Judicial mediators: Is the time right? – Part II

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The issue of the appointment of judicial mediators has once again been raised – this time by the Victorian Attorney-General. But is the appointment of judicial mediators necessary at a time when managerial judging through active case management and lawyer led settlements are leading to the efficient disposition of cases in the civil courts? Part I of this article appeared in the previous edition of this Journal and dealt with defining judicial mediation, after which it discussed why the judicial promotion of settlement is vital to the functioning of the judicial system. It then detailed the first phase of the argument about the constitutional validity of the appointment of judicial mediators and the legal and philosophical arguments that stem from that discussion. In Part II, the discussion on the Constitutional validity of the appointment of judicial mediators is concluded together with a discussion of the positives and negatives of the appointment of judicial mediators. Finally, the conclusion will raise the issue of whether we need judicial mediators?

The constitutional validity of judicial mediators (continued)

Another exception to the Boilermaker 's principle that courts may not exercise non-judicial power is where the judicial power of the Commonwealth is delegated to registrars, masters (now known as "associate judges" in New South Wales) and other senior administrative officers of the court. [1] Such delegation being distinguished from a delegation personae designatae, as discussed in Part I. In Harris v Caladine (1991) *172 CLR 84* [PDF], the High Court was asked to determine the validity of *Family Court Rules 2004* (Cth) which delegated to registrars of the Family Court of Australia the power to make certain orders under the *Family Law Act 1975* (Cth) (the Act). The court found that such a delegation of judicial power to non-judicial officers was a valid exercise of such power. Mason CJ and Dean J stated the role of such non-judicial officers in the following way (at 94-95):

> We must emphasize that the role of the officers of the Court such as Judicial Registrars and Registrars is secondary to that of the judges. The role of the officers is to assist the judges in the exercise of the jurisdiction, powers and functions of the Court. Although it is a commonplace characteristic of modern courts that officers such as masters and registrars exercise jurisdiction, powers and functions in a wide variety of matters, those matters are, generally speaking, subsidiary in importance to matters which are heard and determined by judges.

The court went on to establish a test for the delegation of non-judicial power as an exception to the Boilermaker 's principle where Mason CJ and Deane J stated (at 95):

> The first condition is that the delegation must not be to an extent where it can no longer properly be said that, as a practical as well as a theoretical matter, the judges constitute the court. This means that the judges must continue to bear the major responsibility for the exercise of judicial power at least in
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> relation to the more important aspects of contested matters. The second condition is that the delegation must not be inconsistent with the obligation of a court to act judicially and that the decisions of the officers of the court in the exercise of their delegated jurisdiction, powers and functions must be subject to review or appeal by a judge or judges of the court. For present purposes it is sufficient for us to say that, if the exercise of delegated jurisdiction, powers and functions by a court officer is subject to review or appeal by a judge or judges of the court on questions of both fact and law, we consider that the delegation will be valid. Certainly, if the review is by way of hearing *de novo*, the delegation will be valid. The importance of insisting on the existence of review by a judge or an appeal to a judge is that this procedure guarantees that a litigant may have recourse to a hearing and a determination by a judge.

The first limb of the test in Harris inquires as to, notwithstanding the delegation of power, whether judges of the court continue to bear the major responsibility of the exercise of judicial power in relation to important aspects of contested cases. The appointment of judicial mediators would not upset such a balance of power in that judges would continue to be the sole keepers of judicial power in the deciding of cases before the court. As before, there would be no "crossover" of functions between judicial mediation and judicial power to decide cases at trial. The second inquiry asks whether the exercise of judicial power by non-judicial officers is capable of judicial review; if so, the task of judicial mediation is a valid delegation of judicial power to judicial mediators. The application of the test in Harris can be distinguished in the case of the appointment of judicial mediators. Therefore, the application of the second limb of the test in Harris may not be directly applicable to the case of the appointment of judicial mediators. In Harris , the nature of the delegation was to empower non-judicial officers to make certain decisions embodied in orders of the court. According to the second limb of the test, it is always necessary to have the ability to judicially review such decisions for errors in law and fact and to correct those decisions. In the case of judicial mediators, they are not empowered to decide any issues of procedure or substance that would need to be the subject of judicial review. In other words, the nature of the delegation is not to make decisions; rather, it is to merely execute a process where the only decision-making regarding settlement is made by the parties themselves. In judicial mediation, there is no decision made by a non-judicial officer (the judicial mediator) for a judge to review.

