

**THE RIGHT BALANCE BETWEEN TRIAL AND MEDIATION:
VISIONS, EXPERIENCES AND PROPOSALS`**

**A LOOK BEYOND THE EU
AUSTRALIA**

**The Honourable Justice P A Bergin
Chief Judge in Equity
Supreme Court of New South Wales**

**Aula Magna, Court of Cassation
Rome**

19 October 2012

Introduction¹

- 1 Australia is an island continent consisting of States² and Territories.³ Each of the States and Territories has its own legislature, executive and judiciary. There is also a Federal Parliament that legislates for the whole of Australia on matters prescribed by the Australian Constitution.⁴

- 2 Each State and Territory has its own court system, in which the superior court is the Supreme Court of that State or Territory. The Supreme Courts have both a trial and appellate function. The Supreme Courts hear appeals from inferior courts in the judicial hierarchy of that State or Territory, as well as appeals from decisions of the Supreme Court at first instance.

¹ I acknowledge with gratitude the assistance of Thomas Kaldor, Researcher to the Judges of the Equity Division of the Supreme Court of New South Wales in the preparation of this paper.

² New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia.

³ The Australian Capital Territory and the Northern Territory. There are also a number of external territories, such as Norfolk Island and Christmas Island.

- 3 There is also a Federal court system, including the Federal Court of Australia, the Family Court of Australia, and the Federal Magistrates Court. There is an appellate structure within those Courts to the Full Courts of the Federal Court of Australia and the Family Court of Australia.
- 4 The High Court of Australia is the final court of appeal for Australian cases.⁵ Although it has some first instance jurisdiction⁶ its main function is to hear appeals from the appellate decisions of State and Territory Supreme Courts and the Full Courts of the Federal Court of Australia and the Family Court of Australia.
- 5 The system of justice in Australia has been referred to as “adversarial justice”, in which the parties to litigation have the primary responsibility for presenting all aspects of their cases.⁷ Since the mid 1980s the process of case management in Australia has seen greater emphasis on the judge or the court requiring parties to take particular steps.⁸ However the parties are still in control of determining what evidence is to be collected and led.
- 6 An integral part of the adversarial justice system in Australia is the emphasis on oral cross-examination of witnesses. However fears were expressed that an erosion of faith in the system has occurred because of the rigidities and complexity of the process, to say nothing of the cost of the process.⁹ These attributes, although in part responsible for the ultimate burgeoning of mediation in Australia, should be understood in the context of the following observations of Sir Laurence Street AC KCMG QC, the pioneer of mediation in Australia:

⁴ See s 51 of the Australian Constitution.

⁵ Since 1986. Prior to that time there was an appeal to the Privy Council.

⁶ For instance, matters arising under any Treaty: s 75(i) of the Constitution; and matters between States: s 75(iv) of the Constitution.

⁷ The Hon Sir Anthony Mason AC KBE QC, “The Future of Adversarial Justice”, *Bar News: The Journal of The New South Wales Bar Association*, Spring 1999, 5.

⁸ Vigorous case management was first introduced into the Commercial Division (now the Commercial List) of the Supreme Court of New South Wales by the then Chief Judge of the Division, the Honourable Justice Andrew Rogers.

⁹ The Hon Sir Anthony Mason AC KBE QC, “The Future of Adversarial Justice”, *Bar News: The Journal of The New South Wales Bar Association*, Spring 1999, 5.

It cannot be doubted that litigation – the process of formal determination of a dispute by a court – stands clear and positive amongst dispute resolution procedures. It is indeed well that this process, the sovereign remedy of litigation leading to judicial determination, is clearly recognisable and understood.¹⁰

- 7 Mediation developed in Australia without the safety net of an institutional structure, albeit that it takes place in the predictable environment established by a body of case law. It has been suggested that the promotion of mediation by governments was “not only to deflect criticism of the court system and of government for failing to adequately resource the court system, but also to reduce the cost to government of financing that trial system”.¹¹ There were (and still are) no mandatory requirements or pre-requisites to be satisfied prior to becoming a mediator. However the voluntary, quasi-regulatory system that has evolved has created a competitive environment in which the mediators who are part of that system are preferred.
- 8 In the development of the mediation culture in Australia the Courts were given power to refer cases to mediation irrespective of the consent of the parties.¹² Members of the legal profession in Australia were suspicious of the grant of that power and the consequential process. This suspicion was manifested in meetings between the Court and the profession and in writings in some professional journals.¹³ Interestingly, unlike the fierce

¹⁰ The Hon Sir Laurence Street AC KCMG QC, “The Language of Alternative Dispute Resolution” (1992) 66 *Australian Law Journal* 194 at 194.

¹¹ The Hon Sir Anthony Mason AC KBE QC, “The Future of Adversarial Justice”, *Bar News: The Journal of The New South Wales Bar Association*, Spring 1999, 5 at 7.

¹² Courts in New South Wales have had this power since 2000, with the relevant provision now contained in s 26 of the *Civil Procedure Act 2005* (NSW). For the federal jurisdiction, see s 53A of the *Federal Court of Australia Act 1976* (Cth). 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).

¹³ B Walker and AS Bell, “Justice According to Compulsory Mediation”, *Bar News: The Journal of The New South Wales Bar Association*, Spring 2000, 7.

dissent in Italy,¹⁴ there were no steps taken to challenge the power or to boycott the process. However over the last 12 years there has been a culture change in Australia. Mediation has developed and blossomed into an accepted, respected and popular method of resolving disputes at all levels in all types of cases and circumstances. The culture of mediation is now part of legal thinking in Australia with most Australian law schools offering courses, or parts thereof, dealing with alternative (or additional) dispute resolution.

