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The rise of mandatory mediation in Australia—insights for litigators.

"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."
—Abraham Lincoln

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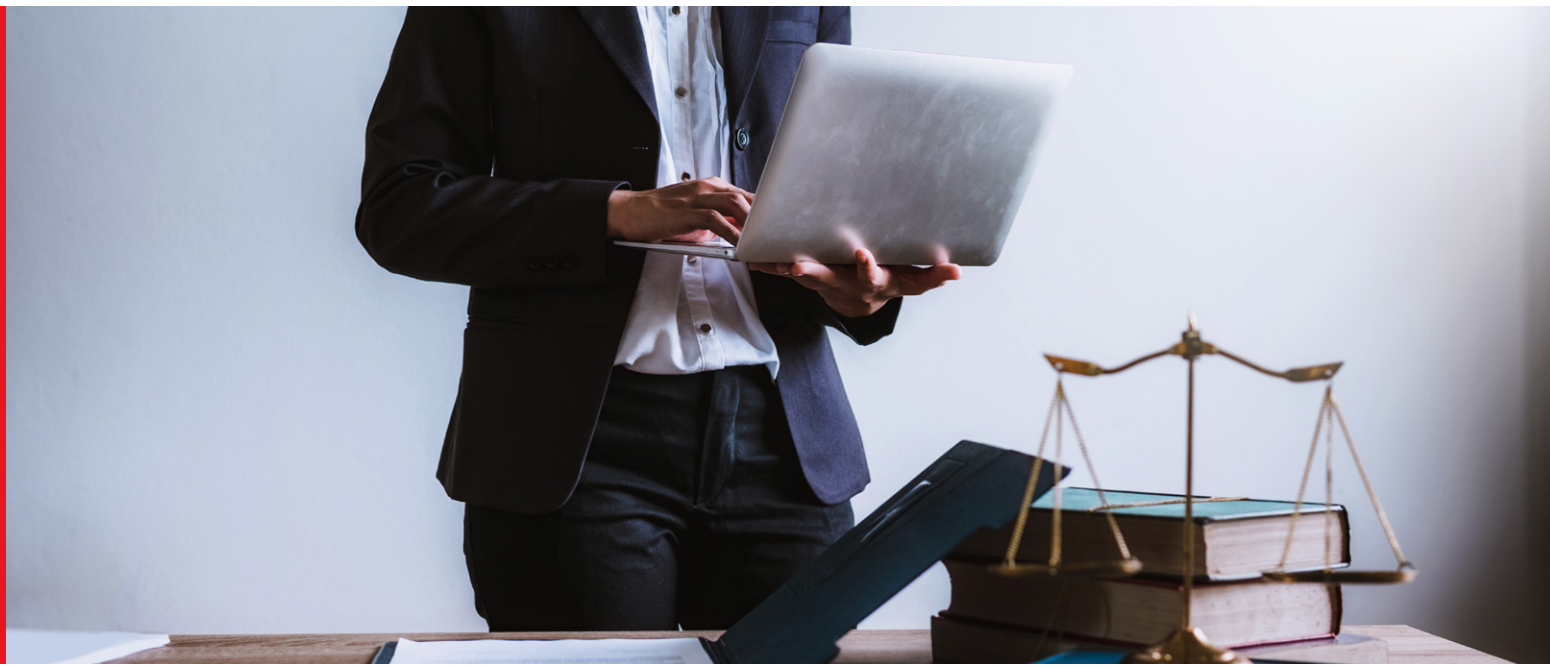


As we head into 2020 and beyond, is mandatory mediation set to enter a new era of acceptance and effectiveness in the justice system?

Since the 1990s, legislatures and courts in Australia have embraced the idea that alternative dispute resolution (ADR), and mediation in particular, is in the public interest. Individual litigants can also benefit, avoiding the many costs of litigation.

