

THE ROLE OF THE COURTS IN THE CHANGING DISPUTE RESOLUTION LANDSCAPE

THE HONOURABLE CHIEF JUSTICE T F BATHURST*

I INTRODUCTION

We have entered a new era in the way the courts and judiciary interact with legal professionals, litigants and the community. Faced with growing costs of litigation and delays in court proceedings, there is an increased focus on case management practices and a proactive role for judges and court officers in ensuring that access to the courts is provided in a timely and cost-efficient manner. Yet for some Australians, access to justice is becoming less attainable; this is especially the case for middle-income earners.¹ In this context, appropriate or alternative dispute resolution ('ADR') mechanisms serve an increasingly important role in facilitating access to dispute resolution services for all citizens and reducing the time and cost spent on litigation. ADR is now regularly seen as a first port of call for the resolution of civil and commercial disputes, and the implications of this trend are the subject of debate about what role the judiciary should play in encouraging or ordering parties to attempt ADR.

In this article, I canvass some of the broad issues that arise in this context. I begin first by considering the way in which the judiciary has approached ADR and the benefits of this approach for litigants and the public. Second, I consider the role that the courts play in ordering or referring parties to ADR, and if and when this is appropriate. Third, I address the recently enacted pre-litigation requirements that apply in the federal jurisdiction and in some New South Wales ('NSW') courts. And finally, I discuss the role of judges in the ADR landscape in light of the ongoing debate over whether it is appropriate for judges to act as mediators. This discussion reveals a complex interaction between the courts and

* Chief Justice of the New South Wales Supreme Court. I would like to thank Melissa Hanks for her helpful research and drafting assistance.

1 See, eg, George Brandis, 'Lack of Access an Impending Social Crisis', *The Australian* (Sydney), 1 June 2012, 37. See also my opinion expressed in: Chris Merritt, 'For Middle Australia, Access to Justice Is Fast Becoming a Pipe Dream', *The Australian* (Sydney), 11 May 2012, 33; Chief Justice Tom F Bathurst, 'Opening Address' (Speech delivered at the 2011 Advanced Alternative Dispute Resolution Workshop, Sydney, 13 August 2011) <[http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst130811.pdf/\\$file/Bathurst130811.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst130811.pdf/$file/Bathurst130811.pdf)>.

ADR processes, but demonstrates, in my opinion, that there is no reason why the two cannot complement each other and work together to allow parties to access the most appropriate method of dispute resolution.

II THE CHANGING NATURE OF LITIGATION

The term ADR is broad and encompasses diverse practices ranging from quasi-adversarial processes such as arbitration and early neutral evaluation, to non-adversarial mechanisms such as mediation and conciliation. The most widely understood of these are arbitration and mediation, however it is important not to forget that the range of ADR options is wide and can be tailored to the needs and preferences of the parties. This much was recognised by Chief Justice Marilyn Warren when she advocated ‘the pursuit of direct judicial involvement in ADR other than mediation’, pointing specifically to ‘judicial case or settlement conferences, judicial early neutral evaluations and summary trials.’² My experience is that parties, particularly sophisticated commercial disputants, are generally open to out-of-court dispute resolution processes, which can have the added benefits of efficiency, confidentiality and more certainty of the up-front costs. Lawyers have similarly embraced ADR processes, however, it is the demands of clients that often lead the push towards non-litigious options. That said, there is still some way to go before the necessary stakeholders have a uniform and informed understanding about the appropriateness, or inappropriateness, of certain processes for the specific case. I have no doubt that as the ‘hype’ surrounding these relatively new processes dies down, we will be left with options which are both flexible and client-oriented. Indeed, as disputants encourage the early resolution of disputes, legal practitioners will need to accordingly transition their own practices as service providers in order to stay competitive.

Considering the broader context in which this ADR landscape is taking shape, it is evident that today’s courts are not only bound to deliver justice that is impartial and discharged with due process, they must also deliver justice efficiently and in a way that mitigates rising legal costs.³ In this way justice encompasses two separate facets: justice to the parties and justice to the wider community. With regards to individual litigants, I have noted previously that the ‘cost of litigation is not only financial – it can also be emotional. Ensuring access to justice in this context means providing flexible options to those who want to avoid confrontation.’⁴ In that respect, the success of ADR can be measured by the extent to which it reduces the personal, financial and public costs of litigation by

2 Chief Justice Marilyn Warren, ‘Should Judges Be Mediators?’ (2010) 21 *Australian Dispute Resolution Journal* 77, 84.

3 These values of justice are now enshrined in legislation: *Civil Procedure Act 2005* (NSW) s 56.

4 Chief Justice Tom F Bathurst, ‘Dispute Resolution in the Next 40 Years: Repertoire or Revolution’ (Speech delivered at UNSW Law 40th Anniversary Conference, University of New South Wales, 1 December 2011) <[http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst011211.pdf/\\$file/Bathurst011211.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst011211.pdf/$file/Bathurst011211.pdf)>.

allowing parties to maintain relationships and settle disputes faster. The converse can be true of litigation, which can affect not only a litigant's bank account but also their mental and physical wellbeing, relationships with family, friends and colleagues, and their professional reputation. ADR processes can also assist parties by narrowing the issues in dispute, even where no settlement is reached.⁵

Looking beyond the individual litigant, it is also evident that protracted litigation can have adverse impacts on the entire community by unduly burdening court resources. Justice Ronald Sackville has advocated a greater role for the court in this context:

Costs and delays are no longer to be matters for the parties alone to address. The wider community is seen to have a strong interest in promoting reasonably swift and economical dispute resolution and in conserving the scarce public resources required to administer the civil justice system. In short, timeliness and affordability are essential elements in justice.⁶

Justice Sackville is not alone in acknowledging that the burden placed on litigants extends beyond the costs borne by the parties. Similar comments have been made by Chief Justice Michael Black, writing:

Delay does more than deny justice. It has multiple cost implications, some more apparent than others. In commercial enterprise, for example, the uncertainty resulting from delay has both direct and incidental costs. Some of these will be measurable, and some not.⁷

Courts in various jurisdictions have also pointed out the detrimental effect that protracted court proceedings can have on the public interest. In *Ketteman v Hansel Properties Ltd*, Lord Griffiths, considering whether to grant an amendment adding a procedural defence late in the proceedings, noted:

Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.⁸

Similar sentiments were echoed by Brennan, Deane and McHugh JJ in *Sali v SPC Ltd*:

In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties. ... What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.⁹

5 Chief Justice Bathurst, 'Opening Address', above n 1.

6 Justice Ronald Sackville, 'The Future of Case Management in Litigation' (2009) 18 *Journal of Judicial Administration* 211, 212.

