COMPARATIVE ADR IN THE ASIA-PACIFIC –

DEVELOPMENTS IN MEDIATION IN AUSTRALIA

The 5Cs of ADR - Alternative Dispute Resolution Conference

Singapore 4-5 October 2012

Campbell Bridge SC FCIArb

1. Australia has always embraced various processes of dispute resolution including mediation. Historically from Federation in 1901 until relatively recently our industrial system has revolved around conciliation and arbitration. Such systems have gone some distance towards creating a culture amenable to mediation. Native title disputes, family law, and farm debt loan disputes are areas (among many) which have arisen in the past few decades and in which mediation is at the forefront. This paper will focus very much on how mediation has risen from relative obscurity to being one of the most significant methods utilised to dispose of cases in mainstream litigation in our Federal and State courts.

2. Like Singapore, Australia has a robust and efficient judicial system. Twenty years ago, it was the norm for the commencement of settlement discussions to await the arrival of the parties at the door of the court. Settlement approaches to the other side were perceived as a sign of weakness. By 2012 the landscape had changed completely. Virtually all cases now settle before the commencement of the hearing. While it is difficult to obtain statistics on this, the experience of the author and my many professional colleagues renders this contention virtually irrefutable. Of the relatively few matters that now proceed to hearing in our superior courts, virtually none do so without at least one mediation on the way. In Australia, mediation rather than arbitration is very much the preferred method of alternative dispute resolution ("ADR"). It is instructive to examine how and why the culture has changed so dramatically in a relatively short space of time.

3. 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.

4. The Australian legal system is a common law system which operates within the framework of a federation. The results of this is that, in effect, Australia has nine legal systems—the eight state and territory systems and one federal system. While the different state and territory systems have much in common, there are significant differences which it is beyond the scope of this paper to explore. There are also many specialised jurisdictions which are beyond the scope of this paper. The philosophy of encouraging ADR and the general means by which that encouragement leads to a practical institution of an ADR regime is common to the Federal Court system and to the courts of the states and territories. This paper focuses principally on how the Federal Court of Australia and the Supreme Court of New South Wales by their practices and procedures encourage a culture of mediation.

5. While the change in culture in the first instance was initiated by the Courts, it has been driven by the clients. In part it is reasonable to assume that the courts were responding to expressions of dissatisfaction from litigants. Most large corporations, institutions and insurers now demand that their lawyers be active and competent at the mediation process. Most clients will not tolerate the “fight everything with no regard to cost” mentality which was commonly adopted by many lawyers only a couple of

decades or so ago. Nor will the courts tolerate such an attitude. The sophistication and awareness of clients, particularly governments and institutional organisations such as banks and insurers, is such that any lawyers who actively advocate protracted litigation as an alternative to mediation, will run a great risk of forever losing the client. Insurers will actively pressure their lawyers into achieving early settlement. Solicitors who frequently act for insurance companies are subject to scrutiny on the specific issue of the percentage of cases in which they achieve early settlement. In general it is the clients and not the lawyers who in the first instance have ensured that the culture of ADR and mediation particular has swamped the previously existing strong adversarial legal culture of Australia. The strong support of the courts has also been vital to this change of culture. There is no culture now of a perception that a suggestion of some form of ADR indicates a sign of weakness or vulnerability.

6. From a client's perspective, the attractions of mediation over litigation or other alternative dispute resolution procedures can be summarised as follows:-

   (a) It is usually a far more economical means of dispute resolution than either litigation or arbitration ;
   (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.

7. While some parties may be prepared to litigate for so long as their financial resources permit, in Australia the courts are becoming increasingly less willing to permit the court system (which is a public resource) to be utilised by affluent belligerent litigants in this way. Judges are acutely aware that Courts are funded by taxpayers' money. The resources are not unlimited and the Court system should be available for all litigants, not just those who can afford to spend inordinate amounts of time in them. These are some of the reasons why the courts have strongly supported the rise of mediation.

8. 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. It is instructive to examine how, at the earliest stages of a dispute, lawyers are encouraged to look at alternative dispute resolution and the courts, to the extent to which they become involved, actively support that approach.

9. In terms of pressure from courts to encourage early settlement or the unnecessary continuation of protracted trials, there are financial penalties in terms of adverse costs orders against recalcitrant parties who do not skilfully utilise the costs protection procedures available both under the court rules and common law. These provide a suitable stick which can be and is used by the courts to discourage protracted litigation and to compel parties, for sound financial reasons, to look at methods of early resolution or provide a deterrent to running long trials with the astronomical costs associated with them. While certainly not the only method of resolving cases, mediation has become recognised in Australia as the most effective way of achieving an early resolution.

