A decade of mediation – the promise fulfilled?

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Mediation – the Greek legacy

Whilst the purpose of my paper is to examine the evolution of mediation in Australia in the past decade, it is illuminating to realise that Athenian law, as early as the 4th and 5th centuries, operated a sophisticated hybrid 'med-arb' type process. The parties to a civil suit involving pecuniary affairs were first sent to a public arbitrator ('diaitetes') who proposed a solution.[1] If one of the parties refused to accept the solution the case was referred to a 'discastery' (a court of citizens selected by lot) presided over by a magistrate having jurisdiction in the matter. The discasts, after listening to the parties' arguments and evidence then made a decision, which could only be a choice between the two proposals made by the parties. The decision was final and there was no appeal. However, the loser was entitled to bring a private tort action (dike pseudomartyrion) against a witness whose false deposition had influenced the verdict.

The attraction of this process was that it compelled the parties to be moderate and realistic in their proposals. This is unlike our modern system of litigation which encourages extravagant claims in the anticipation that at least some will succeed.

The mediation process

The term mediation in its contemporary use has come to mean assisted negotiations in which the services of a neutral third party are used to reduce the differences or seek a solution.

Mediation has played an important role in modern international disputes. It is notable, that one of the first successful uses of mediation in international conflicts was the intervention of the great powers as mediators between Greece and Turkey in the period 1868-9, when relations were strained over Crete.[2]

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[1] *Encyclopedia Britannica*, Macropaedia, 15th ed. vol. 8, p.402.

[2] *Encyclopedia Britannica*, Micropeadia, 15th ed. vol. 8, p.745.

The most famous international mediation was probably the role that Henry Kissinger played in the 1973 Arab/Israeli war, in which Kissinger developed the art of 'shuttle diplomacy' by flying back and forth between Washington and the capital cities of the Middle East to negotiate a series of disengagement agreements between Israel and its Arab neighbours.[3]

One of the strategies Kissinger developed to deal with the tense situation was the use of humour. It is said that on one occasion he invited the Arab foreign ministers to lunch. There was some tension because he fancied that his Jewishness might prejudice the dialogue. He decided to break the barrier with a joke: "I recognise," he told his guests, "that many of you view me with suspicion. This reminds me of a story which corresponds with our situation. The communist called a rally, and the police infiltrated it with an informer. Then the police broke in and beat everybody up. The informer protested and said 'I'm the anti-Communist'. The police said 'we don't care what sort of communist you are – you're under arrest'". It is said that half the audience understood this as Kissinger's subtle way of poking fun at his own Jewishness, whilst the other half had no idea what he was talking about.

My particular area of interest is Court-ordered commercial mediation. This is essentially a process of seeking to reach a voluntary resolution of a commercial dispute, which is satisfactory to the parties, with the aid of a neutral mediator. In recent years Court-annexed mediation has become an integral part of the litigation process in Australia.

Mediation in its simplest form is an informal settlement conference, in which the mediator has no authority to impose a solution on the parties, but acts as a 'go-between' in the negotiations. One commentator has described the process as 'turbocharged negotiations', in which the mediator is the turbocharger.

Usually, a Court-ordered mediation takes place after the pleadings have been exchanged and discovery processes have been completed, although the mediation can be ordered at any time. Generally a direction to take part in mediation will be made by a Court at a directions hearing, often at the same time as the matter is actually listed for trial. It is normal for the parties to select their own mediator, who more often than not tends to be a barrister or senior solicitor, with experience as a mediator. Sometimes, although rarely in my experience, the mediator is chosen by the Court.

In a typical mediation, it is common for the parties prior to the mediation conference to exchange and provide the mediator with written position papers outlining their concerns in relation to the matters in dispute.

[3] Jeffrey L. Rubin (editor) – *Dynamics of the Third Party Intervention – Kissinger in the Middle East – Praeger Publisher* – 1981.

At the mediation conference, the session usually commences with a joint meeting of all parties and their legal advisers at which the mediator briefly gives an overview of the mediation process and sets the ground rules such as pointing out the confidentiality of private meetings with the parties. The mediator then invites each party to give a short opening statement explaining its position. I find it helpful to encourage the participants to speak, as well as their lawyers.

It is a function of the mediator to listen and raise questions directed to improving the mediator's and parties' understanding of the issues in dispute, whilst at the same time ensuring that the discussions are taking place in a co-operative, non-hostile, problem-solving environment. This is sometimes difficult, particularly when lawyers participate, who are unable to escape from their adversarial legal culture and view their role as advocates scoring points against the other side and the solution to the dispute as founded upon legal outcomes.

