MEDIATION AND THE COURT
The Honourable JJ Spigelman AC

The Honourable JJ Spigelman AC comments on court-annexed mediation and the new compulsory mediation introduced with the 'referral proceedings' amendment to the Supreme Court Act in June last year.

In May of 1999 the Council of Chief Justices of Australia and New Zealand issued a Position Paper and Declaration of Principle on Court-Annexed Mediation. Appended to that document were summaries of mediation policy and practice in each of the Courts, including the Supreme Court of New South Wales. In both the respects to which I wish to refer this evening, the policy and practice of the Supreme Court has changed from that set out in the summary in the Position Paper. The registrars of the Court now conduct mediations which are not limited to what was there described as conferences. Secondly, the Court has now acquired the power, after a change of policy within the Court, to compel mediation.

DECLARATION OF PRINCIPLES ON COURT-ANNEXED MEDIATION
The Chief Justices Council adopted a formal Declaration of Principles on Court-Annexed Mediation which included the following points:

- Mediation is an integral part of the Court's adjudicative processes and the 'shadow of the court' promotes resolution.
- Mediation enables the parties to discuss their differences in a co-operative environment where they are encouraged but not pressured to settle so that cases that are likely to be resolved early in the process can be removed from that process as soon as possible.
- Consensual mediation is highly desirable but, in appropriate cases, parties can be referred where they do not consent, at the discretion of the Court.
- The parties should be free to choose, and should pay, their own mediator, provided that when an order is sought for such mediation the mediator is approved by the Court.
- Mediation ought to be available at any time in the litigation process but no referral should be made before litigation commences.
- In each case referral to mediation should depend on the nature of the case and be in the discretion of the Court.
- Mediators provided by the Court must be suitably qualified and experienced. They should possess a high level of skill which is regularly assessed and updated.
- Mediators must have appropriate statutory protection and immunity from prosecution.
- Appropriate legislative measures should be taken to protect the confidentiality of mediations. Every obligation of confidentiality should extend to mediators themselves.
- Mediators should normally be court officers, such as Registrars or Counsellors rather than Judges, but there may be some circumstances where it is appropriate for a judge to mediate.
- The success of mediation cannot be measured merely by savings in money and time. The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation.

Many of these principles will no doubt receive widespread acceptance. Some, I recognise, remain controversial. No doubt some readers would believe that any form of court provided mediation is basically a mechanism for taking food out of the mouths of your children.

At a higher level of principle many of you will no doubt share the view forcibly put by Sir Laurence Street, that participation by court
officers, whether judges or registrars, in a mediation process should not be permitted on the basis that it threatens the integrity and the impartiality of the court system itself. Sir Laurence said in the Australian Dispute Resolution Journal in November 1991:

Private access to a representative of a court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of fairness and absence of hidden influence that the community rightly expects and demands that the courts observe.

The Declaration of Principles adopted by the Chief Justices Council, as quoted above, recommends that mediators should 'normally' be court officers, like registrars. It does, however, contemplate circumstances in which it is appropriate for a Judge to mediate. The practice of the Supreme Court of New South Wales is that mediations are done only by registrars. No judicial officer descends into the arena in the way feared by Sir Laurence.

No doubt there are people who do not understand the difference between registrars, who are administrative officers, and judges and masters, who are judicial officers. Nevertheless, the difference does exist and it is the important line in this respect. This is a distinction which it is the policy of the Supreme Court to maintain.

The first principle in the Chief Justices Council Declaration is that mediation is an integral part of the Court’s adjudicative processes — it is not, of course, itself adjudicative, but is an integral part of the process of adjudication as a means of resolving disputes. That first principle also asserts that the 'shadow of the court' promotes resolution. This appears to unquestionably be the case.

There may be some difficulty in maintaining the distinction between registrars and judges in the public arena, but I do not see any signs that the blurring of any such distinction, if there be blurring, is affecting or likely to affect public confidence in the administration of justice. The issue deserves to be watched, for the reasons Sir Laurence mentioned. As Justice Gummow has put it, 'public confidence in the administration of justice in present times, is the meaning of the ancient phrase "the majesty of the law".' [Mann v O Neill (1996–1997) 191 CLR 204 at 245].

In the Supreme Court mediations have been conducted by the Registrar in the Equity Division since 1996. More recently, as a result of a deliberate policy, a number of registrars have been trained to conduct mediations by either this organisation or ACDC. Six of the Court’s ten registrars are now trained. A programme is in place to ensure that all registrars are trained in mediation, and this will extend to the increase of two in the complement of registrars, likely within the next few months.

The primary use of mediation by registrars has been in the Equity Division. Commencing last year, registrars in Common Law were trained and, this year, in Probate. There has been limited use of mediation in Common Law. The position in the Equity Division is now well established and that in Probate is growing in significance.