7 Chief Justice Michael Black, 'The Role of the Judge in Attaching Endemic Delays: Some Lessons from Fast Track' (2009) 19 *Journal of Judicial Administration* 88, 88.

8 [1987] AC 189, 220.

9 (1993) 116 ALR 625, 629. Toohey and Gaudron JJ also made similar remarks in their dissenting judgment: at 636. See also the comments of Tadgell and Ormiston JJ (Brooking J agreeing) in *Bishopsgate Insurance Australia Ltd (in liq) v Deloitte Haskins & Sells* [1999] 3 VR 863, 887 [60].

An essential reform has been the introduction of case management practices whereby judges and court officers perform the role not only of adjudicator, but also of supervisor, to ensure that the litigation process is conducted with as much speed and efficiency as is possible within the limits of procedural fairness. The High Court's 2009 decision in *Aon Risk Services v Australian National University*¹⁰ affirmed the importance of case management principles and recognised the transforming role of judges. To this end, French CJ observed that:

the adversarial system has been qualified by changing practices in the courts directed to the reduction of costs and delay and the realisation that the courts are concerned not only with justice between the parties, which remains their priority, but also with the public interest in the proper and efficient use of public resources.¹¹

In addition, French CJ remarked on the 'potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification.'¹² Justice Heydon, commenting specifically on the need for certainty and efficiency in commercial life, noted:

Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. ... The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.¹³

Justice Clyde Croft, discussing the outcome of *Aon*, highlighted that just and efficient outcomes benefit not only the parties, but also 'other litigants and the community at large'.¹⁴ His Honour pointed out that for many litigants, the cost of litigation and of disrupted proceedings can go far beyond monetary sums and that '[t]he notion that parties to a proceeding are not entitled to consume an unlimited amount of public resources in pursuit of their own interests seems eminently sensible and reasonable'.¹⁵ Justice Croft cites Professor Zuckerman, who has noted that 'if the court is to provide effective remedies for wrongs it has to deliver judgments within a reasonable time, because timing is as crucial when it comes to righting wrongs as it is when it comes to treating disease'.¹⁶

I can see the value in these opinions. From a litigant's perspective, court processes can seem unbearably tiresome and costly and it is important that these impressions do not impact on the public perception of the courts as providers of

10 (2009) 239 CLR 175 (*Aon*).

11 *Ibid* 189.

12 *Ibid* 192.

13 *Ibid* 224.

14 Justice Clyde Croft, '*Aon* and Its Implications for the Commercial Court' (Speech delivered at the Commercial Court CPD and CLE Seminar, Melbourne, 19 August 2010) <<http://www.supremecourt.vic.gov.au/resources/d2c4048a-27c9-4704-bb3b-a72e7dc83606/aon+and+its+implications+for+the+commercial+court+%5Bccc190810%5D.pdf>>.

15 *Ibid*.

16 Adrian Zuckerman, 'Litigation Management under the CPR: A Poorly-Used Management Infrastructure' in Déirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 89, 91.

justice. That said, the increasing length of proceedings also evidences the growing body of rights and protections that attach to litigants and the courts must be cautious in observing these: the focus on efficiency must not come at the cost of the other tenets of justice.¹⁷ One matter which has led to the prolongation of trials on many occasions is the increasing use of scientific and technical evidence. Such evidence should not be excluded or limited on the ground of so-called efficiency, but courts must be astute in assessing that it is presented in the most effective manner. Courts in this country have devised a number of means to achieve this, including expert conclaves and joint reports, concurrent evidence, and occasionally the use of court appointed experts. In the context of the increasing complexity of litigation, experience has shown that identifying and referring appropriate cases to out-of-court ADR is a simple yet effective way for courts to facilitate the efficient resolution of disputes while maintaining due regard to the dictates of justice in each case. In the remainder of this article I will consider in more detail the role of the courts, the legislature and judges in encouraging the use of ADR processes.

III THE ROLE OF THE COURT

One of the most common ADR processes used by the courts is mediation. It is by no means the only, or most appropriate, form of ADR in all cases. Further, the nature of mediation is constantly changing and will evolve with the demands of sophisticated disputants. In fact, in a number of years, I believe that mediation will have dramatically changed from the form it often takes today as litigants become more experienced at moulding the process to suit their needs. As part of this transition, the definition of ADR is likely to broaden to encompass behaviour that has not previously been thought of as ADR such as conferences or calls between disputants or their lawyers prior to trial. I have no doubt that as our perception of ADR changes, there will be a plethora of new mechanisms that lawyers and parties can capitalise on to meet their needs. At the same time, we confront the danger that if and when we attempt to define such processes and fit them into the dispute resolution landscape, we are at risk of losing the flexibility that they provide. It is integral that practitioners and commentators are alive to this risk and ensure that the attention given to ADR in academic discourse does not hinder the creativity of process that is one of the key benefits of ADR over court-based proceedings. That being said, in the current dispute resolution landscape mediation takes a centre-stage position and it is important to discuss its role with regards to the courts.

17 See my comments in Chief Justice Bathurst, 'Dispute Resolution in the Next 40 Years', above n 4.

The potential for court-ordered mediation to reduce the barriers to justice discussed above has been recognised by a number of members of the judiciary.¹⁸ In addition, both the legislature and the courts have given judges certain powers with regards to mediation. Section 26 of the *Civil Procedure Act 2005* (NSW) permits the court to refer parties in any civil dispute to mediation with or without their consent. In NSW, a corresponding Practice Note explains the court's mediation procedures and the expectations on parties referred to mediation.¹⁹ The court may order the parties to undertake either court-annexed mediation, usually with a registrar of the court, or private mediation with a mediator of their choice. The issues surrounding, if at all, and when, the court should make such orders in the absence of consent remain controversial and will be the focus of this section. A number of questions arise in this context: is it appropriate for courts to order mediation against the parties' wishes? What criteria should the court use to determine whether to refer a case to mediation? And at what stage of the proceedings should this happen?

