PERSPECTIVES ON MANDATORY MEDIATION

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Mediation has become an increasingly popular option for resolving certain types of civil and commercial disputes. The past decade has seen the introduction of various mandatory mediation initiatives, a trend that has advanced at different paces worldwide. Accompanying this shift has been a continuing debate regarding the efficacy and desirability of compelling parties to undertake what is normally thought of as a voluntary process. This paper offers a comparative analysis of the drive towards mandatory mediation at a European-wide level and the various mandatory mediation schemes that have been piloted and introduced in England and Wales[1] and Australia. The purpose of this exercise is to consider some of the factors that influence domestic attitudes to mandatory mediation and the various forms that mandatory mediation schemes have taken. The final part of the paper takes a broader look at the desirability and efficacy of mandatory mediation in light of the comparative discussion.

It is evident from this analysis that there are a number of factors that influence the decision to implement or permit mandatory mediation. Although not discussed here, structural factors such as legal tradition can strongly influence the domestic legal and political environment. For example, differences between civil and common law systems might impact on a state's approach to mediation.[2] External factors, such as membership to regional or international organisations also impact on a state's legal framework. As will be seen, these factors are particularly relevant in the European context with the focus on facilitating free trade within the European Economic Area and the application of the *European Convention on Human Rights* ('*ECHR*').[3] Finally, domestic factors are a significant driver in the trend towards mandatory mediation. These include the time it takes for cases to reach trial, the cost of litigation, the prevailing legal culture and political climate, and the attitudes of the legal profession, judiciary and general public. This paper focuses on the latter two of these factors with particular regard to the influence of the European Union ('EU') and the internal motivations and limitations that affect the decision to implement mandatory mediation. What emerges from this analysis is first, the observation that although

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1 Note that any references to 'England' in this paper refer to both England and Wales.

2 Nadja Alexander, 'Global Trends in Mediation: Riding the Third Wave', in Nadja Alexander (ed), *Global Trends in Mediation* (Kluwer Law International, 2nd ed, 2006) 1, 7.

3 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

mandatory mediation has been widely implemented, it takes many different forms. Secondly, it appears that the form of mandatory mediation implemented is influenced by both external and domestic influences on the legal system. Finally, regardless of the form of mandatory mediation implemented, its efficacy requires the support of the legal profession and judiciary, thus indicating that any such approach will be more successful if accompanied by a corresponding shift in the prevailing dispute resolution culture.

I KEY CONCEPTS

At the outset, it is necessary to clarify what is denoted in this paper by 'mediation'. Mediation as a form of dispute resolution[4] is normally considered to involve an independent third party (or parties) who facilitate discussions between two or more disputants aimed at forming an agreement on the resolution of the dispute or with regard to key issues. The approach varies according to the dispute, legal requirements, mediator, and behaviour of the parties, although it generally permits more flexibility in both its process and outcomes than litigation. This paper focuses on the facilitative approach as opposed to evaluative methods, and considers mediation only with respect to civil and commercial disputes. One of the oft-repeated tenets of mediation is that it is voluntary.[5] However, some authors make a distinction between voluntariness *into* and *within* the process.[6] The focus of this discussion is the former, namely schemes which compel parties to mediate before their dispute can be heard by a court, even in the absence of their consent.

It is also important to delineate what is meant by 'mandatory mediation'. Such initiatives can generally be broken into three categories. First, some mandatory mediation schemes provide for the automatic and compulsory referral of certain matters to mediation. Such schemes are generally legislative and often require parties to undertake mediation as a prerequisite to commencing proceedings. The New South Wales farm debt recovery mediation scheme is an example, [7] as is the recently introduced compulsory mediation scheme in Italy.[8]

4 Note that the term 'dispute resolution' is used in this paper to refer to all mechanisms for dispute resolution, including litigation, while 'ADR' is used as an umbrella term for 'alternative' or 'appropriate' dispute resolution processes – for example, arbitration, conciliation, and mediation.

5 Micheline Dewdney, 'The Partial Loss of Voluntariness and Confidentiality in Mediation' (2009) 20 *Australasian Dispute Resolution Journal* 17, 17–18; Jacqueline Nolan-Haley, 'Mediation Exceptionality' (2009) 78 *Fordham Law Review* 1247, 1247.

6 See, eg, Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 *Cardozo Journal of Conflict Resolution* 479, 485–7.

7 *Farm Debt Recovery Act 1994* (NSW).

This paper will adopt the terminology used by Professor Frank Sander and refer to this approach as 'categorical'.[9] Sander warns against a categorical approach, suggesting that such legislation should always contain an opt-out provision, allowing parties to argue a case for exemption.[10] Opt out schemes are a variant of the categorical approach but allow parties to opt out either because certain criteria are not met or one or more parties do not consent to mediation. Examples include the family law mediation scheme in Australia[11] and the recently introduced pilot scheme in the English Court of Appeal. A second type of mandatory mediation is often referred to as court-referred mediation and described by Sander as 'discretionary'.[12] It gives judges the power to refer parties to mediation with or without the parties' consent on a case-by-case basis. Such an approach is widely available to courts in Australia.[13] However, it has been slower to take hold in Europe.[14] Third, some mandatory mediation schemes can be described as 'quasi-compulsory'. In these schemes, although alternative dispute resolution ('ADR') is not mandated, it is effectively compelled through the potential for adverse costs orders if not undertaken prior to commencing proceedings.[15] The English *CPR* and the recently enacted *Civil Dispute*

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8 Legislative Decree on Mediation Aimed at Conciliation of Civil and Commercial Disputes (28/2010); see Giovanni De Berti, *New Procedures for Mandatory Mediation* (7 April 2011) International Law Office <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=1bd8561f-581d-43b8-8659-0553b90fc0e6>; Nicolò Juvara, *Italy Introduces Mandatory Mediation for Insurance Disputes* (15 April 2010) Lexology <http://www.lexology.com/library/detail.aspx?g=a4d3a8da-2a8f-4cba-99de-eb32196dd2b5>.

9 Frank E A Sander, 'Another View of Mandatory Mediation' (2007) 13(2) *Dispute Resolution Magazine* 16, 16.

10 Ibid.

11 Introduced by sch 4 of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), s 60I(7) of the *Family Law Act 1975* (Cth) provides for mediation or 'family dispute resolution' as a prerequisite to the court hearing a parenting matter. Exceptions are provided for in *Family Law Act 1975* (Cth) s 60I(9)(b), including cases of family violence or child abuse.

12 Sander, above n 9, 16.

13 See, eg, *Civil Procedure Act 2005* (NSW) pt 4; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07; *Uniform Civil Procedure Rules 1999* (Qld) r 319. See also Magdalena McIntosh, 'A Step Forward - Mandatory Mediations' (2003) 14 *Australasian Dispute Resolution Journal* 280.

14 *Civil Procedure Rules 1998* (UK) SI 1998/3132, rr 1.4, 26.4 ('*CPR*'). See also Dame Hazel Genn et al, *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure* (Ministry of Justice Research Series, 2007) 2. See generally Nadja Alexander, 'Within the civil law tradition' (1999) 2(2) *ADR Bulletin* 21; Alexander, 'Riding the Third Wave', above n 2.

15 Note that quasi-compulsory schemes usually require parties to consider ADR in general, rather than mediation specifically. However, mediation is often either implicitly or explicitly suggested. For example, the *Civil Dispute Resolution Act 2011* (Cth) ss 4(d)–(e) lists 'genuine steps' as including:

> (d) 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[.]

Resolution Act 2011 (Cth)[16] are examples of such schemes. Both permit costs sanctions against parties who do not reasonably attempt to settle the dispute. Although mediation in such cases is not categorically mandated, the possibility of adverse costs orders is a strong factor in favour of attempting ADR and as such, these schemes ought to be considered in this analysis.