In 1999 a total of 131 mediations were conducted in Equity of which 91 settled at the mediation and a further 19 settled prior to hearing. In the first nine months of 2000 the Registrar in Equity reports that 89 court-annexed mediations have been conducted, 54 of those resulting in settlement. The Registrar in Probate reports that 20 court-annexed mediations have been conducted, over the period May to September, of which 13 have resulted in settlement.

In Common Law only a handful of cases have been mediated by registrars. However, a substantial practice in reference for mediation has developed in the Professional Negligence List. These mediations are not conducted by court officers.

The judges who administer the Professional Negligence List actively encourage mediation. So does the judge who conducts the Possession List, though not with the same success, in terms of numbers referred. All the reports I get from the Professional Negligence List affirm that the role of the mediators has been of critical significance in the success of the list, both in achieving settlements and in narrowing the range of issues.

During the eight months to the end of October 2000, 252 professional negligence cases were finalised of which 54 had been referred for mediation. Of those 54 cases, 36 were settled, discontinued or otherwise disposed of, without seeking further hearing from the Court and 18 sought further hearing from the Court, but settled at or before the hearing. As at the end of October 2000 there were 554 active cases in the Professional Negligence List. A referral to mediation has been made in 9% of those active cases, nine of these simultaneously obtaining hearing dates and 15 subsequently obtaining hearing dates.

The extensive use of external mediators will, I am sure, be more widely accepted as a result of the experience with the Professional Negligence List. It is perhaps a little early to evaluate the success of mediation in that list, but the early indications are very positive.
There are some signs in the Professional Negligence List, and I will put it no higher than signs, that delays are being occasioned by the unavailability of a mediator chosen by the parties. Mediation is intended to ensure the early resolution of disputes. The Court will keep a watchful eye to ensure that references to mediation do not add to delays in finalising matters.

From the perspective of the Court, one significant consideration is the effective disposal of matters in the list. Delays in the Supreme Court are reducing. Accordingly, directions will tighten thus enabling mediation to occur at a point of time attractive to the parties and in circumstances where, if the mediation proves unsuccessful, the parties will not have lost their priority in the list.

The experience in the Equity Division is that the following kinds of cases are appropriate to be referred to mediation:

*Family Provision Act* matters,
*Property (Relationships) Act* matters, partnership disputes, quantification of damages, accounts and applications under s.66G of the *Conveyancing Act*. In Probate disputes over conflict of wills and between competing applications for grants of probate in estates have been successfully mediated.

**REFERRAL OF PROCEEDINGS**

The second matter to which I wish to refer is the adoption by the Supreme Court of a new policy that there are circumstances in which parties should be compelled to mediate. Until the *Supreme Court Amendment (Referral of Proceedings) Act 2000*, s.110K of the *Supreme Court Act* permitted the Court to refer civil matter or mediation or neutral evaluation with the consent of the parties. The new s.110K expressly states that the power to make a reference can be exercised with or without the consent of the parties. The mediator or evaluator is to be agreed to by the parties, however, in the absence of agreement, the Court may appoint a person to conduct the mediation or a neutral evaluation.

The *Declaration of Principles* of the Council of Chief Justices, which I have quoted above, accepts that, although consensual mediation was desirable, a referral without consent can occur in appropriate cases. In one sense, the idea of a compulsory mediation is a contradiction in terms. To be successful a mediation process requires consensus.

Notwithstanding the 'contradiction in terms', there are precedents for compulsion of mediation. Indeed any contractual arrangement which requires mediation, as is frequently the case, is in one sense a compulsion of this character, albeit one agreed consensually at a time when the possibility of dispute was far from the contracting parties' minds. Some legislative schemes have included provision for compulsion. I refer in particular to the *Farm Debt Mediation Act* and the *Retail Leases Act*. The Federal Court and the Supreme Courts of South Australia, Victoria and Western Australia have for some time had power to refer matters to mediation over the objection of one or both of the parties.

No doubt it is true to say that at least some people, perhaps many people, compelled to mediate will not approach the process in a frame of mind likely to lead to a successful mediation. There is, however, a substantial body of opinion — albeit not unanimous — that some persons who do not agree to mediate, or who express
a reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute.

I am advised that in Victoria no difference in success rates or user satisfaction between compulsory and non-compulsory mediation has been noted. Not all research or anecdotal evidence is to this effect.

It appears that, perhaps as a matter of tactics, neither the parties nor their legal representatives in a hard-fought dispute are willing to suggest mediation or even to indicate that they are prepared to contemplate it. No doubt this could be seen as a sign of weakness. Nevertheless, the parties are content to take part in the mediation conference if directed to do so by a Judge.

There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the new power is directed. I formed the view that a power of the character now conferred on the Court by Parliament was a useful addition to the armoury of the Court to achieve its objectives.

