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**Mediation in Australia: What Can Ireland Learn from Australia's
Promotion of Mediation?**

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1. Introduction

The landscape surrounding mediation in Australia has changed vastly since its inception. During its early stages, mediation existed in a form similar to Australia's physical landscape—rugged like its mountain ranges and rough like its endless desert plains. Since then, it has evolved into its own body of law—enshrined in statute, applied regularly by courts of all jurisdictions and used increasingly in commercial agreements.

This paper will first illustrate the development of mediation in Australia from early indigenous and colonial times up until the new millennium. It will start this illustration with an overview of the theoretical underpinnings of mediation. Following this, the two facets of mediation will be explored. This paper demarcates the two growing areas of mediation into (1) consensual mediation, and (2) court-annexed mediation. Each of these two areas will be explored in detail whilst the increased popularity and benefits of each will be investigated. Finally, the outlook of the future of mediation in Australia will be considered with respect to two major issues: the increasing cost of litigation and the national accreditation system.

Mediation is increasingly being used in all sectors of Australia. This paper will investigate which of these areas are experiencing major growth and the reasons for this increase. It will be concluded that Alternative Dispute Resolution (ADR), particularly mediation, is a constantly developing body of law and that given Australia's accommodating legislative landscape that mediation is likely to grow from strength to strength.

2. The Development of Mediation in Australia

2.1 Theoretical Underpinnings of Mediation

Mediation is the most widely used ADR mechanism in the Australian legal system. As Frank Saunders said “When people get into mediation, in many cases...they’re subsumed...in the warmth of mediation and the potential of the process to get [to a resolution] more amiably and more quickly.”¹

These benefits, the capacity to resolve disputes quickly, cheaply and with business relationships still intact, are the reasons that mediation is quickly becoming a popular option with commercial parties and governments throughout the world. The basis for mediation is the idea that the interaction between two interacting parties will be improved by an impartial third party’s input.² Mediation is based upon the idea that an integrated, party-led outcome will be more successful than one mandated by a third party. In this respect, mediation is fundamentally different from adversarial litigation or arbitration because it facilitates, indeed it encourages, a win-win outcome for the parties.³ Even where this does not occur,

¹ Steven Goldberg and Margaret Shaw, ‘The Past, Present and Future of Mediation as Seen through the Eyes of Some of Its Founders’, (2010) 26(2) *Negotiation Journal* 237 at 240.

² James Wall, John Stark and Rhett Standifer, ‘Mediation: A current review and theory development’, (2001) 45(3) *Journal of Conflict Resolution* 370 at 370.

³ Christopher Honeyman, Bee Chen Goh, Loretta Kelly, ‘Skill is not enough: seeking connectedness and authority in Mediation’, (2004) 20(4) *Negotiation Journal* 489 at 490.

mediation is still a beneficial exercise for the parties because it allows them to streamline their dispute in as amicable a fashion as possible.

A traditional understanding of mediation identifies mediation as comprising five distinct philosophies: confidentiality, voluntariness, empowerment, neutrality and a unique solution.⁴ Confidentiality is important in the mediation process because it encourages full and frank discussions and disclosure between the parties. Without this full and frank discussion, parties will find it difficult to properly resolve the underlying reasons for their dispute. The rationale for voluntariness is based upon the premise that people are more likely to co-operate in resolving the dispute if they choose to be involved.⁵ However, note that as will be discussed later, the court can order mediation even where one party is unwilling to participate, showing that the principle of voluntarism is no longer seen as fundamental.⁶ Mediation is empowering because it allows the parties to acknowledge that they can negotiate with one another and reach their own decisions. Mediation becomes empowering when parties can see the dispute clearly and can acknowledge that they have a range of options available to them.⁷ Any decision that arises from a mediation arises from the parties, and is therefore both empowering and more likely to be adhered to. To facilitate a successful negotiation, the mediator must be neutral. It is not the role of the mediator to arbitrate the dispute but to facilitate the process and allow the parties to own the content. What is most important in this process is that the mediator appears neutral to both parties.⁸ However, this neutrality can be in reference to the particular power balance occurring in the dispute. A mediator has the capacity to even out power imbalances between the parties and still be a neutral third party. Finally, it needs to be recognised that any resolution that the parties agree to does not need to adhere to any legal precedents or community norms (excepting illegalities).⁹ This allows freedom and creativity when discussing possible solutions rather than merely a discussion of legal rights and outcomes.¹⁰ Charlton argues that these principles are the fundamental basis for mediation.¹¹ While they have mutated over the years, for a mediation to be successful, it needs to combine these five elements.

Bouille has established four models of mediation to assist with understanding and defining the key tenets of mediation. Bouille's four models are: settlement, facilitative, transformative and evaluative mediation.¹² The two models most often used in commercial disputes are settlement and evaluative mediation, while facilitative and transformative mediation are more often used in community and family disputes. The main objectives of settlement mediation are to encourage incremental bargaining towards compromise, at a mid-point between the parties' original position.¹³ The mediator's main role is, therefore, to determine the parties' positions and persuasively intervene to move them in increments to points of compromise. The settlement model can be successful because the parties understand the process and it requires limited time and preparation. The settlement model of mediation can be unsuccessful if the mediator overlooks the parties' needs and interests. It can also be easily manipulated, particularly where there is a considerable power imbalance between the parties. In contrast, evaluative mediation combines the benefits of both mediation and arbitration.¹⁴ The purpose of evaluative mediation is to reach a settlement in accordance with the parties' legal rights and obligations. The highlighted problem with this model of mediation is that it does not teach the parties skills to take responsibility for disputes in the future.

⁴ David Spencer and Michael Brogan, *Mediation Law and Practice* (2006) at 85.

⁵ *Ibid.*

⁶ *Id* at 89.

