The Wave of Change – Developments and Trends in Mediation

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Introduction

The title for this session suggests that there have been wide-spread and recent changes in the development and practise of mediation. However changes have been developing slowly over the years but appear to have gained momentum more recently, especially in the area of training and accreditation.

I will give a short historical introduction and conclude by outlining some of the recent trends that I have noticed in my mediation practice and what I have ascertained from senior mediation colleagues and from those who practise as advocates in mediations from time to time. I will also refer to two recent cases, one in Victoria and one in South Australia, that might be indicative of the court's attitude to mediation.

My views are based upon anecdotal material that I have observed since I first commenced mediating as part of my practice at the Victorian Bar in the mid-1980s. My observations are primarily focused on court referred, or court annexed, mediations in which litigation is either on foot or contemplated. I refer in the main to the Victorian experience. I understand that other speakers will be dealing with other jurisdictions.

The Wave of Change

What started as a mediation ripple in the mid to late 1980s became more prominent in the early to late 1990s when the Supreme Courts in New South Wales and Victoria conducted a 'purge' on the cases waiting to be heard in their lists by referring matters to what the Judges called mediation conducted by members of the legal profession. Following that experiment, Judges, particularly in Victoria, accepted mediation as an effective way to ease their lists. Litigation practitioners realised that unless they learned to surf the new wave of mediation they would be left out to sea floundering without the proverbial paddle. This attitude was reflected by the Chair of the Victorian Bar, Alex Chernov QC, (as he then was), in August 1992 in his paper to the First International Conference in Australasia on Alternative Dispute Resolution:

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> *'When ADR first started to make its presence felt, the Bar's attitude was a little like that of Voltaire to his confessor. On his death bed, Voltaire was asked whether he renounced the devil. His response was: this is not the time to make enemies.'*

The resistance of the profession to settling disputes other than by judicial determination was replaced, of necessity, by a culture that required practitioners to take the process seriously, particularly when Judges exercised their newly acquired power to compel parties to mediation with or without their consent.

The 'wave' of mediation popularity probably reached its peak in about the last 2-3 years but then receded as practitioners became more familiar and more comfortable with the process. Practitioners seemed to be more relaxed about the need to settle the dispute at the mediation. The various mediation courses taught by professional groups and universities reached and covered their market; practitioners who completed the courses and gained accreditation realised that they did not thereby get work as a mediator notwithstanding that they had had conferred on them credibility and status by being placed upon a list of mediators kept by the courts; and repeat litigants, particularly institutional litigants such as financiers and insurers, took a more robust view about what they wanted to achieve from an ADR process, and that did not necessarily mean settlement at the mediation. Many more cases that were not settled at the mediation were settled shortly after the mediation concluded.

For litigation practitioners, the wave of popularity of court referred (or court annexed) mediation might peter out again to a ripple in Victoria if Victorian Attorney-General, Rob Hulls' policy is implemented as funding is given to pre-litigation mediation conducted outside the legal profession. In a recent article in the National Newsletter of the Institute of Arbitrators and Mediators Australia, the Minister said:

> *'There is change afoot …*
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> *…*
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> *… Rather than launch an attack and then detour into mediation, our first port of call should be the most appropriate, least traumatic way of resolving the dispute. …*
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> *A straightforward way of doing this may be to make mediation compulsory before filing, rather than leaving it to be ordered by a court or tribunal once the battle lines are already drawn. …*
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> *…*
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> *It is perhaps ironic that the benefits of appropriate dispute resolution have, on the whole, been limited to the more privileged spheres, and, while highly paid executives mediate and conciliate away in boardrooms around the country, the majority of disputes, of interactions or collisions with the law, arise in the context of disadvantage …*
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> *We believe ADR should not be the bastion of privilege, and we are building on existing services and creating new ones at the coalface.*
>
> *That is why we have funded and legislated for new ADR programs run by Victoria Legal Aid, the organisation that deals with the manifestations of disadvantage. … This is also why we fully support the Dispute Settlement Centre of Victoria, which conducts about 700 mediations annually. …'*

Issues that were raised in the early 1990s are still being talked about, debated, and considered by various stakeholders, including the Law Societies and Bar Council sub-committees, the National Alternative Dispute Resolution Advisory Committee (NADRAC), the Australian Institute of Judicial Administration and others. The issues include accreditation, standards, guidelines, codes of practice, systems for managing complaints and the need for mechanisms and procedures to ensure the ongoing quality of mandated ADR.[2]

In 1993 I identified a number of what I described as '*Current Issues in Mediations*'.[3] They included questions as to the definition of ADR and mediation; whether or not mediators should undergo any and what training and assessment before being allowed to mediate; whether there should be any and what standards and protocols applied to mediations; whether there should be any and what criteria for selection of cases for mandatory mediation; whether or not the courts should have any and what role in approving or granting accreditation to suitable people to whom disputes were referred to by the court.