That overriding purpose of the Supreme Court Rules is now set forth in explicit terms in Part 1 rule 3, being the first substantive rule of the Supreme Court Rules. That rule now provides:

Part 1 rule 3 continues:

[2] The Court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule.

[3] A party to civil proceedings, is under a duty to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

[4] A solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of the duty identified in [3].

Although this rule refers to the exercise of a discretion under the rules, similar considerations will be relevant, and in many cases determinative, with respect to the exercise of the statutory powers now found in Part 7B of the Supreme Court Act. Indeed the duty to participate referred to Part 1 rule 3, is expressly enacted in s.110L of the Act, which provides:

110L It is the duty of each party to the proceedings the subject of a referral under s.110K to participate, in good faith, in the mediation or neutral evaluation.

I am aware that there are other views with respect to the efficacy of mediation in reducing delays and costs. Some mediations are conducted as if they were mini trials and, where unsuccessful, a mediation adds to the costs ultimately borne by the parties, in some cases, to a substantial degree.

Nevertheless, the benefits are potentially substantial. We are presently engaged, particularly with respect to compulsory mediation, at the early stage of a long process of gathering experience which will assist us in determining in what circumstances an order under s.110K as amended could prove fruitful.
In making these decisions the Court is anxious to draw upon the experience of mediators who are able to inform the Court about which types of cases are suitable for mediation and which are not. Either by advising those who are making submissions with respect to a particular case, or more generally through the processes of publication, seminars and lectures, I trust that the cumulative experience of those practising ADR will become available to Judges of the Court so that we become aware of what are the matters which favour the Court exercising its powers to compulsorily refer a matter and what are the considerations which weigh against the exercise of those powers. Such researches and opinions, to be reviewed in the course of a public dialogue with others experienced in the field, will assist the Court when it comes to determine whether or not the powers should be exercised.

Section 110M of the Supreme Court Act now requires the parties to meet the cost of the mediation. Where a mediation is unsuccessful and has occurred over the objection of one or, perhaps, even both parties, there may be concerns because the costs of the resolution of dispute have been increased to those parties. Judicious exercise of the power will, I trust, ensure that, considered overall, the amount saved will greatly exceed the costs added by reason of this addition to the judicial armoury. These costs are, of course, not present in the case of court-annexed mediation. That fact is of particular significance where one or both of the parties do not have deep pockets. Where that is the case, the use of registrars remains an important option which should be available to the Court.

The new power will have to be exercised with care. I do not anticipate that it will be exercised frequently. In its exercise Judges will, I have no doubt, seek to ensure that no party is disadvantaged by the mediation process.

As noted above, both s.110L and Part 1 rule 3(3) recognise a duty by the parties to participate in the processes of the Court and of mediation when it is ordered. This statement of principle is, in some respects, a culmination of several decades of development of case management.

The pressure of litigation and the increased costs associated with litigation have come into conflict with restrictions on government expenditure which the courts, legal aid and all aspects of the administration of justice have had to meet, in the same way as all areas of public administration. Progressively, over a period of time the courts, have intervened more and more in the process of litigation to ensure that it is conducted efficiently and expeditiously. The ‘duty to participate’ is a reflection of the proposition that the parties share with the courts and with the profession, a mutual responsibility for the effective administration of justice.

No doubt there will be cases in the future in which the issue of ‘good faith’ under s.110L will be the subject of dispute, perhaps in the context of seeking the Court to make a particular order for the payment of costs of a mediation. These are also matters to be resolved on a case by case basis. The conduct of parties in litigation, including any attempts to settle litigation, is a matter of significance beyond the specific parties involved in the litigation. It affects, potentially, all other
There are occasions, most clearly in a criminal context, but also often in a civil context, where there is a very real public purpose in proclaiming that one party was right and another party was wrong. The performance of that function in a public manner is, and will remain, an important aspect of the administration of justice.

CONCLUSION

In conclusion, I would make certain observations about the limitations on alternative dispute resolution. It is a characteristic feature of such processes that they are held in private. It is the characteristic feature of the administration of justice by the courts, that it is conducted in public. There are important public values served by the resolution of disputes in public. The courts are part of a continuing dialogue by which our society affirms its fundamental values and adapts them to changing circumstances. This function is best served by a public process.

We do not live in a Confucian society in which overriding value is attributed to the restoration of social harmony. Plainly, considerations of that character are of particular significance where the parties to a dispute are in, or ought be in, a continuing relationship after the resolution of the dispute. In such circumstances settlement in and of itself has a particular value. This, however, is not true of all cases.

We live in a society where persons are acknowledged to have rights, which are enforceable by public processes. The State has always lent its authority to the enforcement of private rights, by reason of the public benefits that ensue from the recognition of such rights and the performance of private obligations. There are occasions, most clearly in a criminal context, but also often in a civil context, where there is a very real public purpose in proclaiming that one party was right and another party was wrong. The performance of that function in a public manner is, and will remain, an important aspect of the administration of justice.

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