

“The Objectives, Scope and Focus of Mediation Legislation in Australia”

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Introduction¹

- 1 Over the past decades, mediation has become a central feature of the Australian dispute resolution landscape. Just over thirty years ago, mediation could be found only in Community Justice Centres, or in specific contexts such as family or environmental and planning disputes. By contrast, Federal legislation in Australia now requires parties to pursue alternative methods of dispute resolution as a general rule, before commencing civil litigation.² Similar legislation has been enacted in New South Wales and Victoria.³ The Victorian legislation was recently repealed⁴ and the commencement of the New South Wales legislation has been delayed until 2013 to facilitate the monitoring of the operation of the Federal legislation.
- 2 There is no doubt that the significant cultural shift in favour of alternative dispute resolution (ADR) has contributed to a more efficient and robust civil justice system in Australia. An important issue for consideration is how

¹ I express my gratitude to Thomas Kaldor (Researcher to the Judges of the Equity Division of the Supreme Court of New South Wales) and Nick Roucek (Tipstaff, Supreme Court of New South Wales) for their assistance with the preparation of this paper and the collection and analysis of the sample data discussed in the paper.

² *Civil Dispute Resolution Act 2011 (Cth)*.

³ Part 2A of the *Civil Procedure Act 2005 (NSW)*. *Civil Procedure Act 2010 (Vic)*.

⁴ *Civil Procedure and Legal Profession Amendments Act 2011 (Vic)*.

legislative reforms can support the already beneficial ADR mechanisms that operate as additional processes to the Australian court systems. This issue needs to be considered in the context of the dynamic relationship between litigation and mediation.

- 3 This paper reviews recent trends in court-referred and court-annexed mediation, as well as mediation that takes place pursuant to a statutory requirement to take steps to resolve a dispute prior to commencing court proceedings. It also discusses empirical evidence concerning the “ripe time” for mediation, updating some initial conclusions that I presented on this issue in Hong Kong in 2007.⁵ The analysis of these trends provides a useful framework within which the recent legislative reforms may be examined. Finally, the paper discusses various additional issues concerning mediation in Australia, including mediator accreditation and immunity.

Basic tenets of mediation in Australia

- 4 In 1996, Leonard L Riskin, the CA Leedy Professor of Law and Director of the Centre for the Study of Dispute Resolution at the University of Missouri, Columbia School of Law, said that a “bewildering variety of activities fall within the broad, generally accepted definition of mediation – a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction”.⁶ Some years later, New South Wales adopted a legislative definition of “mediation” in the *Civil Procedure Act 2005 (NSW) (CPA)* as “a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute”.⁷ There are several basic tenets of mediation in Australia that are likely to be of more universal applicability.

⁵ Bergin PA, “Mediation in Hong Kong: The way forward – Perspectives from Australia” (2008) 82 ALJ 196 at 207.

⁶ Riskin LL, “Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed” (1996) 1 *Harvard Negotiation Law Review* 7 at 8.

⁷ Section 25.

- 5 Notwithstanding the centrality of the parties to the dispute, mediation is a structured process that is guided by an independent party. In this sense, mediation is distinguished from ad hoc negotiations conducted between parties. The success of mediation is in part dependent upon the abilities of the mediator. In Australia, private mediation is generally conducted by former judicial officers, lawyers and other professionals with particular expertise in the nature of the relevant dispute. In the main, court staff (Registrars or Commissioners) conduct the court-annexed mediations. However in some jurisdictions judges act as mediators (judicial mediation).⁸
- 6 A most important tenet of mediation in Australia is that it is confidential.⁹ Legislation expressly prohibits parties from adducing evidence of a communication made, or a document prepared, in connection with an attempt to negotiate a settlement.¹⁰ The willingness of parties to voluntarily settle their differences through mediation depends in large part on the confidentiality of the process. If parties fear that their disclosures to mediators or other parties during a mediation may be used against them or published outside the mediation session, it is likely that the use of the process will decline or the process will be weakened by parties manipulating their presentation to ensure that the mediator and/or the other parties are not provided with certain information that might otherwise be pivotal to a settlement being reached at the mediation.
- 7 In the vast majority of cases in Australia mediation is voluntary.¹¹ Although there may be a mandatory requirement to attend mediation, the outcome is always voluntary. The parties alone determine whether they will settle their dispute and the terms upon which they will settle their dispute, albeit that they are assisted in this regard by the mediator.

⁸ For instance, in the judicial resolution conferences conducted in Victoria under the *Civil Procedure Act 2010* (Vic). See also Practice Note 2 2012, "Judicial Mediator Guidelines Supreme Court of Victoria", 30 March 2012; Nickless R, "Victoria allows Judge mediators", *Australian Financial Review*, 13 April 2012.

⁹ CPA, s 31.

¹⁰ *Evidence Act 1995* (NSW), s 131.

¹¹ There are some disputes in which mediation is mandatory, referred to later.

8 Finally, mediation is a cost-effective and efficient mechanism for resolving disputes. Mediation is pursued in large part because of its potential to significantly reduce the practical and financial burden of a dispute. This principle has an important corollary that mediation should not be recommended if it is likely to prolong proceedings and lead to increased client costs. However, assessing whether this is likely to occur is not free from complexity.

Overview of recent legislative developments

9 Since 2000, courts in New South Wales have had the power to refer civil proceedings to mediation, with or without the consent of the parties.¹² A similar power now exists in all Australian jurisdictions.¹³ This power has been effectively used to ‘break the ice’ between hostile parties who would not otherwise have considered mediation as an option. However, recent legislative developments go further by attempting to foster a culture of pre-litigation mediation for all civil disputes.

10 In the Federal jurisdiction, the *Civil Dispute Resolution Act 2011* (Cth) (CDRA), commenced operation on 1 August 2011. The object of the legislation is “to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted”.¹⁴ Section 6 of the CDRA requires applicants instituting civil proceedings to file a “genuine steps statement” with their application.¹⁵ This statement must outline either the steps that have been taken to resolve the dispute or

¹² The relevant provision is now contained in s 26 of the *Civil Procedure Act 2005* (NSW).

¹³ For the federal jurisdiction, see s 53A of the *Federal Court of Australia Act 1976*. For Victoria, see s 48(2)(c) of the *Civil Procedure Act 2010* (Vic) and O 50.07 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). For Western Australia, see s 167(1)(q)(i) of the *Supreme Court Act 1935* (WA) and O 8 of the *Rules of the Supreme Court 1971* (WA). For Queensland, see ss 102-103 of the *Supreme Court of Queensland Act 1991* (Qld). For South Australia, see s 65(1) of the *Supreme Court Act 1935* (SA). For Tasmania, see s 5(1) of the *Alternative Dispute Resolution Act 2001* (Tas). For the Australian Capital Territory, see reg 1179 of the *Court Procedures Rules 2006* (ACT) and s 195 of the *Civil Law (Wrongs) Act 2002* (ACT). For the Northern Territory, see s 16 of the *Local Court Act 1989* (NT) and r 32.07 of the *Local Court Rules* (NT).