A trend towards regulation

- 9 In recent years, governments across the world have introduced regulatory schemes impacting on mediation. Perhaps most significantly, there has been a global trend towards encouraging civil litigants to attempt to settle their differences through mediation before their dispute proceeds to hearing – in some cases by providing for mandatory pre-trial mediation.¹⁵ Legislation to this effect was recently introduced in Australia,¹⁶ mirroring the experience in Italy,¹⁷ and many other countries.¹⁸ By contrast, the mediation process remains largely unregulated in many jurisdictions. One possible explanation for this is the fundamentally confidential nature of the process.

Pre-litigation mediation¹⁹

- 10 Federal and State Parliaments of Australia have introduced legislation requiring parties to attempt mediation before commencing proceedings in

¹⁴ G De Palo and LR Keller, "The Italian Mediation Explosion: Lessons in Realpolitik" (2012) 28 *Negotiation Journal* 181.

¹⁵ See Jacqueline M Nolan-Haley, "Is Europe Headed Down the Primrose Path With Mandatory Mediation?" (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 981. In New York, the June 2012 Report of the Chief Judge's Task Force on Commercial Litigation in the 21st Century recommended that a pilot mandatory mediation program be established.

¹⁶ *Civil Dispute Resolution Act 2011* (Cth).

¹⁷ G De Palo and LR Keller, "The Italian Mediation Explosion: Lessons in Realpolitik" (2012) 28 *Negotiation Journal* 181.

¹⁸ See Nadia Alexander, *Global Trends in Mediation*, 2nd Ed, Kluwer Law International.

¹⁹ The discussion in this section draws from a paper I delivered at the "Mediate First" conference in Hong Kong on 11 May 2012. The full text of that paper, entitled "The Objectives, Scope and Focus of Mediation Legislation in Australia" is available on the website of the Supreme Court of New South Wales, at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_speeches#bergin.

certain contexts; for instance in disputes relating to farm debts and retail tenancies.²⁰ Until recently there was no statutory requirement for pre-action mediation in respect of *all* civil disputes. Rather, some courts had tried to encourage parties to pursue mediation before litigation;²¹ for instance in New South Wales, when filing an originating process, plaintiffs must indicate whether they have already attempted mediation and whether they are willing to mediate the dispute in the future.

- 11 This position changed with the introduction of the *Civil Dispute Resolution Act 2011 (Cth)* (CDRA), which commenced operation in the Federal jurisdiction 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”.²² The use of the word “certain” should not suggest that the scheme is restricted in scope. The legislation applies to all civil proceedings commenced in the Federal Court of Australia and the Federal Magistrates Court, subject to the limited exclusions prescribed in Part 4 of the legislation, such as appellate proceedings,²³ and proceedings under legislation²³ that already prescribes 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)*.²⁴
- 12 Section 6 of the CDRA requires applicants instituting civil proceedings to file a “genuine steps statement” with their application.²⁵ This statement must outline either the steps that have been taken to resolve the dispute or the reasons why no such steps were taken.²⁶ 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

²⁰ *Farm Debt Mediation Act 2011 (Vic)*; *Retail Shop Leases Act 1994 (Qld)*.

²¹ Through their practice and their Practice Notes.

²² CDRA, s 3.

²³ CDRA, s 15(d).

²⁴ CDRA, s 16.

²⁵ CDRA, s 6(1).

²⁶ CDRA, s 6(2).

with which they disagree and the reasons for the disagreement.²⁷ Lawyers are under a statutory duty to inform clients of the obligation to file a genuine steps statement and to assist them in complying with that obligation.²⁸

13 A failure to file a genuine steps statement does not invalidate the proceedings.²⁹ 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”.³⁰ 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.³¹

14 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.

15 Section 4 also provides a non-exhaustive list of examples of “genuine steps”, one of which is “considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process”.³² Although the legislation does not expressly require pre-action mediation, it will inevitably be one of the most common mechanisms for demonstrating that genuine steps have been taken to resolve a civil dispute.

²⁷ CDRA, s 7.

²⁸ CDRA, s 9.

²⁹ CDRA, s 10(2).

³⁰ CDRA ss 11-12.

³¹ CDRA, s 12(2)-(3). See also *Superior IP International Pty Ltd v Ahern Fox Patent and Trade Mark Attorneys* [2012] FCA 282; *Alfaro v Crown Commercial Cleaning Pty Ltd & Anor* [2012] FMCA 478.

³² CDRA, s 4(1)(d).

- 16 In late 2010, the New South Wales Parliament enacted legislation establishing similar measures to those contained in the Federal statute.³³ The new procedures, which became Part 2A of the *Civil Procedure Act* 2005 (NSW) (CPA), were due to commence on 1 October 2011. However, on 23 August 2011, the Attorney-General of New South Wales announced that the introduction of Part 2A would be delayed until early 2013 to provide an opportunity to monitor the operation of the Federal legislation.
- 17 The postponed legislation 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.³⁴ 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.³⁵ The legislation also imposes an obligation on legal representatives to inform their clients of pre-litigation requirements and to advise them about alternatives to the commencement of civil proceedings.³⁶ A failure to comply with pre-litigation requirements, or to file a dispute resolution statement, does not affect the validity of proceedings. The State court may have regard to a party’s failure to comply with pre-litigation requirements in making any costs orders against that party, or against their legal representatives.³⁷
- 18 The Supreme Court of New South Wales has been exempted from this legislation.³⁸ The future of this legislation is uncertain.
- 19 Similar pre-litigation requirements were introduced in the State of Victoria in the *Civil Procedure Act* 2010 (Vic), which commenced on 1 January 2011.³⁹ However, on 30 March 2011 a newly elected government repealed

³³ *Courts and Crimes Legislation Further Amendment Act* 2010 (NSW).