The purpose of the opening session is usually not to engage in negotiations, but to give an opportunity for the parties to participate in information exchange, for the purpose of identifying and clarifying the real issues in dispute, in particular, the issues which are capable of negotiation and resolution at the mediation conference.

After the joint session, the mediator often begins a process of confidential private meetings or caucuses, in which the mediator meets with each side privately in candid discussions to explore the strengths and weaknesses of each party, to examine the underlying interests and needs of the parties to assist the parties to formulate alternative solutions, and to act as a conduit for offers and counter offers.

The ability which the mediator has to speak to each side privately and confidentially and control the communications between the disputants is perhaps the most valuable feature of the mediation process. Sir Laurence Street, a former Chief Justice of New South Wales and now a prominent mediator, has described the caucus session as "the heart of the mediation process".

Some of the uses of confidential caucus sessions include:

- Assisting the parties to identify and appreciate their underlying interests and needs. For example, the desire to preserve an ongoing business or personal relationship or the benefits of a quick resolution of the dispute.
- Educating the parties about each others' concerns. A mediator is often far more successful than the opposing party in explaining and arguing the position of the other party because arguments put by the other party will often be treated with suspicion as phoney arguments intended to advance their interests. For a dispute to resolve, each party usually has to have a clear appreciation of where the other party is coming from.

- Soliciting and helping to frame settlement proposals. Sometimes a party has to be cajoled into putting forward a reasonable settlement proposal. On occasions, a settlement suggestion needs to be refined with the assistance of the mediator to take into consideration a particular interest of the opposing party.
- Pressing for concessions. If a dispute is to be resolved it is invariable that the parties have to make concessions. An important role of the mediator, is to try to persuade the parties to make concessions usually on a reciprocal basis. Parties often find it easier to make concessions to the mediator than the other party.
- Breaking an impasse. An important function of the mediator is to ensure that a concluded agreement is achieved. This often requires the skilful use of strategic intervention strategies, particularly when the negotiations on some or all issues reach an impasse. These intervention strategies can range from emphasising the time and effort that has been put into the mediation to date to re-emphasising what may occur if the dispute does not resolve at the mediation conference, to proposing novel alternatives, usually based on the proposition – 'what if?'.

It has also been pointed out that a mediator often acts as a target for anger, taking a role not unlike a psychotherapist dealing with transference. The mediator serves as a surrogate target for emotional displays, which then allows a catharsis to occur, leading to a party viewing its position more realistically.

In my experience, it is not unusual for virtually the entire negotiations to take place in caucus sessions with the mediator shuffling between the two parties. However, the mediator has the ability to bring the parties, or even some of the representatives in the absence of lawyers, together again at joint sessions if this will assist. There are no hard and fast rules and the skill of a good mediator is to pick up on the dynamics of the negotiations and identify what strategic interventions are likely to work.

If a settlement is able to be reached, then the mediator assists the parties to prepare a comprehensive written agreement setting out the terms of the resolution. Such an agreement is binding between the parties. It is my normal practice to request that written terms of the settlement are signed and exchanged before the mediation session ends.

Settlement 'success' statistics

It is uncertain what the average settlement rates of civil mediation are. There have been few systematic studies and settlement rates can vary considerably between mediators. Success rates are frequently anecdotal and should be treated with some caution. A study carried out following the Victorian Supreme Court 'Spring Offensive' in 1992 reported a 54% settlement rate, although many of the mediators were inexperienced and new to the process. The settlement rate of mediations conducted in the Building Cases Lists of the County and Supreme

Courts, where most of the mediators are experienced and selected by the parties, suggest a settlement rate in excess of 75%.

Most experienced commercial mediators consider that a settlement rate in the order of over 85% can generally be achieved, not taking into consideration that a number of disputes which fail to settle at mediation are settled after the mediation conference, largely due to the impetus provided by the mediation.

The evolution of mediation in Australia

The use of mediation in commercial disputes commenced slowly and is a recent and remarkable phenomenon. In 1983 mediation was introduced as a discretionary procedure in the Victorian County Court Building Cases Rules for building disputes and was a voluntary process which required the consent of the parties. In the early days, mediations were very much *ad hoc* sessions conducted, after hours, in barristers' chambers, or even on-site.

Despite the 'high' success rate which was consistently being achieved and the increasing use of mediation to settle disputes in construction cases, it was not until 1990 that an amendment to the *Victorian Supreme Court Act* entitled Judges to make rules with respect to referring Supreme Court proceedings to mediation.

Procedural rules were subsequently made to enable mediations to take place in cases in the Building Cases List and eventually, in 1992, in the General Civil List of the Supreme Court. The rules gave power to a Judge to require the parties to participate in mediation, with or without their consent.