Legislative, quasi-legislative and administrative steps have been taken to encourage and, more recently, compel ADR and mediation. However, mediation hasn't always fitted perfectly into an adversarial system that's evolved over hundreds of years. Since its introduction, courts and legislators have attempted to refine the role and process of mediation to take advantage of the benefits and limit any pitfalls.

In this whitepaper, we look at how mediation has become an important weapon in the case flow management regimes of courts in Australia and elsewhere during the past 30 years, and is an important element in promoting the efficient and economic disposition of litigation and improving access to justice.

Three forms of mandatory mediation are identified, and a detailed discussion about the pros and cons of court-ordered mediation is presented.

Mediation is, by its very nature, a flexible procedure and in the course of this whitepaper, we discusss finding the right balance which results in a problem-solving exercise rather than an adversarial process.

As the legal profession looks ahead, it will be vital to continue to seek ways to integrate protocols and civil procedures for mediation into the court structure in order to resolve disputes in a way best calculated to service the interests of both litigants and the public interest.

Much of the content within this whitepaper is credited, with thanks, to Philip McNamara QC, whose Australian Bar Review article titled 'Mandatory and quasi-mandatory mediation' covers the topic in detail.

A brief history of mediation

1970's and 1980s

Pioneering work of Professor Frank Sander of Harvard University.

Before the end of the 1980s 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.

Early 1990s

Supreme Court of Queensland is armed with power to compel mediations.

Release of what became known as the interim and final Woolf Reports on Access to Justice which were instrumental in transforming judicial attitudes to dispute resolution both in England and Australia.

Late 1990s

Supreme Court of South Australia invested with a statutory power to appoint a mediator in relation to a matter or particular issue.

Introduction of the Civil Procedure Rules 1998 (UK) in England which authorise the court to encourage mediation.

The Australian Chief Justices Council adopts a Declaration of Principles on *Court-Annexed Mediation*.

2000s

The Supreme Courts of New South Wales and Western Australia invested with statutory power to require non-consensual mediation.

Supreme Court of Tasmania authorise to order that a proceeding, or any part of it, be referred for mediation, with or without the consent of any party.

Capital Territory courts authorised to refer a proceeding, or any part of a proceeding for mediation or neutral evaluation on application by a party or on its own initiative. Similar powers conferred on the Supreme Court of the Northern Territory.

Civil appeals in Victoria began selectively referred to mediation.

Early 2010s

Compulsory mediation under *Civil Dispute Resolution Act 2011* (Cth), requiring applicants who institute civil proceedings in the Federal Court of Australia or the Federal Circuit Court of Australia to file a 'genuine steps statement' with an initiating application. Similar legislation subsequently enacted in New South Wales and Victoria.

Jackson reforms in the UK signal growing acceptance and greater success rates of mediation.

Late 2010s

"Conducting ADR" is excluded from the definition of "barristers' work" in the Legal Profession Uniform Conduct (Barristers) Rules 2015, amid controversy. Ultimately, the definition is amended to include "conducting ADR".

2016

English Centre for Effective Dispute Resolution, finds that approximately 10,000 cases were mediated each year in the United Kingdom following the Jackson reforms with a **combined success rate of 86%**.

> *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.*
> **—Philip McNamara, Barrister**

A closer look at mediation

In simple terms, mediation is a form of consensual attempted settlement of a dispute. It is one of the accepted forms of ADR and is non-adjudicative.

Applying a closer focus, mediation is often defined by reference to these elements:

- a voluntary process
- a process where the parties to a civil dispute attempt, with the assistance of an independent third party, to resolve their dispute
- a process without reference to a court or other tribunal, or without further reference to a court or other tribunal
- a process involving the systematic isolation of issues in dispute
- a process that culminates in a settlement of the dispute which accommodates and adjusts the interests and needs of the parties
- a process involving a mediator who is expected to be an active participant in the course of negotiations between the parties or their legal advisers and facilitate those negotiations.

