

# SHOULD JUDGES BE MEDIATORS?

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“Should judges be mediators?” Another way to ask the question is: “The role of judges and courts; is it changing and should it?”

Before we start any discussion, we need to look at where litigation has come to and where it seems to be heading.

Twenty-five years or so ago, mediation as a feature of the courts system was unknown. Cases were fought, won and lost in the courtroom, with a fair few settling after some argy bargy at the court door. The ancient concept of mediation, well practised by the Chinese for millennia, was viewed as foreign. The overarching concept of alternative dispute resolution (“ADR”) was unheard of. Arbitration was something peculiar to the construction sector. Driven by the pressures of burgeoning court lists, interminable delays and long, complex litigation, the courts called for more judges. Governments would not have a bar of it. I recall, as a government lawyer, sitting in on a deputation of the chairperson of the Victorian Bar and very senior barristers to the Attorney-General. The Attorney General told the deputation very directly that no new judges would be appointed; the problem of delays in courts had to be solved by tackling the court process itself.

In the Victorian County Court, the Building Cases List experimented with the novel idea of sending parties to mediation. Later, Justice Tim Smith, a County Court judge

appointed to the Victorian Supreme Court, was put in charge of the Supreme Court Building Cases List. Nothing too threatening or revolutionary there, it took off and expanded exponentially. A critical event in the promotion of mediation in Victoria was the Supreme Court's "Spring Offensive" in the nineties. A large number of civil cases were listed in a docket before individual judges. Cases were sent to mediation. The Victorian Bar and the profession proffered services as mediators, mostly free of charge. The settlement rate was dramatic. Mediation became an accepted part of the civil litigation process.

Similar experiences occurred in other jurisdictions, mostly a little later. Court rules were introduced and mediation courses were promoted for prospective mediators. The Federal Courts, and some Supreme Courts, proceeded to offer court-based or court-annexed mediation services to litigants through registrars, prothonotaries, associate judges and, even, judges. This occurred to provide a service, to encourage disinclined litigants to the mediation water trough and to overcome impecunious litigants' incapacity to pay for mediation.

Fast forward to 2010. In the Victorian Supreme Court, save in exceptional cases, no civil trial or appeal proceeds to hearing without at least one round of mediation, mostly before specialist members of the Bar or the profession, sometimes before retired judges. Mediation as part of the litigation process has been extraordinarily successful. Without it, courts would have faced intolerable difficulties. This success has come in spite of some rare complaints from the private sector, of "pressuring", "over-bearance", "misunderstanding" and general regret at terms of settlement, one of which, in Victoria, resulted in litigation. In this sense, mediation is a bit like hedging; the risks are weighed up and a calculated gamble is taken.

It is necessary to understand what court mediators do if we are to comprehend the question in issue and answer it. Some judges will have acted as mediators at the Bar or in the profession before judicial appointment. Mediations involve joint and private sessions with mediators<sup>1</sup>. The latter, generally known as “caucusing”, involves the mediator meeting privately with a party both with, and without, a lawyer present. Professor Sourdin of Queensland University was commissioned to study mediation in the Victorian Supreme and County Courts<sup>2</sup>. She conducted a survey of mediators of all identified court-referred mediations. They followed a model form as described by Professor Boulle in his work *Mediation*<sup>3</sup>. In her report, Professor Sourdin reported private sessions were mostly held<sup>4</sup> for the declared reasons of discussing issues and exploring options, and because open sessions were no longer productive in the circumstances<sup>5</sup>. In discussing private sessions, the mediators surveyed also commented that “the culture of these types of mediations is such that the parties want separation”<sup>6</sup>. Relevantly, thirty-five percent of the mediators who responded to the survey informed the parties during the course of the mediation as to what they, the mediators, thought was the likely outcome if the matter proceeded further<sup>7</sup>.

Professor Sourdin’s analysis did not cover the judicial mediation of the Supreme Court of Victoria<sup>8</sup>. Previously, some mediations were conducted by masters, now associate judges, of the Court. The transitional rules to achieve the role change also enabled

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<sup>1</sup> For a general description of different mediation processes see Laurence Boulle, *Mediation* (2<sup>nd</sup> ed, 2005).

