Recent blogs by Alan Limbury on compulsory mediation in former prompts me to consider how likely we are to achieve. 

In compulsory mediation, a common view is that interventions are related to mandatory 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 doctrinally reported “Press SC” decision. 

Australian experience shows that, as long as the outcomes are voluntary and neither the process is mandatory, this includes the least-bounds-interventions expressed by the late and beloved Harvard Professor Frank H. Easterbrook: “There is a difference between coercion into mediation and coercion in mediation.”

The difference is important.

In Australia, research reveals that different rates and degrees of satisfaction are similar whether participants are voluntary or compelled. Take retail tenancy disputes for example. They 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 other party, and in others without consent. Some legislatures require mediation to be undertaken or offered before a claim is filed. Compulsory mediation requires applicants to federal courts to state what “genuine steps” they took to resolve their disputes beforehand.

Steps are “genuine” if they are “sufficient and genuine attempts to resolve the dispute.” All the circumstances and the nature of the dispute must be considered. Examples include:

- premises notice of the dispute to the other person and offering to discuss its resolution;
- providing written notice and documentation to the other person; and
- considering and participating in an ADR program.

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:

“Mediation is not conducted to the exclusion of court process. It is a 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. 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 success when they are compulsory.

The power of the Court to order parties into mediation often persuades them to agree to mediate when they would otherwise resist. This does not explicitly require participation by a person having authority to settle, although this could be implied.

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.

The Court recognizes “the flexibility of the mediation process and its capacity to get around entrenched legal positions, if its beauty.”

In a memorable Australian decision, the Court of Appeal observed: “The plaintiff, for reasons which may or may not be justified, would have nothing to do with a mediator selected and forced on him by the defendants and it is not lawful for the court to interfere.”

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