‘A RIGHT MOMENT TO MEDIATE’

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1 'The time for negotiation has arrived'

1 *'Mr Speaker, Members of Parliament.. The general elections on September the 6th, 1989, placed our country irrevocably on the road of drastic change. Underlying this is the growing realisation… that only a negotiated understanding… is able to ensure lasting peace.. The alternative is growing.. conflict. That is unacceptable and in nobody's interest… No-one can escape this simple truth. It is time for us to break out of the cycle of violence and break through to peace and reconciliation. The silent majority is yearning for this… To reach an understanding by way of dialogue discussion… there is no longer any reasonable excuse for the continuation of violence. The time for talking has arrived and whoever still makes excuses does not really wish to talk. Therefore, I repeat my invitation with greater conviction than ever: Walk through the open door, take your place at the negotiating table together with (those) .. who have important power bases.. Henceforth, everybody's .. points of view will be tested against their realism, their workability and their fairness. The time for negotiation has arrived..'.*

2 Part of the speech of the then South African Republic President, Mr F W De Klerk, to the opening of his Parliament in Pretoria, South Africa, on 2 February 1990. The issue, and the successful negotiation, was no less significant than the transition of South Africa towards a non-racial democracy. 9 days later, Nelson Mandela was released from prison. 3 years later, in 1993, De Klerk was awarded the Nobel Peace Prize for the significance of his calm, but firm, call for negotiations within the maelstrom of the toxic racial divide which, to then, had faced every South African leader before him, and until then been largely ignored.

3 In terms of the title I have chosen for my address, this political example alone signifies one thing. That is, that even within significant National and International turning points of change, most have signified that there has been a 'right moment' to negotiate, and to settle. Most such turning-points have illustrated that the 'chosen moment' has rather, more often than not, been too late, than too early!

4 Thus, then, my chosen title to this address might well attract the alternate proposition: 'Or is there a wrong moment to mediate?' – to which, the answer may well be 'yes.. but not many'.

2 Methods of approach

1 I would not be here if I was not a disciple of Mediation, both as a Mediator, and as a lawyer. My kinship to the process emerges from its resounding success. That success frequently arises from the Mediator's skills. But it is, more often, the process itself which drives that success. I will mention, a little later, something more about this success', including statistically. It is trite to state that it 'takes two to tango'. All disputants must come to it (whether voluntarily, or increasingly, by Court direction, or equally increasingly by statutory requirement). But once there, at Mediation, and that is inherently the 'real trick' and at the essence of my discussion here, parties (who largely come to Mediation for the first time) then, and usually then only, appreciate its benefits and its prospects. But the point is, they need to be introduced to it, and encouraged towards it, whether it be Mediation, Conciliation or other forms of earliest dispute resolution or appraisal.

2 There are a number of approach Methods to be encouraged for those who, like me, act as advisors in what might be termed the 'dispute industry'. Primarily, the thrust of my observations today is towards the legal profession, whether private, Government or in-house practitioners, and whether solicitors or barristers, though hopefully, the messages here have a global reach beyond the corridors of the law.

3 It is, I think, the inherent responsibility, indeed professional responsibility, of lawyers, to apply their experience and wisdom in the encouragement of clients, from the earliest moment of instructions, towards party and party resolution, <u>not</u> towards party and party separation or division. Sadly, it is not a focus which all lawyers have, and certainly, most clients do not, at least at the outset. Thus it is incumbent upon lawyers to, firstly, be mindful of this responsibility, and secondly, to seek out, and practice, methods of approach, including to clients, in this regard. Some techniques of encouragement to clients, if I can call them that, for example include:

(a) Do mention the success of Mediation as a process. It is true.

(b) Assess, as best as possible, the personality type of the client, including as an executive or individual, or if corporate, additionally, its corporate philosophy, as best as one can. Often, this will be clear enough especially if a client of frequency. Even, however, if it is the first or first largest litigation being confronted, the responsibility bar is raised as to your best practice client early resolution alert.

4 There are many versions of earlier or additional Dispute Resolution ('ADR'). Many 'hybrid versions' have arisen, as often as not, at the more recent instance of academics or others (and I will make a brief comment or two about that shortly). However, one does not need to get 'too fancy'. Mediation is a process usually central to, and suited to, most disputes, so one does not usually need to research too much, or search out, other ADR 'versions'.

5 Where litigation has already commenced, and frequently it has, if acting as a Mediator, I have found it counter-productive, indeed almost a distinct negative, to require or 'direct' that the parties or their representatives give you 'copies of the pleadings'. Almost always, the lawyers for the parties, at the Preliminary Conference, will suggest that each side send you 'their pleadings'. I have found that the net result, apart often from a lot of unnecessary reading involved for the Mediator, is that the parties and their lawyers, in full knowledge of your having the 'pleadings', will turn the Mediation, perhaps unwittingly, into 'an early run at' the litigation, rather than the conduct of the broader spectrum of matters which can emerge at a Mediation, and which often are the factors which resolve matters.