<sup>2</sup> Tania Sourdin, *Mediation in the Supreme and County Courts of Victoria* (2001) Department of Justice < <http://www.justice.vic.gov.au/resources/file/eb892e07b6f4491/Mediationin.pdf> > at 29 January 2010.

<sup>3</sup> Boulle, above n 1.

<sup>4</sup> Sourdin, above n 2 [2.38 – 2.40].

<sup>5</sup> *Ibid* [2.41 – 2.42].

<sup>6</sup> *Ibid* [2.42].

<sup>7</sup> *Ibid* [2.46].

<sup>8</sup> The Court-annexed mediators did not participate in the survey.

associate judges to sit on trials. Hence, in Victoria, whereas we had judicial officers, masters, but not judges conducting mediations, we now have judges, albeit associate judges, doing so.

In the Supreme Court, the court-annexed mediations have been extremely successful. Between 2005 and 2008, masters / associate judges mediated two-hundred-and-five cases; of these, one-hundred-and-forty-five settled<sup>9</sup>.

Evidence of the success of court-annexed mediation may be found in most of the higher courts of Australia. In 2008, in the Federal Court, fifty-seven percent of cases referred to mediation were resolved. In the New South Wales Supreme Court in the same year, fifty-nine percent of cases referred to court-annexed mediation were resolved. In the Supreme Court of Western Australia, in the year 2007 – 2008, there was a settlement rate of sixty-one percent (a total of 1009 trial days saved). Evidence of the ubiquity of court-annexed ADR may also be found across the Tasman; New Zealand has been running judicial settlement conferences for over ten years.

The courts' efforts and success have not gone unnoticed by governments. By 2009, mediation was seen as only one element of the ADR list. Mediation fell away as a descriptor and ADR, sometimes now called "Appropriate Dispute Resolution", became the catch-cry of Attorneys-General. Courts, we were told, would look at doing things differently. There had to be another way. By the time governments made these calls, the courts themselves, through mediation as well as case and judicial management, were left to determine about three to four percent of all proceedings initiated. It was

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<sup>9</sup> This is in addition to court-referred mediation to private mediators as well as court-annexed mediations referred to registry officers.

this hard rump that Attorneys-General wanted to tackle; the rest was being dealt with anyway.

Last summer, Justices Byrne and Sackville spoke about the problems of mega-litigation, and the need for proceedings to be approached differently<sup>10</sup>. The previous summer, Justice Hayne spoke about the vanishing trial and urged judges to utilise the question “Why?” when managing litigation: “ ‘Why is this in issue?’ ‘What is this aspect of the fight all about?’ ‘Why do you want to do this?’ ”<sup>11</sup> .

Prior to the last quarter of a century, the judicial role was to decide cases as, and in the form, they were presented before the court without fear, favour, affection or ill will. There is nothing in the judicial oath commanding efficiency, case management or performance levels. As described by Chief Justice Gleeson<sup>12</sup> :

“The function of courts at any level, is to resolve issues on the available evidence. The issues in a case are chosen by the parties within the limits of the relevant substantive and procedural law. Not only do the parties by their pleadings and their conduct of the case, define the matter or matters for decision; they also in large part control, by the evidence they choose to present, the factual information upon which the decision will be made. The adversarial process inhibits judicial creativity. Courts are not Law Reform Commissions. They do not select the questions they will decide; and in general they do not gather information extraneous to the evidence put before them. Courts do not have agendas. Generally speaking, judges must resolve the cases that come to them. They do not select the issues they decide; and they cannot avoid deciding issues that are necessary for decision”.

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<sup>10</sup> Justice David Byrne, ‘The New Approach to Building Cases in Victoria’ (Paper presented at the Supreme and Federal Court Judges Conference, Hobart, 27 January 2009); Justice Ronald Sackville ‘Meeting the Challenges of Complex Litigation: Some Further Questions’ (Paper presented at the Supreme and Federal Court Judges Conference, Hobart, 27 January 2009). See also, Justice Ronald Sackville, ‘Mega-Litigation: Towards a New Approach’ (2008) 9 *The Judicial Review* 89.

