

# MANDATORY MEDIATION

WILL HARDY

*October 2008*

# CONTENTS

I	INTRODUCTION	2
II	THE GOALS AND REQUIREMENTS OF CIVIL JUSTICE	3
	A <i>Overview</i> . . . . .	3
	B <i>Conflicts</i> . . . . .	3
	C <i>Prioritising</i> . . . . .	4
III	MEDIATION	5
	A <i>The Benefits of Mediation</i> . . . . .	5
	B <i>The Downside of Mediation</i> . . . . .	6
IV	MANDATORY MEDIATION	8
	A <i>Rationale behind Mandatory Mediation</i> . . . . .	8
	B <i>Problems with Mandatory Mediation</i> . . . . .	8
V	CONCLUSION	10

## I INTRODUCTION

In a recent report, the Victorian Law Reform Commission ('VLRC') suggested goals for the civil justice system and included a set of fundamental civil justice requirements.<sup>1</sup> These provide a useful point of reference for assessing any potential systemic changes, ensuring that important rights and core functions of our civil justice system are not neglected in a compromise for more efficient and seemingly effective processes.

Mediation is commonplace in the Australian legal scene, and its potential to dramatically save time and money are well known. But justice is about more than just time and money, and what is a good idea for many people would not necessarily substantively improve the civil justice system, were it mandatory.

In this short essay, I will quickly explore the nature of these goals and requirements before briefly assessing the benefits of mediation, both in its common voluntary form and as a mandatory process in civil litigation.

---

<sup>1</sup>Victorian Law Reform Commission, *Civil Justice Review Report, Number 14* (2008) 90-4.

## II THE GOALS AND REQUIREMENTS OF CIVIL JUSTICE

The VLRC's goals included accessibility, affordability, equality of arms, proportionality, timeliness, truth, correctness, consistency and predictability.<sup>2</sup> The fundamental requirements were fairness, openness, transparency, substantive law application, independence, impartiality and accountability.<sup>3</sup> Note that desirable goals such as party satisfaction and productive relationships are not explicitly covered.

### A *Overview*

The goals and requirements are obviously intricately interwoven: many overlap, complement and depend on one another. For example, in addition to the particular needs of fairness, the requirement of fairness also means that justice must itself be accessible, affordable, equal, open, transparent, timely and consistent.<sup>4</sup> But the goals also have the ability to conflict with one another.

### B *Conflicts*

The clearest example of conflict can be found in the goals of timeliness, truth and cost.<sup>5</sup> These three conflicting goals are described as fundamental dimensions by Zuckerman.<sup>6</sup>

In general, no process is perfect and justice will never be any of perfect, instantaneous or free. Time and resources are required to gather truth, but there is a limit to the amount of truth a fact-finder can ever gain access to; any additional time and cost will be wasted once this point is reached.

---

<sup>2</sup>VLRC, above n 1, 90.

<sup>3</sup>Ibid 94.

<sup>4</sup>Ibid 95.

<sup>5</sup>Cost comes under affordability, although the cost to the public was not specifically mentioned under affordability in the report, it is implied.

<sup>6</sup>Adrian Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in Adrian Zuckerman (ed) *Civil Justice in Crisis* (1999).

In addition to that, too much time spent will eventually become counter-productive to the truth-finding cause. This delicate relationship between these three goals is impossible to measure accurately, and varies from case to case. Even if the system were able to identify an optimal mix, it could never achieve this for every dispute it is charged to resolve.

## C *Prioritising*

Given the range of parties, interests and problems that arise, there is a clear need for compromise and to prioritise these goals. The fundamental requirements provide a good baseline for keeping compromised approaches in check, ensuring that the pursuit of one goal does not unacceptably impact an essential aspect of civil justice. With this in mind, I will turn to assess the practice of mediation, and how it might help achieve the goals of our civil justice system. For clarity, any relevant goals or requirements will be noted in brackets throughout this essay.

### III MEDIATION

Litigation is a less-than-zero-sum game, there is usually a ‘winner’, a ‘loser’ and a long, expensive process. In addition to the high cost of litigation (*Accessibility, Affordability*),<sup>7</sup> inappropriate time delay (*Timeliness*)<sup>8</sup> and uncomfortable formality,<sup>9</sup> relationships are strained and an unpredictable<sup>10</sup> (*Predictability*), abstract, binary outcome is imposed on the parties.

