Justice according to compulsory mediation:

Supreme Court Amendment (Referral of Proceedings) Act 2000 (NSW)

By Bret Walker S.C. and Andrew S. Bell

On 8 June 2000 the then Attorney General of NSW, the Hon. Jeff Shaw QC MLC, delivered the second reading speech in support of the Supreme Court Amendment (Referral of Proceedings) Bill. This innocuously titled Bill has two essential components:

(i) it permits the referral of proceedings in equity for determination pursuant to the *Arbitration (Civil Actions) Act 1983 (NSW)* in circumstances where any equitable relief or remedy is claimed ancillary to a claim for the recovery of damages;

(ii) in all but criminal cases, it permits the Court to refer any proceedings or part of proceedings for mediation *without the consent of the parties*.

It is this second aspect of the Bill, which was opposed by the Bar Association, upon which we wish to comment.

Clauses 110K-110M of the Bill, which will replace sections 100K-110M of the *Supreme Court Act 1970 (NSW)*, are in the following terms:

110K Referral by Court

(1) If it considers the circumstances appropriate, the Court may, by order, refer any proceedings, or part of any proceedings, before it (other than any or part of any criminal proceedings) for mediation or neutral evaluation, and may do so either with or without the consent of the parties to the proceedings concerned.

(2) The mediation or neutral evaluation is to be undertaken by a mediator or evaluator agreed to by the parties or, if the parties cannot agree, by a mediator or evaluator appointed by the Court, who (in either case) may, but need not, be a person whose name is on a list compiled under this Part.

110L Duty of parties to participate

It is the duty of each party to the proceedings the subject of a referral under section 110K to participate, in good faith, in the mediation of neutral evaluation.

110M Costs of mediation and neutral evaluation

The costs of mediation or neutral evaluation, including the costs payable to the mediator or evaluator, are payable:

(a) by the parties to the proceedings, in such proportions as they may agree among themselves, or

(b) if the Court makes an order as to the payment of those costs – by one or more of the parties, in such manner as the order may specify.

Section 110K(1) of the Supreme Court Act 1970 currently provides for mediation or neutral evaluation if the Court considers the circumstances appropriate and the parties to the proceedings consent to the referral and agree as to the identity of the mediator or evaluator. Section 110L reinforces the voluntary nature of the existing mediation regime (and underscores the significant change which will be introduced when the Bill passes into law) in its statement that '(a)ttendance at and participation in mediation sessions or neutral evaluation sessions are voluntary'.

The current regime recognises the desirability of mediation as a means of dispute resolution without forcing parties down that route. There are, moreover, institutional mechanisms in place which encourage progress down that route. For example, it is now part of a barrister's duty to advise his or her clients at an early stage about the scope for means of dispute resolution in the alternative to litigation. Rule 17A of the New South Wales Rules provides:

> A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client unless the barrister 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 interest in relation to the litigation.

Further, it is well known that many judges informally encourage litigants of the desirability of exploring dispute resolution by way of mediation. All of this is salutary and to be supported.

The changes to be introduced by the Bill, however, are significant not just in practical terms but are radical and, in our opinion, most undesirable as a matter of principle. There is no reason to believe, either, that such changes, once implemented in relation to the Supreme Court, will be confined to that Court. Similar amendments could readily be made to the *District Court Act 1973 (NSW)*.

During the second reading speech, the then Attorney-General stated that:

> The Bill reflects the current view that many matters are better dealt with by alternate dispute resolution forms rather than the expense and formality of litigation. That does not deprive the parties – the plaintiffs or the defendants – of their *ultimate* rights to have matters determined by a court. I would adhere to that as a matter

> of principle. The Bill provides alternative, less formal and less expensive modes of resolution of controversies between citizens, and I believe makes a significant contribution to that process. [emphasis supplied]

The Attorney's carefully chosen language of an 'ultimate right to have a matter determined by the Courts' masks the significance of the change. A citizen's right to have a matter, commenced bona fide in the Supreme Court of this State, determined according to law and as expeditiously as the Court's processes permitted was, one might have supposed, fundamental. That right has now changed. The Court's processes, once invoked and notwithstanding the payment of a filing fee, may not be practically available to a plaintiff until the parties have undergone, *ex hypothesi* against the plaintiff's wishes and at the parties' expense, a compulsory process of mediation.