Justice Kenneth Hayne, ‘The Vanishing Trial’ (Paper presented at the Supreme and Federal Court Judges Conference, Sydney, 23 January 2008). See also, Justice Kenneth Hayne, ‘The Vanishing Trial’ (2008) 9(1) *The Judicial Review* 33, 41.

<sup>12</sup> Chief Justice Michael Gleeson, ‘The Role of a Judge in a Representative Democracy’ (2008) 9(1) *The Judicial Review* 19, 26.

Justice Hayne expressed the matter this way<sup>13</sup> :

First, an essential element of the organisation and government of this society is that it should be possible to submit legal disputes to independent courts for resolution according to law. The quelling of controversies by the application of the judicial power of the polity is a fundamental feature of the organisation and government of this society. Engaging that process is not to be seen as a failure. It is a defining element of the government of the society in which we live”.

Against this backdrop of what eminent jurists describe as the judicial function on the one hand, and what politicians tell judges they should be doing on the other, academics paint yet another picture.

Professor Resnik of Yale University, has highlighted the decline in cases proceeding to trial, even as filings have increased<sup>14</sup>. She has also alerted us to the fact that resort to, and incorporation of, ADR into court processes “represents the privatisation of public processes”<sup>15</sup>. Professor Resnik observes<sup>16</sup> :

“Indeed, ADR is often chosen because it has the advantage of private decision-making, made in the “shadow” rather than in the light. Public benefits are presumed to flow from the reduction of conflict and the resolutions predicated on parties’ preferences”.

The tension between the public benefit of reduced conflict, and the public detriment caused by sacrificing open and transparent justice processes for greater perceived efficiency, is an important topic to which I will return.

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<sup>13</sup> Justice Hayne, above n 11, 35.

<sup>14</sup> Judith Resnik, ‘Courts: In and Out of Sight, Site, and Cite’ (2008) 58 *Villanova Law Review* 101, 103.

<sup>15</sup> Judith Resnik ‘Procedure as Contracts’ (2005) 80 *Notre Dame Law Review* 593, 623.

<sup>16</sup> *Ibid*, 624.

Professor Freiberg, Dean of the Law School of Monash University, has analysed the adversarial paradigm and drawn attention to the benefits of non-adversarial justice<sup>17</sup>.

He has highlighted that despite the strengths of the adversarial system – its contested nature, judicial impartiality, party control and autonomy, the power and effectiveness of examination and cross-examination, as well as observance of the law – it can be criticised. The adversarial system promotes conflict, not cooperation, seeks proof, rather than truth, resolves conflict, but does not solve problems, is lengthy and costly, provides inadequate remedies and is unsuited to many disputes.

However, Professor Freiberg argues we are not faced with an adversarial system opposed to an inquisitorial system. Instead, he argues that adversarialism and non-adversarialism form a continuum, that they are additive not oppositional and that most legal processes combine aspects of both. Furthermore, adversarialism is not the way the justice system operates in reality. Thus, Professor Freiberg urges a re-examination of first, the operation of the courts; secondly, the role of judicial officers and lawyers; and, thirdly, the way that law students are educated.

Professor Freiberg has described non-adversarial justice as consisting of three elements: non-court dispute resolution (including tribunals and ombudsmen); non-court processes; and court processes with active involvement by judicial officers<sup>18</sup>. He lists the components or theoretical foundations of non-adversarial justice as therapeutic jurisprudence (e.g. drug courts, mental health courts), restorative justice

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<sup>17</sup> Arie Freiberg, 'Non-Adversarial Justice', (Unpublished paper presented at the Supreme Court of Victoria Judges' Conference, Melbourne, 5-6 November 2009). See also, Michael King, Arie Freiberg, Becky Bagatol, and Ross Hyams, *Non-Adversarial Justice* (1<sup>st</sup> ed, 2009); and, Michael King, *Solution-Focused Judging Benchbook* (1<sup>st</sup> ed, 2009).