Mediation provides an alternative to adversarial litigation, but is also an alternative to the more frequently used methods of avoidance, concession, discussion and struggle.<sup>11</sup> Nevertheless, the concept of ‘alternative’ ignores the shadow that the dominant legal system casts.<sup>12</sup>

#### A *The Benefits of Mediation*

The widespread adoption of mediation is testament to the powerful benefits it provides. When successful<sup>13</sup> it is typically quick (*Timeliness*),<sup>14</sup> informal (*Accessibility*), private<sup>15</sup> and cheap (*Affordability*)<sup>16</sup> and satisfaction rates are generally very high.<sup>17</sup> This means that it is less likely to lead to anxiety, fear or stress,<sup>18</sup> but there are also some more subtle benefits. Mediation focuses on current and future interests, as opposed to abstract rights in the past,<sup>19</sup> and the outcome is generally voluntary, flexible,<sup>20</sup> predictable (*Pre-*

<sup>7</sup>Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2<sup>nd</sup> ed, 2002) 53; VLRC, above n 1. See also *ASIC v Rich* [2005] NSWSC 489.

<sup>8</sup>Astor, above n 7, 59; VLRC, above n 1. See also *ASIC v Rich* [2005] NSWSC 489.

<sup>9</sup>Astor, above n 7, 60; VLRC, above n 1, 262. See also *ASIC v Rich* [2005] NSWSC 489.

<sup>10</sup>Laurence Boulle, *Mediation: Principles, Process, Practice* (2005) 145.

<sup>11</sup>Ibid 140.

<sup>12</sup>Ibid 143.

<sup>13</sup>Note that ‘success’ is difficult to define: see Astor, above n 7.

<sup>14</sup>VLRC, above n 1, 214.

<sup>15</sup>Boulle, above n 10, 161; VLRC, above n 1, 214.

<sup>16</sup>VLRC, above n 1, 214.

<sup>17</sup>Boulle, above n 10, 160; Rachael Field, ‘Using the Feminist Critique of Mediation to Explore “The Good, The Bad and The Ugly”’ (2006) 20(5) *Australasian Journal of Family Law* 45, 51.

<sup>18</sup>Astor, above n 7.

<sup>19</sup>Boulle, above n 10, 144; Astor, above n 7.

<sup>20</sup>Field, above n 17, 50; VLRC, above n 1, 214.

*dictability*), comprehensible (*Accessibility*),<sup>21</sup> controllable and final. Power and control is moved into the hands of the parties,<sup>22</sup> who are free to tell their story in their own way<sup>23</sup> without external, socially determined norms and values.<sup>24</sup> Additionally, public resources are freed from the burden of smaller, private matters (*Proportionality*).

Women are generally more satisfied with mediation,<sup>25</sup> as it exhibits less of the institutional masculinity of the courts (*Accessibility, Correctness*) and tolerates *ethic of care* and relationship-oriented input.<sup>26</sup> This feminist point can be equally applied to any group discriminated against by systemic bias (*Accessibility*).<sup>27</sup>

## B *The Downside of Mediation*

The tempting benefits of mediation do come at a cost. Parties forego procedural protections<sup>28</sup> as important rights are often obscured in the ‘shadow of informality’.<sup>29</sup> Parties need not disclose important information (*Truth*),<sup>30</sup> and if mediation is unsuccessful the time and money spent on mediation is wasted (*Timeliness, Accessibility, Affordability*).<sup>31</sup>

Aside from formal disadvantages, mediation allows for some more subtle abuses of power,<sup>32</sup> allowing a party to be coerced into accepting informal agreements (*Equality*),<sup>33</sup> out of need, fear, ignorance, guilt or low expect-

---

<sup>21</sup>VLRC, above n 1, 214.

<sup>22</sup>Field, above n 17, 49.

<sup>23</sup>Simon Young, ‘Cross-Cultural Negotiation in Australia: Power, Perspectives and Comparative Lessons’ (1998) 9 *Australian Dispute Resolution Journal* 41; Field, above n 17, 51.

<sup>24</sup>Boulle, above n 10, 160; Field, above n 17, 50.

<sup>25</sup>Field, above n 17, 51; Rachael Field and Mieke Brandon, ‘A conversation about the introduction of compulsory family dispute resolution in Australia: Some positive and negative issues for women’ (2007) 18 *Australasian Dispute Resolution Journal* 27, 196.

<sup>26</sup>Field, above n 17, 51.

<sup>27</sup>Boulle, above n 10, 155.

<sup>28</sup>VLRC, above n 1, 214; Astor, above n 7.

<sup>29</sup>Field, above n 17, 55.

<sup>30</sup>VLRC, above n 1, 93, 214.

<sup>31</sup>Ibid 214.

<sup>32</sup>Boulle, above n 10, 151; Astor, above n 7.