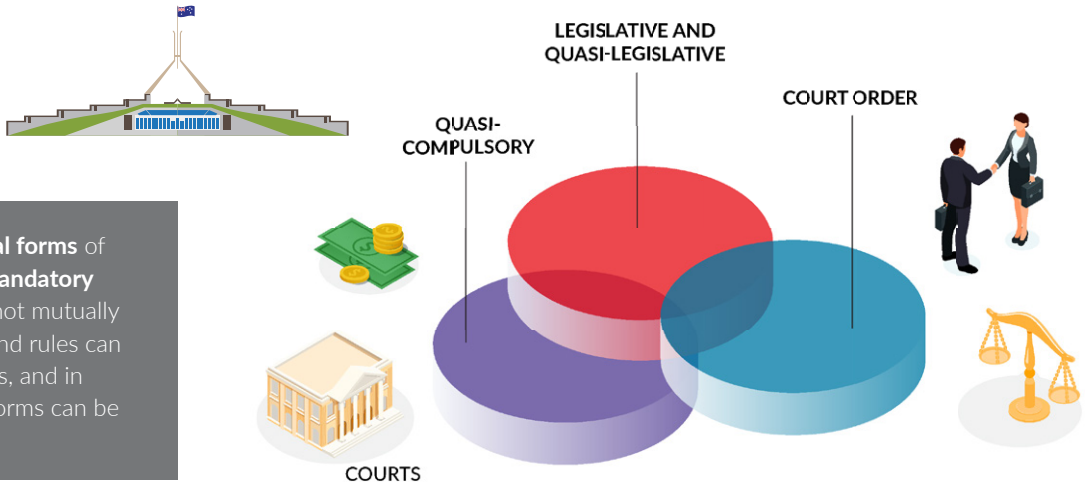
Mediation is not fixed or static, and the manner in which mediations are conducted has changed and continues to evolve.

Of course, the power of a court to compel mediation these days goes against one of the elements of mediation – that it is a voluntary process. The second part of the definition, however, is generally considered inviolable. During mediation, a party cannot be 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.

ADR: a billion dollar business (and growing)

Research suggests the popularity of ADR has surged over the past decade, with industry revenue expected to increase at an annualised 2.9% over the five years through 2018-19, to $1.4 billion.

Mandatory mediation: the three forms



There are **three general forms** of **mandatory** or **quasi-mandatory mediation**. These are not mutually exclusive. Legislation and rules can embrace all three forms, and in proceedings all three forms can be applied successively.

Category 1: Legislative and quasi-legislative schemes
This is where a particular dispute or proceeding is automatically and compulsorily referred to mediation.

Legislative schemes can be further divided into two subcategories:

- where mediation is a prerequisite to the institution of proceedings
- where mediation is required as a prerequisite to the continuation of proceedings beyond a certain point.

Category 2: Mediation by court order
Giving courts and tribunals discretionary powers to refer matters to mediation, whether with or without the parties' consent, on a case-by-case basis is an approach that has been widely adopted in Australia.

Category 3: Quasi-compulsory schemes
Under these schemes 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 prior to a defined stage in the prosecution of the action.

Contract: a fourth form of compulsory mediation?

It's increasingly common for contracts to include mandatory procedures for alternative dispute resolution. The standard provision, an escalation clause, operates in the event of a dispute or disagreement between the parties. It creates, in the first instance, an obligation for the parties to confer through their senior executives. The second step is mediation, followed either by expert determination or arbitration.

These provisions reflect a fact of life: most disputes are resolved by agreement, without the necessity for proceedings and often without the intervention of legal advisers.

Mediation by court order

Even though legislative provisions generally confer an unfettered discretion on the court, rules of thumb have sprung up in most jurisdictions as to when a mediation should or should not be compelled against the objection of one of the parties.

An order for mediation came to be regarded as the norm – Australian courts have not hesitated to compel mediations. The party resisting an order generally needs to point to some exceptional circumstances in order to deflect or delay an order. At the same time, the courts acknowledge that every application for an order for mediation must be resolved by reference to the particular facts of the case.

For and against: should courts have the power to compel mediation?

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.

