INSIGHT

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MEDIATION

MODERN JUSTICE IS STRIKING CREATIVE SOLUTIONS

Judicial mediation as part of the litigation process has been extraordinarily successful. It sets this Court apart from others and underscores our strong commitment to innovative justice systems that truly work.

– Victorian Supreme Court Chief Justice Marilyn Warren

Mediation is a vital part of the Supreme Court's work.

Over the past decade, there has been a determined focus by the Victorian Supreme Court on finding efficient, flexible and appropriate ways of resolving disputes other than by pursuing courtroom trials. Much effort has been dedicated to judicial-led mediation, and the results in this important area of dispute resolution have been extraordinary.

Year after year, about two-thirds of the hundreds of cases that proceed to the Court's mediation unit resolve either at, or shortly after, mediation [see Figure 1]. That has helped to shift a substantial workload from the Court's civil trial lists and aided swifter resolution of other non-mediated cases. It has also implanted a bank of knowledge within the Court about techniques for achieving excellence in mediated settlements.

While there is a vibrant and critically important private market for mediation, and many members of the Victorian Bar and legal profession are accredited mediators, what distinguishes judicial-led mediation in the Supreme Court is the gravitas and command that is brought to the mediation by the presiding judicial officer. The mediation process may be informal, but the agreed outcome is infused with the authority of the highest court in the state of Victoria.

In this first edition of *InSight,* we focus on the Supreme Court's burgeoning mediation group, examining how and why it works so well, and why it is vital that court-based mediation continues to flourish.

Judicial-led mediation is very different from private mediation not only because it is ordered by the Court, urged by the Court and supervised by the Court, but because any agreement resulting from such mediation carries with it the solemnity of the Court.

Settlements for many millions of dollars have been negotiated on behalf of thousands of claimants through judicial-led mediation in the Supreme Court. Some of the biggest have involved class actions or complex commercial claims by multiple parties, such as the Pankaj and Radhika Oswal v ANZ Bank case in 2016, when mediation helped to end multifaceted, protracted and multi-jurisdictional proceedings.

One of the most prominent mediations involved the Murrindindi bushfires class action, which achieved a $300 million settlement for people physically injured and traumatised in the devastating 2009 Black Saturday fires or who had lost business and property assets. A parallel settlement was reached in the Kilmore East-Kinglake bushfires class action through the use of non-court mediators.

Securing these class action settlements through mediation saved the Supreme Court 300 sitting days plus a commensurate number of

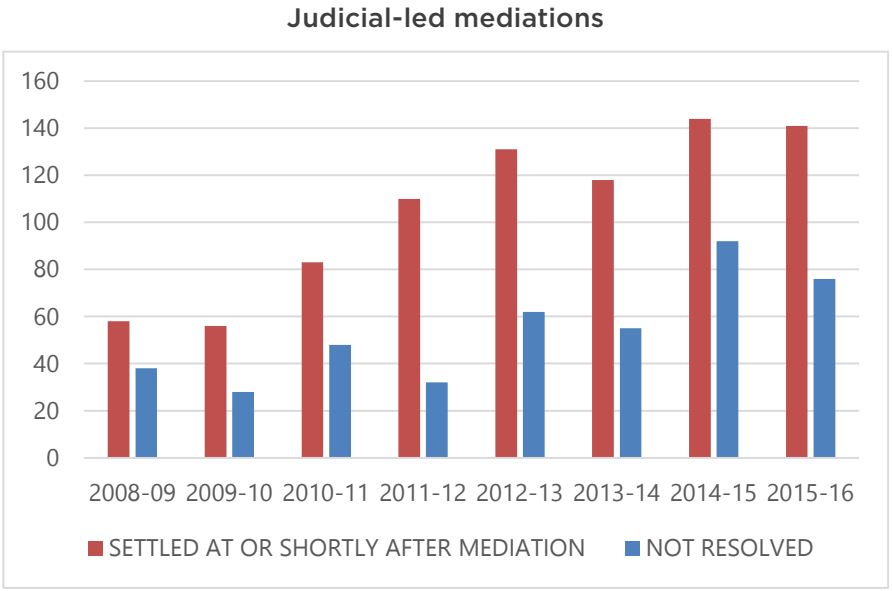

Figure 1.

days that would otherwise have been reserved for judges to write decisions.

Of course, some matters are fundamentally unsuitable for mediation: matters, for example, where a question of law must be decided or a test case. These and other similar types of cases will proceed directly to trial.