Tucker is of the view that judicial mediation is not an exercise of judicial power and, therefore, judicial mediators may only be appointed under the doctrine of personae designatae. He also believes that, despite a potential valid appointment as a persona designata, a judge exercising the functions of a judicial mediator may "pose a very real threat to the bubble of impartiality" [2] resulting in such an appointment be declared ultra vires under Ch III of the *Constitution* .

Justice Michael Moore of the Federal Court of Australia agrees with Tucker that judicial mediators would not be exercising judicial power. However, his Honour has a different view from Tucker's on the issue of whether judicial mediation diminishes public confidence in the integrity of the judiciary as an institution. His Honour's argument is essentially two-fold: first, his Honour argues that the incompatibility doctrine must by necessity include notions of compatibility. Moore J states:

> The attributes and professional experience ordinarily demanded of a judge and the judicial characteristic of impartiality (both perceived and real) are attributes and experience often required of a mediator. That the same characteristics are required in both roles may militate against a conclusion that acting as a judicial mediator is incompatible with the judicial function. [3]

In other words, Moore J is suggesting that the roles of judicial mediator and judge are compatible. The important characteristic of impartiality is an attribute required of both roles and a judicial officer has the ability to ensure that impartiality is maintained, not just in a substantive sense but in a practical sense. This naturally leads to his Honour's second argument: if sufficient safeguards can be put in place in courts employing judicial mediators, there can be no argument that such a role diminishes public confidence in the integrity of the judiciary as an institution. In this respect, his Honour suggests

that judges acting in the role of judicial mediator should be statute-barred from hearing the same matter at trial and any subsequent appeal. Moore J's views are in keeping with s 4.7 of the *Guidelines to Judicial Conduct* endorsed by the Council of Chief Justices of Australia which state:

> Many judges consider that the role of a mediator is so different from that of a judge that it is undesirable for a serving judge to act as a mediator. The difference lies in the interaction of a mediator with counsel and parties, often in private – ie in the absence of opposing counsel or parties, which is seen to be incompatible with the way in which judicial duties should be performed, with the risk that public confidence in the judiciary may thereby be impaired. Many judges would see this as a matter of court policy.
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> In some courts, the Rules of Court with respect to mediation specifically recognise the appointment of a serving judge as a mediator. The success of judicial mediation in those jurisdictions appears to justify the practice. The statutory obligation of confidentiality binding upon a mediator, and the withdrawal of the judge from the trial or an appeal, if the mediation fails, should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary. [4]

Moore J juxtaposes the development of the doctrine of incompatibility with its development in the United States and concludes:

> There has been no suggestion, as far as I am aware, in either authority or academic commentaries that there is incompatibility, for the purposes of Art III of the *United States Constitution* , arising when judges act as mediators. Indeed I have not seen it suggested (in litigation or academic writing or otherwise) in the research I have undertaken that a judge acting as a mediator might be viewed in the United States as not exercising a power that falls within the Judicial Branch. [5]

Moore J finally states that there is no constitutional impediment to judges acting as mediators. Given that there have been no judicial mediators appointed to any courts in Australia, a definitive answer to whether judicial mediators would diminish public confidence in the integrity of the judiciary as an institution is moot. Until a thorough debate is had or until a judicial mediator is appointed and his or her authority is challenged, there can be no definitive answer.

The case against judicial mediators

In Australia, the arguments for and against the involvement of the judicial institution are well publicised. A key advocate against the involvement of courts in dispute resolution is Sir Laurence Street, who believes that such involvement undermines public confidence in the institution because:

> The public sees a court as an integrated institution – indeed this is to be encouraged. If the dispute is not settled the party who loses is likely to feel that the court as an institution was, or may have been, prejudiced by poison privately fed in by the other side during the mediation. Rostering barriers and distinctions between the functions of judges and registrars will not dispel that likelihood. On a wider plane, if it becomes known that a litigant can have private access to a judge or registrar in order, behind the other side's back, to tell the whole story as that party sees it, an expectation could well be built up in the community that this is a normal part of court procedures. [6]

Street's concern about "poisoning" the judicial institution when it comes time to adjudicate the matter is best illustrated by the case of Ruffles v Chilman (1997) *17 WAR 1* where the trial judge ordered a conference during the trial to be presided over by the deputy registrar of the court. It was alleged that at that conference the deputy registrar stated that in a conversation with the trial judge in his Chambers, the trial judge had formed a negative view of the appellant's credit and or the appellant's evidence. [7] The court found for the appellant on the basis of the appellant's reasonable apprehension that the trial judge had already reached a conclusion before the end of the trial. The decision was quashed

and remitted to the District Court for a new trial before another judge. The court's final words (at 14) are of significance in this discussion and support the concerns raised by

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Street:

> Mediation is now a significant feature of litigation in this State. The integrity of that process is of critical importance. This requires that there should be no communication between the mediator on the one hand and the Judge who either will be hearing, or is hearing, the action. If this requirement is not observed, confidence in the process of mediation is likely to be seriously compromised.

