

## **“Mandatory” Mediation**

A recent study in Canada and the “result” of schemes in Australia and Singapore shed light on the question of whether mandatory mediation is likely to be successful in Asia

Citizens of all countries accept regulations if they believe that as a result of that regulation “Society” will be better off. For instance in some countries bans on tobacco advertising are accepted because research has “proved” that smoking is bad for health. We pay for seatbelts in our cars (even though the government tells us we must) because research proves that seatbelts save lives.

It is being proposed in many Countries (including Asian countries) that Courts and Government are to “force” disputants to pay for and attend mediation. What is the rationale? Is mediation worthwhile when compelled?

Many publications in my Country, Australia, have devoted time and energy to the debate. Most of the discussion has been based on the “impressions” of those who should know, anecdotal stories and feelings. David Spencer in an article for New South Wales, Australia readers, *Litigation: Court given power to order ADR in civil actions*,<sup>i</sup> opines

From the author’s own experience, it seems that maybe there is some benefit in forcing parties to meet and discuss their dispute. The best result could be a mutually satisfying and voluntarily agreed upon settlement. The worst result could be that the parties do not settle and the matter proceeds to court. The negative being the additional cost and the unnecessary delay.

The negative argument is represented by comments like those of Bret Walker S.C. and Andrew S, Ball who suggest

Such a forced process of mediation also has the potential to erode respect for the rule of law, especially if the power to order compulsory mediation is exercised frequently.<sup>ii</sup>

These authors may be well qualified to express their opinions on these matters but with the respect to them they are expression opinions unsupported by objective research or analysis. There is little qualitative or quantitative research offered to support either view.

Chief Justice of New South Wales Hon J.J.Spigelman in an address to a LEADR<sup>iii</sup> dinner in November 2000 said

We are presently engaged, particularly with respect to compulsory mediation, at the early stage of a long process of gathering experience which will assist us in determining in what circumstances an order..(for compulsory mediation).. would prove fruitful.<sup>iv</sup>

The Court over which Justice Spigelman presides was granted a power to refer matters to mediation notwithstanding lack of consent from a party. That power was granted in July 2000. The Court exercises the power carefully.. There is not a presumption that all or most matters are referred for mediation. Each case is considered on its own merits.

In view of the paucity of accurate research in Australia the Chief Justice's caution is appropriate.

Australian practitioners do have considerable experience with compulsory mediation. There have been some studies that reflect on the results of its use. There has been a very extensive piece of research conducted of a two year trial in Ontario, Canada Courts. There is a need more research to answer the primary question of the "worth" of compelled ADR processes and then to tell us more about how the processes can be best applied for the benefit of litigants and disputants. The results so far thought show that legislators and the Courts need not be afraid of any adverse effects and that there is reason for optimism that mandatory mediation may benefit the stakeholder in the litigation system.

### **What does Success Look Like?**

Like beauty the success of mandatory mediation is in the eyes of the beholder<sup>v</sup>. The easiest measurement of 'success' for mediation is the 'settlement rate', usually described as a percentage of cases subjected to a mediation process. Courts want earlier disposal, litigants want cost savings and an easier more effective way of reaching enduring solutions, lawyers want to ensure that their clients' rights are not eroded.

Experience shows us that in almost all "common law" jurisdictions most disputes in which the parties resort to litigation are settled. "Settlement rates" are as high as 90% of all civil litigation. So what if mediation results in a majority of cases being settled the argument goes? They were going to settle anyway!

Measurement of the time of settlement, either earlier or later in the litigation process, takes the definition of success further. Again it is very hard to measure when cases would have settled without mediation.

Courts and governments want to know the savings of legal cost the Court time and cost. These can be measured at least by the estimation of the parties.

A saving of legal costs and resources if proved is a very worthwhile result from any initiative applied to the resolution of civil disputes PROVIDED the 'quality of Justice' is not compromised.