⁷ *Ibid.*

⁸ *Id* at 92

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Id* at 84.

¹² Laurence Bouille, *Mediation: Principles, Process, Practice* 2nd ed, (2005) at 44 - 45

¹³ *Ibid.*

¹⁴ *Ibid.*

To get the most out of the mediation process it is important that mediators understand the different perspectives and theories of mediation and their applicable value. The capacity of the individual mediator to bring parties together in a conciliatory fashion is vital to the success of any mediation. Mediators can take either a facilitative or an evaluative approach to a mediation. The facilitative mediator will conceive his or her role as assisting the process rather than offering solutions, while an evaluative mediator will be significantly more involved in the content and the overall solution. In the commercial context, parties often expect and demand more than a facilitative approach to mediation because parties are concerned with having a cost and time effective outcome which is focused on legal rights and obligations.¹⁵

The success of the mediation can also be dependant upon the parties submitting to mediation willingly and with faith in its process.¹⁶ The parties' confidence in mediation as a viable medium of dispute resolution can be enhanced if the process is conducted according to accepted norms and well established legal principles. These norms and legal principles have the capacity to ensure that parties consider mediation to be an important ADR mechanism that has the capacity to resolve disputes cheaply and effectively. This leads parties to have faith in the process and submit to mediation in good faith. The theoretical basis for mediation has undergone significant change over the past 20 years. This is in keeping with the growth of mediation over the same period.

2.2 Indigenous and early colonial ADR

Dispute resolution with the use of a mediator dates back to early traditional societies. Despite any evidence of formal legal institutions there were often mechanisms of resolving conflicts within tribes and clans.¹⁷

In Australia, the aborigines have used consensual problem solving for thousands of years to resolve disputes within their communities. However, the indigenous conceptualisation of mediation bears limited resemblance to the Western model.¹⁸ The Aboriginal dispute resolution mechanisms were more concerned with empowerment of the community as a result of reaching a solution. Conversely, the Western goal of reconciliation of the parties focuses on the empowerment of the disputing individuals.¹⁹

Notwithstanding this, it is evident that mediation in its abstract form has been around since the beginning of time. Mediation was actively engaged in early colonial times in New South Wales.²⁰ It was albeit in a different form than how we view it today, however, there is certainly evidence of an informal process where neutral third parties assisted with the resolution of disputes.

2.3 The growth of Mediation since the late 1960s

Mediation as we know it today has really only developed in recent decades. The origin of modern mediation blossomed in the United States from the 1960s to early 1970s. Similarly, it was not until this time that a shift in interest towards informal dispute resolution mechanisms occurred in Australia. In Australia, ADR, and particularly the growth of mediation is evidenced in two broad categories: (a) community ADR, and (b) commercial ADR. This paper will distinguish these two categories in order to analyse how mediation has developed in recent decades.

(a) Community ADR

¹⁵ David Spencer and Michael Brogan, above n 4, 128.

¹⁶ Wall et al., above n 2 at 371.

¹⁷ David Spencer and Michael Brogan, *Mediation Law and Practice* (2006) 23.

¹⁸ Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 56, cited in Spencer and Brogan, above n 4, 24.

¹⁹ Ibid.

²⁰ See, eg, Bruce Kercher, *Debt, Seduction and Other Disasters: the Birth of Civil Law in Convict New South Wales* (1996).

The growth of mediation as an important mechanism for dispute resolution was largely influenced by the United States. For example, the New South Wales Government's move towards setting up a formal mediation program through Community Justice Centres was largely influenced by the neighbourhood justice centres in the United States.²¹

It is generally accepted that the modern era of ADR in Australia stems from 1979 which saw the then New South Wales Attorney-General, Frank Walker, establish a Co-ordinating Committee to test whether the large amount of disputes that had been unresponsive to court processes could be resolved quickly and inexpensively using a process of informal and voluntary mediation.²² This marked the beginning of the rise of government funded mediation centres (for example, the Community Justice Pilot in New South Wales [1980] and similar establishments in Victoria [1987] and Queensland [1990]). This process saw the growth of mediation in public issue disputes such as victim offender mediation and generally, community disputes and family disputes.

Developments in the area of family law have been among the fastest growing areas in ADR in Australia. The *Family Law Reform Act 1995* (Cth) formalised the importance of ADR techniques such as mediation by calling them the 'primary dispute resolution mechanism[s]'²³ with respect to family disputes. The establishment of the Family Law Court in 1975 was another fundamental stage that emphasised the increasing importance of mediation in Australia. It was important because it focussed on informal dispute resolution techniques, disputant empowerment and pre-trial processes which influenced the ADR movement. The *Family Law Act 1975* (Cth) provided counselling facilities and directed many property disputes for resolution before Registrars, rather than in court hearings.²⁴ However, these services were still envisaged as part of the 'court system' and it was not until the introduction of the 1995 Act that mediation was formally considered as a priority with respect to resolving family disputes.

(b) **Commercial ADR**

Although the Government has played an active role in facilitating the growth of mediation in Australia, the legal profession has been quick to follow suit. The advantages of mediation in the legal arena ensure that it is of value as an effective dispute resolution mechanism in private as well as public disputes. Further, larger institutions are increasingly using ADR mechanisms such as mediation in an attempt to avoid costly and lengthy court proceedings. One significant indicator of this growth has been the proliferation of ADR related legislation that has emerged to deal with the increasing array of services.²⁵ Legislation surrounding ADR has seen the number of statutes referring to mediation increase from a handful in the 1990s to in excess of one hundred to date.

In recent years, most commercial agreements include a dispute resolution clause as a means of resolving disputes arising out of the contract prior to litigation. Consequently, private and government institutions have been established to deal solely with issues of ADR in the commercial field. For example, the Australian Commercial Disputes Centre (ACDC) was established to provide rapid, consensual methods to resolve commercial disputes.

