

Judicial Mediation in Australia

National Judicial College

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Topic 1. Introduction of Judicial Mediation in Australia

The Concept of "Judicial Mediation"

- 1 In Australia the concept of "mediation" is understood to be a process in which an independent and impartial person assists two or more people who are in dispute to reach a voluntary, negotiated settlement of their dispute. It is also understood that a mediator may use various skills and techniques to assist the disputants to reach a resolution of their dispute but has no power to make a decision. The decision is that of the parties.

- 2 Mediation in Australia has been referred to as part of the process of "alternative dispute resolution" or "ADR". That concept includes other mechanisms for resolving disputes that are alternative, or additional, to litigation, including arbitration, a combination of mediation and arbitration referred to as "med-arb", facilitation (where an independent third party guides the disputants to identify areas in which they might mediate their differences), conflict management and dispute counselling. Some parties may attempt to mediate their differences before they commence proceedings in court. Some small neighbourhood disputes are mediated within the system of "Community Justice Centres".¹

¹ Community Justice Centres operate under the *Community Justice Centres Act 1983* (NSW) and form part of the NSW Department of Justice and Attorney General in particular, the ADR Directorate, established in 2009 to "coordinate, manage and drive Alternative Dispute Resolution policy, strategy and growth in NSW".

- 3 Retired judicial officers, lawyers or other professionals mediate some of the more complicated commercial disputes. The parties jointly appoint and pay for these mediators to assist them to reach a resolution of their dispute without proceeding to litigation. This process is referred to as "private mediation", meaning mediation outside the government or court system.
- 4 There are instances of parties commencing proceedings in court without trying to settle their differences by mediation. However these instances are declining as the culture of mediation gains greater support. All the courts in Australia have the power to refer cases to mediation.² Most of the Supreme Courts in Australia provide court-annexed mediation services, that is, mediations that are conducted by officers of the court.³ In some courts it is only the Registrars who provide this service,⁴ whilst in other courts both registrars and/or judicial officers perform this task.⁵ I will refer to this system as "judicial mediation".

Problems in judicial mediation

- 5 The mediations that are conducted by the Registrars in the Supreme Court of New South Wales result in approximately 60% of the cases referred for mediation being settled. If the case does not settle at mediation before the Registrar that same Registrar will make orders for the preparation of the case for trial before a judge of the court.
- 6 If a judge conducts the mediation and the matter does not settle, that judge must have no further involvement with the matter as all materials relating to the mediation and all communications at the mediation are kept confidential and not communicated to the trial judge. It would depend upon

² Australian Capital Territory: Court Procedures Rules 2006 (ACT) r 1179; Commonwealth: Federal Court Rules (Cth) O 72(1A); New South Wales: *Civil Procedure Act* 2005 (NSW) s 26; Northern Territory: *Supreme Court Act* (NT) s 83A; Queensland: *Supreme Court of Queensland Act* 1991 (QLD) s 102; South Australia: *Supreme Court Act* 1935 (SA) s 65; Tasmania: *Supreme Court Rules* 2000 (TAS) r 518; Victoria: *Supreme Court (General Civil Procedure) Rules* 2005 (VIC) r 50.07; Western Australia: *Supreme Court Act* 1935 (WA) s 69.

³ Except the Australian Capital Territory, Queensland and South Australia.

⁴ New South Wales, Western Australia and Tasmania.

⁵ Victoria and the Northern Territory.

the number of judges available to hear cases as to whether there is a practical problem of not having enough judges to hear cases that other judges are precluded from hearing by reason of their involvement in unsuccessful mediations.

