From Alternate to Primary Dispute Resolution: The pivotal role of mediation in (and in avoiding) litigation

Presented by Judge Joe Harman of the Federal Circuit Court of Australia to the National Mediation Conference Melbourne 2014

Introduction

As Felstiner, Abel and Sarat opined “Disputes are not things: They are social constructs”1

Those same authors importantly recognised that:

- “Viewing disputes as things creates a temptation to count them2”; and,
- “Formal litigation and even disputing within unofficial fora account for a tiny fraction of the antecedent events that could mature into disputes. Moreover, what happens at earlier stages determines both the quantity and the caseload of formal and informal legal institutions3”
- “Disputes take various shapes, follow particular dispute processing paths, and lead to new forms of understanding4

As Australia entered the second half of the twentieth century “dispute resolution” remained firmly embedded within litigious Court processes. Tensions occasionally arose between self help (whilst the oldest recognised legal remedy generally frowned upon as “taking the law into one’s own hands” especially when strength or equality of bargaining power between disputants was not equal) and litigation. Ultimately, however, the resolution of disputes was the business of Courts and lawyers.

By the 1960s Court processes were, throughout the first world, increasingly seen (if they had not always been) as cumbersome, expensive and time consuming.

---

2 Ibid.
3 Ibid 631-632.
4 Ibid 632.
The emergence of a new, more affluent society and with it a burgeoning middle class, tentatively entering the previously privileged domains of the elite, saw exponentially greater volumes of commercial, real property transactions and succession disputes.

Improved financial wealth, wealth distribution and workforce participation fuelled greater social freedoms and more liberal attitudes towards (or at least the reality of) divorce, social contracts and social welfare, immigration, a socially, ethnically and gender diverse workforce, claims for indigenous self determination, non-traditional commercial transactions, (especially following the advent of internet based consumption and transacting) and exposure to non-Anglo-normative cultures and practices.

These emerging economic and social trends brought with them a greater volume of disputes and disputes of a type and nature entirely new to a legal processes which had evolved in pre-colonisation England. Consequently existing legal processes were ill-resourced and ill-equipped to deal with such matters as:

- No fault divorce and consequent “matrimonial causes” (let alone the growing and increasingly socially accepted never married population of de facto, same sex and diverse family types);
- Social Security disputes;
- Immigration and Refugee disputes;
- Workplace disputes, particularly the movement from collective to individual or individual and group bargaining as well as the increased regulation of the workplace through discrimination and condition legislating;
- Land Rights and Discrimination disputes;
- Intellectual property, trade mark and increasingly multi-national and complex commercial disputes.

The defining elements (and perceived shortcomings) of the litigious, Court-based model of dispute resolution or determination, largely focused upon transactional disputes, were increasingly exposed as inadequate for dealing with these new and dynamic relational disputes. These involved a growing (both as to quantity and attitude) body of disputants less willing to accept authoritarian or paternalistic dictation of outcome (at great cost of time and money) and seeking greater self determination, tailoring of solutions (rather than precedent-based decision making), expedition, management and review of resolution - and all at less cost.
These disputants and their new and emerging disputes, born of changed and changing social circumstances, were difficult to accurately count. When such disputants and their disputes found their way before Courts the workload of the Court (and legal aid services assisting them) became onerous. Finally, the nature of both disputants and disputes quickly exposed the inadequacy of litigious processes in responding to and addressing relational disputes in a timely or satisfactory manner and especially not in a manner that preserved or minimised damage to ongoing relationships.

In addition to social and financial changes the latter half of the twentieth century also saw the rise of a hitherto unseen legal phenomena: the discussion and consideration of collective and universal rights.

Disputes involving such “rights” - disputes determined by reference to considerations not personal, or perhaps not even directly related, to the disputant litigants or their right to due process - represented fresh and novel challenges for legal processes. These disputes called for new approaches which recognised both the interests of persons not involved in the litigation or the “dispute” (although perhaps the subject matter of it) and the preservation of relationships by which those rights and interests might be addressed.

This new rights-based landscape which called for disputes to be determined by reference to considerations, including primary or paramount considerations, not directly referable or personal to disputants was also, at least potentially, poorly served by adversarial dispute resolution processes that “compensate” or “punish”. It is difficult, for example, to comprehend the utility or efficacy of such considerations in a determination founded upon the “best interests of the child”.

In this fashion the search for, move towards and eventual embrace of non-litigious dispute resolution processes was inevitable. The traditional “tribunal of fact”, adversarial model of judicial determination was increasingly seen as poorly suited to disputes where the subject matter of the dispute was a child’s interests and those interests, whilst subjectively presented, were objectively determined.

Within these fertile soils the seeds of mediation as an alternate form of dispute resolution were sown.

This paper will largely focus, at least as regards illustrative examples, upon family law experience. That is not to suggest that mediation is confined to that area of

---

5 As they either found it difficult to access traditional legal services and Courts or remedies were unavailable to them.
practice. Indeed, it is but one small part of the richly textured fabric of dispute resolution and mediation services in Australia.

The emergence of mediation in the Australian context

It is not the purpose of this paper to engage in any discussion of the definition of “mediation”. I propose to proceed on the basis of the distinction drawn by NADRAC\(^6\) between mediation and conciliation and such that mediation will be taken as “a purely facilitative process” and defined as:

**Mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner\(^7\) (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.

I state a definition in order to delineate the development of mediation in Australia as a professional body of mediators and dispute practitioners with specific training in a mode of facilitative assistance and to distinguish this from the myriad forms of dispute resolution interventions that had previously occurred and which might be distinguished as conciliation or facilitated negotiation.\(^8\) That is not to be, in any fashion, critical of those modes of ADR but purely to distinguish them so as to be able to identify a “starting point” for mediation services.