6 I speak here, for example, of incidents such as, within the first hour of the actual Mediation, the disputants or their lawyers urging matters such as: *'Look, Mr Mediator, you have read paragraph 62 of my client's Affidavit, you've seen the discovered documents, you know as well as we do what that really means!'*, and the like. Before you know where you are as Mediator, you are in the midst of 'litigation positions'. The disputants and their lawyers thus, too, are rowing the same boat.

7 Briefly, I find it in fact better for the Mediator to resist, at the Preliminary Conference, any invitation to be given 'the pleadings', as distinct from saying: *'No thanks. But what I do want from each side is a brief, no more than 2 pages, Issues Statement (or similar*

description) exchanged with each other and with me. That is all I have found I have usually needed. The rest of the story as relevant will unfold when we get together at the Mediation'. The result is that the parties and their representatives are 'enforced' into a position of thinking hard about the central core of their dispute and 'enforced' into recording it briefly.

8 For the same reasons, when as lawyers representing a party at a Mediation, resist digging into the prior baggage of the 'pleadings'.

9 There are not many disputes which cannot devolve into a simple format. It is a true Mediation discipline preparation, as distinct from simply deflecting to the Mediator, as if an Arbitrator or Judge: *'Here are our bundle of documents'*. The 'bundle of documents or pleadings' approach has the clients, (especially when attending Mediation for the first time), with the psychological mindset that 'this is just another avenue of my litigation journey' – when it in fact is not – Mediation being inherently a mechanism, quite separate and apart from the Court forum of a stoush about legal rights, which singularly concentrates on closure.

10 As a lawyer, at the moment of first client instructions, emphasise to the client that he, she or they should be truly fearful of litigation, and that such realisation is better had sooner rather than later. Rather emphasise, in reverse, they can never be fearful of staying empowered within a Mediation, by comparison.

11 Identify earlier, not later, with the client, as the advising lawyer, the potential course of this conflict if it continues. That there is a conflict is uncontrollable history. The course for its resolution, though, is one for controlled management. That is, if it is to be wisely dealt with, not only by the client, but by you. I have developed a habit, as a lawyer advising clients, whether in a personal, executive or commercial dispute of, after obtaining the usual list of instructions (either as a defendant or as a potential plaintiff), and only at the end of the conference, then deliberately to inquire: *'Okay, Harry, I have these instructions. And yes, we can issue the Statement of Claim within the next few days. And when I have your $20,000 retainer cheque and our Costs Agreement signed and so on – but I need to ask you one more question: Harry, what is it you really want?'..'* This always obtains a pause, a counter-inquiry, *'what do you mean?'* It is the most powerful question, though, you can ask from the outset.

12 I then give the brief explanation that 'Harry' has come to me with one problem, and is leaving with three. Namely, he still has the problem itself, the litigation now in pursuit of it, and not just a legal bill with costs, but also the human, executive and other 'costs', in every direction. These latter are the 'true costs' of conflict, and rarely 'costed' with the initial regular focus on professed 'principle', while his instructions direct me to continue the dispute, indeed to formalise it. Which is the opener then for the repeated question: *'Can we work out now what you really want to settle this and how we can quickly get to it – before we institute any formal action which may destroy or limit that prospect including in terms of atmosphere from the other side?'* Remember always, the very filing of formal 'pleadings' from the outset, can be terminally destructive of a prior long-valued commercial of personal relationship between parties – that step also may in some cases make negotiations thereafter, and the timing to negotiate, harder not easier, and the cost of resolution more expensive, not cheaper. Thus, after the above questions are asked, the conference then usually ensues for another hour but in a more positive direction.

13 The importance of this approach to my mind and experience, has been the planting of the resolution seed from 'day one' in the client mindset, which can be constantly revisited by you advising sensibly and responsibly, at every stage later, and indeed quite firmly, rather than the sudden announcement 6 months or more down the track, *'I wonder whether we should try Mediation Harry?'* Here, my emphasis is the identification with the client of the true source of the conflict, right from the outset, including in the very powerful questions I have illustrated above. In this, I see the lawyers' responsible role as twofold – first, dispute management, second, a role directed towards earliest permanent dispute resolution.

14 Identify equally at all stages what then are the barriers preventing resolution? Often, indeed more often than not, the barrier is attitude or 'face'. Equally often, that barrier, attitude or 'face', is mutually shared by the disputants. Sometimes, lawyers trap themselves into the very same positions, sometimes even more sadly and irresponsibly, even when their own client has in fact an open attitude. However, the point is, as an independent advisor, you are significantly yourself empowered to help 'free up' the client from an attitudinal position from day 1. I take the view that it is beyond a matter of empowerment. As a respected and trained advisor, it is your responsibility. The corollary is that it is irresponsible, if not professional neglect, as has been constantly re-

emphasised in the UK and USA as to a lawyer's responsibility to dispute resolution, not to. Indeed, simply to maintain a position to follow the rote instructions of the client (often ignorant of the availability of or potential encouragement towards ADR) to litigate, or to maintain litigation, is not only irresponsible – it serves only to reinforce, at least in the mindset of the client, that it is somehow right to maintain an entrenched approach. That barrier then becomes increasingly very difficult to break down, sometimes insurmountably so. In front of the client you may end up arguing against yourself!