What is also 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.

Looking at the question of whether courts should have the power to compel mediation is important for two principal reasons.

1. Mediation structures are not yet fully integrated within the rules and procedures of superior courts in Australia

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

2. 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

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.

However, this resistance is softening and attitudes to mediation within the profession are changing quickly. In particular, 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.

Mediation: in the interests of the parties and the public

While it may not yet be a cultural norm, it's generally accepted that mediation should be compelled on the basis that it is in the interests of the parties and in the public interest.

Litigation is rarely cost-effective and is often 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. Even in commercial matters, emotions run high. Litigants (particularly non-institutional litigants with limited resources) need to be protected from themselves.

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. 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. 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.

Experience shows that, if forced into mediation, many who are initially reluctant participants become active participants. 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.

Mediation can also 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.

There is also a 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 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.

But what about justice?

It's true that every person has a right to have their dispute litigated in an open, public court – and some agree forced mediation undermines that right. This is the argument often advanced against mandatory mediation

There are a few flaws with this argument. First, none of the forms of mediation mentioned here erode the right of access to justice. Also, members of the community just can't afford to enforce their right of access to the courts. Indeed, one of the reasons for quasi-compulsory ADR is to make civil justice more accessible. One of the highest objectives of ADR is to support equal access to justice and remove any barriers to justice.

At worst, compulsory mediation might delay, or delay 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. 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.

Other matters that are intrinsically inappropriate for mediation include:

- a question of public law which might arise in connection with which a test case (where bringing such a case before the court is in the interest of a large sector of the population)
- where a novel, untested legislation is being challenged or an interpretation of it sought on behalf of a sizeable group of citizens
- where one party is seeking an injunction or other coercive relief
- where 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.

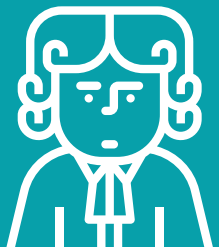
These, however, are exceptional cases. Generally, mediation is properly viewed as a means of access to justice.

Forcing parties to mediate: Waterhouse v Perkins (2001)

When this defamation case came before his Honour Levine J of the NSW Supreme Court it had been running for 10 years.

The case had come about following the publication of the book "The Gambling Man", an expose of the world of horse racing and gambling.

The plaintiff – a solicitor – was entirely opposed to the idea of mediation, with his counsel indicating "for reasons which may or may not be justified" his client would "rather die than accept a mediator selected and forced on him bythe defendants and it wouldn't matter if it was the Archangel Gabrielle."



His Honour also noted several factors which suggested mediation would be appropriate, including:

- The length of time the dispute had already been running
- That it was unlikely to be heard for at least another 12 months
- That a trial would likely last at least six weeks
- The offer of the other party to bear the costs of the mediator and the venue
- The fact that the total cost of mediating compared to litigating could not be considered to be a disproportionate diversion of resources.

His Honour said that it was feasible that, if a party did not act in good faith, one sanction that might apply was contempt of court. Nevertheless, his Honour ordered the parties to participate in mediation, noting that the obligation to participate in good faith in a mediation was imposed under section 110L of the Supreme Court Act 1970 (NSW) and arose consequent upon the making of an order of the court.

Compelling mediation: relevant issues for courts

1. The issues, both factual and legal, and the parties' respective positions and interests at the stage of the action at which an order for mediation is sought.
2. Whether the parties are experienced or institutional litigants.
3. Whether the proposed mediation has sufficient prospects of success.
4. Whether the cost of the mediation can be justified.
5. Whether the mediation is warranted if the cost of litigation will be disproportionate to the amount at stake.
6. The burden in personal attendances which the litigation will impose on the parties if it goes ahead.
7. Whether the litigation involves what one party reasonably regards as a question of legal principle.
8. Whether other alternative forms of dispute resolution have been unsuccessfully attempted by the parties.
9. Whether the matter is likely or unlikely to be listed for trial in the immediate future.
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 contrast, they would be assisted by a candid exchange of views and contentions in the protected environment of a mediation.
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.
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.