This distinction is not entirely artificial. As recently as 1996 it had been noted that:

> a bewildering variety of activities fall within the broad, generally accepted definition of mediation – a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction.\(^9\)

Since that time (and perhaps to address the lack of clarity) a number of definitions, professional standards, guidelines and accreditation regimes have come to be. Thus a more regulated and defined body of professionals exist.\(^10\)

\(^6\) National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003).

\(^7\) An interesting first use of the terminology now applicable under the *Family Law Act 1975* (Cth) (“FLA”).

\(^8\) For example the early referral of parties to a senior legal practitioner or Registrar of a Court who would convene a meeting of parties (and probably their lawyers) and facilitate negotiation on an ad hoc basis.


\(^10\) This has not been entirely without comment, criticism and controversy – see for example Senate Legal and Constitutional Affairs Committee Report, *Inquiry into aspects of family services*, Family Law Reform, Chapter 10 “Divorce Mediation” (1998).
Mediation is no longer a strongly principled, philosophical child. Mediation is a mature adult of 30 years of age or more.

Writing in 1991, with respect to family law mediation, Ilene Wolcott recorded:\textsuperscript{11} 

\begin{quote}
\textit{The Noble Park Centre, established in 1985, was one of the first mediation programs funded by the Commonwealth Attorney-General.\ldots \textit{Approximately 72 mediation sessions were conducted in 1989.}}
\end{quote}

\begin{quote}
\textit{The Marriage Guidance Council of Victoria's Family Mediation Service was established in 1984 and received Commonwealth funding in 1988. In each of the past two years 105 couples have participated in mediation. The Family Mediation Services of the Marriage Guidance Councils of South Australia, Queensland and West Australia began operations more recently, either during 1989 or 1990.\ldots Since 1989 a cooperative Family Mediation Service has been run by the Marriage Guidance Council of New South Wales, Centrecare (Catholic Family Welfare) and the Family Court.}
\end{quote}

\begin{quote}
\textit{UNIFAM NSW began family mediation sessions in 1987...}
\end{quote}

What is also clear from the early development of mediation as a unique practice and distinct discipline is its separation from and development as an alternative to litigation.

In an excellent article for the Queensland Bar Association David Paratz summarises both the genesis and essential, core elements of mediation:\textsuperscript{12}

\begin{quote}
\textit{Born in the United States of America from the 1960's on, ADR was a new philosophy. It was based around the concept of finding mutually advantageous resolutions to conflict through negotiation. In place of the old combat model where parties were pitted against each other until one defeated the other, this new approach looked to co-operative problem solving as its form of operation. Instead of Win/Lose the outcome was to become Win/Win. Central to the new processes was an emphasis on identifying interests and negotiating resolutions that accommodated the interests of each party.}
\end{quote}

Ulrich Magnus advances:\textsuperscript{13}

\begin{quote}
\textit{Next to the United States, Australia has become a global forerunner in mediation law and practice. Mediation is officially seen in Australia as a}
\end{quote}

\begin{footnotesize}\textsuperscript{11} ‘Mediating Divorce An Alternative to Litigation’ (1991) 28 Family Matters 47.  
\textsuperscript{13} Ulrich Magnus, ‘Mediation in Australia: Development and Problems’ in Klaus J Hopt and Felix Steffek (eds) Mediation: Principles and Regulation in Comparative Perspective (Oxford University Press, 2012) 871.\end{footnotesize}
preferred, cheaper and quicker alternative to traditional court litigation. There are a great number and variety of legislative acts providing for mediation, partly enabling courts to order mediation procedures against the will of the parties, partly requiring the parties' consent. Outside the courts, a whole mediation ‘industry’ has been established with many private organisations and institutions offering mediation services for any kind of dispute.

In discussing the development of mediation in Australia, Jo Kalowski notes: ¹⁴

The uptake of mediation in Australia has been nothing short of phenomenal. Australia is a nation of “early adopters”, readily embracing new technology and new ideas. Many Australian laws facilitate, even mandate mediation. Most courts encourage it, either as a case management tool to avoid delays or because its effectiveness is openly acknowledged, or both. Most universities offer courses in dispute or conflict resolution, and some provide actual mediation training.

The early development of mediation occurred away from, and largely uninfluenced by, Courts and litigation. Whilst negotiation had always occurred within the process of (and usually also prior to) litigation, the more formalised, third party facilitated models of negotiation were entirely separate to Court processes. ¹⁵ However, Courts were quick (and perhaps quicker) than the legal profession (and public) to see the potential financial and workload benefits of mediation and to embrace them and “annex” them to Court processes.

As observed by John North:

Court annexed mediation began in Australia in 1983, when the Victorian County Court Building Cases List made provisions for matters to be referred to mediators for the resolution of cases. ¹⁶

The Federal Court of Australia has had a mediation program for alternative dispute resolution since 1987....In June 1991 the Federal Court of Australia Act 1976 was amended to allow the court, with the consent of the parties, to refer the proceeding or any part to a mediator...

¹⁵ Many of which employed and had, for some time, employed processes of conciliation focused upon settlement of a dispute by compromise and with a view to avoiding the necessity of judicial determination and the various “costs” associated therewith (for a discussion of which see Sali v SPC Ltd (1993) 116 ALR 625).
¹⁶ It is to be noted that the reference to “mediators” in this period largely refers to Registrars and senior legal practitioners rather than formally trained “mediators”.

6
What started as a ripple on the mediation front in the early-to-mid 1980s, became a wave in the 1990s. Practitioners realised that unless they learned to surf this “new wave” of mediation and alternative dispute resolution, they would be left floundering at sea without the proverbial paddle.