¹⁴ CDRA, s 3.

¹⁵ CDRA, s 6(1).

the reasons why no such steps were taken.¹⁶ The form of the genuine steps statement is prescribed by the new *Federal Court Rules 2011* (Cth),¹⁷ which also commenced on 1 August 2011. After the respondent to the proceedings is provided with a copy of the applicant's statement, the respondent must then file their own genuine steps statement, stating either that they agree with the applicant's statement or specifying the aspects with which they disagree and the reasons for the disagreement.¹⁸ Furthermore, lawyers are under a duty to inform clients of their obligation to file a genuine steps statement and to assist them in complying with that obligation.¹⁹

11 A failure to file a genuine steps statement does not invalidate an application to commence proceedings, a response to that application or the proceedings themselves.²⁰ However, the Court may take into account whether a person filed a genuine steps statement when they were required to do so and whether that person did in fact take genuine steps to resolve the dispute in two important contexts: in awarding costs and, more generally, "in performing functions or exercising powers in relation to civil proceedings".²¹ The Court may also have regard to a lawyer's failure to inform a client of a requirement to file a genuine steps statement and may also make an order that the lawyer bear costs personally.²²

12 Section 4(1A) of the CDRA provides:

For the purposes of this Act, a person takes *genuine steps to resolve a dispute* if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.

¹⁶ CDRA, s 6(2).

¹⁷ *Federal Court Rules 2011* (Cth), r 5.03.

¹⁸ CDRA, s 7.

¹⁹ CDRA, s 9.

²⁰ CDRA, s 10(2).

²¹ CDRA, ss 11-12.

²² CDRA, s 12(2)-(3); *Superior IP International Pty Ltd v Ahern Fox Patent and Trade Mark Attorneys* [2012] FCA 282.

13 Section 4 also provides a non-exhaustive list of examples of “genuine steps”, including “considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process”.²³ Although the legislation does not expressly require pre-trial mediation, it would inevitably be one of the most common mechanisms for demonstrating that genuine steps have been taken to resolve a civil dispute.

14 The regime in the CDRA applies to civil proceedings in the Federal Court of Australia and the Federal Magistrates Court. However, Part 4 of the CDRA excludes certain proceedings, to which the legislation does not apply, including:

- proceedings for an order imposing a pecuniary penalty for a contravention of a civil penalty provision;²⁴
- proceedings relating to a decision of various tribunals, such as the Australian Competition Tribunal or the Copyright Tribunal of Australia;²⁵
- appellate proceedings;²⁶
- proceedings arising from a power to compel a person to answer questions, produce documents or appear before a person or body under a Commonwealth law;²⁷
- proceedings under various pieces of legislation that already prescribe specific regimes for the resolution of disputes external to litigation, such as the *Family Law Act 1975* (Cth) and the *Native Title Act 1993* (Cth);²⁸ and
- proceedings prescribed by the regulations.²⁹

15 In late 2010, the NSW Parliament enacted similar legislation.³⁰ The new procedures, which became Part 2A of the CPA, were due to commence on 1 October 2011. Part 2A was intended to apply to all civil disputes other than the “excluded disputes” specified in s 18B of the CPA. Civil proceedings in the Supreme Court were excluded by Regulation 21 of the

²³ CDRA, s 4(1)(d).

²⁴ CDRA, s 15(a).

²⁵ CDRA, s 15(c).

²⁶ CDRA, s 15(d).

²⁷ CDRA, s 15(e).

²⁸ CDRA, s 16.

²⁹ CDRA, s 17.

³⁰ The relevant provisions were contained in the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW).

Civil Procedure Regulation 2005 (NSW).³¹ On 23 August 2011, the New South Wales Attorney-General, The Honourable Greg Smith SC MP, announced that the introduction of Part 2A of the CPA would be delayed until early 2013 for the reasons referred to earlier.

- 16 Part 2A of the CPA prescribes certain “pre-litigation requirements”, including that litigants take “reasonable steps” either to resolve their dispute or “clarify and narrow the issues in dispute” before commencing proceedings.³² Similar to the “genuine steps statement” under the CDRA, the CPA requires parties to file a “dispute resolution statement”, specifying the steps they have taken to fulfil these pre-litigation requirements, or explaining why no such steps have been taken.³³ The legislation also imposes an obligation on legal representatives to inform their clients of pre-litigation requirements and advise them about alternatives to the commencement of civil proceedings.³⁴
- 17 As is the case under the CDRA, a failure to comply with pre-litigation requirements, or to file a dispute resolution statement, does not affect the validity of proceedings. However, once again, the Court may have regard to a party’s failure to comply with pre-litigation requirements in making any costs orders against that party,³⁵ or against their legal representatives under s 99 of the CPA.³⁶
- 18 In Victoria, similar pre-litigation requirements were introduced under the *Civil Procedure Act 2010 (Vic)*, which commenced on 1 January 2011. However, on 30 March 2011 a newly elected government repealed the relevant provisions.³⁷

³¹ Under s 18B(4) of CPA the Governor may make regulations declaring that certain specified proceedings are excluded from the operation of Part 2A.

³² CPA, s 18E.

³³ CPA, s 18G.

³⁴ CPA, s 18J(1).

³⁵ CPA, ss 18M and 18N.

³⁶ CPA, ss 18J and 18M.

³⁷ *Civil Procedure and Legal Profession Amendments Act 2011 (Vic)*.

- 19 In South Australia, plaintiffs are required by statute to notify defendants of a prospective claim at least 90 days before commencing proceedings.³⁸ As well as providing sufficient details of the claim, the written notice must also be accompanied by a settlement offer.³⁹ The defendants must then reply within 60 days of receiving the notice, and either accept the offer, make a counter-offer or state the grounds on which liability is denied.⁴⁰ If proceedings are commenced, the originating process must include a statement that this procedure has been complied with, or explaining why it has not.⁴¹ In addition, the plaintiff's notification and any response must be filed in the Court in a suppressed file.⁴² In awarding costs in relation to the action, the Court may take into account whether the parties have complied with their obligations, as well as the terms of any offer or counter-offer and the extent to which the offers were reasonable in the circumstances.⁴³
- 20 There is no statutory requirement for pre-litigation mediation in any of the other States or Territories of Australia.

Particular contexts for pre-litigation mediation

- 21 In addition to the recent State and Federal developments requiring litigants to attempt to resolve their disputes before instituting court proceedings, legislation has for some time required parties to pursue mediation as a first option in certain contexts. These contexts share common characteristics. First, there is some policy imperative directing a preference for mediation and secondly, mediation has been shown to be an effective mechanism for resolving these particular disputes. Although the following examples are from New South Wales, legislative schemes imposing pre-litigation dispute resolution exist in other states, as well as in the federal jurisdiction.⁴⁴

³⁸ *Supreme Court Rules 2006 (SA)*, r 33.

