Articles

Mandatory and quasi-mandatory mediation

Philip McNamara[*]

Over the last 30 years, mediation has become an important weapon in the case flow management regimes of courts in Australia and elsewhere, and an important element in the courts' attempts both to promote the efficient and economic disposition of litigation and to improve access to justice. This article seeks to trace the introduction of court-sponsored mediation in superior courts in Australia and the evolution of mediation from a purely voluntary process to a step in proceedings which is compulsory or quasi-compulsory. The article also outlines the forms of compulsory and quasi-compulsory mediation in Australia. In addition, the article seeks to set out the manner in which superior courts in Australia exercise their statutory discretion to compel mediation, and the competing arguments for and against mandatory and quasi-mandatory mediation.

Introduction

Modern interest in Alternative Dispute Resolution ('ADR'), including mediation, in the Western world can be traced back to the work of Professor Frank Sander of Harvard University in 1976.[1] The subsequent development of ADR in the United States, England and Australia can be attributed ultimately to his pioneering work. Over the 2 decades following 1976, statutory power was conferred on most superior courts in Australia to refer civil matters to mediation without the consent of all parties.[2] Action in Australia was prompted, at least in part, by developments in England and, specifically, by the release in 1995 and 1996 of what became known as the interim and final Woolf Reports on Access to Justice ('Woolf Reports').[3] Those reports were instrumental in transforming judicial attitudes to dispute resolution both in England and Australia.

However, whilst one of the objectives of those reports was to make ADR integral to the civil justice system in England and Wales, the method of implementation of the reports failed to achieve that objective. The Woolf

* Murray Chambers, Adelaide. This is an abridged version of a paper delivered at the Australian Commercial Law Conference sponsored by the Law Society of South Australia on 21 February 2019.

1 Frank Sander, 'Varieties of Dispute Processing' (1976) 70 *Federal Rules Decisions* 79, 111.

2 *Federal Court of Australia Act 1976* (Cth) s 53A; *Civil Procedure Act 2005* (NSW) s 26; *Civil Proceedings Act 2011* (Qld) s 43; *Alternative Dispute Resolution Act 2001* (Tas) s 5(1); *Civil Procedure Act 2010* (Vic) s 48(2)(c); *Supreme Court Act 1935* (WA) s 167(1)(q)(i).

3 Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HM Stationary Office, 1996); Sir Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor's Department, 1995) ('Woolf Reports'). As to the implementation of the report and its impact on civil procedure and mediation practice in the United Kingdom, see Miryana Nesic, 'Mediation — On the Rise in the United Kingdom?' (2001) 13(2) *Bond Law Review* 10.

Reports were followed in England by a number of enquiries, rules amendments and pilot schemes in different courts.[4] Some of those schemes are reported to have been unsuccessful, whilst others are reported to have succeeded. The *Civil Procedure Rules 1998* (UK), introduced in England in the wake of the Woolf Reports authorise the court to encourage mediation, but stop short of compelling it. The dominant view held until recently in England was that, whilst judges should actively encourage mediation, 'parties should never be compelled to mediate'.[5]

Nevertheless, having made a slow start, mediation in the United Kingdom is finding growing acceptance and yielding greater success rates. The latest available audit, conducted in May 2016 by the English Centre for Effective Dispute Resolution ('CEDR'), found that approximately 10,000 cases were mediated each year in the United Kingdom following the Jackson reforms in 2013.[6] The mediators who took part in the CEDR survey which gave rise to the audit reported that approximately 2/3 of matters were settled on the day of the mediation, with a further 19% settling shortly thereafter, producing a combined success rate of 86%. (I am not aware of any corresponding audit in Australia.)[7]

Some jurisdictions within Australia were quicker than others to follow the lead of the United Kingdom. At the same time, some Australian jurisdictions went further than the United Kingdom, in that power to make orders compelling mediation, without the consent of the parties, was conferred on superior courts, as a means of managing civil matters. Since publication of the Woolf Reports, parliaments in all Australian jurisdictions have conferred power on the superior courts of each jurisdiction to compel mediation in civil proceedings.

The Supreme Court of Victoria commenced referring proceedings to mediation in the 1980s. It has been reported that, before the end of that decade, no civil case in Victoria, except for appeals and matters by way of judicial review, went to a full hearing without at least one round of mediation.[8] The Victorian judiciary has continued to support mediation as a form of

4 See generally Susan Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (Oxford University Press, 2013) ch 16.

5 Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009) 361 [3.4] ('Jackson Report'), see generally ch 36.

6 CJC ADR Working Group, Civil Justice Council, *ADR and Civil Justice* (Interim Report, October 2017) 16 [4.10] ('CJC Working Group Report'). See also Blake, Browne and Sime (n 4) 8 [1.18]–[1.19].

7 See the statistics referred to by Chief Justice T F Bathurst, 'The Role of the Courts in the Changing Dispute Resolution Landscape' (2012) 35(3) *University of New South Wales Law Journal* 870, 876; and Vicki Waye, 'Mandatory Mediation in Australia's Civil Justice System' (2016) 45(2–3) *Common Law World Review* 214, 224–5 ('Mandatory Mediation').

8 Justice Murray Kellam, 'Launch of Report Mediation in the Supreme and County Courts of Victoria' [2009] *Victorian Judicial Scholarship* 4, quoted in John Muir, 'The Past and Potential Expansion of Dispute Resolution within the Court System: The Mediation Revolution, Adverse Consequences and Future Trends' (2016) 35(1) *Arbitrator and Mediator* 8, 9.

dispute resolution. In 2007, civil appeals in Victoria began to be selectively referred to mediation, following a change in English practice, reportedly with considerable success.[9]

The Supreme Court of Queensland was armed with power to compel mediations in 1991.[10] Subsequently, the *Uniform Civil Procedure Rules 1999* (Qld) were amended to enable the Supreme Court of Queensland to refer matters to mediation against the wishes of one or all of the parties.

In 1996,[11] the Supreme Court of South Australia was invested with a statutory power, '[s]ubject to and in accordance with the rules of court', to 'appoint a mediator and refer a civil proceeding or any issues arising in a civil proceeding for mediation by the mediator', including an express power to refer a proceeding to mediation without the consent of all parties. In other words, the Court was authorised to appoint a mediator in relation to a matter generally, or in relation to a particular issue in an action.

In 1999, the Australian Chief Justices Council adopted a *Declaration of Principles on Court-Annexed Mediation*.[12]

The Supreme Courts of New South Wales[13] and Western Australia[14] were invested with statutory power to require non-consensual mediation in 2000.

The Rules of the Supreme Court of Tasmania were amended, with effect from 1 May 2000, to authorise the Court to order that a proceeding, or any part of it, be referred for mediation, with or without the consent of any party.[15] Subsequently, in 2001, the Supreme Court of Tasmania was authorised by statute to refer civil proceedings to mediation or neutral evaluation, whether or not the parties consented.[16]

Rule 1179 of the *Court Procedures Rules 2006* of the Australian Capital Territory authorise the court to refer a proceeding, or any part of a proceeding

---

9 Chief Justice Marilyn Warren, 'ADR and a Different Approach to Litigation' (Speech, Serving up Insights Series, Law Institute of Victoria, 18 March 2009), quoted in Muir (n 8) 9–10. See Supreme Court of Victoria, *Practice Note No 10 of 2011: Commercial Court*, 28 November 2011, pt 10; Supreme Court of Victoria, *Practice Note No 3 of 2012: Professional Liability List*, 1 October 2012, para 5.3. The English Court of Appeal established a mediation service in 2003 for all non-family appeals, under which a judge considering whether to grant permission to appeal will consider whether the proposed appeal should be referred to the Court of Appeal mediation service. The scheme was modified in 2012 to the effect that all appeals must be referred to mediation unless a judge orders otherwise: Blake, Browne and Sime (n 4) 194–6 [16.13]–[16.15].

10 *Supreme Court of Queensland Act 1991* (Qld); and *Uniform Civil Procedure Rules 1999* (Qld) div 3. Now see the *Civil Proceedings Act 2011* (Qld) s 43(3).

11 *Supreme Court Act 1935* (SA) s 65, inserted by *Statutes Amendment (Mediation, Arbitration and Referral) Act 1996* (SA) s 10, with effect from 30 September 1996.

12 James Spigelman, 'Mediation and the Court [Paper Originally Delivered as an Address at the LEADR Dinner in November 2000]' (2001) 39(2) *Law Society Journal* 63.

13 *Supreme Court Amendment (Referral of Proceedings) Act 2000* (NSW), inserting *Supreme Court Act 1970* (NSW) s 110K. Now see *Civil Procedure Act 2005* (NSW) ss 26(1)–(2); and Supreme Court of New South Wales, *Practice Note SC Gen 6: Supreme Court — Mediation*, 10 March 2010, para 5.

14 *Courts Legislation Amendment Act 2000* (WA) s 22, inserting *Supreme Court Act 1935* (WA) s 167(1)(q)(i), with effect from 6 July 2000. The current rules are found in *Rules of the Supreme Court 1971* (WA) ord 4A div 1 rr 2(2)(k)–(l), 8.

15 *Supreme Court Rules 2000* (Tas) r 518.

16 *Alternative Dispute Resolution Act 2001* (Tas) s 5(1), which commenced in operation on 19 November 2001.

for mediation or neutral evaluation. The court is authorised to make such an order either on application by a party or on its own initiative.

Similar powers are conferred on the Supreme Court of the Northern Territory both by its constituent legislation and rules.[17]

Almost as soon as the statutory power to compel mediation became available, it began to be exercised in all jurisdictions, even over the strenuous objection of one of the parties.[18]

This article addresses three forms of externally imposed mediation, generally referred to as 'mandatory' or 'quasi-mandatory' mediation. These forms of mediation are not mutually exclusive. The legislation constituting a particular court and the rules of civil procedure of every court can embrace all three forms. In the life of a single civil proceeding, all three forms can be applied successively.

Mediation defined

Generally, the statutory provisions which authorise Supreme Courts to direct matters to mediation do not define 'mediation'. The exception is New South Wales.[19]

Put simply, mediation is a form of consensual attempted settlement of a dispute. It is one of the accepted forms of ADR. It is non-adjudicative. At a more complex level, 'mediation' is commonly regarded as denoting a number of elements: namely (a) a voluntary process by which (b) the parties to a civil dispute (whether or not the dispute has crystallised in litigation) (c) attempt, with the assistance of an independent third party (the mediator) who is expected to (i) be an active participant in the course of negotiations between the parties or their legal advisers and (ii) facilitate those negotiations (d) to resolve their dispute (e) without reference to a court or other tribunal, or (if the dispute has already crystallised in litigation) without further reference to a court or other tribunal by (f) the systematic isolation of issues in dispute culminating in (g) a settlement of the dispute which accommodates and adjusts the interests and needs of the parties.