<sup>18</sup> Professor Freiberg has focused in this respect on the criminal justice system. I would suggest that the principle may equally be applied to the civil justice system. Certainly, that seems to be the approach of some Attorneys-General and law reform bodies concerned with civil procedure.

(eg neighbourhood justice centres), preventative / proactive law (eg creative problem-solving), comprehensive law / holistic law, appropriate / alternative dispute resolution, collaborative law, problem-solving courts and managerial justice.

Professor Freiberg and others<sup>19</sup> adopt a holistic perspective on the justice system in promoting non-adversarial justice. They recognise the need for a public courts system to affirm principles and values, proscribe limits of acceptable conduct, create a framework for dispute resolution, affirm the doctrine of the separation of powers and the rule of law and act as a check on public and private power. Professor Freiberg acknowledges that non-adversarial justice “de-centres the justice system as a locus of power”<sup>20</sup>.

As an inherent component of this type of justice, the role of judges is viewed as active rather than passive: judicial supervision of orders; judicial activity in court; judicial engagement with the community; judicial case management; *and* judicial mediation.

In a joint judicial and academic position, Madame Justice Otis (when a Justice of the Quebec Court of Appeal) together with Dr Eric H. Reiter of Concordia University have strongly supported judicial mediation<sup>21</sup>. They argue that there is a basis for a different approach to the judicial role because there is a “crisis in the authoritative judicial order, as the classical system is proving to be less ideal for, or even ill-suited to, a growing percentage of disputes brought before it”<sup>22</sup>. They see an opportunity to combine the “legal and moral gravitas” of the judicial role with the “flexibility and adaptability of

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<sup>19</sup> Freiberg, above n 17.

<sup>20</sup> Ibid.

<sup>21</sup> Madame Justice Louise Otis and Eric H. Reiter, ‘Mediation by Judges: A New Phenomenon in the Transformation of Justice’ (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351.

<sup>22</sup> Ibid, 361.

ADR”<sup>23</sup>. Justice Otis and Dr Reiter regard the consent of the parties and their control of the process, as well as adequate training for mediator judges, as pivotal. They conclude<sup>24</sup> :

“As the judicial mediation model takes hold and creates a new way of approaching dispute resolution within the formal institutions of justice, new challenges will arise...[they] will require new ways of thinking that go beyond the assumption that adjudication is normative, while other forms of conflict resolution are alternative or exceptional. The goal remains the same: resolution of legal conflicts in a just, complete, and efficient way. Judicial mediation provides another way to achieve this, one that is fully integrated within the formal legal system, but that tempers – in suitable cases – its rigidity and formalism”.

However, it does not stop there. Through the Law Council of Australia, sectors of the legal profession are promoting the ‘multi-door courthouse’<sup>25</sup>. This is an American concept presently being developed in Australia by the Standing Expert Committee on Alternative Dispute Resolution of the Law Council of Australia. Proponents of this approach see courts through a very different prism to that of Chief Justice Gleeson and Justice Hayne. They see the court offering a range of dispute resolution portals, determination by a judge being only one door and *not* the central door. The ‘multi-door courthouse’ concept contemplates a single courthouse where cases are screened and then referred to the appropriate dispute resolution doorway or portal. It is illustrated by a diagram that shows a judge sitting calmly at a bench reading what seems to be a legal text in the middle of a circular courthouse. The entry point to the courthouse is via a clerk or registrar. The first step through the entry point is via pre-

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<sup>23</sup> Ibid, 362.

<sup>24</sup> Ibid, 401.