- 7 In Australia there is the problem of judges going into private mediation sessions with litigants and lawyers who appear before them regularly and discussing matters personal to those litigants directly with those litigants.⁶ This is a problem of perception. It raises the question of whether the appearance of independence and impartiality of a judge who goes into these private sessions is compromised. Mediation by judges is not a popular process with judges. It may be suggested that this "problem" is more theoretical than real. It is too early to make a proper assessment of that suggestion because judicial mediation in Australia has only recently become more widely adopted. It was introduced in the Federal Court of Australia some years ago, however it proved to be most unpopular and is rarely used in that court these days.⁷
- 8 The other potential problem that can arise in judicial mediation is the risk that one or more of the parties may try to use the mediation as a "dry run" of their case (referred to later) and for the purpose of obtaining information that might otherwise not be available to them in the litigation. This would be inconsistent with that party's obligation to attend the mediation and take part in the process in "good faith". However in the rare instances that it may happen it would involve the judicial officer mediator having to make an assessment in private of a party's and their lawyers' motives for reacting in the particular way to the various offers that may be transmitted by the judge from the other side.

⁶ *Note on the detachment of judges to mediation*, Sir Laurence Street (2006) 17 ADRJ 188; *Judicial Mediators: Is the time right? – Part I*, David Spencer (2006) 17 ADRJ 130; *Judicial mediators: Is the time right? – Part II*, David Spencer (2006) 17 ADRJ 189.

⁷ *Mediation in Hong Kong: The Way Forward. Perspectives from Australia*, the Honourable Justice PA Bergin (2008) 82 ALJ 196 at 198-199.

- 9 Although there is a prohibition on publication of what occurs during mediation, there are some exceptions to that prohibition. Accordingly there is the prospect of a judge being called to give evidence in relation to what occurred at the mediation should there be a claim for rectification of any agreement that was purportedly reached or claims of fraud or the like. It may have an adverse effect on the court generally if, for instance, a judge's memory or worse still credibility, were called into question in such a process.

Solving the problems

- 10 It is recognised that every effort should be made to assist parties to reach a resolution of the real issues in question in the most cost efficient and effective manner. It is for that reason that some courts have established the judicial mediation service which is provided by judicial officers. However in the Supreme Court of New South Wales the problems referred to above have been recognised and the system has been established to ensure that judges do not become embroiled in the aftermath of unsuccessful mediations. Registrars conduct all the mediations in the court-annexed mediation service.
- 11 It may be that in the future some legislative structure may be established to enable judges in Australia to mediate without the prospect of becoming embroiled in unsatisfactory consequences of an unsuccessful mediation. Indeed it would be sensible to consider amendments to the legislation to provide that protection in courts where judges are presently conducting mediations if it is planned that such a system continues. One obvious method of solving the "problem" would be to provide immunity to the judge from being called as a witness in any post-mediation litigation. These are matters that require consideration in providing a balance between mechanisms to assist the parties to resolve their disputes and maintaining integrity in the reputation of the court system.

Topic 2: Connection between judicial mediation and trial procedure

Types of cases for mediation and/or trial

- 12 There is no particular type of case in the civil jurisdiction of the Supreme Court of New South Wales that has been identified as unsuitable for mediation. However it is very difficult when one or both parties are not legally represented. It is more difficult when only one party is not legally represented. It may be that in instances such as these the cases should not be referred to mediation.

- 13 One category of case in the Supreme Court of New South Wales has been identified as suitable for mandatory mediation prior to trial.⁸ These are cases involving challenges to wills and applications for greater provision out of the estates of deceased persons. Although there may be some reservation about the imposition of such a mandatory process I should emphasise that it is certainly not an imposition of a condition that parties must settle the case. It is an imposition that they must try to settle it before going to trial. The reasons this category was chosen include that in many of these cases the parties' relationship has soured and emotions run high and the amount in question can be quite small. Indeed it was found that in some of these cases legal costs had been greater than the amounts in question.

- 14 Although, as I have said, all categories of cases are probably suitable for mediation, it is very important to identify the real issues in those cases prior to the matter being mediated. These include disputes in relation to wills and estates, commercial cases, building cases, or cases in which a party has been defamed.