The mediation movement in Australia gained particular impetus and credibility in the early 1990s. In 1992, the then Chief Justice of the Supreme Court of Victoria, Justice Phillips, concluded that delays in the Supreme Court could only be resolved by a “massive and mighty effort using mediation as a vehicle for getting cases resolved.”

This led to the so-called ‘Spring Offensive’ in Victoria in 1992, in which 762 cases waiting for trial were reviewed by a Panel of judges. Two-hundred-and-eighty of these cases were sent for mediation and 104 were settled at mediation....By 1993 mediation was on the rise and was described by the editor of the Australian Law Journal as “the flavour of the year”.

In announcing the establishment of NADRAC, the Attorney-General said “the Government was encouraging the expansion of Alternative Dispute Resolution as part of its strategy to lower legal costs and improve access to justice”.

In 1990 the Family Court of Australia followed the Federal Court’s lead and established its own mediation program service which involved the provision of mediation training to Registrars of the Court. At that time, whether reflective of the paucity of mediation services available in the community or otherwise, the Court was reluctant to (and, in practice, did not) make significant referrals to external agencies. The Court’s service delivery at that time included both forensic and confidential services (including counselling, mediation and conciliation). Since the early 2000s the Family (and Federal Circuit Court) have ceased to provide such confidential services.¹⁷

¹⁷ Save that Conciliation Conferences remained offered by the Court and the contents of such conferences, with limited exceptions similar to those applicable to FDR services (e.g. threats of or actual violence or unethical conduct), remain confidential.
The Federal Court systems have, arguably, been unique in establishing and, in the case of the Federal Court, retaining mediation services within the Court. State and Territory Courts have always operated with a preference for Court referred and controlled mediation but undertaken by external agencies.

By 1993 the first Legal Aid Commission auspiced mediation programmes were established in NSW and almost simultaneously Queensland and Victoria.

As a consequence of these developments mediation is now, to a very large extent, mandatory as a “pre action procedure” at a Federal level. This requirement was introduced by the Civil Dispute Resolution Act 2011 (Cth). Whilst the CRDA does not apply in FLA proceedings there is, of course, s 60I creating a similar obligation and both as a pre action procedure and an obligation upon the Court.

Section 60I precludes a parenting application being filed with a Court or heard and determined absent attendance (or attempted attendance) at Family Dispute Resolution and in the following terms:

\[
\text{a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner.}
\]

Exemptions to this requirement based on urgency, family violence and child abuse are set out. However, even if those exempting circumstances apply the Court has an obligation and an enduring obligation to consider ordering parties to attend FDR and in the following terms:

\[
\text{the court must consider making an order that the person attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to that issue or those issues.}\]

and

\[\text{18 The Federal Court’s website advises “If you are a party to a dispute you should expect that in the early stages of your case the judge will consider whether alternative dispute resolution, including mediation, is likely to assist. In some cases a judge may decide to order the parties to attend mediation even when they don’t agree to it… Ordinarily the mediator will be a registrar of the Federal Court. The Court has adopted the Australian National Mediator Standards for its registrars. This means that those who mediate have been accredited as having certain qualifications, skills, knowledge and experience. Registrars are also required to undertake ongoing professional development of their mediation skills…Parties may agree to use an external mediator at their own expense”.}
\]

\[\text{19 See also the Pre Action Procedures prescribed by the Family Law Rules 2004 and which procedures, in all probability, operate in the Federal Circuit Court in exercise of family law jurisdiction by reference to Reg 1.05 of the Federal Circuit Court Rules.}
\]

\[\text{20 See FLA s 60I(10).}\]
A court exercising jurisdiction in proceedings under this Act may, at any stage in the proceedings, make...[an] order... that the parties to the proceedings attend family dispute resolution.\footnote{See s 13C.}

Laurence Boulle has opined that at least one reason for the rapid growth of mediation in Australia has been “economic rationalism” whereby\footnote{Laurence Boulle, ‘Minding the gaps: reflecting on the story of Australian mediation’ (2000) 3(1) *ADR Bulletin* 1, 2.}: mediation [has] develop[ed] in a context in which the value of social activities is located within the structure of the market-place.

There is to a large extent fundamental truth to this proposition. The theme is taken up, at least to the extent that cost and financial cost in particular are reflected in Court resources and their use, by Campbell Bridge.\footnote{Campbell Bridge, ‘Comparative ADR In The Asia-Pacific – Developments In Mediation In Australia, Paper presented at the 5Cs of ADR Alternative Dispute Resolution Conference, Singapore, 4-5 October 2012.} In doing so he links the economic rationale of mediation, case management by Courts and the increasing interest and involvement of Courts in mediation:

> Historically Australia has been among the most litigious societies in the world. The burden, financial and otherwise, on litigants was severe. The public purse was severely strained by the necessity of allocating huge resources in terms of infrastructure and personnel (judges, juries, facilities and support staff) to the hearing of all these cases. In the late 1980s and early 1990s the courts decided that the days of litigation being conducted at whatever leisurely pace the protagonists chose were over. Case management became the weapon of choice of the judiciary in its quest to confine cases to real and relevant issues and compel litigants to conduct litigation quickly and efficiently. Compelling parties to settle those cases that should be settled as early as possible and to seriously address issues of resolving the more recalcitrant disputants were both philosophies at the centre of the case management drive. It is no accident that the rise of mediation in Australia coincided with the rise of case management and its underlying philosophy. Now the courts and the parties are very much focussed on alternative dispute resolution, with mediation in the forefront of that push.

