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ADR in the courts

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The *Supreme Court Act 1970* (NSW) has recently been amended in ways which, in effect, empower the Court to compel proceedings to be mediated or neutrally evaluated.

The relevant key provision in the legislation is s 110K which provides, inter alia, that in appropriate circumstances the Court may order proceedings, or parts thereof, to mediation or neutral evaluation, with or without the consent of the parties to those proceedings. The parties are able to choose their own mediator or evaluator, but the Court may appoint one if the parties are unable to agree in this regard. Section 110L places a duty on each party to participate in good faith in the mediation or neutral evaluation. The costs of the processes are payable by the parties.

The amendments to the *Supreme Court Act* were reported to have the support of the Attorney General, the Chief Justice of the Supreme Court and the Law Society of NSW. The support of the Law Society of NSW is not surprising, given the Society's endorsement in principle of mandatory early dispute resolution processes contained in its recently released Report of the Early Dispute Resolution Taskforce. For some years the *Supreme Court Act* contained provisions which facilitated voluntary mediation and neutral evaluation but, on anecdotal evidence at least, the take-up rate was very small.

The new development raises a number of interesting issues. Firstly, it sets a precedent and sends out a powerful message to the NSW community at large, including the legal profession, about the increasing importance and utilisation of alternative dispute resolution processes. When the most influential court in NSW, with the support of the Attorney General and the Law Society of NSW, signals its willingness to become even more active in pursuing alternatives to litigation, other courts and tribunals will need to take note. It must be remembered that the same legislation which implemented voluntary mediation and neutral evaluation in the Supreme Court did precisely the same for the District Court, Local Court and Compensation Courts of NSW. The move by the Supreme Court must surely create pressure on the other courts to follow. This development is also consistent with similar moves in other Australian States.

Secondly, the development may provide a much needed stimulus to the demand for mediation and neutral evaluation services in NSW. The Supreme Court already maintains a list of mediators and neutral evaluators, and those practitioners will probably have high hopes for more work in this area if the Court actually exercises its powers.

Thirdly, it will be important and interesting to see what mechanisms are put in place to ascertain the suitability of cases for mediation or neutral evaluation, and how the decision is made to refer a case to either process. Most ADR professionals regard the screening or intake process to be as important as the dispute resolution process itself. Cases may be unsuitable for mediation or neutral evaluation for several reasons. In personal disputes, there may be a serious inequality in bargaining power between the parties, or there may have been violence or abuse or the risk thereof. The physical, emotional or psychological state of one of the parties may indicate an inability to participate in the process. In all disputes, one of the parties may be acting in bad faith, or have engaged in non-disclosure, or want to use the process merely to gain delay or some other advantage.

Cases may be unsuitable for both mediation and neutral evaluation if there is the need to clarify or establish a point of law, or create a precedent. In very general terms, neutral evaluation may be more suitable in those cases where the dispute is about liability or quantification of damage, whereas mediation may be more suitable when the dispute is about relationships, values or interests. These are generalisations, but the important issue is to recognise the need to consider, on a case by case basis, whether a case is suitable before referring it to a particular process.

The fourth issue which this development raises involves the whole debate about whether a consensual process such as mediation (and, to a lesser extent, neutral evaluation) can be made mandatory. The NSW Government has again shown its willingness to make participation in mediation mandatory, consistent with the *Retail Leases Act 1994* (NSW) and the *Farm Debt Mediation Act 1994* (NSW).

There are many competing arguments for and against making mandatory processes such as mediation which would otherwise be regarded as a voluntary, consensual process. It could be argued that mandatory mediation is, in fact, a contradiction in terms. However, it must be understood that the only compulsion is to attend mediation and not necessarily to settle, though it is noteworthy just how effective mandatory mediation schemes are in achieving settlements. With the passage of time reliable information is becoming available as to the Australian experience with mandatory mediation. The settlement rates for a selection of mandatory mediation schemes are set out below.

Mediation under *Farm Debt Mediation Act* (NSW)	89 per cent
Mediation under *Retail Leases Act* (NSW)	73.87 per cent
NSW Legal Aid Commission Case Conferencing	70 per cent
Queensland Legal Aid Conferencing Scheme	69.75 per cent

By way of further contrast, a selection of settlement rates for voluntary mediation schemes

are set out below:

NSW Department of Fair Trading Mediation Service	85.05 per cent
Law Society of NSW Mediation Program	70 per cent
Family Court of Australia Mediation Service	70 per cent
Queensland Settlement Week	80.05 per cent

These figures give much food for thought. The comparatively early experiments in Australia utilising mandatory mediation suggests a settlement rate of between 69.75 per cent and 89 per cent, or an average of 79.375 per cent. There is, perhaps surprisingly, little significant differentiation between success rates in voluntary mediation schemes and mandatory schemes. The other interesting factor which is present in this sample is that in all but the Family Court of Australia Mediation Service and the Department of Fair Trading Mediation Service there is a very high incidence of lawyer representation at the mediation (that is, the disputants are accompanied by a lawyer who often participates in the mediation process).

There would be legitimate arguments against mandatory mediation if all cases were referred without adequate screening, or if there were not enough qualified and experienced mediators, but both of these issues will be addressed in the Supreme Court's proposal. There are also the philosophical arguments against mandatory mediation based on the fact that settlement is not always desirable or in society's interests, but again these arguments are met by the response that mandatory mediation does not force parties to settle; it merely forces them to attend.

Another related ideological argument is that mandatory mediation fundamentally challenges the rule of law in that litigants are no longer individuals who have rights, but become mere components of a problem to be solved. Again this argument is met with the response that litigants are entitled to litigate, to assert their rights, and to proceed to a full hearing, notwithstanding having to attend mediation. The writer is aware of no proposal to penalise parties who participate in mediation or neutral evaluation but fail to reach settlement, other than existing costs related penalties which deter, in the public interest, obstructionist and aggressive behaviour in litigation. Even the s 110L requirement to act in good faith will not compel parties to settle, although this provision will certainly stimulate the debate about what is 'good faith' participation in dispute resolution processes.

The proposal to introduce mandatory mediation and evaluation in the Supreme Court of NSW offers the prospect of better utilisation of the Court's resources, earlier settlements, and costs savings to the litigants. The litigating public in NSW, the legal profession and NSW ADR professionals should welcome this development enthusiastically.

Tom Altobelli LLM (Syd) SJD (UTS) is Associate Professor, Faculty of Law, University of Western Sydney.

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PUBLISHING EDITOR:
Elizabeth McCrone

MANAGING EDITOR:
Linda Barach

PRODUCTION
Kylie Pettitt

PUBLISHER
Oliver Freeman

SYDNEY OFFICE:
Prospect Media Pty Ltd
Level 1, 71-73 Lithgow Street
St Leonards NSW 2065 AUSTRALIA
DX 3302 St Leonards
Telephone: (02) 9439 6077
Facsimile: (02) 9439 4511
www.prospectmedia.com.au
prospect@prospectmedia.com.a

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