

**THE AUSTRALIAN EXPERIENCE OF LEGISLATED PRE-ACTION  
ADR REQUIREMENTS: SPECIFICITIES, ACCEPTATION,  
AND KEYS TO SUCCESS**

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**Overview**

The introduction of the Code of Civil Procedure in Québec mandating the consideration of ADR processes prior to instigating litigation has the potential to affect significantly the legal and commercial culture of the Province if the Australian experience over the last 25 years is any guide.

Mediation is now well-established in Australia particularly in the commercial jurisdictions of the states and territories. However it is still viewed as an unwelcome visitor by many in the legal profession and the judiciary.

This is reflected in the fact that commercial mediations generally take place at the later stages of the dispute. This translates into a process that is directive, evaluative and solution focused. The legal profession is comfortable with this approach because it has a marked similarity to the adversarial litigation process.

The legislated pre-litigation ADR initiatives introduced into Australia over the last decade are designed to pressure lawyers into mediating much earlier in the litigation cycle. This requires a different mediation style, one that is relationship based and facilitative with more of a focus on the soft skills of the mediator.

While there has been significant compliance with the requirements to “attempt” mediation and allied ADR processes there is still strong resistance for it to flow through to an actual mediation. Despite this there has been a significant reduction in the number of matters being set down for a hearing in the Australian commercial courts. Not all of this is due to mediation and ADR but it has played a significant part in changing the commercial culture from adversarial to collaborative.

Part of the motivation for earlier mediation is cost efficiency, but at a more fundamental level, it is a reflection of the fact that we are living in changing times especially in the commercial world.

There has been a fundamental shift towards a more collaborative management style within corporations and the rise, especially recently, of the “collaborative economy” as evidenced by the Uber ride-sharing and Airbnb accommodation platforms.

It is the speed of change together with the relationship complexity of modern commercial activity that will have the most impact on the slow, adversarial and expensive traditional judicial approach to resolving conflict.

This paper will examine the rise of mediation in Australia since 1990 particularly with respect to the commercial courts and the challenges its growth has had on the legal profession, the judiciary, the legislature and most importantly the parties who find themselves in dispute. The role of the mediator has also evolved over this period to be that of a substantive partner with the judiciary in the resolution of disputes.

The paper will also look at the end users of the mediation product particularly in the commercial and industrial context both as a pre-emptive and post-dispute process.

There are five key stakeholders that will be affected by pre-action ADR requirements. They are the parties, the lawyers, the judiciary, the legislature and the mediation/ADR professionals. Each of these stakeholders is driven by internal and external pressures. The key to navigating a way forward is to understand those drivers.

The legislature in the various Federal and State jurisdictions of Australia have played a key role in encouraging the use of mediation and other ADR practices in conjunction with their respective judicial systems. The paper will look at how this has evolved with specific examples from state jurisdictions as well as the Federal *Civil Dispute Resolution Act 2011 (Cth)*.

Mediation, in its modern Western context, is still a relatively new profession. It is continuing to find its way as it evolves its theory and practice base. The profession is still struggling to find its own identity. Despite this, mediation has survived and grown, principally because it seems to work. There is a high rate of success once parties get to and participate in the mediation. This applies to both voluntary and compulsory mediation.

The key to understanding mediation's proper role in the suite of commercial dispute resolution options lies partly in understanding two issues. Firstly, why does mediation work and, allied to this question, what is the source of the mediator's power and influence over the parties and their lawyers in the session? Secondly, why do people get trapped in conflict and are unable to negotiate their way out? It is through understanding these two issues that mediation can find its proper place in working alongside the courts and the legislature to resolve conflict and disputes.

### **The Australian Experience 1990 to Date**

The last 25 years has seen a growth in the use and acceptance of mediation in Australia. There is no one event or initiative that has led to this. It is a combination of many factors.

#### **The Rise of the Private Mediator**

The first major initiative involving mediation and the courts took place between 1991 and 1993 when the Law Societies of the states of Queensland, New South Wales and Victoria partnered with their respective superior commercial courts to conduct what the first two states called Settlement Week and Victoria called the Spring Offensive. Lawyers who had undertaken mediation training were brought together for an induction workshop and were then allocated mediations referred directly by the judiciary from the list of long-running cases.

It is of significance that it was the judiciary and the legal profession, not the legislature that embraced this new process of mediation as a way of dealing with the huge backlog of cases that had built up. It heralded the start of the private mediation movement in Australia especially for lawyer mediators. It provided an opportunity for a significant number of lawyers to obtain practical mediation experience both as mediators and as lawyers acting for the parties in those mediations.

Many of the lawyers who started their mediation careers in those settlement weeks in the early 1990s went on to fill the roles of mediators in a number of substantive mediation panels set up by the legislature in various industries. These included panels for farm debt mediation, franchising mediation, horticultural mediation, retail leases mediation and a host of other schemes.

There is now an active market for private based lawyer mediators in Australia. Over the last 25 years a body of very experienced lawyer mediators has emerged in all

states of Australia which the legal profession can call on to mediate often quite complex commercial matters.

### **The Sir Laurence Street Effect**

A powerful influence on the development of a private legal-based mediation profession was the former chief Justice of the New South Wales Supreme Court Sir Laurence Street. He retired from the bench in 1988 and commenced a very lucrative and successful mediation practice. He was held in high esteem both as a jurist and as a mediator by the broader legal profession, commerce and industry as well as politicians on all sides. He gave the emerging profession of mediation legitimacy within the eyes of the judiciary and the legal profession and helped to overcome the initial scepticism at this new profession. He completed more than 2500 mediations in a wide variety of jurisdictions up until his recent retirement.

