COMPULSORY MEDIATION?

The ambit of this article by Mary Walker is to provide a summary of the Chief Justice's Policy and Planning Sub-committee's Report on Court Annexed Mediation ("the Report") issued on 13 December 1991 and its likely effect on the Bar.

A controversial element of this report is that in the final stage of the recommended pilot project it is envisaged that mediation will be compulsory in several divisions of the Supreme Court.

MEDIATION

Prior to dealing with the Report it is useful to review the definition of mediation.

Mediation is not arbitration. Arbitrators adjudicate and impose a decision award or judgment on the parties to a dispute.[1] Mediation is not a pre-trial conference, issues and listing conference, a directions hearing, a Part 72 referral or any hybrid of these processes.

Mediation is one form of alternative dispute resolution ("ADR"). In the Supreme Court two forms of ADR are presently implemented, arbitration and referrals pursuant to Part 72 of the *Supreme Court Rules*, 1970 (there is, however, argument that arbitration is the second tier of litigation and not truly a form of ADR and expert appraisal is merely a part of the adjudication process).

Mediation is the process of the participants. Mediation is a voluntary process in which a third party, independent of the participants, acts as a catalyst to assist the parties to identify mutually compatible interests and reach settlement in a confidential forum.[2] Mediation is assisted negotiation by an impartial facilitator.[3] The mediator does not impose a solution.

The mediator's function is to establish a forum for negotiation and to specifically assist the parties *inter alia*:

1. to set an agreed agenda for the mediation by helping the parties to isolate the issues in dispute,
2. to help the parties identify the information required by each party to formulate a view of their own and the disputant's case,
3. to encourage lateral thinking to assist the parties to generate viable options for settlement,
4. to assist the parties to investigate options for settlement including options not necessarily part of the court process,
5. to create a positive tone and encourage the parties to arrive at a solution,
6. to establish "ground rules" of common courtesy and to guide the discussions and negotiations in a positive manner,
7. to help the parties by providing an overview and to recommend a course of conduct including disclosure of information, reality testing or obtaining independent expert advice, and
8. to remain impartial, neutral and to disclose any prior dealings or relationship with any participant to the mediation.

The mediator controls the process yet the parties control the exchange of information, the style of negotiation and outcome.

The skills required to represent one's client at a mediation are conciliatory rather than adversarial. This does not mean that the skills of an advocate are not utilised or that counsel relinquishes control of the process. The utilisation of negotiation skills is emphasised. Unlike other pre-trial procedures, mediation allows the lay client to be present and to participate in the forum.

THE PROPOSAL

In November 1990 a sub-committee was formed by the Chief Justice to inquire into the viability of implementing court annexed mediation. The sub-committee consisted of Clarke JA, Wood and Bryson JJ assisted by Principal Registrar Soden.

The essence of the recommendations in the Report is to establish a pilot project to integrate mediation into the court system, in particular, into the Common Law and Equity Divisions of the Supreme Court.

RECOMMENDATIONS

The principal recommendations of the sub-committee are:

1. that the use of court-annexed ADR mechanisms within the Supreme Court be expanded,
2. that the pilot project be conducted over a three year period,
3. that the pilot project have twin objectives;
   (i) to use ADR to reduce existing backlogs, and
   (ii) to establish long term ADR structures annexed to the Supreme Court, with emphasis on mediation,
4. that an ADR Steering Committee be established by the Chief Justice:
   (i) to oversee the implementation of the pilot project and to consider and make recommendations to the Chief Justice upon matters of policy such as accreditation of mediators, funding, training and the like, and
   (ii) to liaise with other courts within Australia operating court-annexed ADR schemes with a view to developing common policy as to matters of training and accreditation of mediators and to establish structures for the exchange of information and the mutual monitoring of programmes,
5. that arbitration continue to be conducted as a measure to reduce the case backlog and that it be considered part of the pilot project, and

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1. J Cooley, "Arbitration vs Mediation - Explaining the Differences", 69 *Judicature* 263 (1986), p. 264 *also* the Report, p.6.
2. Australian Senate Standing Committee on Legal and Constitutional Affairs, *Discussion Paper - No. 4: Methods of Dispute Resolution*, p.12 submission from Australian Commercial Disputes Centre p.6, (Evidence, p.2000); *also* "Guidelines for Solicitors Who Act as Mediators", *Law Society Journal*, July 1988.
3. A Floyer Acland, *A Sudden Outbreak of Common Sense*, Hutchinson Business Books, London, 1990, p. 18.