15 But again, as to 'a right moment', if you have planted the seed of an 'open to resolution' mind to be applied to a dispute or difference, from the very 'day 1' of 'instructions', you can increasingly reinforce that 'resolution' psychology on every client meeting occasion thereafter.

16 As a lawyer then, from the very outset of instructions, and as a Mediator from the very onset of introduction to the matter, the emphasis should be on options for moving forward to resolution, not on any technique which encourages party/party disengagement or separation from the dispute. The latter I term the 'High Noon' combatants and adversaries approach to the potential mismanagement of a dispute, namely 'barristers at 50 paces'. Rather, the emphasis should be on consensual early resolution under perhaps the more attractive banner of 'see you for cocktails at sunset' rather than '50 paces at high noon'!

17 I reiterate this. Wherever feasible, and this will not always be possible, resist the client's initial urgings to file for litigation, which is the first step in disengaging from dispute management. It is tempting, because for the client, it is the easiest instruction to give, and for the lawyer, the easiest instruction to follow. I recognise that this is not always feasible due to statutory or other time limitations, injunctive or emergency relief matters, or for a host of other reasons. But most litigation does not command such professed 'urgency'. Rather, a dispute more often demands a cooler analysis in approach where the lawyer, acting properly, and empowered by experience and a degree of street wisdom as well, can counsel the client to a 'cool your heels' pause-and-analysis approach first, in the mix of which, the raising of Mediation should be central from that first moment.

18 Equally, even where a letter of demand or the like is first necessarily despatched, counsel the client, even where initially instructed for the letter to be in 'bloodthirsty' terms (quite common), to resist the 'take it or leave it' approach to or phrasing of the claim, or to presenting it or its demand as a 'fait accompli'. Rather encourage the client to embrace an openly-worded signalling of a claim at first instance. This does not mean that the letter of demand, or the logging of the claim, should mention ADR upfront or be other than in resolute terms. That may remain between you and the client instructing.

19 As I have stated, every case will be different. There will be emergency or urgent or other cases demanding different forms of presentation, but again in the overall not many. Each case will command its individual case assessment as to this approach. But as between the advisor and the client, unequivocally, earliest ADR should be invariably mentioned and strongly encouraged; and secondly, wherever feasible, the approach to the signalling of a claim, or to the defending of one, should be reasonably 'open-ended', and not in professed exclusionary terms as to disengage prospects of or options for resolution. Indeed, some USA experiences and research have suggested that in corporate, commercial and industrial relations disputes, all sides permanently value and respect a settlement which is based on a progression of comparisons, on a narrowing of options, and on an exchange of information about reality testing of solutions and the like. These are quite different emphases from the conduct of 'stand-off' separatist litigation. The point here is that, leave aside the lawyers, 'all sides value' a consensus settlement, not the least of which for its permanency and economy.

20 Equally, the further point is that, acting sensibly and responsibly, as advisor, you should never resist the opportunity, on whatever argued basis, to approach the other party or its representatives, to raise the prospect of a Mediation engagement, nor equally should you resist the initiative from the other side of an approach to you in the same vein.

21 If some form of independent scientific, medical, structural, fiscal or other expertise is needed to assist your client's decision-making, obtain it early, but inherently ensure its independence. Be robust with your client about it if it is negative, in whole or in part, to the client's cause. If it is positive, be conservative in your encouragement. But either way, don't have its emphasis, either in its first being commissioned, or from its ultimate content, as to its utility as a 'litigation weapon'. Rather, emphasise it as a value-added information resource for resolution. Here, it is noteworthy, especially in medical and

related negligence, building construction, or scientifically-oriented disputes (for example), that the NSW Supreme Court directional emphasis in more recent years, indeed months, has been towards the gathering of an independent conclave of experts, for example, on an agreed list of questions, and where, in many cases, such has led to a shortening or narrowing of litigation issues, and equally, to the identification of common understandings. But, none of that negates ADR at any stage within that process, or immediately at the conclusion of it, Court-directed or not, and where there is a continuance of the advisor's professional responsibility, in my view, to engage in constructive exchanges with the other side towards the earliest moment to mediate it. For example, such can frequently occur before the 'next directions hearing' and where, in my experience, at the 'next directions hearing' the Registrar is informed: *'Registrar, we decided to hold a Mediation 2 weeks ago and in fact we continued Mediation, finishing our second day yesterday, and the matter has settled'.*

22 So these important information-gathering exercises, even if under the directorial tutorship of the Court, did not disenfranchise the dispute from the timely grip of Mediation.

23 As an advisor, always – repeat always - indeed again it is at the level of professional responsibility in my view, seek, and encourage, client instructions as to the insertion of ADR clauses in all relevant contracts. Equally, seek instructions to review any current, or prospectively renewable, commercial or other contracts. This is good business as well as it is good sense. It leads to work, and it fits most corporate good governance budgets, especially in today's economic times more so than ever. The client profile of a formal dispute resolution mechanism actually being provided for by contract, and thus to economies of scale, also enhances solicitor and client relationship proximity, and demonstrates a lawyer consciousness of client need.