The essence of Street's argument comes back to the issue of the public perception of an institution whose purpose is to decide issues between parties, as opposed to seeking consensual resolutions between them. This is a hard argument to counter. The blending of the non-judicial function of mediation with the judicial function of adjudication within the one institution gives succour to Street's argument. A counter argument could be the requirement in most jurisdictions in Australia that promote the just, quick and cheap resolution of the real issues in the proceedings. In other words, if courts are perceived by the community to deal with their disputes through to resolution in a way that is efficient in terms of time and cost, yet still provide for just outcomes through the use of a variety of strategies including dispute resolution and adjudication, then perhaps public confidence in the courts can still be maintained. It is possible to change public perception and bolster public confidence in an institution.

Street's other significant point is the potential for coercion to occur via the influence of a person who ordinarily wields significant power within the system of the administration of justice. Street's arguments relate to the use of sitting judges acting as judge one day and mediator the next, and can perhaps be tempered by the role of the judicial mediator who has no judicial function to perform in relation to the adjudication of any cases that come before the court. In this respect, the only power invested in the judicial mediator is to assist the parties to reach a resolution. Parties would be confident knowing that the judicial mediator could never go on to decide the case and should be statute-barred from discussing the mediation with anybody from the court involved in adjudicating the matter.

Chodosh lists at least three concerns he has with judicial mediation. Firstly, he is concerned of the potential for "brain drain" from the bench. He states:

> Beyond the conventional view of judicial mediation as oxymoronic, judges may see it as a threat to their authority to make public judgments and normative pronouncements. They may perceive the risk of a "brain drain" from the bench as a consequence of perverse incentives for judges to retire early in search of a more lucrative career in private dispute resolution. [8]

Chodosh's view rings true in Australia when we look at the most predominant and utilized commercial mediators. They are just about entirely comprised of former judges or senior lawyers. If judicial mediators are appointed, where will they come from? Perhaps we risk a decimation of the bench, should such a scheme be implemented in the courts of Australia. If the users of court-annexed programs demand ex-judges as mediators with the same propensity that the private sector has, then there could be a drain of judicial resources from adjudication. The same can be said of senior members of the legal profession where, like judges, the demands of the work weigh heavily on such professionals. [9] Chodosh's second concern is the potential loss of revenue for lawyers which he suggests affects more the endorsement of such court-annexed programs as opposed to the competitive nature of legal practice per se. Without the backing of the legal profession, private or publicly sponsored dispute resolution programs would fail because of the fact that the legal profession is the chief captor of disputes.

Chodosh's final concern about judicial mediation is the diminution of the role of law. He suggests that trials serve a useful purpose in society aside from the adjudication of disputes that lead to the creation of the common law. He views trials as necessary because:

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> Litigants in systems where there is little trust of judges generally may feel more comfortable with a formal, public, albeit more rigid, procedure. In some cultures, litigants may not be able to maintain dignity or honor if they have to admit their mistakes or make a concession. [10]

Further, Chodosh opines that public funds should not be diverted into keeping private matters of public interest that should be available to all in a publicly funded court of law through mediation. On the issue of the utilisation of public funds, Chodosh suggests that the public may object to the discounting of the value of their legal rights by matters being pushed into non-adjudicative methods of dispute resolution that are sponsored by the State at the expense of the public's right to have their matter adjudicated upon. This in turn raises the issue of whether an unsuccessful dispute resolution process adds to the cost and delay of finalization of the dispute. At a point in time where, in Australia, public funding in certain sectors is drying up, the use of public funds to operate non-adjudicative forms of dispute resolution must surely be questioned. To employ a "user pays" approach just shifts the financial burden onto the consumers of the justice system and creates more of a detriment than a benefit when the competing process is the publicly funded system of adjudication.

