, the longest hearing in the history of the Court. It was clear the Court's procedures were in need of substantial reform, not just in relation to our ADR and expert evidence process. However, the focus of this speech is on those two matters.

After undertaking a consultation process, I considered more effective use of both ADR and expert evidence would result in a more targeted, focussed hearing dealing with the substantial issues that the Court needed to resolve.

### ADR

Turning to ADR, I found the controversial projects were very adversarial and there was very limited use of ADR. My consultations identified 3 issues with ADR in our jurisdiction.

The first was distrust. Because the miner usually identified the mediator and paid their costs, landowners and environmental groups mistrusted them. They feared they were in the miner's pocket. That perception applied even to very experienced mediators with a strong reputation.

The second issue was expertise. The parties were not sure that the mediators had any real life understanding of how a mining or other project might affect their cultural heritage or, in the case of landowners, their use of their property. I was also concerned about a mediator understanding the legal complexities of the Land Court's jurisdiction and the technical issues that arise in complex environmental disputes.

The third issue was whether the dispute between the parties could be resolved by agreement. Mining companies questioned an environmental group with an ideological objection to coal mining could agree about the project.

We responded in two ways. First, we established a panel of specialist ADR practitioners managed by the Court. Second, we promote ADR as offering a range of benefits beyond the complete resolution of the dispute.

Turning to the panel, all mediators are vetted before we accept them for the panel. Mediators are chosen by the parties, but if they cannot agree we will choose a mediator with relevant knowledge and experience.

The panel addresses the first issue of trust, because it is a panel of mediators chosen and trained by the Court. The Court has a strong reputation for independence and impartiality. That translates to the panel.

The Court addressed the second issue of expertise by choosing mediators who are accredited under National Mediator Standards, but who also possess relevant expertise. About half of the panel are lawyers who practice regularly in our jurisdiction. The other half are a mix of experts in relevant fields or have relevant personal experience. We have farmers, former mine executives, ecologists, valuers, engineers, etc. So, everyone brings something additional to general mediation experience. They tend to have an on the ground understanding of the issues and this gives them authority and enhances their ability to facilitate meaningful discussion.

The Court provides ongoing professional development of the mediators, to ensure they are well equipped for the sort of disputes we will refer to them. For example, tomorrow we have a session for the ADR panel on mediating in indigenous matters. One of our members will talk about some legal issues mediators need to be aware of. Then two of our mediators, one indigenous, and one non-indigenous, but with decades of experience working for and with indigenous people, will provide practical guidance on how to provide a culturally appropriate process. I know the free professional development sessions are well received by the panel members.

The third issue was about suitability for ADR, and we have addressed that by the purposes for which we promote ADR.

For example. We might refer only some issues or some parties to mediation to overcome the perception that an ideologically based objection is not suitable for discussion. Partial resolution is still a good outcome and may benefit some parties. Often, landholders who object to a mine will have discrete concerns to a public interest objector and their concerns might be able to be accommodated by changes to mine plans or conditions.

Another benefit is case management – parties can often agree about the issues for the hearing and the best way to conduct it. Through without prejudice discussions, they will get a better understanding of the issues, and the mediator can educate the parties about the Court's expectations for the hearing, which will prepare them to effectively participate.

Finally, ADR is a good forum to explore issues that require input from experts. Experts can assist the parties by explaining the technical issues in a more direct and conversational way and help them consider alternative proposals or conditions. This is valuable for objectors who are litigants in person, who may not have their own expert witnesses and who might find it difficult to probe expert opinion in an adversarial setting during a hearing. A mediator can make creative use of experts to progress discussions, and can explore on misapprehensions between the experts that might be a barrier to agreement between the experts.

Since we introduced these reforms, we are referring more matters to mediation, particularly in the mining and indigenous disputes, with good outcomes, often a complete resolution. The

reputation of the panel is now strong, and parties are using mediation even before they file a case in the Court.

## Expert Evidence

Turning to expert evidence, in 2018, I introduced a procedure, called Court Managed Expert Evidence (or CMEE) with the objectives of improving the integrity and utility of expert evidence. I identified three issues with expert evidence: one relating to its integrity and two relating to its utility.

The issue of integrity is about whether the expert's opinion is truly independent of, and uninfluenced by, the interests of the party who engaged them. The issues of utility are, first, about its comprehensibility, and, second, whether an expert properly engages with the relevant issues and with the opinion of an another expert on the same topic.