24 Be on active watch for every opportunity as to when to negotiate or to continue to negotiate. Too many litigators have the reverse mindset focussing on: *'I know when I'm going to leave the negotiation table'*, often adopted as the litigator's own style, not even coming from the client. This, often from the first moment of ADR approach, converts to expressions then emerging such as: *'Take it or leave it..'* or *'That's what my client says so I'm stuck'*, rather than: *'Well, my client has some strong views.. you know that.. but I'll see if*

I can convince him/her/it there's no harm in meeting about this'. There is a different emphasis entirely.

25 In introducing a client to the prospect of Mediation, resist any self-invented or 'fancy' rules or descriptions for the Mediation. Academics appear to have taken hold, in the last few years, of trying to develop, encourage or justify, various 'hybrids' of approach, some with fancy or new titles suggested to be given to ADR. Keeping Mediation simple is best in my own experience. The real emphasis is in the parties staying in control of the process. Remember always, in this, including as a Mediator, the process is not yours, nor its outcome, largely to control (and I know some Mediators who appear to be directed in this fashion). It is rather for you, whether as Mediator or as advisor, to chair the process, to keep it simple, and to help take the parties through to their result.

26 Indeed, I have noted some experiences whereby, in attempting to change the process, even having obtained a consensual resolution between the parties, the Mediator then takes over with his own perceived role or agenda by exploring, for want of a better description, a more 'global' result, occasioning, at the very culmination of an otherwise successful Mediation, an unnecessary disenchantment between the parties or the settlement simply falling over.

27 Definitely – most definitely, as a lawyer – set in place a schedule or regimen for internal Firm file audits as a proactive policy. Too often, every practitioner within a Firm, or sole practitioner on his or her own, conducts each dispute or litigation 'in its own box'. Every so often it is useful, as I have found it productive, on a periodic basis, to call the partners/dispute division operatives, together, on some first prior notice and preparation, with a schedule of files, whether already in litigation or whether simply of a 'dispute atmosphere', to discuss the readiness of each of them for the obtaining of client instructions for Mediation. I know of Firms, having activated such a policy of file audit reviews conducted on a bi-monthly basis, to have cleaned out over one-half of their litigation files before reporting within the next bi-monthly period – with significant and earlier costs turnover for them, and with happier and more productive clients resultantly.

28 Lawyers then, should conduct active file audits in litigation matters, and in any file which has a 'dispute atmosphere' even where litigation has not been commenced. I call this

latter group of matters in dispute resolution terms 'the sleepers'. In conducting regular file audits, one should not hesitate in obtaining instructions to immediately 'touch the nerve' of the other side as to settlement prospects.

29 As a Mediator, do emphasise strongly, and openly, to the parties and their representatives, that the parties themselves (and they only) remain empowered as to, and retain ultimate control over, the resolution of the dispute. Equally you should emphasise to them that litigation removes that power and control. As has not infrequently been stated: 'Courts decide disputes, but they do not resolve them'.

30 As a lawyer advising in a dispute, or as a Mediator, emphasise strongly what Mediation is not, and what litigation is. I often describe these differences at the very commencement of the Mediation as I equally do at the Preliminary Conference before it. Namely, by way of example, I explain the differences such as confidentiality (extremely empowering), cost (touches a nerve invariably), reassurances as to the most complex disputes coming to Mediation frequently resolve within hours, and so on, but it is up to them.

3 Benefits

1 As an advisor, your encouragement towards earliest and 'right moments' to Mediation is essential public relations. It is good for you and your Firm. It costs nothing. No advertising is associated with it other than the most powerful advertising of all, especially in the 'value' clients have attested to the relief from the entrenchment of litigation. It will bring in repeat business, hopefully not always litigious – but even there, you watch the mindset of the executive change from day 1!

2 At the external client level, it is equally good PR. It is has become noticeable, especially in the last few years, that a number of commercial insurers, for example, have come to appreciate the real corporate value, in PR terms, of an open-minded early resolution culture to insurance claims litigation settlement. Indeed, they are advertising it sometimes under the banner of 'reduced litigation budget or estimates', or as part of a trumpeted feature of a fresh 'corporate Governance Policy', and frequently appearing, under different guises, in AGM Reports.

3 The alternative - litigation - is not necessarily sophisticated. Rather, it's an exercise of expenditure only towards a declaration of a result. It's not an investment in the earliest permanency of closure.

4 Litigation is not necessarily brave. It's the easiest exercise in the delegation of the responsibility which attaches to managing and resolving a problem about alleged rights. But ADR, including Mediation, Conciliation, reconciliation, or call the various versions what you like, <u>always</u> is sophisticated, is almost always a brave and courageous initiative, is predominantly successful, and when it is, without exception, permanent.

5 It is a better quality of closure, noting that in most cases parties come to Mediation for the first time. But it takes their experiencing the process to find out. In my experience, at the closure of a successful Mediation, you can literally see the relief in the faces of the disputants, notwithstanding their respective acceptance some of the 'pain' of compromise. However, the point here is that it will often take you, as the advisor, and thus as the catalyst, to get them there to find out that inherent value. It could be put this way – an investment in earliest dispute closure is truly an 'investment', for both the lawyer and the client. But, an investment in litigation is, most certainly for the client, no 'investment' at all!