³⁹ *Supreme Court Rules 2006 (SA)*, r 33(2).

⁴⁰ *Supreme Court Rules 2006 (SA)*, r 33(4).

⁴¹ *Supreme Court Rules 2006 (SA)*, r 33(6)(a).

⁴² *Supreme Court Rules 2006 (SA)*, r 33(6)(b).

⁴³ *Supreme Court Rules 2006 (SA)*, r 33(7).

⁴⁴ *Farm Debt Mediation Act 2011 (Vic)*, *Legal Profession Act 2007 (Tas)*, *Retail Shop Leases Act 1994 (Qld)*, *Family Law Act 1975 (Cth)*.

Family provision disputes

- 22 One category of disputes that has been identified as suitable for mandatory pre-trial mediation in New South Wales is cases involving challenges to wills and applications by family members for greater provision out of the estates of deceased persons.⁴⁵ The *Succession Amendment (Family Provision) Act 2008 (NSW)* repealed the *Family Provision Act 1982 (NSW)* (FPA) with effect from 1 March 2009. The key provisions of the FPA were subsumed into Chapter 3 of the *Succession Act 2006 (NSW)*.⁴⁶ Under the legislation, an eligible person may apply to the Court for a “family provision order”.⁴⁷ Since 2008, any applications for a family provision order are referred to mediation before the matter goes to trial.⁴⁸
- 23 Mediation is highly effective in this context. In 2010 and 2011, the Supreme Court of New South Wales referred a total of 933 family provision disputes to court-annexed mediation. Of these, 531 (56.9%) settled at mediation. In addition, the parties were still attempting to reach a negotiated settlement in 242 cases (25.9%), leaving only 160 cases (17.1%) in which the parties conclusively decided not to settle at the end of mediation (see Figure A).

Figure A: Outcomes of Court-annexed mediation of Family Provision disputes during 2010 and 2011

	Settled	Not Settled	Still Negotiating	Total
2010	267 (57.7%)	65 (14.0%)	131 (28.3%)	463
2011	264 (56.2%)	95 (20.2%)	111 (23.6%)	470
Total	531 (56.9%)	160 (17.1%)	242 (25.9%)	933

Farm debt disputes

- 24 The *Farm Debt Mediation Act 1994 (NSW)* (FDMA) establishes a mediation regime “for the efficient and equitable resolution” of disputes arising in connection with debts incurred for the purpose of conducting

⁴⁵ PA Bergin, “Judicial mediation: problems and solutions” (2011) 10 TJR 305 at 308.

⁴⁶ *Succession Amendment (Family Provision) Act 2008 (NSW)*.

⁴⁷ *Succession Act 2006 (NSW)*, s 57.

farming operations.⁴⁹ A creditor cannot take any action to enforce a debt without first notifying the farmer of its intention to do so, as well as the availability of mediation.⁵⁰ A creditor may apply for a certificate exempting it from this requirement. However, such a certificate will only be granted if there has been “satisfactory mediation”, the farmer has declined to mediate or the creditor has attempted to mediate in good faith for a period of three months.⁵¹

25 In *Waller v Hargreaves Secured Investments Limited*,⁵² mediation had taken place in accordance with the FDMA following default by the borrower. At mediation, a further loan agreement was entered into. After further default, the parties entered into a third loan agreement. A certificate under the FDMA was subsequently issued to the lender after which it successfully brought proceedings against the borrower. The High Court held that the legislation barred the lender from obtaining a money judgment or possession of the borrower’s property. Mediation had been conducted and a certificate had been granted in respect of the original loan agreement. Since that agreement had been discharged by the subsequent agreements, the lender was not exempted from its statutory obligations to propose and pursue mediation in relation to the later agreement before commencing court proceedings against the borrower. The legislation required the lender to again notify the borrower of the availability of mediation, despite mediation having already been conducted in relation to the initial agreement.

26 The legislative preference for mediation in this context is underpinned by a desire to temper the perceived structural imbalance between large lending institutions and small agri-business borrowers. Actions taken by financiers in relation to farm debts almost inevitably lead to severe consequences for farmers, including repossession of their property, which is generally both

⁴⁸ Unless the Court orders otherwise “for special reasons”: *Succession Act 2006* (NSW), s 98(2).

⁴⁹ FDMA, s 3.

⁵⁰ FDMA, s 8.

⁵¹ FDMA, s 11.

⁵² *Waller v Hargreaves Secured Investments Limited* [2012] HCA 4.

their family home and place of business. In addition, drought and other seasonal factors may result in temporary default of a farm loan. For these reasons, there is a clear policy imperative to encourage and assist parties to reach a negotiated resolution through mediation.

Retail tenancy disputes

- 27 Disagreements between landlords and tenants are disputes that the NSW legislature decided can be effectively resolved by early mediation. The *Retail Leases Act 1994* (NSW) has been described as being underpinned by a legislative policy of mediation rather than litigation.⁵³ Parties involved in retail tenancy disputes are unable to commence proceedings unless they have first attempted mediation, or the Court is otherwise satisfied that mediation is unlikely to resolve the dispute.⁵⁴
- 28 Tenancy disputes often involve a number of discrete issues and raise concerns for both parties. For instance, the initial dispute may arise from a default on rent payments. However, the tenant may dispute a rent increase following a recent review, or demand certain repairs be carried out at the landlord's expense. Equally, the landlord may be concerned about the way in which the tenant is using the property. Litigation may produce an unsatisfactory outcome for both parties if they wish to maintain their commercial relationship. However the flexibility of mediation enables parties to arrive at a mutually beneficial outcome.⁵⁵

Empirical analysis: the ripe time for mediation

- 29 In 2003 Sir Laurence Street AC, KCMG, QC, made the following observation about the appropriate time for mediation:

It is impossible to generalise as to the time when a dispute is ripe for mediation. Some are ripe very soon after they erupt and before the parties become deeply entrenched in oppositional positions and incur expenditure on costs in consolidating those positions. Some are not ripe until the parties have fought them out to the

⁵³ *GPT Management Ltd v Spa Heaven Pty Ltd* [2005] NSWSC 1043 at [15] (Palmer J).

⁵⁴ *Retail Leases Act 1994* (NSW), s 68.