II EUROPEAN INITIATIVES

The European landscape offers an interesting introduction to this comparative analysis for two reasons. Firstly, the creation of a single economic zone and the increasing unification of European legal systems have led to important developments in the area of ADR, particularly in the field of consumer disputes as a consequence of the growing number of cross-border disputes arising from the free trade area. Examples in the field of consumer law are two recommendations issued by the European Commission ('EC') in 1998[17] and 2001.[18] The EC has also supported networks to facilitate consumer access to ADR processes in general.[19] More recently, in 2011 it released proposals for a new Directive and Regulation dealing with low-value consumer matters on ADR and online dispute resolution respectively.[20]

The pre-action protocols in England generally require parties to 'consider whether some form of alternative dispute resolution procedure would be more suitable than litigation' and then list discussion and negotiation, early neutral evaluation and mediation as possible procedures for the parties to consider. See for example: *Pre-Action Protocol for Personal Injury Claims*, s 2.16; *Pre-Action Protocol for Professional Negligence*, s B6.1; *Pre-Action Protocol for Construction and Engineering Disputes*, s 5.4. The Practice Direction on Pre-Action Conduct, which applies to civil disputes not otherwise subject to a pre-action protocol, provides in slightly different terms, in s 8.1: 'Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings.'

16 *Civil Dispute Resolution Act 2011* (Cth) s 2. See also *Civil Procedure Act 2005* (NSW) pt 2A, which was intended to apply to matters after 1 October 2011 but of which the introduction has since been postponed by NSW Attorney-General Greg Smith to enable New South Wales to monitor the impact of the Federal provisions in the *Civil Dispute Resolution Act 2011* (Cth). See Greg Smith, 'NSW Government to Postpone Pre-Litigation Reforms' (Media Release, 23 August 2011) <http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/230811_litigation_reforms.pdf/$file/230811_litigation_reforms.pdf>.

17 *Commission Recommendation 98/257/EC of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes* [1998] OJ L 115/31.

18 *Commission Recommendation 2001/310/EC of 4 April 2001 on the Principles for Out-of-Court Bodies involved in the Consensual Resolution of Consumer Disputes* [2001] OJ L 109/56.

19 Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer Law International, 2009) 57; European Commission, 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law' (Report, 19 April 2002) 37 < http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf> ('Green Paper').

20 *Proposal for a Directive of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR)* [2011] COD 2011/0373; *Proposal for a Regulation of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes (Regulation on consumer ODR)* [2011] COD 2011/0374.

Secondly, and more significantly, membership to the EU has an impact on member states' domestic policies regarding mediation. As will be seen, one of the key differences between the attitudes towards mandatory mediation in England and Australia rests on the application of article 6 of the *ECHR* to the former jurisdiction. Article 6(1) relevantly provides that:

> in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial …

With regard to mediation in particular, the EC issued a Code of Conduct for Mediators in 2004.[21] It has the objective of ensuring 'a high quality of mediation services offered throughout the Community'.[22] In the area of cross-border civil disputes, there was a call in the late 1990s for the EC to issue a Green Paper on mediation.[23] These calls were answered with the April 2002 Green Paper. It states that:

> ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought to the courts is increasing, the proceedings are becoming more lengthy and the costs incurred by such proceedings are increasing.[24]

The Green Paper considers ADR as a way of improving the right of access to justice enshrined in article 6 of the *ECHR* and suggests that such processes can be used to 'complement judicial processes'.[25] Relevantly, the Green Paper also warns that states should hesitate before implementing mandatory mediation as it is 'likely to affect the right of access to courts' and 'may therefore prevent access to justice in the meaning of article 6(1)'.[26] The Green Paper received over 160 submissions in reply and prompted dialogue on the topic of ADR at the Europe-wide level.[27]

Following the release of the Green Paper, the EC adopted *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters*.[28] The Directive applies only to cross-border civil and commercial disputes and excludes any matters 'on which the parties are not free to decide themselves under the relevant

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21 EC, *European Code of Conduct for Mediators* (2004) <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf >.

22 Director General of Justice, Freedom and Security Jonathan Faull, 'Introduction' (Speech delivered at Conference on Self-Regulation of Mediation: A European Code of Conduct, Brussels, 2 July 2004) <http://ec.europa.eu/civiljustice/adr/adr_ec_speech_jf_en.pdf >.

23 Peter F Phillips, 'The European Directive on Commercial Mediation: What it Provides and What it Doesn't' (2009) *Business Conflict Management* 1 <http://www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf >.

24 Green Paper, above n 19.

25 Ibid 8.

26 Ibid 25.

27 Phillips, above n 23, 1.

28 [2008] OJ L 136/3 ('Directive').

applicable law' with reference to employment and family law.[29] It applies to all EU member states excluding Denmark. The final date for implementation of its provisions was 21 May 2011.[30] The majority of member states complied with this timeline, although in November 2011 the European Commission took action against Cyprus, Czech Republic, France, Luxembourg, Netherlands and Spain for failing to notify it of implementation measures.[31] The Directive specifically states that 'nothing should prevent Member States from applying such provisions also to internal mediation processes', thus leaving it open for states to extend the provisions to local disputes.[32] In a 2011 implementation report, the European Parliament noted that a number of member states have implemented national legislation that goes further than the terms of the Directive.[33] This report also reaffirms the objectives of ensuring that citizens have access to reliable and predictable ADR services and 'ensuring a balanced relationship between mediation and judicial proceedings'.[34]

It is evident from the terms of the Directive that the drafters left it open for states to implement mandatory mediation schemes. Article 3 includes the following definition of mediation:

> 'Mediation' means a structured process … whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.

It continues, providing that the 'process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State'.[35] Under article 5(1), courts must have the discretion to 'invite' parties to a cross-border dispute to attempt mediation, a provision that has been criticised for not going further by imposing an obligation on courts to make a recommendation to that effect.[36] Article 5(2) states that the Directive is 'without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions … provided that such legislation does not prevent the parties from exercising their right of access to the judicial system'.[37] It appears from both articles 3 and 5(2) that the EC accepts the validity of mandatory mediation

29 Directive, Preamble [10] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>

30 This excludes art 10 of the Directive, which required compliance by 21 November 2010: Directive, art 12.

31 European Commission, 'Cross-border legal disputes: Commission takes action to ease access to justice' (Press Release, IP/11/1432, 24 November 2011) < http://europa.eu/rapid/searchAction.do>.

32 Directive, Preamble [10] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>

33 Arlene McCarthy, 'Report on the Implementation of the Directive on Mediation in the Member States, its Impact on Mediation and its Take-Up by the Courts' (Report, No 2011/2026 (INI), EC Committee on Legal Affairs, 15 July 2011) [4] <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0275&language=EN>.

34 Ibid [B].

35 Directive, art 3.

36 Pablo Cortes, 'Can I Afford Not to Mediate? Mandatory Online Mediation for European Consumers: Legal Constraints and Policy Issues' (2009) 35 *Rutgers Computer & Technology Law Journal* 1,15.

37 Directive, art 5(2).

schemes. This implicitly suggests that the EC sees such schemes as consistent with article 6 of the *ECHR* so long as parties have eventual recourse to the court system.

This interpretation is given support by a judgment of the European Court of Justice ('ECJ'), handed down on 18 March 2010.[38] The ECJ found that mandatory out-of-court proceedings are not contrary to European law so long as they do not result in a binding decision, do not cause a substantial delay in litigating, do not oust the court's jurisdiction due to limitation periods and are not excessively costly.[39] The ECJ's support for mandatory out-of-court procedures in general is particularly significant for the understanding of the right of access to civil justice in article 6(1) *ECHR*. As will be seen, this has specific relevance in England where courts have taken the contrary view of article 6, finding that they are unable to compel non-consenting parties to mediate.[40] The ECJ's case law thus raises questions regarding what constitutes access to justice, including whether recourse to the court system must be immediately available and whether other procedures can aid in ensuring that those cases which so require are heard before a judge in a reasonable time. Further, for some states such as Italy where delays in civil litigation are endemic, rather than hindering access to justice, mandatory mediation schemes have the potential to assist in ensuring that disputants are able to access appropriate dispute resolution mechanisms within a reasonable time by reducing the caseload of courts while retaining parties' rights to have recourse to the courts if no settlement is reached.

There have been some criticisms of other articles of the Directive. These focus on its limited cross-border application,[41] what are seen as gaps in the confidentiality provision,[42] the focus on promoting the quality of mediation rather than encouraging mediation on a larger scale,[43] and the absence of uniform standards in the case of non-enforcement of mediated agreements.[44] Nonetheless, there has also been ample support for the initiative. Peter Phillips, for example, writes that '[t]he entire ten-year process of framing, and eventually enacting, the Directive speaks to the first plenary opportunity that Europe had to look at this process. In that sense, it is warmly welcome'.[45] The final impact of the Directive

38 Judgment of the Court (Fourth Chamber) of 18 March 2010 (references for a preliminary ruling from the Giudice di Pace di Ischia – Italy) – Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08) ('*Alassini*').