To the extent that these issues are still being discussed twelve years later without any universal acceptance and implementation, indicates that the wave of change in these very important areas is moving slowly.

Historical Context

Court referred (or court annexed) mediations began in Australia in the 1980s.[4] In the Victorian County Court Building Cases List, provision was made, in 1983, specifically for matters to be referred to mediators for resolution of cases. Court annexed mediation in the County Court of Victoria was described by Judge Lazarus, who was responsible for its introduction, as being 'A novelty devised as an experiment'.[5] His Honour, Judge Kellam who succeeded Judge Lazarus as the Judge in Charge of the Building Cases List of that Court, and later became a Judge of the Supreme Court of Victoria, and more recently and additionally, Chairman of NADRAC, described the initiative as 'One of the first quasi-formalised schemes of Court-administered mediation in the world'.[6]

The Federal Court has had an ADR program since 1987 integrated with case management. The Federal Court's ADR program began as a pilot program in the New South Wales District Registry in 1987. In June 1991 the *Federal Court of Australia Act 1976* was amended to introduce s 53A allowing the court, with the consent of the parties, to refer the proceeding or any part to a mediator or an arbitration for mediation or arbitration.[7] The Family Court now describes its ADR processes as 'Primary Dispute Resolution'.

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2 See eg Report by NADRAC to Commonwealth Attorney-General A Framework for ADR Standards, April 2001.

3 *Current Issues in Mediations*, prepared by Henry Jolson QC, for Law School, Bond University, September 1993.

4 The Family Court had an ADR program available since 1976.

5 Kellam J, *The Use of Mediation in County Court Construction Cases*, 4th International Conference in Australasia on Alternative Dispute Resolution, Melbourne, 12 November 1995.

6 Ibid.

7 *The Courts, Tribunals and ADR, Assisted Dispute Resolution in the Federal Court of Australia*, Chief Justice Michael Black of the FCA, 4th International Conference in Australasia on ADR, 12 November 1995.

The mediation movement in Australia gained impetus and credibility in the 1990s when the Supreme Courts of New South Wales and Victoria conducted what was described as 'Settlement Week' in New South Wales and 'The Spring Offensive' and 'the Autumn Offensive' in Victoria. In 1992, the then Chief Justice of the Supreme Court of Victoria, Mr Justice Phillips, was reported as saying that the problem of delay in the Supreme Court could only be resolved by a massive and mighty effort using mediation as a vehicle for getting cases resolved.[8]

This led to the so-called 'Spring Offensive' in Victoria in 1992, in which 762 cases waiting for trial were reviewed by a Panel of Judges. 280 were sent for mediation and 104 cases were settled at mediation.[9] Mediations were conducted primarily by Barristers and Senior Solicitors. There was no training in mediation required.

The Spring Offensive was regarded by the Court as a success gauged by a settlement rate of over 50%. The success of that initiative led to a further attack on the Civil List in the Supreme Court in March 1995 known as the 'Autumn Offensive' when 150 cases were referred to mediation and a total settlement rate of 79.35% was claimed.[10]

A similar purge on the list of cases awaiting trial in the Supreme Court of New South Wales had taken place earlier. That purge became known as 'Settlement Week'.

By 1993 mediation was described by one editor of the *Australian Law Journal* as 'the flavour of the year'.[11] Others described mediation as 'a novelty devised as an experiment.[12] Professor Boulle described it as 'a practice in search of a theory'.[13]

There were sceptics one of whom in 1993 questioned whether mediation was a waste of time.

> *"Although there are some compelling reasons in support of mediation, which no doubt explain why it has enjoyed the apparent success it has achieved to date, the likelihood is that mediation is properly classifiable as 'a fad' and that it will be utilised less, rather than more, frequently in the future."*[14]

History has proven otherwise.

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8 "Supreme Court Plans 'Offensive' to Cut Backlog", *The Age* Newspaper, 3 July 1992.