⁵⁵ Redfern M, "Mediation is Good Business Practice" (2012) 21 ADJR 53 at 56.

point of judgment or award in a court or an arbitration. Between these two extremes is a continuum.⁵⁶

- 30 One example that demonstrates the unpredictability of determining the ripe time for mediation is the case in which an independent contractor successfully brought a claim in negligence against Coca-Cola Amatil for injuries he sustained after being shot when delivering the company's products.⁵⁷ The trial judge awarded the plaintiff approximately \$3 million in damages. However, the Court of Appeal overturned this decision in March 2006, concluding that the plaintiff's injuries were not caused by Coca-Cola's negligence.⁵⁸ Shortly after the Court of Appeal delivered judgment, the parties proceeded to a successful mediation.⁵⁹ Experience has suggested that a dispute is highly unlikely to settle following judgment at first instance and on appeal. However, in that case the parties may have wished to avoid the prospect of litigation in the High Court. In addition, the proceedings had already damaged Coca-Cola's reputation. The company was under immense pressure from both the public and the NSW government to "show some compassion" and "perhaps put aside their strict legal rights".⁶⁰ Notwithstanding these factors, it would have been difficult to predict that the ripe time to mediate this dispute was two and a half years after the case first went to hearing, and following the decision of an appellate court.
- 31 Despite this unpredictability, it is possible to identify certain characteristics of a dispute that may indicate whether mediation is more likely to be successful at a particular stage in the conflict or even whether mediation is likely to be successful at all. Indeed, it is the ability to generalise about certain categories of disputes that enables the legislature to put in place

⁵⁶ Sir Laurence Street, *Mediation: A Practical Outline* (5th ed, 2003), 8-9.

⁵⁷ *Pareezer v Coca-Cola Amatil (NSW) Pty Ltd* (2004) Aust Tort Reports 81-772; [2004] NSWSC 825.

⁵⁸ *Coca-Cola Amatil v Pareezer (NSW) Pty Ltd* (2008) Aust Tort Reports 81-834; [2006] NSWCA 45.

⁵⁹ "Media Release: Coca-Cola Amatil and Craig Pareezer" (22 March 2006), available at <http://ccamatil.com/InvestorRelations/md/2006/CCA%20and%20Craig%20Pareezer%20-%20220306.pdf>.

the specific mediation regimes discussed above. Yet, even in those contexts, there is no guarantee that early mediation will effectively resolve all disputes in these categories.

32 Beyond the categorisation of disputes, the task of identifying a ripe time for mediation becomes even more problematic. In 2007, I attempted to shed some light on the issue by examining a limited sample of cases in the Equity Division of the Supreme Court of New South Wales.⁶¹ More specifically, I considered 98 cases from the Commercial List and the Technology & Construction List (the Lists) that had been referred to mediation in the period 1 January 2006 to 1 June 2007.

33 The cases in the sample were divided into three categories, depending on the stage in the litigious process at which they had been referred to mediation:

- the *preliminary* stage – in which the parties are finalising their pleadings;
- the *intermediate* stage – during which discovery and other interlocutory steps occur;⁶² and
- the *advanced* stage – when parties are preparing their evidence and the trial date has been set.

34 The data revealed that cases referred to mediation at a late stage in proceedings were more likely to settle. Of the 30 matters referred to mediation at an advanced stage, 18 (60%) settled. This compared to a settlement rate of 27% and 29% for matters referred to mediation at a preliminary stage and intermediate stage respectively. The overall settlement rate for the cases considered in the study was 38%.

⁶⁰ Former Premier of NSW, Morris Iemma, quoted in “Shot Coke worker keeps payout”, *Sydney Morning Herald* (online), 17 March 2006, available at <http://www.smh.com.au/news/national/shot-coke-worker-keeps-payout/2006/03/17/1142098650896.html>.

⁶¹ Bergin PA, “Mediation in Hong Kong: The way forward – Perspectives from Australia” (2008) 82 ALJ 196 at 207-210.

⁶² This stage will need to be adjusted in any future sample because parties in cases in the Equity Division of the Supreme Court of New South Wales are now required to serve their evidence before any discovery (disclosure) is permitted (unless there are exceptional circumstances): Practice Note SC Eq 11 Disclosure in the Equity Division 22 March 2012.

35 New data has been collated from 99 cases referred to mediation from the Lists between 1 January 2008 and 31 December 2011. These cases were again categorised according to the three stages specified above. Significantly, the new data is consistent with the earlier finding that cases referred to mediation at an advanced stage are more likely to settle, although the difference between the settlement rates across the various stages was less marked in the new sample.

36 Occasionally, a matter was referred to mediation at multiple stages. There was a total of 104 referrals across the 99 cases. Where a matter was referred to mediation twice and a settlement was subsequently reached, the first referral was recorded as unsuccessful, while the later referral was recorded as successful. Where a matter was referred to mediation unsuccessfully on multiple occasions, all referrals were recorded as unsuccessful.

37 The overall settlement rate for the 99 cases was 46%, which was slightly higher compared to the earlier research (38%). Of the 46 matters that settled at mediation:

- 16 (35%) were referred at a preliminary stage;
- 14 (30%) were referred at an intermediate stage; and
- 16 (35%) were referred at an advanced stage.

38 Of the 104 referrals to mediation:

- 38 were referred at a preliminary stage and 16 (42%) settled;
- 31 were referred at an intermediate stage and 14 (45%) settled;
and
- 35 were referred at an advanced stage and 16 (46%) settled.

39 In respect of those referrals to mediation that did not result in settlement (58):

- 22 (38%) had been referred at a preliminary stage;
- 17 (29%) had been referred at an intermediate stage; and
- 19 (33%) had been referred an advanced stage.

- 40 Of the cases that did not settle at mediation, the majority (53%) went to trial or were proceeding to trial at the time the data was collected, while 15% settled within six months of mediation and 32% settled more than six months after mediation.
- 41 The recent study also provided some further detail that was not available in the 2007 evidence. In nine cases the parties attempted to mediate the dispute before commencing proceedings. Each of these cases were subsequently referred to mediation during the course of proceedings, and the settlement rate among this group was generally in line with the overall settlement rate (four settled while five failed to settle).
- 42 Where the parties expressed concerns about the appropriateness of mediation at the commencement of litigation, subsequent mediation outcomes were much less successful. There were eight cases in which the parties were completely unwilling to mediate and five cases in which willingness was conditional (either upon the completion of a certain stage in the interlocutory process or the determination of a threshold question of law). Only one case in each group subsequently settled at mediation, which represents a significantly lower settlement rate compared to all cases.
- 43 As I said in 2007, “the drawing of inferences and conclusions from raw statistics is never satisfactory and in an area such as this, where mediations are conducted in private with confidentiality regimes, the conclusions and inferences are bedevilled by even more uncertainty”.⁶³ However, although less pronounced, the new data is consistent with the observations I made in 2007.
- 44 Even if the data were unable to support a clear inference that the ripe time to refer a matter to mediation is at an advanced stage, it nonetheless

⁶³ Bergin PA, “Mediation in Hong Kong: The way forward – Perspectives from Australia” (2008) 82 ALJ 196 at 209.

suggests that mediation is at least as *effective* at a later stage in proceedings as it is at the earlier stages. An equally available conclusion is that the ideal time to mediate varies from case to case; in other words, there is no universal ripe time to mediate civil disputes. Both of these conclusions offer an alternative perspective to the current legislative shift in favour of pre-litigation mediation.