More importantly he had the ability to communicate with people and lawyers and was able to use a broad process that combined a facilitative and a subtly directive mediation style. He was a very effective and creative mediator who, through equal measures of charm and guile, was able to build a constructive relationship with parties as well as with their lawyers. His example led to an increasing number of judges retiring from the bench to follow his lead into private mediation practice. It also opened the door to many senior legal practitioners devoting themselves fully to mediation.

There is now a significant number of former judges and senior lawyers working as full-time private mediators with fees ranging from \$5,000-\$15,000 per day. As a result members of the legal profession who practice in the commercial courts have come to accept that mediation as a process is now an integral part of dispute resolution within Australian commercial litigation.

### **NADRAC**

Another significant development was the initiative by the Federal Attorney General to appoint a panel of experienced mediators from both the lawyer and non-lawyer sectors to advise on policy issues with respect to alternative dispute resolution within a legislative framework. The committee's title was the National Alternative Dispute Resolution Advisory Committee (NADRAC). This gave experienced mediators direct access to policymakers and politicians at a time when there was much ignorance and misinformation in the general community on the positives and

negatives of mediation. It allowed some practical realism to be brought into the discussions with respect to proposed legislation.

NADRAC made two long-term contributions to the growth of mediation in Australia. The first was that it developed, in consultation with the broad legal and non-legal mediation community, an Australia wide set of national mediation standards and accreditation (NMAS). Although NADRAC adopted a minimalist approach the standards have had the effect of forcing a number of sitting and retired judges and senior lawyers to undertake basic mediation training. These standards have challenged, and continue to challenge, the illusion held by a significant number of judges and lawyers that they were natural mediators simply because of their legal training and experience.

NADRAC's second significant contribution, which was a focus on pre-action litigation requirements, was its 2009 report titled "*The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal jurisdiction*". This, together with an internal report within the Federal Attorney Generals Department, led to the enactment of the *Federal Civil Dispute Resolution Act 2011(Cth)* and has had an influence on similar legislation in Victoria, New South Wales and the other states.

### **Judicial Mediation**

There had been pilot programs in the late 1980s for court annexed mediation in a number of courts particularly the Federal Court of Australia and the New South Wales Land and Environment court. However they evolved more as court Registrar lead ADR processes with occasional participation by judges.

There has been continuing debate within Australia as to whether the judicial role should be kept separate from the mediation role. A number of judges including Sir Laurence Street and the former Chief Justice of the Supreme Court of Queensland the Hon. Paul De Jersey advocated that the two roles be kept separate while other judicial officers have advocated a combined role.

While some judges in a number of jurisdictions will make themselves available for a mediation role within their own courts the majority are happy to refer to private mediation practitioners. Most mediation when conducted within the various court systems are more in the form of pre-trial conferences and more often than not conducted by court offices such as Registrars and Masters.

There has been some reluctance amongst Federal Court judges to act as mediators. Although the provision for judicial mediation remains in force under the Federal Court Rules it is utilised extremely rarely (Justice P. A. Bergin).

It is the State based commercial courts that have been more practitioner lead with respect to ADR processes.

### **Early Legislated Intervention**

The initial interventions by the legislature began in the early 1990s more as a response to debates about whether the courts had the power to order non-consensual pre-litigation mediation. This issue partly arose out of the settlement week and spring offensive initiatives. Some judges were prepared to find that they had that power within their inherent power to manage their own court. Some novel approaches developed including setting matters down for hearing in a priority list if the parties had attempted mediation and in a non-priority list if they had not.

By the end of the 1990s most states had introduced legislation to give courts the power to order non-consensual mediation. Some courts actively applied those powers particularly in Queensland during the tenure of Chief Justice De Jersey who championed a practitioner lead mediation approach. Other state courts were less proactive while others simply ignored their powers. It was often at the level of the individual judge to decide how proactive they were in "encouraging" and later directing parties to mediation.

By the mid-1990s the legislature began to take a more proactive and directive role in promoting mediation within specific jurisdictions and industries. A host of legislation was introduced mandating compulsory ADR processes for farm debt, franchising, residential tenancies, retail tenancies, small business, building disputes and strata schemes management, the various state based workers compensation mediation panels, common law work injury claims, and administrative law tribunal's in the various states and territories of Australia.

These legislated initiatives have been referred to as 'scheme' arrangements (Sourdin) and are generally government funded whether through a private mediation organisation such as "The Office of the Mediation Adviser" for franchising disputes or run through government departments such as the New South Wales Department of State and Regional Development for retail tenancies.

Perhaps the most dramatic scheme was that introduced by the New South Wales legislature to abolish the long established Workers Compensation Court. It was replaced by the Workers Compensation Commission using a Med/Arb process. A notable feature was the deliberate appointment of experienced mediators as the arbitrators over that of the experienced members of the adversarial workers compensation Bar. The adversarial culture changed immediately because of the cultural alignment between the Med/Arb process and practising mediators acting as the arbitrators.

It is a fate that has hung over the Family Court of Australia for a number of years because of the continued attachment by the family law judiciary to traditional adversarial processes despite having the most comprehensive pro ADR legislation and rules in Australia. This is an example of how legislation, by itself, cannot facilitate cultural change without genuine cooperation from the judiciary.