³⁴ CPA, s 18E.

³⁵ CPA, s 18G.

³⁶ CPA, ss 18J(1).

³⁷ CPA, ss 18J, 18M and 18N.

³⁸ *Civil Procedure Regulation* 2012 (NSW), reg 16

³⁹ The relevant provisions were contained in Pt 3.

the relevant provisions.⁴⁰ However, the Victorian legislation still requires litigants to “use reasonable endeavours” to resolve disputes including “by appropriate dispute resolution”, unless it is not in the interests of justice to do so, or the nature of the dispute is such that judicial determination is the only appropriate course.⁴¹ Where parties are unable to resolve the disputes, they are obliged to use reasonable endeavours to narrow the issues in dispute, subject to the same exceptions.⁴²

- 20 There is no general statutory requirement for pre-litigation mediation of civil disputes in any of the other States or Territories of Australia.⁴³

Mediation Regulation

- 21 The CDRA does not regulate the process of mediation. Nor does it specify who may conduct mediations or how mediations must be conducted.
- 22 Direct regulation of the mediation process is very rare in Australia. However there is statutory regulation of aspects of the process. In New South Wales, mediators are prohibited from disclosing information obtained in connection with a mediation except with the consent of the parties,⁴⁴ or in a few other circumstances, for instance, if there are reasonable grounds to believe that the disclosure is necessary to prevent injury to a person.⁴⁵ There is also a statutory prohibition on the parties adducing evidence of a communication made, or a document prepared, in connection with an attempt to negotiate a settlement.⁴⁶ The confidentiality of mediation is a key reason why parties initially pursue it and it is critical to the effectiveness of mediation. Regulators are cautious not to undermine confidentiality.

⁴⁰ *Civil Procedure and Legal Profession Amendments Act 2011* (Vic).

⁴¹ *Civil Procedure Act 2010* (Vic), s 22.

⁴² *Civil Procedure Act 2010* (Vic), s 23.

⁴³ In South Australia there are statutory requirements to take certain steps before commencing proceedings including making a settlement offer, but these requirements do not include mediation. *Supreme Court Rules 2006* (SA), r 33.

⁴⁴ CPA, s 31(a).

⁴⁵ CPA, s 31(c).

⁴⁶ For example *Evidence Act 1995* (NSW), s 131.

23 There is a distinction between formal government regulation, which is primarily implemented through legislation enacted by Parliament and self-regulation generally in the form of professional/industry schemes and guidelines produced by professional associations and organisations.

Accreditation of mediators

24 The success of mediation is dependent in large part on the expertise and experience of the mediators. Choosing the right mediator will enhance the parties' settlement prospects.⁴⁷

25 In Australia there is no statutory regulation of mediators.⁴⁸ Indeed mediator accreditation is not mandatory. In theory, anyone can practise as a mediator, regardless of background or training. However, a voluntary system of accreditation, the National Mediator Accreditation System (NMAS) has been in operation since 2008.⁴⁹ Before the NMAS was established numerous organisations had developed systems for the accreditation of mediators.⁵⁰ Despite the concurrent operation of multiple accreditation systems, the NMAS Approval Standards have been adopted by those various organisations.

26 The Approval Standards deal with various matters, including approval and continuing accreditation requirements for mediators. The Standards also identify certain requirements that must be met by Recognised Mediator Accreditation Bodies (RMABs), the groups that handle the process of

⁴⁷ Law Council of Australia, "Guidelines for Parties in Mediation", Pt 4 and "Guidelines for Lawyers in Mediations", Pt 4.

⁴⁸ However in the ACT there is a statutory regime for the registration of mediators: *Mediation Act* 1997 (ACT). Registration does not appear to be mandatory. However it is a pre-requisite for some court/tribunal referred mediations: s 193 *Civil Law (Wrongs) Act* 2002 (ACT). Registration can be cancelled if the mediator is found to have disclosed confidential information received during a mediation, the publication of which has not been authorised.

⁴⁹ The essential elements of which are 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) (Approval Standards). The second is "Practice Standards for Mediators Operating under the National Mediator Accreditation System" (September 2007) (Practice Standards).

⁵⁰ For instance, the Institute of Arbitrators and Mediators, LEADR – Association of Dispute Resolvers, Mediate Today, the New South Wales Bar Association and the Law Society of New South Wales.

accreditation under the NMAS. Among other things, an RMAB must have more than ten mediator members, sound governance structures and financial viability and an adequate complaints system.⁵¹

27 An applicant seeking accreditation as a mediator under the NMAS must provide to an RMAB:

- evidence of “good character”;
- an undertaking to comply with ongoing practice standards and compliance with any legislative and approval requirements;
- evidence of relevant insurance, statutory indemnity or employee status;
- evidence of membership or a relationship with an appropriate association or organisation that has appropriate and relevant ethical requirement complaints and disciplinary processes as well as ongoing professional support; and
- evidence of mediator competence by reference to education, training and experience.⁵²

28 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.⁵³ Once accredited, a mediator is also required to conduct at least 25 hours of mediation and attend 20 hours of continuing professional development courses every two years.⁵⁴

29 The NMAS Practice Standards apply to any mediator who is accredited under the Scheme. The Practice Standards recognise the different mediation models in use across Australia in different industries and professions. However the Practice Standards do not impose a requirement that a particular mediation process be adopted. The Practice Standards deal with various aspects of mediations including suggestions of what the mediator might do at the commencement of the process, power issues, impartial and ethical practice, confidentiality, competence,

⁵¹ Approval Standards, paragraph 3(5)

⁵² Approval Standards, paragraph 3(1).