The first element, that of voluntariness, has itself two aspects in reference to a mediation. First, there is the concept of voluntarily entering into the process. Secondly, there is the concept of voluntary participation in the process once it has been embarked upon. The power of the court to compel mediation does violence to the first of these concepts — that of mediation as a process voluntarily embarked upon — but not to the second concept, which must remain inviolable. There can be no question of a party being compelled to enter into a settlement, let alone a settlement imposed on either or both of the parties by the mediator. A party must have the right to terminate or adjourn

17 *Supreme Court Act 1979* (NT) ss 83A(1), (7); *Supreme Court Rules 1987* (NT) r 48.13.

18 *Hopcroft v Olsen* (1998) 201 LSJS 54, 58. The same occurred in the Supreme Courts of Victoria: *Butcher v Commonwealth* (Supreme Court of Victoria, Hedigan J, 1996); and of New South Wales: *Singh v Singh* [2002] NSWSC 852, [3]–[5].

19 A statutory definition is found in *Civil Procedure Act 2005* (NSW) s 25. Neither the *Supreme Court Act 1935* nor the *District Court Act 1991* of South Australia defines 'mediation'. By contrast, the term is defined in *Supreme Court Civil Rules 2006* (SA) r 4 to mean 'a process by which a person (the mediator) assists the parties to a dispute to reach an agreement to settle the dispute'.

a mediation, subject only to due consultation with the mediator. The only true obligation of a party to a mediation is to attend and participate in negotiations in good faith. However, there is no reason why a party who fails at a mediation to negotiate in good faith or act reasonably should not be dealt with adversely by costs orders at the conclusion of the litigation, if the matter does not settle at the mediation by reason of unreasonable conduct of that party.[20] This important, and more recently developed, aspect of court supervision of mediations is addressed further below.

The form of mediation is not fixed or static. The manner in which mediations are conducted in Australia has changed since the mid-1990s, and will continue to evolve. Moreover, it is open to the litigants themselves to mould the form of a particular mediation and, by consent, to dictate the manner in which it is conducted.

In matters where money only is at stake, the purpose of the mediation is to bring the parties to agreement either (a) on the quantum and terms for payment of a sum of money which will fully and finally discharge the claims being agitated at the mediation, be they the claim of the plaintiff or a claim of a counterclaiming party; or (b) that the claim for money which is being agitated is bound to fail.

In matters where more is at stake than money, such as employment disputes, disputes between principal and agent, fencing or boundary disputes, claims for the imposition of a constructive trust, claims in respect of an express or implied trust, claims for the winding up of a partnership or claims under the testator's family maintenance legislation, mediation will involve identifying particular methods of adjusting the claims of the parties in respect of identifiable assets.

Mandatory mediation defined

In 2013, Lord Dyson MR said:

> ADR is now a well-established part of every lawyer's practice. If there was ever any doubt that the consensual settlement of disputes — facilitated through the use of ADR — serves the public interest, it has been laid to rest. Consensual settlement — whether facilitated through informal negotiation, structured mediation, early neutral evaluation, or any other such means — is an essential aspect of any civil society. The effective promotion of ADR is unquestionably in the public interest.[21]

Since the 1990s, legislatures and courts in Australia have embraced the proposition that both ADR generally and mediation, in particular, are in the public interest. Legislative, quasi-legislative and administrative steps have been taken to encourage and, more recently, compel ADR and specifically mediation. Forms of compulsion in relation to mediation can, for present purposes, be subdivided into three categories:[22]

---

20 *Earl of Malmesbury v Strutt and Parker* [2008] All ER (D) 257 (Mar); *Merelie v Newcastle Primary Care Trust* [2006] All ER (D) 200 (Jun).

21 Blake, Browne and Sime (n 4) Foreword.

22 Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) *University of New South Wales Law Journal* 929, 930–1.

(1) Legislative and quasi-legislative schemes[23] under which a particular dispute or proceeding is automatically and compulsorily referred to mediation. This category can be further subdivided into (a) instances where mediation is a prerequisite to the *institution* of proceedings: that is, a precondition of access to the court; and (b) instances where mediation is required as a prerequisite to the *continuation* of proceedings beyond a certain point. The first of these two subcategories has in the past been favoured in England in certain settings.[24] This form has been adopted in an attenuated manner in the federal courts in Australia such that it requires, not mediation, but simply negotiation, between the parties before the institution and defence of an action. In order to be useful, any pre-action scheme or protocol must include an obligation on the parties to exchange adequate information, with a view to enabling productive settlement negotiations and with the objective of forestalling the issue of proceedings.[25] This form of scheme has been criticised as creating the risk of 'expensive front-end loading of legal costs at a period of making a claim which is very hard to police retrospectively'.[26] This form of compulsion also creates the risk of permitting and encouraging intended defendants, by prolonging negotiations, to delay the institution of proceedings and hence fend off the evil day when the defendant will be required to pay compensation to the plaintiff.

(2) Discretionary powers conferred on courts and tribunals to refer existing proceedings to mediation, whether with or without the parties' consent, on a case-by-case basis. This approach has been widely adopted in Australia. It was the type of scheme preferred for Australia by the National Alternative Dispute Resolution Advisory Council.[27] It was not embraced by the Woolf Reports. However, the 2017 English Civil Justice Council ('CJC') Working Group, consciously departing from one of the recommendations in the Woolf Reports, favoured permitting the court to make orders in particular cases compelling an unwilling party to attend a mediation or engage in some other form of ADR.[28]

(3) Quasi-compulsory schemes under which a party can be retrospectively penalised, by a court or tribunal, by way of an adverse costs order if mediation is not undertaken either prior to the institution of an action or

---

23 Such as the schemes provided for by the *Defamation Act 2005* (NSW) s 40; the *Farm Debt Mediation Act 1994* (NSW); the *Strata Schemes Management Act 1996* (NSW); the *Retail Leases Act 1994* (NSW); the *Motor Accident Insurance Amendment Act 2000* (Qld); and the *Personal Injuries Proceedings Amendment Act 2002* (Qld). At the federal level, the Australian Competition and Consumer Commission has promulgated certain industry specific Codes of Conduct which require forms of ADR as a condition of enforcement of contractual rights such as, eg, termination of a franchise agreement.

24 CJC Working Group Report (n 6) 24 [5.2]. See Bathurst (n 7) 880.

25 Note the summary of the English *Practice Direction: Pre-action Conduct and Protocols* in Blake, Browne and Sime (n 4) 81–6 [8.13]–[8.16].

26 CJC Working Group Report (n 6) 25 [5.10].

27 National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General* (Report, September 2009) 24 [2.16].

28 CJC Working Group Report (n 6) 58 [9.32].

prior to a defined stage in the prosecution of the action.[29] This was the scheme most commonly introduced in England in the wake of the interim and final Woolf Reports. In England, the *Civil Procedure Rules* were complemented by pre-action protocols.[30] These protocols emphasise the desirability of cooperation between the parties in order to identify the main issues between them. A failure on the part of one party to cooperate may lead to the imposition of cost penalties, irrespective of the success of the party's claim or defence.[31] So far as is known, this form of quasi-mandatory mediation has not been formally adopted in any superior court in Australia.[32] The English High Court has also issued a practice direction on pre-action conduct, para 8 of which is to the effect that, whilst ADR is not compulsory, the Court may require evidence that the parties have considered some form of ADR.

These three categories are not mutually exclusive. There is no reason in principle why one dispute cannot, in turn, be subject to all three forms of compulsion.

There is a fourth category: compulsory mediation created by contract. It has become quite common for contracts (and, in particular, infrastructure contracts) to embody mandatory procedures for alternative dispute resolution. The standard provision (referred to as an escalation clause) operates in the event of a dispute or disagreement between the parties and creates, in the first instance, an obligation on the part of the parties to confer through their senior executives. The second step is mediation, followed either by expert determination or arbitration. These provisions have encountered mixed success in the courts[33] and are outside the scope of this article. However, these provisions form an important part of the background to the question whether mediation should be compulsory. They reflect a fact of life: most disputes are resolved by agreement, without the necessity for proceedings and often without the intervention of legal advisers.

---

29 An example is found in the *Civil Dispute Resolution Act 2011* (Cth), in its requirement that, prior to the institution of an action, the applicant take 'genuine steps' with a view to resolution of the dispute. This legislation imposes pre-litigation requirements relating, not to the type of dispute, but simply to the court in which the initiating party files its claim. Blanket provisions of this kind have been criticised: Bathurst (n 7) 882; Waye, 'Mandatory Mediation' (n 7) 221–3.

30 The protocols are paraphrased in Waye, 'Mandatory Mediation' (n 7).

31 The costs provisions implemented in England as of April 2013 as a result of the Jackson Report (n 5) are summarised in Blake, Browne and Sime (n 4) ch 11.

32 These protocols go further than, eg, *Supreme Court Civil Rules 2006* (SA) r 33, which requires the exchange of offers prior to the institution of proceedings. They have a counterpart in the *Supreme Court Civil Supplementary Rules 2014* (SA), in ch 3 rr 16–21, which apply, eg, to construction disputes (which are broadly defined, so as to include actions for damages for professional negligence against certain classes of professionals).

33 *Walford v Miles* [1992] 2 AC 128; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334; *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540; *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303; *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC); *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137; *Hardesty & Hanover International LLC v Abigroup Contractors Pty Ltd* (2011) 27 BCL 122; *Laing O'Rourke (BMC) Pty Ltd v Transport Infrastructure* [2007] NSWSC 723; and the cases cited in Blake, Browne and Sime (n 4) 26–7 [3.04]–[3. 05], 94–6 [9.25]–[9.32]; and in Waye, 'Mandatory Mediation' (n 7).

A variation on Category 2 is found in the system operating in British Columbia.[34] There, a party to civil proceedings is authorised to serve on an opponent a notice in a specified form requiring mediation. A mediation process is then set in train, with specified procedures for appointing a mediator and organising both pre-mediation and mediation meetings. If the respondent to the notice declines to attend, then save in certain exceptional cases, the respondent is liable to be ordered to attend or otherwise to be punished by the court. The CJC found that the establishment of the notice to mediate procedure has resulted in informally agreed mediation becoming the norm in British Columbia, with invocation of the formal procedure becoming the exception rather than the rule.[35]

This article focuses on the second and third forms of compulsion.