<sup>25</sup> The Law Council of Australia convened the Multi-Door Courthouse Symposium, Canberra 27 July 2009. A selection of papers presented at this symposium are available online, see Chief Justice Robert French, ‘Perspectives on Court Annexed Alternative Dispute Resolution’ (Paper presented at the Multi-Door Courthouse Symposium, Canberra, 27 July 2009) <<http://www.hcourt.gov.au/speeches/frenchcj/frenchcj27july09.pdf>> at 2 February 2010; and Robert McClelland MP, ‘Speech to the Multi-Door Courthouse Symposium’ (Paper presented at the Multi-Door Courthouse Symposium, Canberra, 27 July 2009) <[http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/Speeches\\_2009\\_ThirdQuarter\\_27July2009-SpeechotheMulti-doorCourtHouseSymposium](http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_ThirdQuarter_27July2009-SpeechotheMulti-doorCourtHouseSymposium)> at 2 February 2010.

action protocols. The case is then sent to a settlement conference, mediation, conciliation, arbitration, early neutral evaluation, expert determination, reference to a referee, arbitration and if necessary, judicial determination by leave or with certification that at least one ADR procedure has been undertaken<sup>26</sup>.

So one way or another, the courts have become participants in a bigger and different system to that commented upon by Chief Justice Gleeson and Justice Hayne. That is not in any way to suggest they misstate the position, utterly not so. Rather, it is to suggest that the role, focus and emphasis on courts deciding the cases that come before them has shifted or is attempting to be shifted.

We may summarise the current state of affairs by saying that, we now have mediation as an accepted part of the litigation process; we have politicians telling courts to be more innovative and pursue ADR; and, we have eminent judges urging their judicial colleagues to seize control of the litigation before them.

Against this background, judges are urged by Attorneys-General, law reformers and the profession itself to engage in ADR in one form or another; judicial case management, judicial case conferencing, mediation and, more recently, early neutral evaluation.

So, as judges should we mediate?

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<sup>26</sup> Frank E. Sander and Stephen B. Goldberg, 'In Practice – Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10 *Negotiation Journal* 49; Justice Brian Preston, 'The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse – Part 1' (2008) 19 *Alternative Dispute Resolution Journal* 72.

Justice DeBelle has argued in very pragmatic terms that we should<sup>27</sup>. I would summarise his position thus:

1. Fears as to impartiality at a post-mediation trial by the same judge are resolved by the judge recusing him or herself.
2. Fears as to a negative impact on the integrity and authority of the courts are addressed by the comprehension and understanding that mediation is different from adjudication “and that caucusing is an exception to the rules of natural justice”.
3. Fears as to the weakening and dilution of the judicial system by branching out to different forms of the judge role fail to recognise 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”.
4. If courts do not “equip themselves with techniques to resolve disputes by means in addition to litigation.....there is a risk that courts, not external mediators, will be seen as alternative dispute resolvers”.<sup>28</sup>
5. Any suggestion that judges involved in mediation are placed at risk of a complaint of coercion is misconceived. The risk is no greater than applies to non-judge mediators, including retired judges who act as mediators.

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<sup>27</sup> Justice Bruce DeBelle, ‘Should Judges Act as Mediators’ (Paper presented at the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1-3 June 2007).

<sup>28</sup> In this respect Justice DeBelle also cites Henry Jolson, ‘Judicial Determination: Is it Becoming the Alternative Method of Dispute Resolution?’ (1997) 8 *Australian Dispute Resolution Journal* 103.

6. Judicial mediation is an appropriate utilisation of scarce judicial resources: “...judges are resolvers of disputes and the rule of law is maintained if they arm themselves with techniques to resolve disputes by means other than litigation”.
7. Judicial mediation saves court time.
8. Judges will not lack the skills for mediation if they are appropriately trained. In addition, judges are highly skilled at identifying issues<sup>29</sup>.
9. Judicial mediation has been very successful as demonstrated by the experience of the Federal Court and the Supreme Court of South Australia.

In a very significant document, the National Alternative Dispute Resolution Advisory Council (NADRAC)<sup>30</sup>, following close and extensive national consultation with interested and affected courts and parties, came down against judicial mediation<sup>31</sup>.

NADRAC noted that there is uncertainty as to what actually constitutes judge led mediations. They noted the concept may be a judge conducted pre-settlement conference or a judge conducted mediation<sup>32</sup>. NADRAC raised the following concerns:

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<sup>29</sup> Ibid, 15.