²¹ See, eg, Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (1992).

²² Wendy Faulkes, 'The Modern Development of Alternative Dispute Resolution in Australia' (1990) 1 *Australian Dispute Resolution Journal* 61, 61.

²³ See, eg, The *Family Law Reform Act 1995* (Cth) s 14E.

²⁴ Faulkes, above n 22, 62.

²⁵ Spencer and Brogan, above n 4, 31.

This shift reflects a move away from the purely logical debate of the perceived merits of a dispute, to a more in-depth analysis of the commercial needs and values of the parties.²⁶ The increased focus on 'building relationships' in business has encouraged companies to use ADR tools such as consensual mediation to ensure long lasting, profitable business arrangements.

The growth of ADR, including mediation, remains strong in Australia in the twenty first century. There are a number of peak bodies that advocate for the growth of mediation and continue to research its advantages on individuals and on the judicial system. The importance of these organisations will be outlined below and the most influential of them will be expounded.

2.4 Peak bodies and their impact on mediation

There are a number of influential organisations that have had and continue to have an impact on the development of ADR in Australia. Large, formal, professional organisations generally contribute by way of researching, training and or by increasing awareness of the different mechanisms of ADR. The main bodies in Australia include the Australian Commercial Disputes Centre, the Institute of Arbitrators and Mediators Australia, the Chartered Institute of Arbitrators and the National Alternative Dispute Resolution Advisory Council. The role and contribution of each of these organisations will briefly be outlined below.

The Australian Commercial Disputes Centre (**ACDC**) was established in 1986. Its primary roles are to resolve major commercial disputes and to decrease the amount of costly and time-consuming disputes heard in the courts. ACDC was established to introduce non-adversarial dispute resolution processes into Australia. These procedures have been rapidly accepted and adopted as part of the overall business and government approach to dispute resolution.²⁷

The National Alternative Dispute Resolution Advisory Council (**NADRAC**) was established in 1995. Its origins stem from a 1994 report by the Access to Justice Advisory Committee chaired by the Hon Justice Ronald Sackville: *Access to Justice - an Action Plan*. The report recognised the need for a peak national body to advise the Government, the Federal Court and tribunals on ADR issues with a goal of achieving and maintaining a high quality, accessible, integrated federal ADR system. The NADRAC is an independent, non-statutory body charged with providing policy advice to the Australian Attorney-General on the development of ADR and with promoting the use and raising the profile of alternative dispute resolution. Funding is provided through the Australian Government Attorney-General's Department.²⁸

The Institute of Arbitrators and Mediators Australia (**IAMA**) was founded in 1975 as a not-for-profit company limited by guarantee. It is now Australia's largest, independent and most experienced arbitration and mediation service. The IAMA has a strong commitment to multi-disciplinary fellowship and learning. The institute aims to serve the community, commerce and industry by facilitating efficient dispute resolution procedures including mediation. Members are represented in all States and Territories.²⁹

The Chartered Institute of Arbitrators (**CIArb**), founded in London in 1915, has 11,000 members spread over 100 countries. It is a professional body active in the settlement and determination of disputes by alternative dispute resolution processes. Traditionally, the CIArb focussed on arbitration, however, in recent years, it has added mediation and adjudication processes. The Australian Branch of the Institute maintains international and domestic panels of trained and qualified mediators. It has also taken on the

²⁶ Peter Dwight, 'Commercial Dispute Resolution in Australia: Some Trends and Misconceptions' (1989) 1 *Bond Law Review* 1, 4.

²⁷ Australian Commercial Disputes Centre <<https://www.acdcltd.com.au/>> at 14 March 2013.

²⁸ National Alternative Dispute Resolution Advisory Council <<http://www.nadrac.gov.au/>> at 14 March 2013.

²⁹ Institute of Arbitrators and Mediators Australia <<http://www.iama.org.au/>> at 14 March 2013.

status of a Recognised Mediator Accreditation Body (RMAB) to accredit its mediators to the new national standard.³⁰

3. The two facets of modern mediation practice

Broadly speaking, mediation can be constituted in two ways. First, parties may agree to resolve any disputes that arise between them by using mediation (consensual mediation). The second means is where a court refers parties to mediation in order to resolve the dispute before trial. These two areas are explored below.

3.1 Consensual mediation

Most modern agreements, whether they are industrial, commercial, domestic or international, contain some form of dispute resolution clause in order to resolve disputes when they arise. Mediation is probably the most popular choice of dispute resolution choice in contracts.³¹

(a) Reasons for consensual mediation

The rationale behind the insertion of an ADR clause into a commercial contract is that parties wish to avoid the potentially long, arduous, and costly process of litigation. Further, a successful, informal mediation process allows parties to continue a sound commercial relationship whilst settling a dispute, whereas litigation can potentially ruin the chance to salvage a positive relationship.

Another primary reason why parties opt for mediation as a form of dispute resolution is because the mediation process is largely confidential. Despite the increasing number of exceptions to confidentiality,³² obligations in respect of confidentiality have been affirmed by the common law.³³ Confidentiality fosters communication between the parties and helps maintain the neutrality of the mediator. This enables the dispute to be resolved swiftly by encouraging communication by both parties.

(b) Examples of consensual mediation in Australia

The use of mediation clauses in commercial contracts is increasing. This has encouraged a developing legal framework surrounding ADR mechanisms. Accordingly, the nature of this changing environment suggests the importance of accurately and appropriately drafting mediation clauses.