Category 2: Compelling mediation by order

As might be expected, even though the legislative provisions referred to above confer an unfettered discretion on the court, rules of thumb sprang up in most jurisdictions as to when a mediation should or should not be compelled against the objection of one of the parties. Almost immediately, an order for mediation came to be regarded as the norm. The party resisting an order needed to point to some exceptional circumstances in order to deflect or delay an order. It was said first, that a case need *not* be exceptional for a mediation to be ordered against the wishes of a party generally;[36] secondly, and by contrast, that a case *does* need to be exceptional for a mediation to be ordered close to trial and against the wishes of a party;[37] thirdly, that a case *does* need to be exceptional for mediation to be compelled where a difficult and untested point of law is one of the dominant issues in the proceedings.[38] At the same time, the court acknowledged that every application for an order for mediation must be resolved by reference to the particular facts of the case.

The court has an implied power to give directions incidental to an order for mediation to ensure that the mediation is not frustrated by uncooperative conduct on the part of one or more parties.[39] An order for mediation, if not complied with, can be vindicated by an order for the striking out of a pleading, by proceedings for contempt of court or, in a case where the plaintiff defies an order for mediation, by the striking out or dismissal of an action.[40]

The dominant consideration in deciding whether a mediation should be ordered, and ordered against the wishes of one or more parties, is the question of economy of expedition in resolution of the proceedings.

---

34 *Law and Equity Act*, RSBC 1996, c 253, *Notice to Mediate (General) Regulation*, BC Reg 4/2001, as cited in CJC Working Group Report (n 6) Appendix 3.

35 CJC Working Group Report (n 6) 43 [7.18].

36 *Matthews v The Tap Inn Pty Ltd* [2015] SADC 20 [22].

37 *Cawthorne v Olsen* [2005] SASC 34; *Re Anne Lewis Pty Ltd* [2014] NSWSC 418; *Harrison v Schipp* [2002] NSWCA 27.

38 *Matthews v The Tap Inn Pty Ltd* (n 36).

39 *Addstead Pty Ltd v Simmons [No 2]* (2005) 238 LSJS 189, 192 [15].

40 *Baulderstone Hornibrook Engineering v Dare Sutton Clarke* [2000] SASC 159, [8].

Should mediations be compelled by order of the court?

There is no simple and universal answer to this question. What is clear is that, if the courts are to order matters to mediation against the wishes of the parties, they should do so consistently, with reference to the interests of the parties, and with reference to the requirements of efficient case management.[41] (Consistency, as manifested in the rules of thumb referred to earlier, is important to the practising profession. It is essential that practitioners be able to advise their clients with some confidence when and in what circumstances an opposed application for mediation will be successful.) The question of the timing of an order will loom large. In that respect, the court must be flexible.[42] The question of timing is referred to in more detail below.

Australian courts have not hesitated to compel mediations. In other jurisdictions, by contrast, there has been a reluctance on the part of the courts to compel mediations.[43] For example, the English Court of Appeal held in 2004 that English courts are precluded by art 6 of the *European Convention on Human Rights*[44] from ordering parties to mediate against their will.[45] The Court also held that, even if English courts did have jurisdiction to order non-consenting parties to mediate, it could not readily conceive of circumstances in which it would be appropriate to exercise that power.[46] For this reason, some commentators concluded that, for over a decade, the English Court of Appeal impeded the development of discretionary mandatory mediation in England. More recent judicial decisions, however, have questioned the proposition that an opposed order for mediation is contrary to art 6.[47] Correspondingly, English judicial practice is changing. The current English approach to pending proceedings is that, whilst a court may occasionally direct the parties to participate in some form of ADR,[48] the order will not specify which ADR procedure is to be used. Nor will the order compel the parties to attend. The order will provide for the convening of a case management conference if the parties fail to initiate ADR within a fixed period. Two model forms of order commonly pronounced by English courts are extracted below.

---

41 Bathurst (n 7) 877.

42 Ibid 878; Ian Davidson, 'Issues with the Use of ADR in Will Disputes' (2018) 45(1) *Australian Bar Review* 1, 10.

43 As to the United Kingdom, see CJC Working Group Report (n 6) 6 [1.11]. Only a minority of the Working Group favoured imposing ADR as a condition of access to the court or as a condition of progress of the case beyond the directions hearing stage: at 8 [2.8]–[2.9]. The Jackson Report (n 5) concluded that there was no need for pre-action protocols in commercial matters in United Kingdom courts.

44 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

45 *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920, 924. The court overruled earlier decisions of lower courts to the contrary. Ibid art 6 guarantees, in substance, the right of a party to a fair trial.

46 Ibid.

47 *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234. See also Blake, Browne and Sime (n 4) 89–90 [9.07].

48 *Shirayama Shokusan Co Ltd v Danovo Ltd* [2003] EWCA Civ 3306 (Ch).

The question posed above, in the heading to this segment, is one which will not need to be posed in 25 years' time. It needs to be posed now, and it has needed to be posed since 1990, principally for two reasons: first, because mediation structures are not yet fully integrated within the rules and procedures of superior courts in Australia; and secondly, because of resistance or even hostility in some sectors of the legal profession and of the judiciary to forms of dispute resolution alternative to adjudication by a court or a public tribunal.

The first reason would vanish if a legislative or administrative presumption in favour of mediation applied to all civil litigation such that mediation became compulsory at some stage before a matter comes on for trial. The rules of civil procedure need to treat mediation as a normal form of dispute resolution in no way inferior to adjudication by a judicial officer. The settlement of cases has historically been treated by our legal system as a merely accidental by-product of an adjudicative system. Forms of alternative dispute resolution have traditionally been viewed by the courts, and hence by the litigating public, as 'semi-detached'. This needs to change, and it needs to change partly by institutional means. It is essential that mediation cease to be seen by the profession and by litigants as in some way extraneous to the judicial process and thus inferior to adjudication in the traditional manner. Litigation and judicial adjudication should be seen as the last resort. It is for the courts, by way of changes to the rules of civil procedure and by a consistent course of decision, to make adjudication the last resort. Whilst in office, Baroness Scotland, Attorney-General of the United Kingdom under Gordon Brown, announced her government's aspiration to make ADR the mainstream dispute resolution process, with litigation as the alternative. Unfortunately, that aspiration was not achieved.

It is for the courts to act where the Parliament either cannot or will not act.

For as long as mediation is seen as either peripheral or extraneous to the judicial system, there is a risk that mediation will be less effective if compulsory. By contrast, if mediation is either compulsory or a normal and indispensable step in the course of litigation, it will be seen as no less a part of the judicial system than a trial. To this end, the Chief Justice of South Australia recently introduced a practice under which no matter in the civil list of the Supreme Court of South Australia will be listed for trial unless it has been the subject of at least one mediation.

The second reason referred to above — resistance to mediation within the profession and the judiciary — is softening and will vanish with the effluxion of time. Attitudes to mediation within the profession are changing, and changing quickly. The junior members of the profession have a more positive attitude towards mediation than the more senior members of the profession. Growing numbers of junior members of the profession are keen to learn the particular skills and techniques which assist the resolution of a matter without adjudication. They seem to embrace the views of Abraham Lincoln who, in the course of delivering a lecture to law students in Illinois, is quoted as having said:

> Discourage litigation. Persuade your neighbours to compromise whenever they can ... As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.

At present, a substantial sector of the profession still regards an expression of willingness to mediate as a sign of weakness and harbours a fear that a solicitor risks his or her relationship with the lay client by pressing for mediation. That attitude infects the clients of those members of the profession. The clients, correspondingly, become reluctant to mediate. Again, fortunately, this attitude is not shared by more junior members of the profession.

As the profession changes, the attitudes of litigants to alternative dispute resolution will also change. In time, mediation will become the cultural norm. Mediation will become such a well-established part of the profession's litigious culture that it will form an intrinsic and instinctive part of the lexicon of the profession and of its thought processes, in the same way as does consideration of a rules offer. Legal practitioners will need to modify their own styles of practice in order to stay competitive.[49] When that change occurs, statutory provisions authorising compulsory mediation and the fine tuning of the rules of civil procedure in support of ADR will become less important.

It is thought, therefore, that mandatory mediation is a purely transitional concept and that, once the legal profession embraces mediation as a satisfactory equivalent to adjudication or, indeed, a preferred mode of dispute resolution, rates of voluntary mediation will increase and the rates and importance of involuntary mediation will reduce.[50] If that is so, the question posed in the heading above will not bedevil the judicial system for more than a generation or two.

But to restate that question: should mediation be compelled by order of the court?

In the general run of case, an affirmative answer to that question is justified in the interests of the parties and in the public interest. (In this context, claims for damages for personal injuries are excluded from consideration.) As far as concerns the interests of the parties, to put it bluntly, litigants (particularly non-institutional litigants with limited resources) need to be protected from themselves. Litigation is rarely cost-effective. Litigation is instituted and prosecuted without balanced regard to its potential benefits and detriments. Many litigants embark on litigation with a conscious or unconscious desire to win at all cost and, if necessary, to see blood on the walls. They either have at the outset, or acquire by virtue of the judicial system itself, both an objective and a need to crush the opponent. This attitude is, of course, inimical to the true interests of the litigant. The litigant becomes irrational and does not think in objective, economic terms. Emotions control decision-making, to the exclusion of reasoning. Litigation, once embarked upon, is maintained by reference to personal attitudes towards the opposition, rather than by a rational, economic assessment of the utility and likely outcome of the litigation. Even in commercial matters, emotions run high. Self-esteem is battered either in the course of the events giving rise to the litigation or in the course of the litigation itself. The parties are controlled by feelings of anger, frustration, humiliation and sometimes betrayal. These feelings feed the desire to sustain litigation. The litigation appears to offer to a litigant everything for

49 Bathurst (n 7) 871.

50 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Wolters Kluwer, 2009) 157.

which he or she yearns: complete vindication, outright success, the public defeat and humiliation of the opponent, and (in the case of a plaintiff) a vast sum of money. To mask their emotions, many litigants profess to elevate a relatively mundane dispute to a 'question of principle'. The 'principle' precludes entry into any form of settlement short of capitulation by the opponent. Asked by a bystander to formulate the 'principle', such a litigant normally responds: 'he should not be allowed to get away with it'. At the same time, many non-institutional litigants think that, if they abandon their 'principles' and settle a dispute, particularly one with an institution or an agency of government, the entire fabric of society will be rent asunder. The scope of their dispute ceases to be merely a battle and becomes a war on behalf of the general public or a section of the public. Compromise becomes unthinkable. Nothing other than complete victory will be satisfactory.