<sup>30</sup> National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve – Embracing ADR to improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General of the Commonwealth of Australia* (2009) NADRAC <[http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~NADRAC+The+Resolve+to+Resolve+Report\\_web.PDF/\\$file/NADRAC+The+Resolve+to+Resolve+Report\\_web.PDF](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~NADRAC+The+Resolve+to+Resolve+Report_web.PDF/$file/NADRAC+The+Resolve+to+Resolve+Report_web.PDF)> at 29 January 2010.

<sup>31</sup> Ibid, [7.56].

<sup>32</sup> Ibid, [7.40 – 7.41].

1. Judicial mediation (involving private sessions or caucusing with parties) may be incompatible with the constitutional role of judges exercising federal jurisdiction<sup>33</sup>.
2. A judge might express an opinion on the likely outcome, possibly inconsistent with the principles of mediation and the role of a judge<sup>34</sup>.
3. Mediation, reliant upon the imprimatur of a judge, is an inappropriate application of judicial authority<sup>35</sup> :
  - The mediation may only succeed because of the judicial imprimatur.
  - The agreement reached based on the judicial imprimatur may leave a party dissatisfied.
  - Public confidence in the integrity and impartiality of the court and the judge may be threatened<sup>36</sup>.
  - Unless specifically trained the acknowledged judicial skills are less relevant.
  - Judges risk confusing their roles as judge and mediator.

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<sup>33</sup> Ibid, [7.42].

<sup>34</sup> Ibid.

<sup>35</sup> Ibid, [7.43].

<sup>36</sup> Ibid, citing the comments of Sir Laurence Street, including Sir Laurence Street, 'Mediation and the Judicial Institution' (1997) 71 *Australian Law Journal* 794.

- Judges are likely to need extensive training.
  - Judges might need to be recused from increasing numbers of hearings.
  - There are numerous mediation services available in any event from other sources.
  - Judicial time is expensive and mediation is more cost effectively left to private ADR providers<sup>37</sup>.
4. Dissatisfaction with judicial conduct of a mediation may reflect negatively upon the judiciary as a whole<sup>38</sup>.

Significantly, NADRAC did not receive any submissions supportive of judicial mediation where the judge responsible for the case also assumed the role of mediator<sup>39</sup>. Chief Justice French in his submission to NADRAC, whilst acknowledging the benefits of judicial mediation, noted the potential confusion of the role of the judge. The Chief Justice concluded that with the availability of experienced court officers and private mediators, the need for judicial mediation was questionable<sup>40</sup>.

The Victorian Bar put its position to NADRAC very directly<sup>41</sup>:

“Judges are appointed to judge, and not to negotiate or take part in commercial negotiations between commercial parties. Judges are appointed not for their mediation skills, but for their judicial abilities”.

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<sup>37</sup> Ibid, [7.44].

<sup>38</sup> Ibid, [7.45].

<sup>39</sup> Ibid, [7.49].

<sup>40</sup> Ibid, [7.50].

<sup>41</sup> Ibid, [7.52].

Ultimately, NADRAC adopted the analysis of Justice Hayne as to the purpose of courts in our democratic system<sup>42</sup>. NADRAC also agreed with the statement of Chief Justice French when considering the concept of the multi-door courthouse<sup>43</sup> :

“...it is in the public interest that the constitutional function of the judiciary is not compromised in fact or [ as ] a matter of perception by blurring its boundaries with non-judicial services”.

NADRAC recommended in its report that save for exceptional circumstances, judges should not mediate and, if they do so, they should not hear the case. Any judge who mediates should be accredited<sup>44</sup>.

Essentially, NADRAC’s position was based on four reasons: first, the fundamental function of courts is to resolve disputes according to the law; secondly, the constitutional uncertainty of judicial mediation; thirdly, the incompatibility of judicial involvement in the private sessions which are a hallmark of mediation; and, fourthly, reservations as to the purported success of judicial mediation elsewhere.

However, NADRAC supported judicial mediation where it involved a facilitative role through active case management.