Perhaps the most important impact upon mediation was the 1992 Supreme Court 'Spring Offensive', in which the Judges of the Court made an effort to clear out the court lists, to cut delays in hearings, by sending some 250 cases to mediation before senior barristers and senior solicitors, who incidentally agreed to conduct the mediations without fee. Although the success rate was only in the order of some 50%, a number of the cases settled after the mediations. The 'Spring Offensive' introduced Judges and a large number of practitioners to the mediation process and persuaded them that it was possible to resolve difficult cases by mediation in a fast and cost-effective manner.

In 1994, in what is known as the 'Autumn Offensive', there was another concerted effort made by the Victorian Supreme Court to clear out its lists and some 150 cases were referred to mediation. This time, a number of the mediators to whom cases where referred had attended training courses and had developed experience in the process. It is interesting to observe that a total settlement figure of 79.35% was achieved.

The current position in Victoria is that mediation has become an important factor in the litigation process. The County Court has developed a Court management system, with Judge-controlled lists in virtually every area of civil

litigation, in which the referral of the case to mediation at an early stage is now one of the central considerations.

In the Supreme Court it has become increasingly common for Judges or Masters conducting directions hearings to propose mediation, or to set the case down for trial, with a direction that a mediation conference take place prior to the trial date.

In a number of significant cases, Judges have even adjourned lengthy trials to direct a mediation conference to take place. In one recent dispute, involving the winching systems installed in the State Theatre of the Victorian Art Centre, the case was referred to mediation by the Trial Judge after the trial had proceeded for some weeks, involving 13 defendants, including the State of Victoria, and very complex technical and factual issues. The dispute was able to be resolved at a mediation conference occupying one day.

Apart from Victorian Courts there has been what one writer has described as a "legislative avalanche" in many Court and Tribunal systems in Australia.[4] There is hardly a Court or Tribunal which does not enable disputes to be referred to mediation, including in many cases 'mandatory' mediation or conciliation.

In an article in 1998, Professor John Wade of Bond University summarised some of the Queensland legislation which contained ADR clauses and identified 28 different Acts of Regulations which made provision for ADR procedures, generally mediation, ranging from retail shop leases to disputes relating to the sugar industry. The position is similar in most other states of Australia, with a number of Acts such as the *Farm Debt Mediation Act* 1994 (NSW) and the *Retail Leases Act* 1994 (NSW) providing for compulsory mediation.

The rhetoric and the reality

One commentator described mediation as being similar to most new social practices ranging from psychotherapy to financial advising.[5] There is a first phase of innocence in the initial establishment of the practice, when there is an optimistic and idealised vision of the new practice and a conviction of its ability to deal with problems better than before. As innocence turns to experience, there tends to be a second reactive phase in which there develops a sceptical and sometimes hostile reaction to the new process, with many horror stories and disappointments. Finally, there is a pragmatic stage in which there is a more realistic appreciation about the strengths and shortcomings of the practice and it becomes a recognised and conventional pursuit.

The substantial growth in mediation in the early and mid 90s was certainly supported by a large amount of enthusiastic rhetoric. In the beginning Courts and legislators found mediation to be a very attractive proposition because it helped clear Court lists, did not require elaborate rules and could be conducted relatively cheaply. Mediation was also shown to have a high rate of success.

[4] Professor John Wade – Director, Dispute Resolutions Centre, Bond University – Current Trends and Models in Dispute Resolution: Part II – *ADRJ*, May 1998 113.

[5] Professor Lawrence Boulle, Bond University – Mediation Principles, Process, Practice – Butterworths 1996.

From the perspective of legal practitioners, there was the obvious attraction that mediation often resulted in a satisfactory commercial resolution for their clients, without the costs and risks of litigation. In addition there may have been the underlying consideration that a client who loses a case at litigation rarely blames themselves, but often looks for a scapegoat, who sometimes happens to be his own lawyer, resulting in the breakdown of a longstanding professional relationship.

My own impression is that there was initially little client demand for mediation, probably because of a fairly poor understanding and experience of the process. Most clients were encouraged into the process either by Court direction or by lawyer recommendation. However, familiarity with the process has created client demand, particularly amongst large-scale users of the Court system such as insurance companies and financial institutions.

The avalanche of mediation has seen its fair share of horror stories and disappointments. There is little doubt that some mediations are being conducted by poorly trained or unsuitable mediators. Some of the poorest mediators are untrained lawyers, who treat the mediation as an extension of a Court hearing and see their role as hearing submissions from the parties' legal advisers and making evaluations based upon their perception of their legal outcome. What has been called a 'lawyer-comfortable' model of mediation.