The ultimate success of any dispute resolution or determination is surely the satisfaction of the consumer. Satisfaction in the way a dispute is resolved must be a very important measure in the success of mediation (or any other process). Anecdotal evidence and our own common sense suggests that the satisfaction of the business world with the litigation process is not high. And yet litigation is ever more popular. There is no doubt that the common law litigation system that is applied in Hong Kong, Malaysia, Singapore and other places in the Asia region as well as in Australia, the United State and Great Britain is seen as being fair and at least peaceful in the way it decides disputes. That system was not designed to "resolve" any dispute let alone the majority of them. It was designed to create precedents and decide a "winner". It is the hope of the system that citizens will make wise use of that precedent to effect settlement of their disputes.

Is this not what good mediation seeks to achieve? A wise and skilled assistant helps parties to see how precedent may determine their dispute and compares that against the needs and interests of the parties *and* the best negotiated result that can be achieved as a result of the fair application of the mediation process.

Consumer satisfaction has rarely been measured in exit surveys or studies of mediation programmes (or the Court) in my Country with the possible exception of the studies made of the New South Wales Law Society's settlement weeks from about 1991.<sup>vi</sup> After the 1992-93 programme 94% of parties indicated that they would recommend mediation to others, regardless of the outcome of their own case! This sounds like a high level of satisfaction. But this was a voluntary programme. Would it make a difference if the mediation were in some way required by law?

Pragmatically the success of mediation like the success of the Courts should be measured by a combination of time and cost consequences, settlement statistics and 'consumer satisfaction'.

### ***The Australian Experience***

We have a volume and variety of experience of mediation (mandatory and voluntary) in Australia. The United States is probably the only other country with more experience. In Victoria and Queensland the Courts have for many years exercised a power of compulsory referral to mediation with almost unbridled enthusiasm. Once again the evidence is mostly anecdotal, but it seems that "mandatory" mediation is accepted in those jurisdictions as a useful and valuable part of the landscape in which litigation is resolved. The Chief Justice of

Queensland is quite glowing in his assessment of the worth of the mandatory mediation scheme in his Court;

I have to say that I am absolutely convinced of the desirability of our approach, with relation primarily of course to the interests of the litigating public, and ultimately, addressing the issue of the principal concern: enhancing access to justice. <sup>vii</sup>

Not every practitioner will speak so highly of mediation, but then there are critics of every initiative of the Courts to better manage litigation. Lawyers in particular are slow to change. In England the "Woolf reforms" have seen a much greater emphasis placed on extra curial dispute resolution processes. In Hong Kong there has been a trial of a consensual Court Annexed mediation in family matters.

Settlement Rate statistics have been gathered from various schemes, mandatory and consensual. These reveal that a mandatory referral to mediation does not necessarily limit the success rate if defined as mediation resulting in settlement. In New South Wales, Australia there are two "mandatory" schemes where independent settlement figures have been compiled since 1994.

The Rural Assistance Authority keeps records of matters subject to the Farm Debt Mediation Act 1994. The Retail Tenancy Unit keeps statistics about cases mediated under the Retail Leases Act 1994. Both of these schemes involve circumstances in which one of the parties (at least) may be participating in mediation only because the legislation requires them to. There are legal aid schemes in many places where mediation is a prerequisite to a grant of legal aid.

There are voluntary schemes where settlement statistics are recorded. The tables records some of those statistics <sup>viii</sup>

Mandatory Schemes		Voluntary Programs	
NSW Farm Debt Mediation Act	89%	NSW Department of Fair Trading Scheme	85.05%
NSW Retail Leases Act	73.87%	NSW Law Society Mediation Program	70%
NSW Legal Aid Commission Conferencing	70%	Australian Family Court Mediation Service	70%
Queensland Legal Aid Conferencing	69.75%	Queensland Settlement Week	80.05%

In Singapore a large number of cases have been subject to compulsory mediation. The statistics kept showed that 3746 of 3943 cases or 95% were resolved.<sup>ix</sup>

The Chief Justice of Queensland in his speech<sup>x</sup> quotes statistics of disposal rates of the Queensland Mandatory Mediation Programme in 1999. Of the 304 cases the subject of mediation only 9 were cases in which a party subsequently elected to go to trial.