Perhaps the most eloquent statement of the role of Courts in addressing these financial considerations, which fundamentally addresses and preserves the role of the rule of
law in both litigation and mediation, comes from NSW Supreme Court Chief Justice Tom Bathurst: ²⁴

...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. In this way justice encompasses two separate facets: justice to the parties and justice to the wider community.

Whilst the economic and broader “resources” arguments for the growth of mediation are compelling and valid there must surely be other reasons why mediation has grown so strongly. This is perhaps best encapsulated by retired US Supreme Court Chief Justice Warren E Burger:

*Traditional litigation is a mistake that must be corrected... For some disputes trials will be the only means, but for many claims trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for really civilized people.*

If this is so (and I strongly believe it to be so) then it is necessary to consider the fundamental differences between litigation and mediation to gain any real understanding to the exponential increase in interest in and support of mediation by government, Courts, the public and even, by and large, the legal profession.

**What difference to litigation does mediation offer?**

Laurence Boulle has accurately opined: ²⁵

*Traditionally dispute resolution processes have had system-maintenance functions: in broad terms they maintain the societal status quo through their functions of compensating, punishing, distributing and restoring.*

If this statement is accurate (and I respectfully believe it to be so) then once can well see that “traditional” dispute resolution processes (ie litigious adversarial processes) have significant shortcomings for any relational rather than transactional disputes, whereby parties are in and desire to, or irrespective of desire will, continue in that relationship. It is well recognised²⁶ that the costs of litigation go well beyond financial

---

²⁵ Boulle, above n 22.
²⁶ See for example *Sali v SPC Ltd* (1993) 67 ALJR 841.
costs and include emotional expenditure and damage to or even termination of relationships between disputants.

In an opinion piece by the South Africa dispute resolution practice “Mediate Africa” the following is offered:

*Alternative Dispute Resolution is an umbrella term for processes, other than judicial determination, in which an impartial third party assists those in a dispute to resolve the issues between them [including mediation].*

*Mediation...is the most widely used ADR process in Australia, primarily because it is so flexible and so effective.*

*... where parties participate in the mediation process, they frequently find it empowering relative to litigation. This is because they have more of a sense of “ownership” over both the solution and the process that gets them there...*

This perhaps gives some insight into the bases for greater community embrace of mediation over time.

A convenient starting point for considering the differences between litigation and mediation is to identify the perceived failings, in the present day and age, of litigation as a form of dispute resolution. A succinct analysis is contained in the United Kingdom’s *Woolf Report*:27

*[i]t is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.*

---

In contradistinction Bridge identifies the attractions of mediation over litigation as including:28

(a) It is usually a far more economical means of dispute resolution...;

(b) It is fast;

(c) It is confidential;

(d) It is almost infinitely flexible;

(e) Because the parties themselves make the ultimate decision, in most instances the parties perceive both the process and the result to be fair;

(f) It minimises risk for the parties whether the risk be financial, cultural or risk of any other sort.

An additional area of potential difference is confidentiality. I have described the difference as “potential” as I am conscious of the obligation of full and frank disclosure which applies to all civil litigation. Thus there is potentially a valid argument that anything raised in mediation (or FDR if it is to be differentiated as separate and distinct) could and should be disclosed by the parties in their litigation. Indeed, as regards “information” known to a party already involved in litigation addressing the same subject matter at or preceding mediation the argument is irresistible.

As regards confidentiality Justice Bergin of the Supreme Court of NSW observes:29

A most important tenet of mediation in Australia is that it is confidential. Legislation expressly prohibits parties from adducing evidence of a communication made, or a document prepared, in connection with an attempt to negotiate a settlement. The willingness of parties to voluntarily settle their differences through mediation depends in large part on the confidentiality of the process. If parties fear that their disclosures to mediators or other parties during a mediation may be used against them or published outside the mediation session, it is likely that the use of the process will decline or the process will be weakened by parties manipulating their presentation to ensure that the mediator and/or the other parties are not provided with certain

---

28 Bridge, above n 23.
information that might otherwise be pivotal to a settlement being reached at the mediation.

Justice Bergin, in common with most authors on the topic identifies that “mediation is a cost-effective and efficient mechanism for resolving disputes”.

The American Bar Association,⁴⁰ in directly addressing the benefits of mediation in their public education materials identifies nine such advantages, namely:

**You get to decide**

**The focus is on needs and interests**

**For a continuing relationship**

**Mediation deals with feelings**

**Higher satisfaction**

**Informality**

**Faster than going to court**

**Lower cost**

**Privacy**

Of these benefits perhaps those which might most starkly differentiate mediation from litigation are the preservation of relationships and self determination. Whilst the preservation of relationships is often the focus of twenty-first century litigation, especially but not exclusively in addressing family law disputes, less formal and less adversarial court processes⁴¹ and objects for the conduct of litigation can only go so far. Despite increasing use and popularity of therapeutic jurisprudence principles, even this cannot preserve a relationship (nor meet the needs of those involved in a dispute) as successfully as the avoidance of litigation altogether through a needs based self-determination of the dispute.

### The attitude of legal professionals to mediation

It would be fair to say that lawyers have been amongst the strongest advocates both for and against mediation especially when it is mandated (whether as part of Rules of

---


⁴¹ See, for example, the Principles for the Conduct of Child Related Proceedings in FLA s 69ZN.
Court dealing with Pre Action Procedures) or legislated (such as by the FLA or CDRA or State and Territory equivalents).