10. Mediation has also proven to be remarkably effective when utilised shortly before the commencement of a long and/or complicated trial. Part of the reason for the success of mediation in areas of complex professional negligence actions such as medical negligence claims is that it involves not only the parties and their lawyers giving very close consideration to the forensic risks associated with such litigation but also the fact that such trials are invariably very lengthy and exceedingly expensive to conduct. Matters can be (and are) referred to mediation either before or during an appeal by the relevant appeal court. A further and perhaps more substantial stick which provides a strong disincentive to frivolous litigation is the risk of personal costs orders against lawyers and not their clients.

11. The significant pressure towards early resolution requires lawyers to consider how best to achieve that outcome. There are many cases which experienced and competent lawyers can easily resolve without recourse to a third party whether it be a mediator, an arbitrator or a judge. Those cases are commonly dealt with by way of informal settlement discussions or, in more difficult circumstances, a more formal

settlement conference. In the more difficult situations which arise when one party or another is superficially (at least) intractable an independent intermediary can greatly assist in achieving a resolution. Mediation has become the preferred method of resolving such matters.

12. 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.

13. Ethical obligations are specifically incorporated in the New South Wales Law Society Rules which provide as follows:-

> "*A.17. A practitioner must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case.*
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> *"A.17A. A practitioner must inform the client or the instructing practitioner about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation."*

14. The rules thus impose an obligation to actively encourage settlement of a case, not just inform the client of the settlement option. The obligation arises in respect of a lawyer's responsibilities to both the client and to the court. Even if one's client takes the attitude that he or she is not particularly interested in compromise or settlement,

the fundamental obligations of a lawyer remain. In such circumstances, the client must be told of these matters. If the client chooses to ignore that advice (as sometimes happens), then the lawyer has at least discharged his or her obligations.

15. In *Skinner & Edwards (Builders) Pty. Ltd. -v- Australian Telecommunications Corporation* (1992) 27 NSWLR 567 at 571, Cole J (as he then was) said as follows:-

"The Court expects parties in ……..litigation….to act in a sensible ……fashion. That imposes upon the parties an obligation to consider the ultimate financial outcome of litigating or compromising a dispute. Unless there be some major matter of principle involved, there is no point in a party to commercial litigation succeeding and establishing a factual circumstance or legal consequence at a net cost or loss.

The expectation the Court has that parties will act sensibly imposes a very heavy duty indeed upon legal advisors, both barristers and solicitors. They have in my view, an obligation at the commencement of litigation in this division to advise their clients of the likely duration, inconvenience and cost of litigation upon alternative success, qualified success or loss. Only then can a client make a sensible commercial decision regarding litigation or compromise."

16. The effect of Rules A.17 and A.17A is to enshrine this practical and common sense obligation in a formal rule. There is little doubt that the obligation will require re-consideration at various stages during the conduct of proceedings. It is an ongoing obligation. Giving a client the appropriate advice at the commencement of litigation and ignoring its repetition as the litigation becomes exceedingly more complex and expensive would not be a prudent course for a lawyer to take.

17. At the time that Cole J. gave that judgement, such sentiments were more frequently ignored than adopted by litigants and their lawyers. These days, the impact of costs protection procedures and ethical rules have rendered the views expressed by Cole J. almost a reality. The significance of the ethical rules is that, having pressured lawyers into seriously considering resolution of the case, the question which then arises is how to carry their ethical obligations into effect. A commonly adopted means is to conduct a mediation. The pressures created by those rules has been a significant factor in the increase of mediation.

18. This decade has also seen specific court rules put in place in certain jurisdictions to encourage and hopefully persuade would-be litigants to seriously address the question of resolution of a dispute prior to commencing litigation. It is fair to say that such procedures have not found universal favour nor have they been commonly adopted.

19. One such procedure is prescribed in the Civil Dispute Resolution Act 2011 (Commonwealth) which commenced on 1 August 2011, at the same time as the new Federal Court Rules. The Act requires parties to civil proceedings in the Federal Court and the Federal Magistrates Court to take "genuine steps" to resolve or narrow the issues in dispute before commencing proceedings. The Act provides that "genuine steps" includes:

    (a) notifying the other party of the issues in dispute and offering to discuss these with them
    (b) providing relevant information/documents to the other party;
    (c) consideration and/or participation in alternative dispute resolution; and
    (d) negotiation.

20. Applicants are then required to file a Genuine Steps Statement upon instituting proceedings and respondents before the hearing date specified in the originating application. Failure to do so will be relevant to costs. Quite obviously, it is not an appropriate procedure for some proceedings such as actions for a civil penalty, bankruptcy matters, some matters under the corporations law, ex parte applications; and appeals.