These figures are not definitive of the settlement "effectiveness" of any scheme. There is no consistency in the manner in which they are gathered or in the types of cases the subject of the various programs. As I say above most cases would have settled in any event. At the best they indicate that the evidence, so far, is that mandatory mediation could be just as likely to lead to a concluded settlement as voluntary submission to the process. Much more research needs to be conducted.

### ***The Ontario Mandatory Mediation Program***

Toronto and Ottawa are cities in Ontario Canada with a middle class, "industrialized" demographic not dissimilar to many in Asia and Australia. The legal process is similar to many countries. Most of the Courts' business is conducted in English (although French can be chosen). Toronto is a similar sized city to Sydney.

In January 1999 a Rule was introduced into the Ontario Court Rules for the Ontario Superior Court of Justice (Rule 24.1 ) that made mediation mandatory except if the Court granted leave to the parties to be excused.<sup>xi</sup> Rule 24.1 was introduced for a two-year test term.

Throughout the first 1 year and 11 months that the Rule was applied an extensive study was conducted using surveys, focus groups interviews and a control group of cases not subject to the rule.<sup>xii</sup> The study is the most comprehensive that I have seen of the use of mandatory mediation. Over 3,000 mediated cases were studied and controls were in place to make comparisons with cases not subject to mandatory mediation. The conditions are not directly referable to Asia and Australia but the study confirms that we can and should be considering much more closely a similar approach. The study attempts to measure the effect on litigants, the Courts and the profession of "Rule 24.1".

The findings of the Study in areas where there is much debate in Australia and Asia are summarised by the researchers as follows:

- Mandatory mediation under the Rule has resulted in significant reductions in the time taken to dispose of cases.
- Mandatory mediation has resulted in decreased costs to the litigants.
- Mandatory mediation resulted in a high proportion of cases (roughly 40% overall) being completely settled (and a large further group partially settled) earlier in the litigation process with other benefits being noted in many other cases that did not completely settle.
- In general, litigants and lawyers have expressed considerable satisfaction with the mediation process under Rule 24.1.
- Although there were at times variations from one type of case to another, these positive findings applied generally to all case types - and to cases in both Ottawa and Toronto.

The findings as to litigant satisfaction and the timing of settlement are most important. Any process we apply to the conduct of litigation must ultimately be of benefit to the consumers of the product. One of the biggest criticisms those consumers make of litigation (and one of the most pressing concerns of most Courts' administrators) is the timing of ultimate settlements. No study is needed to demonstrate the inefficiency of settlement "at the steps of the Court" when all the preparation costs and court resources allocated for a piece of litigation have already been consumed.

The savings to all if there are 40% of cases settling earlier than otherwise should be obvious.

73% of Ottawa litigants and 60% of Toronto litigants agreed with the statement "one of the benefits of Mandatory Mediation was that it required the parties and their counsel to begin negotiations earlier than would otherwise have been the case."

At the least the Ontario study shows us that there is every reason for Courts in Asia and Australia to be comfortable in embarking on their own Mandatory ADR programme. The study also demonstrates the benefit of having available reliable and independent research of the effect on litigants, Courts and lawyers of the application of any new rule. In Ontario both the researchers and the Evaluation Committee set up to oversee and consider the research were quite certain that Rule 24.1 (that provides for the mandatory referral of cases to mediation) should remain permanently as part of the Court's rules.

Some of the other findings of the study confirm what practitioners might have suspected but been unable to prove, in particular

- Mediator choice is important. There was a markedly higher success rate for cases where the parties chose their own mediator than from when they had a mediator assigned by the local mediation coordinator.