It is interesting to note that the qualification of mediators (or FDRPs in the case of the FLA) was initially seen to be and in fact was connected with legal or social science qualification. This had the effect of excluding others (or reserving the “privilege” of qualification and accreditation to those professions).\(^{32}\)

Irrespective of the historical reluctance of lawyers to embrace mediation (as is often asserted to be so) and their suggested propensity to see mandated pre-action mediation or FDR as a “speed hump” in the road to the Court, there can be no doubt of the acceptance, and I would suggest embrace, of mediation by the majority of the legal profession. In family law one need look no further that the number of legal practitioners who have completed mediation or FDR training and gained accreditation.

This embrace of litigation, from the 1980s to date, has no doubt been contributed to by any number of factors.

The rapid embrace of change within a profession of such ancient traditions as the legal profession is, on many levels, unrealistic. There is, as the Toffler’s\(^ {33}\) advanced, a natural reluctance by many to see, adjust to or embrace change. Lawyers are not alone in that regard.

The period from mediation’s first appearance as a formalised system of dispute resolution to the present has been a period of unprecedented threat and disadvantage for lawyers. For the first time in Australia’s history the role, validity and sanctity of the work undertaken by the legal profession has been attacked. The introduction of licensed conveyancing, no fault or, as is presently proposed in NSW, capped fee compensation regimes, Tribunals with appearance by leave only, inability to claim costs in certain civil claims matters and the like have had a real impact on the availability of work for and livelihood of lawyers.

In those circumstances it is entirely explicable (though perhaps not appropriate) that reservation towards and rejection of mediation occurred. But times have changed.

Many have observed that the community has, albeit with imperfect knowledge or understanding of mediation, been responsible for a consumer driven shift in favour of

---


\(^{33}\) Alvin Toffler, Future Shock (Bantam, 1984).
mediation. No doubt the concerns expressed by many in the sector regarding community understanding and misunderstanding of mediation has been driven by a desperate desire for a quicker, cheaper and less painful resolution of dispute and knowledge made readily available through online research and the power of Google.

But lawyers have had a significant role to play as well and it would be disingenuous and pejorative to suggest that the profession has been, at first, reactionary and then entirely responsive. Many lawyers and lawyers’ associations have led the way including State and Territory Law and Bar Societies, Associations and Institutes and the Law Council of Australia. In addition lawyers and lawyer/mediators are prominent and a substantial if not majority membership of groups such as AIFLAM, LEADR and so on.

John North set out the steps which had already been taken by Courts and the Profession and their representative bodies in 2005:

The Council of Chief Justices of Australia and New Zealand, in an important move in March 1997, agreed that it is a function of the State to provide the necessary mechanisms for the resolution of disputes and that Court annexed mediation was part of that process...

The Law Council’s Constituent Bodies, the various law societies, law institutes and bar associations in Australia, have fostered alternative dispute resolution processes within the legal profession and have been responsible for providing pilot schemes in some courts.

The New South Wales Law Society, for example, encourages its members to advise clients of the advantages of mediation through the publication of guides and codes of practice. The law societies of the Australian Capital Territory, New South Wales, Queensland, South Australia, Victoria and Western Australia offer dispute resolution services or maintain a register of approved alternative dispute resolution practitioners, which is made available to the public. The Law Council has also been involved in the development of standards for mediators and model rules for courts and tribunals.

---

34 See Senate Committee Report, above n 10.
Most Law Schools at Australian Universities now include as core, if not mandatory, subjects ADR and mediation (and many have established and been accredited to provide FDR and Mediation training programs to provide accreditation).

Lawyers have also grown tired of dissatisfied clients and dissatisfying practice and have searched not only for relevance in changing markets and environments but sought better means of practice, service delivery and, ultimately, dispute resolution and conflict management. Lawyers have been quick to see and seize the advantages of quicker, cheaper and more satisfying and long lasting resolution of disputes.

The legal profession has, by and large, fulfilled the promise of famous lawyer Abraham Lincoln:36

*Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man.*

Credit needs be paid where due in this regard. In this regard Bridge again makes the clear and valuable point, as regards lawyers and their evolving attitudes to mediation:37

*Lawyers engaged in litigation are subject to pressures from their clients, from ethical rules which bind them, and from rules of court to achieve early settlement. Mediation is a commonly utilised means of complying with these various obligations.*

In jurisdictions with mandated Pre Action Procedures (essentially all jurisdictions in Australia and almost without exception Courts at all levels within those jurisdictions) mediation is now not only an accepted but a convenient means (if not mandated means) of complying with such obligations.

Mandated and prescribed Pre Action Procedures (whether within Court Rules or Legislation) have imposed obligations upon lawyers to use, give advice regarding and engage in mediation. The existence of legislative, rule based or common law sanctions for failing to comply has no doubt sharpened the focus of lawyers individually and collectively as observed again by Bridge:38

---

37 Bridge, above n 23, 4
38 Ibid 5.
From an ethical perspective, lawyers practising in New South Wales ignore ADR at their peril from a professional and potentially even a disciplinary perspective. While lawyers are subject to an over-riding obligation to advance and protect the client’s interests to the best of their ability, this includes an obligation not to encourage the client to act to his or her financial detriment when a solution with less personal and financial cost such as settlement may be open. This philosophy is not only embodied in ethical rules, but it is also incorporated in both court procedures requiring (in some jurisdictions) steps to be taken to settle disputes pre-litigation, as well as the risk of either a recalcitrant client or, in extreme circumstances, his lawyer personally becoming liable for the cost of the other side.

No doubt over time lawyers have also become used to, accepting of and ultimately champions of mediation. As Justice Spigelman\(^\text{39}\) had opined and as quoted within the following passage of Justice Bathurst:\(^\text{40}\)

...non-consenting parties can, in fact, become willing participants in the mediation process and participate in constructive and successful outcomes. As Chief Justice James Spigelman said ‘There is a category of disputants who are reluctant starters, but who become willing participants.’