The CMEE procedure brings together 2 commonly encountered features of civil litigation – case management conferences and expert meetings and reports – and places them under the supervision of a judicial officer, acting as a CMEE Convenor, who operates within a without prejudice environment.

The role of the CMEE Convenor is expert, neutral, procedural and facilitative. Expert because of their role on the Court. Neutral and procedural, because they cannot make any substantive decisions, cannot preside over the case at trial or on appeal, and can only make procedural orders with consent.

The Convenor facilitates the parties and the experts in navigating the pre-trial preparation of expert evidence. It is not evaluative, except to the extent that suggestions about process might involve applying that expertise to help the parties move through process stalemates.

The Convenor must maintain the confidentiality of both the meeting of experts and the case management conference and must provide draft reports to the parties before providing them to the Court.

Dealing with the issue of integrity, expert witnesses are usually engaged, briefed, prepared, and paid by one party. They may regularly be engaged by a particular law firm or to advise a particular client. They are engaged in an adversarial context, which creates the tension between their duty to their client and their duty to the Court. The Land Court imposes a duty on expert witnesses to assist the Court which overrides any obligation to a person who pays their fee.

The CMEE process reinforces the expert's duty to the Court, by supervising how they are briefed, and how they meet and prepare their reports. This guards against an overly adversarial approach by an expert.

The second issue was about the comprehensibility of the evidence. Expert witnesses must be able to explain their opinion to laypeople, including judges and lawyers. The CMEE Convenor provides feedback to the experts about the clarity and comprehensibility of their report before it is finalised. The Convenor will never tell an expert witness what to say, but may give feedback about the way the report is structured or particular opinions are expressed. The objective is to ensure the parties and the member hearing the matter can understand the expert evidence.

The third issue was whether the expert witnesses properly address the issues in dispute and clearly engage with each other on their points of disagreement. Where conflicting expert opinions are offered, the Court must be able to understand the nature and the reasons for the disagreement and the consequences of that disagreement for the issues in dispute. We found the experts often pass like ships in the night, leaving it to the Court to try to work out the consequence of their difference.

That starts with how the experts are briefed. Intentionally or not, the lawyers may set them off on parallel tracks so they never meet. They may brief them with different information. They may ask them to make different factual assumptions. They may ask them to address different scenarios or to answer different questions.

Sometimes, what appears to be a dispute between expert witnesses is in truth a dispute not of their making and not for them to resolve. The dispute may mask an underlying factual or legal conflict that the Court will have to decide. It is unhelpful for an expert to pick the winner and provide an opinion on the assumption that a factual or legal assertion will be accepted by the Court. The Court will also need to have that expert's opinion assuming an assertion they act upon is rejected.

To counter that problem, the Court requires the parties to provide a single consolidated brief to the experts, which identifies any issue a party considers the experts should address and any information a party considers relevant. Importantly, the parties do not have to agree on the issues or the information. If that is in dispute, the Court will determine that at trial or, if necessary, earlier.

The Court requires experts to meet and produce a report that identifies what they agree and disagree about and the reasons for their disagreement. That is a common practice in civil courts in Australia. A CMEE Convenor will focus on how clearly the experts have communicated the important disagreements and the reasons for them. Even identifying the differences between them that are not important to their ultimate opinion can be helpful.

Finally, addressing both the issues of integrity and utility, the CMEE Convenor plays a critical role in facilitating proper communications between the experts and the lawyers dealing with a variety of matters ranging from the logistics of the process, to whether the experts should be provided with further information or instructions, or be able to undertake their own investigations. The CMEE Convenor has a role in ensuring all of these issues are efficiently and properly addressed, either by agreement between the parties or, if necessary, by listing a matter for decision by the Court.

The CMEE process has been very successful in improving the quality of joint reports, in reducing the scope of disagreements between the experts, and in reducing the complexity of the issues for trial.

## Relevance to a Regional Tribunal

In closing, procedures like these could be adopted by a regional tribunal.

If developed in a staged way, it would make sense to start with pre-trial processes that will promote resolution and better prepare the parties and the evidence for hearing by a domestic court. Domestic courts could, in effect, outsource those processes to the regional tribunal. Once it is clear the matter will not resolve completely and any expert evidence has been prepared, the tribunal could return the case to the domestic court to be heard and determined. The countries that support and use the regional tribunal would have the benefit of a concentration of expertise and consistency of practice in ADR and preparation of expert evidence in these complex environmental disputes.