6. it is proposed that a legislative framework be enacted to enable the Supreme Court to develop ADR structures and procedures. This legislation would entail provisions relating to the jurisdiction of the Court to order parties to attempt ADR, confidentiality of mediation sessions and the protection of mediators from liability.

THE STAGES OF IMPLEMENTATION

Three stages of the pilot project will be implemented each with an expected duration of one year. It is intended that the pilot scheme will be evaluated on an incremental basis which may result in a change in the pilot project's proposed time frame. It is estimated that the pilot scheme will commence in mid-1992, however this may be delayed if the infrastructure is not established prior to that time.

PHASE I

In phase I, cases will be allocated to mediation or arbitration as and when they are reviewed at callover and directions hearings in the ordinary course. Judges, registrars and deputy registrars will make determinations in regard to the appropriateness of ordering parties to attempt arbitration or mediation.

PHASE II

In phase II, subject to considerations of funding and demonstrated need, two referral officers, one attached to the registry of the Common Law Division and one attached to the registry of the Equity Division, will be appointed. It is proposed that these officers will vet files approximately one month after the defence has been filed in a matter with the view to making recommendations to the Supreme Court about the appropriateness of ordering parties to attempt available ADR procedures. If a case is deemed suitable by these referral officers the parties will be required to attend a callover for the court to consider the recommendations and to make appropriate orders.

Case management procedures will be expanded under the pilot scheme. It is not accurate to presume that the procedures implemented in the Commercial Division of the Supreme Court will be adopted. The procedures enunciated in *Practice Note 68 of the Supreme Court Rules* will be expanded and implemented with a view to assisting the Court's referral officers to identify the most suitable cases for referral to mediation or other ADR mechanisms.

In phases I and II the court may order mediation in cases involving personal injury, possession of mortgaged property and simple contractual disputes. In this segment of the scheme where mediation is ordered by the Court, a case will not proceed to hearing unless the parties satisfy the Court that they attempted, with reasonable diligence, to have the dispute mediated.

PHASE III

In phase III in some cases the parties will need to provide the Court with certification that pre-filing mediation has been attempted prior to the commencement of proceedings. The cases which will require certification are: motor vehicle personal injury cases, industrial accident personal injury cases and occupiers' liability cases.

The defendant must accede to the plaintiff's request for a pre-filing mediation within three months following service of a notice of demand upon the defendant by the plaintiff, in default of which the plaintiff will be able to commence proceedings without certification. The parties will select a suitable mediator and remunerate them. The Court reserves the right to order the parties to arbitration for appropriate personal injuries cases although pre-filing mediation may have been unsuccessful.

The sub-committee also recommends cases concerning the possession of mortgaged property, particularly those involving actions by banks against individuals, should be referred to compulsory mediation at an early stage in the litigation process. Similarly, simple common law breach of contract cases should be referred.[4]

Mediation will be required in most equity cases including: family and neighbour cases, vendor/purchaser cases, partnership disputes and testator's family provisions cases.

SAFEGUARDS

Safeguards have been recommended in respect to the selection of matters for referral to ADR. It is submitted in the Report that, as a matter of policy, cases should not be submitted to ADR where:

(i) one or more of the parties is a litigant in person,
(ii) there is a history of violence or personal animosity between the parties,
(iii) the applicable legal principles are not clear and the law would benefit from a judicial exposition of those principles, or
(iv) the case involves an important issue of public concern which should be ventilated in the public arena.

Procedural safeguards have also been recommended which include the following:

(i) participation is regarded as only "presumptively mandatory". This means that an order to attempt ADR will not be made upon the showing of good cause by *either* party,
(ii) the parties may object to the appointment of a particular dispute resolver or alternatively, the parties may agree upon a suitably qualified dispute resolver, who will thereafter be formally appointed by the Supreme Court,
(iii) it should be made clear to the parties in the form of the order that they are not required to settle but simply to participate in the session in a constructive way, and
(iv) a case submitted (by court order or otherwise) to ADR should not lose its priority in the list.

Although mediation is compulsory there are instances where applications may be made to negate the referral in

4. *Report of the Chief Justice's Policy and Planning Sub-Committee on Court Annexed Mediation*, November 1991, pp. 84 and 85.

circumstances where the parties view the referral as unsuitable and which would fall within the safeguards noted above.