Associate Professor Peter Bowal (as he was then) investigated the Ontario judicial dispute resolution pilot program and highlighted what he considered were the disadvantages of such models. [11] Bowal was initially concerned that parties consenting to participate in non-adjudicatory dispute resolution had no guarantee of a resolution. His view is that dispute resolution provides no binding decision and that "[a] compelled binding decision is the great advantage of litigation and arbitration". [12] In this respect Bowal surmises: "What contributes to making litigation unattractive, may also be its greatest virtue." [13] In the Ontario pilot program, if the parties fail to settle at the dispute resolution stage, they have to file a certificate with the court advising of the failure of the process and providing the trigger mechanism for a subsequent trial. This, according to Bowal, creates more delay in having the matter finalised and adds unnecessarily to the costs of disposition.

Bowal's argument is a valid criticism of the system of judicial dispute resolution in cases where matters do not settle. Adding veracity to Bowal's argument is the fact that, in most judicial mediation programs, it would be assumed that the parties themselves have already attempted to resolve the dispute through non-adversarial means and failed. Further, given the fact that only about 10-20% of disputes that enter the trial trail proceed through to trial and judgment, we are talking about very few cases that – chances are – would not have settled, regardless of the existence of judicial mediation. [14] For those cases that remain in the court lists destined for trial, only a very small proportion of them settle before judgment and of those cases, they are being settled without any judicial dispute resolution process other than judicial case management. In other words, those cases that settle on the trial trail are doing so satisfactorily between the parties themselves without the need for judicial mediation. Therefore, why go to the expense of appointing judicial mediators and having the parties expend further funds and experience further delay by having to participate in judicial mediation. In other words, why not let the parties themselves, who are often motivated by the cost and delay in getting to trial, settle the dispute themselves without having to jump a judicial dispute resolution hurdle.

Like Bowal, Resnik is also concerned about the additional time and cost of implementing quasi-mandatory judicial mediation via the employment and deployment of judicial officers through case management schemes. Some of her concerns are related to the dual role of judge and judicial mediator. Resnik claims:

> But close examination of the currently available information reveals little support for the conclusion that management is responsible for efficiency gains (if any) at the district court level, and strong reason

> to suspect that many purported efficiency gains in the district courts are illusory. [15]

Keeping in mind that Resnik is referring to managerial judging, of which judicial mediation could be considered a subset, and her assessment was based on the early usage of managerial judging by the United States Federal District Court, the view that judicial intervention in the resolution of matters has little or no impact on perceived efficiency gains is not to be used as a corollary in Australia. Certainly, figures from the New South Wales District Court show the opposite experience to that of the United States District Court, [16] in that active case management

has achieved a reduction in the time taken to dispose of cases by trial from a median time of 45 months in 1990 to 11 months in 2002. [17] From these figures, it can be stated with some confidence that active case management strategies reduce the time taken for matters to be disposed of, which translates to efficiency gains for courts and litigants.

Another concern Resnik has about managerial judging is the fact that the power to conduct non-adjudicatory processes within the court system is unreviewable. She states:

> Unreviewable power, casual contact, and interest in outcome (or in aggregate outcomes) have not traditionally been associated with the "due process" decision making model. These features do not evoke images of reasoned adjudication, images that form the very basis of both our faith in the judicial process and our enormous grant of power to federal judges. [18]

While judicial mediation does not require the mediator to exercise the power to decide issues between the parties or have an interest in the outcome, in a case where a judicial mediator acts contrary to the philosophical underpinnings of mediation by, eg intervening in the process and directing parties to settle, Resnik's concern may be valid. In such a case, the actions of a judicial mediator should be subject to review, should one or more parties to mediation make application to the court to have the mediated settlement overturned for reasons of, among other things, duress. This may be more of a question of process that can be resolved satisfactorily without rejecting the concept of judicial mediation. The only impediment to such an administrative solution to a substantive problem is the ever-present veil of confidentiality which prevents the admission of evidence of what transpired in mediation. However, most jurisdictions in Australia allow evidence of what transpired at mediation to be admitted into evidence to enforce a mediated settlement agreement. [19] Of course Resnik's point is not just in relation to cases where matters settle in judicial mediation. In cases where parties did not settle, adducing enough evidence to review the actions of a judicial mediator may be problematic.

Resnik's final point of concern about the use of managerial judging is a simple yet persuasive one. She is concerned that lawyers as a profession and society as a whole have come to devalue adjudication. She states:

> Case processing is no longer viewed as a means to an end; instead, it appears to have become the desired goal. Quantity has become all important; quality is occasionally mentioned and then ignored. Indeed some commentators regard deliberation as an obstacle to efficiency. [20]

Resnik's point is a sobering one in this day and age where economic rationalists seem to have taken on the role of policy makers and implementers. So preoccupied are governments on replacing government funding with user pays systems, that we have quite forgotten the quality issue in the

administration of justice. This is not to suggest that judicial mediation would necessarily manifest itself as an inferior system of disposition of disputes; rather, we should not shy away from funding and making more accessible the process of adjudication. This issue will be further discussed in the conclusion to this article.