⁵³ Approval Standards, paragraph 5.

⁵⁴ Approval Standards, paragraph 6.

inter-professional relations, procedural fairness, information provided by the mediator and charges for services.

A statutory duty to mediate in good faith

- 30 One attempt at formal regulation of the mediation process can be found in the statutory requirement to mediate in good faith. For instance the CPA provides that parties who have been referred to mediation by the Supreme Court are under a duty to participate in the mediation in good faith.⁵⁵ A similar duty also exists under other statutes.⁵⁶
- 31 Beyond some inherent difficulties in defining good faith and identifying when a party is not acting in good faith, the cloak of confidentiality might often protect a party who fails to mediate in good faith. This presents a complex problem for mediation regulation. In order to give substance to the duty to mediate in good faith, it is necessary to permit disclosure of information in certain circumstances. However this will be at the cost of the inherently confidential nature of mediation. Without confidentiality, the effectiveness of mediation, and its desirability as a method of dispute resolution, is greatly reduced. This dilemma arises whenever the authority of the court is called on to enforce or otherwise scrutinise the outcomes of a mediation.⁵⁷
- 32 In the analogous setting of negotiation, certain indicia have been identified to assist in determining whether a party has negotiated in good faith.⁵⁸ Several of these indicia related to inaction or omissions, for instance, a failure to make proposals, contact parties, organise meetings or respond to information requests. Others involve more active steps, such as negotiators not having authority to make decisions. The final indicium, “failure to do what a reasonable person would do in the circumstances”,

⁵⁵ CPA, s 27.

⁵⁶ *Farm Debt Mediation Act* 1995 (NSW), s 11(1)(c)(iii); *Native Title Act* 1993 (Cth), ss 31(1)(b) and 94E(5).

⁵⁷ See for example *Hurworth Nominees Pty Ltd v ANZ Banking Group Limited* [2006] NSWSC 1278, in which the plaintiffs brought proceedings for rectification of a deed entered into after a successful mediation pursuant to the *Farm Debt Mediation Act* 1994 (NSW).

⁵⁸ *Western Australia v Taylor* (1996) 134 FLR 211 at 224-5.

seems to impose a general standard on a negotiator's conduct. The application of these indicia to mediation suggests that a party would not be acting in good faith if their conduct stymies, stalls or otherwise fails to progress the mediation process.

33 The "central or core content" of the obligation to mediate in "good faith" has been described as:

- (a) A willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate; and
- (b) A willingness to give consideration to putting forward options for the resolution of the dispute.⁵⁹

34 The fact that a party might pretend to be disinterested in putting forward any constructive solutions to the problem at hand "is far from conclusive proof" that the party has breached the obligation. This is because:

At the same time as putting up such pretence, [the party] might be awaiting a first offer from [the other party] or giving close consideration to itself making an offer at what it perceives to be an appropriate time.⁶⁰

35 These observations expose the inherent difficulties in identifying and enforcing a duty to act in good faith in the confidential setting of mediation.

Law Council of Australia Guidelines

36 The Law Council of Australia (LCA), the peak representative body of the Australian legal profession, has done extensive work on self-regulation for mediators. The LCA publications include: "*Ethical Guidelines for Mediators*", "*Guidelines for Lawyers in Mediations*" and "*Guidelines for Parties in Mediations*".

37 The Guidelines were produced by the LCA's Expert Standing Committee on Alternative Dispute Resolution, drawing on the work of various

⁵⁹ *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996; 153 FLR 236 at 268.

international professional bodies. The Guidelines include the provision that “a mediator must not mediate unless the mediator has the necessary competence to do so and to satisfy the reasonable expectations of the parties”.⁶¹ It is noted that “competence comprises appropriate knowledge and skills which would normally be acquired through training, education, and experience”.⁶²

38 The Guidelines also provide that “all persons attending the mediation should participate in good faith with the intention of seeking settlement”⁶³ and that a mediator may terminate the mediation if the mediator considers that a party is abusing the process.⁶⁴ The mediator may be assisted in this regard by the parties’ legal representatives. The Guidelines advise that a lawyer who suspects that a party is acting in bad faith should raise the matter privately with the mediator.⁶⁵ This form of mediator-led regulation likely reflects common practice. Mediators are responsible for the conduct of mediation and so, in effect, are under a duty to facilitate participation in good faith.

39 The LCA Guidelines commentary includes the following:

A mediator should not disclose any matter that a party requires to be kept confidential (including information about how the parties acted in the mediation process, the merits of the case, any settlement offers or agreed outcomes) unless:

- (i) The mediator is given permission to do so by all persons attending at the mediation with an interest in the preservation of the confidence; or
- (ii) The mediator is required by law to do so.⁶⁶

40 Direct regulation of the actual process of mediation is rare in Australia. There is great potential to regulate mediation through the role of the

⁶⁰ *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996; 153 FLR 236 at 269.

⁶¹ Mediator Guidelines, paragraph [4].

⁶² Mediator Guidelines, paragraph [4], comment (a).

⁶³ Guidelines for Parties, paragraph [6]. See also Guidelines for Lawyers, paragraph [2.2].

⁶⁴ Guidelines for Parties, paragraph [11]; Mediator Guidelines, paragraph [6].

⁶⁵ Guidelines for Lawyers, paragraph [2.2], comment (b).

⁶⁶ Mediator Guidelines, paragraph [5], comment (c).

mediator, who is in the best position to monitor and control the mediation process and enforce the duties of parties to mediation. However, if mediators are to be relied on to regulate mediation, there must be an appropriate scheme to determine who is permitted to practice as a mediator and to control the standards of mediators. The development of the voluntary NMAS in Australia has been a positive development in this regard.