- When cases settle at or soon after mandatory mediation litigants save a substantial amount of money.
- Mediation takes time to be conducted effectively. Mediations that lasted more than 3 hours were more likely to be successful.
- Very few mediation sessions lasted more than a day or needed more than one session (2-4%)
- In Ottawa where mandatory mediation had been a part of the system prior to the implementation of the rule the results for settlement rates and client satisfaction were better than in Toronto that had not had the experience. Toronto figures improved as the trial period went by. This suggests that success breeds success and also that the practitioners and litigants experience with mediation is a factor in successful settlement and satisfaction.
- More experienced mediators had more successful settlements. Mediator training is an important aspect to the satisfaction of the litigants.
- In many cases partial settlement was obtained even if complete settlement was not possible.
- Settlement is not the only measure of success. There was a very high satisfaction rate even for the parties to cases that did not resolve completely.
- Cases that did not settle at or shortly after mediation still settled or were resolved earlier than the control group of non-mediation cases.

The Evaluation conducted in Ontario should be studied carefully by policy and law-makers. There are many lessons that we can learn for our own application of mandatory mediation. Not the least is that there is little to fear from a well designed mandatory system of referral to mediation.

The Evaluation demonstrates the value of well-planned evaluative and qualitative research. Our judgment of processes designed to improve our systems of justice should be made on the basis of what occurs in the process and the parties actual experiences, not on perceptions coloured by experience in and loyalty to a model of adversarial dispute decision, even if that model has served well for many years.

There is room in many jurisdictions for a similar trial of a compulsory ADR programme on a large scale, or a "multi door" courthouse approach where Court Administration has a responsibility for directing cases into the most appropriate mode of dispute resolution or adjudication.

To steal a phrase from the late John F Kennedy Courts should not use mandatory mediation out of fear but by the same token they should not fear to apply the many benefits of Mediation when compelled.

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<sup>i</sup> (2000) 38 (9) LSJ 71

<sup>ii</sup> Bar News Spring 2000 p 7

<sup>iii</sup> LEADR is an organisation of ADR practitioners first known as Lawyers Engaged in Alternative Dispute Resolution and now known as Leading Edge Alternative Dispute Resolution.

<sup>iv</sup> (2001 ) 39 (2) LSJ 63

<sup>v</sup> Dr Tania Sourdin discusses the problems of the difficulty of "proving" the benefits of ADR and the lack of evaluative assessment of Litigation processes as compared to ADR in an article "Testing ADR processes (2000)3(2) ADR at page 30.

<sup>vi</sup> See for instance "Paving the way for court related mediation" Authors Christine Chinkin, Micheline Dewdney, Bridget Sordo. This document is a report on Settlement Week in NSW in 1991 and "Contemporary Developments in Mediation within the Legal System and Evaluation of the 1992-1993 Settlement Week Program".by Chinkin, Dewdney and Chinkin. See particularly pp 78 to 88 for discussion on the parties' perceptions of the worth of mediation.

<sup>vii</sup> Paper presented at the "Use of Alternative Dispute Resolution in Commercial Disputes" Seminar University of Queensland and published in "LEADR Brief". The only 'hard' statistic offered by the Chief Justice relate to the number of cases disposed of without the need for a hearing by the Court. I am sure that the Chief Justice also had much anecdotal evidence of user satisfaction with mediation.

<sup>viii</sup> These tables are reproduced from "NSW Supreme Court makes mediation mandatory" by Dr Tom Altobelli (2000) 3 (3) ADR p 43

<sup>ix</sup> Mediation in Singapore: a brief overview, Asian Dispute Review No 1 September 2000

<sup>x</sup> As above

<sup>xi</sup> The effect of "Rule 24.1" can be found at <http://www.attorneygeneral.jus.gov.on.ca/default.htm>

<sup>xii</sup> Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1) prepared by Robert G.Hann and Carl Baar with Lee Axon, Susan Binnie and Fred Zemans. A full copy of the report. the executive summary and a report of the Evaluation Committee can be found at <http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/pilotproject.htm>