There are no simple answers to these questions. However, as a starting point I think the courts should be wary of assuming too paternalistic a role in ordering non-consenting parties to attempt ADR. Certainly it must be acknowledged that judges are in a unique position when it comes to referral to ADR. They see cases pass through the doors of the court every day and are charged with the role of divorcing themselves from the history and emotions that parties bring to disputes. This impartiality makes them ideally placed to objectively assess whether a given case would be amenable to mediation or another form of ADR. However, there is force in the competing assertion that determining which cases are amenable to ADR is simply not a judge's responsibility. Legal practitioners are already

18 My predecessor, Chief Justice James J Spigelman, was an advocate of court-referred mediation and introduced the Mediation Practice Note to the Supreme Court of New South Wales: Supreme Court of New South Wales, *Practice Note SC Gen 6 – Mediation*, 17 August 2005. He described successful mediation as measured in more than savings in money and time: 'The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation': Chief Justice James J Spigelman, 'Address to the LEADR Dinner' (Speech delivered at LEADR Dinner, Sydney, 9 November 2000) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_spigelman_091100>. This statement was taken from: Council of Chief Justices of Australia and New Zealand, *Position Paper and Declaration of Principle on Court-Annexed Mediation* (1999). Similar views have been voiced by the Chief Judge at Common Law, Peter McClellan: Justice Peter McClellan, 'Some Benefits of Mediation' (Speech delivered at Chinese National Judges' College, Kunming, China, April 2008) <[http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/mcclellan20408.pdf/\\$file/mcclellan20408.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/mcclellan20408.pdf/$file/mcclellan20408.pdf)>. I have also acknowledged that the emphasis placed on mediation has encouraged a more holistic approach to dispute resolution, whereby clients are informed of out-of-court non-litigious dispute resolution options as a matter of course: Chief Justice Tom F Bathurst, 'Arbitration and International Arbitration' (Speech delivered at the Continuing Professional Development Seminar, Sydney, 21 September 2011) <[http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst210911.pdf/\\$file/Bathurst210911.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst210911.pdf/$file/Bathurst210911.pdf)>.

19 Applies to the Court of Appeal, the Supreme Court (Equity Division) and the Supreme Court (Common Law Division) in civil matters only: see Supreme Court of NSW, *Practice Note SC Gen 6*, above n 18, [2].

charged with informing their clients about ADR.²⁰ In addition, it is relevant that by the time a case reaches trial, a substantial portion of the costs of the proceedings has already been borne by the parties during preparation of the case. It might be thought that once this work has been done, the role of the judge is to hear the case as presented by the parties and make a decision by applying the law.

My own views lie somewhat in the middle of these two extremes. I accept that judges are in a good position to assess the suitability of cases for ADR, and that sometimes, such objective assessment will elude the parties and their legal practitioners. In this context, court-annexed mediation, which is usually conducted by a registrar and offers the advantage that it can be provided with little wait and at the court's expense, has become increasingly popular.²¹ The benefits of such an approach were recognised by Chief Justice Gerard Brennan as early as 1996:

if judges were to be vested with a discretionary power to send matters to private mediators or arbitrators, their office would be diminished by the function of procuring business for those to whom the matters are sent. ... There is no reason why, in the vast majority of cases, mediation should not be compulsory in the sense of being a condition of the right of any party to have the dispute brought on for trial. But let it be court-attached mediation.²²

There have been significant successes in court-referred mediation schemes. Statistics from the NSW Supreme Court evidence significant success in court-annexed mediation. In 2009, almost 60 per cent of cases referred to a mediation program in NSW settled during mediation.²³ A report from Victoria in the same year found that the 43.2 per cent of cases surveyed that were referred to mediation finalised the dispute, along with another 27.4 per cent that settled through negotiation; only 7 per cent were resolved at trial.²⁴ These figures demonstrate that there are instances in which the nature of the dispute and attitudes of the parties make an order to attend mediation fruitful, even where the parties do not consent. It has further been noted that non-consenting parties can, in fact, become willing participants in the mediation process and participate in constructive and successful outcomes.²⁵ As Chief Justice James Spigelman said: 'There is a category of disputants who are reluctant starters, but who become

20 See New South Wales Bar Association, *NSW Barristers' Rules* (at 8 August 2011) r 38; Law Society of New South Wales, *Professional Conduct and Practice Rules* (at 11 December 1995) r 23 A.17A.

21 In May 1999, the Council of Chief Justices of Australia and New Zealand issued a *Position Paper and Declaration of Principles on Court-Annexed Mediation*: Council of Chief Justices, above n 18. See Chief Justice James J Spigelman, 'Mediation and the Court' (2001) 39(2) *Law Society Journal* 63, 63.

22 Chief Justice Gerard Brennan, 'Key Issues in Judicial Administration' (Speech delivered at 15th Annual Australian Institute of Judicial Administration Conference, Wellington, 21 September 1996) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_aija1.htm>.

23 See Chief Justice Warren, above n 2, 78.

24 Tania Sourdin, Department of Justice of Victoria, *Mediation in the Supreme and County Courts of Victoria* (2009) 137 [figure 5.1]. It should be noted that the scope of this report was somewhat limited and therefore these figures may be subject to some scrutiny.

25 Chief Justice Spigelman, 'Mediation and the Court', above n 21, 65.

willing participants.²⁶ I do not doubt the truth in these comments and accordingly, I support the discretionary, compulsory referral of cases to court-annexed mediation. However, I wish to stress that judges should be cautious in using such powers against the parties' will and should take particular note of the unique circumstances in each case that would warrant such an order. I do not entirely agree with Chief Justice Brennan, that all compulsory mediation should be court attached. If the parties indicate a preference for a particular non-court mediator, generally courts should accede to that preference. However, courts should not, in my opinion, force particular mediators on unwilling parties, and generally should not promote particular mediators as appropriate to resolving disputes.