Confidentiality

- 41 A great deal has been said about confidentiality of communications in mediations. The statutory framework within which the mediation occurs is aimed at ensuring that parties feel free to negotiate without fear of having their statements within the confines of the mediation used against them in litigation. In *Unilever PLC v The Proctor & Gamble Co* [2000] 1 WLR 2436 (CA) the Court of Appeal in England refused to allow a party to a mediation to sue on litigious threats made in the mediation session. Walker LJ said at 2448-2449:

But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties.

- 42 Walker LJ gave an indication of what a “special reason” might be when he referred to the absence of any conduct that was “oppressive, or dishonest or dishonourable”.

Mandatory mediation

- 43 Recent legislation in New South Wales has made mediation mandatory in claims in respect of provision out of deceased estates (Family Provision claims) unless special reasons dictate otherwise.⁶⁷ The legal profession and institutional executors and trustees have welcomed these reforms.

⁶⁷ *Succession Act 2006* (NSW), s 98(2).

- 44 The policy behind the reforms and the introduction of mandatory mediation has been driven by the Court's concern in relation to excessive legal costs that have been out of all proportion to the size of the estate.
- 45 Presently, little can be said with certainty (other than from the manipulation of statistics) about the outcomes of the mediations that have occurred since the implementation of the reforms. Although I have always said that raw statistics, particularly in relation to the outcome of mediations, are of limited assistance, the statistics show that the overall settlement rate of Family Provision claims at mandatory mediations is about 60%. The charts in section A of the Schedule to this paper show that although 40% of Family Provision claims do not settle at mediation, in approximately 25% of those cases the parties continue settlement negotiations and experience is that most of those settle before trial.
- 46 The experience in the Commercial List of the Supreme Court of New South Wales is that the success rate of mediations is greater towards the end of the litigious stage. This may be explained in part by the nature of the litigants in these cases. In the main they are commercially sophisticated litigants with large amounts of money at stake, usually in a very competitive field of commerce and quite often suing their competitors. Although great caution should be applied to raw statistics, it would appear that the "ripe" time for the mediation in this type of litigation is towards the end of the preparation process. It is at that time that the parties are able to truly assess the evidence of the other side and obtain what they regard as reasonable advice on the merits of their case. However there are cases that will settle at a preliminary stage of litigation. Statistics gathered in 2012 support these conclusions.⁶⁸

⁶⁸ These statistics are set out in charts in the annexures to the paper Bergin PA, "The Objectives, Scope and Focus of Mediation Legislation in Australia", paper delivered at the "Mediate First" conference in Hong Kong, 11 May 2012 available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_speeches#bergin

A recent development

- 47 A major global problem in commercial litigation has been the cost of discovery (or disclosure) of documents before trial. Many nations have grappled with the alternatives that might be adopted to reduce the exorbitant cost of discovery. Some have decided to outsource the process to countries in which labour rates are much lower. For instance in both the United States of America and Australia some legal firms have outsourced their discovery to Mumbai, India. The outsourcing process has its own difficulties, particularly having regard to the restraints on foreign lawyers practising in the jurisdiction to which the task has been outsourced. There are also ethical constraints in relation to the process.
- 48 The discovery process has also been identified as a reason for not sending matters to mediation. Parties have suggested that it would be premature and counter-productive to send a matter to mediation prior to the parties seeing the documents of their opponents.
- 49 There has been a recent development in the Equity Division of the New South Wales Supreme Court. On 22 March 2012 the Chief Justice issued Practice Note SC Eq 11 that requires parties to serve their evidence prior to any discovery or disclosure, unless exceptional circumstances can be demonstrated.⁶⁹ The aim of this new process is to reduce the cost of litigation, to enable parties to be referred to mediation at an earlier stage and to bring matters on for hearing more promptly. Except in unusual cases, by the time the parties serve their evidence, including any documents upon which it is claimed the case is made out or defended, there is very little else by way of documentary material that the parties will need. Experience across the world is that although mountains of documents have been copied and placed carefully into chronological order in numerous folders, the real issues are able to be decided having regard to a very much smaller number of documents.

⁶⁹ The terms of the Practice Note are in Section B of the Schedule to this paper.

50 The process under Practice Note SC Eq 11 requires the parties to focus on the real issues to be proved in the case, requiring the client to provide detailed instructions at an early stage including the production of documents that support the case and that will form part of the client's affidavit or statement of evidence. This is in contrast to the previous process of starting a very large search into the documents of the client before a proof of evidence was taken.

51 This will return lawyers to their pivotal role of making forensic judgments about what evidence is necessary to support the claim the client wishes to make or to defend, rather than sifting through many thousands of documents to see whether they relate to a possible issue in a pleading before any evidence from the client is put into the form of a statement or an affidavit.⁷⁰ It has had the result of defining the issues far more clearly and reducing the need for the vast amounts of document management and discovery. There have been only a few cases seeking to establish exceptional circumstances.⁷¹

Judicial Mediation

52 In some States and Territories of Australia judges may act as mediators.⁷² This practice has not been adopted in the Supreme Court of New South Wales.

Western Australia

53 Part 4.2 of the Supreme Court of Western Australia's *Consolidated Practice Directions* 2009 deals with "Mediation and Compromise" in the "General Division – Civil" of the Supreme Court. Section 4.2.1 is entitled "The Supreme Court Mediation Programme". Paragraph 3 of that section provides:

⁷⁰ *Armstrong Strategic Management and Marketing Pty Ltd & Ors v Expense Reduction Analysts Group Pty Ltd & Ors* [2012] NSWSC 393

⁷¹ *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2012] NSWSC 913

⁷² South Australia, Western Australia, Northern Territory and Victoria.

