STANDING COMMITTEE ON LEGISLATION

INQUIRY INTO THE JURISDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 14 MAY 2008

SESSION THREE

Members

Hon Graham Giffard (Chair)
Hon Giz Watson (Deputy Chair)
Hon Ken Baston
Hon Sally Talbot

Hon George Cash (Substitute member for Hon Peter Collier)

Hearing commenced at 11.42 am

HALSMITH, MS MARGARET
Chair, Board of LEADR,
44 Daglish St,
Wembley, 6014, sworn and examined:

CASTLEDINE, MR GRAHAM
Member of LEADR WA Chapter Committee,
Castledine Legal and Mediation Services,
residing at 7 Henty Loop,
Woodvale, 6026, sworn and examined.

The CHAIR: Good morning. I am required to ask you to take either an oath or affirmation.

[Witnesses took the oath or affirmation.]

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full tile title of any document you refer to during the course of the hearing for the record and please be aware of the microphones and try to speak directly into them. I remind you that you transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in private. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please not that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that premature disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

I might invite you, at the outset, to make a statement or would you prefer to go to the questions that we asked you? You are welcome to progress this either way.

[11.45 am]

Ms Halsmith: I would like to make a couple of introductory comments. First of all, I would like to thank you for hearing our thoughts here; LEADR appreciates that very much.

I will now give you a little bit of background about where I am coming from. I am the chair of the Australasian board of LEADR and, as well as that, a member of the WA executive. I am also a member of the national mediation accreditation committee, and I want to mention national mediation accreditation along the way. I teach mediation at a couple of Perth universities and I run my own mediation practice. I say that just to provide you with some context. The sorts of mediations I do that possibly overlap with the SAT-type mediations include harassment, discrimination, aged care, land use, industrial relations, professional issues and commercial sorts of issues. I also mediate in other areas that are, I think, not so relevant to the SAT.

Mr Castledine: I have had a lot less experience as a mediator than Margaret, but I have appeared many times in SAT as a representative of the parties to mediation. I might be able to add an extra dimension from the point of view of a party to the mediation.

Ms Halsmith: In terms of LEADR, we have provided a bit of background about LEADR in our submission. To bring that information up to date: LEADR has been very active in policy formation at a national level, most recently in terms of national mediation accreditation and, very recently, we made a submission to the Victorian Law Reform Commission on ADR. It just gives you a flavour of, perhaps, who we are.

The CHAIR: Thank you, Ms Halsmith. Are you happy for the submission that you have provided to be made public?

Ms Halsmith: Certainly.

The CHAIR: Thank you.

Ms Halsmith: Lastly, I wanted to describe mediation as LEADR sees it, so that when I refer to mediation we are all on the same, as it were, plane. The definition that LEADR uses, and that is used throughout Australia, is the NADRAC definition. NADRAC—National Alternative Dispute Resolution Advisory Council—is the group that advises the Attorney General on matters to do with ADR, mediation being a subset of ADR. The NADRAC definition is that —

> Mediation is the structured problem-solving process. It is an opportunity for parties with the assistance of an impartial facilitator to do four things; that is, to identify the disputed issues, to develop options, to consider alternatives and to endeavour to reach agreement.

The definition goes on, but I just want to make the point that the emphasis there is on the parties doing these things as distinct from the mediator doing them. The other point that I want to make there is that it is about endeavouring to reach agreement, not necessarily reaching agreement. That is the sense in which I think of mediation. It goes on to say —

> The mediator has no advisory nor determinative role in regard to the content nor the outcome. The mediator does advise on and determine the process of mediation whereby resolution is attempted.

This is relevant, I think, to the questions that we have here. Finally —

> Mediation maybe undertaken voluntarily or under a court order or subject to an existing contractual agreement.

That is the full NADRAC definition and it forms the platform for LEADR.

The CHAIR: Thank you very much. Unless members have questions, we might proceed to go through your responses to the questions that we have provided—I might take you to question 1.

Ms Halsmith: Yes. Question 1. In terms of the background comments there, I think that it is important that the parties who are repeat presenters at the SAT can recognise mediation as being the same for each of their visits. They might be in a variety of streams and they might be with a variety of mediators, but the sense that they are actually attending the same sort of process, I think, is important.