Evaluation of recent reforms

- 45 The most common criticism of mandatory pre-litigation requirements is that they conflict with the essentially voluntary nature of mediation. The force of this complaint is reduced by the fact that compulsory mediation has existed for many years, both in the Courts' powers to refer proceedings to mediation without the parties' consent and in the pre-action mediation mandated for certain types of dispute. Furthermore, experience demonstrates that a referral to mediation is often the initial stimulus that otherwise non-communicative parties need to move towards a voluntary and successful process of mediation.⁶⁴
- 46 One difference between the CDRA on the one hand and the repealed Victorian provisions as well as the New South Wales legislation on the other, is the pre-litigation standard of conduct. The CDRA requires parties to take "genuine steps" to resolve their dispute, while the legislatures in the two States opted for the criteria of "reasonable steps".⁶⁵ The Chair of the National Alternative Dispute Resolution Advisory Council (NADRAC), an advisory body to the Federal Attorney-General, suggested that the New South Wales and Victorian legislation "missed the point" by adopting an objective test of reasonableness that "lawyerised a piece of non-lawyer legislation and caused a pre-litigation tool to be drawn away from the disputant and thrust into the fray of litigation".⁶⁶

⁶⁴ Bergin PA, "Mediation in Hong Kong: The way forward – Perspectives from Australia" (2008) 82 ALJ 196 at 203-204.

⁶⁵ CPA, s 18E(1); *Civil Procedure Act* 2010 (Vic), s 34(1) (repealed).

⁶⁶ Gormly J, "The Children of the Revolution: A Change in Dispute Culture" (Speech delivered at Dispute Resolution Conference, *Dispute Resolution in the Next 40 Years: Repertoire or Revolution*, University of New South Wales, 2 December 2011).

- 47 Measuring a party's efforts to resolve a dispute by reference to an objective criteria may present as a flawed exercise. Yet, it may be equally problematic to determine whether a party has in fact taken "genuine" steps. This debate regarding the appropriate standard obscures a broader concern. Attempts to explicitly regulate attitudes to mediation may be misguided and perhaps even antithetical to the mediation process.
- 48 Legislation prescribing compulsory pre-litigation mediation involves a delicate balance between ensuring that parties attempt to settle their disputes before litigating and preserving the right of access to the Courts. The characteristics of certain disputes justify legislation deeming that good faith involves a requirement to mediate first in the context of those disputes. It is another thing entirely to conclude that good faith requires disputants to *Mediate First* in all cases.
- 49 The new legislation may encourage a party to 'play along' with attempts at resolution as a necessary pre-condition to litigation. This would only lead to additional expense and delay before the case finally goes to trial. An additional risk is that parties, by approaching mediation as a mere formality in the process of instituting proceedings, may reduce the potential for mediation to be effectively deployed at a later stage.
- 50 It is imperative to ensure that the operation of the legislation does not undermine confidentiality. Under the postponed New South Wales legislation, a Court may order that one party pays another's costs of compliance with pre-litigation requirements.⁶⁷ The Court may make such an order of its own motion or on the application of a party.⁶⁸ This introduces the possibility for litigants to present evidence and make submissions in relation to another party's failure to take reasonable steps. More generally, if pre-litigation requirements are to be enforced, it will be necessary for courts to scrutinise the steps taken by prospective litigants.

⁶⁷ CPA, s 18M(1)(a).

⁶⁸ CPA, s 18M(2).

- 51 By scrutinising whether parties are taking reasonable or genuine steps to resolve their disputes, the new legislation may foster an environment in which parties are less likely to settle their differences through mediation. Confidentiality is an indispensable component of mediation; it is the essential pre-condition that initially brings parties to the table and the framework that enables parties to openly discuss their concerns in order to reach a mutually beneficial solution to their conflict. The strength of mediation is damaged irreparably if confidentiality is infringed.
- 52 Finally, empirical evidence from the Equity Division of the NSW Supreme Court indicates that mediation may often be more effectively deployed at a later stage in proceedings. In the sample presented, matters referred to mediation at an advanced stage in proceedings settled at a higher rate than other cases. This does not mean that early mediation serves no purpose at all. Even if settlement is not reached, mediation may clarify and narrow the real issues in contest between the parties, thereby expediting the litigation process. Moreover, the fact that mediation is shown to be effective at a later phase in a dispute, does not necessarily mean that early mediation would not also have been successful.

Accreditation of mediators

- 53 Accreditation in Australia is not mandatory. However, since the beginning of 2008 a voluntary system known as the National Mediator Accreditation System (NMAS) has been in operation.⁶⁹ This system has become the primary source of mediator standards in Australia. Despite the concurrent operation of multiple accreditation systems, the NMAS seems to have acquired de facto status as an endorsed accreditation system, as most providers of court-ordered mediation are accredited under the NMAS.⁷⁰

⁶⁹ The system is provided for by two main documents known collectively as the “Australian National Mediator Standards”. The first is “Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System” (September 2007). The second is “Practice Standards For Mediators Operating under the National Mediator Accreditation System” (September 2007).

⁷⁰ Thomson Reuters, *The Laws of Australia* (at 1 May 2009), 13 Dispute Resolution, ‘2 Mediation and Conciliation’, [13.2.730].

54 The history of the development of the standards dates back to 2000, with the release of a discussion paper on the issue,⁷¹ and a series of forums held throughout the nation. This was followed by further papers and consultations, which culminated in a 2007 draft standards paper proposing the creation of the national system. The proposal ultimately became the current NMAS.⁷² A defining feature of the development of the system in Australia is the central role played by mediation organisations and academics, with funding support provided by the Commonwealth Government.

55 The standards deal with various matters, including the creation of Recognised Mediation Accreditation Bodies (RMABs) to handle the process of accreditation, as well as the establishment of approval requirements and continuing accreditation requirements for mediators. A mediator seeking accreditation under the NMAS must:

- pass a “good character” test;
- have a relationship with an appropriate organisation that meets certain ethics requirements, has in place complaints and disciplinary processes and offers ongoing professional support; and
- provide evidence of competence by reference to a combination of experience, training and education.⁷³

56 Where an applicant does not have sufficient experience in mediation, there is a requirement to complete a 38-hour workshop, including at least nine simulated mediation sessions.⁷⁴ Once accredited, a mediator is also

⁷¹ National Alternative Dispute Resolution Advisory Committee, *The Development of Standards for ADR* (2000). NADRAC is an independent body in Australia, charged with providing policy advice to the Australian Attorney-General on the development of alternative dispute resolution mechanisms and with promoting the use and raising the profile of alternative dispute resolution.

⁷² Sourdin T, *National Mediator Accreditation System: Report on Project* (2007).

⁷³ Australian National Mediator Standards, “Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System” (2007), 3(1).