The breakdown of a mediation can result in enormous disappointment and frustration. The parties have invested a great deal of time and energy in the negotiating process with no apparent result. This is rarely to do with their own intransigence, or unrealistic expectations, but is generally related to some deficiency on the other side, or some failure on the part of the mediator to understand their case and to persuade the other party of the weaknesses in its case.

Many mediators find that mediation is not the dynamic and creative process they were taught to expect during some of the training courses. One experienced mediator has remarked:

> "I have really had it. If I hear one more word about the moral and spiritual uplift of being a mediator, I am going to find some other line of work. As far as I am concerned, it is just plain hard work."

However, there are many 'hardcore' disputes in which a successful commercial solution is able to be readily achieved in a very constructive problem-solving mediation.

I recently conducted a Court-ordered mediation involving a complex $39m claim by a large Australian retailing organisation, in respect of a state-of-the-art computerised distribution facility which allegedly failed to fulfil its requirements. The defendant was an American corporation, which had arranged for the manufacture and installation of the facility in Australia. The American company was represented at the mediation by its Corporate Counsel and Vice-President.

The negotiations were conducted essentially between the mediator and the Corporate Counsel for each party, excluding the rest of the large teams of lawyers and advisers. The negotiations were very commercial and a successful resolution was able to be achieved in 1½ days, avoiding the necessity for a hearing which was set down to occupy six weeks or longer.

Mediation as a creative process for dispute resolution

It seems to me that mediation offers a range of very attractive features, as a dispute resolution mechanism:

Cost-effectiveness – mediation is almost always a very cost-effective process. It is usual for mediations, even in very complex cases, to occupy no longer than a day. On some occasions, in very difficult matters, involving multi-party and multi-issued disputes, mediations may extend over two or three days, but hardly ever longer. At the same time complex commercial and construction disputes seem to be taking longer to litigate, because of the modern tendency to join every conceivable party and raise every conceivable claim, on the basis that some of them may succeed. Even the longest mediation is going to be cheaper than the cost of litigating the dispute.

Timing and flexibility – the advantage of mediation is that it can take place at any time, even before litigation is commenced, or expensive interlocutory and discovery procedures have taken place. More often than not mediation occurs after pleadings and discovery have been completed, but it is not unusual for the parties to sacrifice their depth of knowledge about the legal or factual merits, in favour of saving costs and seeking a settlement at an earlier stage. Indeed, the exchange of pleadings in litigation may often result in the making of claims and counterclaims which entrench the parties and camouflage the real issues in dispute.

Informality – even with 'new age' sensitive Judges, most parties still find Courts to be alien and daunting. The participants often feel that they lose control of the dispute, which is dealt with in a highly legalistic way. By contrast, mediation is generally conducted in a very informal environment around a conference table, away from the Court environment. The parties are given the opportunity to speak to each other and, if necessary, to point out how the dispute may have had emotional or personal impact. These matters are usually treated as irrelevant and inadmissible in a Court hearing, but may be very important in enabling a dispute to be resolved. Informality and flexibility of procedure are very attractive features of the mediation to clients, who feel far more in control of the dispute in a mediation process, than being a passive participant in Court.

Confidentiality and relationships – many parties prefer their disputes to be handled in a confidential private environment away from the glare of publicity. In addition, because mediation necessarily involves a consensual resolution, drafted by the parties themselves, there is still the possibility of preserving continuing

personal/business/professional relationships. Indeed, some resolutions in my experience will actually involve the parties taking part in future business ventures.

Creative and lateral solutions – mediation can give the disputants an opportunity to explore a range of creative settlement options which would simply not be available in a Court, including the resolution of associated disputes that are not part of a current litigation. I recently dealt with a dispute between four brothers over the family farms and other estate assets, following the death of their father. The dispute had occupied 14 years and had cost a great deal of money. The settlement which was able to be achieved required a complex partition and exchange of the various farm properties, a division of shares and other assets and various compensatory payments payable over several years. In addition, the State Trustee representing the infirm mother, who had a range of claims against the brothers, was able to join into the mediation, although it was not a party to the formal litigation. All of the disputes were resolved in a one-day mediation conference, leaving the brothers finally to get on with their lives.

It works – the ritual of mediation with the help of a good mediator consistently works surprisingly well, even in the most entrenched disputes.