### **Legislating Pre-Action Requirements in the Superior Australian Commercial Courts**

By the mid-to late 2000's the legislature in the various states and territories started to introduce civil pre-action requirements. At first they were limited to general pre-action steps such as requiring lawyers to advise their clients of the availability of ADR processes and for parties to exchange written offers and responses within set time-frames, disclose documents and minimise delay. There also started to emerge rules to introduce behavioural expectations for lawyers including the duty to act in a reasonable manner, cooperate, to act honestly and in New South Wales the introduction of the concept of "good faith" (*Supreme Court Civil Rules 2006 (SA) r33*, *the Supreme Court (General Civil Procedure) Rules 2005 (Vic)* and *the Courts and Crimes Legislation Further Amendment Act (NSW) 2010*).

The judiciary and the legal profession seemed to generally accept these directions from the legislature principally because they were left free to self regulate their behaviour. The oversight of their behaviour is left to the individual judge. Lawyers are experts at analysing the foibles of individual judges and can moderate their pre-litigation behaviour accordingly.

However, organised resistance started to develop when the legislature went one step further in seeking to impose certification obligations on parties and their lawyers requiring them to confirm that they have complied with the relevant pre-action obligations.

The Federal Government, the New South Wales and Victorian governments introduced Acts of Parliament requiring forms of certification of pre-action requirements. The Federal government introduced the *Civil Dispute Resolution Act of 2011(Cth)* which remains in operation. However both New South Wales and Victoria's similar pre-action legislations were repealed when both states had a change of government.

### **The Federal Civil Dispute Resolution Act 2011 (Cth)**

The key feature of the Federal legislation was that it introduced a form of certification where the disputants had to file a genuine step statement before commencing action in a range of civil disputes within the Federal jurisdiction.

The relevant rules of the court have restricted the 'genuine step statement' to a maximum of 2 pages.

The relevant sections of the act are as follows:

#### Section 3 Object of Act

*The object of this Act is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.*

#### Section 4. Genuine steps to resolve a dispute

*(1A) For the purposes of this Act, a person takes genuine steps to resolve a dispute if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.*

*(1) Examples of steps that could be taken by a person as part of taking genuine steps to resolve a dispute with another person, include the following:*

**Les exemples suivants font partie des initiatives appropriées prises en vue de résoudre un différend :**

*(a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;*

*(b) responding appropriately to any such notification;*



*(c) providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;*

*(a) donner avis à l'autre personne des questions qui sont, ou peuvent être, en litige et offrir d'en discuter en vue de régler le différend;*

*(b) répondre convenablement à un tel avis;*

*(c) fournir des renseignements et des documents pertinents à l'autre personne pour permettre à l'autre personne de comprendre les questions impliquées et comment le différend pourrait être réglé;*

*(d) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;*

*(e) if such a process is agreed to:*

*(i) agreeing on a particular person to facilitate the process; and*

*(ii) attending the process;*

*(d) évaluer si le différend pourrait être réglé à l'aide d'un processus facilité par une autre personne,*

*y compris un processus du mode alternatif de règlement extrajudiciaire des différends;*

*(e) si un tel processus est convenu:*

*(i) convenir d'une personne donnée pour faciliter le processus; et*

*(ii) participer au processus;*

*(f) if such a process is conducted but does not result in resolution of the dispute — considering a different process;*

*(g) attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.*

*(f) si un tel processus se déroule, sans aboutir au règlement du différend, envisager un autre processus;*

*(g) tenter d'entrer en pourparlers avec l'autre personne, en vue de régler certaines ou toutes les questions en litige, ou autoriser un représentant à le faire.*

The Federal Attorney General is currently reviewing the operation and effect of this legislation which hopefully will provide some statistical evidence to better inform the debate.

There is limited case law on what constitutes reasonable behaviour with respect to pre-litigation obligations. The courts have tended to explore what constitutes unreasonable or not genuine behaviour by the parties and their lawyers. The limited case law to date has set a low bar in that the accepted standard of behaviour appears to be whether there is any evidence of pre-litigation contact between the parties or their lawyers. (Sourdin 2012 B, p. 910)

### **The New South Wales and Victorian Legislative Experience. One Step Forward and Two Steps Back.**

It is of interest to examine why both New South Wales and Victoria took a step back from the Federal legislation when both governments changed to a more conservative party. The arguments for this have exposed the fault lines that have developed over the years between the mediation process and the legal profession/judiciary.

The New South Wales government simply postponed the previous government's legislation and then repealed it. In the second reading speech the Attorney General noted that it was necessary to gather more evidence about the impact of the Federal reforms and that an evaluation of those reforms was being undertaken by the Federal Government. This report is still pending.

The new Victorian Government's response was more direct and reflective of the concerns from sections of the legal profession and the judiciary. In his second reading speech repealing the legislation the new Attorney General stated

*"However, the government's view and the view of many practitioners, is that to seek to compel parties to do so through these heavy-handed provisions will simply add to the complexity, expense and delay of bringing legal proceedings, because of the need to comply with these mandatory requirements, whether or not they are likely to be useful in any particular case.*

*In many cases these pre-litigation requirements will allow dishonest parties to postpone and frustrate proceedings." (Sourdin)*

The twin arguments that there is not enough evidence and that the process will do more harm than good (without similar evidence) seem to represent the more conservative elements of the legal profession/ judiciary's resistance to directive pre-action requirements.