The case for judicial mediators

The previous section commenced with one view on the negatives attributable to judicial mediation from a notable Australian and, in the name of balance, this section should begin with the view of another notable Australian on the case for judicial mediation. The Honourable James Spigelman, Chief Justice of New South Wales, states in response to the concerns raised by Sir Laurence Street:

> At a higher level of principle many of you will no doubt share the view forcibly put by Sir Laurence Street, that participation by court officers, whether judges or registrars, in a mediation process should not be permitted on the basis that it threatens the integrity and the impartiality of the court system itself … The *Declaration of Principles* adopted by the Chief Justices Council … recommends that mediators should "normally" be court officers, like registrars. It does, however, contemplate circumstances in which it is appropriate for a Judge to mediate.

> The practice of the Supreme Court of New South Wales is that mediations are done only by registrars. No judicial officer descends into the arena in the way feared by Sir Laurence. No doubt there are people who do not understand the difference between registrars, who are administrative officers, and judges and masters [now known as "Associate Judges"], who are judicial officers. Nevertheless, the difference does exist and it is the important line in this respect. This is a distinction which it is the policy of the Supreme Court to maintain. The first principle in the Chief Justices Council Declaration is that mediation is an integral part of the Court's adjudicative processes – it is not, of course, itself adjudicative, but is an integral part of the process of adjudication as a means of resolving disputes. That first principle also asserts that the "shadow of the court" promotes resolution. This appears to unquestionably be the case. There may be some difficulty in maintaining the distinction between registrars and judges in the public arena, but I do not see any signs that the blurring of any such distinction, if there be blurring, is affecting or likely to affect public confidence in the administration of justice. [21]

The Chief Justice has picked up on the topic of earlier discussion in this article – that of the diminution of public confidence in the judicial institution should courts sponsor judicial mediation. His Honour is suggesting that there can be no loss of confidence in the judicial institution, providing the judicial and non-judicial roles of the court are kept separate and that the public are educated in accepting the emerging role of the court in providing a just, quick and cheap resolution of the real issues in the proceedings before the court. Two years after Spigelman's comments, the Honourable Hugh Landerkin QC of the Provincial Court of Alberta raised a similar issue to that of Spigelman when he stated that "helping parties settle their cases does not undermine the foundations of our formal justice system". [22] In other words, surely it is within the overriding principles of the courts to help parties resolve their disputes – therefore, how can it undermine public confidence in the judicial institution to assist parties in that process via the provision of judicial mediation?

Landerkin suggests that the role of the judicial function [23] "can be broader than that traditionally expected in an adversarial system of justice". [24] In other words, the role of judges developed under the adversarial system of justice, fits with judicial dispute resolution because of the move, largely governed by statute, to include other modes of dispute resolution other than adjudication within the spectrum of the work of the courts. His Honour's important words tell us that non-adjudicatory methods of dispute resolution very much form part of the judicial process or function of the judicial institution. This in itself is an important development that allows the comments of Spigelman to be

framed in a more convincing way over the critics of judicial dispute resolution who are concerned with the erosion of public confidence in the courts.

Academic John Epp conducted a study among legal practitioners into the role of the judiciary in case management and found that, in Canada, 82.5% of lawyers surveyed thought that judicial involvement by judges in settlement discussions was likely to improve significantly the prospects of success. [25] Further, that 58.5% of those lawyers surveyed thought that settlement conferences before judges should be mandatory. [26] Epp hypothesises that the reason these figures disclose support for judges to be involved in settlement discussions is because judges have the unique ability to discuss common ground in a setting where parties are expected to act reasonably. Epp suggests that "[t]he judge can improve the civility, efficiency, and efficacy of the negotiation process". [27] Further, that judges bring the ability to break impasses between parties and that they, by being involved in such a process, can provide face saving for lawyers who think that participating in such processes weakens their position as trial advocates. A side-effect of judicial mediation is that by judges managing the process, they can assist lawyers to handle difficult clients with unreasonable expectations – there is nothing more sobering than a judge telling a party that their case is not as strong as they first perceived!