⁸ *Executors/Trustees and Mandatory Mediations*, the Honourable Justice PA Bergin, 25 November 2009, [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/bergin251109.pdf/\\$file/bergin251109.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/bergin251109.pdf/$file/bergin251109.pdf)

Building a bridge between mediation and trial

- 15 The relationship between mediation and trial is important. When parties commence proceedings, for instance in the Supreme Court of New South Wales, they are required to prepare their evidence and take all other steps necessary to have the matter ready for hearing on a particular date. Experience suggests that the mediation is far more effective when the parties have already been given a firm trial date. If the matter is referred too early in that process where parties still have to complete their evidence or give disclosure of documents, a mindset is created that the hearing of the matter is a good way off and there is no urgency to reach a commercial agreement. That mindset makes it more difficult for the mediator to facilitate an agreement between the parties because of the uncertainties of the future. On the other hand where parties are focussed on having to outlay legal costs for a lengthy trial, the mindset and motivation is quite different.

Trial and Mediation

- 16 In Australia the court can refer a matter to mediation at any time, but usually prior to the delivery of judgment. However it would be possible for a judge to deliver judgment on some aspects of a trial (for instance on liability only) and then refer the parties to mediation prior to damages being assessed. A number of cases have been referred to mediation during trial. Some of those mediations have been successful but in others where success is not achieved the parties then resume the trial. Once again the trial judge is cocooned from any knowledge of what occurs at mediation and simply continues on with the trial in the usual way. There is no real disadvantage to any of the parties who have attended the unsuccessful mediation other than of course the legal costs incurred in that mediation. Sometimes the parties will require the court to make orders in respect of the costs of the mediation, prior to them going to mediation or after the mediation has occurred.

Whether information can be shared between mediation and trial

- 17 In New South Wales, except in very limited circumstances, evidence of anything said or any admission made in a mediation session is not admissible in any proceedings before any court.⁹ The same prohibition applies to any document prepared for the purposes of, in the course of or as a result of a mediation session.¹⁰ The mediator may only disclose information obtained in connection with a mediation in limited circumstances including with the consent of the person from whom the information was obtained, or in connection with the administration and execution of a mediation.¹¹ Any party may call evidence at trial, including from a mediator, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.¹²
- 18 Confidentiality of mediation attracts parties who wish to avoid publicity and increases their willingness to conduct open and frank negotiations. Where mediation occurs in a litigation context, parties are provided with a safe place to make disclosures, propose and respond to offers, and engage in negotiations without the threat of evidence being used against them (except in the limited circumstances referred to above). Confidentiality encourages parties to be frank about their real needs and interests, and contributes to finality of litigation.

Topic 3: Strategy and techniques of judicial mediation in practice

- 19 Although there are some different techniques used by individual mediators, the usual procedure in court-annexed mediations commences with a mediator meeting with the parties together and explaining the nature of the mediation, the process to be adopted and the terms of the mediation agreement that the parties are required to sign.

⁹ *Civil Procedure Act 2005* (NSW) s 30(4)(a).

¹⁰ *Civil Procedure Act 2005* (NSW) s 30(4)(b).

¹¹ *Civil Procedure Act 2005* (NSW) s 31.

¹² *Civil Procedure Act 2005* (NSW) s 29(2).

- 20 In that first meeting the parties will be given an opportunity to put their position consistently with the position paper that may have been provided to the mediator by each party. The parties will then "break out" into separate rooms and the mediator will attend those rooms in the absence of the other party to discuss the way in which that party sees a commercial agreement possibly being reached. The experience is that giving the parties an opportunity to air their grievances in private assists the mediator in forming a view as to the prospects of the parties reaching agreement on some issues and not others and being aware of where the parties might really have an issue that is insoluble. In this way the mediator is in a position to try to diffuse the problem without having a confrontation between the parties where the goodwill between them for reaching a mediated outcome might be diminished.
- 21 The mediator will at times bring the parties back together to discuss some issues and may then again break away into individual discussions. Much will depend upon the nature of the case, the intensity of the feelings between the parties, and the complexity of the issues that are the subject of the proceedings. It will also depend upon whether an insurer is funding any of the parties and whether there are multiple parties who are affected by the outcome of the proceedings.
- 22 In Australia we have a national accreditation system for mediators with the aim of achieving some uniformity in approach. However that system is presently voluntary albeit that it is expected that it may become mandatory. All of the Registrar mediators within the New South Wales Supreme Court are accredited under this voluntary system.
- 23 The aim of the mediator is to attempt to: (1) make the proceedings manageable; (2) develop an atmosphere conducive to problem-solving negotiations; (3) gather all the information available about the interests of the parties; (4) help the parties to create options; (5) help the parties narrow the options and move towards agreement; and (6) help the parties make rational decisions between agreement and pursuing a claim.