If it is accepted that ordering mediation is appropriate in some circumstances, one of the challenges faced by the courts is how to ensure a consistent use of such powers. Consistency is an important aspect of justice and can be beneficial for efficient case management by allowing parties to foresee potential orders and accommodate these prior to their hearing. Ensuring consistency is not merely a matter of singling out certain types of disputes that are deemed appropriate for ADR, although this may be a starting point. It involves considering the nature of the dispute, the relationship of the parties and the complexity of the issues in question. This is particularly relevant in the context of commercial disputes, which usually involve sophisticated parties with experienced legal representation. Not all commercial cases are amenable to mediation and it will rarely be appropriate to force this process on parties. Indeed, Lord Jackson's 2009 report into the state of costs in civil litigation in the UK concluded that there is no need for a pre-action protocol for commercial matters and that the general pre-action requirements should cease applying in commercial proceedings.²⁷ This conclusion followed submissions from commercial practitioners in England to the effect that in large commercial cases with complex issues, pre-action requirements at an early stage are unlikely to encourage settlement. It can usually be assumed that in such cases parties and their lawyers have already considered possible options for out-of-court resolution and have made an informed choice to continue with litigation. As Chief Justice Warren has observed: '[b]y the time commercial litigators are ready to initiate proceedings, mostly, they have been through all the processes contemplated by ... pre-action protocols.'²⁸ Nonetheless, the Supreme and County Courts in Victoria have opted for a

26 Ibid.

27 Lord Jackson, *Review of Civil Litigation and Costs: Final Report* (Stationery Office, 2009) 347 [2.8].

28 Chief Justice Marilyn Warren, 'Remarks on the Occasion of the Victorian Commercial Bar Association Reception' (Speech delivered at Victorian Commercial Bar Association Reception, Melbourne, 6 May 2010) <<http://www.commercialcourt.com.au/PDF/Documents/Victorian%20Commercial%20Bar%20Reception.pdf>>. It should also be noted that these characteristics do not apply only to commercial cases. There are many circumstances in which it is evident that the parties are able to make an informed decision about the prospects of their case. See, eg, *Rinehart v Welker* [2012] NSWCA 95 in which the subject matter and experience of the parties were relevant factors in deciding whether the case should be sent to mediation.

different approach by referring all cases in the commercial list to mediation unless the List Judge decides there is a good reason not to do so.²⁹

In NSW, the vast majority of commercial cases are referred to mediation, generally with the consent of the parties. However, the judges in the commercial list recognise that cases are suitable for mediation at different points in time and adopt a flexible approach to such referral practices. I think that such a flexible, case-based approach is more desirable than the ‘one-size fits all’ model that might be seen as circumventing judges’ discretion. Selecting broad categories of cases as being amenable to mediation fails to take into consideration the vast divergences between disputes and parties, and the different needs of sophisticated litigants. For that reason, the focus in NSW is on facilitating greater efficiency within the litigation process rather than mandating pre-action conduct. For example, recent changes to the way that parties in commercial disputes undertake discovery which limit this process to the key issues in dispute are an important step forward in reducing the complexities of commercial litigation.³⁰ Nonetheless, in NSW we also recognise some broad categories of cases as amenable to mediation, such as family provision applications before the Equity Division.³¹ While there are doubtless some categories of dispute that benefit from automatic early referral to mediation, the better approach, in my opinion, is to ensure that judges are adequately assessing each case that comes through to determine whether it is appropriate for ADR. While this requires judges to invest time early on in the proceedings, the benefits that can ensue for both the parties and the courts when matters settle before trial justifies the time spent. The criteria that might affect a referral to ADR include the nature and history of the dispute, the remedies sought, the relationship of the parties, the complexity of the legal issues, whether the parties are experienced litigants, the presence of legal representation and the parties’ preparedness towards trial.

Related to the issue of consistency is that of timing: when is it most appropriate for cases to be referred to ADR? The obvious answer is that the appropriate timing will depend on the nature and complexity of the case. However, there seems to be a general assumption that mediation is most effective if attempted early. The pre-litigation requirements and the treatment of commercial cases in Victoria just considered are one example. This assumption was also borne out in a study of the Victorian Supreme and County Courts which suggested that ‘using mediation processes at an earlier time could result in lower public and private costs’, particularly for younger cases that had been filed less

29 See Supreme Court of Victoria, *Practice Note No 10 – Commercial Court*, 28 November 2011, [10.3]; see also County Court of Victoria, *Practice Note PNCI 6-2010 – Operation and Management of the Commercial List*, 4 May 2010, which states that ‘[i]t is to be expected that all proceedings will be the subject of alternative dispute resolution and the standard orders provide for mediation to occur’: at [26].

30 Supreme Court of New South Wales, *Practice Note SC Eq 11 – Disclosure in the Equity Division*, 22 March 2012, [5].

31 See *Succession Act 2006* (NSW) s 98; Supreme Court of New South Wales, *Practice Note SC Eq 7 – Family Provision*, 15 May 2009, [8]; the Industrial Relations Commission also requires all disputants under pt 9 div 2 of the *Industrial Relations Act 1996* (NSW) to attempt conciliation prior to a full hearing: *Industrial Relations Act 1996* (NSW) s 109.

than one year after the dispute arose.³² In my experience, the preference towards early referral to mediation does not always generate effective outcomes. Indeed, where complex issues are in question, progress towards court proceedings can be a useful way for parties to clarify the key issues and understand the strengths and weaknesses of the other party's case before attempting settlement. Where referral to mediation or another procedure takes place too early, there is a risk that the parties will not be able to make an informed decision based on the strength of their case and the result may not be in their best interests. This is particularly so in situations where there is a power imbalance between the parties.

On the other hand, if referral to mediation is ordered too late, there is the risk that the parties will have expended significant sums in preparation for court proceedings only to have their trial delayed pending the outcome of ADR procedures. This can have a variety of impacts. It is no doubt a cause of great frustration for litigants who have their proceedings delayed while they undertake another process. Where the matter does not settle, the mediation can lead to additional costs in the proceedings. If the matter does settle, the parties might be equally frustrated that substantial costs were expended before the successful ADR process was attempted, particularly where there are a large number of documents or expert report requirements. In the recent case of *Rinehart v Welker*, the trial judge found that:

So far as mediation is concerned, sooner or later – as with most commercial and family disputes – it may well be desirable that these proceedings be referred for mediation. But in my view, they are not ripe for that yet. Further disclosure will have to take place before the proceedings can be referred for mediation.³³

On appeal, I noted (with McColl and Young JJA agreeing) that although there was no error in this exercise of the trial judge's discretion at that time, given the nature of the dispute, it would be in the parties' interests to settle it as soon as possible and it seemed that 'an attempt to mediate this dispute sooner rather than later [would] be of benefit to all the parties'.³⁴ That case is an appropriate example of the difficulties that face judges in finding a balance so that the referral to mediation is in the parties' and the public's best interests. It is evident that there will be cases where the issues are not complex and mediation prior to the dispute even being filed may be in the parties' best interests. On the other hand, where there are complex factual or legal issues, it may be more appropriate for parties to attempt ADR at a later stage, once they have a better understanding of the strengths and weaknesses of each side's legal case and of the key issues that are in dispute. I reaffirm that judges are in a good position to perform this type of balancing act and I see this as an appropriate use of the court's time. In this light, I will now consider in more detail the recent introduction of pre-litigation requirements in Australia.