Mediation agreements will vary considerably in different jurisdictions. Additionally, the nature of the commercial agreement as well as whether the contract is domestic or international will impact how the clause should be drafted. Below is an example of a standard mediation clause based on the recommended clauses of the NSW Law Society:

Dispute

1. If any dispute arises out of this contract ('Dispute') a party to the contract must not commence any court or arbitration proceedings unless the parties to the Dispute have complied with the following paragraphs of this clause except where a party seeks urgent interlocutory relief.

³⁰ Institute of Arbitrators and Mediators Australia <<http://www.iama.org.au/>> at 14 March 2013.

³¹ Spencer and Brogan, above n 4, 408.

³² Amber Bernauer, 'Confidentiality' (2005) 16 *Australian Dispute Resolution Journal* 135, 136.

³³ See, eg, *AWA v Daniels* (1992) 7 ACSR 463 (Comm Div).

Notice of Dispute

2. A party to this contract claiming that a Dispute has arisen out of or in relation to this contract must give written notice ('Notice') to the other party to this contract specifying the nature of the Dispute.

Dispute Resolution

3. If the parties do not agree within seven (7) days of receipt of the Notice (or such further period as agreed in writing by them) as to:-

(a) the dispute resolution technique (eg. expert determination) and procedures to be adopted;

(b) the timetable for all steps in those procedures; and

(c) the selection and compensation of the independent person required for such technique,

the parties must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales, and, the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration.

Properly drafting a dispute resolution clause is fundamentally important because the enforceability of such clauses is dependent on a number of criteria. In *Aiton Australia Pty Ltd v Transfield Pty Ltd*,³⁴ Einstein J suggested four criteria that must be satisfied before a dispute resolution clause will be enforceable:

- (a) It must be in the form described in *Scott v Avery*.³⁵ Moreover, it should operate to make completion of the mediation a condition precedent to commencement of court proceedings.³⁶
- (b) The process established by the clause must be certain. There cannot be stages in the process where further agreement is required on some course of action before the process can proceed. If the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty.³⁷
- (c) The administrative processes for selecting a mediator and in determining the mediator's remuneration should be included in the clause and, in the event that the parties do not reach agreement, a mechanism for a third party to make the selection is necessary.³⁸
- (d) The clause should also set out in detail the process of mediation to be followed or it should incorporate these rules by reference. These rules will also need to state with particularity the mediation model that will be used.³⁹

³⁴ (1999) 153 FLR 236.

³⁵ (1856) 10 ER 1121. It was held in this case that parties may not contract to oust the jurisdiction of the courts but may make a dispute resolution process a condition precedent to litigation.

³⁶ (1999) 153 FLR 236, 252 (Einstein J).

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

The most contentious of these criteria is (b) whether or not the clause is 'sufficiently certain'.⁴⁰ The NSW Supreme Court concluded in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,⁴¹ that the general rule of requisite certainty is:

An agreement to conciliate or mediate is enforceable in principle, if the conduct required of the parties for participation in the process is sufficiently certain.⁴²

The uncertainty rule has been interpreted very narrowly. For example, it was held in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*⁴³ that:

[A]n agreement to mediate whereby parties merely agree to sign a mediation appointment agreement the terms of which have not been agreed upon as between the parties is not sufficiently certain to be given effect.⁴⁴

Therefore, drafters must ensure that they take care when drafting a dispute resolution clause within a contract. An 'agreement to agree' on terms or the procedure that will be followed should a dispute arise will be void for uncertainty.⁴⁵

The 2008 case of *United Group Rail Services Ltd v Rail Corporation New South Wales*⁴⁶ provides a contradicting opinion on scope of the uncertainty rule. The issue before the New South Wales Supreme Court was whether the requirement (within the written contract) to negotiate a construction dispute 'in good faith' was void for uncertainty. Detailed dispute resolution clauses were inserted into the contract. However, the plaintiff claimed that the clause requiring senior representatives of each firm to meet and undertake genuine good faith negotiations was void for uncertainty.

The presiding judge, Rein J, held that a provision requiring contractual disputes to be subject of negotiation in good faith is binding and enforceable.⁴⁷ His honour asserted that:

[A]n obligation of good faith in the performance of a contractual obligation has 'content' and is not void for uncertainty.⁴⁸

... Because I am of the view that 'good faith in negotiation' has content, I think that parties could legitimately gain comfort in extracting a promise from the other party that disputes will be the subject of good faith negotiations in attempt to resolve them.⁴⁹

⁴⁰ See generally, *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSW 194; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646.

⁴¹ (1992) 28 NSWLR 194.

⁴² *Ibid* 194 (Giles J).

⁴³ (1995) 36 NSWLR 709. Note that the New South Wales Court of Appeal declined to follow *Elizabeth Bay Developments* in *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177. However, the court was specifically concerned with the enforceability of an obligation of good faith as opposed to the certainty requirements of a mediation clause generally.

⁴⁴ *Ibid* 714 (Giles J).

⁴⁵ *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 252 (Einstein J).

⁴⁶ [2008] NSWSC 1364.

⁴⁷ *Ibid* para 15 (Rein J).

⁴⁸ *Ibid* para 13 (Rein J), See also *Burger King Corp v Hungry Jacks Pty Ltd* [2001] NSWCA 187; *Alcatel Australia Pty Ltd v Scarcella* (1998) 44 NSWLR 349; *JF Keir Pty Ltd v Priority Management Systems Pty Ltd* [2007] NSWSC 789.

⁴⁹ *Ibid* para 15 (Rein J).

The negotiation clause was held to be valid and enforceable notwithstanding that the parties had a broad requirement to meet and resolve disputes (after they arise) in good faith. The decision of Rein J was later affirmed by the full court of the New South Wales Court of Appeal.⁵⁰

The general rule surrounding certainty of a dispute resolution clause is complex and continually changing as is evidenced by the aforementioned cases. Accordingly, contract drafters should ensure that the clause is of sufficient certainty by making sure that all terms are agreed upon and nothing is 'left open' for the parties to determine at a later date.