6 Some benefits, clearly client-oriented, are your responsibility to identify and to constantly reinforce in the 'mindset' of the client. Some of these (only) frequently include:

(a) Relationship preservation, often valuable and often still rescuable.

(b) The potential creativity in or flexibility of settlement terms in a Mediation environment, not deliverable by a Court resolving 'legal issues' solely.

(c) Permanency of result if settled, and its potential confidentiality also (many disputes have a 'nerve touched' on that element).

(d) The sense of personal or corporate achievement, because of that empowerment, given from a mediated and permanent result and in being the direct architect of it.

7 These are but some of the fashions of encouragement but to be delivered, in my view, to the client almost invariably, if acting responsibly, at the earliest moment of dispute instructions. As there is a 'right moment to mediate', there is a 'right moment to mention' and emphasise it.

8 Emphasise to the client that, if they are 'fearful' of litigation, it is right for them to be fearful. And if they are not, they should be. It is not an arena in which to purport to be brave or ferally 'principled'. In mentioning the naturalness of 'litigation fear' reinforce, from the outset, some litigation features as:

(a) Its variable, unpredictable, and almost always, negative 'costs drain'. That emphasis and clarity should not just be on legal costs. But more emphatically, the emphasis should be on the other real 'costs' – namely in human executive health and other terms, never properly calculated on the 'true ledger of litigation'. These latter 'costs' are the greater 'costs' usually by far, than simply some calculated analysis of anticipated legal costs, for example. The lawyer has a professional responsibility in this at another level. The *Legal Profession Act*, 2004, NSW, apart from general professional responsibility, commands the lawyer to provide ongoing estimates of costs and of the costs equation, as to avoid the later impact, or implications flowing from, client costs arguments, often converted later by the client, or by the lawyer, within a costs assessment environment, usually in that atmosphere then of a litigation loss. In speaking about costs, the lawyer himself or herself should not be fearful of stating without equivocation what costs, and in their own professional time and indeed health, and distraction, are devoted in the litigation journey to such things as (and this choice is their decision only):

(i) The now 'bloodthirsty' litigation tracking and Court-directed timetables.

(ii) The extent of work, and therefore of costs, involved in the litigation exercises of discovery, interrogatories and the like, many such exercises largely useless in or irrelevant to, the proceedings, and rather often more only tactical between the disputants, as also with subpoenae and the like, to say nothing of potential corporate or personal information exposure. Here, there is an argument that a 'right moment to mediate', in a litigation context, can only sensibly follow when the 'pleadings are all in'. I do not subscribe to that view at all. Indeed to the

contrary in my experience, these interlocutory processes, apart from their expense and other aspects of 'negative dispute investment', lead to a greater degree of separation and disenchantment between the disputants, rather than an earlier meeting of the minds. Each case will be different. But I have not known of many commercial or other Mediation disputes before me as Mediator which, conducted at the very earliest moment, and without 'pleadings', but with the issues before the parties, have failed to resolve because of a lack of 'information'. There are very few of them. But even there, I have conducted, in those few cases, a continuing series of Mediations, but usually only over sequential weeks, where information was to be had and, once obtained and shared, advanced the settlement prospects.

9 A contemporary approach to damages settlements, which embraces in my view the professional responsibility to seek earliest prudent resolution, does <u>not</u> take over the centuries-old precepts of amelioration of risk, and of the duty to mitigate loss. In most damages cases, ADR, and your encouragement towards it at the earliest moment, squarely addresses <u>both</u> responsibilities.

10 Many corporations have low levels of corporate competency in ADR techniques where 'lip service' at best, structurally, or in the executive mindset, is paid to Mediation, but where litigation still remains the 'first' not 'last', report. Sadly, often their legal and other advisors lack the wisdom, commitment, courage, or all three qualities, to express forthrightly, and at very timely moments: *'Look.. there's other ways potentially here'* picking up some of the psychology of approach which I have elsewhere here mentioned. This comment, including as to corporate executive mindset, applies as much, too, to <u>internal</u> organisational disputes, which within companies or divisions or branches, if not addressed, can become disastrously cancerous, as to <u>external</u> corporate or executive disputation. There needs to be an organisational education in, and some active knowledge about, and certainly some alertness to, ADR, applied early.

11 In this context, it is noteworthy that (by one illustration alone of this) some UK corporate research during 2007 identified:

(a) Nearly two-thirds of organisations don't educate staff on dispute avoidance.

(b) Less than 30% of organisations don't update policies in the light of lessons from previous disputes.

(c) Only 38% of employers train staff in dispute management.

(d) Notwithstanding this, almost 100% of organisations stated that risk management policies must include dispute resolution and practical dispute management and training.

12 The lawyer as the advisor is in a keynote position for this. This is not only in the giving of corporate or structural advice, and never to be removed from it, but from the very outset of any instructional approach from the client in a dispute context.

13 At the macro-professional level, an early dispute resolution mindset enhances the image of the profession perhaps, including politically, converting the impression of lawyers as purveyors of entrenched litigation, to being the central engineers for earliest resolution. And that is as it should be.