Mediation simply cannot offer these results to a litigant. Emotionally, in this respect, it cannot compete with adjudication and judgment. One reason, albeit a paternalistic reason, to make mediation compulsory is to protect litigants from their own folly and from entrenched emotions. At a mediation, particularly if a calm atmosphere can be generated, the level of contention will fall, the parties' shared attitude of litigation being a battle will be superseded, emotional obstacles to a settlement can be dealt with and matters can be compromised.

There is an additional public interest in compelling mediation: the substantial, albeit unquantifiable, benefit to the judicial system in the settlement of cases before trial. Settlement of matters eases the congestion in court lists and thus enables the earlier adjudication of those matters which are incapable of settlement. History demonstrates that the judicial system would be congested to the point of inefficiency if a majority of civil matters ran to trial. This form of benefit to the judicial system is greater the earlier a particular case settles. More specifically, the judicial system benefits from the settlement of a matter before it is entered into the trial list, before it is entered into the trial roster and, most importantly, before a judge is allocated to try it. The settlement of matters at the door of the court results both in dislocation of hearing lists and the waste of judicial time. This comes at a cost to the public purse. At the same time, the parties have incurred costs preparatory to a trial which is never held. These costs will usually be a significant financial burden to at least one of the parties.

Correspondingly, there is a substantial, and usually quantifiable, benefit in costs to the parties in the settlement of a dispute as soon as possible after it crystallises. The parties also benefit in substantial, unquantifiable ways from settlement in that they are freed from the uncertainty, distraction and anxiety (and, in some cases, consequential ill health) associated with litigation. Settlement of a dispute by a means in which the parties participate — such as mediation — increases the satisfaction of the parties with the judicial process. Whilst, in advance of a settlement, the parties' emotions might be running high, once the matter is settled, the majority of litigants are satisfied with compromise via an autonomous, speedy and cheap resolution of their dispute, with or without the assistance of an independent facilitator. The parties to litigation, particularly where they are natural persons, generally feel more satisfied about the resolution of the dispute where they, rather than a judicial

officer, have retained control of that dispute. Moreover, mediation can result in an outcome not available by order of the court, such as an apology, an agreement as to future dealings or cooperation with a view to influencing the conduct of a third party. The simple fact is that most disputes are destined to settle. The sooner they reach their natural destination, the better for the parties.

The argument of principle most often advanced against mandatory mediation is that every subject has a constitutional right of access to justice and a right to have a dispute litigated in an open, public court and that mandatory mediation undermines that right. However, none of the forms of mediation discussed in this article erode the right of access to justice. Those who propound the contrary overlook the fact that, for many members of the community, access to the courts has become unattainable, for financial reasons. In England as in Australia, Parliament and the courts embraced quasi-compulsory ADR in the 1990s in order to make civil justice more accessible. This purpose underpinned both the Woolf Reports and the subsequent Jackson Report.[51] Those reports concluded that the courts are, or were at risk of becoming, accessible only to those entitled to legal aid (at one extreme) and to financial and commercial institutions with deep pockets (at the other extreme). Whether or not one accepts that proposition, the fact is that, far from obstructing or limiting access to justice, mediation (including court ordered mediation) has as its highest objective the support of the right of equal access to justice for all and the reduction, if not removal, of barriers to justice.[52]

Neither judicial practice nor legislation, primary or delegated, in relation to ADR must derogate from or undermine the right of access to the courts. For example, a party who opposes mediation should not, merely for that reason, be mulct in costs or otherwise exposed to a punitive order as to costs, interest or otherwise. No order for mediation should foreclose resort to the court if mediation does not resolve the dispute. In addition, for example, it would not be appropriate to order a mediation against the wishes of a party which is struggling to bear the costs of litigation. Such a party may be able to carry the cost of a short trial but may not be able to carry the accumulated cost of a mediation followed by a trial. In such a case, it may not be an appropriate compromise to order the applicant for the mediation to bear the whole of the mediator's fees: the indigent party may feel, rightly or wrongly, that the independence and impartiality of the mediator will be undermined if the mediator is aware that his or her fees are to be paid by the other party only. At the same time, an order for mediation should not be made where the associated delay may have an irreversible, detrimental effect on the substantive rights of a party: for example, in asbestos litigation, where a party or an important witness is facing the prospect of imminent death, and where the death of the party or of the witness will deprive the party of important evidence.

---

51 Jackson Report (n 5) 361 [3.1], see generally ch 36; Blake, Browne and Sime (n 4) 7–8 [1.17]. See also Bathurst (n 7).

52 Lord Neuberger MR, 'Has Mediation Had Its Day?' (Gordon Slynn Memorial Lecture, Judiciary of England and Wales, 10 November 2010); *Browning v Crowley* [2004] NSWSC 128, [6]; Bathurst (n 7) 875.

These, however, are exceptional cases. In the ordinary run of case, mediation is properly viewed as one means of access to justice. Any reasonable form of compulsory or mandated mediation which is under the control of the court is, by definition, compatible with the constitutional right of access to the judicial system. At worst, compulsory mediation merely delays, and delays briefly, the progress of the dispute to trial. It does not deprive a party of the right of access to the court or of the right to an adjudication.

Compelling mediation — Particular cases

Some matters are intrinsically inappropriate for mediation. For example, a question of public law might arise in connection with which a test case is brought before the court in the interest of a large sector of the population. Novel, untested legislation may be challenged or an interpretation of it sought on behalf of a sizeable group of citizens.[53] One party might seek an injunction or other coercive relief. The proprietor of intellectual property might need a judgment of the court against one defendant in order to be able to assert rights against a large number of other potential defendants or alleged infringers.

However, these cases, too, are exceptional. In the ordinary run of case, the matters which are relevant to an exercise of the discretion to order a mediation against the objection of one or both parties are:[54]

(1) The entirety of the issues, factual and legal, joined in the proceedings and the parties' respective positions and interests at the stage of the action at which an order for mediation is sought.[55] The existence of acrimony between the parties is relevant, but not decisive.[56]

(2) Whether the parties are experienced or institutional litigants, or otherwise.

(3) Whether the proposed mediation has sufficient prospects of success.[57]

(4) Whether the cost of the mediation can be justified. It is relevant for the court to weigh, insofar as it can, the prospects of success of the mediation as against the expense which it will entail. This will involve a comparison of the likely length and expense of a mediation against the estimated length of the trial and the costs of preparation for trial.[58] There must be a proportionality between the likely cost of a mediation and the amount at stake in the case. Mediation can be an expensive exercise, particularly where a large volume of materials needs to be perused by

53 *Matthews v The Tap Inn Pty Ltd* (n 36) [26].

54 See the lists of examples and decided cases referred to in Blake, Browne and Sime (n 4) 4–5 [1.08], 20–4 [2.41]–[2.61].

55 *Australian Competition and Consumer Commission v Lux Pty Ltd* [2001] FCA 600; *Perpetual Trustee Co v McAndrew* [2008] NSWSC 790; *Matthews v The Tap Inn Pty Ltd* (n 36) [20].

56 *Re Henley (in the estate of Weinstock)* (2013) 17 BPR 32,435; *King v Linney* [2009] NSWSC 911; *Lidoframe Pty Ltd v New South Wales* [2006] NSWSC 1262; *Higgins v Higgins* [2002] NSWSC 455 (where mediation was ordered despite entrenched positions and acrimony). Cf *Harvey v Alecci* [2002] NSWSC 898 (where mediation was not ordered because the family involved in the proceedings was in a state of 'internal enmity').

57 *Harvey v Alecci* (n 56); *Harrison* (n 37).

58 *Browning v Crowley* (n 52) [5].

the mediator or where the mediation may occupy more than one day. Where the trial will be short and relatively inexpensive, it is more difficult to justify a mediation, given that it cannot be predicted in advance that any mediation will succeed. By the same token, if the mediation is able to be conducted by officers of the court or if a private mediator is willing to conduct the mediation without fee, the cost of the mediation will be substantially reduced.

(5) As a corollary, mediation is warranted if the cost of litigation will be disproportionate to the amount at stake.[59]

(6) The burden in personal attendances which the litigation will impose on the parties if it goes ahead.[60]

(7) Whether the litigation involves what one party reasonably regards as a question of legal principle. It is quite common for an institution (such as a credit provider or insurer) to seek to use particular proceedings as the vehicle for the resolution, by both the court at first instance and an appellate court, of a question of legal principle or a question of first impression (for example, a case involving the interpretation of a clause in a standard form consumer contract). In cases like this, mediation is unlikely to succeed, because a mediation cannot vindicate the legitimate litigious interests of at least one of the parties. By the same token, many litigants regard the institution or defence of litigation as merely a negotiating tool. Steps are taken by such litigants which, from an objective point of view, are completely unjustifiable and which would not be taken if the party was subject to ordinary cost constraints. This conduct may border on the abusive. However, it is very difficult for the court to deal with conduct of this kind prior to a trial and prior to the making of final costs orders. Where one of the litigants is demonstrably abusing the procedures of the court, mediation will rarely succeed and should not be ordered.

(8) Whether other alternative forms of dispute resolution have been unsuccessfully attempted by the parties:[61] for example, a settlement or conciliation conference within the framework of the rules of the court or a settlement conference or mediation pursuant to a contract between the parties.

(9) Whether the matter is likely or unlikely to be listed for trial in the immediate future.[62] If a matter is listed for trial in the near future, it may be unfair or oppressive to one of the parties and, in particular, to a less well-resourced party, to order the duplication of effort which is involved in its legal advisers readying themselves both for a mediation and a trial.

(10) Whether it is likely that the parties fully understand the case of the opposing party, at both the factual and legal level or whether, by

59 *Dibble v Pfluger* [2011] 1 FLR 659. The *Civil Proceedings Act 2011* (Qld) s 43(4) (without limiting the discretion of the court) expressly requires this factor to be taken into account, along with the third factor listed above, by a judge in Queensland in deciding whether to compel a mediation.

60 *Browning v Crowley* (n 52) [5]–[6].

61 *Hopcroft v Olsen* (n 18).