(c) **Enforcing a mediation agreement**

It should be noted that no court in Australia has ever enforced a mediation clause by specific performance. However, there is an increasing trend for courts to encourage the enforcement of a valid agreement to mediate. A number of courts have indirectly enforced mediation clauses by ordering a stay of curial proceedings. The importance of encouraging parties to adhere to their commercial contracts was expounded by Giles J in *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*:⁵¹

[T]he inherent jurisdiction of the court [is] to prevent abuse of its process in accordance with the principle stated by MacKinnon LJ in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 126:

... namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them will be otherwise determined.⁵²

Given that the concept of abuse of process applies across all jurisdictions in Australia, the indirect enforcement of mediation clauses by staying proceedings is commonly used by the courts.

3.2 Court-annexed mediation

Alternative, non-adjudicative dispute resolution mechanisms have been utilised by Australian courts. State, Territory and Federal legislatures have introduced various court and tribunal-annexed schemes that operate within their respective jurisdictions. For example, the *Courts (Mediation and Arbitration) Act 1991* (Cth) provides a legislative framework for the use of mediation in the Federal Court of Australia as well as the Family Court of Australia.

(a) **Reasons for court-annexed mediation**

Court annexed mediations have existed in Australia since the late 1970s.⁵³ Mediation as a means of dispute resolution has been used by the courts for two reasons:

(i) Case Management

Initially they were used for the purposes of case management. For example, in 1983 in the Victorian County Court Building Cases List, provision was made specifically

⁵⁰ *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177.

⁵¹ (1992) 28 NSWLR 194.

⁵² *Ibid* 211 (Giles J).

⁵³ The Family Court has utilised an alternative dispute resolution mechanisms since 1976.

for matters to be referred to mediators for resolution of cases.⁵⁴ Subsequently, courts from a variety of jurisdictions have used mediation to alleviate pressures on the court system.

Court-annexed mediation frees up resources of the courts as it enables them to avoid wasting time on cases that should have been resolved at an early stage in the dispute. The primary objective of mediation in this instance is to reduce delays and costs in unnecessarily prolonged court proceedings.⁵⁵

(ii) Utilising the advantages of mediation

More recently, there has been a move away from utilising ADR methods for the purposes of purely case management towards a realisation of the true advantages of ADR. Accordingly, courts are using ADR including mediation as a separate and interlinked system of dispute resolution.⁵⁶

The Family Court is the most relevant example of how a court can use the advantages unique to mediation. In parental disputes over children, for example, mediation has made inroads into the adversarial system, which has previously caused problems in many sensitive family law cases. The capacity to resolve a dispute without creating an excess amount of tension between the parties is an advantage that extends to many civil cases outside the area of family law.

(b) **Examples of court-annexed mediation in Australian Courts and Tribunals**

Legislators, by enshrining ADR methods into statute, have reiterated the importance and efficiency of such methods. In Australia, there are a plethora of court-related mediation provisions throughout a variety of federal and state statutes. It is outside the scope of this paper to venture into great detail of all of these statutes, however, an ancillary glance at the different courts as well as some relevant legislation will be provided below.

(i) Administrative Appeals Tribunal

The Administrative Appeals Tribunal (AAT) provides a legislative framework for a court-annexed mediation program pursuant to section 34A of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**). The AAT reviews decisions made by the Commonwealth Government, its ministers, officials and authorities (namely, the Executive).

Section 34A(1) of the AAT Act allows the President of the Tribunal to refer the dispute to mediation if it is deemed appropriate and with the consent of the parties.

(ii) Fair Work Australia (FWA)

The FWA, through the *Fair Work Act 2009* (Cth) has continued the trend of using ADR techniques to resolve disputes. The *Fair Work Act 2009* (Cth) allows the FWA to attempt to conciliate or mediate disputes.⁵⁷

(iii) Family Court of Australia

⁵⁴ Henry Jolson QC, 'The Wave of Change - Developments and Trends in Mediation' (2006) 25(1) *The Arbitrator & Mediator*, 63.

⁵⁵ Tania Sourdin, "Alternative Dispute Resolution" (2nd ed, 2005), 12.

⁵⁶ The Hon James Spigelman, 'Mediation and the Court' (2001) 39 *Law Society Journal*, 63.

⁵⁷ *Fair Work Act 2009* (Cth) s 595.

The Family Court of Australia encourages mediation as a main form of dispute resolution. Numerous provisions referring to mediation permeate the *Family Law Act 1975* (Cth),⁵⁸ the *Family Law Regulations 1984* (Cth)⁵⁹ and the *Family Law Rules 2004* (Cth). These provisions reiterate the importance of mediation and promote it as a 'primary dispute resolution' mechanism within the Family Law framework.

The move towards mediation as a 'primary dispute resolution' (PDR) tool recognises that 'for the vast majority of clients PDR is the first, and often the last, intervention process they encounter with the Family Court'.⁶⁰ As mentioned previously, developments in the area of Family Law have been amongst the fastest growing in the area of ADR in Australia in modern times.

(iv) Federal Court of Australia

Section 53A of the *Federal Court of Australia Act 1976* (Cth) outlines the availability of ADR methods within the Federal Court of Australia. The Federal Court has had the power to refer disputes to mediation without the parties' consent since 1997.⁶¹

The 'Assisted Dispute Resolution' program (which commenced in 1987) involved the mediation of disputes by registrars of the Federal Court. Registrars have conducted mediations dealing with a wide range of issues from asylum seeker interventions to trade practices disputes.