The Court may direct that a mediation be conducted by a Judge of the Court if warranted by the particular aspects of the case.

54 If the Supreme Court orders parties to attend a mediation conference, generally the mediator must be a person who has been approved as a mediator by the Chief Justice as well as being accredited under the NMAS.

55 Under s 69 of the *Supreme Court Act 1935 (WA)*, “mediator” means:

- (a) a registrar appointed by the Chief Justice to be a mediation registrar under the rules of court; or
- (b) a person approved by the Chief Justice to be a mediator under the rules of court; or
- (c) a person agreed by the parties.

56 Similarly, O 4A, r 1 of the *Rules of the Supreme Court 1971 (WA)* defines “approved mediator” as “a registrar or other person, approved as a mediator by the Chief Justice”.

57 Where parties are ordered to attend mediation, the Court must direct whether the mediator is to be an approved mediator or some other person.⁷³ However, the Court must not direct that the mediator is to be a person who is not an approved mediator unless the parties consent.⁷⁴ It is now the practice of the Supreme Court that the Chief Justice will not approve mediators unless the mediator is accredited under the NMAS.⁷⁵

Northern Territory

58 A Judge of the Supreme Court of the Northern Territory may direct that a matter be set down for mediation, if the Judge is of the opinion that the proceedings are capable of settlement or ought to be settled.⁷⁶ The mediator may be a Judge, Master, Registrar or a person appointed from a

⁷³ *Supreme Court Rules 1971 (WA)*, O 4A, r 8(2).

⁷⁴ *Supreme Court Rules 1971 (WA)*, O 4A, r 8(3).

⁷⁵ *Consolidated Practice Directions 2009 (WA)*, 4.2.1.2 (“Approval and Accreditation of Mediators”), para 7.

⁷⁶ *Supreme Court Rules (NT)*, reg 48.13(1).

list of persons who, in the opinion of a Judge or the Master, are suitably qualified and willing to act as mediators.⁷⁷

South Australia

- 59 In South Australia, s 220(4) of the *Supreme Court Civil Rules 2006 (SA)* expressly provides that a judge or master may be a mediator.

Victoria

- 60 The Supreme Court of Victoria recently issued a Practice Note governing judicial mediation.⁷⁸ As is the case in New South Wales, the Supreme Court of Victoria has the power to refer proceedings to “appropriate dispute resolution”.⁷⁹ However, in Victoria, “appropriate dispute resolution” is defined to include a “judicial resolution conference”.⁸⁰ A judicial resolution conference is a process presided over by a Judge of the Supreme Court for the purposes of negotiating a settlement to a dispute, including judicial mediation. The purpose of the Practice Note is to set out the procedures for the conduct of judicial mediations.⁸¹
- 61 The Victorian Practice Note is a rare example of a court in Australia attempting to regulate the actual process of mediation. Practice Notes provide guidance in relation to court procedures and practitioners and litigants are expected to act in accordance with that guidance. The Practice Note refers to the “usual practice” for the mediator to destroy all materials connected with the mediation, after the mediation has ended.⁸² It also provides that a mediator “will not” provide legal advice to parties.⁸³ It prohibits a mediator from meeting separately with a party unless there is express approval of all parties to the mediation.⁸⁴ If a separate session is

⁷⁷ *Supreme Court Rules (NT)*, regs 48.13(2) (as amended by “Practice Direction No 2 of 2008 – Mediation” pursuant to reg 48.28) and 48.13(9).

⁷⁸ Supreme Court of Victoria, Practice Note 2 of 2012, “Judicial Mediation Guidelines”, issued 30 March 2012.

⁷⁹ *Civil Procedure Act 2010 (Vic)*, s 66.

⁸⁰ *Civil Procedure Act 2010 (Vic)*, s 3.

⁸¹ Paragraph [4].

⁸² Paragraph [13].

⁸³ Paragraph [17].

⁸⁴ Paragraph [19].

conducted with a party, the mediator must not disclose any information disclosed in the session to any other party, unless expressly authorised to do so.⁸⁵

Court-annexed mediation in New South Wales

- 62 In the Supreme Court of New South Wales great care has been taken to ensure that judicial officers are not part of the mediation service provided to the litigants. Registrars provide this service. It is presently a free service in that there are no fees charged to the litigants, albeit that they are responsible for their own lawyers' fees relating to the mediation. There is a suite of mediation rooms provided within the court precinct that is used by the Registrars for the mediations. The mediations that are referred to the Registrar's are both mandatory mediations in the Family Provision claims and any other matter that might be referred to the Registrars by a Judge consensually or otherwise.

Concerns

- 63 I have expressed my concerns about this practice and the need for caution in respect of judicial mediation on previous occasions.⁸⁶ Although this practice has been adopted in other States there has been no identification of any necessity for Judges (as opposed to others who are unencumbered by judicial office) to conduct mediations. There seems to be a suggestion that Judges would be better at mediating the more complex cases, commercial or otherwise. It is understandable that some Judges who have been involved in the case management of a matter for some lengthy period and who may have developed a preliminary view about the merits of the case may "feel" that it would be in the parties' best interests if they assisted the parties to move towards a commercial settlement by moving into a confidential mediation mode. However as the Practice Note in Victoria recognises, once the Judge moves into this mode there will be a

⁸⁵ Paragraph [20].