24 Obviously a mediator must understand some basic techniques of negotiation. In cases where parties may wish to deal with one another in the future, maintaining credibility and trust may be as important as obtaining any particular substantive gain. Multi-issue disputes are frequently easier to resolve than single issues where there may be less room for accommodation.

25 It has been suggested that an effective mediator should keep in mind the following "truisms about human behaviour":

- People will rarely make a decision if there is any way to avoid it;
- People may agree on the "facts" but disagree violently over the meaning of those facts;
- People usually act out of self-interest;
- When two people have a dispute, it cannot be resolved until both parties decide that they really want to resolve it;
- People do not like to be told what to do;
- People do not like to apologise;
- People tend to carry out only those decisions they have helped to formulate;
- People are more important than disputes. If the parties can agree to live with each other without resolving who did what yesterday, then who did what yesterday is not important;

- Disputes are not resolved by dwelling on the negative; they are resolved by discussing areas of agreement between the disputants and by accentuating the positive;
- No settlement is entered into without doubt.¹³

Topic 5: Mechanism to prevent fake (not real) mediation

- 26 A party to a dispute may attempt to use mediation as a "dry run", in order to trial their case, gauge the opposing party's case and obtain information and/or documents that may otherwise not have been available. To some extent the confidentiality requirements governing mediations in Australia prevent a mediation being used in this way.¹⁴ As one judge said: "It is of the essence of successful mediation that parties should be able to reveal all relevant matters without an apprehension that the disclosure may subsequently be used against them. As well were the position otherwise, unscrupulous parties could use and abuse the mediation process by treating it as a gigantic, penalty free discovery process".¹⁵
- 27 There is a danger of the opposing party becoming aware of information during an unsuccessful mediation and then seeking to gather evidence to prove the matter the subject of the information received if the matter goes to trial. This is permissible.¹⁶ Accordingly parties who attend mediation are usually very careful to ensure that they limit their disclosures to information they are happy to be disclosed at trial should the mediation be unsuccessful.
- 28 The New South Wales legislation provides that parties who have been referred to mediation have a duty to participate in the mediation in good

¹³ *Harvard Negotiation Institute Mediation Training Manual* 2010, p 5-6.

¹⁴ See for example: *Civil Procedure Act 2005* (NSW) ss 30 and 31.

¹⁵ *AWA Limited v George Richard Daniels* (1992) 7 ACSR 463 at 468 Rogers CJ Comm D.

¹⁶ *Williamson v Schmidt* [1998] 2 Qd R 317.

faith.¹⁷ There is no definition of the expression "good faith" in the legislation, however it has been construed as meaning that the parties are to participate with a non-obstructive, cooperative attitude and that strict insistence upon legal rights in a mediation may amount to a lack of good faith.¹⁸

- 29 In the early years of mediation in Australia, in the 1990s, when the legal profession was sceptical about the benefits of the mediation process, there were some instances of mediators terminating the mediation because of a perceived lack of real willingness of a party to engage in realistic settlement proposals. This is no longer a real problem. The culture has changed and the legal profession and the community are very comfortable with the mediation process. However it will be a matter of judgment for the mediator during the course of discussions with the parties to be satisfied that they are engaging in good faith negotiations. If not, then the mediation should be terminated. There have been recent amendments to the New South Wales legislation that provide for cost sanctions against parties who abuse the process in this way.¹⁹ It is hoped that it will not be necessary to exercise these powers on a regular basis.

¹⁷ *Civil Procedure Act 2005* (NSW) s 27.

¹⁸ *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137 per Ipp J.

¹⁹ *Civil Procedure Act 2005* (NSW) s 18M.