32 Sourdin, above n 24, 160.

33 *Welker v Rinehart (No 2)* [2011] NSWSC 1238 [51] (Brereton J).

34 *Welker v Rinehart* [2012] NSWCA 95 [194] (Bathurst CJ).

IV THE COURT'S ROLE IN ENFORCING PRE-LITIGATION REQUIREMENTS

Pre-litigation protocols, referred to variously as pre-action requirements and pre-filing protocols, generally refer to a list of steps that parties are required to undertake prior to commencing litigation. As a new feature on the Australian dispute resolution landscape, it is interesting to consider the outlook of these protocols and their interaction with the courts.

In England, pre-litigation requirements have operated since 1999 with the introduction of the *Civil Procedure Rules 1998* (UK) ('CPR') and are championed as a way of reducing costs and delays in civil proceedings.³⁵ The disputes subject to the various English protocols include construction disputes, defamation, personal injury, professional negligence, certain tenancy disputes and judicial review. The matter-specific protocols set out the steps that disputants in such cases should take and invariably require the parties to consider 'whether some form of alternative dispute resolution procedure would be more suitable than litigation'.³⁶ There is also a general pre-action protocol that applies to all other civil disputes and requires parties to 'make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of ADR in order to do so'.³⁷

Given that England has now had more than a decade of experience with pre-action protocols, the effect that they have had on civil litigation in that country is instructive. Some accounts project an image of great success. In reply to the question 'Have the protocols been a success?', the *Civil Procedure White Book* for 2012 responds: 'Anecdotally without a doubt. New litigation post CPR has reduced by 80 per cent in the High Court and 25 per cent in the County Court – the protocols and Pt 36 offers are certainly a factor in this.'³⁸ This evidence is undoubtedly promising. However, the *White Book* also notes that some solicitors have expressed concerns in response to the growing number of protocols and the front-loading of costs.³⁹ Lord Jackson's 2009 report stated that the specific protocols '[b]y-and-large ... perform a useful function, by encouraging the early settlement of disputes' and should be retained.⁴⁰ However, he recommended that the general protocol applying to all disputes should be substantially repealed

35 See Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Her Majesty's Stationery Office, 1996) ch 10.

36 See, eg, Ministry of Justice (UK), *Practice Direction – Pre-Action Protocol for Professional Negligence*, 6 April 2012, 5 [B6.1]; Ministry of Justice (UK), *Practice Direction – Pre-Action Protocol for Personal Injury Claims*, 6 April 2012, 4–5 [2.16]; Ministry of Justice (UK), *Practice Direction – Pre-Action Protocol for Defamation*, 6 April 2012, 4 [3.7].

37 Ministry of Justice (UK), *Practice Direction – Pre-Action Conduct*, 6 April 2012, [6.1].

38 Lord Jackson et al (eds), *Civil Procedure White Book* (Sweet & Maxwell, 2012) C1A-005 ('*White Book*'); see also Michael Legg and Dorne Boniface, 'Pre-Action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39, where the authors highlight the successes of pre-action protocols at reducing the volume of proceedings: at 40–3.

39 Lord Jackson, *White Book*, above n 38, C1A-005.

40 Lord Jackson, *Review of Civil Litigation and Costs*, above n 27, xxii [6.1].

because it is ‘unsuitable as it adopts a “one size fits all” approach, often leading to pre-action costs being incurred unnecessarily (and wastefully)’.⁴¹ Lord Jackson also noted that while ADR has a ‘vital role to play in reducing the costs of civil disputes ... [it] should not be mandatory for all proceedings’.⁴² Rather, he recommended focusing on the provision of information and education to litigation lawyers and judges, as well as to small businesses and the public.⁴³

The implementation of pre-litigation procedures in Australia poses a number of questions. First, the legislature has opted for a general approach to pre-action requirements, rather than developing matter-specific protocols as was initially done in the UK. However, as discussed above, not all cases are amenable to ADR, and of those that are, the right time for such procedures may not be as early as prescribed by the legislation. Related to this is the question of whether schemes such as these are necessary in Australia, where mediation is already an important part of the dispute resolution landscape.⁴⁴ Second, the language in the legislation is broad and necessitates clearer principles for parties, lawyers and the courts to follow. This could initially lead to parties being unnecessarily burdened prior to the commencement of proceedings and might be seen by some disputants as an obstacle to the justice system. Finally, although not discussed in this article, the legislation raises questions for the courts in relation to issues of evidence, legal professional privilege and ‘without prejudice’ disclosures, as well as the risk that pre-litigation requirements may actually generate satellite litigation over costs orders made under the provisions.

The pre-litigation requirements in Australia were introduced following reports in the late 2000s from the National Alternative Dispute Resolution Advisory Council (‘NADRAC’), the Attorney General’s Department, the Australian Law Reform Commission (‘ALRC’), the New South Wales Department of Justice and Attorney General, and the Victorian Law Reform Commission (‘VLRC’).⁴⁵ These reports indicate a general consensus, in line with what I have said above, that the courts are well placed to identify the types of

41 Ibid xxii [6.2].

42 Ibid xxii [6.3].

43 Ibid. Professor Adrian Zuckerman also considered the impact of the *CPR* after ten years of operation. He suggested that it ‘has not greatly reduced the complexity of litigation; if anything it has increased as a result of the growth of satellite litigation over costs’: Zuckerman, above n 16, 89. Zuckerman argues that the issue lies in the court’s unwillingness to enforce compliance with case management deadlines: at 94.

44 Courts have long upheld ADR agreements and have shown a willingness to enter costs judgments against parties as a result of their behaviour in such procedures. See, eg, the case of *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137, in which Ipp J awarded costs against a party who, in a mediation conference, adopted ‘an obstructive unco-operative attitude in regard to attempts to narrow the issues, and where it [was] subsequently shown that, but for such conduct, the issues would probably have been reduced’: at 140.