Epp's study was conducted only with Canadian lawyers but his article quoted a study by Judge Wayne Brazil who, with the support of the American Bar Association, conducted a study of about 1,900 litigators who practiced in United States Federal Courts. Brazil's study found that 85% of respondents to the study believed that judicial involvement was likely to improve the chances of settlement with 72% believing that settlement conferences before judges should be mandatory. [28] This is confirmed by Galanter and Cahill when they argue that the advantage of having judges involved in resolving disputes prior to adjudication is that "they know what a case is worth". [29] In another result, 70% of American respondents wanted judges to be involved, regardless of an invitation to do so. [30] The Canadian study resulted in 86% of respondents wanting an active judge at settlement conferences – an active judge being defined as a judge who

> come[s] well prepared, having a thorough understanding of the facts and relevant law. They want carefully considered input: both opinions and creative alternatives. They want an active, persistent judge. They do not want a judge who is aggressive, so as to put a party in a defensive mode, nor a judge who is quick to leap to conclusions. A judge who suggests that the parties "split the difference is useless". They want a judge who is confident, competent and polite, attuned to the dynamics of the personalities involved. [31]

From these results, it can be concluded that the legal profession in the United States and Canada have confidence in the judiciary to take a lead role in the early resolution of disputes coming before the courts. The author suspects that there would be similar results in Australia if such a study were to be conducted here. It seems that lawyers do not want an overly evaluative judicial mediator; at the same time they do not want an overly transformative one. From the above comments, it seems they seek an adherent to the principled negotiation model that, among other things, seeks to assist the parties in identifying creative options for settlement that are based on interests not positions.

In Bowal's assessment of the Ontario judicial dispute resolution model, he contended that its advantages included savings in time and money because the complex procedural and evidentiary

provisions that make litigation so lengthy – and therefore expensive – are avoided. [32] Providing the judicial officer is not too directive or evaluative, Bowal contends that an asset of judicial dispute resolution is the power of the parties to arrive at their own settlement and to fashion a more creative settlement than a judge could do at the conclusion of a trial. [33] Bowal believes that judicial dispute resolution provides public interest advantages such as the cost savings that flow back into the consolidated revenue to be spent on other more worthwhile projects. [34] Further, reducing the number of matters for trial means parties who are unable to resolve their disputes out of court can get a court date sooner which in turn assists in the quality of the evidence presented, since witnesses would not have to wait extensive periods of time before having to give evidence. [35] American literature shows conflicting results from perceived time and cost savings through court-annexed dispute resolution [36] and, to this author's knowledge, there has been no comprehensive study in Australia on the impact of dispute resolution in the court system.

Resnik argues that judges in America know more details about each individual case in their docket than before because of case management systems and the development of the rules of discovery that has sought to minimise the element of surprise in civil litigation [37] – a situation comparable with Australia. Because of this Resnik argues that judges should be involved in the early resolution of cases because, as already mentioned, they are best placed to actively seek a just, quick and cheap resolution of the real issues in the proceedings.

The case for the appointment of judicial mediators largely revolves around the new mandates courts now operate under, ie the requirement to do more than just conduct a trial – the need to orchestrate more efficient methods of dispute resolution whether those methods be adjudicatory or non-adjudicatory. These new mandates are not necessarily directed towards the compulsory use of non-adjudicatory types of dispute resolution rather the case management of matters that give the parties every opportunity to resolve their cases before using adjudication. But perhaps these new mandates are hinting at much more than that. Perhaps the real agenda is for the judicial institution to reform itself so that even its adjudicatory functions fulfil the mandate of a just, quick and cheap resolution of the issues. Perhaps the time is right for reform that addresses the inequitable access to justice through adjudication in our courts. Is this the way forward?

Where to from here?

There are many different directions available to the policy makers on the conundrum of the appointment of judicial mediators. One direction is not to do anything at all. If clients, lawyers and judges are already settling somewhere between 80-90% of cases that commence their life on the trial trail then there is probably no need to change anything other than to ensure that law graduates have the necessary skills to negotiate effectively on behalf of their clients. Notwithstanding this impressive statistic, the remaining 10-20% of cases that are litigated still present problems in terms of providing access to justice for the users of the system. Resnik, quoting Roscoe Pound, Dean of Harvard Law School 1916-1936, highlighted the problem and its solution elegantly:

> Judges have also become concerned with problems of their own – the perception that the courts are too slow, justice too expensive, and judges at least partly at fault. Since the early 1900s, judges have attempted to respond to criticism of their efficiency by experimenting with increasingly more managerial techniques. Turn-of-the-century critics, led by Dean Roscoe Pound, were dismayed by court delay, technical and antiquated procedural rules, and inadequate substantive laws. In his 1906 speech to the American Bar Association, Dean Pound urged the bench and the bar to take responsibility for

> weaknesses in the administration of justice. [38]

Dean Pound puts both the blame and the solution at the feet of both branches of the legal profession that is, the practitioners and the judicial institution. He suggests that the weaknesses of the system are the responsibility of the practitioners and the courts but, most importantly, by doing so he empowers the profession as a whole to rectify the problems and strengthen the system of the administration of justice. If the system is too slow and costly, then lawyers and judges who operate the system of justice should fix the problem. Chodosh sums up the use of judicial mediation as a way to resolve the excessive delay and costs of trial when he states:

> [T]he mere creation of alternatives to trial, without significantly reducing delay, may not be effective in practice. Absent the pressure of imminent jeopardy, incentives to negotiate directly remain weak. Consequently, mediation may not be effective unless closely linked to other reforms that shorten the time to judgment. [39]

Chodosh's observations are significant because the answers to the problems associated with the administration of justice are not simply about finding alternatives to litigation. The solution lies in reforming the system of litigation so that processes like mediation are not seen as alternatives; rather they are seen as adjuncts to it. The importance of the trial can never wither completely; however, it should move with the demands of its users. The law is capable of adapting to its surroundings and it should respond to the delay and cost that now acts as a negative to its users. Some changes in litigation practice that could result in a reduction in delay and cost include limiting evidence through court imposed restrictions and better cooperation between lawyers on what evidence is to be admitted. Perhaps limiting the costs of representation to that of the court scale of party-party costs may assist in a reduction of the spiralling costs. Increasing the use of specialist tribunals, commissions and referees can all assist in the reduction of the delay and expense of running litigation. Continuing and escalating case management already present in most courts today will help move cases through the courts more efficiently, including the use of methods of dispute resolution such as the appointment of judicial mediators.

The appointment of judicial mediators may assist the process of removing matters on the trial trail that have the potential to settle. Resnik believes in the retention of adjudication but agrees that we need to "reorient the judicial system to accommodate contemporary demands". [40] She suggests a number of steps to help judges do their job more efficiently, such as refraining from giving them too many distracting new responsibilities, such as increasing their responsibilities in areas other than running trials. However, she suggests:

> Both before and after trial, one judge could handle the formal adjudication; a second could be responsible for the informal mediation and settlement work. Under this model, judges rather than surrogates would be in charge of cases. Yet judges who adjudicate would not receive unfiltered information that could bias their decisions. Some district judges have implemented this system in an informal manner by "swapping" cases when settlement is to be discussed. [41]

What Resnik is referring to is the appointment of judicial mediators – a second judge to handle the non-adjudicatory process or processes prior to the last resort of adjudication taking place who ceases to be involved with the case once the non-adjudicatory process has been unsuccessful and the matter is escalated to trial.

The arguments both for and against the appointment of judicial mediators are compelling. The chief argument against the loss of public confidence in the judicial institution is of great concern as the preservation of that confidence is crucial to the functioning of society. The argument in favour of the appointment of judicial mediators is equally compelling – that of the benefits that could potentially flow to the users of the justice system. Perhaps it is appropriate to finish with the words of a current sitting judge:

(2006) 17 ADRJ 189 at 199

Adjudication by a judge following the Rule of Law must always be a fundamental component of a free and democratic society. Complementing this classical task however is the concept of judges and courts also being conflict resolvers. The end point for many important disputes in our society can be adjudication by a judge. Yet along the way to this day in court, there can be ADR-inspired opportunities for judges to demonstrate their judicial skills by promoting settlement. Appropriate interventions to help the parties reach satisfying results in a more timely and less costly way meets the needs of the disputants themselves. The result will be more satisfaction for them. This in turn reflects well on our courts. JDR [judicial dispute resolution] not only encourages the continued search for substantive justice but also emphasizes the quest for procedural justice. [42]

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1 The above discussion relates to courts established under Ch III of the Commonwealth *Constitution* and while the doctrine of the separation of powers and the restriction over Parliament to not vest its judges with non-judicial power and its exceptions clearly applies to the Federal and Family Courts of Australia, what of State Supreme Courts that handle high volumes of civil cases? In Kable v Director of Public Prosecutions (NSW) (1996) *189 CLR 51* [PDF], the High Court of Australia extended the separation of powers doctrine in relation to the application of Ch III judicial power to State Supreme Courts. In other words, the restrictions over investing judges with non-judicial power and its exceptions are applicable at State level where the State court has been invested with the powers of a federal court pursuant to s 77 of the *Commonwealth of Australia Constitution Act 1900* (Cth) .