PROBLEMS

1. More Process, More Cost, No Benefit?

Is this another obstacle parties must overcome prior to obtaining a hearing date? Will it be perceived as an impediment or an inconvenience? The public perception may be that if the process is compulsory it is another cost to be incurred prior to the resolution of the matter. Will it be perceived as a disincentive?

Is this a medium which may be abused? Could it be used as a fact finding mechanism rather than for *bona fide* settlement negotiations? The caveat here is that the litigants and lawyers involved will lose their credibility amongst other litigants and lawyers if they abuse the system. A short term gain, even if possible, would be obviated by the refusal of litigants and lawyers to participate in future mediations with those who refuse to act *bona fide*. Further safeguards or mechanisms for review are required to deal with this problem if the scheme remains based upon compulsory referral. Should mediators, who have traditionally been neutral, become the instrument of conscience if a lack of *bona fides* becomes apparent in a mediation? What occurs if the mediator discovers *mala fides* in caucus? Is the confidentiality sanction of the mediation process paramount?

What will be the cost of this process? It is recommended that the remuneration of the mediator for court ordered mediation should be fixed by regulation, collected by the court and there should be provision for the waiver of fees in appropriate cases. Further, it is recommended that each party to the mediation be required to contribute a fee of $200 where the parties are ordered to attend mediation by the court. If the parties voluntarily select their own mediator the sub-committee recommends that they should bear the commercial cost of the process. It is envisaged that the filing fees of initiating process in the Supreme Court will be increased by $20 which will be earmarked for funding this pilot project.

Is there any benefit in the mediation process? Obviously, if the matter settles there are cost benefits, process benefits and the satisfaction of participants. If the matter does not settle benefits to the process may ensue such as defining the issues in dispute, determining by agreement non-contentious issues and refining the approaches of the litigants to reduce hearing time and the costs to be incurred.

A caveat is, if the mediator becomes the "conscience" of the mediation process because it is compulsory, and limits are placed on the solutions available to the parties, the mediation process may become another settlement conference with no specific benefit to disputants. The latitude available in the traditional mediation process for creative design and solutions in a confidential forum is the essence of its success.

2. Confidentiality

Confidentiality in mediation is a vexed issue. The forum is confidential. Most mediation agreements ensure that the negotiations and documentation which are part of the mediation process remain confidential.

In practice several issues arise:

(i) the private/public forum distinction,
(ii) privileged communications,
(iii) communications in joint session, and
(iv) caucus communication. [5]

Mediation is a private forum, therefore the risk of adverse publicity is negated.[6] An additional inherent safeguard is the overriding concept of privileged negotiations as part of settlement negotiations.[7]

Communications in joint session involving confessions and admissions are likely to occur in mediation. Safeguards have been created and are currently being refined. Attempts at creating safeguards are as follows:

(i) mediation agreements, confidentiality agreements and third party acknowledgements (eg. when interpreters or support persons are in attendance),

(ii) legislation such as the *Courts (Mediation and Arbitration) (C'wth) Act*, 1991 and the Community Justice Legislation make provision for the inadmissibility of admissions or confidential information obtained solely in a mediation session, and

(iii) guidelines prepared by different bodies and institutions such as the Law Society of New South Wales. ("Guidelines for Solicitors Who Act as Mediators", *Law Society Journal, July 1988.*)

Confidentiality in mediation was investigated in *AWA Limited v George Richard Daniels t/a Deloitte Haskins & Sells & Ors* (unreported No. 50271 of 1991, 18 March, 1992 S.C. Comm. D.) by his Honour Mr Justice Rolfe who made the following finding - no party is entitled to seek to prove any statements or admissions made on a confidential and without prejudice basis at mediation in subsequent legal proceedings except by consent in accordance with the joint judgment of Dixon CJ, Webb, Kitto and Taylor JJ in *Field v Commissioner of Railways for NSW* (1957) 99 CLR 285. It was not considered

5. W O'Rourke, "Current Controversies and Future Directions", *The Centre for Conflict Resolution Mediation: Current Controversies and Future Directions*, p. 3.
6. *ibid.*
7. *ibid.*

by Rolfe J that Notices to Produce issued after the mediation were an attempt to circumvent the confidentiality and the without prejudice nature of the mediation.