(v) Federal Magistrates Court

The *Federal Magistrates Act 1999* (Cth) defines primary dispute resolution as non-judicial dispute resolution procedures and services.⁶² Amongst other ADR mechanisms, mediation is included as a form of primary dispute resolution, which is encouraged under this Act. In fact, Federal Magistrates have a duty⁶³ to consider whether it is appropriate to advise parties about the primary dispute resolution processes that could be used to resolve any matter involved in the relevant dispute. Following this, the Federal Magistrates Court should encourage the parties to make use of the primary dispute resolution process.⁶⁴

(vi) National Native Title Tribunal

The National Native Title Tribunal (NNTT) was created by the enactment of the *Native Title Act 1993* (Cth). This Act provides for mediation as a means of resolving disputed matters relating to native title and compensation applications.

The NNTT is an administrative body whose primary role was to provide a mediation service in relation to applications under the Act. The *Native Title*

⁵⁸ See, eg, s 13 B - approval of mediation organisations; s 14 - use of primary dispute resolution; s 19 B - invoking mediation; s 19 B - court may advise parties to seek mediation; s 19J - advice to parties on mediation; s 19 M - mediator and arbitrator immunity.

⁵⁹ See, eg, reg 59; reg 60; reg 61; reg 62; reg 63 - conduct of mediation; reg 64; reg 65.

⁶⁰ Angela Filippello, 'Simplifying Forms and Procedures to Meet Client Needs' (paper presented at AIJA Court Administrators' Conference, Sydney, 21 August 1997) cited in Sourdin, above n 54, 104.

⁶¹ See *Federal Court of Australia Act 1976* (Cth) s 53A. See also s 53A(1) and (1A) as amended by the *Law and Justice Legislation Amendment Act 1997* (Cth).

⁶² *Federal Magistrates Act 1999* (Cth) s 21.

⁶³ *Federal Magistrates Act 1999* (Cth) s 22.

⁶⁴ *Federal Magistrates Act 1999* (Cth) s 23.

Amendment Act 1998 (Cth) inserted a number of new provisions into the original Act confirming that the primary role of the Tribunal was to provide mediation services. This position changed in July 2012, however, with the Federal Court of Australia becoming wholly responsible for all native title mediation.⁶⁵

(vii) District Court (NSW)

Section 164A of the *District Court Act 1973* (NSW) allows the District Court to refer parties to mediation with or without their consent. It provides also that if the parties cannot agree on who will mediate the dispute that a mediator may be appointed by the court.⁶⁶

(viii) Supreme Court (NSW)

The *Supreme Court Act 1970* (NSW) allows the Court to order, in appropriate circumstances, that any proceedings or part of any proceedings before it, with the exception of criminal proceedings, be referred to mediation. In 2000, s 110K of the *Supreme Court Act 1970* (NSW) was amended such that the parties need not consent to mediation.⁶⁷ The Supreme Court must appoint the mediator⁶⁸ and the parties to the proceedings are under a duty to participate in the mediation in 'good faith'.⁶⁹

As mentioned previously [see 3.2(a)(i)], the rationale behind moving towards compulsory mediation is that the court must utilise its limited resources to improve case management such that cases that are likely to be resolved early in the process can be removed from that process as soon as possible.⁷⁰ This logical reasoning is behind the growth of court-annexed mediation within this jurisdiction. Given that there is a back log of cases in the Supreme Court it must look for innovative ways to improve efficiency (without forgoing quality) to reduce this excess load—compulsory mediation is one of the most effective of these techniques.

(ix) Land and environment court (NSW)

Section 34 of the *Land and Environment Court Act 1979* (NSW) allows parties to apply to the Land and environment court for referral to mediation of a matter arising in proceedings. If the mediation is successful, the commissioner must dispose of the proceedings in the terms of the parties' agreement.⁷¹ If mediation is terminated, the proceedings will be restored to the court.

(c) **Case law on court-annexed mediation**

Given that court-annexed mediation is still a relatively new and developing concept in Australia,⁷² there are often legal issues that arise surrounding mandatory mediation schemes.

⁶⁵ National Native Title Tribunal, *Budget Statement 2012-2013* (2013) available at <<http://www.nntt.gov.au>> accessed 14 March 2013.

⁶⁶ *District Court Act 1973* (NSW), Pt 5.

⁶⁷ *Supreme Court Act 1970* (NSW), s 110K(1).

⁶⁸ *Supreme Court Act 1970* (NSW), s 110K(2).

⁶⁹ *Supreme Court Act 1970* (NSW), s 110L.

⁷⁰ Spigelman, above n 55, 63.

⁷¹ *Land and Environment Court Act 1979* (NSW) s 34(3).

⁷² Although, the concept of court-annexed mediation is not new, the concept of mandatory mediation is.

There have been numerous cases that have dealt with court-annexed mediation, and this case law has consequently clarified many issues that have arisen.

The issue of a court's discretion to order mediation under the *District Court Act 1967* (Qld) was considered in *Barrett v Queensland Newspapers Pty Ltd*.⁷³ Samios DCJ concluded that it is inappropriate to approach the existence of discretion to refer a matter to mediation via a consideration of the prospects of success of mediation. His honour emphasised that a court may refer a dispute to mediation whenever it sees it as an appropriate means to resolve the dispute:

[I]n my opinion a mediation provides the best opportunity for a dispute to resolve, notwithstanding one or more parties to the dispute say convincingly the mediation will not succeed in resolving the dispute. I ask rhetorically why do so many disputes resolve on the door step of the court? A solution to the dispute must have been found and why could that solution not be found earlier!⁷⁴

The question of whether a mediation by an external mediator should be ordered against the desires of one of the parties was considered in *Hopcroft v Olsen*.⁷⁵ In this case the plaintiffs applied for an order for compulsory mediation specifying an appropriately qualified person to be decided by the court as mediator. The defendants opposed to the making of such an order arguing that it would be futile as all the claims were fiercely contested. In his judgement, Perry J asserted that regardless of how remote the chance of settlement may appear, there are countless instances when matters have successfully been resolved through mediation. His honour concluded that the current practice of the court was to encourage alternative dispute resolution.⁷⁶

Despite the existence of a 'general rule' against referring parties to an external mediator without both parties' consent,⁷⁷ Perry J was not convinced by the arguments against mediation in this instance. His honour felt that it would not be right to read down s 65(1) of the *Supreme Court Act 1935* (SA) which gave the court the jurisdiction to order mediation even if one or more of the parties may not consent to it. Thus, his honour ordered in favour of the plaintiff and ordered that the dispute be heard by a mediator.