Drawing back to reflect upon the primary arguments in favour of judges mediating, they appear to consist of three points. First, the gravitas of a judge heightens the likelihood of settlement in difficult proceedings. Insofar as we are talking about three to four percent of the proceedings initiated, they need a special element to facilitate settlement should settlement be possible. In the Victorian Supreme Court, by the time

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<sup>42</sup> Ibid, [7.53].

<sup>43</sup> Ibid, citing Chief Justice French, above n 25.

<sup>44</sup> Ibid, [7.59].

proceedings fall within the category of the remaining three to four percent of matters, they will have been the subject of at least one round of, usually private, mediation, through the Bar or the profession, and ongoing docket management at varying levels either by an associate judge or a judge. Generally, this experience is consistent across most jurisdictions. This argument contemplates that until parties sit opposite the individual who carries the mantle of judicial office, and the judicial scalpel is applied to the individual's case, settlement is unlikely to occur.

Secondly, from a political and pragmatic perspective, if judges do not heed the catchcries of governments and fail to engage sufficiently in ADR, including mediations, courts risk being marginalised and essentially becoming appellate and supervisory institutions insofar as civil litigation is concerned. Supreme Courts may find themselves predominantly hearing criminal trials and appeals. Governments will legislate to limit citizens' ability to take their disputes to courts in favour of tribunal systems at the lower level of justice.

Thirdly, mediations provide an opportunity to expand and develop the judicial role to the mutual benefit of judges and the community. For some, acceptance of judicial appointment provides an opportunity to perform the pure judicial role of deciding cases. For some, it may even involve an escape from mediations. For these judges, the last function they wish to perform is that of mediator once again; it would not feel very different from doing what they had previously been doing at the Bar or in practice. On the other hand, hearing and determining cases, in particular writing judgments, is constant and wearing. The opportunity to use ADR skills, in particular mediation skills, at least some of the time, would provide variety in the judicial life.

Whilst there are a range of reasons proffered why judges should mediate, these three seem to lie at the heart of the discussion.

The primary arguments against judges acting as mediators are also three-fold.

First, mediation involves an abuse of the judicial function. Judges should judge and avoid engaging in political and administrative pragmatism. Fundamentally, the judicial role is a pure one; it should not be diluted. Furthermore, there is no shortage of highly skilled mediators at the Bars, in practice, and, not to be overlooked, amongst the senior retired judiciary, a group who have been extraordinarily successful in settling some of the most difficult and contentious civil litigation in the country.

Secondly, it is improper for judges to engage in closed and private justice by participating in mediations. Judges are intended to conduct their work publicly. They are required to be transparent in what they do and to account for their decisions through their statements in court and their reasons for judgment. If judges participate in mediations behind closed doors, justice is closed and the community is ignorant of judicial activities.

Thirdly, participating in mediation involves relocating a precious judicial resource – judges – away from trials and appeals. In all jurisdictions there is too much work to do. However, that is not to say judges do not perform quasi ADR tasks repeatedly. When we go onto the bench in trials and appeals, we persistently scrutinise what is said in court, the documents provided, what is happening and ask the question urged by Justice Hayne: “Why?” Of itself, these are part of the modern judicial technique.

Judicial case conferencing (the facilitative form of judicial mediation) provides the proper model.

Whilst the law, courts and judges must necessarily be adaptive and evolve they must do so within the constraints of the common law and statute, as well as legal and constitutional principles.

I suggest a better approach to the question I posed at the start, is the pursuit of direct judicial involvement in ADR other than mediation. For example, judicial case or settlement conferences, judicial early neutral evaluations and summary trials. If judges are to mediate then great care needs to be taken with the management of the judicial presence. It would be prudent for judges to conduct mediations only with a court officer such as a registrar and a judge's associate present. It would also be wise to record the proceedings in the mediation. That said, it would be essential in my view for judges only to meet with parties in a mediation whilst their lawyers are present.

There are always things judges can do and techniques that may be applied. We should not forget the effectiveness of the pre-action protocols being rolled out across the country. Ultimately, one thing judges can do is increase the barriers to achieving a trial or appeal hearing, that is, ensure that parties exhaust every possible alternative to a court hearing before they have time before the judge.