The other point that arose before I get directly to question 1(a) is around agreements. It is interesting to note that parties reaching a good agreement does not necessarily mean that that agreement itself will be durable because if they have reached a really good agreement they will go on negotiating an agreement if there is an ongoing relationship. The agreement might not look the same down the track but, in fact, it will be an excellent agreement because it gave them the platform to negotiate further refinements. Where there is talk about the durability of the agreement, I wanted to make that point.

In terms of whether the SAT should undertake procedures internally or they should be carried out by an external consultant, I think, the procedures need to be undertaken internally and externally. Internally because, I think, you get a different angle on things when you know the ins and outs and

the finer details; and externally for all the reasons that most things should be done externally—for transparency, to avoid conflicts of interest, for accountability, and so on.

In terms of undertaking the sorts of procedures externally and giving the client feedback, I used to be the senior mediator for Legal Aid. It was an inaugural position. I would have a bit more to say on that because it was an interesting position. Legal Aid uses a detailed ADR client survey by a company the name of which entirely escapes me now, but it will come to me eventually. We used to get really rich data back from this company and it occurred to me that the SAT may be interested in that same sort of survey to find out what is going on for their clients.

The CHAIR: Just before we move off this first question, I am interested to know whether the suggestion to do this audit comes out of a particular observation or dissatisfaction with current circumstances or simply because it is good practice for continuity.

Ms Halsmith: It is the good practice notion first and foremost for me. It is also based on some feedback that I have had. However, I am well aware that the only feedback you ever hear is the "not so good" feedback. I am not at all assuming that there are massive issues. However, from people who have been repeat presenters at the SAT and from people who have been involved in other mediations, there has been some feedback that has helped me to think my way through these sorts of things.

The CHAIR: Feedback indicating inconsistency?

Ms Halsmith: Yes, indicating very different mediation styles and very different understandings of the definition of mediation. That is why I thought I would start today with the NADRAC definition which is Australia-wide, albeit a little idealistic.

Mr Castledine: Perhaps I can add something. Most of my experience is in the development and resources stream of SAT. The mediators do a good job but, based on my experience and anecdotal reports, it seems that the mediators will often come close to expressing a view or in fact express a view, on the merits of the case as a method of, perhaps, progressing the mediation. That would not fall within the—if I can put it this way—pure LEADR style of mediation in which the mediator is entirely neutral and does not express a view. The difficulty with that kind of approach, although it may well persuade a party to come to an agreement because an objective person has expressed a view—that is, a person with expertise and skills and so on—and they may be concerned about the strength of their case. However, if that happens too often, then mediation starts to become just another adversarial process and parties come with their lawyers ready to push their arguments as strongly as they can in an attempt to get the mediator on side. The need for an audit is to look at things like that: are there some streams where the mediation is in fact verging on something different, more like a conciliation approach or early neutral evaluation when the mediator expresses the view in an attempt to persuade a party to settle now or suffer the consequences later? That is not what we would call mediation. That is what is partly behind our comment.

Hon SALLY TALBOT: The committee has had some internal discussions about the notion of advocacy. We are getting very close now to teasing out the definition. Can you just talk us through the difference between mediation and advocacy? I hear you saying that there are times when the mediator almost steps over that line and tries to represent a particular point of view. Do you clearly exclude advocacy from the role of the mediator?

Mr Castledine: Yes. The mediator must not allow himself or herself to become an advocate for either party. If that is happening, that is not mediation. I always say as a lawyer representing parties in these situations, it is fantastic when the mediator is helping your side of the cause. However, it is not really what the mediation should be about. If it does happen too often, then naturally parties will try to get the mediator to be an advocate for their cause in an attempt to get a strategic benefit. I think, and I am sure Margaret would agree, that the mediator must not become an advocate.

Hon SALLY TALBOT: So there may be a confusion in the mediator's mind between advocacy and mediation?

