

**JUDICIAL MEDIATION AND CH III OF THE
COMMONWEALTH CONSTITUTION**

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A thesis submitted in fulfilment of the requirements
for the award of the degree of Doctor of Philosophy

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SIGNED CERTIFICATION

This thesis is submitted to Bond University in fulfilment of the requirements for the Degree of Doctor of Philosophy.

This thesis represents my own work, except where due acknowledgement is made, and contains no material which has been previously submitted for a degree or diploma at this University or any other institution.

Iain Field

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ABSTRACT

The judicial process is neither static nor uniform. In recent years, judicial control over the civil trial process has become increasingly apparent. Judges are now frequently involved in the provision (either directly or by referral) of alternative dispute resolution ('ADR') processes. The individual reforms which punctuate this increase are often referred to as 'access to justice' reforms, and respond to concerns regarding the cost and quality of adversarial litigation. One such reform, and the focus of this thesis, is a process described as 'judicial mediation'. Judicial mediation falls within the 'third-wave' of the access to justice movement, and has the potential to improve the quality and efficiency of civil litigation.

This thesis examines judicial mediation from a constitutional and jurisprudential perspective. More specifically, it asks whether Ch III of the Commonwealth Constitution limits the capacity of Australian judges to engage in judicial mediation and, if so, how this will affect the development of judicial mediation in practice. The idea of judges mediating can be controversial, and calls for a re-examination of certain underlying assumptions regarding the nature of the judicial process. Many of the issues raised by judicial mediation also reflect broader practical and jurisprudential questions common to other third-wave reforms, including case management (in particular prehearing conferences), court-connected ADR, and less adversarial trial procedures.

It has been argued that judicial mediation will conflict with certain inviolable precepts and conditions of the common law judicial process; in particular the principles of

procedural fairness and the integrity of the judiciary. Certain of these requirements have been identified as implications of Ch III. On this basis, it has been suggested that federal judges cannot mediate, that judicial mediation is ‘incompatible’ with the ‘status and role’ of State and territory courts as repositories of federal judicial power, and that private mediation by an active judge would be ‘incompatible’ with the performance of his/her judicial functions. This thesis demonstrates that, in practice, it is highly unlikely that judges will be prohibited from mediating by the requirements of Ch III in any of these contexts.

Many of the concerns voiced in relation to judicial mediation are fuelled by the belief that mediation and adjudication are somehow dichotomous, and that the term ‘judicial mediation’ is therefore oxymoronic. These views reflect an early tendency to define mediation in contradistinction with litigation. The reality, demonstrated in this thesis, is that mediation and adjudication are more aptly described as theoretical constructs which occupy opposing ends of the same ‘procedural continuum’. The question is not whether judges can ‘mediate’, but how far towards the mediation end of this continuum judicial participation can travel before the boundaries of acceptable conduct are exceeded. In practice, simple strategies can be adopted to minimise any risk of apprehended bias arising, or of damage being sustained to the integrity of the judicial institution.

Perhaps more importantly, this thesis demonstrates that the ultimate object of Ch III would not be served by the prohibition of judicial mediation. It is shown that the High Court’s approach to Ch III can be framed as an attempt to maintain and expand four essential jurisdictions; exclusive, inherent, appellate and supervisory. These

jurisdictions serve the rule of law by insulating the judiciary and the judicial process from governmental interference (exclusive and inherent jurisdiction), by ensuring an avenue of appeal to the High Court from all Australian Courts (appellate jurisdiction), and by securing the judiciary's overarching authority in all spheres of Australian dispute resolution (supervisory jurisdiction). This thesis demonstrates that judicial mediation poses no threat to any of these jurisdictions and that, on the contrary, judicial mediation has the potential to further the rule of law by increasing the efficiency and quality of dispute resolution in independent and impartial tribunals.

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