62 Ibid.

contrast, they would be assisted by a candid exchange of views and contentions in the protected environment of a mediation.[63]

(11) Whether it is unlikely that the parties will be able to achieve settlement by means of direct negotiations between their respective legal advisers, without the intervention of a mediator.[64] To put it another way, is there a prospect that mediation might save the parties from themselves: compulsory 'referral may be appropriate where the court is satisfied that the parties' approach to the resolution of the proceedings is being unduly influenced by emotional or irrational considerations, the effect of which might be minimised by a skilled mediator'.[65]

(12) Whether a settlement of the dispute might be able to be brought about by agreement to take specific action, or engage in specific conduct, which the court is not able to order.[66]

It might be relevant, but it is not decisive, that the parties might, as things stand, be a long way apart in such negotiations as might have occurred between them.[67] It is no argument against an order for a mediation that the parties are in dispute, not only about essential facts, but about peripheral facts and remedial questions, such as the appropriate quantum of compensation. By definition, litigation involves a dispute. If the parties themselves were able to resolve that dispute, the litigation would either not have been instituted or would already have come to an end.

When ordering a mediation under its statutory powers, the court has an implied power to order the parties and, indeed particular representatives of the parties, to attend the mediation.[68] This power is particularly important in cases where one or more of the defendants is an institution, such as an insurer. The settlement of a matter where an absentee decision-maker, such as a claims manager, is instructing the solicitors for one or more defendants is made considerably more difficult, both for the mediator and the claimant parties, because neither the legal advisers for the claimant party nor the mediator can confront the absent decision-maker directly. In the case of large corporations, it is essential that an officer or employee from a senior position in the corporate hierarchy be in attendance at the mediation.

In addition, the court has an implied power to give directions incidental to the mediation, both to ensure that the process is not frustrated by non-cooperation and to maximise its prospects of success. One particularly useful form of order is an order requiring the disclosure of information relevant to the mediation. For example, where appropriate, disclosure of documents relevant to the quantum of damages can be ordered prior to a mediation, even though liability is in issue.[69] The implied power to order disclosure incidentally to a mediation is wider than the power to order the

63 *Matthews v The Tap Inn Pty Ltd* (n 36) [27].
64 *Cawthorne v Olsen* (n 37).
65 *Higgins v Higgins* (n 56) [4].
66 *Addstead Pty Ltd v Simmons [No 2]* (n 39) 192 [18].
67 *Hopcroft v Olsen* (n 18); *Browning v Crowley* (n 52) [5].
68 *Baulderstone Hornibrook Engineering Pty Ltd v Dare Sutton Clarke Pty Ltd* (n 40).
69 *Regent Holdings Pty Ltd v Victoria* (2012) 37 VR 424.

disclosure of documents in the ordinary course of litigation.[70] Likewise, the court is authorised to delegate powers to the mediator. As a consequence, it can empower a mediator to require a party to disclose information to facilitate the mediation.[71] In addition, the court is authorised to make orders for the attendance of experts at the mediation, along with orders that, prior to the mediation, the experts confer with a view to agreement and with a view to minimising areas of disagreement between them.

Category 3: Costs sanctions

Category 3 schemes involve rules of court or a course of judicial decision-making under which a party may (at the termination of proceedings) be retrospectively penalised by way of an adverse costs order, if mediation is not undertaken either prior to the institution of an action or prior to a defined stage in the prosecution of the action. The purpose of schemes falling inside this category is to bring about a change in the conduct of the profession and thereby of litigants (and in particular, of institutional litigants). It is hoped that by a systematic change in the exercise of the judicial discretion as to costs and, specifically, an erosion of the principle that costs follow the event, the profession will alter its attitude to mediation and will routinely encourage clients to participate in mediation at an appropriate stage in the life of an action.

English courts have recognised a discretionary power (under r 44.2 of the *Civil Procedure Rules 1998* (UK)) to make retrospective costs orders (after a trial) reflective of an assessment as to whether or not a party's conduct in refusing to mediate (during the interlocutory stages of the action) was reasonable or unreasonable.[72] In other words, contrary to the presumptive position that costs follow the event, the court will order a successful party to bear some or all of the costs of the unsuccessful party if the successful party unreasonably refused to enter into a mediation either at all or at an appropriate stage in the proceedings. The burden of proving that an opponent's conduct was unreasonable lies on the party alleging it. English courts have frequently punished litigants for refusal or failure to mediate.[73] (The scope of the privilege in favour of 'without prejudice' statements has been placed under attack.)[74] The CJC found that the line of decisions penalising parties for an

70 *Addstead Pty Ltd v Simmons [No 2]* (n 39) 192 [19]–[20], 194 [28].

71 Ibid.

72 *Dunnett v Railtrack plc* [2002] 2 All ER 850; *Halsey v Milton Keynes General NHS Trust* (n 45). Contrast *Swain Mason v Mills & Reeve* [2012] STC 1760, in which the refusal by one party to mediate was found to be not unreasonable; *Burchell v Bullard* [2005] All ER (D) 62 (Apr) (where a cost penalty equivalent to £185,000 was imposed); *Mitchell v News Group* [2013] EWCA Civ 1537. The English cases on costs are addressed in Blake, Browne and Sime (n 4) 109–13 [11.07]–[11.22].

73 *PGF II SA v OMFS Co 1 Ltd* [2014] 1 All ER 970; *Garritt-Critchley v Ronnan* [2014] EWHC Civ 1774 (Ch); *Laporte v Commissioner of Police of the Metropolis* [2015] 3 Costs LR 471. The cases are reviewed in Blake, Browne and Sime (n 4) ch 11.

74 Cf *R (on the application of Wildbur) v Ministry of Defence* [2016] EWHC 1636 where the court held that privilege prevented the admission into evidence of both a refusal to mediate and a refusal to make an offer pursuant to a mediation. Section 167(1)(q)(iv) of the *Supreme Court Act 1935* (WA) displaces this conclusion: it authorises the making of rules of court regulating 'the admissibility of evidence in relation to a mediation for the purpose of

unreasonable refusal to mediate has 'caused an upward spike in the usage of mediations', and 'was the first evidence that judicial action on costs was significantly more effective in increasing mediation take-up than mere exhortation or threat', with an effect which has been lasting.[75]

The course of decision-making has been moulded by the English Court of Appeal. Whilst recognising that the discretion as to costs cannot be fettered, the English Court of Appeal has listed the following matters, by way of a non-exhaustive list of factors to be considered when determining whether or not a party's refusal to mediate, or the abandonment of a mediation by a party, was unreasonable:[76]

(1) The nature of the dispute and, in particular, whether the case raised a complex question of law.
(2) The merits.
(3) The extent to which, if at all, settlement methods other than mediation were attempted between the parties.
(4) Whether the costs of the proposed mediation would have been disproportionately high.
(5) Whether any delay in setting up and attending a mediation would have been prejudicial.
(6) Whether a mediation would have delayed either a trial or an appeal, as the case may be.
(7) Whether mediation might have had reasonable prospects of success.[77]

As will be seen, some of these matters cannot be the subject of judicial adjudication until after a trial. Others require an assessment of the state of disputation between the parties at different times in the course of the litigation. Other factors are also relevant to the discretion exercisable under Category 2 schemes. The factors listed by the English Court of Appeal, which must be considered against the background of offers filed or exchanged between the parties separately from a mediation, have generated a substantial body of case law. It has been found that the two factors most commonly agitated on retrospective costs applications have been first, whether a party had a reasonable belief that its case was watertight and secondly, whether the mediation had any reasonable prospects of success (the final factor listed above).[78]

On analysis, the final factor is question begging. It is impossible to know in advance whether or not a mediation will succeed.[79] Experience shows that, unless a case is genuinely a test case or unless a claimant is obsessive,

---

determining the costs of the mediation or the costs of the proceedings between the parties to the mediation'.

75 CJC Working Group Report (n 6) 33 [5.45].

76 *Halsey v Milton Keynes General NHS Trust* (n 45) 925–6. See also *Rolf v De Guerin* [2011] 5 Costs LR 892; *PGF II SA v OMFS Co* [2012] EWCA 83; *Thakkar v Patel* [2017] 2 Costs LR 233.

77 This criterion necessarily focuses on a specific time during the interlocutory processes of a particular action: *Gore v Naheed* [2017] 3 Costs LR 509.

78 CJC Working Group Report (n 6) 33–4 [5.48].

79 *Hurst v Leeming* [2001] 2 Costs LR 153.

mediation has good prospects of succeeding in the majority of cases. Even cases that are initially described as ground-breaking or test cases prove in fact to be capable of settlement.[80]

In addition to attracting a punitive costs order, there is no reason why an unreasonable refusal to mediate on the part of the defendant should not result in the court considering the imposition of a higher rate of interest on damages ultimately awarded to the plaintiff, retrospective to the date of refusal to mediate.

However, punitive orders in relation to costs and interest are not an adequate substitute for early intervention by the court. The main disadvantage in Category 3 schemes is that judicial adjudication over, and criticism of, the parties' use of, or failure to use, ADR is deferred until after judgment. The approach provokes the question why the conduct should not and cannot be exposed to critical review by the court at the time when the decision is taken, by one or both parties, not to use ADR. The subsequent decision on costs is taken only in those rare cases which go to final judgment and final costs orders. The decision of the court reviewing the parties' own decision-making about ADR is inevitably overshadowed by the judgment on the merits. There is no reason why the court cannot more actively promote mediation while the case is on foot — that is, make a Category 2 order — and interrogate the reasons, if any, proffered by a party as to why settlement is not being explored at that stage. The decision of a party not to mediate, and the reasonableness of that decision, should be open to be reviewed and adjudicated upon by the court at the time when it is made, and not merely ex post facto after judgment.[81]

A second disadvantage in Category 3 is that the criteria formulated by the English Court of Appeal (paraphrased above) have the tendency to result in collateral litigation, which adds to the parties' costs.