39 Giovanni De Berti, *ECJ Finds Italian Rules on Mandatory Mediation Consistent with EU Law* (29 April 2010) International Law Office <http://www.internationallawoffice.com/Newsletters>.

40 *Halsey v Milton Keynes General NHS Trust* [2004] 4 All ER 920 ('*Halsey*'). See also Gordon Blanke, 'The Mediation Directive: What Will it Mean for Us?' (2008) 74 *Arbitration* 441, 442.

41 See Cortes, above n 36, 13.

42 See, eg, Peter Phillips who describes these gaps as 'the most egregious flaw in the Directive': Phillips, above n 23, 3.

43 Ibid. See also Angelica Rosu, 'International Regulations Dealing with Alternative Dispute Resolution for International Commercial Disputes' (2009) 4 *EIRP Proceedings* 6 <http://journals.univ-danubius.ro/index.php/eirp/article/view/471>.

44 Alexander, *International and Comparative Mediation*, above n 19, 301; Phillips, above n 23, 3.

45 Phillips, above n 23, 4.

has yet to be seen but it is apparent that many states have not extended the provisions further than required, with the exception of a few such as Hungary, Italy and Romania in which the domestic legislation exceeds the requirements of the Directive.[46]

One European state that acted both swiftly and emphatically to the Directive is Italy. Its context and implementation process provide an interesting example of how a state can embrace mandatory mediation as a means of improving access to civil justice. Italy has been plagued by substantial backlogs in the court system with an average delay of three and a half years before a civil case reaches trial.[47] If a litigant wishes to appeal a civil case, they can expect to be waiting around ten years for a final judgment.[48] This situation, which has been described as both 'disastrous'[49] and 'appalling',[50] has had adverse consequences for the Italian government which, by 2000, had paid out over €600 million to individuals who brought claims that Italy had violated article 6 of the *ECHR*.[51] In response, from the early 1990s, the Italian government attempted to reduce the delays through the appointment of around 4000 'Judges of the Peace' who are empowered to make decisions on small claims and mediate civil disputes[52] and by giving local Chambers of Commerce the power to introduce mediation services.[53] A categorical mandatory mediation scheme was first introduced in Italy in 1998

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46 See generally McCarthy, above n 33. Status information available from Eur-Lex website which officially tracks the progress of European Directives < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72008L0052:EN:NOT>. See also, European Commission, 'European Commission calls for saving time and money in cross-border legal disputes through mediation' (Press Release, IP/10/1060, 20 August 2010) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1060&format=HTML&aged=0&language=EN&guiLanguage=en >.

47 Giuseppe De Palo and Penelope Harley, 'Mediation in Italy: Exploring the Contradictions' (2005) 21 *Negotiation Journal* 469, 470.

48 Giuseppe De Palo, Paola Bernadini and Luigi Cominelli, 'Mediation in Italy: the Legislative Debate and the Future' (2003) 6(3) *ADR Bulletin* 51, 51.

49 De Palo and Harley, above n 47, 470.

50 De Palo, Bernadini and Cominelli, above n 48, 51.

51 For example, in 1999 the Grand Chamber of the European Court of Justice ('ECJ') made awards against Italy in two cases: *A P v Italy* (35265/97) [1999] ECHR 61 and *Ferrari v Italy* (33440/96) [1999] ECHR 64 ('*Ferrari*'), both of which were handed down by the Grand Chamber on 28 August 1999. The applicants in both cases were successful in arguing that Italy had breached art 6(1) of the *ECHR* for failing to hear the applicants' claims before a court in a reasonable time and granted damages to the applicants. In *Ferrari*, the Grand Chamber of the ECJ applied *Salesi v Italy* (13023/87) [1993] ECHR 14. It also referred to the fact that:

> since 25 June 1987, the date of the Capuano v. Italy judgment (Series A no. 119), it has already delivered 65 judgments in which it has found violations of Article 6 § 1 in proceedings exceeding a 'reasonable time' in the civil courts of the various regions of Italy. Similarly, under former Articles 31 and 32 of the Convention, more than 1,400 reports of the Commission resulted in resolutions by the Committee of Ministers finding Italy in breach of Article 6 of the Convention for the same reason.

See also De Palo and Harley, above n 47, 471; Giuseppe De Palo and Luigi Cominelli, 'Mediation in Italy: Waiting for the Big Bang?' in Nadja Alexander, *Global Trends in Mediation* (Kluwer Law International, 2nd ed, 2006) 259, 260.

52 De Palo, Bernadini and Cominelli, above n 48, 51.

53 Legislative Decree on Reorganisation of Chambers of Commerce, Industry, Crafts and Agriculture (580/1993): see ibid.

with three laws, which entitled consumers and required subcontracting and employment disputes to go to mediation before trial.[54] The next major legislative initiative came in 2003 with Decree No. 5 (2003) which created an opt in mediation procedure for corporate matters, exempting settlements of those matters from stamp duty and in certain cases, requiring a stay of proceedings while the mediation takes place.[55] Although this regime was not a categorical approach applying to all corporate matters, the stamp duty exemptions bring the scheme into the quasi-compulsory category. The 2003 law also introduced a system for the registration and accreditation of mediation organisations.[56] If no agreement is reached, the law gives mediators the power, if both parties so require, to recommend a solution at the end of the session which the parties must either accept or decline with reasons.[57] The law commenced operation in 2004 however, initial results were hardly promising. A study published in 2010 showed that although 80 per cent of mediated cases resulted in settlements, less than 0.1 per cent of parties in pending proceedings voluntarily submitted to mediation.[58]

In 2009, Italy passed legislation empowering the government to issue statutory instruments on mediation extending the provisions of the 2003 Decree on corporate mediation to other areas and allowing courts to award costs against a winning party that has refused a recommendation which is the same as the judgment.[59] The 2009 Decree also placed a duty on lawyers to inform clients in writing about the availability of mediation.[60] Then, in response to the 2008 Directive, Italy announced a fortification of its mediation regime in an attempt to 'eliminate one million cases' from the courts.[61] In April 2010, Italy notified the European Commission that it had passed a statutory instrument, Legislative Decree No. 28 (2010),[62] implementing the Directive. That scheme went far beyond the Directive's terms, introducing a categorical mandatory mediation regime for disputes in real property; insurance, banking and financial

54 Legislative Decree No 281/2008, Legislative Decree No 192/2008, Legislative Decree No 80/2008. See also De Palo, Bernadini and Cominelli, above n 48, 51.

55 De Palo, Bernadini and Cominelli, above n 48, 52.

56 De Palo and Cominelli, above n 51, 265.

57 De Palo, Bernadini and Cominelli, above n 48, 52.

58 For a summary of results, see Rachele Gabellini, 'The Italian Mediation Law Reform' (2010) 12(3) *ADR Bulletin* 64, 64.

59 Law No 69 of 19 June 2009 <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2009;69>; Legislative Decree No 5 of 17 January 2003 <http://www.camera.it/parlam/leggi/deleghe/testi/03005dl.htm>; Micael Montinari and Dino Abate, *Italy: News on the Italian Civil Procedure Code - Draft Law 1082* (9 April 2009) Mondaq <http://www.mondaq.com/article.asp?articleid=77814>; Giovanni De Berti, *New Law on Implementing EU Mediation Directive* (23 July 2009) International Law Office <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=86300185-f033-4c35-84ab-f9755e39ae83&redir=1> ('*New Law*').

60 De Berti, *New Law*, above n 59.

61 See ibid; Giuseppe De Palo and Leonardo D'Urso, 'Explosion or Bust? Italy's New Mediation Model Targets Backlogs to 'Eliminate' One Million Disputes, Annually' (2010) 28 *Alternatives to the High Cost of Litigation* 93.