> "They do not seek to prove directly or indirectly what was said at mediation. They seek to prove, by admissible evidence, a fact to which reference was made at Mediation not by reference to the statement but to the factual material which sourced the statement. A finding to the contrary would mean that irrespective of relevance to issues the statement at Mediation made the factual material upon which it was based immune from subsequent consideration by the Court ... Once all this is understood the donors and the recipients of information can proceed without fear that their positions will be prejudiced."[8]

Traditionally, in caucus discussions, the mediator is bound by the mediation agreement not to disclose matters divulged in this type of private session unless permission is granted by that party (the *Settlement Week 1991 Mediation Agreement*, clause 18 however reversed this presumption; the *Settlement Week 1992 Mediation Agreement* has reverted to the traditional view, now clause 17).

Confidentiality in the mediation forum is yet to be adequately investigated and the guidelines refined. It is not the ambit of this paper to investigate this issue but merely to note that it is crucial to the success of the mediation process as an alternative to the litigation system that it remains confidential.

3. Certification

In phase III the parties will be required to furnish the court with a certificate from a recognised mediator to the effect that they have "attempted mediation". What does this mean? Is it sufficient merely to attend without providing any input? Presumably not. Consider the following scenarios:

(i) if a defendant views its case as a sure success on the issue of liability and attends the mediation, is advised by its legal advisers not to disclose information to the plaintiff, uses the forum as a fishing expedition, does not participate in the negotiations and succeeds at the final hearing of the matter what are the cost implications? Would the mediator be obliged to provide the appropriate certification?

(ii) Alternatively, what if the defendant attended the mediation but the only participation by the defendant was to file an offer of compromise pursuant to Part 22 of the *Supreme Court Rules*. Would this be sufficient to obtain certification and obviate a costs order against the defendant at the end of the day?

These scenarios are contradictory to the philosophy of mediation where it is presumed that the parties attend voluntarily and participate in the structured and supervised negotiation process by *inter alia* defining the issues in dispute, canvassing options for settlement and realistically approaching a settlement of the dispute. Is it appropriate to order parties to mediate where there is a lesser or greater reluctance by the disputants to submit to mediation? Is there any likelihood of success when there is an inequality of bargaining power or inequality of need or want to participate in the forum? Some of these issues were canvassed by his Honour Mr Justice Rogers in *AWA Limited v George Richard Daniels t/a Deloitte Haskins & Sells & Ors* (unreported No. 50271 of 1991, 24 February, 1992 S C. Comm. D. at p. 5).

How subjective would the certification by a mediator be? It is stated in the report that "It is important that there be some requirement that the parties make a genuine or *bone fide* attempt to participate constructively in the session". It is further suggested in the report that the approach of the mediator should be to determine whether a party has demonstrated a lack of *bona fides*, rather than whether a party has made a *bona fide* attempt. Cases of lack of *bona fides* envisaged in the report are:

(a) attempts by a party to threaten or intimidate the other party,

(b) the refusal to participate in any discussions at all, or

(c) the making of outrageously unrealistic settlement offers.

MEDIATION FORUMS - THE FOCUS IN 1992

The initiatives by the Chief Justice's Sub-committee are not the only initiatives implemented in respect of ADR which may affect members of the Bar in 1992. Below is an attempt to provide an overview of initiatives in the area of mediation. This list is not exhaustive.

1. SETTLEMENT WEEK

The Law Society has recently obtained funding for Settlement Week 1992. This scheme will encompass matters in the Supreme Court, District Court and the Family Court. The courts will vet files which are suitable for mediation in the above jurisdictions. The parties may or may not accept the invitation to attempt mediation.

The following timetable has been adopted for actual mediations:

(i) for the Family Court, the period between 22 June 1992 and 30 October 1992,

(ii) for the Supreme Court and the District Court, the period between 12 October 1992 and 30 October 1992.

2. COURT INITIATIVES

The Supreme Court will participate again in the Settlement Week initiative. Letters of invitation for mediation in Settlement Week 1992 have been sent in respect of 3000 matters pending trial in the Supreme Court. The pilot project should also commence in 1992.