In my experience from the Bench few practitioners now fail to understand the requirement to attend or attempt to attend\(^\text{41}\) FDR prior to commencing parenting proceedings.

The Future of mediation and Litigation

The following is offered by The Federal Court’s website:

**What cases are suitable for mediation?**

All cases, regardless of their complexity or number of parties, are eligible to be referred to mediation. The types of matters commonly mediated at the Federal Court include corporations law, intellectual property, industrial law, consumer law, human rights, admiralty, tax and costs.

---

40 Bathurst, above n 24, 877
41 Whilst FDR is often referred to as “compulsory” it is nothing of the sort. An FDRP has no power to compel attendance and can, at best, advise of the benefits of attendance and the potential disadvantages of non-attendance including the possibility of an adverse costs order and/or delay in the Court process.
Some factors about your dispute may indicate that it is particularly suited to mediation, such as:

- A willingness to participate in mediation;
- The possibility that a judge’s decision will not end the dispute;
- The need for parties to find a way to preserve their relationship;
- The existence of non-monetary factors; and
- The potential for a negotiated outcome that better suits the needs and interests of the parties than a judge’s decision.

**Why mediate?**

Mediation offers many benefits over a trial by a judge, including:

- **Time:** ordinarily a dispute can be resolved more quickly through mediation than through a trial.

- **Cost:** if a dispute can be resolved through mediation, the costs of preparing and running a trial can be avoided. Additionally, after a trial the unsuccessful party may be ordered to pay the legal costs of the successful party.

- **Flexibility:** mediation offers parties more control over the outcome. A mediation process which is customised to your needs can be arranged with the mediator.

- **Stress:** mediation is less formal and less intimidating than appearing in court.

- **Confidentiality:** mediation is private. The judge is not informed of the contents of the mediation. It is also usually unable to be used against a party if the case goes to trial. (The Court recommends you discuss mediation confidentiality with your lawyer).

- **Satisfaction:** because the parties decide and agree on the outcome of their dispute they are more likely to be satisfied with the result and to comply with what has been agreed.
Finality: settlement agreements can usually only be modified with the agreement of all parties

A clearer statement of the Federal Court’s attitude would be difficult to fathom. Further, a clearer statement of the benefits to litigants of avoiding litigation, when and where appropriate, would be hard to draft.

The simple reality in litigation in any superior or intermediatory Court is, as Bridge has observed,\(^\text{42}\) that:

\[
\text{The culture of mediation is so strong and judges are so inclined to order mediations even over the objection of parties that many mediations take place by consent although one party or another does not wish the mediation to occur. Its consent is brought about by a belief that it is almost inevitable that the court will order mediation at the request of one party or another. Most objections come down to a question of timing i.e. the matter is not yet ripe for mediation because certain steps need to be taken first. The most common response of a judge in those circumstances is to order the steps to be taken and then order the mediation....}
\]

\[\ldots\text{in the real world of Australian litigation in 2012....virtually no case proceeds to trial without at least one round of mediation and is and sometimes more than one}\]

From a government perspective clearly mediation is here to stay as it offers value for money or “bang for buck”. That is always readily measurable and near guaranteed to be so, as against the cost of a judicial determination of a dispute. In reality it is far from comparing apples with oranges. To continue the funding analogy it is in reality comparing apples with, at best, sultanas (if not comparing bananas with onions). The cost base of the two is never comparable and the focus should, perhaps, be upon the justice obtained (especially from the perspective of the disputant and, in a family law context, the child) rather than the money saved.

There is always the potential, in such an economically driven analysis, to seek to “value” justice in a mathematised way. To do so devalues not only justice but the importance and value of the rule of law as a principle for government of civil affairs.

Mediation has a fundamental role and value in the proper administration of both justice and society. However, when it is seen in isolation from the system of which it

\(^{42}\) Bridge, above n 23, at 12 and 14.
is part, a justice system in which the Court and lawyers play a fundamental role, it is mischaracterized.

One aspect of the value of mediation relies, at least in part, in the failure of the “traditional” justice system to respond to the needs of litigants or consumers. The facilitation of negotiation through mediation is in no way a novel concept. The role of mediation has, to a significant extent, been a response to the failure of the litigation and lawyer assisted negotiation processes, to allow and enable an early resolution of disputes.

The litigation process has traditionally been dependant upon the role of the lawyer as an officer of the Court to identify issues in dispute. If this is consistently done then the Court is able to focus upon those issues and thus clearly identify and work towards resolution of issues in dispute. If this model was not operating effectively then the rise and rise to primacy of mediation, is entirely explicable. In areas of the law such as family law, where in up to 40% of cases one or both parties is self represented, this is all the more explicable.

Perhaps, to some extent, the rise of mediation to prominence, indeed indispensability, is readily explained by such changes and shortcomings of the litigation process. But this cannot be the most significant basis for the pre-eminence of mediation.

To the extent that mediation is a means of negotiation its purpose, across areas of the law, changes. In commercial disputes parties are more likely to be represented. Thus the traditional wisdom that the reluctance to negotiate at an early stage, for fear of showing or suggesting weakness, might be a stronger motivation for a private, confidential and non-Court-connected (or Court facilitated process) to be favoured.

Ultimately one issue that resonating with the value and importance of mediation in the modern context is the inherent uncertainty of litigation and the natural desire for certainty (and with it expeditious determination of disputes).