62 Decree No 28 is Legislative Decree on Mediation Aimed at Conciliation of Civil and Commercial Disputes (28/2010).

agreements; division of assets; inheritance; family law; tenancy law; neighbour disputes; gratuitous loans for use; compensation claims for car or boat accidents; medical negligence claims; and defamation in the press and other media.[63] It also introduced a non-mandatory mediation procedure for all other civil or commercial claims. The scheme came into effect on 20 March 2011 to fierce opposition from lawyers, striking over fears that it would jeopardise their practices.[64]

There have been criticisms of Italy's scheme. Some fear that the strict regulatory approach regarding the registration of mediation bodies and fees may hinder growth of the mediation industry by imposing excessive restrictions on registered mediators.[65] For instance, Italy has legislated to set mediation fees remarkably low, based on the value of the dispute, the lowest fee being €40 for a claim of less than €1000.[66] Critics suggest that this arrangement might deter people from becoming professional mediators.[67] De Palo and Cominelli, for example, warn that the 'effect of somewhat prescriptive legislative interventions, coupled with the lack of necessary funding, may discourage parties from resorting to mediation and undermine its immediate and long-term success'.[68] They point to evidence that introducing mandatory measures for employment disputes actually resulted in fewer settlements because the mediation authority was unable to cope with the demand.[69] Further, the laws, in theory, allow the parties to choose the mediator from a list published by a recognised mediation body, but, in practice, require them to approach that mediation body which is then responsible for appointing the mediator.[70] For many parties, the appointment of a specific mediator by reason of their personality, mediation style or expertise is an important factor in the decision to mediate and this requirement therefore raises questions about the effectiveness of such a procedure.

Finally, the negative reaction of legal professionals to the scheme is indicative of the cultural hurdles facing mediation in Italy.[71] However, there are already some promising indications that lawyers are adapting to the changing dispute resolution climate[72] and that Italian education providers are responding

63 Nicolo Juvara, *Italy Introduces Mandatory Mediation for Insurance Disputes* (15 April 2010) Lexology <http://www.lexology.com/library/detail.aspx?g=a4d3a8da-2a8f-4cba-99de-eb32196dd2b5>.

64 Owen Bowcott, 'Compulsory Mediation Angers Lawyers Working in Italy's Unwieldy Legal System' on The Guardian, *Butterworth and Bowcott on Law Blog* (23 May 2011) <http://www.guardian.co.uk/law/butterworth-and-bowcott-on-law/2011/may/23/italian-lawyers-strike-mandatory-mediation>; Giuseppe de Palo, 'Mediating Between the Bar and the Government? Italy's Attorneys Strike Over a New ADR Law' (2011) 29 *Alternatives to the High Cost of Litigation* 81.

65 De Palo and Harley, above n 47, 477–8.

66 De Palo and Cominelli, above n 51, 268.

67 Ibid.

68 Ibid 271.

69 Ibid.

70 Andrew Colvin, 'The New Mediation in Italy' (2010) 76 *Arbitration* 739, 742.

71 For a further discussion of the adversarial culture in Italy, see De Palo and Harley, above n 47, 473–4.

72 See, for example, ibid; Gabellini above n 58; Giovanni De Berti, *Mandatory Mediation: The Italian Experience, Two Years On* (June 7 2012) International Law Office <http://www.internationallawoffice.com/>.

by increasing places for training mediators to handle the growing number of claims.[73] This is reflected in figures from the ECJ. When looking at all claims in which the ECJ found that Italy had violated article 6(1) of the *ECHR*, the number has fallen dramatically from 93 violations in 2003, to 17 in 2004, 3 in 2005, 6 in 2006 and no violations found by the Court from 2007 to 2011.[74] Although such figures cannot provide a complete analysis, they do give a promising initial impression of the Italian mandatory mediation regime.

The Italian reforms, and the support provided for such initiatives by the decision of the ECJ in the *Alassini* case,[75] provide an interesting perspective on the debate over mandatory mediation. Although not all European states have taken such drastic measures in response to the Directive, pending the Directive's overall success with regard to cross-border disputes and the impact of schemes such as that introduced by Italy, it is likely that we will see growing support for mandatory mediation in the European context.

III THE ENGLISH PERSPECTIVE

Having looked at European-wide initiatives in favour of mandatory mediation and the implementation of the Directive in Italy, it is interesting to consider attitudes towards mandatory mediation in England. As a common law country and the foundation of Australia's legal system, England provides an interesting point of comparison. It is particularly interesting to consider the way in which these two countries differ in their acceptance of mandatory mediation. Such divergences appear to be largely due to both a long-standing view in England about the supremacy of the judicial process, and perhaps more significantly, the influence of the EU in the English context.[76] A consideration of mandatory mediation in England must take into account a number of factors. First, it is notable that the legislature embraced quasi-compulsory ADR early on as a response to concerns over access to civil justice. The *CPR* encourage parties to consider ADR processes prior to litigation. On the other hand, although courts take an active role in enforcing the *CPR*, discretionary referral to mediation has not taken hold in England and the courts cannot compel unwilling disputants to mediate. Finally, there have been a number of attempts at categorical schemes by both the courts and legislature with little success so far.

The release in 1996 of the Interim and Final Woolf Reports on *Access to Justice* has been instrumental in transforming the dispute resolution landscape in

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73 See the account of address given by Giovanni De Berti at the World Mediation Forum in Lisbon in January 2012 in Peter Phillips, 'Court Mandated Mediation: Perspectives from Australia, Europe and America' on F Peter Phillips, *Business Conflict Blog* (31 January 2012) <http://businessconflictmanagement.com/>.

74 These figures are publicly available on HUDOC: HUDOC, European Court of Human Rights <http://hudoc.echr.coe.int/>.

75 (Joined Cases C-317/08 to C-320/08) (2010).

76 The *ECHR* is given legislative effect in England by *Human Rights Act 1998* (UK) c 42, s 1.

England.[77] The reports dealt directly with the issue of access to civil justice in England and made a number of recommendations including the encouragement of non-adversarial dispute resolution processes.[78] This led to the introduction of the *CPR* which came into force in 1999. The *CPR* have a strong emphasis on pre-action procedures and in particular, they place an onus on courts to encourage settlement where appropriate.[79] Part 36 of the *CPR* provides that a court may order costs against a claimant who has turned down a higher settlement offer.[80] Similarly, rule 44.3(5) allows the court to make an adverse costs order against a party after appraising the extent to which they have complied with pre-action protocols, including considering ADR processes for most civil claims.[81] The *CPR*, which laid the groundwork for pre-action requirements in Australia, therefore introduced a quasi-compulsory system of ADR, although the parties maintain significant discretion with regards to determining the appropriateness of out-of-court procedures for their dispute.

There is evidence that these reforms have been successful at encouraging a wider uptake of ADR in general. Writing in 2010, Legg and Boniface indicated that since the introduction of the *CPR*, litigation in the English High Court and County Courts has reduced by 80 per cent and 25 per cent respectively.[82] Between July 2007 and 2009, the number of mediations conducted by members of the Civil Mediation Council increased by 181 per cent.[83] On the other hand, Susan Prince, considering the impact of the *CPR* after ten years, noted that there is no evidence of an increase in court referrals to mediation, and in fact, the introduction of a central telephone mediation helpline by the government has 'led to loss of direct ownership by the court and the district judges, who had previously referred cases to their local mediation scheme, and their local mediators'.[84] Speaking generally about the impact of ADR processes, she concluded that:

> [t]he enthusiasm about ADR, incorporated into the [*CPR*], has received an extremely cautious welcome, and still there is a lack of consensus about the true value of mediation. In the future, the benefits of mediation can only be further

77 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Ministry of Justice, 1996) <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm> ('Final Report'). See also Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Ministry of Justice, 1995) <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/interim/woolf.htm> ('Interim Report').

78 Miryana Nesic, 'Mediation – On the Rise in the United Kingdom?' (2001) 13(2) *Bond Law Review* 20, 21.

79 *CPR* r 1.4(2). See also ibid.

80 Cortes, above n 36, 25.

81 Michael Legg and Dorne Boniface, 'Pre-action protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, 40–1.

82 Ibid 42.

83 Lord Jackson, *Review of Civil Litigation and Costs: Final Report* (Ministry of Justice, 2009) ch 36, [2.3] < http://www.judiciary.gov.uk> ('Jackson Report').

84 Susan Prince, 'ADR after the CPR: Have ADR initiatives now assured mediation as an integral role in the civil justice system in England and Wales?' in Deirdre Dwyer (ed) *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 327, 333.