These judgements emphasise the recognition of the importance of mediation in Australia's legal framework. Court-annexed mediation is being increasingly utilised by courts of all jurisdictions. As evidenced in the aforementioned cases, courts (across different jurisdictions) in Australia have a large discretion to refer disputes to mediation. Court-annexed mediation is still a developing concept and given the advantages of alleviating pressure from the court system, one would envisage its continual growth.

(d) **The effects of court-annexed mediation**

Court-annexed mediation is an evolving concept and as is no doubt evident from the plethora of recent legislation surrounding it, it is still in its early stages of growth. Furthermore, the nature of court-annexed mediation varies across jurisdictions and between courts. Accordingly, it is difficult to measure the success of court-annexed mediation as a general concept.

It is clear that mediation has relieved pressure from the Federal Court of Australia in particular. According to the Federal Court's 2011/2012 annual report, a total of 583 matters

⁷³ (1999) 20 Qld Lawyer Reps 104.

⁷⁴ *Barrett v Queensland Newspapers Pty Ltd* (1999) 20 Qld Lawyer Reps 104, 107 per Samios DCJ.

⁷⁵ [1998] SASC 7009.

⁷⁶ *Ibid* 27 (Perry J).

⁷⁷ *Ibid*, 32 (Perry J).

were referred to mediation in that period.⁷⁸ The number of matters that are either resolved or partially resolved at mediation has also increased over recent years to 61%.⁷⁹ Mediations have continued and increasing use shows that court-annexed mediation has significant advantages at resolving disputes prior to litigation and relieving pressure on the court system.

4. Factors affecting the future growth of mediation in Australia

4.1 Introduction of Pre-Litigation Requirements

The introduction of pre-litigation requirements in both the Federal and New South Wales jurisdictions has the capacity to greatly expand the use of ADR mechanisms and highlights both governments' approval of ADR techniques in dispute resolution. The purpose of these requirements is to encourage ADR as the forerunner to considering formal litigation and to encourage both professional and public awareness of ADR as a preeminent dispute resolution mechanism.⁸⁰

(a) Civil Dispute Resolution Act 2011 (Cth)

The *Civil Dispute Resolution Act 2011* (Cth) came into force in August 2011. It mandates that parties must take "genuine steps" to resolve the dispute before commencing litigation in the federal courts.⁸¹ The parties must file statements outlining the genuine steps that they have taken before beginning litigation.⁸² The requirements do not preclude the parties from litigating without taking genuine steps to resolve the dispute, but the failure to take steps to resolve the dispute pre-litigation may impact upon costs orders and increase the likelihood of court annexed mediation being recommended for case management purposes.⁸³ The requirement of 'genuine steps' is based upon NADRAC's recommendations.⁸⁴ NADRAC recommended that a flexible approach be instituted so as to allow the parties a range of options to choose from.⁸⁵ While the options that parties can consider include both formal and informal dispute resolution mechanisms, there is an explicit affirmation of formal ADR processes within the Act.

The Act constitutes the Federal Government's response to the NADRAC report 'The Resolve to Resolve' which strongly advocated for pre-litigation steps to be included in any regime to boost involvement in ADR and to make the practice the natural forerunner to any steps in litigation.⁸⁶ NADRAC argued that the more that ADR is used to resolve disputes and provide benefits to the parties, the more receptive lawyers and disputants will be to its use. It is for this reason that "genuine steps" does not include too prescriptive a regime, and does not prescribe a high burden of cost or time on the parties.

(b) Courts and Crimes Legislation Further Amendment Act 2010 (NSW)

The *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) inserted the requirement that parties must take reasonable steps before commencing litigation into the *Civil*

⁷⁸ Federal Court of Australia, 'Annual Report 2011-2012' (2012), 33.

⁷⁹ Ibid 36.

⁸⁰ *Civil Dispute Resolution Bill 2010* (Cth), Explanatory Memorandum, 2.

⁸¹ *Civil Dispute Resolution Act 2010* (Cth), s 4.

⁸² *Civil Dispute Resolution Act 2010* (Cth), ss 6-7.

⁸³ *Civil Dispute Resolution Bill 2010* (Cth), Explanatory Memorandum, 2.

⁸⁴ *Civil Dispute Resolution Bill 2010* (Cth), Explanatory Memorandum, 2.

⁸⁵ National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*, (2009), 31.

⁸⁶ Ibid.

Procedure Act 2005 (NSW).⁸⁷ This ensures that parties take reasonable steps to resolve the dispute or to at least narrow the issues in dispute. The standard of reasonable steps is defined by the pre-litigation protocols and is very similar to the genuine steps requirement outlined in the Commonwealth Act. The amendments operating in a very similar way to those outlined in the federal legislation and will very likely increase the usage of mediation as a pre-litigation step.