A third disadvantage in Category 3 is that it invites erosion of both 'without prejudice' privilege and legal professional privilege. In a case where an opponent has refused outright to mediate, a party seeking a punitive costs order will wish to demonstrate that the opponent's refusal was unreasonable. The opponent will wish to prove the contrary. On what materials should the trial judge adjudicate on that question? In some jurisdictions, a report from the mediator is contemplated.[82] There are difficulties with that approach. In the absence of information from the mediator, should the applicant for an order be permitted to seek discovery of materials which would otherwise be protected by one or other head of privilege? If the respondent to the application adduces some material (otherwise privileged) tending to show that its opposition to a mediation was reasonable, will it run the risk of impliedly waiving either head of privilege completely in all communications connected or associated with documents adduced in evidence on the costs application? One solution to this problem is to require a party successfully opposing an application for a mediation to file a short statement of reasons, that statement to be read only

80 CJC Working Group Report (n 6) 45 [8.5].

81 Ibid 58 [9.34], Recommendation 14.

82 *Supreme Court Civil Supplementary Rules 2014* (SA) r 207(6) authorises a mediator who 'considers that a party has not participated appropriately in the mediation or has not made a genuine attempt to resolve the matters in issue' to report to the court in writing.

by the trial judge after publication of reasons for judgment. That statement would bind the respondent. In this respect, the courts could follow the practice of the profession. It is the practice of many solicitors, in the wake of a failed mediation, to restate the client's final offer at the mediation, with a statement of reasons, in the form of a protected letter (a 'Calderbank' letter), possibly complemented by a simultaneous filed offer. The party which successfully opposed an application for a mediation will stand or fall according to the assertions made in its statement of reasons, in the light of the subsequent findings of fact at the trial. This is one mechanism adopted in England, via para 3 of the 'Ungley' order referred to below.

Similar issues will arise, but in a more acute form, if the contention is that the respondent to the costs application attended a mediation but did not engage in negotiations in good faith at the mediation.

Commercial matters

Both the adjective 'commercial' and the phrase 'commercial matter' are protean expressions. By contrast, in the context of civil litigation, the phrases 'commercial matter' and 'commercial cause' have acquired a narrow, technical meaning: they denote a claim for money arising from the ordinary transactions of merchants and traders, or a claim relating to the construction of mercantile documents, to the export or import of merchandise, to contracts of affreightment, insurance or banking, to mercantile agency or mercantile customs and usages. This technical meaning found reflection in the scope of the jurisdiction of the commercial courts, both in England and Australia. The primary object of those courts is the expeditious resolution of litigation in order to promote the ready circulation of money in the commercial community, so that claimants can in turn discharge their own debts. The purpose of the commercial court was to provide a forum for the litigation and resolution of disputes between merchants and traders who desired, and were prepared to cooperate to achieve, an early opportunity of having their disputes decided.[83]

When considering whether or not a mediation is appropriate and should be ordered against the wishes of one or more parties, a matter that might be characterised as 'commercial' is intrinsically no different from other matters involving money. When all is said and done, most disputes involve money or a fungible asset such as real estate, and most disputes involve contested questions of fact and law.

However, the feature of a commercial cause which does set such a dispute apart from others is the same feature which led courts in England and Australia to create either commercial courts or commercial lists, namely the need for a prompt resolution in the interests of the wider commercial community, in order to promote the circulation of money. In matters where the alleged plaintiff/creditor is other than a substantial and highly liquid financial institution, the plaintiff will often require payment of the debt which is the subject of the action in order to be able to pay its own debts. Delay in the payment of debts can have effects not only as between the parties, but in the

83 *Witten v Lombard Australia Ltd* (Supreme Court of New South Wales, Macfarlan J, 25 May 1967).

business pyramid sitting above or below the claimant.[84] The non-payment of a debt to an illiquid plaintiff/creditor can trigger illiquidity and insolvency on the part of the creditors of that plaintiff/creditor. The very factor which led to the creation of commercial courts militates in favour of compulsory mediation in commercial matters because mediation generally brings about a more expeditious resolution of a dispute, and payment of the underlying debt, than judicial adjudication. There is a public interest in the 'velocity of [the] circulation' of money[85] which can be promoted by orders for compulsory mediation in commercial matters.

The second benefit to a commercial enterprise inherent in the negotiated settlement of an action before the costs of a trial are incurred is that the working capital of the enterprise can be freed up for a productive use, rather than for payment of legal fees. The third benefit is one which is particularly pertinent to small and medium businesses: senior management and the proprietors of the business can devote their time and energy to income-generating activities, rather than to the unproductive activities associated with litigation, such as instructing solicitors and counsel, finding and collating documents for the purposes of discovery, reading and approving correspondence, drafting witness statements and the like, and generally collaborating with solicitors in the orderly conduct of proceedings.

Should mediation be compulsory in commercial matters?

It follows that the interest, both of the litigants to a particular commercial cause and of the wider commercial community, in the expeditious resolution of commercial causes should predispose the court to order a mediation in relation to such a dispute, provided that mediation is more likely than a trial to result in the expeditious termination of the proceedings.

Commerce has willingly embraced mediation. In England, the business community has led the profession in that respect. The Commercial Court was the first English court to embrace ADR. In 1994, it began requiring practitioners to consider and discuss with their clients and opposing parties the possibility of attempting to resolve proceedings by ADR, and to ensure that parties were fully informed as to cost-effective dispute resolution options.[86] CEDR has found that the number of commercial disputes being referred to mediation has been increasing year by year. By 2001, it was found that the construction industry in the United Kingdom was the largest single user of mediation, followed by banks, the information technology sector and insurers. It was also found that the proportion of in-house lawyers who favoured compulsory mediation was twice as high as the proportion of solicitors in private practice (78% as against 40%). In relation to the public interest in the efficiency of the judicial system, CEDR has claimed that, since 1990, the

84 It was for these and other reasons that the security of payment legislation was enacted in respect of the construction industry.

85 *Aon Risk Services v Australian National University* (2009) 239 CLR 175, 224.

86 Commercial Court, *Practice Note* [1994] 1 All ER 34.

savings to the business community alone of mediation as opposed to litigation has been of the order of £22,000,000,000. This is a staggering amount of money.

The English Commercial Court commonly makes orders in relation to ADR in substantially the following form:

1 On or before [date] the parties to exchange lists of 3 neutrals or identify one or more panels of individuals who are available to conduct ADR procedures in the case prior to [date].
2 On or before [date] the parties shall in good faith agree a neutral individual or panel from the lists so exchanged or provided.
3 Failing such agreement by [date] the court will facilitate agreement on a neutral individual or panel.
4 The parties shall take such serious steps as they may be advised to resolve the dispute by ADR procedures before the individual or panel so chosen not later than [date].
5 If the case is not settled, the parties shall inform the court what steps towards ADR have been taken and why such steps have failed.[87]

An alternative form of order, known as the 'Ungley' order,[88] takes the following form:

1 Parties shall by [date] consider whether the case is capable of resolution by ADR.
2 If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such a means of resolution were appropriate, when he is considering the appropriate costs order to make.
3 The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice, save as to costs, giving reasons upon which they rely for saying that the case was unsuitable.

The orders stop short of directly compelling mediation. They are merely a direction that the parties consider mediation. The pith and substance of both forms of order is found in the requirement that the parties must make available to the court a written account of the reasons for resisting mediation. The account can later be used by the court in retrospectively assessing the reasonableness of the parties' conduct, should the matter go to trial and judgment. In other words, the written account is an aid to a retrospective costs order under a Category 3 scheme. In the nature of things, the account must be both convincing and comprehensive. Consider the wrath of a judge who has devoted considerable time and effort to a long judgment, in the preparation of which he or she reviewed folder after folder of evidence and thousands of pages of transcript, and who, when asked to deal dispassionately with questions of costs, is armed with a statement of reasons on the part of a losing party, filed many months before the trial, which advances only points of fact or of law which the judge has found to be not only wrong but untenable!

87 CJC Working Group Report (n 6) 32 [5.42], 33 [5.44].
88 Ibid. The CJC understood that such orders were usually made at the second or third case management conference, late in the life of a litigated case. The form of order is named after Master Ungley, who developed it in reference to actions for clinical negligence.

Are Category 3 schemes effective? Should they be complemented by Category 2 schemes? Should mediation in commercial matters be compulsory? There are no universally true a priori answers to these questions. Only by the use of pilot schemes, error and experimentation will decision-makers be able to ascertain whether arguments against compulsion are borne out. A number of English schemes which embodied automatic references to mediation are regarded as having failed to achieve their objectives.[89] By contrast, the model orders set out above seem to be having some effect. On the whole, nevertheless, if compulsion is to be deployed, the most effective form is Category 2, complemented by Category 3, embodied in the 'Ungley' order.

Given the advantages of mediation, both to the public and to the parties, the rules of superior courts should therefore create a rebuttable presumption in favour of mediation, by way of a provision that an order for mediation must be made at least once in the course of civil litigation, unless a judge is satisfied that the parties have demonstrated either good cause or special reason to the contrary.[90] The only questions should be as to the (a) timing of and (b) conditions precedent to an order for mediation. Mere reluctance to mediate on the part of one or more parties, and mere pessimism as to the prospects of success of a proposed mediation, should not constitute 'good cause' or 'special reasons' for this purpose. Many parties are reluctant to either initiate or agree to participate in a mediation because they are of the belief that an expression of willingness to engage in a mediation will be construed by the opponent as a sign of weakness and lack of conviction. Experience shows that, if forced into mediation, many who are initially reluctant participants become active participants.[91] Compulsion eliminates the 'weakness' or 'who blinks first' issue. Parties are often quietly relieved when compelled externally to take part in a mediation which they did not have to propose or support. There is another category of litigant which is assisted by compulsory mediation: the class of litigants who wish at all cost to avoid the confrontation implicit in a trial. They are willing to mediate but are reluctant to evince a desire to mediate.

Experience also shows that, once underway, a mediation can create a momentum of its own. It can create an atmosphere where the most intractable parties can come to terms. Settlements become possible even in cases where direct negotiations have failed to resolve the dispute and the parties are reluctant to commit further time and money to negotiations. The intervention of a neutral third party can bring about a settlement where direct negotiations cannot. The parties are able, at a mediation, to influence the procedure followed by the mediator and, if both agree, to engage in constructive dialogue, both directly and between their legal advisers. In face-to-face sessions, litigants or (in the case of corporate parties) their representatives are able to express their personal attitude about the litigation, each party's contentions and the underlying facts. The making of concessions, albeit

89 Hanks (n 22) 943–4.

90 The former is the criterion in the Commercial Court in Victoria: Supreme Court of Victoria, *Practice Note No 10 of 2011: Commercial Court*, 28 November 2011. The latter is the phrase employed in *Succession Act 2006* (NSW) s 98(2).

91 *Idoport Pty Ltd v National Australia Bank Ltd [No 21]* [2001] NSWSC 427, [29]–[30]; *Remuneration Planning Corporation Pty Ltd v Fitton* [2001] NSWSC 1208, [3].

hypothetically and conditionally, can itself create a momentum which culminates in a settlement, as can a conditional offer.[92] The parties can explore common ground, such as a shared interest in the minimisation of future costs, rather than dwelling upon the past and upon matters which divide them.

