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## **Mediation cannot always be measured by statistics**

*Article by Marcel Alter for 'Mediation News' (a VCAT publication)*

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We noted with some concern Dan O'Dwyer's article on the success rates of individual Mediators. Success or failure of a Mediation is difficult to judge. It will often depend on the criteria used and the supposed end aim. Mediation is not about win/win but about the Parties making commercial and personal decisions to resolve "dispute" situations or positions in which they have found themselves. The Parties need a forum in which to express themselves and have the other Party hear them and their hurt.

Mediations in commercial areas often focus on whether the matter is settled but the true success or failure of a Mediation is whether the Parties believe they have been heard and have had the opportunity of having their matter resolved.

There is no way around the fact that most Mediations, especially in the areas of Domestic Building or Retail Tenancy will be simply resolved as after all the facts are on the table, the cost and the legalities of the matter take over. Therefore, commerciality dictates a settlement which neither Party may feel is one they are personally happy with but which in the light of what could happen if it went further, is one they can or must accept and to move on.

The true value of any settlement may be not to judge it at the end of the Mediation but to allow a six months' period or longer to go by and then assess whether –

- A. Any settlement reached still stands
- B. Even if the Parties didn't settle – how happy were they with the process that followed and whether they felt in retrospect they would have been better to settle
- C. Whether they remember the matter at all now
- D. What they thought of the Mediator and the Mediation process used.

Using results-based statistics can be misleading. We are currently involved in a matter, as Solicitors in the franchising area, where the Mediator achieved what he believed to be a settlement and the Parties signed. This would go down in the statistics as settled Mediation. It has now cost the Parties some \$20,000.00 each fighting about what happened at the Mediation and how the Mediation was conducted.

In relation to the VCAT statistics we would also like to know



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- A. How many failed Mediations are the result of only one party turning up. We have recently had a run of these, which is not good for our statistics.
- B. How many settle or are withdrawn after mediation but before the next stage
- C. How many 'successful mediations come back for hearing

Everyone has their own style and each Mediation is different. There is always the possibility of improving the Mediator's abilities. We would agree with any proposal that involved in up-grading skills and the gaining and sharing of knowledge.

Yours sincerely,

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