> appreciated if public awareness is raised; mediation is integrated into the legal system; and furthermore, the complex and challenging issues which are raised in order to do this are fully addressed.[85]

The Jackson Report released in December 2009 reinforced the sentiments of the Woolf Report by indicating that rising costs of litigation could be tackled in part by the systematic early referral of appropriate cases to mediation or other forms of ADR.[86] Lord Justice Jackson's findings with regards to mediation in England were that while it has proved to be a 'highly efficacious means of achieving a satisfactory resolution of many disputes', its benefits are not appreciated by many small businesses or the general public and in addition, some judges and legal practitioners remain uninformed about the benefits of mediation.[87] He asserted that what is needed is 'culture change, not rule change'.[88] The Report also reaffirmed legal authority in England that although judges should actively in encourage mediation, 'parties should never be compelled to mediate'.[89] These findings are illustrative of the fact that despite continuing efforts by the legislature, private bodies and courts to promote mediation, the largest impediment to a greater uptake is the culture of litigation among legal professionals and the general public.

Although the *CPR* encourages ADR procedures in general, the English courts have shown support for mediation in their enforcement of the pre-action requirements. For example, in *Dunnett v Railtrack plc*, the court made a costs order against the successful party for refusing to mediate.[90] The court's power to make a costs order based on an unreasonable refusal to mediate was confirmed by the English Court of Appeal in *Halsey*[91] which is still the leading case on court powers regarding mediation. In that case, Dyson LJ, delivering the judgment of the Court, noted that mediation can benefit parties by reducing the cost of the proceedings, offering a range of solutions that are not available to the courts, such as an apology, and the potential for greater party satisfaction at the outcome of the process.[92] His Lordship went on to set out a non-exhaustive list of factors to be considered when determining whether a party's refusal to mediate is unreasonable, as follows:

> (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.[93]

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85 Ibid 340.

86 Jackson Report, above n 83, ch 36, [3.1].

87 Ibid.

88 Ibid ch 36, [3.5].

89 Ibid ch 36, [3.4].

90 [2002] 2 All ER 850. Cf *Swain Mason v Mills & Reeve* [2012] EWCA Civ 498 in which the refusal by one party to mediate was found to be not unreasonable; see also *Burchall v Bullard* [2005] EWCA Civ 358 cited in Cortes, above n 36, 25.

91 *Halsey v Milton Keynes General NHS Trust*[2004] 4 All ER 920.

92 Ibid 925.

93 Ibid 926.

The decision in *Halsey* assists disputants by clarifying the potentially ambiguous term, 'unreasonable', and might offer reassurance for Australian commentators who fear that terms such as 'genuine steps' or 'reasonable steps' in Australian pre-action requirements will remain elusive concepts. Recent examples of the application of *Halsey* can be found in the English Court of Appeal's decision in *Rolf v De Guerin*[94] and the High Court's decision in *PGF II SA v OMFS Company,*[95] both of which indicate that the courts are willing to enforce the provisions of the CPR and expect parties to at least consider mediation as an alternative to litigation.

The decision in *Halsey* also created an impediment to the progression of discretionary mandatory mediation in England.[96] Despite prior decisions to the contrary,[97] the Court of Appeal in *Halsey* held that courts do not have the power to order parties to mediate against their will as this would constitute a breach of article 6 of the *ECHR*. As Dyson LJ said in the judgment of the Court, '[i]t seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court'.[98] The Court quoted the 2003 edition of the '*White Book*',[99] which stresses the voluntary nature of ADR procedures. Their Lordships concluded that even if the Court had jurisdiction to order non-consenting parties to mediate, '[they] find it difficult to conceive of circumstances in which it would be appropriate to exercise it'.[100]

This case has been criticised by some commentators. For example, former English High Court judge, Gavin Lightman, opined that 'the Court of Appeal appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order that places a permanent stay on proceedings'.[101] He further stated that '[n]o thinking person can but be disturbed by the imposition of the twin hurdles to mediation that the *Halsey* decision creates'.[102] Similarly, Miryana Nesic suggested that the legal profession in England is dissatisfied with the unwillingness of the judiciary to embrace mediation.[103] The ECJ's decision in the *Alassini* case and the terms of the Directive also serve to place some doubt on this aspect of the *Halsey* judgment; these developments appear to give the go-ahead for compulsory mediation so long as it does not oust the court's jurisdiction entirely. Based on this discrepancy, it appears likely that the English courts will eventually be

94 [2011] EWCA Civ 78.
95 [2012] EWHC 83.
96 [2002] EWHC (Comm) 2059 cited in Cortes, above n 35, 25.
97 See, eg, *Cable & Wireless v IBM United Kingdom* [2002] EWHC (Comm) 2059 (Eng), cited in Cortes, above n 36, 25.
98 *Halsey* [2004] 4 All ER 920, 924.
99 Civil Procedure (The White Book), 2003, Sweet & Maxwell.
100 Ibid.
101 Gavin Lightman, 'Breaking Down the Barriers', *The Times* (online), 31 July 2007 <http://www.thetimes.co.uk/tto/law/article2209965.ece>.
102 Ibid.
103 Nesic, above n 78, 23.

confronted with a new opportunity to decide on whether compulsory mediation will abrogate access to the courts under article 6 and it is possible that this aspect of the *Halsey* judgment will not withstand the challenge.

Despite the fact that discretionary referral of unwilling parties to mediation has been rejected in England, there have been a handful of categorical schemes, initiated by both the courts and legislature, that have attempted to promote mediation in civil matters. Between 1996 and 2002, various English courts established voluntary mediation schemes.[104] However, despite high settlement rates and satisfaction with the process, there was a slow uptake of mediation, which ultimately led the government to attempt a compulsory mediation scheme.[105] The Automatic Referral to Mediation ('ARM') pilot scheme, which was implemented by the Department of Constitutional Affairs, ran from 2004 to 2005 as part of the London County Court. It aimed to randomly refer 100 cases each month to mediation with an opt-out provision if certain requirements were satisfied. At the launch of the pilot, Professor Marin Partington noted that 'it is only by running the experiment that we will be able to find out whether the arguments against compulsion are borne out or whether those in favour are supported'.[106] Ultimately, the scheme was a failure and highlighted the hesitation of disputants to accept mandatory mediation. According to an evaluation conducted 10 months after the pilot, only 22 per cent of the 1232 cases referred to mediation had a mediation appointment booked.[107] Further, in 81 per cent of the cases at least one of the parties objected to the case being mediated.[108] Some commentators have suggested that the failure of the ARM pilot scheme can be attributed to the *Halsey* decision.[109] Professor Dame Hazel Genn wrote that the 'mood or tenor of the *Halsey* judgment and its representation in the professional press, effectively undermined both the object and purpose of the automatic referral to mediation pilot'.[110] Others have blamed the legal profession, and particularly 'intransigence by solicitors'.[111] For a scheme such as this to be successful, it requires the support of lawyers and judges yet recent research suggests that some legal practitioners in England are unclear about the process of mediation.[112] This is concerning because a 2003 survey found that in 2001, 56

104 Genn et al, above n 14, 8.

105 In the London County Court voluntary scheme, about 62 per cent of cases settled at mediation and a further 18 per cent settled before trial. Moreover, 85 per cent of respondents reported satisfaction with the process: Hazel Genn, *Mediation in Action: Resolving Court Disputes without Trial* (Calouste Gulbenkian Foundation, 1999); see also Genn et al, above n 14, 8–9.

106 Professor Martin Partington, 'Speech on Automatic Referral to Mediation Scheme' (Speech delivered at the Central London County Court, London, 29 March 2004) 2 <http://www.docstoc.com/docs/25372469/Automatic-Referral-to-Mediation-Scheme>.

107 Genn et al, above n 14, ii.

108 Ibid ii–iii.

109 Cortes, above n 36, 31; Genn et al, above n 14, 19.

110 Genn et al, above n 14, 19.

111 Nesic, above n 78, 33.

112 Varda Bondy and Linda Malcahy, *Mediation and Judicial Review: An Empirical Research Study* (The Public Law Project, 2009) 25–6.

per cent of disputants relied on lawyers for their information about mediation with ADR institutions (particularly CEDR) coming in next at 41 per cent.[113]

The disjoint between the courts and mediation was further evident in a 2011 consultation paper addressing litigation in County Courts. It proposed an automatic referral to mediation scheme for small claims cases, suggesting that if it were taken up 'mediation will be seen as part of the actual court process'.[114] Notwithstanding the failure of the ARM scheme, the Court of Appeal recently announced a one-year automatic referral to mediation pilot program. The categorical referral scheme commenced on 2 April 2012 and applies to all personal injury and contract claims worth up to £100,000. Such claims are automatically referred to mediation unless specifically exempted by a judge, however parties are not obligated to participate and can terminate the mediation at any time without reason.[115]

In 2011, England introduced legislation to implement the Directive in the context of cross-border disputes.[116] The legislation does not go any further than the terms required by the Directive and it is yet to be seen whether the legislature will seek to extend the application of those provisions. As is evident, England has willingly embraced the use of quasi-compulsory ADR and continued to trial categorical referral schemes. However, the bar to discretionary referral to mediation by courts evidences a continued resistance to mandatory mediation on the part of the judiciary and the strong influence that article 6 of the *ECHR* has on English jurisprudence. It seems that an important factor in England will be ensuring that there is sufficient support for and knowledge of mediation among both the legal profession and disputants as well as the courts continuing to play an active role in enforcing the pre-action requirements in the CPR.