It has been recognised since the 1980s that every court must adopt full responsibility for the economic and expeditious resolution of every action instituted in its registry.[93] Recognition of this fact resulted in the implementation of case-flow management principles. The discharge of this responsibility requires the court positively to consider in every case resolution of an action by way of mediation and other non-judicial procedures. It also requires the court to provide comprehensive mediation services itself, either by provision of a judge, master or administrative officer, in the same way as is done in federal courts.

Parties would embrace mediation more willingly if mediation were seen as an integral part of the actual court process, and an indispensable interlocutory step, rather than as something extraneous and alternative to the judicial process. Indeed, a strong argument can be mounted in favour of the amendment of rules of court to permit the parties to invoke mandatory mediation even before litigation is instituted,[94] in much the same way that the rules in some jurisdictions require the exchange of offers before the filing of a summons.[95] These rules recognise that to permit the institution of litigation merely after the service of a letter of demand or letter before action is neither in the public interest nor in the interests of the parties.

Rules of court giving effect to Category 2 compulsion and presumptively requiring mediation must also be complemented by Category 3 compulsion. The court should possess, and it should exercise, the power to depart from the principle that costs follow the event where one party unreasonably refuses to mediate. The court should routinely exercise retrospective costs control over both pre-litigation conduct and post-institution conduct, by way of punishing unreasonable litigious conduct at any time during the life of a claim. This

---

92 As Shakespeare so incisively said in Act 5 Scene 4 of 'As You Like It':

> I once heard of an argument that seven judges couldn't settle. The two parties met up on their own, and one said, 'Well, if you said this-and-that, then I must have said such-and-such,' and they shook hands and parted on good terms. 'If' is the only peacemaker. 'If' is a very valuable word.

93 This responsibility is embodied in *Supreme Court Civil Rules 2006* (SA) r 3. The expressed objects of the Rules include the facilitation and encouragement of the resolution of civil disputes by agreement between the parties and the minimisation of the cost of civil litigation to the litigants and to the State.

94 Justice GL Davies, 'The Changing Face of Litigation' (Speech, Supreme Court and Federal Courts Judges' Conference, 29 January 1997), cited by Muir (n 8) 10. *Civil Dispute Resolution Act 2011* (Cth) s 6 requires applicants who institute civil proceedings in either the Federal Court of Australia or the Federal Circuit Court of Australia to file a 'genuine steps statement' with an initiating application. The statement must outline either the steps taken to resolve the dispute or the reason why no such steps were taken. Section 7 requires the respondent, after receipt of the applicant's statement, to file its genuine steps statement, either stating agreement with the applicant's statement or specifying points of disagreement, and the reasons therefor. Substantially similar legislation was subsequently enacted in New South Wales (*Civil Procedure Act 2005* (NSW) pt 2) and Victoria (*Civil Procedure Act 2010* (Vic) ss 22–3 as amended by *Civil Procedure Act 2010* (Vic) s 6).

95 *Supreme Court Civil Rules 2006* (SA) r 33.

would involve penalising a party, be it the successful or the unsuccessful party, who litigates in an unreasonable way, including refusing to mediate or refusing to take part in good faith in mediation.[96]

In addition, the rules should authorise the court to direct (and not merely permit) the parties to file rules offers, possibly accompanied by a short statement of reasons. The rules as to offers have been rightly described as 'a core element of the civil justice system'.[97] In England, reforms have gone to the point of a third step: judicial costs management under which the court manages both the steps to be taken in an action and the costs to be incurred by the parties in connection with those steps.[98]

Enhancing Category 2 mediation: Timing and preconditions

Mediation is, by its very nature, a flexible procedure. It can be used at any stage of proceedings and, indeed, prior to the institution of proceedings. It can be used in relation to merely part of a dispute. It can be used after the court has pronounced its final adjudication: for example, disputes about questions of costs and contributions to costs can usefully be referred to mediation.

English practice is to require the parties' legal advisers to consider mediation at two stages in the life of an ordinary civil action. This is a very prudent approach. It requires the parties' legal advisers to monitor the appropriateness of a matter for mediation. In many matters, the timing of a mediation can be critical to its success. Many mediations are held too early in the life of an action, and equally many are held too late. It is virtually impossible in practice for the parties' legal advisers, and thus the court, to select the perfect or most opportune time for a mediation.[99] The best that the parties' legal advisers and the court can do is to undertake a balancing exercise and select an appropriate and propitious time for a mediation, having regard to the competing interests of their respective clients. Continuing consideration by practitioners of the question of the timing of a mediation is essential.

From the point of view of minimising costs, a mediation should be held early in the life of a dispute,[100] and if at all possible, before litigation is instituted. This is the thesis underpinning Category 1 compulsion. Once litigation is underway, Category 2 comes into play. No mediation should be ordered until it is clear that a claim is going to be defended. There is no utility in directing a mediation before a defence is filed. If there is a reasonable

96 The CJC found that retrospective costs control under the *Civil Procedure Rules 1998* (UK) r 44, adopted after the Woolf Reports (n 3), 'has had a significant impact on litigation conduct in a jurisdiction where costs are high and generous cost recovery is an important ancillary motivator in litigating at all. Broadly parties behave better than they used to before the CPR and the litigation culture is more civilised'.

97 CJC Working Group Report (n 6) 30 [5.35].

98 Blake, Browne and Sime (n 4) 88 [9.03].

99 Factors relevant to time are considered in ibid, see generally ch 3.

100 Eg, in *Zeccola v Fairfax Media Publications Pty Ltd [No 2]* [2014] NSWSC 421, McCallum J referred the matter to mediation conducted by a private mediator, notwithstanding that pleadings had not closed, on the basis that the parties' respective positions were sufficiently known and to wait for the pleadings to be finalised would impose undue delay. A similar approach was taken in *Oasis Fund Management v ABN Amro* [2009] NSWSC 967.

possibility of a matter passing to judgment undefended, there is no reason why the court should burden the plaintiff with participation in a mediation which may well be a waste of time and money.

By the same token, an order for mediation should not in general be made until the dispute has attained a certain level of clarity. Ideally, a mediation would be ordered immediately before the point when costs are about to escalate. In most cases, that is either at the point at which expert reports are being procured and exchanged or the matter is being readied for trial, such as by the exchange of affidavits or witness statements. Once a matter is being defended, it should not be permitted to go to a listing conference unless the parties have already conducted a mediation or given good reason for not holding one.

By contrast, many matters (particularly domestic building disputes) come to mediation after the costs of each party or of the parties combined exceed the subject matter. Matters like that are extremely difficult to resolve at mediation. Costs naturally become the main obstacle to a settlement because costs are part of the economic detriment involved in the litigation. The parties' aggregate legal costs become a very significant component of the value at risk in the litigation. In cases where it is foreseeable that the quantum of the claim might be ultimately outweighed by the parties' aggregate costs (for example, a domestic building dispute), the sooner a mediation is ordered the better.

Likewise, where there is an economic inequality between the parties, the sooner a mediation is ordered the better. Experience shows that many defendants and, in particular, institutional defendants, will not make either a fair or a realistic offer of settlement whilst no trial is in prospect. Ordering an early mediation, complemented by a Category 3 scheme, coupled with the power to order the filing of offers, will assist in righting the imbalance in such cases.

By contrast, from the point of view of maximising prospects of settlement, a mediation should be held after all interlocutory steps, such as the production of documents by the parties and third parties, and the exchange of all necessary expert reports, have taken place. Once these steps have occurred, the parties are better able to assess their prospects of success on the factual merits and are in a better position to assess litigation risk at a mediation. Many parties quite naturally feel reluctant to settle a dispute in the absence of full information as to the other party's case. This is particularly so where a power imbalance exists between the parties to the proceedings.[101] However, the price paid for taking these procedural steps, particularly where only a relatively small sum of money is involved, is that the matter becomes intrinsically more difficult to settle, because one or both parties will want its costs paid by the opponent.

The compromise between these competing needs — that is, between the need to convene a mediation *before* costs become an obstacle, on the one hand, and the need of the parties to be fully informed and to mediate only *after* information has been fully exchanged — can be struck by orders for disclosure of documents and non-party discovery, in advance of the mediation.

---

101 Bathurst (n 7) 879.

In addition, the court should consider directing the parties to file offers,[102] if they have not already done so, (a) no later than say 3 weeks in advance of a proposed mediation; and (b) within 7 days of the termination of the mediation if it fails. In each case, the offers should be required to be accompanied by a statement of reasons, to permit the court to adjudicate expeditiously and economically as part of a Category 3 costs adjudication.

Practitioners need to remember that, if a mediation is held prematurely and fails, time and costs will be wasted but, more importantly, the very failure of the process may exacerbate the dispute between the parties and harden the parties' attitudes towards one another. Nevertheless, the possibility of a mediation should be raised between opposing practitioners early in the life of an action and practitioners should cooperate with a view to deciding the most appropriate time for, and the necessary preconditions to, a mediation.

Preparation for a mediation

No form of compulsory mediation can succeed without the cooperation of the legal profession. If solicitors, in particular, are not able to persuade a client to take part in a mediation, then no order of a court will make that party a willing party.

The prospects of success of a mediation are enhanced, not only by the full and frank exchange of information between the parties, but also by the attitude of the parties' legal advisers. Many mediations are embarked upon in an atmosphere of hostility and distrust between both the parties themselves and their legal advisers. Views have become entrenched. Each side accuses the other of non-cooperation and, indeed, of obstruction and refusal to admit the obvious. Practitioners are not on speaking terms. Anger, frustration and resentment begin to influence the conduct of the litigation, on one or both sides. The defendant is accused of deep-pocketing the plaintiff. The mediation itself gets underway in a poisonous atmosphere. Not even super-mediator can purge the toxic atmosphere and bring about a settlement single-handedly.

Mediation must not be treated as an adversarial process, even though it has arisen out of the adversarial system. It must be treated as a problem-solving process, in the interests of the client.[103] The party needing persuasion is not the opponent, but the practitioner's own client. From this it follows that the most potent enemy of a successful mediation is, not the intractable party, but the practitioner who engages in the conduct of a saboteur or fifth columnist, and who undermines all efforts of the mediator and of his or her opponent to bring about a compromise.