Mediation, though, has become an integral aspect of case management at all levels in the Victorian Supreme Court's civil lists. Judges play a significant role by constantly challenging parties to find agreement before trial or urging them to pare down their multi-pronged claims and focus on what really matters and what is genuinely in dispute.

Close co-ordination between trial judges in the civil lists and the Court's mediation team ensures there is immense flexibility to host mediations at short notice. A matter might begin at trial in the morning and be referred to mediation in the afternoon at the Court's special-purpose mediation centre across the road.

Justice James Judd says while a process of mediation is required to be undertaken before a civil trial in the Supreme Court, "the most effective mediation method I have found is to make both parties open their cases, and as soon as they have opened to send them immediately to the Associate Justices". He says this technique generates "as much as a 90 per cent success rate" for settlement.

The increase in the number of mediated cases in the Supreme Court, and the associated decline in the number of cases going to trial, is the product of a profound revolution in the way courts around the world are managing justice issues. Over the past 30 years, the traditional adversarial battle before a judge has become the exception, not the norm, as courts adopt a 'multi-door' approach to resolving disputes. This reconceptualisation positions judges at the focal point of the Court yet provides disputants with many potential routes to resolution other than an expensive trial.

Under the Civil Procedure Act 2010, all parties commencing civil actions in Victoria's Supreme, County or Magistrates' courts are required to make "reasonable endeavours" to resolve their disputes. Getting parties to resolve their differences before trial saves the disputants and the Court time and money. It helps empower parties to find enduring solutions for themselves, rather than having them imposed. And it frees up judges to attend to other cases that, for one reason or another, are not suited to mediation and do require a court-based decision.

"Why go to mediation?" Associate Justice John Efthim says. "Because the courts simply cannot cope if everything is rushed off to trial, and because mediation provides a resolution that, if properly done, may well leave the parties' relations intact. A trial, and a decision, fixes a position. It may resolve the issue but it may raise a lot of other problems."

Mediation in the Supreme Court is essentially a round-table discussion led and moderated by an associate judge or judicial registrar. The benefits for litigants in this regard are many. The judicial officers are experts in particular areas of mediation (e.g. commercial disputes, testators and family maintenance), they are specialists in the practices and procedures of law, they are part of the litigation administration chain inside the court, and they can be deployed at short notice to hear disputes on request from judges. They aim to help parties develop solutions outside the confines of pleadings or beyond what might be admissible in a court.

Supreme Court Associate judges John Efthim and Jamie Wood

were both previously at the Federal Court in Melbourne, where they presided over significant mediations in areas such as native title claims, intellectual property, migration, trade practices and workplace relations. John Efthim joined the Supreme Court in 2005 as a judicial officer and became its first official mediator. Jamie Wood followed six months later. Over the next decade, there was a concerted effort by the Supreme Court to develop a vigorous mediation practice.

"In 2006, I would have done about a dozen mediations for the year," Associate Justice Wood says. "In the last two years, I would have done about 100 in each year – and that's only me." He says flexibility, creativity and a good ear for listening are the keys to successful mediation. "It's a kind of problem solving process. When you all sit down in the one room, you may find building blocks for a settlement that no one has even thought of yet, or you might devise one that a judge may not be able to deliver considering the parameters of the litigation."

"A mediated outcome could have extras in there that a judge might not be able to deliver, such as an apology, a joint statement from the parties, timeframes, payments by instalments and so on."

Parties at a mediation are urged to concentrate on outcomes and consequences, and they are encouraged to devise solutions instead of focusing on hostile disagreements. What is discussed within the confines of the room must remain strictly confidential.

Commercial cases represented 49 per cent of the mediations list in 2015-16. Many well-resourced commercial parties, including large companies, prefer to resolve their disputes swiftly and privately,

Some of the mediation team. Back: Commercial Court Judicial Registrar Julian Hetyey; Appropriate Dispute Resolution Manager Nicholas Day; Associate Justice Jamie Wood. Front: Associate Justice John Efthim; Costs Court Judicial Registrar Meg Gourlay.

away from the courtroom, away from public glare, and with the certainty that they will have some say in the outcome. Their goal is often a manageable, flexible solution instead of an absolute ruling. Mediation reduces their overall legal expenses, limits potential damage to their public and commercial reputations, and it curtails the prospect of an unhappy loss before a judge.