IV THE AUSTRALIAN PERSPECTIVE

Australia has had a different experience to England with regard to the introduction of mandatory mediation schemes, notwithstanding their shared legal tradition. For one, Australia is less constrained by external factors. However, the federal system means that the various legislative and court initiatives vary greatly from state to state.[117] Secondly, Australia already has experience of a number of successful mandatory mediation schemes which provides some foundation for further work in this area and is indicative of wider support among the legal

113 Loukas A Mistelis, 'ADR in England and Wales: A Successful Case of Public Private Partnership' in Nadja Alexander (ed), *Global Trends in Mediation* (Kluwer Law International, 2006) 139, 171.

114 Ministry of Justice, *Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System*, Consultation Paper CP6/2011 (2011) [152].

115 Judiciary of England and Wales, 'New Pilot To Show Mediation Can Work For the Court of Appeal' (News Release, 30 March 2012) <http://www.judiciary.gov.uk/media/media-releases/2012/news-release-mediation-pilot-court-of-appeal>.

116 *The Cross-Border Mediation (EU Directive) Regulations 2011* (UK) SI 2011/1133. These regulations entered into force on 20 May 2011.

117 Notably, this paper refers predominantly to case law from NSW as this is the author's jurisdiction.

profession and judiciary than exists in the European jurisdictions discussed above.

As early as 1980, Community Justice Centres were established in NSW as a pilot program to provide voluntary mediation services for certain disputes.[118] The scheme was made permanent in 1983 after a 1982 report indicated promising results.[119] Since that time, the number of organisations offering mediation services has dramatically increased and Australia has been at the forefront of the establishment of mandatory mediation schemes. These range from far-reaching court powers permitting discretionary referral to meditation to categorical legislative schemes which require mediation as a prerequisite to bringing a court action. Examples of categorical schemes in NSW include the *Farm Debt Mediation Act 1994* (NSW), *Retail Leases Act 1994* (NSW), *Legal Profession Act 2004* (NSW) and *Strata Schemes Management Act 1996* (NSW).[120] Victoria has a similar legislative scheme applying to retail tenancy disputes.[121] In Queensland, the *Motor Accident Insurance Amendment Act 2000* (Qld) and the *Personal Injury Proceedings Amendment Act 2002* (Qld) provide for the categorical referral to mediation of personal injury claims.[122] At a federal level, legislation mandates mediation in family law proceedings except where there are certain factors making mediation unsuitable, in which case parties are permitted to opt out.[123]

Courts in Australia have wide discretionary powers to order mediation without the parties' consent. Legislative provisions empowering the Supreme Court of NSW to order mandatory mediation first appeared in 2000.[124] Supreme Court Practice Notes have reinforced these powers of judges to order unwilling parties to mediate.[125] There has been open judicial support for this initiative, often in the form of court-annexed mediation where the process is carried out by

118 NSW Law Reform Commission, *Community Justice Centres*, Report 106 (2005) 3 <http://www.lawlink.nsw.gov.au/lrc.nsf/b302b703a1328b7e4a2565e8002658dc/675813304049fdf3ca256fcb00826416/$FILE/r106.pdf>.

119 Ibid.

120 Tania Sourdin, 'Mediation in Australia: Impacts on Litigation', in Nadja Alexander (ed), *Global Trends in Mediation*, (Kluwer Law International, 2006) 37, 62.

121 *Retail Leases Act 2003* (Vic), s 87.

122 McIntosh, above n 13, 280.

123 See also Sourdin, above n 120, 58–9; Nicola Berkovic, 'Family Law Blitz to Hit Backlog', *The Australian* (online) 24 May 2012 < http://www.theaustralian.com.au/business/legal-affairs/family-law-blitz-to-hit-backlog/story-e6frg97x-1226365070014>.

124 *Supreme Court Act 1970* (NSW), s 110K; this provision has since been repealed and replaced by a near identical provision in the *Civil Procedure Act 2005* (NSW), s 26(1) and (2).

125 See, eg, Supreme Court of NSW, *Practice Note SC Gen 6 – Mediation*, 10 March 2010, [5]. This Practice Note applies to the NSW Court of Appeal, the Common Law Division (civil cases only) and the Equity Division. See also Supreme Court of Victoria, Commercial Court, *Practice Note 10 of 2011 – General* (1 January 2010) pt 10; Supreme Court of Victoria, *Practice Note 3 of 2012 – Professional Liability List* (1 October 2012) [5.3], which provides that 'all proceedings will be referred to mediation unless there is a good reason to the contrary'.

a court officer and in some cases, a judge.[126] In 2010, former Chief Justice of the Supreme Court of NSW James Spigelman acknowledged that

> [p]eople are reluctant to admit that they might have some weakness in their case and therefore don't offer to settle or mediate … Whereas if they are forced into it, experience is that reluctant starters often become active participants.[127]

These remarks echo Justice Einstein's judgment in *Idoport Pty Ltd v National Australia Bank Ltd (No 21)*[128] and Justice Hamilton's comments in *Remuneration Planning Corporation Pty Ltd v Fitton*.[129] Similarly, Bryson J in *Browning v Crowley*[130] listed a number of reasons why the judiciary should favour mediation including its comparatively low cost, the importance of the relationship between the parties and the 'public interest in relatively peaceable resolution of conflicts'.[131] There has also been support for discretionary compulsory referral to ADR by the National Alternative Dispute Resolution Advisory Council ('NADRAC'). In its report, *The Resolve to Resolve*, NADRAC stated that it supports 'a mandatory pre-action requirement to attempt ADR' in appropriate cases.[132] It encouraged courts to have powers to order mandatory ADR both at the pre-filing and post-filing stages but warned against a categorical approach, stressing that the court should retain its discretion in referring a case to ADR. This is because courts are 'well placed to identify those types of matters where a pre-action requirement to use a specific ADR process or processes may be desirable'.[133] It is evident that there are a number of strong public policy factors

126 In 1999, the Chief Justices Council adopted the *Declaration of Principles on Court-Annexed Mediation:* Chief Justice James J Spigelman, 'Mediation and the Court' (2001) 39(2) *Law Society Journal* 63, 63. See also Chief Justice James J Spigelman, 'Address to the LEADR Dinner' (Speech delivered at University and Schools Club, Sydney, 9 November 2000) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_spigelman_091100>; Chief Justice Warren, 'Remarks on Opening of the Supreme Court Mediation Centre', (Speech delivered at the Opening of the Supreme Court Mediation Centre, Melbourne, 4 March 2008) <http://www.supremecourt.vic.gov.au/resources/abd64f3e-b138-4346-a5f2-aff28c87c720/remarks+by+cj+at+the+opening+of+the+supreme+court+mediation+centre+4+march+2008.pdf>; Chief Justice French, 'Perspectives on Court-Annexed Dispute Resolution' (Speech delivered at Multi-Door Symposium, Law Council of Australia, Canberra, 29 July 2009) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj27july09.pdf>. With regards to judicial mediation, the Supreme Court of Victoria has recently released guidelines addressing this practice, see: Supreme Court of Victoria, *Practice Note 2 of 2012 – Judicial Mediation Guidelines*, 30 March 2012.

127 Quoted in Chris Merritt, 'Mediation in NSW Supreme Court works: Spigelman', *The Australian* (online), 1 October 2010 <http://www.theaustralian.com.au/business/legal-affairs/mediation-in-nsw-supreme-court-works-spigelman/story-e6frg97x-1225932539482>.

128 [2001] NSWSC 427, [29]–[30].