⁸⁶ Bergin PA, "Mediation in Hong Kong, the way forward – perspectives from Australia" (2008) 82 *Australian Law Journal* 196 at 199 and Bergin PA, "The Objectives, Scope and Focus of Mediation Legislation in Australia", paper delivered at the "Mediate First" conference in Hong Kong, 11 May 2012, [66]-[69], available at

personal relationship between the Judge and the litigant. The Judge will owe the litigant a duty of confidence not to disclose those matters imparted to the Judge by the litigant (albeit usually through a lawyer) unless the litigant authorises the Judge/mediator to disclose those matters. That relationship will continue after the mediation and if Judges continue to mediate on a regular basis it will mean that Judges create and continue personal relationships with numerous litigants.

- 64 A hallmark of the adversarial system in Australia, in contrast to the inquisitorial system in Italy, is that Judges do not inquire into a matter but rather they hear matters on the evidence presented to them by the parties. They do not decide what evidence to pursue or to gather. The litigants through their lawyers (and sometimes without lawyers) present their evidence to the Court. In this role Judges are independent from each other and from the litigants. The rule is that justice must not only be done but appear to be done.⁸⁷ Any perception that a Judge may be partial to a litigant or lacking in impartiality in relation to a litigant's case can be the subject of challenge, indeed to the High Court of Australia.⁸⁸ In this regard the High Court has said: "The requirement of the reality and the appearance of impartial justice in the administration of the law by the courts is one which must be observed in the real world of actual litigation".⁸⁹ The test in Australia in relation to the impartiality of Judges is whether in all the circumstances the parties or the public might entertain a reasonable apprehension that the Judge might not bring an impartial and unprejudiced mind to the resolution of the matter before that Judge.⁹⁰
- 65 This system has operated in New South Wales since 1823 when the New South Wales Supreme Court was first established. The way in which parties are able to identify any apprehension in relation to a Judge hearing a case is usually by reason of the public utterances and/or conduct of that

http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_speeches#bergin.

⁸⁷ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256.

⁸⁸ *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568; *Grassby v The Queen* [1989] HCA 45; (1989) 168 CLR 1.

⁸⁹ *Vakuta v Kelly* [1989] HCA 44; (1989) 167 CLR 568 at 570 (Brennan, Deane and Gaudron JJ).

Judge either in Court or extra-curially. If Judges proceed into private session with litigants there is no prospect of that Judge's conduct and/or utterances being the subject of review because of the confidentiality of the mediation session.

- 66 In 1999, a former Chief Justice of the High Court of Australia, Sir Anthony Mason AC KBE QC, made these percipient observations:

Courts are courts; they are not general service providers who cater for "clients" or "customers" rather than litigants. And if Courts describe themselves otherwise than as courts, they run the risk that their "clients" and their "customers" will regard them, correctly in my view, as something inferior to a court.

...

Of course the new vision of the court system with its emphasis on prompt and efficient disposition does not favour review because it delays final disposition. But it is essential that we do not allow court proceedings to degenerate into private proceedings that are not subject to review and publicity. Openness and publicity have been an essential feature of our system.⁹¹

- 67 As already mentioned the practice in some States of Australia of having Judges mediate cases has not developed with any identification of principle or necessity for Judges to move from the public arena into private session.
- 68 There is a body of writing on what is referred to as "procedural justice" that is "increasingly being taken into account by socio-legal scholars in the field of litigation and alternative dispute resolution".⁹² The central proposition of the procedural justice theory is used to discuss and contradict three assumptions about the efficiency of judicial procedures being: (1) the inquisitorial style of judicial procedure is suggested to be more efficient because it places a higher degree of control in the hands of the Judge and

⁹⁰ *Grassby v The Queen* [1989] HCA 45; (1989) 168 CLR 1 at 20.

⁹¹ The Hon Sir Anthony Mason AC KBE QC, "The Future of Adversarial Justice", *Bar News: The Journal of The New South Wales Bar Association*, Spring 1999, 5 at 7 and 12.

⁹² H Fix Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart Publishing, 2003) 56.

is to be preferred over the adversarial model of litigation; (2) settlement and other less formal mechanisms of dispute resolution, such as mediation, are more efficient in terms of cost and delay and therefore to be preferred over formal adjudication; and (3) the expected value of a judgment, as well as the costs and delay associated with judicial proceedings are the most important factors affecting litigant satisfaction and therefore efficiency is defined as the minimisation of the sum of error and direct costs and prevails over procedural justice considerations.⁹³ In this way the economic theorists create the paradigm for preference of one mechanism for dispute resolution over another. However it must be remembered that no consideration is given to the essential element of judicial independence in such theory.

- 69 If there is to be a change to the structure of the judiciary in Australia so that judges can move into secret session with litigants and lawyers, I suggest it requires a principled approach based on some identifiable necessity. That has not occurred.

Consultation

- 70 In New South Wales one of the mechanisms that has proved to be very successful in the co-operative development of the culture of acceptance of mediation is the dialogue between the courts and the profession. In the Supreme Court of New South Wales there are numerous committees (referred to rather unsatisfactorily in some instances as "Users Groups") constituted by the Judges of the particular List or area of the Division in relation to which the committee has been established, members of the Bar Association and the Law Society and some in-house Counsel and/or other representatives of corporate entities, including regulators.⁹⁴
- 71 It is through the open and frank discussion at these meetings that the Court receives feedback from the profession, including in relation to the

⁹³ H Fix Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Hart Publishing, 2003) 57.

operation of various Lists within the Court and the referral of matters to the court annexed mediation service. It is through these meetings that constructive criticism is offered as to how to better improve the process of case management and/or referral of matters to mediation. The dialogue includes the provision to the "users" of the statistics relating to pending cases, disposal of cases, new filings and an analysis of court resources and the ideal time between the filing of the matter in court and the finalisation by either mediation or judgment after trial.