Justice Judd, however, notes that not every case is amenable to mediation. "It depends on whether you have sensible counsel who can properly advise their clients," he says. "And you have got to have a case that does not involve too many hidden agendas." It also hinges on the personalities of the mediators and the willingness of judges to press disputants on difficult issues.

"Sometimes it needs a judge to focus the parties' energy and make them think about their 'exposures'," he says. "With corporations or business that are in dispute I always emphasise the cost of business 'distraction', which is very difficult to measure but very real. The distraction for management can be a critical thing and highly prejudicial."

While about half the mediations managed by the Supreme Court are commercial matters, many others arise from the Testators Family Maintenance list. These commonly involve disputes between family members who disagree, for example, over the distribution of deceased estates or the split of properties and other assets.

What makes the judicial-led mediation managed by the Supreme Court unique is its close integration with the Court's existing litigation process, the decades of expertise offered by its mediators, its flexibility, and the Court's enduring authority as a superior court of excellence. ■

MEDIATION - THE BID TO FIND MIDDLE GROUND

A senior counsel, two barristers, three lawyers, five plaintiffs and seven defendants are arranged either side of a long wooden table. It is a relatively big gathering, though not the most crowded mediation the Victorian Supreme Court has handled. Some mediations – class actions, for example – can involve scores of counsel, barristers, lawyers and their clients.

It all occurs in the Supreme Court's purpose-designed mediation centre, where numerous cases can be mediated in private, across a series of meeting rooms. Some mediations arise on the orders of trial judges; others are here because the parties concede the prospect of striking a deal is best if it is done informally, outside the confines of the courtroom yet under the guidance and authority of judicial officers.

The Court has mandated through its Practice Notes that all proceedings in the Commercial Court will be referred to mediation or another form of dispute resolution "unless the List Judge decides that there is a good reason not to do so". The aim is to improve access to justice for all; to ensure that everyone, irrespective of how they entered the justice system, has an equitable opportunity to have their disputes resolved in an appropriate forum, as efficiently and fairly as possible.

This particular case, though, is difficult. It has been to mediation previously and, already, many hundreds of thousands of dollars have been spent on lawyers. A trial is looming. If this case proceeds and a decision is handed down by the Court, one side will win and one will lose. Victory for one party means defeat for the other, and that may lead to grief, anger and worsening relations.

At one end of the room is the Victorian Supreme Court's longest-serving mediator, Associate Justice John Efthim. He tells the group that if everyone works creatively, a solution can be found – one that will stick. Indeed, the solution must hold because, as Associate Justice Efthim puts it, the alternative may forever split a small community. So let's talk, he says. What do you want?

He gives the lawyers time to outline the key points and an hour passes as each side labours over legal details. For now, Associate Justice Efthim remains silent. He listens and observes the dynamics of the room. The arguments run on and eventually patience is tested. Fingers are pointed, arms are crossed and body language around the table sours. Associate Justice Efthim decides to intervene. He straightens in his seat.

Put away the legal points for now, he urges, and let's try something practical. Instead of trying to score legal wins, why don't you do this? And he outlines a modest, elegant proposal that potentially gets each side what they want, yet leaves a way open for legal action if the deal falls apart.

Associate Justice Efthim looks at each person in the room. There are a few wry smiles and some shaking heads. Come on, he urges. Wouldn't that work? Or am I missing something?

A woman at the back tentatively raises her hand. She is clearly nervous but soon her volume rises. She gestures to the sky and points to her opponents, then her voice falters and she starts crying. Associate Justice Efthim leans forward in his seat. He speaks slowly, deliberately easing down the tension. The woman's passionate rendering of what initially seemed to be a side-issue has highlighted the crux of the problem, the real reason for the strains between the parties.

Associate Justice Efthim thanks her for speaking and calls for a break. Over the next few hours, the two sides will adjourn into private rooms to debate their options. They will reconvene, split again, and all along they will be urged to strike a compromise. Because, when all is considered, this kind of dispute may never be fully resolved if it is decided by a judge finding in favour of one party. It can only turn the corner if each party yields a little.

Hours later, a tentative compromise is reached. It is a huge relief to all. The parties proved open to a creative solution and struck what they believe will be a fair and smart deal, one that paves the way for their community to come together again. They have saved thousands of dollars in legal expenses and avoided the need for a trial by utilising the services of the Supreme Court's experienced mediators. ■

InSight is a publication of the Supreme Court of Victoria.

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