129 [2001] NSWSC 1208, [3]. Other NSW cases in which the desirability of compelling parties to mediate is discussed include *Singh v Singh* [2002] NSWSC 852, [4]; *Higgins v Higgins* [2002] NSWSC, [5]–[12].

130 [2004] NSWSC 128, [5].

131 Quoted in Sourdin, above n 120, 39. See also *ASIC v Rich* [2005] NSWSC 489; *Amzin Firoz Daya v CAN Reinsurance Co Ltd & Ors* [2004] NSWSC 795, [4].

132 NADRAC, *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General* (Report, Commonwealth of Australia, September 2009) 24 [2.16] <http://www.nadrac.gov.au/publications/PublicationsA-Z/Pages/default.aspx> (*'The Resolve to Resolve'*).

133 Ibid 24 [2.18]; 38 [Recommendation 2.8].

in favour of discretionary mandatory mediation, particularly if it can reduce the caseload of courts while simultaneously increasing party satisfaction at the outcome of the process. While the courts play an integral role in the resolution of complex disputes and the creation and interpretation of legal precedent, for less complex matters, compelling parties to attempt mediation has the potential of reducing costs, allowing for a wider range of solutions, and maintaining the relationships between the parties.[134]

More recently, quasi-compulsory mediation has been implemented in Australia.[135] In 2009, NADRAC recommended introducing a quasi-compulsory system at a federal level similar to the *CPR* in England, allowing costs orders against parties that do not take appropriate steps to resolve their dispute before trial.[136] Notably, it warned against imposing costs orders against a party based on conduct during the ADR process.[137] The *ADR Blueprint* released by the NSW Attorney General's Department in the same year expressed similar ideas to NADRAC. It recommended an increased use of ADR by government bodies by including an ADR clause in all appropriate government contracts as has been done in England.[138] It also made recommendations relating to pre-action protocols including extending section 56 of the *Civil Procedure Act 2005* (NSW) to cover pre-action conduct, developing pre-action protocols for appropriate types of disputes, and requiring parties to advise the court if they have attempted, or are willing to attempt ADR.[139]

The recommendation of pre-action protocols by both reports has recently come to light with the introduction of legislation in New South Wales and at the federal level.[140] The Commonwealth legislation, which applies to proceedings in the Federal and Federal Magistrates Courts, commenced operation on 1 August

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134 See, eg, *Yoseph v Mamano & Ors* [2002] NSWSC 585; *Johnston v Johnston* [2004] NSWSC 497 (cf *Roy v Roy* [2004] NSWSC 463).

135 It is worth noting at this point that in some areas, measures encouraging settlement of proceedings have existed for some time. For example, s 40 of the *Defamation Act 2005* (NSW) provides that costs must be awarded on an indemnity basis if the parties either failed to make or failed to accept a reasonable settlement offer before the proceedings are determined.

136 NADRAC, above n 132, 37 [Recommendation 2.6].

137 Ibid 26 [2.27].

138 NSW Attorney-General's Department, *ADR Blueprint Discussion Paper: Framework for the Delivery of Alternative Dispute Resolution* (Report, Government of NSW, April 2009) 14 [Proposal 8] <http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m40265213/adr_blueprint.pdf > ('*ADR Blueprint*'); NSW Department of Justice and Attorney-General, *ADR Blueprint Draft Recommendations Report 2: ADR in Government* (Report, Government of NSW, September 2009) 12 <http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m40265213/250909_updated_adr_recommendations_report2.pdf>.

139 NSW Department of Justice and Attorney-General, *ADR Blueprint Draft Recommendations Report 1: Pre-Action Protocols and Standards* (Report, Government of NSW, August 2009) 2 <http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m40265213/adr_blueprint_draft_recs1_preaction_protocols.pdf>.

140 Victoria enacted similar provisions in 2010 but they were repealed shortly thereafter following a change of government. See *Civil Procedure Act 2010* (Vic) ch 3, repealed by *Civil Procedure and Legal Profession Amendment Act 2011* (Vic) as of 30 March 2011.

2011.[141] It requires parties to take 'genuine steps to resolve a dispute' prior to filing civil proceedings. Genuine steps include 'considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process'.[142] The NSW legislation has been postponed pending the outcome of the federal scheme as a result of issues raised by some stakeholders.[143] As enacted, it requires the parties to take 'reasonable steps' to resolve the dispute or narrow the issues in dispute.[144] These legislative regimes permit the court to consider the pre-litigation conduct of parties when making costs orders.

While their impact is yet to be seen, it is clear that there remain concerns about pre-litigation protocols such as the front-loading of costs and the potential increase of satellite litigation relating to the pre-filing conduct of parties.[145] Such concerns were raised by NADRAC in *The Resolve to Resolve* suggesting that there was 'still some resistance to ADR amongst members of the legal profession'.[146] This casts doubt on whether there is enough support among the profession to render pre-filing requirements effective.[147] There will necessarily be a transition period while courts develop principles on what constitutes 'genuine' or 'reasonable' steps and practitioners adapt to these practices. If embraced, this author is of the view that pre-action requirements have the potential to reduce the overall rates of civil litigation and at the least, the length and cost of proceedings. Even where a matter is not settled, they encourage parties to clarify the key issues in dispute and make necessary concessions prior to trial. On the other hand, although the prospect of adverse costs orders may encourage parties to mediate, it is hoped that courts will be hesitant in applying these too strictly against litigants, especially unrepresented litigants. It seems more important that courts develop clear guidelines regarding what constitutes 'genuine steps' to allow parties to make informed decisions as to the appropriateness of ADR to their case. Despite these concerns, it is evident that there is a greater level of support for mediation in Australia by the judiciary, legislature and legal profession and regardless of whether mandatory schemes are permanent or only temporary expedients, they are a positive step in encouraging more efficient access to civil justice.

141 *Civil Dispute Resolution Act 2011* (Cth).
142 Ibid s 4(1)(d). See also s 4(1)(e)–(g).
143 *Civil Procedure Act 2005* (NSW) pt 2A as amended by *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) pt 10. The application of pt 2A is currently limited by *Civil Procedure Regulation 2012* (NSW) r 16. See also Smith, above n 16.
144 *Civil Procedure Act 2005* (NSW) s 18E.
145 Legg and Boniface, above n 81, 50, 55.
146 NADRAC, above n 132, 21 [2.5].
147 See Rhain Buth, 'Responding to Resolve: Considering Pre-action Requirements in Relation to ADR' (2010) 21 *Australasian Dispute Resolution Journal* 179, 183.

V MANDATORY MEDIATION: THEORETICAL ISSUES

It is evident from the above overview that the trend towards mandatory mediation is affected by both external and domestic factors. Beyond these legal and political influences, there are also a number of theoretical issues pertaining to the efficacy and desirability of introducing mandatory mediation. First, it has been criticised for curtailing voluntariness in the mediation process. Secondly, there are questions about the effectiveness of prescribing mediation without consent. Finally, it is notable that mandatory mediation may not need to be a permanent fixture on the ADR landscape.

As previously noted, mediation is usually referred to as a voluntary process. Thus, the growth of mandatory mediation raises questions about the nature of consent. Jacqueline Nolan-Haley maintains that there are two forms of consent in mediation: 'front-end participation consent' and 'back-end outcome consent'.[148] A similar distinction is made by Dorcas Quek with regard to coercion 'into' and 'within' a mediation.[149] Both types of consent have problematic aspects. With respect to 'participation consent', it is arguable that compelling entry into mediation curtails the voluntary nature of the process.[150] On the other hand, Nolan-Haley suggests that parties who agree voluntarily to mediate often do not have enough information about the process to make an informed decision thus rendering their willingness nugatory.[151] She questions whether the rhetoric of self-determination and autonomy, which are integral to mediation discourse, are based on a misunderstood notion of consent.[152] It is evident that, particularly in Australia, the legislature and courts are less concerned about revoking participation consent by requiring parties to attend mediation.[153] On the contrary, it is integral to uphold voluntariness within the process by ensuring that settlements are consensual.[154] As such, there is no obligation on mediators to reach an agreement and the parties or mediator are entitled to end the process at any time. In order to avoid any intrusion into the voluntary nature of the mediation process, it seem preferable that mandatory schemes only operate to remove the aspect of voluntariness into the process and that parties retain their freedom within the process.