Uncertainty arises on many levels in the litigation context including:

- The potential for uncertainty in the law (such as from repeated and non-identical appeal decisions on the same or similar points);
- Inconsistency in the quality of service (whether lawyers, mediators, judicial officers or otherwise);
- Uncertainty as to cost and delay.
To some extent these matters are within the control of the judiciary and Courts (at least as regards consistency of decision making, the common law system being based on a system of clear and certain legislation and precedent interpreting it). If the “market place” (as regards commercial transactions) and society broadly (as regards all other disputes) are clear as to the law and the outcome or likely outcome of disputes, then the potential for disputes is limited and the need for dispute resolution services (including the Court) substantially reduced.

Perhaps if we are more conscious of the reality that negotiation occurs in the shadow of the law\(^{43}\) rather than the shadow of the Court then two consequences will follow. Firstly, there will be less “dispute”. Secondly, any “dispute” will more amenable to, and more appropriate for, a negotiated resolution within clear and readily identified parameters of law and justice. Thus the greater clarity in the law the greater ability of lawyers to negotiate without external intervention (whether mediation or Court) and, if external intervention is required, the greater efficacy of mediation. Indeed, if the law were always “clear” the judicial determination of disputes would be rare.

Litigation is, however, here to stay. There are and will always be cases that are not capable of resolution whether at a given point or ever, irrespective of how clear the law may be. Such matters require judicial determination and access to justice by the litigants involved.

That being said the capacity and willingness of Courts to order or require mediation, let alone the expectation that it will occur without judicial intervention and simply as a matter of best practice, cannot be realistically questioned even if judicial enthusiasm for mediation is not entirely consistent. There are no longer any “nay sayers” amongst the judiciary - merely gradients of enthusiastic proponents.

As Justice Bergin astutely observes:\(^{44}\)

---

\(^{43}\) A phrase oft attributed to US Supreme Court Judge Oliver Wendell Holmes. The distinction between negotiation in the shadow of the law and the shadow of the Court is significant. Negotiating in the shadow of the law neither suggests or infers that litigation is contemplated or on foot. The law applies everywhere and in every context. If one were to negotiate in the shadow of the Court then it implies something totally different. The Court interprets and enforces the law and has coercive power that the operation of the law in general society does not imply. Negotiation in the shadow of the law recognises that the law is an organic, living organism that applies to all disputes whether litigated or not and including both common law and legislation. Thus, negotiation in the shadow of the Court (when there is pending and imminently heard litigation) is entirely separate and different to simply negotiating with a desire to ensure that the law applies to and guides the resolution of a dispute as occurs with pre litigation mediation. Thus one can (and ideally will) negotiate in the shadow of the law but without Court intervention or scrutiny.

\(^{44}\) Bergin, above n 31, 50.
Since 2000, courts in New South Wales have had the power to refer civil proceedings to mediation, with or without the consent of the parties. A similar power now exists in all Australian jurisdictions.\textsuperscript{45}

The unanimous and overwhelming result of any evaluation of mediation services has been a high settlement rate delivered at a far lower cost that judicial determination. Thus, one is struck by both:

- The inherent value and purpose of mediation; and,
- The potentially perceived lack of value and relevance of the remainder of the process to their dispute.

However, one is best focused on the role and value that each element of the process may bring. In this sense, the embedding of mediation within the psyche of litigants and the litigation process is fundamentally valuable. It allows the litigation process to ensure address of disclosure and discovery and the affording the opportunity, to the extent that lawyer assisted negotiation has not been able to conclude the dispute, for the parties to use mediation as an adjunct to litigation and resolve matters between themselves.

Felstiner, Abel and Sarat identified that “viewing disputes as things creates a temptation to count them”. This very temptation creates one of the real conundrums in accurately assessing the use of mediation services, especially those which are voluntarily accessed – the difficulty in accurately measuring or counting the number of disputants using services.

Additionally, the far more philosophical question arises – how does one measure the success of mediation? Whilst the execution of an agreement at the mediation session is, simplistically, a fairly ready measure that the mediation was “successful” there is a dearth of research (and explicity so) as to the “success” of mediation measured by:

- Limiting issues in dispute (e.g. a litigated matter in which the parties attend mediation shortly before a hearing and in reaching some better understanding of the other’s case or in agreeing to some issues, reduce the hearing time from three days to one day)

\textsuperscript{45} For the federal jurisdiction, see s 53A of the Federal Court of Australia Act 1976 (Cth). For Victoria, see s 48(2)(c) of the Civil Procedure Act 2010 (Vic) and O 50.07 of the Supreme Court (General Civil Procedure) Rules 2005 (Vic). For Western Australia, see s 167(1)(q)(i) of the Supreme Court Act 1935 (WA) and O 8 of the Rules of the Supreme Court 1971 (WA). For Queensland, see ss 102-103 of the Supreme Court of Queensland Act 1991 (Qld). For South Australia, see s 65(1) of the Supreme Court Act 1935 (SA). For Tasmania, see s 5(1) of the Alternative Dispute Resolution Act 2001 (Tas). For the ACT, see r 1179 of the Court Procedures Rules 2006 (ACT) and s 195 of the Civil Law (Wrongs) Act 2002 (ACT). For the Northern Territory, see s 16 of the Local Court Act 1989 (NT) and r 32.07 of the Local Court Rules (NT).
- Not settling immediately but settling some time later as a consequence of, or influenced by, that which occurred in the mediation process;
- Not settling at all (and the matter continuing to a judicial determination) but as a consequence of the mediation and that which occurred in the process the judicial determination “sticking”.

Similarly, whilst clearly Court ordered mediation is now common, statistics on such referrals and their effectiveness in addressing the dispute (at least to the extent that the dispute does not then require determination by the Court) are more difficult to locate.