Another argument is that there already exists a robust private mediation market as noted in the Annual Report of the Supreme Court of Victoria, 2009 -2010 (p 46) of "*virtually no civil case going to trial without at least one round of mediation*". This would be true of most commercial jurisdictions around Australia although some more than others.

Perhaps the certification requirement is seen as being just one step too far for the profession and the judiciary that has become ever more wary of the expanding use of mediation. Nevertheless the latitude and freedom allowed through, at times, minimal supervision by the judiciary might be coming to an end. There is the implication, by this suite of legislation, that the legislature views the profession as not taking seriously its pre-action requirements and that total self-regulation may no longer be warranted.

It is clear that the advance of mediation over the last 25 years has resulted in a reduction in court time in many jurisdictions with the associated loss of status particular for the judiciary. There have also been financial implications for practitioners.

## **Lessons Drawn from the Australian Experience**

### **Market Forces**

The growth of mediation in Australia is partly due to the effect of market forces at play. It started with the early growth of the private lawyer mediator and the substantial financial rewards that flowed especially for Senior Counsel and retired Judges. It has become an attractive adjunct to standard legal practice. The professional ability of the earlier pioneers, including Sir Laurence Street, to include a facilitative aspect to their mediation process established a high standard of professionalism. This more than anything else gave mediation its initial legitimacy as a real alternative to adversarial litigation.

There has also been a societal change in Australia, especially in the commercial context. It is more than just the corporate world trying to reduce costs. There has been a fundamental shift towards a more collaborative management style within

corporations and the rise, especially recently, of the “collaborative economy” as evidenced by the Uber ride-sharing and Airbnb accommodation platforms.

This has been aided by the development of model litigant obligations that governments have imposed on government departments as well as many private commercial institutions such as insurance companies taking more pro-active steps to resolve disputes earlier.

There is also an increasing trend for private mediations to take place at a much earlier date often immediately after a letter of demand has been issued. This can partly be put down to pre-litigation ADR legislated initiatives and the growing awareness and acceptance of mediation within the commercial community.

Often these earlier mediations are conducted by solicitors rather than by legal counsel drawn from the private bar. It might be partly a cost saving exercise but solicitors often have a deeper long-term personal relationship with their clients which can be useful in helping to bring in some business reality and commercial sense to the offers of compromise especially at the earlier stages of the dispute. However they still tend to be evaluative and solution focused.

### **The Power of Mediation - Why Does Mediation Work?**

The principal lesson from the Australian experience is that mediation, as a process, has a power and momentum of its own. Mediation as a process has its own innate power. It has continued to grow despite the passive (and sometimes active) resistance of the legal profession and the judiciary. It would not have survived and continued to evolve over the last 25 years otherwise.

Why does mediation work? It is assumed by many mediators, particularly ex-judges and senior counsel, that the power and driving force of the mediation process resides in the mediator. While the mediator has an important role, in my view, he or she does not constitute the core power behind the success of mediation as a process.

Does the power of mediation reside in the expertise, knowledge and skill of lawyers representing the parties in the mediation and their relationship with their clients ability to compromise? In my view this does not constitute the core of what is mediation.

I have come to the view that what is at the core of mediation and why it works so well is the simple fact that it is a venue. A venue where the parties are required to set aside time to spend with their lawyer, the other party and that party's lawyer in

the company of a mediator. The venue, like the door of the court, requires lawyers to look at their file in a holistic manner rather than piece by piece actioning over a long period of time. It is where the parties are presented with the tantalising option that the matter could resolve that day if they so choose.

This concept can be best described by the following quote from Michael Slattery QC recalling his first experience as a lawyer acting for a party in a large commercial mediation conducted by Sir Laurence Street:-

*“The fatal step in mediation is to say yes to the idea in the first place. Mere participation in the process works insidiously over time to suspend, then overcome, much of the detachment of lawyers and the cynicism of their clients. Once hours, days or even months have been spent mediating in a structured environment, human reactions attempt to give all this activity some purpose. The motivation to settle then appears” (M. Slattery QC).*

**« D’abord, l’étape fatidique de la médiation est de dire «oui» à l’idée. La simple participation au processus parvient insidieusement au fil du temps à suspendre, pour ensuite surmonter, le désintérêt des avocats et le cynisme de leurs clients. Après avoir déployé des heures, des jours ou même des mois de médiation dans un environnement structuré, les réactions humaines tentent d’attribuer un but à toute cette activité. D’où l’apparition de la motivation à l’égard d’un règlement. » Michael Slattery, c.r.**

Mediation is more than the sum of the parts of the people who are present. It is a collective enterprise where the mediators, lawyers and the parties individually and collectively play a role. Each participant certainly has an influence both positive and negative, but they do not individually make the process. The structure and environment of the venue creates something that emerges out of this group activity that has an existence of its own, almost like a separate person, and is capable of thinking in ways as a collective that neither the mediator, the lawyers or the parties as individuals are capable of generating on their own (Rooney and Ross).

Psychoanalysts call it intersubjectivity or ‘The Third’ (Ogden)

The belief that the person of the mediator constitutes the core of the mediation process is, in my view, the principal reason why mediation is misunderstood as a process by many in the law, the judiciary and policymakers.

## **The Source of the Mediator's Power**

There are a number of models of commercial mediator behaviour that have developed over the last 25 years. The earlier more relationship based facilitative/ advisory approach of Sir Laurence Street has of late been challenged by the more court-based adversarial style mediator who sits as quasi-judge hearing submissions from the party's lawyers without any contribution from the parties.