(c) **Requirements in Other States**

Currently no other state has pre-litigation requirements. The previous Victorian government introduced a regime but this has since been repealed by the new conservative government. The Victorian government argued that the regime added costs and had the capacity to allow parties to frustrate proceedings or attempts at settlements.⁸⁸

4.2 Costs of formal dispute resolution

Dispute resolution processes used for commercial disputes reflect the requirement of quick, inexpensive processes which allow parties to maintain commercial goodwill.⁸⁹ Mediation and other ADR techniques are generally accepted as a cheaper alternative, and on that basis there has been an increase in these methods to resolve disputes. Conversely, long and arduous litigations can be expensive for both parties.

Recently in Australia, there has been much talk about the unreasonable amount of money spent on some commercial disputes. Most notably, the *Seven Network Limited v News Limited*⁹⁰ which was described by Sackville J (the presiding judge) as a 'mega-litigation'. Sackville J went on to state:

An invariable characteristic of mega-litigation is that it imposes a very large burden, not only on the parties, but on the court system and, through that system, the community.⁹¹

His honour elucidated that he himself was surprised at the excessive amounts of money spent on this case. He estimated that 'the parties have spent in the order of \$200 million on legal costs in connection with these proceedings'⁹² and he questioned whether the amount of money spent was justified given the amount of damages claimed in the case. For example, Seven claimed between \$194.8 and \$212.3 million when its final submissions were made.⁹³ Sackville J concluded that '[t]he maximum amount at stake in this litigation has not been very much more than the total legal costs incurred to date'.⁹⁴

His honour quite forthrightly labelled the *C7 Case* litigation 'extraordinarily wasteful'⁹⁵ and bordering on the 'scandalous'.⁹⁶

The *C7 Case* is but one example, albeit an extreme one, of how litigation can be costly in commercial disputes. Logically, the legal costs for long, drawn out disputes will accumulate. Bearing this in mind, many companies now opt for ADR clauses within their commercial contracts. ADR techniques, such as mediation, are likely to be far less 'wasteful' whilst achieving similar results.

⁸⁷ *Civil Procedure Act 2005* (NSW), ss 25-41.

⁸⁸ Victoria, Parliamentary Debates, *Legislative Assembly*, 10 February 2011, 307 (R Clark - Attorney General) 207.

⁸⁹ Boule, above n 12, 214–215.

⁹⁰ [2007] FCA 1062 (*C7 case*).

⁹¹ *Ibid* para 2 (Sackville J).

⁹² *Ibid* para 8 (Sackville J).

⁹³ *Ibid* para 9 (Sackville J).

⁹⁴ *Ibid*.

⁹⁵ *Ibid* para 10 (Sackville J).

⁹⁶ *Ibid*.

4.3 National accreditation scheme

Since 2001,⁹⁷ there has been much discussion about the need for a national accreditation scheme for mediation in Australia. NADRAC has been instrumental in lobbying for a national system for accrediting mediators.

The National Mediator Accreditation System (NMAS) commenced operation on 1 January 2008. It is an industry-based scheme that relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards. These organisations are referred to as Recognised Mediator Accreditation Bodies (RMABs).⁹⁸

In its discussion paper released in 2004, *Who Says You're A Mediator?*, NADRAC defined accreditation as:

[T]he process of formal and public recognition and verification that an individual, (or organisation or program) meets, and continues to meet, defined criteria. An accrediting body or person is responsible for the validation of an assessment process or processes, for verifying the ongoing compliance with the criteria set through monitoring and review, and for providing processes for the removal of accreditation where criteria are no longer met.⁹⁹

NADRAC suggested that there was a need to move towards a national scheme because it would promote the following objectives:¹⁰⁰

- enhancing the quality and ethics of mediation practice;
- protecting consumers of mediation services;
- building consumers confidence in mediation services; and
- building the capacity and coherence of the mediation field.

Bearing the importance of these factors in mind, a consensus was reached in 2006 as to the basic characteristics of the National Mediator Accreditation Scheme. This scheme was intended to develop a framework and documentation to guide the implementation of the National Mediation Accreditation System. Proposals were discussed and accepted at the National Mediation Conference in May 2006.

Nation-wide accreditation standards have been developed in order to enhance the quality of national mediation services in Australia. They also aim to facilitate consumer education and build consumer confidence in ADR services, improve the credibility of ADR and help build the capacity and coherence of the ADR field.

With consistent standards across Australia, mediation and other ADR tools are being used increasingly and on a larger scale. Therefore, it can be reasonably inferred that the successful implementation of this project over the coming years will cause a continued increase in the use of mediation.

⁹⁷ See, eg, National Alternative Dispute Resolution Advisory Council, 'A Framework for ADR Standards' (2001) available at <<http://www.nadrac.gov.au/>> at 14 March 2013.

⁹⁸ National Alternative Dispute Resolution Advisory Council, *National Mediation Accreditation System* <<http://www.nadrac.gov.au/>> at 14 March 2013.

⁹⁹ National Alternative Dispute Resolution Advisory Council, 'Who Says You're a Mediator? Towards a National System for Accrediting Mediators' (March 2004), 3.

¹⁰⁰ Ibid.

5. Conclusion

Whilst the courts, legislature, peak professional bodies and businesses continue to extol the virtues of mediation in Australia, it appears that it will continue to grow and develop as an alternative method of dispute resolution. The benefits of mediation over litigation and other ADR tools are becoming increasingly apparent and accordingly many firms are opting to draft mediation clauses within their commercial contracts. Furthermore, the court system is utilising the benefits of mediation to alleviate the pressure from their lack of resources.

Australia's successful implementation of various mediation schemes has proven that effective legislation, a supportive judiciary and an innovative legal culture are key ingredients in promoting the use of mediation. That is not to say that there are no issues in the way that mediations are conducted in Australia. The debate continues as to how to best approach teaching ADR in law schools, as well as how to address issues with power positions in mediation involving individuals, such as family disputes. Given the way that the mediation framework has developed thus far, however, mediation in Australia looks to a very promising future.

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