<sup>33</sup>Field, above n 17, 71.

tations (*Correctness*).<sup>34</sup> Existing power relationships and language skills<sup>35</sup> invariably play a role (*Equality*), especially when they remain unrecognised by the mediator.<sup>36</sup> Poorer parties may not be able to afford *not* to settle (*Accessibility*),<sup>37</sup> and are often unable to reject an agreement they are not happy with (*Correctness*).<sup>38</sup> Whilst interest-based negotiation provides for more suitable remedies, a party can use their disinterest for leverage.<sup>39</sup> For example, if one party is more interested in maintaining a good relationship, they may forfeit some of their rights to achieve that.<sup>40</sup> Parties may even use mediation to delay proceedings (*Timeliness*)<sup>41</sup> or to exploit the other party's financial weakness (*Equality*).

The social, psychological, economic and post-separation vulnerability of women, means that many women will miss out on the empowering benefits of mediation (*Equality*).<sup>42</sup>

One of the most important differences between mediation and litigation is the lack of public interest input.<sup>43</sup> Although a discreet, private settlement might allow more compensation to be afforded, future plaintiffs will be greatly disadvantaged by the missing precedent (*Consistency*)<sup>44</sup> and no fuel is provided for public discussion of the issues involved. A final issue for consideration is the naïve assumption that mediators are neutral (*Impartiality*).<sup>45</sup>

---

<sup>34</sup>Field, above n 17, 58.

<sup>35</sup>Boulle, above n 10, 152; VLRC, above n 1, 214.

<sup>36</sup>Field, above n 17; VLRC, above n 1, 214.

<sup>37</sup>Field, above n 17, 57.

<sup>38</sup>Ibid 58.

<sup>39</sup>Boulle, above n 10, 152; Astor, above n 7.

<sup>40</sup>Boulle, above n 10, 152.

<sup>41</sup>Jill Hunter, Camille Cameron and Terese Henning, *Litigation* (7<sup>th</sup> ed, 2005) 53; VLRC, above n 1, 214.

<sup>42</sup>Field, above n 17, 56.

<sup>43</sup>Boulle, above n 10, 144, 159.

<sup>44</sup>Astor, above n 7.

<sup>45</sup>Field, above n 17, 60.

## IV MANDATORY MEDIATION

Any discussion about mandatory mediation only affects those disputes where one or more parties are unwilling to mediate. Involuntary mediation is fundamentally different in nature to voluntary mediation. Importantly, some of the known benefits of mediation are only valid so long as it is voluntary,<sup>46</sup> mediation may be inappropriate or ineffective for certain kinds of dispute.

### A *Rationale behind Mandatory Mediation*

Court ordered mediation and mandatory mediation for family law matters already exist.<sup>47</sup> Judges have consistently ordered mediation on the grounds that many parties who are initially unwilling to mediate, eventually settle (*Timeliness, Affordability*).<sup>48</sup> This reasoning is troublesome, as it does not address any of the other goals of the civil justice system, especially truth and correctness. There is very little empirical information available on mandatory mediation,<sup>49</sup> data on voluntary mediation is unlikely to be valid because of self-selection bias.<sup>50</sup>

### B *Problems with Mandatory Mediation*

As mentioned earlier, there are various cases where mediation is inappropriate, such as where the parties' relationship has involved violence.<sup>51</sup> If mediation is to be mandatory, these cases must be avoided. An formal exemption may not be enough to ensure that this never happens,<sup>52</sup> especially as family violence is often kept secret.<sup>53</sup>

<sup>46</sup>VLRC, above n 1, 262.

<sup>47</sup>Field, above n 17; VLRC, above n 1, 258.

<sup>48</sup>Hunter, above n 41, 55; VLRC, above n 1, 257; Transcript of Proceedings, *ACCC v Cadbury Schweppes* (Federal Court, 22 April 2002); *ASIC v Rich* [2005] NSWSC 489; *Australian Competition and Consumer Commission v Lux Pty Ltd* [2001] FCA 600 (Unreported, 24 May 2001) ('*Lux*').

<sup>49</sup>VLRC, above n 1, 285.

<sup>50</sup>Self-selection bias: parties that choose mediate are already willing to settle, making settlement rates and satisfaction appear very high.

<sup>51</sup>Boullé, above n 10, 154; Field, above n 17, 71.

<sup>52</sup>Field, above n 25, 201.

<sup>53</sup>*Ibid* 201.

A system that places too much emphasis on mediation, may do so at the expense of the existing system of litigation, relaxing procedure and reducing resources (*Truth*). Some of the essential requirements of civil justice such as openness, transparency and accountability are simply lacking in a system without litigation<sup>54</sup> and their prevalence diminishes with a shift away from litigation.

