

# ADR in the COVID Age – The Good, the Bad and the Ugly

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As with all other aspects of legal practice, the conduct of ADR proceedings has also had to adapt to the challenges and restrictions created by the response to the coronavirus. ADR proceedings in my experience have had very mixed results, with some matters proceeding better than expected, others unexpectedly worse.

## THE GOOD



In my experience, arbitrations have been run with a relatively high degree of success. In Workers Compensation proceedings, these have been run almost entirely over the telephone. Proceedings generally commence with being placed on hold for an interminable amount of time, then once you are 'joined to the conference' a 'roll call' of attendees is undertaken, ensuring that everyone who is supposed to be there is there and capable of hearing.

So long as the matter is ready to proceed and there are not many parties in attendance, arbitrations tend to run fairly well. Difficulties arise when there are more than two parties as it is frequently not clear which person is speaking and which party they are representing (though this is one of those times when being a woman in a jurisdiction which is majority male helps).

While being in a different place to my instructing solicitor does have some difficulties, I have found that text messages are quite an effective replacement to the hastily scribbled notes that are usually passed between my instructing solicitor and myself. The fact that no one else can see what is written down has certainly allowed for a degree of frankness in these communications that may not have been there otherwise.

## THE BAD



My experience of mediations through AVL, using either WebEx or Skype for Business, have been mixed. When parties are confined to either videoconferencing facilities, text message or telephone, communication is necessarily focussed and precise. However the use of AVL can detract from the seriousness and formality of the mediation, particularly when one is given a glimpse of the far more 'intimate' settings in which AVL proceedings are conducted.

What is lost are those relationship building moments which are so useful in getting a matter settled. Gone is the opportunity to banter and have a frank discussion (or a little bit of cajoling and gentle arm twisting) with my opponent. A significant loss is the ability to look a plaintiff in the eye and gauge for yourself how they would come across in court, which can be very determinative of whether or not purse strings are loosened.

## THE UGLY



Conciliation proceedings have been, by far, my most difficult and frustrating ADR proceedings to date. The Workers Compensation Commission guidelines require that parties enter into conciliation prior to arbitration proceedings. Protocols were developed to require parties to obtain instructions before the conciliation conference and attempt some conciliation prior to the conference. While this can be done to some extent, it is usually only during the course of the conciliation conference that offers and discussions can occur with any efficacy.

Unfortunately the need for parties to go into 'separate rooms' to discuss offers, provide advice and receive instructions creates a particular difficulty. There is the constant frustration in dealing with the telephone with the usual request for the operator's attendance (with the interminable 'your hand is raised'), the wait for an operator to place you in a separate conference, and a similar request and wait for the operator to bring you to the main conference means that a conciliation conference can take twice as long as it otherwise would.

Worse still are the difficulties in receiving and conveying any offers. Emailing offers often means a wait of a few minutes before the other party receives it. Text messages are usually quicker, but require you to confirm their contents by reading them out, which sometimes means that mistakes are made in either understanding their content or conveying the full effect of the terms. These matters would have been easily dealt with when in person and using a pen and paper.

Finally there is the possibility of no settlement being able to be reached as written instructions need to be obtained, particularly when a claimant seeks to settle a matter on less than beneficial terms. When every party is in a different location, orders may need to be held in 'escrow' for a short period to allow written instructions to be obtained, meaning that matters are not resolved when they are listed.

Overall my experience of ADR has been, like most things during the coronavirus, frustrating, challenging and surprising in its effectiveness. I've been impressed by the flexibility of all parties as well as the courts and tribunals in managing to ensure that matters proceed. But most of all I've also been incredibly thankful that we have the ability to create technological solutions to allow us to meet the challenge that the coronavirus has presented.

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