14 At the corporate level, an ADR alertness, and active preparation and commitment to embrace it, should appear in the list of the stated Corporate Governance Policies. That would, indeed should, be a directorial and executive duty and responsibility including the commitment to desist from unnecessary and unrewarding litigation or disputation, often discovered too late, to the cost of shareholders, amongst other implications.

15 In the current economic climate, ADR should perhaps indeed be one of the central features of the mandates of such Corporate Governance. It should also be central to all Governmental or statutory potential disputation areas.

16 ADR is productive at every level. At the 'purely selfish' lawyer level it results in:

(a) Repeat business.
(b) Enhanced confidence as between client and lawyer.
(c) Imbues a resolution culture not only with the client, but within the law Firm or Practice itself.
(d) It is economically dynamically successful in clients saving the money, time and expense in litigation.

(e) It frees the lawyer up for other client work.

(f) It leads to quicker 'bill turnaround', the dispute being resolved earlier, and thus for earlier accounting, than later.

Thus, from these and many other perspectives, ADR application is not only prudent but productive.

17 Company directors favour Mediation over litigation as a means of resolving business disputes. This is constantly reinforced in continuing research conducted by the Australian Institute of Company Directors. Consistently, across surveys conducted across over 600 directors, KPMG (for instance) has in the past isolated that, in the context of supplier, customer, industrial relations, and other disputes, an overwhelming 96% of directors agreed litigation was not a useful way to resolve business disputes. 87% agreed that litigation 'does not manage costs'. 80% said it failed to preserve an ongoing relationship between disputing parties. 59% agreed it failed to maintain confidentiality. Noteworthy, though, is that 100% reacted with a recognition that litigation was costly, and a 90% recognition that litigation did not empower the disputants to achieve their wanted result.

18 The Courts are increasingly appreciating that they can, and should, themselves do things differently. Thus it is, I have found even within the last 6 months or so, that the Courts in NSW, at almost every level, are robustly inquiring, at Directions hearings for instance, of representatives as to: *'Why is this NOT suited to Mediation?'* And at Judicial level, directing it, and frequently, even when matters are not initially settling at Mediation, redirecting it for Mediation.

19 The Courts themselves are increasingly recognising that, whilst they might forensically search for 'truth', it is only as a means towards a declaration of a 'legal' outcome, whether the 'truth' be found or not. Whereas an earlier consensual resolution between the parties, not quite irrespective of 'truth', may well involve that 'doubt' is accepted as part of the price for compromise. Litigation, though, does not remove that 'doubt' either!

20 It has now been correctly identified by the Courts, as to their way for the future, that both cost and delay, are the 'twin evils'.

21 The community, especially lawyers, should take critical notice of, as already do the Courts, the rigidities and complexity of Court adjudication, commensurate with its length of time and associated expense.

22 The Courts increasingly recognise that Mediation does not disengage the disputants from the capacity to obtain requisite scientific, accounting or other specialist information, indeed to the contrary – but to use it within the parameter of reaching consensus, without the need for a superimposing Court structure or formal pre-trial processes.

23 The community itself has increasingly come to the acceptance of the fact that the Courts need not be the primary decision-maker. Whilst the Court may 'decide' the dispute, the capacity for each dispute resolution remains in the hands of each party. Mediation engineers the constructive use of that empowerment.

24 I disagree with the urgings of some, thankfully the minority, who have adhered to the view that private justice, as in the form of Mediation, *'inhibits the development of the common law'* (refer J Gruin in *'The Rule of Law, Adjudication and Hard Cases..'* – (2008) 19 Australasian Dispute Resolution Journal 206).

25 If time management were the sole measure of dispute resolution, Mediation, contrasted to litigation, wins hands down.

26 As Rolf J stated in the NSW Supreme Court in the *ANI Spedley* Case: *'A settlement (through Mediation) is recognised as a victory for the commercial commonsense of all parties, who and which necessarily recognise the uncertainty and risk of litigation. There were eight QCs, eleven junior counsel and eight firms of solicitors appearing and the amount of documentation involved has led to the structural modification of the Supreme Court complex'.*

27 Tony Fitzgerald QC (former Judge of the Federal Court of Australia and of the Supreme Court of the Act), at the launch of a Mediator's Handbook (in about 2005) made some illuminating comments including:

(a) That when he first became a Judge in 1981, ADR was regarded as unconventional and inferior, and no substitute for the 'proper resolution' of disputes before a Court.

(b) That, now, Mediation is the most revolutionary change to the legal system in his view in his 40 years in law.

(c) That dissatisfaction with traditional litigation is almost universal, a view now shared by the Courts and by most Western Governments.

(d) That it would only be a matter of time before Australian Governments follow the lead of the UK Government which, in 2001, pledged that all of its departments and agencies would settle all legal disputes by ADR, wherever feasible.

4 The Right Moment to Mediate - Responsibility

1 I have, already, made certain commentaries, quite deliberatively in places, using the expression 'responsibility'. As an advisor, to touch upon with the client, and indeed to encourage, the activation of that 'right moment to mediate', is in my view no less than a legal and professional responsibility. That it accords with commonsense, as well as street wisdom and legal wisdom, converts that responsibility to an active duty. It is not necessary that I traverse those earlier remarks on 'responsibility' again. But I do supplement the point with some further illustrations and observations.