2 Tucker P , "Judges as Mediators: A Chapter III Prohibition" (2000) 11 ADRJ 84 at 94, citing Brown AJ , "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge" (1992) 21 *Federal Law Review* 48 at 68-70.

3 Justice Michael Moore , "Judges as Mediators: A Chapter III Prohibition or Accommodation?" (2003) 14 ADRJ 188 at 194.

4 Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2002), http://www.aija.org.au/online/GuidetoJudicialConduct.pdf viewed 22 February 2006, cited by Moore, n 3 at 195.

5 Moore, n 3 at 196.

6 Sir Laurence Street , "Mediation and the Judicial Institution" (1997) 71 ALJ 794 at 796.

7 The appellant deposing to the former and his solicitor deposing to the latter.

8 Chodosh HE , "Judicial Mediation and Legal Culture" (1999) 4(3) *Issues of Democracy* 1. (Electronic journal of the USA Department of State, http://usinfo.state.gov/journals/itdhr/1299/ijde /chodosh.htm viewed 7 March 2006) at 4.

9 See Priest M , "Solicitors Go in Search of the Good Life", *The Australian Financial Review* (27 January 2006) p 43; Justice Peter Young , "English Chancery Judge Retires Early" (2006) 80 ALJ 84.

10 Chodosh, n 8 at 4.

11 Bowal P , "The New Ontario Judicial Alternative Dispute Resolution Model" (1995) 34 *Alberta Law Review* 206.

12 Bowal, n 11 at 211.

13 Bowal, n 11 at 211.

14 Worthington D and Baker J , *The Costs of Civil Litigation* (Civil Justice Research Centre, 1993).

15 Resnik J , "Managerial Judges" (1982) 96 *Harvard Law Review* 374 at 417. However, Resnik also notes that there is evidence in the United States to show that efficiency gains through managerial judging has been achieved in the appellate level of the United States District Court.

16 Spencer D , "The Vanishing Trial Phenomenon" (2005) 43(8) *Law Society Journal* 58.

17 Spencer, n 16 at 59.

18 Resnik, n 15 at 430.

19 See, eg s 29 of the *Civil Procedure Act 2005* (Cth) which states: (1) The court may make orders to give effect to any agreement or arrangement arising out of a mediation session. (2) On any application for an order under this section, any party may call evidence, including evidence from the mediator and any other person engaged in the mediation, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement. (3) This Part does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session, in relation to the matters the subject of a mediation session.

20 Resnik, n 15 at 431.

21 The Hon James Spigelman , "Mediation and the Court" (2001) 39 *Law Society Journal* 63 at 64.

22 The Honourable Hugh Landerkin QC , "Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada" (2003) 82 *Canadian Bar Review* 249 at 282.

23 Referred to by Moore, n 3 at 190, citing Fencott v Muller *(1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ* as "the power to decide controversies by judicial process (that is, by the ascertainment of facts, by application of law, and by exercise of judicial discretion if appropriate)".

24 Landerkin, n 22 at 285.

25 Epp JA , "The Role of the Judiciary in the Settlement of Civil Actions: A Survey of Vancouver Lawyers" (1996) 15 *Windsor Yearbook of Access to Justice* 82 at 87.

26 Epp, n 25 at 88.

27 Epp, n 25 at 88.

28 Epp, n 25 at 89-90.

29 Galanter M and Cahill M , "Most Cases Settle: Judicial Promotion and Regulation of Settlements" (1994) 46 *Stanford Law Review* 1339 at 1344. A sentiment also endorsed by Landerkin, n 22 at 293.

30 Epp, n 25 at 90.

31 Epp, n 25 at 92.

32 Bowal, n 11 at 209.

33 Bowal, n 11 at 210.

34 Bowal, n 11 at 210.

35 Bowal, n 11 at 210-211.

36 See Stipanowich TJ , "ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution" (2004) 1(3) *Journal of Empirical Legal Studies* 843.

37 Resnik, n 15 at 378.

38 Resnik, n 15 at 395.

39 Chodosh, above n 8 at 4.

40 Resnik, n 15 at 432.

41 Resnik, n 15 at 435.

42 Landerkin, n 22 at 298.

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