- 72 The establishment of such groups or committees can have a beneficial outcome for both the profession and the courts. On the one hand the profession is kept abreast of the developments of the Court. On the other the Court is kept abreast of the concerns of the profession in relation to reform of the system. We have found that in this co-operative environment reforms can achieve greater support and effectiveness.

Conclusion

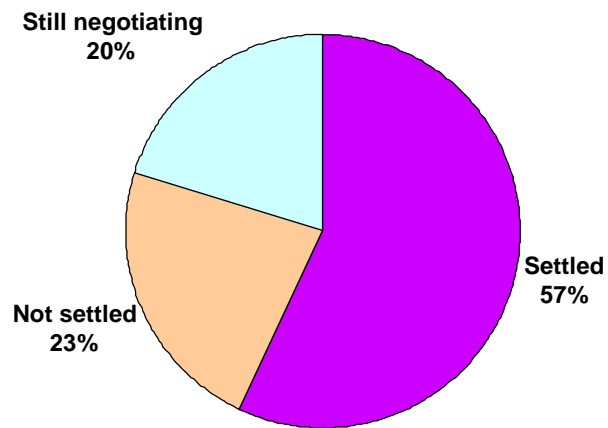
- 73 It has not been possible in this paper to define what happens in the private and government sectors where parties to disputes settle their differences by mediation without resort to the courts. Rather there has been a concentration on mediation of disputes that have been brought to Australian courts for resolution.
- 74 The balance in Australia for the resolution of disputes is trending towards more mediated settlements than disputes being determined by judgment after trial. That has been achieved by the development of the culture of mediation not only within the profession and the courts but also with the support of the Australian government.

⁹⁴ For instance, Equity Liaison Group, Commercial List Users Group, Corporations List Users Group.

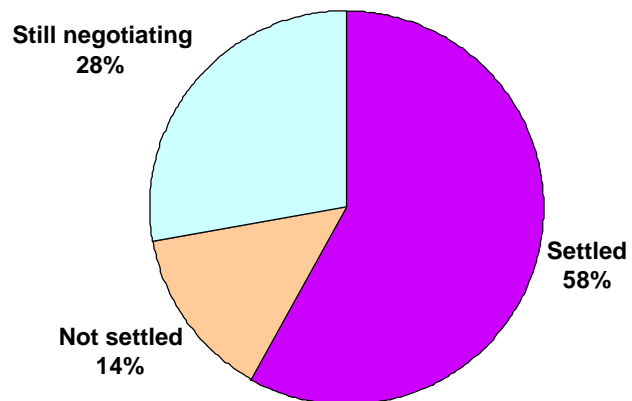
SCHEDULE

A. MANDATORY MEDIATIONS – FAMILY PROVISION CLAIMS

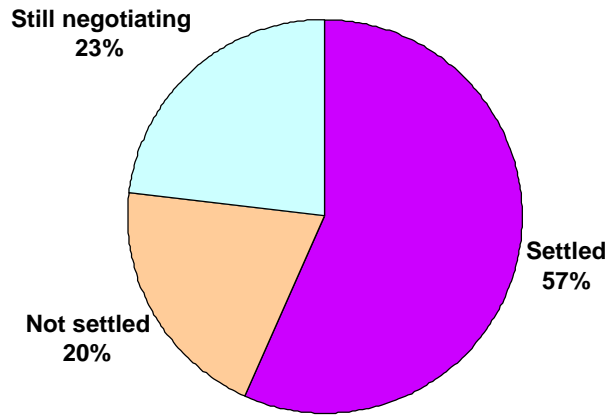
Family Provision mediations in 2009



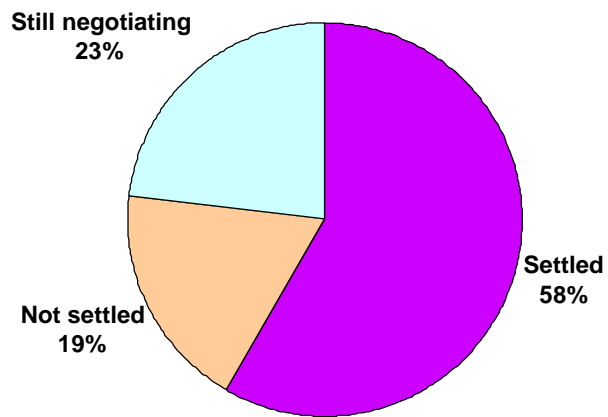
Family Provision mediations in 2010



Family Provision mediations in 2011



Family Provision mediations in 2012 (Jan- Aug)



B PRACTICE NOTE

PRACTICE NOTE SC Eq 11

Disclosure in the Equity Division

Commencement

1. This Practice Note was issued on 22 March 2012 and commences on 26 March 2012.

Application

2. This Practice Note applies to all new and existing proceedings in the Equity Division, except in the Commercial Arbitration List.

Purpose

3. This Practice Note is for the guidance of practitioners in preparing cases for hearing in the Equity Division with the aim of achieving the just, quick and cheap resolution of the real issues in dispute in the proceedings.

Disclosure

4. The Court will not make an order for disclosure of documents (disclosure) until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure.
5. There will be no order for disclosure in any proceedings in the Equity Division unless it is necessary for the resolution of the real issues in dispute in the proceedings.
6. Any application for an order for disclosure, consensual or otherwise, must be supported by an affidavit setting out;

the reason why disclosure is necessary for the resolution of the real issues in dispute in the proceedings;

the classes of documents in respect of which disclosure is sought; and

the likely cost of such disclosure.

Costs

7. The Court may impose a limit on the amount of recoverable costs in respect of disclosure.