2 As of just a few months ago, November 2008, the Victorian Justice Department was looking into (including as part of National Mediator Accreditation Standards) having Victorian practitioners commit to an 'ADR Pledge', by which lawyers commit to education about the role of ADR. Here, Brian Tee MLC, the Parliamentary Secretary for Justice, remarked upon the perception that the Australian adversarial system had failed including in terms such as: *'Courts have become clogged with technical arguments and procedures that delay and frustrate court proceedings'.*

3 Interestingly, the reference to the ADR Pledge included such lawyer education as to embrace lawyers <u>ensuring they fully discuss earliest dispute resolution options with clients</u> and where such a 'Pledge' system has been operating in California for some time, and which commitment, including prospectively in Victoria, included:

- Once initiated, the litigation process is to be constantly assessed by the practitioner as to the appropriateness of using ADR at various stages.
- The practitioner is to encourage open communication with the opposite side to a dispute inviting appropriate ADR.
- The initiative coincides with Federal and State Attorneys-General emphasising the need for Mediation in curtailing rising litigation costs.
- The perception, borne out by statistical experience, that Mediation offers progressive opportunities to resolve disputes more quickly, and opening the Court system up to truly unresolvable matters.
- Victorian Government statistics are that between October 2005 and July 2007, 94 Supreme Court cases were referred to Mediation. Of those, nearly 60% were resolved at or shortly after the Mediation process, resulting in a Government saving of an estimated 311 sitting days for the Court system.

5 Statistics (not lies) – and a Right Moment to Mediate

1 Some statistics are frighteningly telling. A number of years ago now, but the comparison unfortunately remains still live, the Young Lawyers section of the Law Society of NSW drew some litigation settlement statistics from the Supreme Court of NSW. At that point, about 10 years ago now as I recall it, the statistics were that, from the time of initial claim filing to the first day of hearing, occupied about 2.1 years on average. The other averages were that the parties, almost without exception with solicitors and barristers in tow, attended the Court on 6.1 occasions for directions, call-overs and the like.

2 To that point, it takes no great imagining to appreciate the costs, not purely legal, but more significantly in human and executive terms, attracted to that fashion of dispute conduct. Notwithstanding that litigation journey, the further stat was that just on 72% of cases were resolving within the last 5 business days prior to the first hearing day. This was happening through, largely, the 'Court-corridor-revolving-door-syndrome' where the parties, whether it be through the 'sweaty-palms-I'm-just-about-to-be-a-witness' realisation, or whether it be through the nasty doubts suddenly coming into focus (and previously deliciously and deliberately ignored) as to the lottery of litigation, outcome doubt, doubts as to costs or costs orders, and other implications including as to matters of relative integrity or truth, and frequently as to publicity. At that point, the parties, many of them to that point professing executive intelligence, were settling. They were

doing so in thus a chaotic, and heavily-adrenalin driven, atmosphere, but then doing so in a rush of pre-trial argy-bargy.

3 True enough it is, in my experience, that the large bulk of these disputes, driven ultimately usually by single individual decision-making at all its stages, could have been, if properly advised or encouraged, undertaken in a more structured, relaxed, controlled, and certainly in many cases 2 years earlier, environment of a Mediation with equivalent, or even greater, success.

4 In statutory Mediations, it is interesting to consider what the statistics indicate including relative to the question of 'a right moment to mediate' can only be 'after the pleadings are in'. Firstly, in Retail Lease (Retail Tenancy Unit – 'RTU') Mediation, there are no 'pleadings' as such required at all. The Mediation, briefly stated, is activated only by a landlord or a tenant filing a formal Application, the content of which can significantly vary from almost one or two jot points of complaint, to a bundle (usually of correspondence). But there are no 'pleadings'. Yet, the success rate at Mediation, on the barest usually of Application information, in the 15 years from August 1994 to December 2008, is at 80%. And, in my experience, these Mediations on average occupy not much more than 3 hours. It is true that, on rarer occasions, the Commercial Tribunal (NSW) might refer a matter to Retail Lease Mediation where there might thus already be 'pleadings', but that circumstance is rarer.

5 In Farm Debt Mediation under the *Farm Debt Mediation Act*, 1994, NSW (Rural Assistance Authority – 'RAA'), again no 'pleadings' are required, merely the statutory processes to access the Mediation (which I will not go into here). But there are no 'pleadings' as such. No great imagining is needed to reflect upon the highly emotive nature of many of these Mediations, frequently involving several generations of the one family landowners, confronting often difficult natural conditions, and constrained by accruing debt, trying to reach a resolve with a Banker/creditor. Here, notwithstanding all of that, and looking only at the 1080 statutory Mediations certified as having taken place since the inception of the Mediation Scheme of 12 February 1995 to 31 January 2009, the Mediation settlement success rate is an extraordinary 89%.

6 In NSW Workers Compensation Commission ('WCC') Mediations, as to work injuries damages, there are 'pleadings' only in the sense that the Application to Mediate is usually

accompanied by a draft District Court Statement of Claim and a draft Defence (usually with medical reports and occasionally a workplace safety report study). However, these documents are usually the inheritance of (often) WCC statutory claims, conducted earlier. Here, the success rate in matters which in reality have embraced actual Mediation, is 72%.

