BALANCE
MARCH 1998
The Official Publication of the Law Society of the Northern Territory

Order 48 – The Great Debate

Tactful moderator Justice Dean Mildren declared the debate between Law Society President, Steve Southwood and Law Faculty Dean, Professor Ned Aughterson, on the merits of court-ordered mediation, a draw. The debate, entitled *Hot Spot in Order 48*, was conducted following the Annual General Meeting of the Media Association of the Northern Territory on 17th February at the *Roma Bar*.

Approximately 40 people, including Justice Sir William Kearney and Chief Magistrate Hugh Bradley attended the debate, where Ned Aughterson argued the case for compulsory mediation and Steve Southwood, the case against.

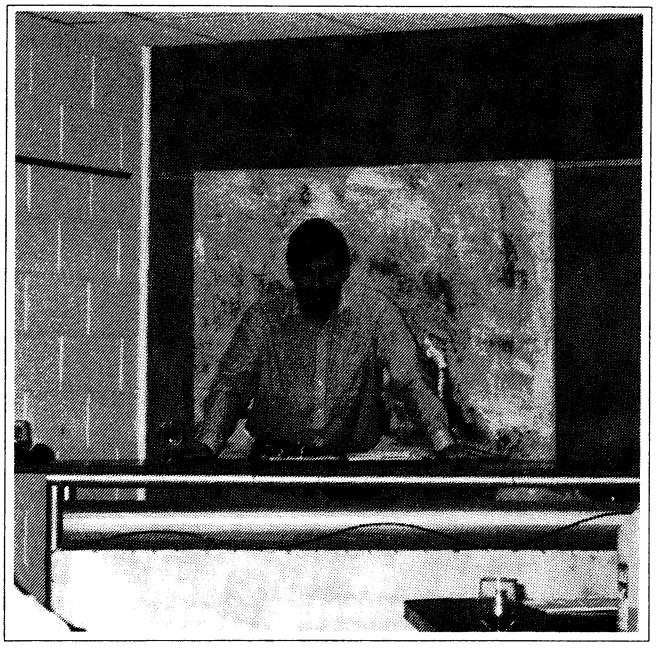
Professor Aughterson, a barrister and NSW accredited mediator, began his case by outlining what he saw as the usual approach taken by lawyers to mediation. He pointed to the incompatibility of a legal training in linear logic, deductive reasoning and the search for ultimate truth with the concepts of mediation, noting that in the latter, the emphasis lay with the interests of the parties, rather than the search for truth.

His list of reasons for supporting compulsory mediation began with one of the most obvious - money. Professor Aughterson argued that under the present adversarial system, parties don't pay the full costs of running courts and that court-ordered mediation would compel litigants to take a different path if it was expedient, thereby saving taxpayers' money.

He continued on to suggest that the element of compulsion was necessary to facilitate the change, citing human inclination to stick with familiar remedies. He argued that as a large proportion of cases now settle on the steps of court, a compulsory mediation system will allow this to happen earlier.

He suggested that parties frequently listened more willingly to an independent party (the mediator) and that early compulsory mediation would bring parties together before their positions hardened, thereby increasing and accelerating the likelihood of settlement of a dispute.

In response to the suggestion that court-initiated mediation would compromise the court, Professor Aughterson argued that adjudication in court remained as a further step if a dispute was not settled at mediation and returned to his first point that mediation would ultimately save money.



Professor Aughterson at the Roma Bar

In conclusion, he suggested that a the degree of compulsion implicit in court-ordered mediation was necessary as an incentive to change. His parting quote, attributed to Mae West, suggested that the legal system might "when confronted by two evils, choose the one yet untried."

Steve Southwood, in putting the opposing view, prefaced his comments with the statement that he was largely untrained in mediation and his view was that of a mere and humble lawyer (*bitter laughter from the floor*). His position did not doubt the benefits of mediation, merely the compulsory aspect of it as indicated in Rule 48.15. He felt that a mediation rule enacted by statute similar to the original Rule 53A of the Federal Court, requiring consent of the parties would be acceptable.

The thrust of Mr Southwood's argument was that compulsory mediation interfered with the unfettered rights of parties to adjudication, and that this amounted to infringement of

continued on page 2

From the Profession

MDPs — South African View

Republic of South Africa

The Association of Law Societies of the Republic of South Africa surveyed its membership in 1997 to gauge reaction to the concept of multidisciplinary partnerships (MDPs).

78% of respondents indicated approval of the concept that attorneys should be able to form partnerships with 'accountants, financial advisers, advocates, foreign lawyers, merchant bankers, estate agents and town planners.'

De Rebus of November 1997 reports that the respondents to the survey also added to this list brokers, psychologists, doctors, social workers, engineers, architects and insurance consultants.

The response to the survey also indicated that 88% of respondents were in favour of the sharing of offices, 73% in favour of the sharing of fees. 71% of respondents favoured the formation of stand -alone consulting companies with other professionals , but only 61% approved of the notion of sharing premises and/or fees with the consulting company.

The South African profession has recently aired issues related to MDPs through debate at the AGMs of law societies based on which the Association of Law Societies would make a recommendation on behalf of the profession.

Order 48 – The Great Debate

continued from page 1

constitutional rights, something that should be jealously protected, not diminished and delegated.

His view was that conflict *per se* was not necessarily bad and that preferred outcomes were often a just determination rather than a closed deal.

Further, he suggested that there was nothing intrinsically bad about winning or losing litigation, provided a fair and just judgment was achieved, pointing to the importance that this also be seen to occur.

Mr Southwood expressed a concern that compulsory mediation for disputes, especially where it was felt that certain types of cases would always be ordered to mediation could result in an impoverishment of legal doctrine in coping with disputes.

He pointed also to the disadvantage to weaker parties posed by compulsory mediation, suggesting that funds may be depleted in the mediation process and if no settlement was reached, these would not be available to put the best case during litigation. He expressed a concern that this scenario could be used as a tactic to delay and further weaken an opposition's case.

Mr Southwood also argued that the option of compulsory mediation should not be taken up until proper quality assurance could be guaranteed, noting that currently there were no protocols, standard forms or codes of conduct in place for mediators. He suggested that further education of lawyers and their clients was necessary before a mediation process became compulsory.

Following Professor Aughterson's reply, the matter was thrown open for discussion.

Of interest to practitioners was the point made by the moderator, Justice Mildren , who warned that legal practitioners would need to familiarise themselves with the process and availability of mediation if they wished to protect themselves from malpractice charges by clients not offered the process as an option at an early stage.

Newly-elected President of MANT, Tom Stodulka suggested that legal practitioners could benefit greatly by educating themselves about mediation as an indubitable element of change in the legal process.

LAW SOCIETY OF THE NORTHERN TERRITORY

Level 11, NT House
22 Mitchell Street
DARWIN NT 0800

GPO Box 2388
DARWIN NT 0801

Telephone: (08) 8981 5104
Fax: (08) 8941 1623

Balance is published 11 times per year by the Law Society of the Northern Territory. All contributions, letters and enquiries to the Editor, *Balance*, Law Society of the Northern Territory, GPO Box 2388, DARWIN NT 0801