Mr Castledine: It may also be a confusion between the role of a mediator and the role of an adjudicator or an investigator. If a member is one day being an adjudicator, then it is absolutely appropriate in that role to question and to test one party's case. However, if the next day they are a mediator, they have to remember what hat they are wearing. It is inappropriate to make comments which go down that path of suggesting that the merits of the case may be weak or strong.

Hon GEORGE CASH: Can I take from what has been said to date that from your knowledge there is no consistency of process across that?

Ms Halsmith: That is my understanding.

Hon GEORGE CASH: Perhaps I should have rephrased it to say there is room for improvement in respect to consistency.

Ms Halsmith: I think there is always room for improvement in everybody's practice.

Hon GEORGE CASH: The next question that I wanted to ask was has LEADR consulted to SAT on a review of mediation outcomes and processes?

Ms Halsmith: We have not provided consultation services but we were doing the research for our submission.

Mr Castledine: Yes, certainly I have spoken to people there about what they are attempting to do with the mediation. LEADR does provide training as well for the SAT mediators.

Hon GEORGE CASH: It does now already provide that training?

Mr Castledine: Yes, it does already.

Ms Halsmith: It has done since SAT commenced. I think all or almost all of the SAT mediators have done a four-day mediation course with LEADR. If they have not done one with LEADR then they have done it with, maybe, IAMA. However, I understand that most of them have done a course with LEADR. I think what happens is that you do the four-day course, and it is only four days, and then you go into a situation where you have limited time and resources and have to produce the outcomes and so on. In an ideal world, mediation does not have a limited amount of time. There are brief mediation models and again it would be interesting to look at the Legal Aid model, which for the record, is call the G-string model. I can explain that model if you would like me to.

Ideally speaking a mediation ends when a mediation ends whereas the SAT does not have those resources and thus, I think, it is hard to interpret or to put into practice good mediation practice of the ideal sort that we are talking about here.

The CHAIR: We might move to question 2.

Ms Halsmith: Question 1(b) asks if LEADR offer these services. The short answer is no. We would love to say yes, but the truth is no.

Question 2 talks about peer review and that is where I thought it could be interesting to talk a bit about the Legal Aid model of the senior mediator. I did send—very late and I do not know if you have it there—the position statement for the senior mediator.

[12 noon]

The CHAIR: Yes, that was a four-page document, which was the role description of the senior mediator at Legal Aid WA.

Ms Halsmith: Yes, and if you have a look on page 2 where it says scope of duties, those were my duties as the senior mediator and they largely involved peer review. Just to fill that out a bit, it was called "supervision" because under the family law act the term is "supervision". I do not like the notion of supervision, so as soon as a mediator had reached the criteria that the family law act

required, I would call it "consultation" rather than "supervision". I just wanted to make the point that it can be done in an endless variety of ways: you can have individual peer review, you can have group peer review and part of that can be mentoring, debriefing, defusing, training and complaints handling so there are all sorts of ways of going about peer review. Everyone needs to be trained to provide and to receive peer review. It is not just something where you have chatter at the end of a mediation so there needs to be some training and people need the expertise to assist each other in terms of analysing disputes for mediation, which is quite different from litigation. The other point I think that is important is having done the four-day LEADR training and maybe some training for peer review, there needs to be ongoing training; it is not kind of a one-off, it is more of an ongoing process. It might sound daunting—I am not suggesting hours and hours and hours of training—but just the notion that the training is ongoing and that ties into the notion of national mediation accreditation, which I will come to soon.

Again, I have been saying that it is an internal process—it needs to be an internal process—and either added to with an external consultant or perhaps the position appointed similar to a specific position like the senior mediator notion at Legal Aid. Therefore, it might be an internal position but the position is dedicated to that role of standards and training and so on.

Hon GEORGE CASH: Just before we go on to question 3, can I go back to question 1(b) —

> Does the LEADR offer these services?

You have answered no, but I am not sure that we are talking about this. I am unsure about the services that we are talking about. The capacity of LEADR for instance to offer a consulting role for the auditing and analysing of the effectiveness and the appropriation of mediation, is that something that LEADR does or does not do?

Ms Halsmith: At the moment, LEADR does not do that. You would find many highly qualified LEADR people in Western Australia and Australia-wide who can provide that but they would be providing that under their own steam not —

Hon GEORGE CASH: As a private consultancy?