⁷⁴ Australian National Mediator Standards, “Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System” (2007), 5(3).

required to conduct at least 25 hours of mediation and attend 20 hours of continuing professional development courses every two years.⁷⁵

Immunity of mediators

- 57 Legal action against mediators may threaten the efficacy of mediation in two ways. This may require the Court to investigate the content of mediation sessions, which may undermine confidence in the process of mediation itself and discourage participants from engaging in a completely honest and open manner.⁷⁶ Exposure to legal liability may force mediators to adopt a more legalistic course of conduct in order to protect themselves, increasing formality and cost.⁷⁷
- 58 In Australia, mediators enjoy broad protection from civil proceedings by reason of a rather piecemeal system of immunity, predominantly provided by legislation and supplemented by exclusions or limitations agreed to contractually on an ad hoc basis between the parties to mediation.
- 59 Immunities from civil proceedings in Australia are provided for by three main sources – common law, statutory provisions and contract. Under the Australian common law, no civil action lies at the suit of any person for any words, actions, omissions or other behaviours of a Judge in a judicial proceeding.⁷⁸ The provision of unqualified immunity of this sort is founded on public policy grounds, relating principally to the importance placed on judicial independence in the Australian legal system. The immunity extends to other participants in the judicial system, including quasi-judicial officers and bodies making determinations in cases before them, such as tribunals. In this context, one might expect this immunity to cover at least part of a mediator's activities. Although opinions differ on this point and there is some suggestion that mediators are enveloped within common law

⁷⁵ Australian National Mediator Standards, "Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System" (2007), 1(3).

⁷⁶ National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters* (2006) at 63.

⁷⁷ National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters* (2006) at 63.

⁷⁸ *Cabassi v Vila* (1940) 64 CLR 130.

judicial immunity, there is no Australian authority to this effect, and the better view is that no such immunity exists for mediators.⁷⁹ Statutory provisions are therefore the main source of mediator immunity in Australia.

60 While there is no single overarching statute at a state or federal level providing immunity to all mediators, a number of statutes cover the activities of mediators in specific circumstances. The result is a regime consisting of two different levels of immunity. Some mediators enjoy protection equal to that of a judicial officer, which is known as “unqualified mediator immunity”. This affords mediators a complete immunity from civil proceedings without the need to first establish the impugned conduct was carried out in good faith. This kind of immunity applies to mediations connected to the highest courts in New South Wales, Victoria, Queensland, Western Australia and South Australia.⁸⁰ Such protection is also applied to the higher courts in the federal jurisdiction, including court-appointed mediators in the Federal Court,⁸¹ Federal Magistrates Court⁸² and the Administrative Appeals Tribunal.⁸³

61 Other mediators must establish certain requirements before they have “qualified immunity”. The most common qualifications are that a mediator must prove they acted in good faith or without fraud, or were carrying out the statutory purposes of the legislation providing the immunity.⁸⁴ Provisions of this kind apply to the highest courts in Tasmania⁸⁵ and the Australian Capital Territory,⁸⁶ as well as mediators in community justice

⁷⁹ Boule L, *Mediation: Principles, Process, Practice* (3rd ed, 2011) at 738; Carroll R, “Mediator Immunity in Australia” (2001) 23 *Sydney Law Review* 185 at 189-190.

⁸⁰ CPA, s 33; *Supreme Court Act 1986* (Vic), s 27A; *Supreme Court of Queensland Act 1991* (Qld), s 113; *Supreme Court Act 1935* (WA), s 70; *Supreme Court Act 1935* (SA), s 65.

⁸¹ *Federal Court of Australia Act 1976* (Cth), s 53C.

⁸² *Federal Magistrates Act 1999* (Cth) s 34(5).

⁸³ *Administrative Appeals Tribunal Act 1975* (Cth), s 60(1A).

⁸⁴ Boule L, *Mediation: Principles, Process, Practice* (3rd ed, 2011) at 740.

⁸⁵ *Alternative Dispute Resolution Act 2001* (Tas), s 12.

⁸⁶ *Mediation Act 1997* (ACT), s 12.

centres in New South Wales, Queensland and Victoria,⁸⁷ and the Human Rights and Equal Opportunity Commission.⁸⁸

- 62 Although the courts have not examined statutory immunity for mediators in Australia extensively, the Queensland Court of Appeal considered the issue in *Von Schultz v Attorney-General*.⁸⁹ That case concerned various allegations of misconduct made against a mediator, including an allegation of falsely signing a mediator's certificate to the affect that settlement had been reached in mediation between the parties. In dismissing the application for leave to appeal, the Court of Appeal applied s 113(1) of the *Supreme Court of Queensland Act 1991* (Qld), granting the mediator immunity from suit equivalent to that enjoyed by a judge.
- 63 Parties may expressly agree that the liability of the mediator is limited or excluded. While the strength of contractual exclusion clauses in the context of mediation remains untested in practice, the immunity provisions contained in Australian mediation contracts are normally clear in scope and intent and provide a significant obstacle in the path of legal action against mediators.⁹⁰
- 64 Litigation against mediators in Australia is extremely rare.⁹¹ At least one reason for this is the regime of mediator immunity. There has been some debate about the current state of mediators' immunity in Australia, which has formed part of a wider debate as to role for immunities.⁹² The view has been expressed that immunities need to be strongly justified as a matter of public policy, as they are a privilege bestowed on very few professions,

⁸⁷ *Community Justice Centres Act 1983* (NSW), s 27(1), *Dispute Resolution Centres Act 1990* (Qld), s 35(1)(c), *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s 21N.

⁸⁸ *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 48.

⁸⁹ [2000] QCA 406.

⁹⁰ Boule L, *Mediation: Principles, Process, Practice* (3rd ed, 2011) at 744-45.

⁹¹ *Tapoohi v Lewenberg (No 2)* [2003] VSC 410.

⁹² *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

and that the case for mediators' immunity has not yet been sufficiently made out.⁹³

65 It has also been suggested that mediator immunity from civil action is superfluous, because a sufficient level of protection for mediators can be achieved using more moderate mechanisms, such as professional insurance and indemnity schemes.⁹⁴ Indeed, mediation services provided incidentally to a range of professional service activities in Australia (such as legal practice and accountancy) are generally covered by existing professional indemnity schemes and arrangements. Mediators accredited under the NMAS are now required to hold indemnity insurance.⁹⁵ With the increasing use of such schemes it remains to be seen whether the Australian mediation regime will continue to rely on and provide for broad statutory immunities.

Judicial mediation

66 That brings me to the important topic of judicial mediation upon which I touched when I was here in 2007. On that occasion I suggested that there was a real question whether the system of open justice is able to accommodate judges brokering deals in private.⁹⁶ That question has yet to be properly addressed in Australia.

67 It is understandable that practitioners may find that "Judge-led" mediation is effective.⁹⁷ However, the more serious and important question is whether it is appropriate. It is clear from the provisions in place in those parts of Australia where judicial mediation is tolerated that the judge-mediator will not be permitted to do certain things unless there is approval

⁹³ Carroll R, "Mediator Immunity in Australia" (2001) 23 *Sydney Law Review* 185 at 221; National Alternative Dispute Resolution Advisory Council, *Legislating for Alternative Dispute Resolution: A Guide for Government Policy Makers and Legal Drafters* (2006) at 20.