The District Court will participate in Settlement Week 1992 and has sent letters of invitation in respect to 3004 pending cases for involvement in the Settlement Week initiative. The District Court Rule Committee has amended the *District Court Rules* to include Part 24C which is to take effect from 1 July 1992. The purpose of the amendment is to establish a Motor Accidents List in the District Court. The substance of the amendment is that in all proceedings commenced within the meaning of Part 5 of the *Motor Accidents Act*, 1988 the plaintiff shall file a praecipe for trial within six months after the commencement of the action. The praecipe must be

8. *AWA Limited v George Richard Daniels t/a Deloitte Haskins & Sells & Ors* (unreported No. 50271 of 1991, 18 March, 1992 S.C. Comm. D.) per Rolfe J at p.12.

accompanied by a certificate that appropriate documents have been served on the defendant's insurer, which include *inter alia* the statement of particulars pursuant to Part 12 rule 4A of the *District Court Rules*, relevant documents and reports including a letter from the employer, if any, of the plaintiff immediately before the accident including wage records and income tax returns for a period of two financial years ending immediately prior to the date of the accident (including a statement noting any income tax returns lodged by the plaintiff since the accident or if self-employed, copies of any accountants' reports or other documents on which the plaintiff intends to rely).

A status conference will be scheduled by the court for directions approximately three months after the praecipe is filed. A timetable has been fixed for the exchange of further documentation prior to the status conference. If no praecipe for trial and certificate are filed within the prescribed six months after the commencement of the action, the matter will be struck out.

These amendments to the *District Court Rules* have been implemented to encourage early settlement. Many of these matters will be referred to mediation either in future court programmes or through centres such as The Australian Commercial Disputes Centre. This will be discussed in further detail below.

The Family Court will also participate in Settlement Week 1992. Letters of invitation to participate have been sent in 350 matters pending trial in the Family Court.

The Land and Environment Court and the Federal Court have implemented mediation programmes in which registrars act as mediators of disputes.

The Administrative Appeals Tribunal has also implemented a pilot programme for the mediation of matters concerning customs disputes, disputes regarding social security and veteran affairs. Four members from the Sydney registry will mediate disputes. At present 15 members of the Tribunal throughout Australia are trained mediators. A pilot project in Queensland and Victoria of 56 matters in 1991 showed a ninety-five percent success rate. This may be an atypical figure as there is a naturally high settlement rate in this jurisdiction due to the many conferences held and careful monitoring of disputes by the members.

3. PRIVATE MEDIATIONS

There are many private mediations being held outside the ambit of the courts by parties either prior to the commencement of litigation or as an alternative to litigation proceedings.

4. CENTRES

Centres such as the Australian Commercial Disputes Centre have initiated programmes such as the NSW Compulsory Third Party Personal Injuries Mediation Program with the co-operation of the Motor Accidents Authority of NSW. This is a private scheme which has the co-operation of the majority of the insurers under the *Motor Accidents Act*, 1988 and has been created to offer mediation for claims or prospective claims arising under the *Motor Accidents Act*.

The Community Justice Centres were the first to utilise mediation on a systematic basis. The Community Justice Centres work in conjunction with the Local Courts, particularly in city and suburban locations, the most recent centre being opened in Bankstown. The majority of the matters mediated through this scheme are family, defacto and neighbour cases.

5. GROUPS AND PROFESSIONAL BODIES

Groups such as LEADR (Lawyers Engaged in Alternative Dispute Resolution) provide access to a panel of experienced mediators for private mediations and may soon provide a facilitation service.

The Law Society, through its Dispute Resolution Committee, has been active since 1987 and has had a major impact upon the introduction of mediation as an ADR option in New South Wales. The Law Society initiated Settlement Week 1991 and has again obtained funding to carry on this initiative by organising and promoting Settlement Week 1992.

The Bar Association of NSW recently resolved to offer training courses to members on how to represent a party at a mediation and to provide training for those barristers who wish to become mediators.

CONCLUSION

It was stated in the Premier's Policy Statement, "New South Wales Facing the World" that the Government is fully supportive of the Chief Justice's proposal for enforceable court annexed mediation and will be introducing projects in each of the State's courts during the next financial year.

The Attorney-General and the Minister for Justice have recently approved the adoption of the recommendations in the Report.

Most barristers are likely to have cases which will be referred to mediation either through the court process or recommended by lay clients or instructing solicitors. It appears that mediation will be a parallel process to litigation in most jurisdictions in the foreseeable future. ❑