LEADR
Association of Dispute Resolvers

18 August 2011

Letter to the Editor

Justice Winkelmann highlights some important issues in her recent address regarding mediation and the civil justice system. *(NZ Lawyer 12 August 2011).*

As her Honour quite rightly identifies, mediation (or indeed any one process on the dispute resolution spectrum) is not, and should not be, the only form of redress available to those with a commercial conflict to resolve.

Just as it is inappropriate for promoters of mediation to be "directly or indirectly undermining the civil justice system"; it is important when discussing the benefits or otherwise of mediation, to recognise that an unhealthy focus on settlement to the detriment of the parties is not the norm.

Facilitative mediation, as promoted and taught by LEADR, provides the parties with the opportunity to create "good and lasting settlements". Mediation is designed to enable the parties to make sound decisions based on the information they can gain through the process, which will include each party's view of their relative legal rights and, of course, the alternatives to reaching agreement. The time, cost and risks associated with court proceedings are relevant to this information matrix. They are raised, not as a stick to force a party to settle, but as part of the reality check that enables the party to assess whether the proposal of settlement is better or worse than their alternatives.

LEADR encourages its mediators to focus the parties on the benefits of making good commercial decisions, which will often, as the Judge points out, result in a settlement. There is a crucial difference between mediators selling their services by reference to the percentage of settlements they achieve (which could infer the mediator has an investment in the outcome as suggested) and assuring parties that the majority of cases can be resolved through mediation.

LEADR agrees with AMINZ Executive Director, Deborah Hart, that the time is right for informed debate, both on the issues highlighted in the NZ Lawyer article but also the wider breadth of issues raised by her Honour in her speech, including the need for more research into the NZ experience. 20 years on, we have not only a depth of experience amongst practitioners but also participants who have a greater understanding as to why they might choose mediation, the process involved and the potential outcomes that are achievable.

When reflecting on the role of mediation, Justice Winkelmann identifies the advantage of being able to learn from the lessons of other jurisdictions. Perhaps, as we move forward with this debate we should be looking not only to the United Kingdom and the United States but to our closest neighbours.

PO Box 10-991 Wellington New Zealand
www.leadr.co.nz leadr@leadr.co.nz Phone: +64 4 470 0110 Fax: +64 4 470 0111

The work of NADRAC www.nadrac.govt.au in Australia has led to an ever growing body of research and an effective forum for government, the judiciary, academics and practitioners to consider not only the role of mediation but the wider range of alternative dispute resolution processes in the context of access to justice. Is the time now right for NADRAC NZ style?

Gabrielle O'Brien
Executive Officer

LEADR NZ

499 words

PO Box 10-991 Wellington New Zealand
www.leadr.co.nz leadr@leadr.co.nz Phone: +64 4 470 0110 Fax: +64 4 470 0111