Mandatory mediation: using cost sanctions to encourage mediation

Some mediation schemes erode the principle that costs follow the event in an effort to alter the profession's attitude to mediation in effort and motivate practitioners to routinely encourage clients to participate in mediation at an appropriate stage in the life of an action.

These schemes mean a party may 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.

English courts have recognised a discretionary power 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. 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. The course of decision-making has been moulded by the English Court of Appeal. While 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:

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

Disadvantages of cost sanction schemes

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 no substitute for early intervention by the court. The main disadvantage in these schemes is that judicial adjudication over, and criticism of, the parties' use of, or failure to use, ADR is deferred until after judgment.

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.

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

Another disadvantage is that it invites erosion of both 'without prejudice' privilege and legal professional privilege.

Should mediation be compulsory in commercial matters?

Defining "commercial" in civil litigation

- a claim for money arising from the ordinary transactions of merchants and traders
- 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.

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 need for a prompt resolution in the interests of the wider commercial community, in order to promote the circulation of money (which is in the public interest).

There are additional benefits to a commercial enterprise inherent in the negotiated settlement of an action before the costs of a trial are incurred:
the working capital of the enterprise can be freed up for a productive use, rather than for payment of legal fees
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.

It's no surprise, then, that commerce has willingly embraced mediation. 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.

Finding the right balance

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 in relation to disputes about questions of costs and contributions to costs.

English practice is to require the parties' legal advisers to consider mediation at two stages in the life of an ordinary civil action. Continuing consideration by practitioners of the question of the timing of a mediation is essential, and the English approach is a prudent one.

From the point of view of minimising costs, a mediation should be held early in the life of a dispute, before litigation is even instituted if possible. This is the thesis underpinning legislative schemes for mediation.

Once litigation is underway, mediation by court order becomes a possibility. 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 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.

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.

> *"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."*

Continued from ***Finding the right balance.***

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 quasi-compulsory scheme, coupled with the power to order the filing of offers, will assist in righting the imbalance in such cases.

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.

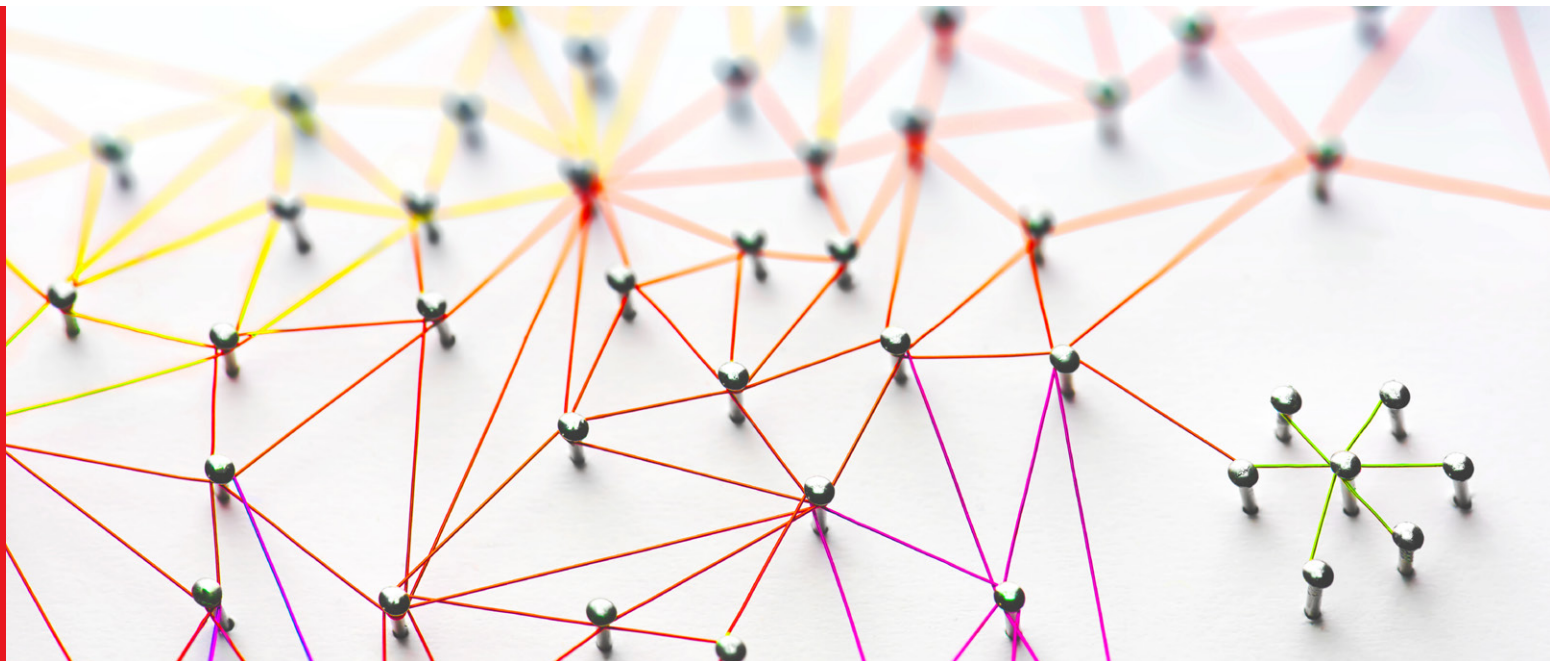
The compromise between these competing needs — that is, between the need to convene a mediation before costs become an obstacle, on the one hand, and the need of the parties to be fully informed and to mediate only after information has been fully exchanged — can be struck by orders for disclosure of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