45 See NADRAC, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009) ch 2; Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce* (Attorney General’s Department (Cth), 2009) 104; ALRC, *Discovery in Federal Courts*, Consultation Paper No 2 (2010) ch 5; Department of Justice and Attorney General (NSW), *ADR Blueprint: Draft Recommendations Report 1: Pre-Action Protocols & Standards* (August 2009) Lawlink NSW, 8–13 <http://www.lawlink.nsw.gov.au/lawlink/adr/ll_adr.nsf/vwPrint1/adr_adr_publications>; VLRC, *Civil Justice Review*, Report No 14 (2008) ch 2.

matters in which specific ADR processes should be encouraged or mandated, and that the courts should be empowered to refer cases to ADR and called on to assist in determining which types of matters should be subject to pre-litigation protocols.⁴⁶ There also appears to be consensus that pre-action protocols would be most effective if targeted to *specific* matters, rather than attempting to introduce a ‘one size fits all’ to civil litigation. The ALRC report, for example, advocates a tailored approach to pre-action requirements, recommending that ‘the adoption of specific protocols for particular types of dispute should be explored’.⁴⁷ The recommendation made in NSW was to ‘identify other types of disputes appropriate for pre-action protocols, and develop appropriate pre-action protocols for these’.⁴⁸ Commentators have also advocated this approach, such as Dorne Boniface and Michael Legg who suggested that ‘the successful adoption of pre-action protocols in Australia requires a “bespoke” or “tailored” approach that matches the requirements of the protocol with specific types of case’.⁴⁹

The pre-litigation procedures recently introduced by the federal and state governments apply generally and are seemingly at odds with these recommendations. Victoria was the first state to enact a pre-litigation procedure in all civil proceedings, which came into force on 1 January 2011. Those provisions did not last long and were repealed in March of that year.⁵⁰ The Commonwealth and NSW acted next, introducing similar legislation which came into force on 1 August 2011 in both jurisdictions.⁵¹ While the Commonwealth legislation currently applies to proceedings in the Federal Court and Federal Magistrates Court, the application of the NSW legislation to Supreme Court proceedings has been postponed by the Attorney General.⁵² It seems anomalous that these jurisdictions have all introduced generalised pre-litigation requirements that relate not to the type of dispute, but rather to the court in which the party is filing their claim. The decision to implement a blanket provision applying to all civil and commercial disputes affords the courts little or no discretion in the types of disputes to which pre-litigation protocols should apply, except in a reactive capacity by supervising adherence to the protocols once the matter proceeds to trial. I am doubtful whether such a broad approach will produce benefits for litigants or the courts. The experience in England bears out these doubts.

46 See, eg, NADRAC, above n 45, 24 [2.18]; Attorney General’s Department (Cth), above n 45, 104; VLRC, above n 45, ch 8, 146. Recommendation 1 in ch 8 of the VLRC report also refers to the development of ‘pre-action protocols’, seemingly referring to specific protocols although this much is not specified: at 142.

47 ALRC, above n 45, 176 [5.73]. A similar recommendation is present in the Attorney General’s Department report: Attorney General’s Department (Cth), above n 45, 104.

48 Department of Justice and Attorney General (NSW), above n 45, 11.

49 Legg and Boniface, above n 38, 57.

50 *Civil Procedure Act 2010* (Vic) ch 3, as repealed by *Civil Procedure and Legal Profession Amendment Act 2011* (Vic).

51 *Civil Dispute Resolution Act 2011* (Cth); *Civil Procedure Act 2005* (NSW) pt 2A.

52 *Civil Procedure Act 2005* (NSW) sch 6 cl 19; Greg Smith, Attorney-General (NSW), ‘NSW Government to Postpone Pre-Litigation Reforms’ (Media Release, 23 August 2011).

A further question that arises with respect to this legislation concerns the language chosen to describe the standards of behaviour expected of litigants. The *Civil Dispute Resolution Act 2011* (Cth) requires a disputant to file a ‘genuine steps statement’ setting out the steps taken to resolve the dispute.⁵³ Examples of such steps are given in section 4(1). In addition, section 4(1A) provides that: ‘a person takes *genuine steps to resolve a dispute* if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person’s circumstances and the nature and circumstances of the dispute’ (emphasis in original). Certain matters are excluded from these requirements under part 4, however, this generally covers disputes that are the subject of separate legislation or are simply not amenable to mediation such as migration, citizenship and native title proceedings. Where a party has not taken ‘genuine steps’ to resolve the dispute prior to filing, the court can consider this in awarding costs.⁵⁴

The Explanatory Memorandum to the Civil Dispute Resolution Bill 2010 (Cth) highlights the fact that the ‘genuine steps’ standard allows parties maximum flexibility to take the most appropriate action for their dispute, ‘to ensure that the focus is on resolution and identifying the central issues without incurring unnecessary upfront costs, which has been a criticism of compulsory pre-action protocols.’⁵⁵ Introducing the second reading of the Bill, the Attorney-General stated: ‘The bill does not introduce a mandatory alternative dispute resolution or prescriptive or onerous pre-action protocols, nor does it prevent a party from commencing litigation. It is deliberately flexible in allowing parties to tailor the genuine steps they take to the circumstances of the dispute.’⁵⁶ This ‘genuine steps’ formulation is based on recommendations made in the NADRAC Report.⁵⁷ Interestingly, both the NSW and Victorian jurisdictions favoured language of ‘reasonableness’ over that adopted by the Commonwealth. The NADRAC report acknowledged that it was:

not aware that the phrase ‘genuine steps’ has been used before in the law of civil procedure either in Australia or in other countries. Nevertheless, NADRAC considers that it is a phrase that can usefully be given its ordinary meaning in the circumstances of any particular dispute.⁵⁸

I am not convinced by this latter observation. The courts will be required to construe the meaning of these words and it will be some time before parties have access to principles that set out what is required of them. Until that authority is made, lawyers will need to be overly cautious in advising their clients as to what might constitute ‘genuine steps’ for the purposes of their dispute. While such a cautious approach may be preferable in the case of complex or commercial

53 *Civil Dispute Resolution Act 2011* (Cth) ss 6–7.