Ms Halsmith: Yes, as distinct from LEADR. Certainly, there are people around who can do that and certainly, they are quite likely LEADR accredited.

Hon GEORGE CASH: Yes, thank you.

Ms Halsmith: Thanks for clarifying that.

The CHAIR: Are you happy we move to question 3?

Hon GEORGE CASH: Yes.

The CHAIR: Thanks.

Ms Halsmith: This one was interesting to read what the Commissioner of Soil and Land Conservation had to say in terms of issues being black and white. Mediation is often thought of as being the grey between the black and white, but, really, mediation is, as someone said, can be green with white stripes or a whole rainbow. Therefore, a mediated outcome is not a compromise position between the black and the white. It is something we step away from, the black and the white continuum and actually come up with something creative that meets the needs of all the parties involved.

In terms of whether some matters are suited to mediation, basically, all matters can be mediated. It is really whether the parties in the particular matters are well supported enough to participate in a mediation and to come up with an agreement that is realistic and sufficiently durable and that they can manage. For example, in my private practice at the moment I happen to have two potential parties in different mediations who are psychiatrically ill. At this stage I have not decided, but it is quite likely that one of those mediations will go ahead and one will not. That is based on my

assessment and the information that I get, with these people's permission, to decide whether these people themselves are able to participate in the mediation with the help of their psychiatrist and their lawyer. At the preliminary stage I am thinking one of them probably will go ahead and one of the mediations will not go ahead. Therefore, it is not do with the matters for mediation; it is to do with a party's ability to participate with support in a mediation. I mediate in some areas, such as the towards healing mediations—as does Graham—where there has been sexual abuse in a church setting and so on where the parties are very, very vulnerable and, again, it is about designing a process in which the parties can participate fully and including support people that they need. Therefore, I guess that goes to the point again that it is more about how the process is set up. It also goes the point that I think is really important and that is the intake procedures before mediating, rather than parties just arriving and meeting a mediator and the other party's representatives and so on. The care that goes into preparing parties for a mediation astronomically alters the likelihood of reaching a durable agreement.

Mr Castledine: Just on this black and white issue, those same concerns were raised in the early days of the Administrative Appeals Tribunal starting to adopt mediation practices, and that is the federal version, if you like, of this body. There were issues such as someone applying for a veteran's pension or something like that and the government departments were of the view that, "You either fulfil the criteria or you don't; what's the point in going to mediation?" What you would find is that when they went mediation, a different conversation would take place from what happened over the counter. It would be, "Well, you don't fulfil this criteria but have you thought about this?" The matter would be resolved without an expensive and sometimes intimidating hearing because the parties were communicating in a way that for some reason they do not always before there is a review application. I think the same thing would happen in the SAT with things like disciplinary proceedings. It might seem difficult in a disciplinary proceeding to say that there is some room for a creative outcome but there is always a benefit from getting the parties talking in an environment where they feel able to discuss things that perhaps they cannot by the time it gets to a hearing. Therefore, in my experience there are very, very few matters that do not benefit from mediation.

Ms Halsmith: It is interesting too to take up the point of benefiting from mediation and going back to the definition of endeavouring to reach an agreement. Quite often I am asked to mediate matters where there is unlikely to be an agreement but where the issues will be identified. I am told by the legal profession that that can halve the length of the trial, so that it can be helpful just to get to the issues point and then take it into a court sitting where it needs to go. It is amazing too how often a mediation looks like it is just about a financial transaction or a financial settlement when, in fact, many more than one agreement is reached. One agreement might be reached on the financial aspects and a whole lot of interpersonal stuff can be sorted out in a mediation, which would otherwise just remain bad blood between people.

Mr Castledine: I think perhaps the only areas I have come across where there is sometimes no point in having a mediation or at least a mediation beyond clarifying the issues are things that are inherently political, such as a local government refusing approval for a tavern or something like that and it just has to go to a different party for determination. However, even there, as Margaret says, a mediation can thrash out what the real issues are, refine them and get it into a more efficient state.

The CHAIR: Thank you, I think we might just ask you whether you had any other matters you wanted to raise for our inquiry or further information?