21. *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282 concerned a dispute in a Superior Court over a small sum of money - approximately $10,000. Reeves J noted that the fact that the matter was proceeding when a small amount of money was at stake. His Honour was exceedingly critical of the amount of costs incurred in preparation of substantial affidavit material in such a small case. In dealing with the parties' failure to comply with the genuine steps procedures, he blamed the lawyers for those failures. After stating that the matter did not justify the use of the Court's resources in hearing the matter, His Honour ordered

that the lawyers on both sides be joined as parties to the action or rather that part of the action relating to costs, and the matter was referred to the relevant disciplinary authorities in Queensland.

22. In New South Wales the Labor government which was defeated at the polls in March 2011 had previously passed amendments to the Civil Procedure Act 2005 (NSW) requiring parties to take steps to resolve proceedings prior to litigation. This legislation was substantially similar to that which applied in the Federal Court of Australia. The incoming government has postponed its operation. It is not possible to say when or if the legislation will come into force in New South Wales. In Victoria, similar legislation was passed but promptly repealed when the government changed.

23. While these pre-litigation procedures would not usually be expected to trigger an upsurge in mediation (although there may be some cases where a very early mediation could be conducted), they are part of the overall landscape in which mediation is an essential feature which is very much focused on early resolution of cases or resolution in circumstances which avoid a trial.

24. It is trite to note that conducting litigation is intrinsically risky. As a mediator, the author constantly reminds parties that however strong they think their argument is, virtually all litigants in the law reports were optimistic at the start of litigation yet at least half of them lost. A significant part of the financial risk in any substantial piece of litigation relates to the costs. Obviously a settlement eliminates the risk of litigation and the potential costs become a factor in the choice of parties to pursue the mediation option. Part of the carrot and stick approach adopted universally in Australian courts concerns potentially severe costs penalties against parties if matters are run in court rather than resolved. As a common law country, the general rule in Australia is that costs follow the event. In other words, the loser of litigation pays the costs of the winner. However procedures are in place which permit litigants on either side to effectively hedge against the risk of incurring a substantial cost order even if the result is not a complete victory.

25. Court rules provide for formal Offers of Compromise and the common law recognises Calderbank (*Calderbank v Calderbank* [1975] 3 All ER 333) offers of settlement. Either device can be used to provide a sanction as to costs against a party who

unreasonably fails to accept an offer of settlement. Parties who incur costs unnecessarily as a consequence of refusal to accept a reasonable offer are severely penalised in relation to what costs are properly recoverable. The mediation process is recognised not only as perhaps the most effective way of resolving cases, but also provides an excellent opportunity to assess an appropriate range for an offer of compromise or a Calderbank letter. Even if the matter does not resolve at mediation, placing mechanisms to put parties at significant risk with respect to cost in due course further aids the process of resolution of disputes. It is well recognised that the so-called "success" of mediation should not be looked at only on the basis of whether or not a case resolves on the day of the mediation.

26. A Calderbank offer is an offer which may be without prejudice and leaves costs in the discretion of the court depending upon the outcome of litigation. In New South Wales, the court rules (Uniform Civil Procedure Rules Part 42 Division 3) provide for without prejudice confidential offers to be made with structures in place in relation to time limits, acceptance, and consequences. A party on either side of the record who fails to beat an offer of compromise may be subject to dramatic costs penalties notwithstanding the outcome of litigation. The advantage of an Offer of Compromise as opposed to a Calderbank offer is that an Offer of Compromise places the onus of escaping the consequences of the offer (so far as the unsuccessful party is concerned) on the unsuccessful party itself whereas a party seeking to rely upon a Calderbank offer must establish why the discretion should nevertheless be exercised in his or her or its favour. Beazley JA of the New South Wales Court of Appeal has published an excellent paper entitled "Calderbank Offers" which deals with the common law of Calderbank offers and with many authorities relevant to the statutory regime in New South Wales with respect to offers of compromise. The paper was given to the conference of the Australian Lawyers Alliance in March 2008 and at other legal conferences in Australia.

27. To add to the potential minefield associated with conducting frivolous, unmeritorious or unnecessarily expensive litigation in Australia, there is the risk of personal cost orders being made against lawyers themselves rather than their clients. In extreme situations, lawyers in New South Wales may be subject to personal cost orders. In other words, it is the lawyers and not their clients who are responsible for the costs.