In a submission to the Australian Productivity Commission in October 2013, Family Relationships Services Australia indicated:

_Evidence from the Australian Institute of Family Studies (AIFS) evaluation of the 2006 law reforms and from court system reports has shown that FRCs have been effective in the first five years of operation with overall parenting applications to the courts dropping by approximately 32%, and public use of mediation and counselling services increasing (Kaspiew, 2009: 304-5)._ According to Professor Patrick Parkinson...the significant decline in court applications since the introduction of FRCs shows how ‘a well-organised and funded system of mediation and other family support, away from the court system, can have collateral benefits to the courts’ (Parkinson, 2013: 209)...Thus FRCs represent ‘a modest level of expenditure to address issues that [if unsolved] will create other costs for government in one way or another’ (Parkinson, 2013: 211).

The December 2009 _Evaluation of the 2006 Family Law Reforms_ found:

...the overall number of [parenting] applications declined by 22% from 18,752 in 2005-06 to 14,549 in 2008-09...

The reality is that, consistent with trends from the annual reports of both the Family and Federal Circuit Courts, the number of applications has increased annually (leading up to the 2006 reforms). Thus, if one considers this reality also, the contribution made by FDR [in resolving matters without the need for litigation] is more probably a reduction in filings, in real terms, of over 30%.

By reference to the _2011-12 Annual Report of the NSW Legal Aid Commission_, 2,586 FDR sessions were conducted in Family Law matters before Federal Courts in that

---

year (being a mix of pre litigation and litigation intervention conferences and litigation intervention conferences representing approximately half of the conferences undertaken).

The contribution of this form of mediation, occurring during and bringing a conclusion to litigation, cannot be accurately gauged due to an absence of reliable statistics. However, on the assumption of an approximately 80% resolution of “some or all issues” arising from such conferences this would represent approximately 1,300 matters settled in whole or in part.

The resolution of matters by agreement, subsequent to commencing litigation, occurs at a high rate. Within the context of the Family Law Act mediation or FDR is relevant as both a “Pre Action procedure” and a Court referred mediation regime.

In an excellent paper Chief Justice Bathurst observed, as regards the NSW Supreme Court jurisdiction:

> 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. 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.

Boulle speaks of the role and future of mediation in the following terms:

---

47 The valid adoption of which figure would be supported, for example, by the findings of KPMG, Family dispute resolution services in Legal Aid Commissions evaluation report (2008).
48 See, for example, the Annual Report of the Federal Circuit Court 2012-13 suggesting a pre hearing settlement rate of approximately 88%. Settlements in such matters are not solely attributable to mediation and FDR as other forms of negotiation and other factors contribute.
49 Importantly (and with respect accurately) the KMPG report, in reviewing legal aid conferencing programs, placed FRD “between litigation and mediation”. In this regard it must be noted that the word “mediation” is not used within the FLA and the definition of FDR contained within the FLA provides that FDR is “is a process (other than a judicial process)...in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other...and...in which the practitioner is independent of all of the parties involved in the process”. Whilst this definition may have much in common with many accepted definitions of mediation it does not necessarily require FDR to be mediation and Regulation 29 of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 required only that the FDRP “must ensure that, as far as possible, the family dispute resolution process is suited to the needs of the parties involved”. Thus a mediation model is neither required nor excluded and clearly the majority of FDR services adopt a facilitative mediation model.
50 Bathurst, above n 24, 870.
51 Boulle, above n 22.
ADR and mediation provide another vision of justice that emphasises the direct participation of parties in the dispute resolution process and the focus on personal and commercial needs and interests rather than on legal rights. In the early days of mediation’s life story we referred in particular to the procedural benefits of mediation: its informality and flexibility, its lack of technicality or rigidity, the direct and continual involvement of the parties in the resolution of their problems, and the like.

The value of mediation is fundamentally proven both as an alternative to and an integral part of litigation as a means of dispute resolution. The social, financial and systems based benefits of mediation cannot be seriously questioned even with the shortcomings we have in data collection and analysis.

Perhaps as we move into the next decade, building upon the successes that mediation has amply demonstrated, what is called for is a more nuanced approach towards the use of various dispute resolution mechanisms including both litigation and mediation, seeing the two not as mutually exclusive but as different strategies to address the same dispute.

So much is envisioned by Part II of the FLA in the context of parenting disputes wherein the legislation requires the use (or consideration of) mediation prior to litigation and empowers the Court to order mediation (and family counselling and other services) during the proceedings.52 It is beyond the scope of this paper to address how those powers might best be used within a therapeutic jurisprudential framework.

Justice Bathurst also addresses the use of mediation at different and potential serial occasions as follows:53

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...

52 Section 65F requires that the Court not hear proceedings unless Family Counselling has occurred and the combination of ss 13C and 60I allow the Court flexibility regarding the use of FDR once (prior to the proceedings) or continuously.
53 Bathurst, above n 24, 877.
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.

Similarly Justice Bergin\textsuperscript{54} reflects upon the observations of one of Australia’s most experienced and pre-eminent mediators and jurists:

\textit{In 2003, Sir Laurence Street AC, KCMG, QC made the following observation about the appropriate time for mediation:}

\textit{“It is impossible to generalise as to the time when a dispute is ripe for mediation. Some are ripe very soon after they erupt and before the parties become deeply entrenched in oppositional positions and incur expenditure on costs in consolidating those positions. Some are not ripe until the parties have fought them out to the point of judgment or award in a court or arbitration. Between these two extremes is a continuum.”}

I will happily leave the last word to Justice Bergin in summarising the present state of play:\textsuperscript{55}

\textit{Long gone are the days when mediation could be accurately described as “alternative” dispute resolution. It is now an integral component of the civil justice system in Australia.}

Thank you.

\textsuperscript{54} Bergin, above n 31, 60.
\textsuperscript{55} Ibid, 61.