English courts recognise a duty on the part of a practitioner to discuss with the lay client alternatives to litigation, such as mediation.[104] As a corollary, practitioners have a duty to adopt a constructive attitude to mediation once ordered or agreed. Practitioners also have an obligation to facilitate a settlement consistent with the interests of the client, along with a duty to prepare the client for mediation. They have a duty not to misrepresent the

102 *Supreme Court Civil Rules 2006* (SA) ch 6 pt 11.

103 Davidson (n 42) 14–18.

104 *Burchell v Bullard* [2005] EWCA Civ 358. See also Blake, Browne and Sime (n 4) 36–8 [4.03]–[4.06]. See also the New South Wales conduct rules referred to by Bathurst (n 7) 876.

client's prospects of success: in other words, a duty not to lead a client to negotiate too ambitiously at the mediation. The parties are entitled to comprehensive and realistic advice as to matters which create a risk of failure. In addition, the parties are entitled to advice as to the worst case which might befall them should the matter go to trial.

Those duties find expression in the Law Council of Australia's Guidelines for Lawyers in Mediation ('Guidelines') which require practitioners to:

> look beyond the legal issues and consider the dispute in a broader, practical and commercial context [...] Before a mediation, a lawyer should, as well as assessing the legal merits of the case, consider the dispute in commercial terms and in the light of the client's business, personal and commercial needs, generate possible practical options for resolution.[105]

In this setting, the likely future cost of the litigation, if it is not compromised, is of great importance to most litigants. Advice about the client's prospects must be coupled with an assessment of the likely aggregate costs which the client will bear if it fails in the action and if it is ordered to pay the taxed costs of another party or of other parties. Most importantly, the Guidelines require a legal practitioner to develop a risk analysis focusing on, among other things, the client's worst case, and 'linking risks to the client's interests'. This is a most important obligation.[106] The task of preparing a risk analysis, and an assessment of the client's worst case, should not be left until the mediation is underway. More importantly, it should not be delegated to the mediator. Parties often misconstrue the conduct of a mediator in discussing their potential worst case as an indirect way of giving legal advice, of undermining advice already given to the party, or of casting doubt upon the party's position in the litigation. The parties are entitled, in advance, to balanced advice from their advisers about their prospects of success and risks of failure and to advice about the likely quantum of any award of damages. In addition, as the Guidelines contemplate, the advice of the solicitor must go beyond mere economic questions. Intangibles, such as the need for certainty, finality, the alleviation of stress and the cessation of distraction from employment and family, require emphasis.

Finally, the Guidelines invite practitioners to discuss with their clients, in advance of the mediation, the interests of other parties. The client can be encouraged, particularly where the opponent is a natural person, to sit notionally in the chair of the opponent and consider the opponent's likely perspective on the dispute. This is a way of enhancing the atmosphere of a proposed mediation. It is particularly important in family disputes, including inheritance claims.

A second means of diffusing the parties' usual negative states of mind towards one another, and the hostility which many solicitors feel in the conduct of litigation, is a preliminary conference. When such conferences are held, they are often simply used as a vehicle for the discussion and agreement

---

105 Law Council of Australia, *Guidelines for Lawyers in Mediations* (August 2011) 5 [5.1] ('Guidelines').

106 As to the scope and contents of a risk assessment, see Blake, Browne and Sime (n 4) 173 [14.84]. See also the tips for legal practitioners involved in inheritance claims and disputes over wills in Davidson (n 42) 5–6.

of procedural matters. Deployed constructively, they can achieve much more. They can be used to discuss questions of substance. In addition, they can be deployed for a preliminary discussion of procedural questions, including such matters as the resolution of limited issues in the case and other ways of conducting the litigation with minimal cost to the parties, if the mediation fails. Those matters can be productively addressed at a preliminary conference, with a view to minimising both delay in bringing the matter to trial and the parties' costs (if the matter is not settled at the mediation), because they are essentially legal or technical topics, rather than matters of substance for the parties.[107] Preliminary conferences enhance the prospects of a mediation getting underway expeditiously and productively. At such a conference, each side should be asked to indicate whether both the parties and the mediator have the materials necessary to enable the opposing parties to reach an informed and a balanced decision about settlement. In addition, the parties could be asked to consider whether any preconditions, procedural or substantive, should be satisfied before the mediation is convened.

The desirability of the preparation, circulation and agreement of a draft deed of settlement (even if incomplete) in advance of the mediation cannot be over-emphasised.

Conclusion

It is now widely accepted that the mediation of disputes is in the public interest and is of benefit to the judicial system and through it the community.[108] Mediation also serves the private interests of most litigants. While it has often been asserted that mediation is less effective if compulsory, statistical evidence (such as it is) is to the contrary.[109] It is, therefore, in the public interest that superior courts have the power to compel litigants to engage in mediation. This article has reviewed two forms of compulsory or quasi-compulsory mediation within the armoury of the courts.

No single form of compulsory mediation is either a perfect or a universal solvent. The widespread implementation of Category 1 compulsion is a matter for Parliament. Implementation of Categories 2 and 3 is in the hands of the courts.

All superior courts in Australia possess a statutory power of the kind embodied in Category 2, namely to order the mediation of a proceeding, with or without the consent of the parties. The power is a very salutary one. It should be used consistently, but with discrimination. The court remains the arbiter of cases which are and are not suitable for mediation. This, however, points to one shortcoming in Category 2: it gives the parties the opportunity to argue in a public forum about whether or not to mediate. Entrenched parties will take advantage of that opportunity, generally for tactical reasons only. Argument in open court upon an application for mediation may result in an

107 This final matter is required by the Guidelines (n 105) 6 [5.2].

108 *Browning v Crowley* (n 52) [5].

109 CJC Working Group Report (n 6) 44 [7.21]–[7.22], 46 [8.5.6]. It would be a relatively straightforward and simple exercise to audit the efficacy in Australia of both mediation generally and court-ordered mediation in particular. Corresponding audits have been conducted a number of times in the United Kingdom.

expensive procedural debate. Nevertheless, this is a small price to pay for the benefits of systematic mediation of civil proceedings. The solution to this problem might be a rule or judicial practice requiring adjudication on an application for a mediation to be dealt with in chambers, on the papers only, without argument, with no appeal by leave or otherwise, similar to the approach espoused some decades ago in relation to applications for cross-vesting. The British Columbia approach referred to above also has much to recommend it. It permits a party to initiate a process of mediation which, once initiated, is compulsory and self-executing. The British Columbia approach does not harbour the disadvantage referred to above.

By one means or another, protocols and procedures for mediation should be integrated into the court structure and into the rules of civil procedure, such that, to the extent possible, mediation becomes an ordinary and indispensable interlocutory step in the course of every action, unless good cause to the contrary is shown to the satisfaction of a judge or master.

Integration can take one of a number of forms. First, the court itself can provide internal mediation services by making judges, masters or registrars available to conduct mediations, to the extent consistent with the resources of the court. This will bring about a perception on the part of litigants that mediation is as much a part of the judicial process as is a trial. In addition, it is a fact of life that, given the attributes and attitude of certain litigants and their legal advisers, some disputes can be resolved only by a mediator with the authority of a sitting judge.[110]

Secondly, the rules regulating the case flow management scheme of the court can require both the court and litigants to address the desirability of mediation at least once and, more desirably, twice, in the life of every action.

Thirdly, those rules could embody an express presumption or norm that mediation will be ordered at least once in every civil matter unless a judge or master is satisfied that mediation (a) would be unfair or would not be productive or, in the alternative, not productive at the stage at which the mediation is sought, or (b) otherwise should be refused for some sufficient or proper reason.

Fourthly, the rules might emulate the rules in force in British Columbia in authorising one party to serve notice on an opponent requiring mediation and thereby making mediation unavoidable, unless the court otherwise orders. Under such a scheme, mediation is triggered by notice, rather than by an order of the court. It is invoked at less cost. The court becomes involved only if mediation is resisted by one or more parties. The resisting party will carry the onus of proving that mediation would be unfair or unproductive. The resisting party will create a risk of an adverse costs order against itself.

Category 3 — retrospective costs orders — are not an adequate substitute for early intervention by the court. Such orders are made after the damage

110 Conflicting views have been expressed on the topic whether sitting judges should conduct mediations. See, eg, Vicki Waye, 'The Role of Judges and the Courts in Encouraging the Use of Alternative Dispute Resolution in Australia' (Speech, International Seminar in Relationships between ADR and Judicial Proceedings, 26 November 2009) 11–12; Bathurst (n 7) 884–7.

sought to be avoided by ADR — the incurring of costs which might otherwise have been avoided — has been done. Category 3 schemes need to be merged with Category 2 schemes.

The forms of compulsion involved in Category 2 and 3 schemes do not, on analysis, do violence to the concept of mediation being a voluntary process. On the other hand, voluntariness within a mediation must be sacrosanct. There can be no question of a party being compelled to enter into a settlement, let alone a settlement imposed on either or both of the parties by the mediator. A party must have the right to terminate or adjourn a mediation, subject only to due consultation with the mediator. The only true obligation of a party to a mediation is to attend the mediation and participate in negotiations in good faith. However, there is no reason why a party who fails at a mediation to negotiate in good faith or act reasonably should not be dealt with adversely by costs orders at the conclusion of the litigation if the mediation fails by reason of the conduct of that party, as contemplated by Category 3 schemes.

Mediations (like trials) are a human process. Mediations involve negotiation, strategy, risk analysis, preparation and, ultimately, resolution. President John F Kennedy remarked in his inaugural address: 'Let us never negotiate out of fear. But let us never fear to negotiate.'[111]

The technological age has led to e-courts and also to online dispute resolution ('ODR').[112] These forms of dispute resolution are not addressed in this article. Mediations of the type addressed in this article are, and are likely to remain, an inherently 'human' process, albeit sometimes assisted by technological advances. It is vital that steps be taken to reduce the apprehension which members of the public and non-institutional litigants feel towards the judicial system and that courts positively support fully entrenched, and fully resourced, mediation in order to resolve litigation in a manner best calculated to serve both the interests of litigants and the public interest.

111 John F Kennedy (Inaugural Address, United States Capitol, Washington, 20 January 1961) <www.jfklibrary.org/asset-viewer/archives/JFKPOF/034/JFKPOF-034-002>.

112 Karim Benyekhlef and Fabien Gélinas, 'Online Dispute Resolution' (2005) 10(2) *Lex Electronica* 1 <www.lex-electronica.org/files/sites/103/10-2_benyekhlef-gelinas.pdf>.