54 *Civil Dispute Resolution Act 2011* (Cth) s 12(1).

55 Explanatory Memorandum, *Civil Dispute Resolution Bill 2010* (Cth) 8.

56 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland).

57 NADRAC, above n 45, see especially 30–1 [2.46]–[2.51].

58 *Ibid* 31 [2.47].

disputes, it might also have negative consequences for individual litigants who will bear the costs of pre-litigation requirements out-of-pocket and who might perceive such onerous requirements as a barrier to accessing the court system. This problem is particularly acute for unrepresented litigants who do not have the benefit of legal advice prior to commencing their proceedings.⁵⁹ The issues I raise do not point to the conclusion that the courts will be unable or unwilling to supervise this legislation.⁶⁰ However, it does raise a doubt as to whether litigants will benefit from these provisions in the absence of clear principles setting out what is required. At the time of writing, the Federal Court has not had the opportunity to consider how the words ‘genuine steps’ might be construed.⁶¹ It will be interesting to note developments in this area.

It is essential that the objectives of pre-action protocols – improving access to justice and reducing the cost and time of court proceedings – are not overshadowed by the consequences of such protocols, such as the unnecessary front-loading of costs, prejudices against unrepresented litigants and increases in satellite litigation. As noted above, efficiency is only one aspect of justice; the scales must be balanced with considerations of fairness. That being said, if the effect of the protocols is to allow more citizens to assert their rights and improve the access to the courts, then they will be fulfilling their purpose. The experience of the Federal Court will be a useful indicator of the efficacy of pre-action requirements in other Australian jurisdictions.

V JUDGES AS MEDIATORS

The question of whether judges should act as mediators has attracted much debate. On the one hand, putting aside arguments about the constitutionality of this practice, judges are experienced at handling disputes and maintaining impartiality. On the other, there are those who believe that this is simply not the role of judges and it is inappropriate for them to so act. I should note that by judicial mediation, I refer to mediation by serving judges. As is often pointed out, many retired judges continue their career as mediators and I see no problems with such a practice. As it stands, judicial mediation has become an accepted practice in some jurisdictions. Victoria, for example, released Judicial Mediation

59 Similar concerns were noted by NADRAC in the report in explaining why ‘genuine steps’ was used over ‘genuine efforts’. However, it is questionable whether the preferred wording will alleviate the problem: *ibid* 31 [2.50].

60 In fact, there are many circumstances where terms have been construed. One example in this context is the construction of contracts that require parties to ‘negotiate in good faith’: see *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236. See also *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618 in which the parties contracted to ‘undertake genuine and good faith negotiations’: at 623. Allsop P (with whom Ipp and Macfarlan JJA agreed) found that: ‘These are not empty obligations; nor do they represent empty rhetoric. An honest and genuine approach to settling a contractual dispute ... does not constrain a party. ... It requires the honest and genuine assessment of rights and obligations and it requires that a party negotiate by reference to such’: at 638.

61 Although note that in *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282, Reeves J considered the application of the costs implications of the *Civil Dispute Resolution Act 2011* (Cth) in circumstances where neither party had filed a genuine steps statement.

Guidelines earlier this year.⁶² In NSW, court-annexed mediation frequently takes place before a registrar of the court.

Turning first to the arguments in favour of judicial mediation, a number of judges and commentators have stressed the qualities that judges can bring to the role of mediator. In 2006, Judge Margaret Sidis published an insightful account of her experience in judicial mediations in the District Court of NSW.⁶³ Her Honour pointed out the overwhelmingly positive outcomes of mediations undertaken, citing a settlement rate of close to 80 per cent since commencing this practice in 2002.⁶⁴ She noted that judicial mediators should stress the fact that as mediators, they do not ‘judge, express any opinions, give any judgment or provide legal advice,’ however, she acknowledged that in her experience, ‘there is no doubt that the parties respect the fact that I hold judicial office’.⁶⁵ Her Honour voiced strong opinions in favour of judicial mediation stating: ‘I reject the proposition that there is only one way in which to perform the judicial role. ... Allowing judges the flexibility to deal with disputes in less traditional ways might well prevent any further erosion of legal rights’.⁶⁶

Justice Monika Schmidt, now a judge of the Supreme Court, has also raised arguments in favour of judicial mediation. Her Honour previously sat on the Industrial Relations Commission where pre-trial conciliation, conducted by members of the commission (judges or commissioners), is compulsory for certain disputes.⁶⁷ Justice Schmidt detailed the success of a compulsory conciliation scheme introduced at the Commission in 1996.⁶⁸ She cited informality in the process, judicial control, lower costs, the diverse experiences of judges and high settlement rates as factors pointing to the success of the program.⁶⁹ Michael Moore, a former judge of the Federal Court, made a number of comments in response to an article in 2000 in which Philip Tucker questioned the constitutionality of judicial mediation.⁷⁰ In Justice Moore’s view, mediating falls squarely within the judicial function, namely the ‘resolution of disputes or controversies’.⁷¹ However, he stressed the fact that judges who feel uncomfortable with the process of mediation should not be required to perform such a function, that judicial mediations should be conducted sparingly and on a case-by-case basis and that if a mediation fails, the judge should have no further

62 Supreme Court of Victoria, *Practice Note 2 of 2012 – Judicial Mediation Guidelines*, 30 March 2012.

63 Judge Margaret Sidis, ‘Judicial Mediation in the District Court’ (2006) 18(9) *Judicial Officers’ Bulletin* 74.

64 *Ibid* 74.

65 *Ibid*.

66 *Ibid* 75.

67 *Industrial Relations Act 1996* (NSW) s 109.

68 Justice Monika Schmidt, ‘A Successful Experiment in Judicial Mediation’ (2006) 18(9) *Judicial Officers’ Bulletin* 71.

69 *Ibid* 72–3.

70 Philip Tucker, ‘Judges as Mediators: A Chapter III Prohibition?’ (2000) 11 *Australian Dispute Resolution Journal* 84.

71 Justice Michael Moore, ‘Judges as Mediators: A Chapter III Prohibition or Accommodation?’ (2003) 14 *Australian Dispute Resolution Journal* 188, 190.

involvement in the case.⁷² Another proponent, David Spencer has proposed that judicial mediation is simply ‘the next logical step’ in encouraging active case management practices.⁷³ However, he highlighted the fact that judicial mediation as such should not be seen as an exercise of judicial power.⁷⁴ There are clearly benefits available through judicial mediation and I accept that there will be times when the circumstances of the case point to the overwhelming decision that judicial mediation is in the parties’ best interests.