Changing attitudes

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. 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.

The Law Council of Australia's Guidelines for Lawyers in Mediation ('Guidelines') 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." 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'. 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.



The role of technology in mediation

Online ADR

In so many areas, digital technology has cut costs and boosted efficiencies – including in the world of ADR. Online dispute resolution (ODR) offers a new way to deliver affordable access to justice, and can remove barriers like geographical isolation and lack of transport options or mobility.

ODR generally describes dispute resolution that is facilitated or assisted by information and communication technology. It might include online mediation and online case appraisal. It can happen in real-time or at each parties' convenience, such as via email.

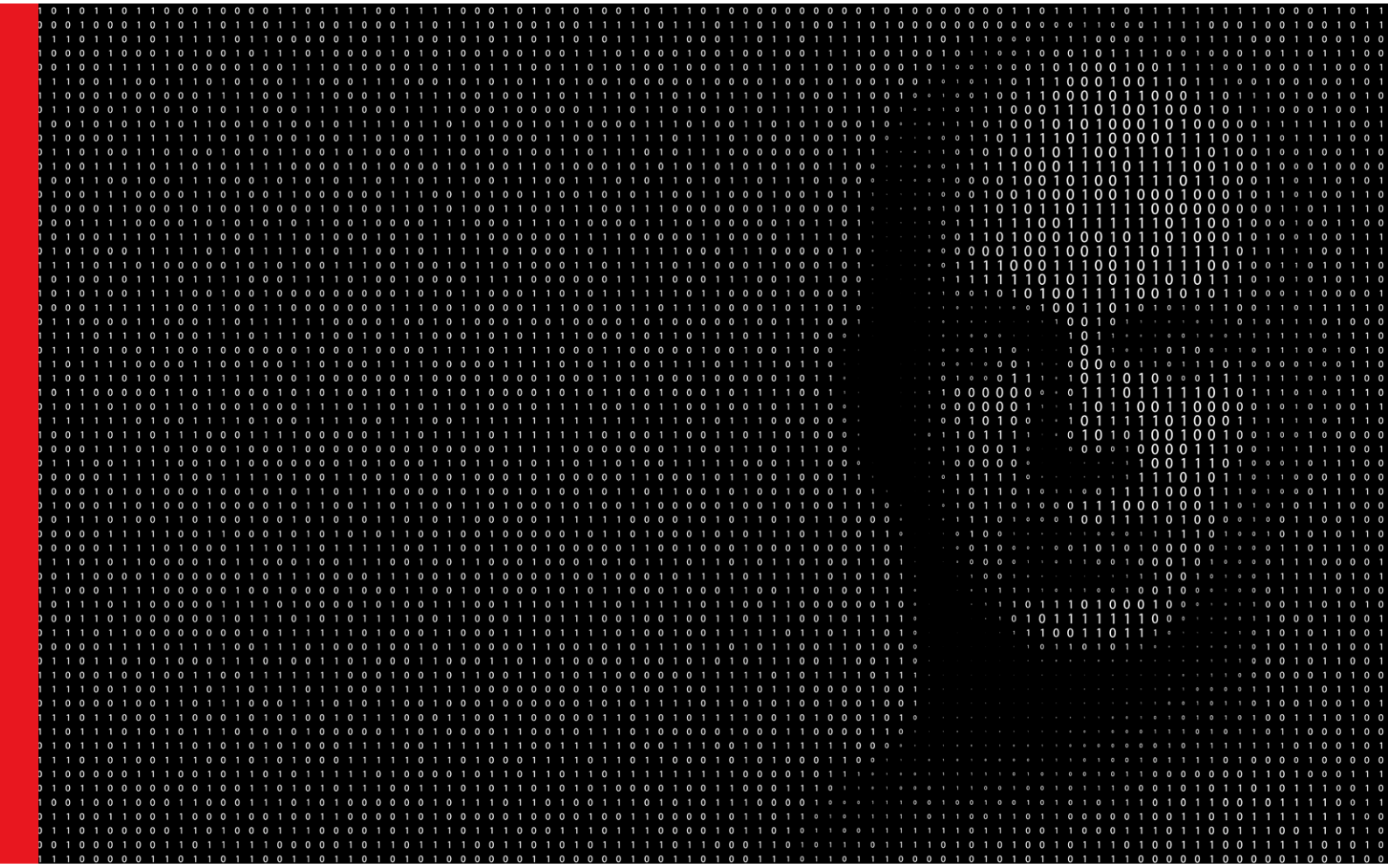
As technology advances, online ADR transforms and offers new opportunities – from simple email to video conferencing, instant messaging and now the advent of purpose-built online systems that incorporate artificial intelligence to create a computerised "mediator" who uses big data to make better decisions.

At present, this technology enables three primary formats for ODR:

1. AI dispute resolution
2. Online or electronic mediations and arbitrations
3. Online courts

While there are clear time and cost-saving advantages offered by ODR, there are several risks and disadvantages to be considered:

- risks to confidentiality when using third-party applications
- difficulty for the advocate, arbiter and mediator in building rapport with parties
- drawbacks of not appearing in person: less fluid discussions, less engagement, strategic issues
- absences of human insight and empathy
- disadvantages for those who are not tech-savvy
- lack of accountability, regulation and guidelines
- the potential for algorithmic bias.



Continued from ***Online ADR***.

Algorithmic bias

Algorithmic technology offers potential to increase efficiencies in the courts, with courtrooms in the United States successfully trialling it to decrease the jail population without jeopardising public safety and lawyers in Argentina using an algorithmic software app to generate draft rulings.

However, algorithmic technology is dependent on the data itself, and within this data is human bias, compounded even further. The 2016 ProPublica saga highlighted the dangers: a software program to determine the rate of recidivism incorrectly labelled black defendants as a risk almost twice as many times as it did for white defendants. It made the opposite mistake for white defendants, with those labelled lower risk going on to reoffend at twice the rate of black defendants.

> *"A shift towards online dispute resolution ODR seems inevitable and is an opportunity to enhance rather than replace —***ADR***"*

Despite the drawbacks, it's likely that ODR platforms will continue to evolve, driven by time and cost efficiencies along with user empowerment. In the United States, experts predict that 75% of all lawsuits will be litigated online within a decade.