There is a widely held view, especially with the more adversarial lawyer mediators, that the power of the mediator comes from their expertise in the relevant area of law, their status as a senior lawyer or retired judge and their ability to "persuade" parties to settle. This translates into a process that is directive, evaluative and solution focused. The legal profession is comfortable with this approach because it has a marked similarity to the adversarial litigation process. Lawyers feel culturally at home. Implied in this is the belief that a successful mediation is due to the ability and capacity of the mediator.

I would argue the opposite is the case. The vast majority of the more than 1,500 mediations I have dealt with over the last 24 years have settled. I did not settle any one of those cases. They settled themselves. My contribution was to clear the path for the settlement and in effect to try to stop them from not settling. There might have been one or two cases that I did a 'brilliant' intervention but more often than not I just cleared the way, particularly helping the lawyers get out of the way and avoid tripping up their own client, the other party and the other party's lawyer. As lawyers have become more familiar with the process I have found them to be of great assistance not only to myself as the mediator but to their own clients and the ultimate outcome.

I would argue that there is a general misunderstanding of the power of the mediator. In my view the power of the mediator comes from having absolutely no power. It is a paradox in that having no power allows the mediator entry into the relationship plane that exists between the parties which is at the core of the decision to hold fast to a position or whether or not to compromise. While mediation takes place in the shadow of the law it is at the level of the relationship plane that the mediator has the most effect. That is why Sir Laurence Street's personal charm with the parties was so effective.

This challenges the concept of mediator neutrality because the mediator is, in a sense, manipulating the parties at an emotional level. This places far more power

and responsibility in the hands of the mediator and requires a higher degree of personal ethics and self-awareness on their part (Rooney 2015).

### **Why Parties Get Trapped in Conflict - Triggering the Nash Trap**

What draws people into conflict and keeps them in ever deepening cycles of claim and counter claim? Why do they end up being trapped in the litigation process. The answer to this question can be found in game theory.

Nobel Prize winner John Nash used advanced logic and mathematics to examine situations in which parties in competition reject a strategy of co-operation that would benefit everyone and instead act independently in an attempt to maximise their own self interest. They quickly fall into a trap because if one party refuses to compromise it is not worth the other party giving way.

Nash postulated that a point of balance is quickly reached in which either side cannot independently escape without suffering a loss. He called this trap the Nash Equilibrium which he postulated was lying in wait for every situation of competition and conflict in which parties are unwilling or unable to communicate.

*“Cooperation would lead to the best overall outcome in all ... cases, but Nash’s Trap (which is now called the Nash Equilibrium) draws us by the logic of our own self-interest into a situation in which at least one of the parties fares worse but from which they can’t escape without faring worse still. That is why it is such an effective trap. If we are to learn to cooperate more effectively, we need to find ways to avoid or escape from the trap.” (Fisher)*

*« La coopération mènerait au meilleur résultat global dans tous ... les cas, mais le Piège de Nash (qui est maintenant appelé l’Équilibre de Nash) nous attire par la logique de notre propre intérêt personnel dans une situation où au moins une des parties s’en tire mal mais ne peut en échapper sans que ce soit encore pire. Voilà pourquoi ce piège est si efficace. Si nous devons apprendre à coopérer plus efficacement, nous devons trouver des façons d’éviter ou de nous échapper du piège. » (Fisher)*

Anatol Rapoport came up with a simple negotiation formula to avoid the Nash trap by offering cooperation on the first move and thereafter doing exactly what the other side does. Reward cooperation with cooperation and defection with defection. He called this ‘Tit for Tat’. This approach has been further expanded by game theorists (Fader and Hauser) who called their strategy Implicit Cooperation. They suggested

that it often pays to be more cooperative in multi person situations and that magnanimity and forgiveness are key factors in promoting cooperation in the presence of someone who is not cooperating.

Mediators face parties caught in a Nash trap every time they mediate. It leads to the classic mediator verbal intervention: *"As I look around the room I cannot see any winners here. Everyone here is a loser in some form"*. Often the trap revolves around the ever-increasing legal costs and who is going to be liable for them; a classic example of the Nash Equilibrium at play.

International examples of where equilibrium has been reached include the nuclear arms race during the Cold War, the Catholics and Protestants in Northern Ireland, the Israelis and the Palestinians, the Sunnis and the Shi'ites and the gun control/gun violence issue in the United States.

It is clear from research into game theory that the only way out of the trap is through some form of cooperation, magnanimity and forgiveness. The earlier this takes place the quicker is the escape from the Nash trap. The power of gift giving by way of making concessions is the first step towards engendering cooperation (Mauss, Rooney and Ross). The nuclear arms race, the Northern Ireland troubles and apartheid South Africa resolved through negotiation facilitated by the granting of concessions as the path to building cooperation and trust.

### **The Role of Pre-action ADR Initiatives**

The pre-litigation ADR initiatives introduced by the legislature in Australia have played an important part in the development of early intervention mediation processes especially in commercial disputes. It has forced lawyers to engage in a genuine discussion with their clients at a very early stage in the litigation cycle about the option of using collaborative processes. This, in tandem with the evolving collaborative commercial environment has helped the growth of mediation in Australia.

The certification requirements of the Civil Dispute Resolution Act and the lesser requirements of the various State Acts have had a direct impact on the professional duty and responsibility of lawyers. This is reinforced by the cost implications for the lawyers and their clients of the failure to take the required 'genuine steps'

At a policy level the introduction of pre-action protocols is recognition that litigation should be considered by the legal profession as a process of last resort. It encourages



the use of mediation and allied ADR processes to help short-circuit the parties when sinking ever deeper into a lose/lose Nash Equilibrium.