Ms Halsmith: One of them is national mediation accreditation. I sent through a whole lot of information, which I know you will not have had a chance to get through this morning, and to just suggest that the SAT seriously considers having all the mediators meet the national mediation accreditation requirements, which have a threshold entry and then the requirement for ongoing CPD. That scheme commenced on 1 January this year and it is in a two-year period of refining what

is practical, what works, what the profession needs and what the clients of the profession need. The SAT might be interested to take an active role in that. For example, one of the concepts in there is the RMAB—recognised mediation accreditation body. LEADR is one of four RMABs in Australia so far, but there are lots of other groups looking at becoming a RMAB. The SAT itself might be interested to do that or it might be interested to connect with a RMAB, such as LEADR and LEADR then helps the SAT to monitor the standards in terms of the national mediation accreditation. That is the way mediation is going. It is a voluntary process at this point, but I used to start my uni courses by saying to students, "Look, you could actually leave this unit, if you like, recoup your money that you've paid to do it and just go home and hang a shingle and call yourself a mediator", which is, in fact, what you could do and what you still can do, because it is voluntary at this stage. That has actually undermined the reputation of mediation around the place, so now we have taken the first steps towards actually professionalising it and being accountable as a profession. That was one of the points that I wanted to mention.

The other point was the importance of intake. People, by the time they get to the SAT, naturally have a fairly adversarial mindset about whatever dispute they are involved in. Without an intake, I think it is very hard to help people to shift into a more collaborative approach, which is the approach of mediation. For all the reasons that we mentioned before in terms of parties' states of mind and so on, and for the mediator to be able to prepare and analyse the dispute, I think for the SAT to consider an intake process would really be a valuable asset to the whole process.

The CHAIR: Could you just explain an intake process a little more?

Ms Halsmith: Sure. An intake process occurs when the parties are met separately, usually by the mediator but in some schemes Australia-wide there are intake specialists, so you might do a phone intake with someone who is representing the mediator but who actually is not. However, let us look at it from the point of view that the mediator meets with each of the parties and their representatives and support people separately and develops some rapport with the parties, answers any questions and finds out about the dispute from the party's perspective and starts to, by their questioning, shift the party's mindset from being "I am right and they're wrong" into "Well, I'm right but, you know, they could be right as well" sort of mindset. Respectfully creating doubt is what it is known as. Just getting basic details and being more familiar with the matter and encouraging parties to get more information if there seems to be gaps and coaching a bit in how will you cope if this happens. What might go wrong in a mediation—well, this is what I can do and this is what I suggest you do, cooperate, that sort of conflict coaching as it is sometimes known as.

Mr Castledine: In a typical SAT mediation there is initially some kind of directions hearing and if the parties are represented they take instructions. The matter may then be referred to mediation and the parties' first experience of that process may be on a day when they turn up for the mediation. It would be nice if the legal profession had reached a point where you could trust legal representatives to explain what mediation is about and do that kind of coaching that Margaret is talking about, but that cannot be relied upon at this stage because there is still quite a number of people in the legal profession who themselves do not properly understand what mediation is about. Therefore, I think the intake process that Margaret is talking about is to be a bit more deliberate about that, to ensure that the parties are understanding the process before they go to it.

[12.15 pm]

Ms Halsmith: Absolutely, and that they have the mindset of "We can sort this out. We don't need to be told what to do", because the lack of intake, I think, leads into what we were talking about earlier in that the mediator becomes an adjudicator because the parties do not have the mindset that "We can sort this out", so they sit there waiting for someone to tell them what to do.

Hon SALLY TALBOT: What sort of degree of resistance are you meeting from the legal profession in introducing this culture change?

Mr Castledine: Not so much resistance. I may have been overly disparaging of my profession.

Hon SALLY TALBOT: I thought I would give you an opportunity to clarify it.