A shift towards ODR seems inevitable, however it offers the most potential as a means to enhance – rather than replace – traditional ADR. Perhaps the greatest advantage of ODR is that it also allows for the re-imagining of court process to more closely align with the ideal operation of mediation.

A more human approach

Alongside technological advances, our deepening understanding of human behaviour is also shaping the future of mediation and refining its applicability and effectiveness.

Nadja Alexander and Laurence Boulle, in *Mediation Skills & Techniques, 3rd edition*, explain how insights from behavioural economics recognise that most people, whether at work, in market exchanges or in dispute resolution distress, do not make rational decisions after objective assessments of the advantages and detriments of the choices facing them. Underlying motivations for decisions are, rather, found in unconscious and seemingly irrelevant factors. For example, findings in different jurisdictions show that sentencing and parole decisions are more lenient or favourable when the respective sentencing judges or parole boards make their decisions after, rather than before, enjoying their lunch. This seeming irrationality is, though, in part predictable. It is possible for mediators to understand and predict the factors that might be, though not necessarily are, inhibiting settlement decisions.

The authors also explain how understanding the Solomon paradox can assist mediators. The Solomon effect refers to the incongruous reality that some individuals are knowledgeable and wise in resolving others' problems but less so in relation to their own. In general terms, the Solomon effect is a function of the lack of distance parties sometimes have from the respective issues in dispute — they are too close to see them clearly. In attempting to resolve the Solomon paradox mediators encourage clients to think about the dilemma from different perspectives or vantages — a little distance, even if only imagined, may lead to a wise decision being brought back into the imminence of the moment.

> *"Underlying motivations for decisions are, rather, found in unconscious and seemingly irrelevant factors."*

A template for a mediation scheme that strikes the right balance

1. 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.

2. 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.

3. 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.

4. 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.

"As we look ahead, technology and a deepening understanding of human behaviour and the pros and pitfalls of mediation give us every reason to be optimistic that mediation is set to enter a new era of increased acceptance and effectiveness."

Conclusion

It's clear that no single form of compulsory mediation is either a perfect or a universal solution.

However the aim is clear – by one means or another, protocols and procedures for mediation should be integrated into the court structure and into the rules of civil procedure, so that 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.

As we look ahead, technology and a deepening understanding of human behaviour and the pros and pitfalls of mediation give us every reason to be optimistic that mediation is set to enter a new era of increased acceptance and effectiveness.

Philip McNamara QC is the author of *Mandatory and quasi-mandatory mediation*, the Australian Bar Review article upon which this whitepaper is based. Philip McNamara is a founding member of the Editorial Panel of the Australian Bar Review since the inception of that journal in 1988.

Philip has served on the Committee of the South Australian Bar Association (1987-1995), the South Australian Committee of the Australian Mining & Petroleum Law Association (1981-1983), the Editorial Panel of that Association (1982-1988), and on the Costs Committee of the Law Society (1990-1993).

He has published in the fields of evidence, mining & petroleum law, natural resources, constitutional law, and international law.

Between 1986 and 2014, Philip practiced at the Bar in Adelaide, as a member of Murray Chambers.

During that time, he was appointed Queen's Counsel in November 2001. In 2012, Philip was accredited as an adjudicator by the Law Society of South Australia and the South Australian Bar Association under the Building & Construction Industry Security of Payment Act 2009.

Since 2014, has been practicing solely as a mediator and in 2018, Philip McNamara was listed in Doyle's Guide as one of South Australia's leading mediators.

Philip graduated from the ANU in 1971, then practiced as a solicitor in NSW (1972-1977) .
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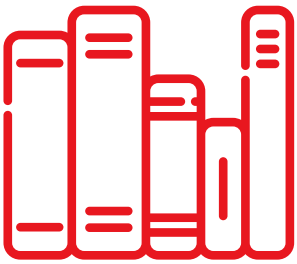

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