### **The challenge for the judiciary and the legal profession in the 21<sup>st</sup> century**

The challenge for the mediation profession and allied ADR practitioners, the legal profession and the judiciary is to find their proper place within the dispute and conflict resolution framework as we move further into the 21<sup>st</sup> century.

### **The Judiciary**

For the judiciary the challenge is to adjust to the fact that it is no longer the principal means of resolving disputes in the commercial framework. Mediation as a process has challenged that assumption.

The judiciary has traditionally referred to access to the courts as access to Justice. It is as if the concept of Justice is synonymous with the courts. This raises the question as to whether adjudicating on the facts of a particular case ipso facto amounts to Justice.

The observations of his Honour Mr Justice P. W. Young (retired) of the New South Wales Court of Appeal are particularly relevant:

*“Just as judges do not make law, they do not resolve disputes, rather, they adjudicate upon them” (Young)*

*« De la même manière que les juges ne font pas la loi, ils ne règlent pas non plus les différends, mais ils statuent plutôt sur ceux-ci. » Juge P. W. Young*

Can justice only be dispensed by the judiciary?

*“Just as health is not found primarily in hospitals or knowledge in schools, so Justice is not primarily to found in official Justice-dispensing institutions. Ultimately, access to Justice is not just a matter of bringing cases to a font of official Justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.” (Galanter, Sourdin 2012 B p.893)*

*« Tout comme la santé ne se trouve pas principalement dans les hôpitaux ou le savoir dans les écoles, la justice non plus ne se trouve pas principalement dans des institutions officielles d'administration de la justice. En fin de compte, l'accès à la justice n'est pas uniquement une question de porter une cause à une*

*source de justice officielle, mais d'améliorer la qualité de la justice des relations et des transactions dans lesquelles les gens sont impliqués. »*

**(Galanter, Sourdin 2012 B p.893)**

Justice must also be looked at in the context of compromise. The giving up of a just and legally enforceable right to obtain the benefits of a release from the Nash trap challenges the concept of justice.

Justice, like the concepts of neutrality, equality and balanced power, is a theoretical construct that does not exist outside of theory. It is subjective term which is at most an aspiration, the degree of attainment of which can only be assessed after the determination has occurred (subject to appeal). Therefore justice can only be assessed in retrospect.

In a negotiated settlement, whether through direct negotiations or mediation, justice is in the hands of the parties and can be assessed by them before the agreement is reached. The only test is whether, in all the circumstances, the results of the agreement were good enough. Justice can reside in such an agreement even though just rights and entitlements are abandoned or compromised (Rooney 2015).

### **The Legal Profession**

The challenge for the legal profession is whether it retains its traditional role as a trusted profession always acting in the best interests of its clients or whether it continues its current drift towards a commercial profit based service industry as has been the trend in Australia over the last 15 years.

How does the law as it is currently practised fit with the concept that the clients' best escape from the Nash trap is to settle early through compromise. Perhaps some advice from Abraham Lincoln extolling the lawyer's role as peacemaker might be of assistance.

*“Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser-in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be a business enough”. Abraham Lincoln*

*« Découragez les litiges. Convainquez vos voisins d'accepter un compromis chaque fois que vous le pouvez. Faites-leur remarquer que la personne nommée gagnante est souvent perdante en raison des dépenses occasionnées*

*et du temps perdu. Dans son rôle de conciliateur, l'avocat peut profiter d'une occasion supérieure d'être un homme vertueux. Les occasions d'affaires ne manqueront pas. » Abraham Lincoln*

The issue of diminished professional fees is not far removed from this issue.

### **The Clients and Potential Clients**

Clients no longer unquestioningly place their trust and welfare in the hands of professionals (Dr Google is kept very busy). They are more informed and discerning than previous generations. They want their lawyers to provide realistic and creative options for dealing with disputes. They prefer options that create opportunities and minimise the risk of involvement in further disputes (Rooney 2002).

Examples such as Project Alliancing in the oil and gas and construction industries where parties enter into a relationship contract expressly excluding litigation (Rooney 2009), and the Australian version of Dispute Boards that have a pre-dispute issues focus are examples of creative commercial contracts that allow conflict to be dealt with in-house well before they escalate into a dispute. Mathematician Len Fisher calls these 'self-enforcing strategies' which he states carry their own enforcement so that there is no incentive to cheat on cooperation once it has been established. It is a creative and pro-active antidote to the Nash trap.

An opportunity exists for enterprising lawyers and other professionals to develop these relationship building processes and the agreements that flow from them. These challenging economic times call for more flexible relationship-based contractual arrangements based on shared pain and gain. This is a challenge to traditional contractual agreements in which owners seek to transfer all risks to contracting parties. These are inherently unstable contractual arrangements and inevitably lead to litigation and costs blow outs for the project.