The power of a court to make cost orders against solicitors is found in both s. 99 of the Civil Procedure Act 2010 and s. 345-348 of the Legal Profession Act 2004. In *Harris v Villacare Pty Limited* [2012] NSWSC 452 a Supreme Court judge hearing a simple motion was confronted with an affidavit of the defendant's solicitor which was over four pages long and attached "78 pages of annexures separated by 25 dividers". He took the view that the affidavit was largely irrelevant to the matters in issue, attached an excessive number of documents, and concluded that it was appropriate for him to make a personal costs order simply if costs were incurred "without reasonable cause". The defendant's solicitor suffered a personal costs order. The interesting question is whether or not this principle will be extended to a situation where a lawyer unnecessarily prolonged litigation rather than resolving it early by way of mediation or otherwise.

28. The significance of the cost regimes is in place is not that they lead directly to mediation. Rather, those regimes enable parties to very much increase the financial risks of litigation. Both parties and their lawyers wish to minimise the risk. Obviously settlement or resolution of the case eliminates the risk altogether. As mediation is so effective, it is frequently utilised. In the overall complex scenario of a dispute, the risk associated with adverse costs orders is very much a factor in why a resolution is desirable. The costs risk is just part of a landscape which has been created by the courts where settlement is desirable and mediation is a particularly effective way of eliminating that risk.

29. With respect to litigation being conducted in the state Supreme Courts or in the Federal Court, there is some court annexed mediation but it usually does not take place in the more substantial cases. The Federal Court of Australia website records the following with respect to the likelihood of being subjected to mediation in matters pending in the Federal Court and the procedures which are adopted in relation to the appointment of the mediation:-

> *"In the Federal Court judges actively manage cases so that they are quickly and efficiently resolved. Parties are expected to assist in bringing about this result. 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.*

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, trade practices, human rights, admiralty, tax and costs.

Who will be the mediator?

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 obtained a certain level of qualifications, skills, knowledge and experience. Registrars are also required to undertake ongoing professional development of the mediator skills.

Parties may agree to use an external mediator at their own expense.

30. In the Supreme Court of New South Wales, the situation is not entirely dissimilar. The information provided by the court is as follows:-

HOW ARE CASES REFERRED TO MEDIATION?

This is done by a court order. The parties can ask the Court to make an order for referral, or the Court may consider the case appropriate for referral, even if the parties do not ask. The Court has the power to make a referral to mediation with or without the consent of parties. Parties can use either of two types of mediation – court-annexed mediation or private mediation.

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HOW MUCH DOES MEDIATION COST, AND WHO PAYS FOR IT?

Court annexed mediation

With court-annexed mediation, there is no charge for the mediator or use of rooms. The cost of legal representation is the responsibility of each party.

Private mediation

With private mediation, there are usually fees for the mediator and also for the use of rooms. In addition, some mediation agencies charge a commission/registration fee. Some mediators charge for preparation time separately from the mediation session.

Private mediation costs vary from mediator to mediator. For an estimate of the overall costs, you could contact:

- your legal advisor

- a mediation provider organisation or a private mediator (private mediators and more mediation provider organisations are listed in the Yellow Pages).

The cost of legal representation is the responsibility of each party.

Usually each party pays an equal proportion of the costs associated with the mediation, although other arrangements can be agreed by the parties or ordered by the Court. The order of referral to mediation usually includes an order for how the costs are to be apportioned.

If there is an issue of financial hardship, some mediation providers will consider requests for reduction of the mediation fee. This needs to be discussed with the mediation provider at the time of arranging the mediation. Note that some mediation providers apply a specific means test to determine fee reduction.

31. In reality, the overwhelming majority of mediations which take place with respect to any substantial piece of litigation with a significant amount of money at stake are conducted as private mediations not court annexed mediations. Many mediations take place as a result of a court order for a mediation. Most, if not all courts can and will refer matters to mediation without the consent of the parties (s. 110K Supreme Court Act 1970 (NSW); s. 55A Federal Court Act (Commonwealth)). Except in specialised jurisdictions, and in Family Provision Act matters (which involve disputes between families over wills and estates) in the Supreme Court there is no mandatory mediation.

32. Costs are usually (but not always) shared equally between the parties. In the case of court ordered mediations, in New South Wales the cost of the mediation forms part of the costs of the proceedings which are recoverable.

33. 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 a 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. As stated at the beginning of this paper, it would be exceedingly rare for any matter of any complexity to reach the trial stage without it having been through at least one mediation.