⁹⁴ Carroll R, "Mediator Immunity in Australia" (2001) 23 *Sydney Law Review* 185 at 220.

⁹⁵ Boule L, *Mediation: Principles, Process, Practice* (3rd ed, 2011) at 754; Australian National Mediator Standards, "Approval Standards for Mediators Seeking Approval under the National Mediator Accreditation System" (2007), 3(1)(c).

⁹⁶ Bergin PA, "Mediation in Hong Kong, the way forward – perspectives from Australia 2008" 82ALJ 196 at 199.

⁹⁷ Nickless R, "Victoria allows Judge mediators", *Australian Financial Review*, 13 April 2012.

given to the judge by the parties. It is also envisaged that judge-mediators will receive information directly from the party albeit that the legal practitioner for that party will be present. The judge is then prohibited from disclosing that information to any other person without the express authorisation from that party or the lawyer for that party. Accordingly, the judge-mediator will owe a duty of confidentiality to the party and/or the legal representative of the party.⁹⁸ Over the years, legal firms have established “information barriers” for the protection of clients’ confidential information and to avoid conflicts of interest. At this stage no debate has occurred in Australia as to how the judges’ duty to keep confidential the information is to be accommodated. The prospect of a need to establish an information barrier between judges of a court further highlights the real difficulties with the practice.

- 68 That judges should be directed to act in a particular manner by a party, be in a relationship with the party and/or legal practitioner and owe duties to those parties or legal practitioners who appear before them on a regular basis is antithetical to the perception of an impartial and independent judiciary. That judges should operate in secret and broker commercial (or other) deals during which they may express views to lawyers that cannot be repeated to anyone (including their colleagues) has the real potential to compromise the integrity and independence of the judiciary. History in this regard suggests only adversity. For instance, in Sweden, where judicial mediation was introduced, an Ombudsman had to be appointed to deal with the numerous complaints against judges in the conduct of mediations.
- 69 Although the practice has been described as “controversial”⁹⁹ it seems to me that a more appropriate epithet is that the practice is “untenable”.

⁹⁸ This is an unqualified duty to preserve the confidentiality of the information provided to the judge: Charles Hollander QC & Salzedo S, *Conflicts of Interest* Thomson Sweet & Maxwell 2008 par 7-003.

⁹⁹ Nickless R, “Victoria allows Judge mediators”, *Australian Financial Review*, 13 April 2012.

Conclusion

- 70 Long gone are the days when mediation could be accurately described as “alternative” dispute resolution. It is now an integral component of the civil justice system in Australia. The new legislation goes even further, requiring that civil litigants will always take reasonable or genuine steps to settle their dispute (including by mediation) before instituting proceedings. It will be critical to monitor whether this significant change supports the already positive impact of ADR on civil justice in Australia.

Appendix

Figure 1: Settlement rate

Referral year	Matters referred to mediation	Matters settled at mediation	Matters not settled at mediation
2008	38	23	12
2009	21	7	14
2010	17	7	10
2011	26	9	17
Total	99	46	53

Figure 2: Settlement rate

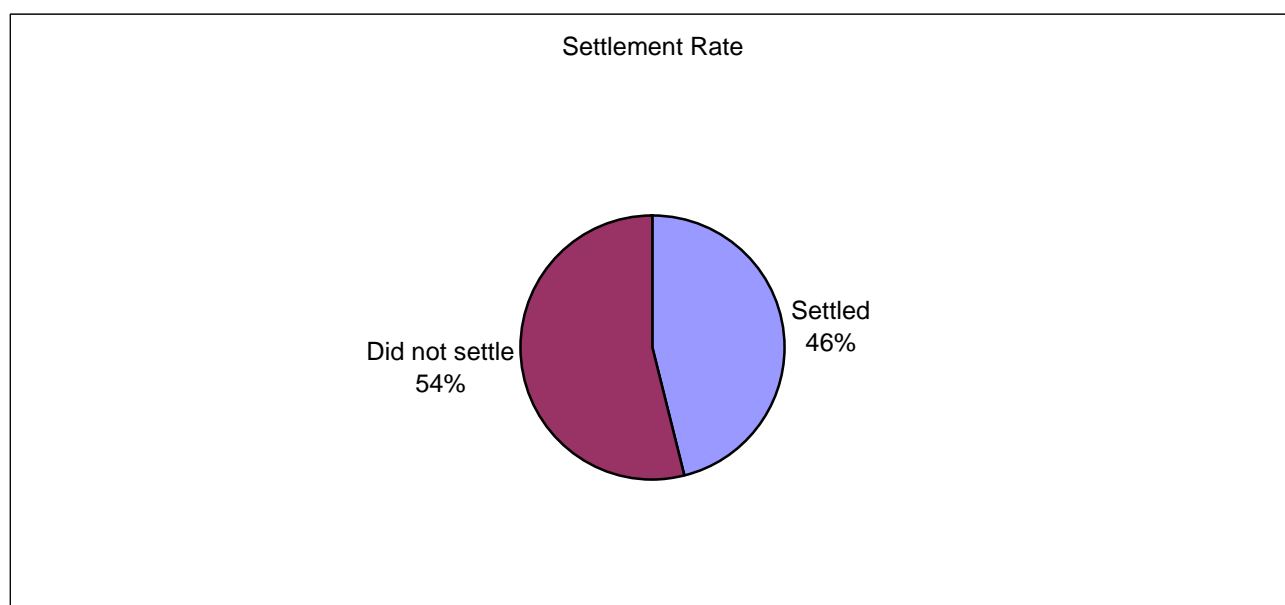


Figure 3: Stages at which cases settled at mediation

Referral year	Preliminary stage	Intermediate stage	Advanced stage
2008	9	5	9
2009	2	2	3
2010	2	3	2
2011	3	4	2
Total	16 (35%)	14 (30%)	16 (35%)