*"In recent years a considerable number of projects have not been finished, nor will they be finished. This disorder, Sir, is caused by the depressed prices frequently obtained for your works:...these cut prices are illusionary, especially as a contractor who is working at a loss is like a drowning man who clutches at straw. In the case of the contractor this means he does not pay his suppliers, cheats everyone he can, underpays his men, getting the worst, not only using the most inferior materials, but quibbling over everything and always begging forgiveness over this and that. Abandon [this type of competitive tendering] Re-establish good faith, give the estimation of the work and not refuse a reasonable payment to a contractor who will*

*fulfil his obligations. That will always be the best transaction you will be able to find.*" Marshal Vauban, (1633 – 1707), Chief of Fortifications for Louis XIV – a letter from Sébastien Le Prestre de Vauban, Maréchal de France written 17<sup>th</sup> July 1685 from the island Belle-Isle-en-Mer (Bretagne) to Louvois, Superintendent of Buildings of France. (Vauban 1685, Green 1991, Construction Queensland, 2001)

If lawyers do not meet these challenges organisations will find people with degrees in business, commerce, psychology and engineering who will (Rooney 2002).

### **The Legislators**

Part of the motivation to introduce the Code of Civil Procedure is cost efficiency. However, there are more fundamental reasons to do with good governance, commercial harmony and economic growth.

Economic advantage can be gained by legislating processes that allow commercial organisations to resolve disputes in an efficient and timely manner. As an example, Great Britain became a great maritime trading nation overtaking the Italian maritime republics of Genoa, Venice and Amalfi principally because the British Admiralty laws and Admiralty Courts offered a far superior and simpler system for resolving maritime disputes than the complex maritime laws of the Italian city states. 21<sup>st</sup> century Russian oligarchs use the British Justice system for the same reason.

### **Mediators**

The major benefit to mediators through the introduction of the Code of Civil Procedure in Québec and the Civil Dispute Resolution Act and other similar acts in Australia is that the legislature requires lawyers to consider mediation almost at the time of taking instructions.

This creates an opportunity for mediators although there are still significant challenges to overcome.

The main marketing challenges are:

- a. How do mediators market themselves, particularly in the early stages of a dispute, to a sceptical legal profession that likes to keep control over access to their clients?

- b. What is the product we are trying to sell? Unless we are clear about what we provide to the parties, their lawyers and to the general dispute resolution system we will continue to have difficulties selling the product.
- c. Mediators are promoted as being third party neutrals. Neutrality is therefore at the core of our brand recognition. Yet neutrality is a theoretical construct that does not exist outside of theory. This is at the core of our confused self identity and the reason why it is hard to market our product. Until the mediation profession sorts this out it will continue to be sub-strata of the law and the social sciences and will be seen through their lenses.

The main practice challenges are:

- a. How mediators can get access to the parties and their lawyers at the earliest stages of the litigation cycle. Getting our foot in the door. Part of the solution is to promote the value of the pre-mediation meetings by expanding the definition of mediation to include a pre-mediation conference with each party and their lawyer
- b. The value to the process and outcome of the mediator assisting in the facilitation of discovery. Mediators do not have any power to order discovery but they can assist in facilitating it. This is one of the greatest challenges for mediators as lawyers are often unwilling to bring in a mediator until after discovery has been completed.
- c. Introducing soft skills into the negotiating process at this early stage. The art of influencing (manipulating) the parties is achieved by avoiding any talk about the parties' hard positions, possible outcomes and the law. It is at the level of the non-contentious pre-mediation administrative functions that mediators see parties with their guards down. It is through these exchanges that the parties reveal their true underlying needs and desires. It is a chance for the mediator to engage a deeper level.

## **Marketing the Mediation Product**

### **Lawyers are the Consumer**

People, especially in the commercial arena, still traditionally go to lawyers as a first port of call where there is a dispute. Lawyers undertake a triage role in deciding which product they will use to resolve the conflict whether it is direct negotiation with the other lawyer, mediation, arbitration, collaborative engagement or litigation. So lawyers are in effect the consumer.

The mediation product is difficult to sell partly because it is still trying to work out what it is. This is not uncommon for a new profession struggling to come out of the shadow of traditional source professions such as the law and the social sciences. Although there are different models and philosophical approaches the traditional answer seems to be that the mediator is a third party neutral.

So we market ourselves as neutral. There are two problems with this. The first is that we are not neutral and the second is that the word neutrality can also mean apathy (Rooney 2015 p.5). We are trying to sell something akin to apathy.

### **The Problem with Neutrality - It Doesn't Exist**

Neutrality is physically and emotionally impossible to attain as a personal attribute for a mediator. The same applies to the concepts of 'just outcomes' and 'balanced power'. They are all theoretical constructs which do not exist outside of theory.

There is nothing theorists can point to that would indicate to a mediator when these states have been physically achieved. They are subjective concepts subject to infinite variables especially in the context of the fluid art of compromise. They are at most aspirations the degree of success of which can only be assessed after the event has occurred.

Neutrality, just outcomes and balanced power are states that can only be assessed in retrospect. This leaves mediators with the situation that they cannot predict the true status of their neutrality, issues of justice in the outcome and power differentials. They have to wait until they and the parties have undergone the experience to judge what has occurred. Having experienced the experience there is no formal benchmark with which to judge whether those states were achieved. The only valid assessment can be whether, in all the circumstances, the results of the process and outcome were good enough.

There are good reasons to detach from the concept of mediator neutrality as the basis of mediator behaviour. It is counter-productive because it programs mediators' minds into accepting a state that is unattainable. It distorts how mediators view themselves as practitioners as well as how they see themselves relating to the parties. Paradoxically it installs an internal program in their minds that can unintentionally mask their own hidden prejudices, biases and preconditioning (Rooney 2015).

## **Beyond Neutrality**

Bernard Mayer in his book '*Beyond Neutrality*' advocates moving away from mediator neutrality mainly to add value to the mediation product and for marketing reasons.