The evaluative approach taken in the Italian legislation seems to overstep this approach and has been criticised for this reason.[155] It permits a mediator, in the event that no settlement is reached, to propose a solution to the dispute which must then either rejected with reasons or accepted by the parties; this applies even if the parties do not require the mediator to issue the proposal, and even if

148 Nolan-Haley, 'Mediation Exceptionality', above n 5, 1251.
149 Quek, above n 6, 485.
150 Jacqueline Nolan-Haley, 'Consent in Mediation' (2008) 14(2) *Dispute Resolution Magazine* 4, 5.
151 Nolan-Haley, 'Mediation Exceptionality', above n 5, 1252.
152 Ibid 1251–2.
153 See NADRAC, above n 136, 2.16.
154 This has been noted by the courts. See, eg, *Hillig v Darkinjung Pty Ltd* [2008] NSWSC 409, [9]; *King v Linney* [2009] NSWSC 911, [8].
155 See, eg, Gabellini, above n 58, 67.

one of the parties does not appear. The traditional role of a mediator is to act as a neutral third party and thus, this approach raises questions as to whether such a system can be classed as mediation at all.[156] In any case, it indicates a particular need to ensure that mediators are adequately trained and have the requisite knowledge to propose solutions that are legally enforceable and in the parties' interests. Thus, the changes implemented by Italy will only be effective if they are complemented by the education of legal professionals and the training of a large number of mediators to handle the inevitable increase in claims.

A second issue surrounding mandatory mediation regards the effectiveness of compelling parties to mediate. Arguments against mandatory mediation often maintain that parties who are forced to mediate are unlikely to approach the process with a positive attitude.[157] For example, the EC's Green Paper questions 'the usefulness of conferring a binding character on [ADR] clauses because it might serve no purpose to oblige someone to participate in an ADR procedure against his will …'[158] On the other hand, there is evidence indicating that parties who are forced to mediate usually participate effectively. In 2000, Spigelman CJ suggested that:

> There is … a substantial body of opinion – albeit not unanimous – that some persons who do not agree to mediation, or who express a reluctance to do so, nevertheless participate in the process often leading to a successful resolution of the dispute.[159]

Further, studies demonstrate that where parties are compelled to mediate, there are still comparatively high rates of settlement and the parties benefit from the process.[160] It has also been shown that, if given the choice, disputants will normally choose to opt out of mediation however there are high rates of settlement for both voluntary and mandatory mediation when it is engaged in early on in the process.[161] Some jurisdictions have attempted to address these concerns by regulating the parties' conduct during mediation. For example, section 27 of the *Civil Procedure Act 2005* (NSW) requires parties to participate in court-referred mediation in 'good faith'.[162] The good faith standard also exists in various North American jurisdictions however it has been criticised for being ambiguous[163] and inappropriate in the mediation context.[164] In Queensland, the *Uniform Civil Procedure Rules 1999* (Qld) require the parties to 'act reasonably

156 Although there are different styles of mediation including evaluative mediation in which the mediation may offer advice as to the parties' positions and possible outcomes, the process implemented in Italy appears more similar to 'med-arb', a process where an unsuccessful mediation is followed by arbitration.

157 See, eg, Paul Venus, 'Court directed compulsory mediation - attendance or participation?' (2004) 15 *Australasian Dispute Resolution Journal* 29.

158 Green Paper, above n 19, 25.

159 Chief Justice James J Spigelman, 'Address delivered to the LEADR Dinner', above n 126.

160 Quek, above n 6, 483.

161 Cortes, above n 36, 18–19.

162 *Civil Procedure Act 2005* (NSW) pt 4, s 27. See also Justice Harrison's comments in *King v Linney* [2009] NSWSC 911, [8].

163 See Quek, above n 6, 493.

164 NADRAC considers that a 'good faith' requirement could pressure disputants to make concessions, especially where there is a power imbalance between the parties: see NADRAC, above n 132, ch 2 [2.50].

and genuinely' in the mediation.[165] In England, the courts have made adverse costs orders against parties who have 'unreasonably' refused to mediate.[166] The English courts have also made it clear that where a party takes an unreasonable position or conducts themselves unreasonably during mediation, they may be liable for costs.[167] While such costs sanctions may be an effective monitoring tool, it nonetheless seems that, in practice, participants get 'swept along' by the process, even where entry into it has been compelled.[168]

A third point relates to the potential for mandatory mediation, particularly categorical and quasi-compulsory schemes, to be used as a temporary expedient to encourage wider use of mediation in general. Michael Redfern, for example, advocates pre-litigation procedures for their potential to work in the interests of litigants. He suggests that many lawyers, and indeed judges, in Australia are not informed or comfortable with the mediation process, meaning that litigation is often seen as the safe option.[169] These remarks point to the importance of the legal culture on the use and success of mediation initiatives. Nadja Alexander proposes that 'experience in numerous jurisdictions around the world suggests that court-referred ADR only begins to develop as a real alternative to court proceedings where it is subject to some degree of mandating'.[170] She further notes evidence that shows that as rates of mediation grow, rates of mandate can decrease.[171] Accordingly, while prima facie, mandatory mediation erodes aspects of voluntariness and autonomy, it can be a useful tool to encourage mediation on a wider scale.[172] This idea is supported by the introduction of mediation schemes to reduce backlog or unwarranted costs in litigation. For example, in Italy, excessive delays in litigating and concerns about access to justice prompted the introduction of categorical mandatory mediation for subcontracting disputes as early as 1998.[173] Similarly, in England, the findings of Lord Woolf's Interim and Final Reports prompted the government to introduce a quasi-compulsory scheme through the *CPR*. It is therefore evident that schemes which mandate mediation need not be regarded as a permanent solution but can have positive long-term effects by increasing the awareness of mediation processes amongst disputants, the legal profession and the courts.

165 *Uniform Civil Procedure Rules 1999* (QLD) r 325.
166 See, eg, *Halsey* [2004] 4 All ER 920; *Dunnett v Railtrack plc* [2002] 2 All ER 850.
167 See *Earl of Malmesbury v Strutt & Parker* [2008] EWHC (QB) 424; *Merelie v Newcastle Primary Health Care Trust* [2006] EWHC (QB) 1433, cited in Nolan-Haley, 'Mediation Exceptionality', above n 5, 1262.
168 Both Sander and Quek take up this idea of participants being 'swept along' by the process: see, eg, Sander, above n 9, 16; Quek, above n 6, 484.
169 Michael Redfern, 'Should Pre-Litigation Mediation Be Mandated' (2012) 23 *Australasian Dispute Resolution Journal* 6, 11.
170 Alexander, *International and Comparative Mediation: Legal Perspectives*, above n 19, 157.
171 Ibid.
172 See, eg, Sander, above n 9; Quek, above n 6, 484.
173 De Palo and Harley, above n 47, 471.

VI CONCLUSION

This paper has provided an overview of the approaches to mandatory mediation in Europe, England and Australia. In bringing together these ideas, it is necessary to make a few comments. First, it is evident that although mandatory mediation exists in many forms, the common thread is that such schemes only compel parties to enter into the mediation process and do not mandate outcome. Although the jurisdictions discussed here place expectations on parties to behave reasonably or in good faith during the process, once mediation has commenced, parties are not compelled to persist with an unproductive process or to reach a settlement. Secondly, the different perspectives on mandatory mediation indicate that there is no right or wrong approach and that the legislature and courts must react to the specific needs of the domestic legal environment. While England has favoured quasi-compulsory practices in the form of pre-action protocols, is has been slower to embrace other forms of mandatory mediation, particularly court-preferred procedures. Australia, on the other hand, has a number of categorical mandatory schemes, has actively utilised discretionary referral and only recently, has introduced quasi-compulsory mechanisms. Thirdly, regional influences appear to have a strong impact in the European context. Notably, the restrictive approach to discretionary referral to mediation in England appears largely due to its interpretation of article 6(1). The different approach taken by Italy, and affirmed by the ECJ, demonstrates that although Italy and England are bound by the same regional initiatives, their interpretation and implementation of these obligations is different. A similar trend is evident in the implementation of the Directive. Finally, it is evident that mediation is now a permanent fixture on the dispute resolution landscape and, although drastic mandatory schemes may prove to be temporary measures while the new landscape takes shape, it seems that legal practitioners and parties would benefit from becoming acquainted with such procedures so that they can apply them where appropriate.