Figure 4: Stages at which cases settled at mediation

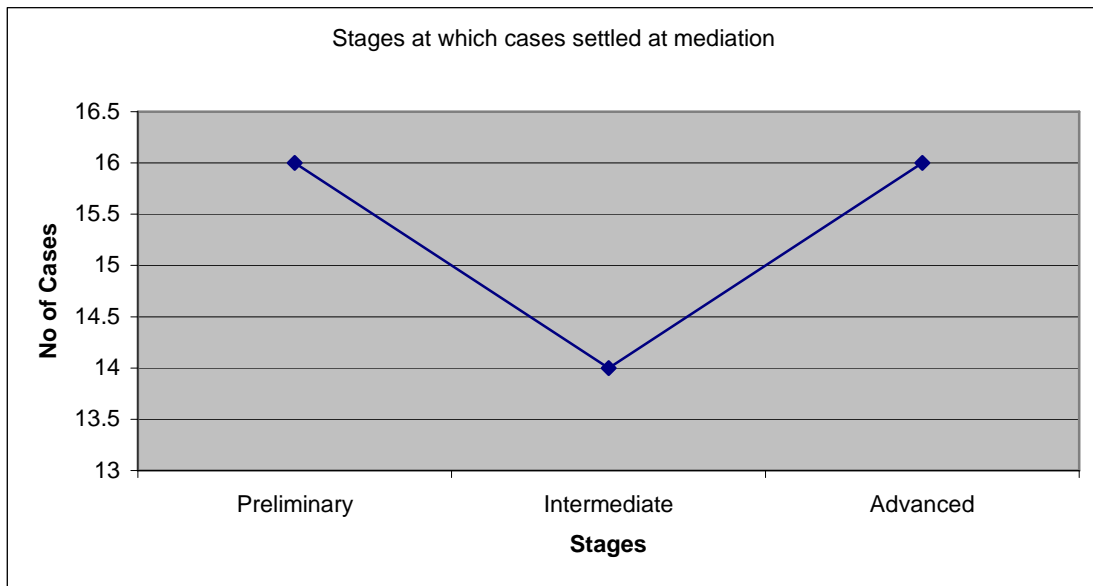


Figure 5: Success rate during stages

Stage	Number of referrals to mediation*	Number of settlements at mediation	Success Rate
Preliminary	38	16	42%
Intermediate	31	14	45%
Advanced	35	16	46%

*Note: Some matters were referred to mediation at multiple stages in the same proceedings

Figure 6: Success rate during stages

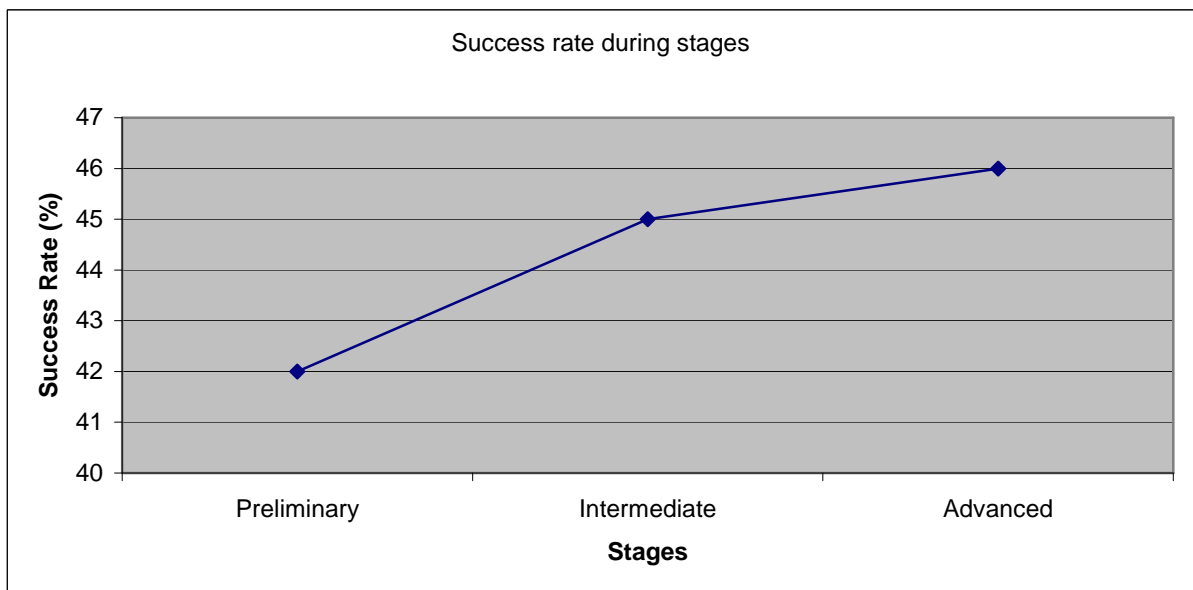


Figure 7: Unsuccessful referrals by stage

Referral year	Preliminary stage	Intermediate stage	Advanced stage
2008	7	6	1
2009	4	4	6
2010	5	4	2
2011	6	3	10
Total	22 (38%)	17 (29%)	19 (33%)

Figure 8: Unsuccessful referrals by stage

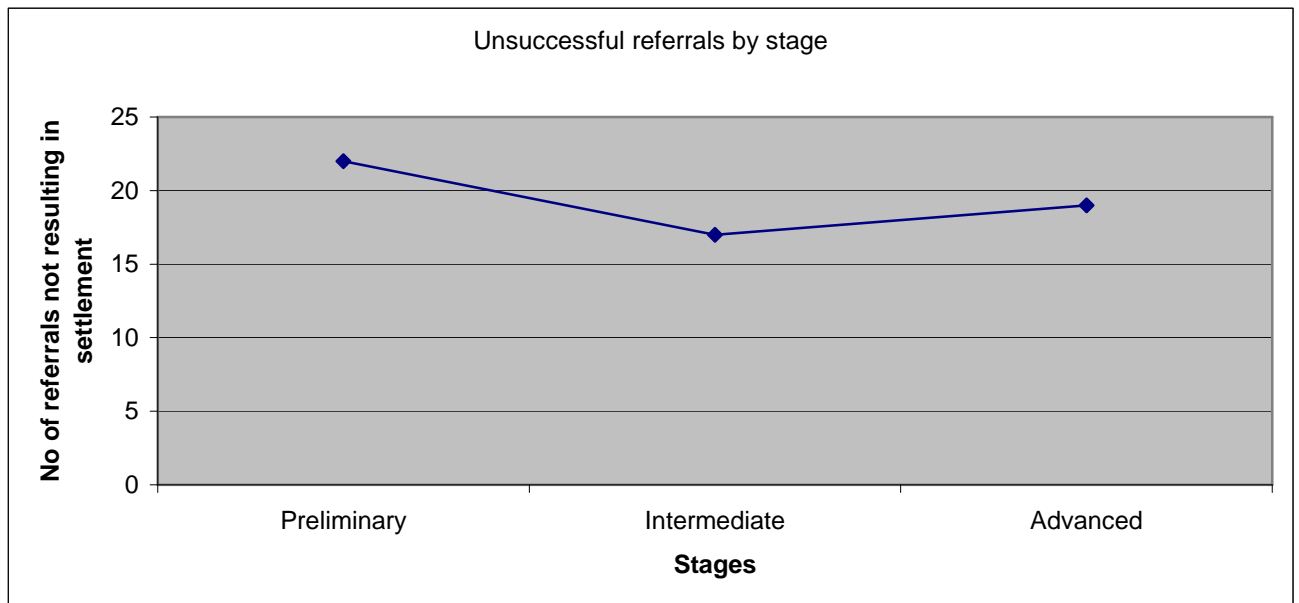


Figure 9: Progression of cases after unsuccessful mediation

Referral year	Settlement reached less than 6 months after mediation	Settlement reached more than 6 months after mediation	Progressing to hearing or has been heard
2008	1	7	4
2009	0	7	7
2010	4	2	4
2011	3	1	13
Total	8 (15%)	17 (32%)	28 (53%)

Figure 10: Progression of cases after unsuccessful mediation