Notwithstanding arguments in favour of judicial mediation that see it as merely incidental to the judge’s role in much the same way that case management is,⁷⁵ I am not convinced that it is appropriate. Judicial mediation involves judges performing a function that is not that for which they are appointed. In 1991, Sir Laurence Street, now a successful mediator, issued a warning:

Developments [in the field of ADR] are to be welcomed, involving as they do utilisation of resources from outside the regular court system. There is, however, a very real danger that the courts, in well-intentioned attempts to extend their own services to litigants, will stray beyond their conventional role.⁷⁶

Some of the key arguments on this side of the debate were pointed out by former Chief Justice Spigelman at an address delivered in 2011.⁷⁷ They include the fact that numbers of judges are limited and should be reserved for dealing with caseloads, the availability of experienced private mediators as well as trained mediators in the courts, that judges might be uncomfortable with the privacy imposed by mediation, the risk that judicial mediation could undermine the integrity and impartiality of judges and the courts, and the fact that judges are trained to identify and apply the law and might not have the requisite skills for a successful mediation.⁷⁸ These are all compelling reasons. Dealing with the first, there is no doubt that the caseload of the courts is growing and, given the number of experienced professional mediators in Australia who are trained in this practice, it seems that reducing the number of sitting days in favour of mediation is a questionable use of the court’s resources.⁷⁹ In addition to this, NSW has

72 Ibid 195–7.

73 David Spencer, ‘Judicial Mediators: Is the Time Right? – Part I’ (2006) 17 *Australian Dispute Resolution Journal* 130, 134.

74 Ibid 135. Note that different views on whether or not judicial mediation involves the exercise of judicial power are expressed by Iain Field, ‘Judicial Mediation, the Judicial Process and Ch III of the Constitution’ (2011) 22 *Australian Dispute Resolution Journal* 72, 75–6. Field goes on to suggest that ‘there is no reason in principle why a function which is not historically associated with the exercise of judicial power cannot be vested in a court as a function incidental to the exercise of that power’: at 77–8.

75 See, eg, Field, above n 74.

76 Sir Laurence Street, ‘The Courts and Mediation: A Warning’ (1991) 2 *Australian Dispute Resolution Journal* 203, 203.

77 Chief Justice James J Spigelman, ‘Judicial Mediation in Australia’ (Speech delivered at National Judicial College, Beijing, 28 April 2011) <[http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman280411.pdf/\\$file/spigelman280411.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman280411.pdf/$file/spigelman280411.pdf)>.

78 Ibid.

79 Similar concerns have been raised by Chief Justice Warren in Victoria: Chief Justice Warren, ‘Should Judges be Mediators?’, above n 2, 84.

embraced the practice of court-annexed mediation, where a cost-free mediation service is provided by court officers. I see no reason why this practice cannot be extended if necessary, leaving judges free to hear cases through to judgment. Second is the concern that encouraging judicial mediation has the potential to undermine the integrity of the courts. It is important to stress that it does not matter whether or not the judge is impartial in their dealing during the mediation; in fact, I have the highest confidence in the capacity of judges to assume this role. Rather, what matters is how the public perceives the judiciary and the courts and we must be careful not to erode any of the hallmarks of justice that exist in the court system. In this sense, judicial mediations clearly have the capacity to raise questions about lack of transparency and the integrity of the process.⁸⁰ In addition, there are a number of questions that arise over issues of confidentiality and whether a judicial mediator could be called as a witness in a subsequent trial. Finally, there is the argument that judges are not trained as mediators and therefore should leave this role to those who are. I have more trouble with this contention, largely because I see many similarities between the role of a judge and mediator, the most significant being the ability to approach a dispute objectively.⁸¹ However, there are a number of other skills required of successful mediators, such as communication skills and the ability to identify creative settlement options. My experience is that many parties choose their mediators based on their experience, not necessarily in a legal context, but in a commercial or industry-specific capacity. The personality and style of individual mediators are also important considerations. It follows that the ability to identify and apply the law, skills that are integral for a judge, are not necessarily the qualities of a good mediator. Further, there may be judges who feel less comfortable acting in a conciliatory context, especially where it involves switching roles depending on the dispute. Given the growing cohort of trained mediators, some of whom are performing court-annexed mediation at the Supreme Court, it seems to me that it is best to avoid judicial involvement in this process but retain it as a possibility in those cases in which it is most appropriate.

VI CONCLUSION

The courts and ADR are both important elements of the dispute resolution landscape and it is important that we give thought to the ways in which they can further complement and support one another. In this article I have canvassed some of the broad issues facing the courts with regards to ADR, including the

80 See also comments by Chief Justice Warren. Her Honour states: 'If judges are to mediate, then great care needs to be taken with the management of the judicial presence': *ibid.*

81 Note comments made by Justice DeBelle that the time has 'been reached when judges' skills should include the capacity to resolve disputes by other means in addition to adversarial litigation as we know it': Justice Bruce DeBelle, 'Should Judges Act as Mediators?' (Speech delivered at the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1-3 June 2007), quoted in Chief Justice Warren, 'Should Judges be Mediators?', above n 2, 81.

role of the courts in ordering non-consenting parties to ADR, the impact of pre-litigation requirements in Australia and the appropriateness of judicial mediation. The common thread between all of these issues is the need for courts and judges to accept that the face of dispute resolution is changing and that they will need to be flexible to the needs of the modern litigant. The courts are in an ideal position to objectively consider whether certain proceedings are amenable to ADR, however, it is important that the powers of the court to order parties to another process be used on a case-by-case basis, bearing in mind the interests of the individual litigants. Only then can we ensure the dual goals of maintaining the integrity of the courts and ensuring greater access to justice. As a final note, the goals of any ADR regime will only be achieved if it is supported by the requisite education of legal professionals and the availability of information to disputants. If we accept that ADR now forms an integral part of the dispute resolution landscape, then it is integral that lawyers, law students, judges, and potential litigants are provided with enough knowledge to make an informed choice about the most appropriate mechanism and that this is done in a way that allows for parties to retain their freedom in determining which route works best for them.