Most seriously, the general privatisation of dispute resolution sacrifices the openness and transparency requirements<sup>55</sup> and creates ‘second-class justice’.<sup>56</sup> Whilst most other problems of mediation can be mitigated using exceptions, procedure and mediator training, this flaw cannot. The fact that the Victorian *Charter*<sup>57</sup> recognises the right to a public hearing<sup>58</sup> demonstrates the seriousness of openness.

---

<sup>54</sup>Field, above n 17, 68.

<sup>55</sup>Boulle, above n 10, 160.

<sup>56</sup>Ibid 162.

<sup>57</sup>*Charter of Rights and Responsibilities Act 2006* (Vic) (‘*Charter*’).

<sup>58</sup>VLRC, above n 1, 95, 257, 262; *Charter of Rights and Responsibilities Act 2006* (Vic) s 24(3).

## V CONCLUSION

Overall, the move towards mediation is a positive trend, which has a great amount of benefit for accessibility, affordability, timeliness and predictability. But in some cases it may be clear that some of the goals and even some fundamental requirements of civil justice cannot be satisfied by mediation. A denial of a party's right to a public hearing in these cases poses a serious threat to civil justice, perhaps an incentive to mediate would be a safer measure.<sup>59</sup>

It is however conceivable, that well-trained and experienced mediators will be able to recognise these situations and immediately end mediation.<sup>60</sup> A set of clear guidelines, comprehensive training<sup>61</sup> and procedural protections are particularly important. If mandatory mediation is to be introduced, each one of the issues mentioned in this essay would certainly need to be considered, addressed and carefully monitored.

---

<sup>59</sup>VLRC, above n 1, 262.

<sup>60</sup>Field, above n 25, 203.

<sup>61</sup>Field, above n 17, 70; Field, above n 25, 204.

## BIBLIOGRAPHY

### *Articles/Books/Reports*

- Astor, Hilary and Chinkin, Christine, *Dispute Resolution in Australia* (2<sup>nd</sup> ed, 2002).
- Boulle, Laurence, *Mediation: Principles, Process, Practice* (2005).
- Byrne, Justice David, *Promoting the Efficient, Thorough and Ethical Resolution of Commercial Disputes: A Judicial Perspective* (2005).
- Field, Rachael, ‘Using the Feminist Critique of Mediation to Explore “The Good, The Bad and The Ugly”’ (2006) 20(5) *Australasian Journal of Family Law* 45.
- Field, Rachael and Brandon, Mieke, ‘A conversation about the introduction of compulsory family dispute resolution in Australia: Some positive and negative issues for women’ (2007) 18 *Australasian Dispute Resolution Journal* 27.
- French, Brendan, ‘Dispute Resolution in Australia — the movement from litigation to mediation’ (2007) 18 *ADJR* 213.
- Hunter, Jill, Cameron, Camille and Henning, Terese, *Litigation* (7<sup>th</sup> ed, 2005).
- Llewellyn, Jennifer, ‘Dealing With the Legacy of Native Residential School Abuse in Canada’ (2002) 52 *University of Toronto Law Journal* 25.
- Mnookin, Robert, Peppet, Scott and Tulumello, Andrew, *Beyond Winning* (2000).
- Moore, Christopher, *The Mediation Process : Practical Strategies for Resolving Conflict* (2003).
- Sander, Frank and Goldberg, Stephen, ‘Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure’ [1994] *Negotiation Journal* 69.
- Slim, Randa, ‘Small-State Mediation in International Relations: The Algerian Mediation of the Iranian Hostage Crisis’ in Bercovitch, Jacob and Rubin, Jeffrey (eds) *Mediation in International Relations* (1992).
- Victorian Law Reform Commission, *Civil Justice Review Report, Number 14* (2008).
- Young, Simon, ‘Cross-Cultural Negotiation in Australia: Power, Perspectives and Comparative Lessons’ (1998) 9 *Australian Dispute Resolution Journal* 41.
- Zuckerman, Adrian, ‘Justice in Crisis: Comparative Dimensions of Civil Procedure’ in Zuckerman, Adrian (ed) *Civil Justice in Crisis* (1999).

### *Case Law*

- Transcript of Proceedings, *ACCC v Cadbury Schweppes* (Federal Court, 22 April 2002).

*ASIC v Rich* [2005] NSWSC 489.

*Australian Competition and Consumer Commission v Lux Pty Ltd* [2001] FCA 600  
(Unreported, 24 May 2001).

*Seven Network Limited v News Limited* [2007] FCA 1062.

### *Legislation*

*Charter of Rights and Responsibilities Act 2006* (Vic).

*Family Law Regulations 1984* (Cth).