Mr Castledine: Yes. Thank you. The legal profession has come a long way in the past 20 years in understanding what ADR is. I do not see any vested interest in pushing matters to an adversarial hearing because the lawyer will make more money or anything like that. It is more that lawyers who have not been trained in mediation themselves will not necessarily be able to pass on to their client the proper information about what the process is about and trying to achieve, and so, when you combine that with the earlier problem that we talked about of perhaps the mediator becoming a little bit involved in the merits of the case as well, it is very easy for a lawyer to just continue to be adversarial in that process. Margaret is exactly right. It is a new process for clients. They will sit there and wait to be told what to do by their lawyer, whereas in an ideal mediation the lawyer, after opening, gradually moves to the background, and the clients come together and start talking. Therefore, there is quite a lot of warming up to be done to get parties to the point where they are mediating properly. Some lawyers are interested in ADR and some are not.

Ms Halsmith: I would agree completely. My private practice relies on referrals from lawyers, so there are a lot of ADR-friendly lawyers out there. On the other hand, even those who refer tend to think of mediation, as it was described here, as the grey between the black and white as distinct from, if you like, the rainbow of possibilities right off that continuum. If people are going to a directions hearing in the morning and a mediation in the afternoon in the same location, naturally their mind is set more in that adversarial way, so they actually need some assistance to think, let us say, in terms of the rainbow of possibilities rather than a squeeze between the black and the white. However, the legal profession is very active in the mediation business, both in terms of referrals and accompanying parties to mediations and training sessions and so on.

Mr Castledine: This is not part of what we have put in our submission. It is only occurring to me now; but so it does not get lost perhaps, there could be more done in terms of simple things like preparing an explanatory document that goes out to parties. That is a fairly simple thing that could be done by the SAT, which explains very clearly what the process is and how it differs from a final hearing on the merits.

Ms Halsmith: The description of mediation on the SAT website could be fuller. If you know what mediation is, the description is great. If you do not know what mediation is, there is probably not quite enough there, and that could be in the same description that you were talking about. It was also a bit hard to find. When I did a search for “mediation” on the site, it was about the fifteenth or twentieth of the listings that came up which I found; so I persisted, but I am not sure that everyone would persist in looking for what mediation means to the SAT.

Hon GIZ WATSON: Thank you very much. That has been most useful. Thank you for your time. That completes the hearing this afternoon.

Hearing concluded at 12.19 pm

LEGISLATION COMMITTEE

INQUIRY INTO THE JURISDICTION AND OPERATION OF THE STATE ADMINISTRATIVE TRIBUNAL
HEARING WITH THE LEADR ASSOCIATION OF DISPUTE RESOLVERS
14 MAY 2008

ABBREVIATIONS

SAT = State Administrative Tribunal
SAT Act = *State Administrative Tribunal Act 2004*
SAT Regulations = *State Administrative Tribunal Regulations 2004*
SAT Rules = *State Administrative Tribunal Rules 2004*

Proposed Questions regarding the Operation of the SAT	
1.	LEADR suggests (Submission 50) that the "different styles of mediation used across and within SAT streams" should be audited and analysed for their "effectiveness and appropriateness for the issues under review." LEADR also recommends that the SAT establish "a process of reviewing mediated outcomes 'down the track' to measure the durability of the agreements reached and identify any pitfalls or mistakes for future mediations which concern similar issues." The SAT has advised the Committee that it is keeping its own statistics on the methods, consistency, scale and outcomes of its mediations. (a) Should the SAT undertake these procedures internally or should they be carried out by an external consultant? (b) Does the LEADR offer these services?
2.	LEADR recommends (Submission 50) that the performance of SAT members as mediators be continually monitored and 'peer reviewed'. (a) What is involved in a 'peer review'? (b) As recognised in LEADR's submission, the SAT is endeavouring to monitor the performance of its mediators internally by having its members observe mediations being facilitated by other members. Should the SAT be undertaking this monitoring internally or should it be carried out by an external consultant?

3.	The Office of the Commissioner of Soil and Land Conservation (Submission 6) makes the following observation: "In some regulatory situations, the issues are "black" and "white" with little scope to adopt positions of "grey" through mediation." Are there any matters within the SAT's jurisdiction which are particularly ill-suited to mediation or conciliation? If so, please provide further comment.
4.	Are there any other issues/matters relevant to this inquiry which you wish to address? If so, please provide further comment.