9 Report on Mediation in the Spring Offensive, 1992 Law Institute of Victoria.

10 The Courts, Tribunals and ADR; Paper given by Phillips CJ at the 4th International Conference in Australasia on Alternative Dispute Resolution, Melbourne, 12 November 1995.

11 Introducing a comment by Sir Laurence Street entitled '*The Courts and Mediation – a Warning*', 67 ALJ 491 (July 1993).

12 Kellam J, Use of Mediation in County Court Construction Cases, 4th International Conference in Australasia on ADR, Melbourne, 12 November 1995.

13 Boulle L, *Menke Legal Negotiation: A Study of Strategies in Search of a Theory*, (1983). Professor Boulle is a Professor of Law and Director of Dispute Resolution at Bond University, Queensland, former Chair of NADRAC and author of '*Mediation, Principles, Process & Practice*' (2005).

14 Griffin, JA '*Is mediation a waste of time?* (1993, unpublished paper).

Courts' Declaration of Principle

The mediation movement has gained strength from the courts, particularly in Victoria and South Australia, and from the work of NADRAC. The Council of Chief Justices of Australia and New Zealand, in March 1997 in an important statement, agreed that it is a function of the State to provide the necessary mechanisms for the resolution of disputes and that court annexed mediation was part of that process.

The Council made the following 'Declaration of Principles' relating to court annexed mediations.

1. Mediation is an integral part of the Courts' adjudicative processes and the 'shadow of the Court' promotes resolution.
2. 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.
3. Mediation ought to extend to appeals in appropriate cases.
4. Consensual mediation is highly desirable but, in appropriate cases parties can be referred where they do not consent, at the discretion of the Court.
5. The availability of mediation should not be seen as a reason for reducing funding to Courts. Mediation should be fully funded by Government.
6. The parties should be free to choose and pay their own mediator provided that where an Order is sought for such mediation, the mediator is approved by the Court.
7. Mediation ought to be available at any time during the litigation process but no referral should be made before litigation commences other than in the Family Court.
8. In each case, referral to mediation should depend on the nature of the case and be at the discretion of the Court.
9. 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.
10. Mediators must have appropriate statutory protection and immunity from prosecution.
11. Appropriate legislative measures should be taken to protect the confidentiality of mediations and the obligation of confidentiality should extend to the mediators themselves.
12. 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.
13. The Harmonious Rules for Court-Annexed Mediation endorsed by the Standing Committee of Attorneys General should apply, as varied for local conditions.
    (This is a reference to the model legislation and rules for court-annexed mediation as drafted by the Law Council of Australia and varied as required for each jurisdiction.)

14 Mediations should occur in properly designed and constructed accommodation attached to or associated with the Courts.

15 The success of mediation cannot be measured merely by savings in money and time. The opportunity of achieving participants' satisfaction, early resolution, and just outcomes are relevant and important reasons for referring matters to mediation.

The Declaration was made nine years ago. The Government has provided no funding for court annexed mediation (Declaration 5) and accreditation and standards of mediation (Declaration 9) has just recently been addressed.

Standards

In April 2001 NADRAC reported to the Commonwealth Attorney-General on the (then) current position of standards for ADR practitioners in Australia and on future directions for their development.[15]

In the introduction to the report NADRAC noted –

> *'Australian ADR is at an historic moment in its development. Initial pioneering work has led to the increasing acceptance and use of ADR in many areas. The national Alternative Dispute Resolution Advisory Council (NADRAC) has found overwhelming support for the development of standards for ADR in order to maintain and improve the quality and status of ADR, to protect consumers and to promote Australia's International Dispute Resolution profile.'*

NADRAC made 21 recommendations (set out at p 74 of its Report) and includes recommendations that:

- Standards for ADR be developed comprising guidelines for developing and implementing standards, a requirement for a Code of Practice, an appropriate and effective system for managing complaints, and where applicable, enforcement of such a code through appropriate means.
- Bodies which mandate or compel the use of ADR give special attention to the need for mechanisms and procedures to ensure the ongoing quality of mandated ADR.
- Programs be determined to identify the need for and nature of accreditation of ADR practitioners on a sector basis.
- Those responsible for accrediting ADR practitioners:
  - o clearly define the level of competence and responsibility recognised through the accreditation;
  - o use valid and reliable assessment procedures;
  - o provide monitoring, review or audit processes;
  - o provide fairness to those seeking accreditation;
  - o ensure that accreditation processes are transparent and publicly available;
  - o provide consistency and comparability with similar accreditation regimes.

15 A Framework for ADR Standards, April 2001.