7 As to Court-directed Mediation, the NSW Supreme Court's 2007 Annual Review illustrates:

(a) There were 748 Registry referrals to Mediation. Of those, 282 were handled within the Court-annexed Mediation program, that is, Mediations conducted by the Court Registrars. But, within the period 2003-2007, the settlement Mediation rate of the 282 Registrar-conducted Mediations fluctuated between 49% and 65%.

(b) The above needs, however, to be measured against the remaining approximately 500 referred for 'external' Mediation, referred to private Mediators where, in my view, the anticipation, whilst not recorded, in probability approaches the 70% mark.

(c) Further, as with most Mediations, none of these Court-annexed statistics include cases which, having had Mediation conducted without success, settled at a later time, usually just days later, but not notified. In my view from experience, there would be a not insignificant additional settlement rate there.

8 What all of this suggests is that little difference is made to the successful application of Mediation to a quite different variety of disputes, being statutorily required Mediations, and where largely, at best, some 'information only' is needed, but not necessarily formal pleadings – and where the success rate is nonetheless extremely high. What this points to, in my view, is that the success of a Mediation does not necessarily depend on 'paper or pleadings', rather more on at least some background information, and not necessarily a lot, but more on the commitment to enter into it. There were many, myself included, now diminishing in number, who years ago were doubtful of the value of enforced statutory Mediations, arguing that, if people were enforced into Mediation, no goodwill attaches, and it would be 'just another hoop' in the litigation process.

9 However, the early sceptics have been proven wrong in this, and the statistics reinforce the point. So that parties now attending Mediation, even where required by law, are entering into it by and large with the right commitment, and with great success, – and not critically dependant upon pleadings or positions.

6 That 'Right Moment' – In Summary

1 May I finally mention some of the following matters by way of some brief 'jot point' summations, namely:

(a) Yes, there is not only 'a right moment to mediate', there are many. When actively inquiring in any dispute before you: 'Has the right time for negotiation arrived?', err on the side of dawn, not dusk. Ignore, in taking the initiative, either as a Mediator or an advisor, the misplaced 'fear of weakness'. The early engaging of ADR, and the initiative taken towards it, is not a sign of weakness, nor should be read as such. Indeed it is to the contrary. The phone should be picked up at the earliest stage on behalf of a client to the other representative to invite it including in such terms as: *'Don't think this is a sign of weakness. Rather, you will say your case is strong and ours weak. And I'm going to say the same in reverse. Where does that get us? Where does that get your client or mine? If you are looking after your client, as I am trying to mine, we should get together on this on this through a Mediator. This call is only to instigate that prospect'.* This will not often be easy to do or to get instructions about. But there will be a 'right moment' for it.

(b) It is your duty and responsibility to clients as well as to the Courts.

(c) It is your duty and responsibility to your own Firm.

(d) The identification of that 'right moment' is active, not passive. It may not necessarily present as a 'once-only' mention, and now I've 'done that'. The resolution door, and as to its process, should always remain ajar.

(e) The value of timely and regular file audits.

(f) The rationale for active identification of a 'right moment to mediate', and being earlier rather than later, includes but is not limited to issues such as:
   (i) Exacerbation of, and responsibility towards limiting of, costs (both client and advisor).
   (ii) Entrenchment of parties, if not undertaken.
   (iii) Entrenchment of legal representatives, equally.
   (iv) The value of maintenance of client relationships between themselves as disputants wherever feasible, and of the practitioner and client.

(g) Not only is there a 'right moment to mediate', it is additionally right to mediate. Indeed it is now an obligation and responsibility to seek to activate it.

(h) Impresses clients with an emphatic early resolution approach.

(i) Saves clients bucket-loads of money.

(j) Often saves client's own commercial relationships.

(k) Ultimately and importantly is conducive to good health.

(l) Enhances almost always the solicitor/client relationship.

(m) Is productive in terms of costs to the practitioner gathering in costs much earlier. There is another important feature here. When clients, actively advised from the start, then settle earlier, and to a degree of satisfaction, there is less likelihood of a complaint as to costs to the advisor. When one considers the significant time, energy, and potential client loss, involved in later costs assessments, commonly with the legacy of costs unpaid which frequently emerges as a result of a dissatisfied litigation process, there is significant 'added value' to the early resolution culture of encouragement from the advisor from the outset.

7 In Conclusion

'A 98 percent civil settlement rate and the increasing use of negotiation, mediation, and collaboration in resolving lawsuits have dramatically altered the role of the lawyer. The traditional conception of the lawyer as "rights warrior" no longer satisfies client expectations,

which centre on value for money and practical problem solving rather than on expensive legal argument and arcane procedures… Lawyers play a vital role in conflict resolution. They offer a unique form of client service. Lawyers are specialists in identifying legal issues and predicting legal outcomes. They should also offer their clients practical support, mentoring, counselling, risk assessment, and respect. The new lawyer will maintain and strengthen the place of the legal profession in our communities and allow lawyers and the public to again feel good about what they do.' [1]

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[1] MacFarlane, Julie. "The New Lawyer". UBC Press 2008