But it goes deeper than just marketing. We can never really be a legitimate profession until we can understand and explain what we are doing in the mediation session and why we are doing it. The third party neutral explanation is not an answer because it is an illusion.

The mediator is not a distant or bland observer having no effect on the moment to moment exchanges in the mediation session as the concept of neutrality suggests. Both the mediator and the parties (and their lawyers) are equal co-creators of each moment in the mediation just by their physical presence. How mediators think affects how they behave. Everything we do has an effect.

Until we can answer the question of 'what do we do and why do we do it' we will continue to struggle to sell ourselves as a stand-alone profession. So the mediation profession has to get its own house in order.

## **The Main Practice Challenges**

### **Promoting the Pre-mediation Meeting**

In my view the pre-mediation meeting with the parties and their attorneys is one of the biggest contributors to the success or otherwise of a mediation. It has far more impact and offers a far greater source of personal connection with the parties than the private meeting or caucus held during the mediation session. The new pre-action litigation legislation opens the door for more use of this valuable part of the mediation process.

There is some debate as to whether a pre-mediation meeting is separate to or part of the mediation process. I would argue that the definition of mediation should include a compulsory pre-mediation meeting. This would bring the mediator's experience and professionalism into the requirement for lawyers and their clients to consider private prevention and resolution processes before referring the dispute to the courts as per the Code of Civil Procedure in Québec and making genuine steps as per the Civil Dispute Resolution Act in Australia.

The early entry of the mediator can also be of assistance in facilitating discovery. The longer the mediator works with the parties before they start the hard negotiation the more the mediator can build a personal relationship with them and their lawyers.

### **Promoting the Soft skills of the Mediator**

Parties are influenced by legal issues and the opinion and advice of their lawyers when considering settlement. However the actual decision to compromise and to say “yes” and settle is taken by the parties at the personal level on the emotional relationship plane. That emotional relationship connection between the mediator and the parties has to be kept intact right from the initial meeting right through to the final “yes I will settle”. The earlier the mediator can establish that relationship the more it can be nurtured.

It is by working through non-contentious administrative and discovery issues that the mediator can build such a relationship. It is much harder to do this in a private session during the mediation when parties are at their most defensive.

The pre-action requirements open the door for mediators to build an early relationship with the parties. It then becomes a marketing issue to show value in their involvement so early in the process. To do this mediators must show that they are something more than just third party neutrals and that they bring a discrete set of skills and expertise that can add value to the process and the outcome.

### **Conclusion**

There are a number of reasons why the legislature has sought to impose pre-litigation protocols on the legal profession and the parties. It would be simplistic to say it is just revenue driven and to dismiss them by adopting a minimalist response hoping that they will go away.

Historically self-regulation is a first step and precursor to a more interventionist regulatory approach by the legislature, especially where self regulation is seen to be ineffective. Therefore failure by the judiciary, legal profession and to some extent by mediators and other allied ADR professionals to take up this challenge set by the pre-action ADR requirements can eventually lead to a more interventionist approach by the legislature.

The legislated pre-litigation ADR initiatives are designed to pressure lawyers into mediating much earlier in the litigation cycle. This requires a different mediation



style, one that is relationship based and facilitative with more of a focus on the soft skills of the mediator.

Part of the motivation for earlier mediation is cost efficiency, but at a more fundamental level, it is a reflection of the fact that we are living in changing times especially in the commercial world. There is far more fluidity and unpredictability in commercial activity as we progress into the 21<sup>st</sup> century.

We live in a fast changing commercial world driven by internet connectivity and cross border commercial activity. The Internet and social media are driving this change with challenges to established industries such as Uber with the taxi industry, Airbnb with the hotel industry, Twitter with the political establishment and the traditional news media, YouTube with the advertising industry, Google with all of the professions particularly medicine, on line shopping with the retail industry, renewables with the energy industry, robotics with the manufacturing industry and so on.

These 21<sup>st</sup>-century commercial platforms challenge to traditional industries and professions are being referred to as the “collaborative economy” (Ransom). Mediation’s challenge to adversarial litigation can be seen in much the same way.

This high level of interconnectedness, both personal and commercial, creates significant levels of relationship complexity which adds a significant layer of uncertainty and unpredictability to any commercial enterprise. How people relate to each other and their ability to communicate and resolve differences are crucial to the proper functioning of this modern complex society. The emphasis by business on managerial ‘soft skills’ is evidence of this.

The greatest challenge for the modern legal system and lawyers is the speed at which these changes are occurring. We are witnessing the effects of exponential commercial change - change that increases by multiples of itself. For example Uber grew from a zero base in mid-2012 to be a \$50 billion company today. It is this speed of change together with the relationship complexity of modern commercial activity that will have the most adverse impact on the slow, adversarial and expensive traditional judicial approach to resolving conflict.

Mediation and other ADR practices will therefore have to play a far greater role, perhaps even a dominant role, for the commercial lawyer and business leader, in the 21<sup>st</sup> century.

Early relationship-based mediation can be the pathway for commercial lawyers and the 19<sup>th</sup> century judicial processes to move into and play a respected part in the new 21<sup>st</sup> century collaborative commercial economy.

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*He together with colleagues Margaret Ross and Barbara Wilson run, annually, a mediation workshop retreat in Tuscany, Italy, based on the theme: "Moving the Focus from Mediating the Problem to Mediating the Moment".*

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