Kluwer Mediation Blog

Compulsory Mediation – The Australian Experience

Alan Limbury (Strategic Resolution) · Monday, October 22nd, 2018

Recent blogs by Haris Meidanis on compulsory mediation in Greece prompt me to consider how lucky we are in Australia. Compulsion into mediation is common here. Outcomes are similar to voluntary mediation.

It is sometimes argued that mandatory mediation is a contradiction in terms because mediation is *"a voluntary process"*. This view was adopted by the UK Court of Appeal in the much criticized and (extra-)judicially regretted case of Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576.

Australian experience shows that, so long as the **outcome** is voluntary, it matters not that the **process** is mandatory. This echoes the well-known sentiments expressed by the late and beloved Harvard Professor Frank EA Sander: "*There is a difference between coercion into mediation and coercion in mediation*".

This difference is important.

Research

Australian research reveals that settlement rates and degrees of satisfaction are similar, whether participation be voluntary or compelled. Take retail tenancy disputes for example. These are required by statute to be mediated before they can be heard. The settlement rate has remained steady at over 80% for several years.

Power to order mediation

Most Australian courts have statutory power to refer cases to mediation and other forms of ADR. In some instances with the consent of the parties and in others without consent. Some legislation requires mediation to be undertaken or offered before a claim is filed. Commonwealth legislation requires applicants in Federal Courts to state what "*genuine steps*" they took to resolve their disputes beforehand.

Steps are "*genuine*" if they constitute a sincere and genuine attempt to resolve the dispute. All the circumstances and the nature of the dispute must be considered. Examples include:

- giving notice of the dispute to the other person and offering to discuss its resolution;

- providing relevant information and documents to the other person; and
- considering and participating in an ADR process.

When the Supreme Court of New South Wales was given power in 2000 to order mediation, with or without parties' consent, the then Chief Justice said:

"*It appears that, perhaps as a matter of tactics, neither the parties nor the legal representatives in a hard-fought dispute are willing to suggest mediation or even to indicate that they are prepared to contemplate it. No doubt this could be seen as a sign of weakness. Nevertheless, the parties are content to take part in the mediation conference if directed to do so by a judge. There is a category of disputants who are reluctant starters, but who become willing participants. It is to that category that the new power is directed*".

The legislation requires each party to participate in good faith. This has been held to mean to subject oneself to the process of negotiation or mediation. Also to have an open mind – to be willing to consider proposing options for resolution and to consider options proposed by the opposing party or the mediator.

If these conditions are satisfied, there is no obligation to act in the interests of the other party. Nor to sacrifice one's own interests. This does not explicitly require participation by a person having authority to settle, although this could perhaps be implied: Aiton v Transfield [1999] NSWSC 996 (1 October 1999).

The power of the Court to order parties into mediation often persuades them to agree to mediate when they otherwise would not. In exercising the power and in declining to exercise the power, courts give their reasons. These assist parties and their lawyers in deciding whether to agree to mediate. Mandatory mediations attain settlement and satisfaction levels similar to voluntary mediations. Even when not wholly successful, they often narrow the issues to be litigated. Giving reasons helps educate judges to see the inherent value of mediation. Mediation is not merely a way to shorten the court waiting list. This is a false premise, since success will attract newcomers to the court system and the list will lengthen again.

The Court recognizes "*the flexibility of the [mediation] process and its capacity to get around entrenched legal position-taking is its beauty*": Yoseph v Mammo & Ors [2002] NSWSC 585 .

In a memorable Australian defamation case counsel opposed a mediation order, saying:

"*the plaintiff, for reasons which may or may not be justified, would rather die than accept a mediator selected and forced on him by the defendants and it wouldn't matter if it was the Archangel Gabriel*".

In ordering mediation, the judge examined that argument and provided a compelling explanation:

"Litigation of an action of this kind in this Court is one that leads to the determination of what might be described as "*rights*". Mediation is not conducted to the exclusion of

"*rights*". The mediation might be directed to consideration of "*interests and needs*" independently of or against the backdrop of "*rights'* as exposed in the forensic environment": Waterhouse v Perkins [2001] NSWSC 13.

A great example of the benefits experienced in Australia by judges recognizing the different frameworks that apply in litigation and mediation. The ability to order mandatory mediation is an important part of their repertoire.

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