The advantages of a third party neutral

A good mediator can have a powerful impact on the parties' negotiations. At the outset, a skilled mediator will ensure that the negotiations are a structured process, in which the parties exchange their points of view and are given the opportunity to access the strengths and weaknesses of the opposing point of view before settlement discussions commence. It is remarkable how often parties involved in litigation focus exclusively on their own case and fail to adequately understand or consider the opposing case. Sometimes, what is said by the other side at the mediation is a major revelation which requires a reassessment to be made of risks. Secondly, the mediator is able to assist the parties to move away from the strict legalities of the dispute and focus on their real interests and needs. Business parties are usually keen to achieve certainty and avoid undue risk – considerations which strongly favour an early commercial resolution. Finally, a sharp mediator is able to keep the momentum of the mediation going in the face of 'impasse', which occurs in almost every negotiation. A good mediator should be optimistic, persistent, creative and have a repertoire of strategic interventions readily available to keep the negotiations moving forward.

The promise fulfilled?

Perhaps the most important development in commercial mediation in Australia in the past few years has been the establishment of a small group of skilled mediation practitioners using problem-solving models, who have developed considerable experience in the mediation process and who have achieved a 'track

record' of high success in resolving large and complex commercial and construction disputes. At the same time, many lawyers have now obtained mediation experience and learnt mediation skills, including presentation and negotiation skills. Mediation is no longer an unknown product for most legal practitioners and their clients now generally receive a good briefing concerning the manner in which the mediation conference will be conducted, the way in which negotiations should progress and what realistic expectations they should have of the process. The use of experienced, respected commercial mediators increases the prospects of success of the mediation and certainly creates genuine expectations on the part of the participants that the dispute is likely to resolve at the mediation; which gives the mediation added momentum.

It is fair to say that in a remarkably short time mediation has reached the third phase and has become a recognised and accepted part of the Court fabric for resolving disputes, to the extent, certainly in Victoria, that most significant commercial and construction cases are now referred to mediation before experienced mediators, prior to trial.

Unfortunately, the greatest danger for mediation is its very success and acceptance and the increasing trend for Courts, Tribunals and legislators to impose mediation on all disputants as a matter of course, and to provide for mediation as part of the Court system. As a result, mediation is perceived by some parties and practitioners, not as a bold and innovative way to resolve their disputes, but as yet another expensive procedural 'hurdle', which has to be surmounted before a litigant can gain access to the Courts.[6] There is also a perception by some that the Courts have become a venue for the wealthy, and wealthy corporations who are able to get rapid access to the Courts, through the Commercial and Corporation Lists, whilst the middle class and the poor are channelled into highly pressurised coercive mediations, which are primarily aimed to reduce Court or Tribunal backlogs.

Many sessional mediators used in specialist Tribunals are poorly paid and have to deal with a huge workload of disputes, resulting in inevitable stress, burnout and poor performance.

Recently, a meeting of the Council of Chief Justices of Australia & New Zealand circulated a Draft Position Paper[7] declaring its support for mediation as an integral part of the Courts' adjudication processes, but also resolving to make mediation part of the Court system, so that mediations were fully funded by Government and conducted by Registrars or Court officers, and sometimes Judges, in accommodation attached to or associated with the Court.

[6] Professor Lawrence Boulle, Bond University – *Mediation Principles, Process, Practice*, Butterworths 1996.

[7] Council of Chief Justices of Australia and New Zealand: Court Annexed Mediation: Draft Position Paper – 18 June, 1998.

I think that such trends to institutionalise and regulate mediation run a very real risk of discrediting and weakening the process. In my experience, mediation works most successfully when the parties are able to select and pay for their own external mediator and the mediation takes place away from the Court, with a maximum degree of flexibility; unrestrained by strict process rules. Each dispute and each of the disputants needs to be treated as unique. The progress of any mediation can be highly unpredictable. Some cases can be settled in a short time, other cases require a longer time or even a number of sessions. The best mediators are flexible and innovative and adopt a dynamic problem-solving model, which functions best in an independent environment.

The alternative is a second rate, free or low cost mandatory mediation service involving poorly paid government-funded or sessional mediators imposed upon the parties, adhering to highly regimented uniform processes, who are under a great deal of pressure to achieve a high output of cases to fulfil 'success' quotas and save resources. The result will be exhaustion, stress and frustration amongst the mediators, as well as a likelihood that disputants will be subjected to coercive pressure to settle and disappointment.

This will invariably lead to a general lowering of the standard of mediation. This would be a sad outcome for such a creative, dynamic and successful process as mediation. Rather, mediation must be free to develop as a better way for society to deal with its disputes, a way that is responsive to the important human and social needs of the community, and a very valuable alternative to the traditional adversarial system of warring parties. As Winston Churchill has said "jaw jaw is better than war war".