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The Rise and Rise of Tribunals
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**Commentary by Dr Greg Lyons, Senior Member and Mediator,
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Tania Sourdin, “Facilitating the Resolution of Disputes before Tribunals”**

While Professor Tania Sourdin has dealt with some broad issues facing Tribunals and Courts with regard to facilitative processes – and has done so very well – I would like to make some observations about the Victorian Civil and Administrative Tribunal’s use of ADR. That is, I would like to look at how one large Tribunal uses ADR and see if some lessons are emerging. In this way, I may be able to complement a number of the points made by Professor Sourdin.

First, a little background about VCAT may be useful. Having commenced operations on 1 July 1998, VCAT will have its seventh birthday on 1 July 2005. VCAT has twelve Lists (or areas of practice). VCAT has judicial leadership: a Supreme Court judge as President and two County Court judges as Vice Presidents. A Deputy President heads each List. VCAT has some forty full-time members and about one hundred sessional members. It also has a panel of approximately fifty private mediators.

VCAT deals with about 90,000 matters each year. Of this total, some 65,000 matters are in the Residential Tenancies List; some 10,000 are in the Guardianship List; some 5,000 are in the Civil Claims List; some 4,000 are in the Planning and Environment List; and the General List deals with about 1,500 matters.

Other VCAT Lists deal with hundreds of matters per year, rather than with thousands. For example, the Domestic Building List deals with some 800 matters, the Anti-Discrimination List with some 500 matters, and the Occupational and Business

Regulation List with about 150 matters. Other Lists – Real Property, Retail Tenancies, Credit, and Land Valuation – deal with smaller numbers of matters each year.

As can be seen, VCAT has a disparate range of jurisdictions, both original and review. Across all areas of its work, VCAT has common objectives. Those common objectives are to be accessible and informal; timely; cost-effective; fair and impartial; and to make high-quality decisions, when decisions are needed.

Where does ADR, and mediation in particular, fit in all this? We have found that in three Lists, mediation has a great deal to offer in terms of meeting the Tribunal's goals. In the Anti-Discrimination List, virtually all complaints are referred to mediation. In the Domestic Building List, most matters are referred to mediation or to compulsory conferences (and sometimes to a combination of mediation and compulsory conferences). In the Planning and Environment List, some 15 – 20 per cent of matters are referred to mediation. As well, a small number of matters are referred to mediation in the Credit, General and Guardianship Lists.

Our experience is that 25 to 30 matters go to mediation each week (or some 1,250 to 1,500 per year). Who are the mediators? The mediators are drawn from:

- full-time members of the Tribunal (and some 10 of the 40 or so full-time members mediate on a regular basis, as well as conducting hearings);
- sessional members of the Tribunal; and
- the Tribunal's panel of private mediators.

It can be noted that the ten or so full-time members of the Tribunal who mediate on a regular basis have self-selected themselves as being keen to include mediation as part of their work.

It can also be noted that the three judges at VCAT – the President and Vice-Presidents – typically hear the more complex, sensitive or controversial cases. The judges do not enter the mediation field.

What is the “success rate” of VCAT mediations? While this term is somewhat problematic – for example, is a mediation “unsuccessful” if issues are clarified and narrowed at mediation so that what was to have been a five-day hearing becomes a two-day hearing – the success rate varies between 60 – 75 per cent across the Lists under discussion.

What observations can one make about VCAT’s use of mediation, particularly in its Anti-Discrimination, Domestic Building, and Planning and Environment Lists?

First, mediation works, and there is broad acceptance of VCAT’s use of it, even when parties are referred to mediation over their objections. VCAT’s relevant User Groups favour mediation and the Tribunal receives virtually no complaints about its use of mediation.

Second, in the Anti-Discrimination, Domestic Building, and Planning and Environment Lists, mediation is not “Alternative” Dispute Resolution; rather, it is an integrated part of the Tribunal’s case management. It is therefore “mainstream” dispute resolution, not something “alternative”.

Third, mediators need to be expert and experienced in the area (or areas) in which they mediate. This helps their credibility and means they can be of more assistance to self-represented parties and to lawyers and other advocates who may not be wholly familiar with the List in which they are appearing.

In other words, while in theory a competent mediator can mediate well no matter what the subject matter of the dispute, there are significant advantages in having a competent mediator who has expertise in the subject-matter of the dispute.

To ensure that its mediators can bring strong subject-matter expertise to the disputes they mediate, VCAT is able to call on lawyers and non-lawyers as mediators, the latter including architects, building experts, engineers, scientists, town planners, and so on.

The style of mediations conducted by VCAT mediators – whether members, sessional members or private mediators – will range from facilitative to evaluative, depending on the presenting issues, underlying issues, the parties' wishes, and so on.

Fourth, VCAT does not refer matters to mediation unless it is time and cost-efficient to do so – for both the parties and for VCAT. Clearly it is time and cost-efficient to refer a Domestic Building List matter to mediation in circumstances where a one day mediation may well produce a resolution – rather than have the matter go to a four or five day hearing. By contrast, in the Civil Claims List, VCAT does not refer more minor matters to mediation as they can be dealt with through one or two hour hearings. (In more significant matters in the Civil Claims List, compulsory conferences are regularly used to explore issues and to promote settlements).

Fifth, in managing business in their respective Lists, the Deputy Presidents in charge of the Anti-Discrimination, Domestic Building and Planning and Environment Lists are flexible in deciding when to refer matters to mediation. Referrals may be made soon after the filing of initial proceedings, or once the parties have completed preliminary paper-work. Sometimes, matters are referred to mediation shortly after a hearing commences – the judge or member hearing the matter forming the view that there is scope for negotiation between the parties, so long as a mediator assists. And occasionally, a matter may be referred to mediation after a hearing has been underway for some time.

Sixth, mediation can on occasion be a useful way of dealing with claims that have little or no legal merit. For example, some Anti-Discrimination complaints are ill-conceived. While respondents can make strike-out applications in such circumstances, this is costly and time-consuming. An alternative is to refer such a matter to mediation where some frank discussion may well produce a resolution.

Seventh, one can observe that when Tribunal members conduct mediations, as well as conducting hearings in other cases, their mediation skills come to influence the way they conduct hearings. Members who conduct both mediations and hearings may well find that in hearing cases, they are re-framing, agenda setting and summarising (to name but three mediation techniques) – that is, they are using mediation techniques in

the management of hearings. If one asked these members if the manner in which they conduct hearings has been improved and strengthened through their knowledge and use of mediation skills, the answer would certainly be in the affirmative.

In conclusion, while mediation is used regularly in three VCAT Lists (and occasionally in several others), and while compulsory conferences are also used regularly in a number of Lists, one cannot assume that these are the only forms of ADR that VCAT will use. There are other ADR approaches – for example, early neutral evaluation and med-arb (a combination of mediation and arbitration) – which may in future warrant attention by VCAT, and quite possibly by other Tribunals.