34. There is no body in Australia like the Singapore Mediation Centre or the Indonesian Mediation Centre. This is not to say that various ADR organisations have not been

extremely active and influential in the Australian mediation landscape over many years. Bodies such as the Institute of Arbitrators & Mediators Australia (IAMA) and the Association of Dispute Resolvers (LEADR - previously "Lawyers Engaged in Alternative Dispute Resolution") have been extremely active in promoting ADR and in providing training and accreditation programs. While these bodies have panels of mediators accredited with them, most mediation in matters pending in the courts is conducted by the legal profession. Both the Supreme Court of New South Wales and the District Court of New South Wales maintain lists of the panel mediators. These days there are numerous accrediting bodies including the New South Wales Bar Association and the Law Society of New South Wales. The National Alternative Dispute Resolution Advisory Council (NADRAC) describes its role on its website as "an independent body charged with providing policy advice to the Australian Attorney-General on the development of ADR and with promoting the use and raising the profile of alternative dispute resolution"

35. The usual procedure is that the parties will agree in principle that the mediation should be conducted or will be subjected to a court order to that effect. Usually the court will leave to the parties questions of the appointment of the mediator and the place where the mediation is to occur. The time of the mediation is sometimes subject to a court order - mostly to the effect that the mediation is to occur before a particular date. The parties then usually exchange lists of names of possible mediators, many of whom are well known senior barristers (usually Senior Counsel), solicitors or ex-judges. Being unable to agree upon a mutually acceptable mediator is unheard of in the author's experience. In this event, it is likely that, if the matter was listed before the court, the judge would simply select a mediator from the relevant court panel.

36. As can be seen from the extracts from the websites of the Federal Court and the Supreme Court, the Federal Court seems to be more proactive in terms of court annexed mediations. In the Supreme Court, such mediations usually take place in the context of dispute over small amounts of money or particularly impecunious parties. The Supreme Court is particularly active with respect to mediations in Family Provision Act matters which involve disputes between families over estates. There is no doubt that court annexed mediation has been successful in numerous jurisdictions. According to statistics from the Victorian Supreme Court, between 2005 and 2008

there were 205 court annexed mediations conducted by Masters or Associate Judges in the Victorian Supreme Court of which 145 matters were settled. These figures are in keeping with the experience of the writer in New South Wales.

37. There is virtually no mediation conducted as judicial mediation by sitting judges in common law and commercial matters in either the state Supreme Courts or the Federal Court. The previous government in Victoria had some enthusiasm for judicial mediation, but it is fair to say that judges generally are of the view that judges should judge and mediators should mediate. Judges are acutely aware of the necessity of retaining a genuinely open-mind and being seen by all parties to do so. It is difficult to see how a judge could mediate in any way which touches upon evaluative mediation yet still hear the case. There is a difference between being very proactive in encouraging settlement, actively managing cases to compel parties to litigate the real issues, and expressing opinions about the factual or legal merits of the case before those merits have been properly canvassed in court.

38. What has been the outcome of all these factors in the real world of Australian litigation in 2012? Now, virtually no case proceeds to trial without at least one round of mediation and is and sometimes more than one. Most mediations in major litigation, whether or not court ordered, are conducted by private mediators arranged by the parties. Most mediators are specialist members of the bar (often Senior Counsel), senior solicitors and retired judges. While there are notable exceptions, for example in construction disputes, once matters proceed to litigation, lawyers usually appoint other lawyers as the mediator. The reality of what has occurred in Australia is summarised in a paper of the Honourable Marilyn Warren AC, Chief Justice of Victoria in a paper entitled "Should Judges Be Mediators?" where Her Honour states "mediation is part of litigation process has been extraordinarily successful. Without it, courts would have faced intolerable difficulties."

39. In Australia, mediation is very definitely here to stay. Leaving aside the narrow and misleading measure of the success of mediation i.e. the rate of "on the day" settlements, there are many other benefits which are recognised by all involved in the process. Accurate current statistics and Australia particularly in relation to private mediations are virtually unobtainable. On the simple analysis of statistical settlements, the experience of the author in mediating hundreds of professional negligence actions

over several years is that in excess of 70% settle on the day and no more than 10% and probably significantly less would resolve ultimately before trial.

40. There is also much material to support the proposition that the parties find mediation a more beneficial process than litigation. Disputes which do not resolve at mediation usually become shorter as a result of the mediation because parties focus more on the real issues. The process of mediation, if conducted properly by a competent mediator, almost invariably renders a dispute far more susceptible to settlement at some time in the future. Finally, from the perspective of government and the courts, a resolution of disputes or a reduction in court time by any actual hearing are extremely beneficial reasons described in this paper. Legal practitioners and their clients who do not embrace the changes of culture described in this paper may fail to do so at their financial peril.