

Lawyers as conservationists

By STEPHEN LANCKEN

Resources may become scarce, but the legal profession can draw on a deep well of problem-solving skills.



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IF THE CIVIL JUSTICE SYSTEM can be seen as a landscape, then judicial time is being approached by the nation's Attorney Generals as if it were water – a finite resource that needs to be preserved.

Federal Attorney-General Robert McClelland told an ADR-in-government forum in May this year that he was "serious about focusing on other mechanisms to ensure better access to justice through alternative dispute resolution".

In Victoria, Mr Hulls has been reported as saying that courts should be "a port of last resort", and calling for more mediation outside the court system to help reduce legal costs. His state's recent Law Reform Commission report into civil justice devotes around one quarter of its discussion and recommendations to changing the way ADR is applied in the civil justice system. Almost \$18 million was allocated for ADR programs in the 2008 Victorian state budget.

Here in NSW, Attorney General John Hatzitzergos has made similar references to the use of ADR in the civil justice system, and we have already seen the beginnings of policy and law aimed at preserving judicial resources, including:

□ Parts 4 and 5 of the *Civil*

Procedure Act 2005 and its overriding purpose set out in s.56;

□ the establishment of the Workers Compensation Commission;

□ the limited role of lawyers in some jurisdictions such as the CTTT;

□ use of pre-filing ADR processes in such areas as retail leasing and farm debt recovery actions; and

□ mandatory mediation and ADR in all courts and tribunals.

None of this, however, should be seen as a threat to lawyers' ability to remain of service to their clients. As a profession, we are well equipped to participate in the judicial resources conservation movement.

What impediments their our to our becoming fully engaged in the process were well summed up by Tom Howe QC, chief litigation counsel at the Australian Government Solicitor, in a speech to the same ADR forum addressed the Robert McClelland in May. Mr Howe postulated that the reasons lawyers are not using more ADR could be:

□ Asking the wrong question. Lawyers ask 'Why should we try ADR?', rather than 'Is there any reason why this case ought to proceed to a litigated outcome without recourse to ADR?'

□ Lawyers waiting for cases suitable for ADR to magically 'self select', when there is no magic.

□ The win/lose paradigm is alluring to lawyers. Lawyers get distracted by the weaknesses in the 'other side's case'.

□ Partnering with clients is sometimes mixed up with championing what is in the clients' interests. Lawyers fear suggesting an alternative approach lest the client think

that they have gone soft.

□ The thought that, because our best effort at settlement is not successful, the case cannot be resolved with the assistance of a third party.

□ Lawyers comfort with litigation. A familiar path seems easier than an unfamiliar alternative.

□ That lawyers think 'ADR is not for my specialty', be it insolvency, defamation, administrative, injury litigation or some other speciality.

Finally, Mr Howe suggests that government clients may be restricting the use of ADR with accountability requirements that appear to get in the way of giving settlement instructions. He points out, however, that the Legal Services Directions of the Federal Government require the exact opposite. The directions require proper investigation and application of resolution options, as well as government's giving lawyers appropriate instruction to settle.

Avoiding self-imposed boundaries

What can lawyers do to avoid the self-limiting thinking suggested by Tom Howe? Here are my suggestions:

Learn how ADR processes work. Not everyone needs (or has the interest or skills) to be a mediator. Lawyers can, however, easily understand and embrace the principles of interest-based models of ADR such as negotiation and mediation. More knowledge will allow lawyers to better advise clients about engagement in such processes, and make the lawyer's knowledge and skill more valuable.

Recognise and expose clients to the real differences between advocacy (in which I argue my client is right and the other side is wrong) and collaborative problem solving, where two parties work together to find solutions, even when there may be a dispute. Remember

that a gram of advocacy (especially if managed clumsily or with ill will) can destroy the prospect of finding a tonne of collaboration.

Choose ADR services, providers and timing that are appropriate to the needs of the parties, rather than responsive to the dictates of a court order.

Market themselves as 'conservationists'. In embracing conservation of judicial time, lawyers can say that the resource is precious, not that going to court is a bad idea?

Develop skills to access negotiation opportunities, mediation and ADR easily and cheaply.

Advocate prevention of disputes and deliver services that help clients learn to make deals with others without getting ripped off.

Be less adversarial. When a client instructs a lawyer about their problem, lawyers can have a different conversation. For instance:

□ Instead of asking to be told 'what the other party did to you' explore why people behave and how that behaviour could be changed

□ Instead of filing a court case, then wondering whether ADR may be an idea, first get the clients into an ADR process, then explore whether court is really necessary.

□ Ask if they can call the other lawyer (or the other party) to discuss the problem and see if there is a way of sorting it out.

□ Get all the details of the dispute, including details of damages, and provide them to the other party *before* filing. Ask if there is a sensible way that settlement could be discussed, without either party being at risk or losing face.

□ See if the client would like to learn, with the lawyer's assistance, some negotiating skills to assist in resolving the dispute.

□ Find out if there is anything the client may have done to contribute to the dispute.

□ Make a fair offer (as opposed

to an ambit claim), and put it to the other side at an early time, with plenty of objective justification.

□ Determine the client's real motivation in seeking legal advice, not why they think they should win, rather why they are seeking to claim or defend a claim, and what their underlying interests are .

□ Without ignoring rights, address the real interests of the client so that rights can be used appropriately to satisfy those interests.

□ Seek instructions to delay filing court proceedings until settlement options have been explored.

I know that most lawyers ask some or all of those questions and wonder why in the public eye they are not seen as dispute resolvers.

The challenge is to change the perception of lawyers' clients and of government about how we embrace alternatives to courts for resolving conflict. □