Such a forced process of mediation also has the potential to erode respect for the rule of law, especially if the power to order compulsory mediation is exercised frequently. It is not difficult to suppose that the power will be exercised frequently in times of pressure on courts institutionally to 'up their productivity', whatever this is meant to mean, and on judges individually, to deliver judgments expeditiously. Citizens may legitimately wonder about the importance of the rule of law in this State if, before they can have their disputes determined by a judge of the Supreme Court according to law, they may be *required* to explore compromises which, again *ex hypothesi*, will not be based upon an application of law to the facts of the case as determined by the Court. That is reinforced by the fact that, under the Bill, a litigant in the Supreme Court of New South Wales will be subjected to the duty imposed by clause 110L to participate in good faith in mediation or neutral evaluation, notwithstanding what may be a perfectly legitimate wish to have his or her rights determined by the Court as expeditiously as possible according to law.

'Mediation surely requires as a basic pre-requisite consensual participation'

That good faith requirement is also capable, as experience in the *Farm Debt Mediation Act 1994 (NSW)* context suggests, of adding further layers (and cost) to a dispute (and further delaying access to justice according to law) by generating potential disputes to the effect that a party did not engage bona fide in the compulsorily ordered mediation: see, for example, *Gain v Commonwealth Bank of Australia (1997) 42* NSWLR 252; see also *Aiton Australia Pty Ltd v Transfield Ltd (1999)* NSWSC 996, (2000) 16 BCL 70.

We stress that the foregoing observations are not a criticism of mediation or alternative dispute resolution, but proper encouragement of that process should *not* be taken to a stage, which the Bill now does, which at the very least qualifies the place and importance played in a democratic society of courts of law which, put simply, should be available to all citizens to have their disputes determined according to law if that is how the parties wish to resolve their differences.

Further, as a practical matter, whilst mediation has a very important role in the resolution of both personal and commercial disputes, it surely requires, as a basic pre-requisite consensual participation.

There is an additional sting in the tail of the proposed amendments. Not only may mediation be compulsorily required by the Court, but the costs of the mediation are payable by the parties in such proportion as they agree amongst themselves or as ordered by the Court (clause 110M). Several points can be made.

First, this requirement is somewhat at odds with the assertion by the Attorney and several of the Legislative Councillors who spoke in favour of the Bill (none spoke against it) to the effect that the amendments ought to produce less expensive modes of resolution of controversies between citizens.

Secondly, it means that, for a party wishing to have his or her matter determined by the Court, not only must the customary filing fee be paid but, also, if mediation is ordered, the costs of that mediation must also be borne including those of the mediator. (At least under the Federal Court's mediation regime, mediation, if ordered, may be performed by a Registrar of the Court at no additional cost to the parties: see Federal Court Rules, Order 72).

Thirdly, increased costs may not be confined to simply the costs of the mediation. It is easy to foresee (and litigation arising out of the Farm Debt Mediation Act tends to confirm this) that interlocutory litigation could be generated as a result of the mediation process. For example, one party, perhaps a defendant looking to delay or otherwise wear down a plaintiff, could contend that the plaintiff had failed to participate 'in good faith' in the mediation. Such arguments have been made in the context of the *Farm Debt Mediation Act* with issues as to compliance with the good faith mediation obligation under that legislation being taken to the Court of Appeal.

Finally, to the extent that the parties do not reach agreement as to the costs of the mediation and the Court is called upon to award the costs of the mediation in such manner as it may specify, the exercise of such power will, in our opinion, further compromise or corrode the role of the Court and the perception of its role. The exercise of such a power is surely beset with the practical problem that mediations are, for good reason, usually conducted on a confidential basis. How a costs discretion could be exercised without lifting this veil is difficult to envisage. Further, the usual rule that costs follow the event does not readily or automatically translate into a decision as to who should pay the costs of the mediation. In this way, the Court will be inevitably drawn into the mediation process and there will be a further undesirable blurring of the Court's proper constitutional role.

Note: This Bill was assented to on 14 June 2000; it commenced on 1 August 2000