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CASES, COMMENTARY AND MATERIALS

THIRD EDITION

DAVID SPENCER • SAMANTHA HARDY



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DISPUTE RESOLUTION IN AUSTRALIA: CASES, COMMENTARY AND MATERIALS

DAVID SPENCER

Professor and Academic Director
Office of the Provost
Australian Catholic University

SAMANTHA HARDY

Director, Conflict Management and Resolution Program
James Cook University

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This book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.

David dedicates this book to his best friend and partner for life, Mary-Anne, and to his other two best mates, Millie and Prue.

Sam dedicates this book to her colleagues in the ADR Research Network, who provide advice, reading recommendations, encouragement and friendship.

PREFACE

The third edition of *Dispute Resolution in Australia: Cases, Commentary and Materials* records a further reshaping of the dispute resolution landscape across Australia. For example, we are now more fully seeing the impact of government changes to the handling of civil disputation with the establishment and consolidation of specialist tribunals and commissions. The result of the creation of these extra-judicial bodies is a reduction in some jurisdictions of matters proceeding to trial. The interesting side-effect of this development is the rise of dispute resolution processes within these specialist tribunals and commissions that seek resolution of disputes in order to avoid hearings.

Further, government and non-government organisations are more attuned to detecting conflict and dealing with it an early stage before it escalates into a full-blown dispute and as a result of this we have seen the further development of organisational conflict management processes.

The third edition contains some new features including a chapter on conflict coaching which is an area of dispute or conflict resolution that has continued to grow in popularity in response to the organisational shift described above. It also provides further career opportunities for those trained in both coaching and dispute resolution.

Another new feature is the re-written chapter on arbitration given the April 2009 agreement of the Standing Committee of Attorneys-General to draft a new uniform Commercial Arbitration Act for domestic arbitration in Australia. The new Acts, passed by all the States in Australia between 2010-2013, seek to apply the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on International Commercial Arbitration 1985* (including the 2006 amendments) thereby aligning some features of international arbitration to the domestic application of arbitration.

There is a new chapter on dispute resolution and the criminal law system acknowledging the development of restorative justice programs which have now been established in a number of Australian jurisdictions. Those jurisdictions are experiencing successful outcomes through victim-offender conferencing that often provide the opportunity for the victim of crime to face the offender and seek some closure by better understanding the offence and its effects.

Another new chapter deals with workplace dispute resolution reflecting the fact that various governments have resourced their industrial relations commissions to attempt a consensual resolution before allowing parties to embark on a full hearing of the dispute.

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As is always the case with books that enjoy co-authorship, two authors often employ slightly different writing styles and no matter how talented the publisher's editor is, the two styles are sometimes apparent. It is healthy to have such differing styles in the one book and we set our readers the challenge of discerning which author wrote which chapter or part of a chapter. To the best of our knowledge the law is correct at the time of writing.

DAVID SPENCER
SAMANTHA HARDY

Melbourne-
Townsville
March 2014

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- L Boule, "Diagnostic Factors in Mandatory ADR Referrals" (2001) 4 *ADR Bulletin* 31.
- B Johansson, "Cybercourts, the Future of Governmental Online Dispute Resolution? Part 1" (2006) *ADR Bulletin* 8(7) 137.
- B Johansson, "Cybercourts, the Future of Governmental Online Dispute Resolution? Part 2" (2006) *ADR Bulletin* 8(8) 163.
- D Spencer, "Requiring Good Faith Negotiation" (1998) 1 *ADR Bulletin* 37.
- D Tyler, "A Brief Discourse on Conciliation, Fairness and Illumination" (2000) 3 *ADR Bulletin* 39.

American Lawyer Media (Incisive Media): <http://www.incisivemedia.com>

- J P Etheridge and L Dooley, *Coming to the Table: A Guide to Mediation in Georgia* (1994).

Arbitrator & Mediator (The Institute of Arbitrator and Mediators Australia)

- P Megens and A Peters, "International Arbitration Amendment Act 2010 – Towards a New Brand of Australian International Arbitration" (2011) 30(1) *Arbitrator & Mediator* 43.
- D Spencer, "The Decline of the Trial in Australia" (2011) 30(2) *The Arbitrator and Mediator* 1.

Australasian Dispute Resolution Journal (ADRJ) (Thomson Reuters (Professional) Australia Limited): <http://www.thomsonreuters.com.au>

- R Alexander, "Family Mediation: Friend or Foe for Women?" (1997) 8 *Australian Dispute Resolution Journal* 255.
- T Altobelli, "Private Conciliation in Family Law" (2002) 13 *Australasian Dispute Resolution Journal* 230.
- A Ardagh, "Evaluating Collaborative Law in Australia: A Case Study of Family Lawyers in the ACT" (2010) 21 *Australasian Dispute Resolution Journal* 204.
- A Ardagh and G Cumes, "Lawyers and Mediation: Beyond the Adversarial System" (1998) 9 *Australian Dispute Resolution Journal* 72.
- A Ardagh and G Cumes, "The Legal Profession Post-ADR: From Mediation to Collaborative Law" (2007) 18 *Australasian Dispute Resolution Journal* 205.
- S Armstrong, "Developing Culturally Reflexive Practice in Family Dispute Resolution" (2011) 22 *Australasian Dispute Resolution Journal* 30.
- D Bryson, "And the Leopard Shall Lie Down with the Kid: A Conciliation Model for Workplace Disputes" (1997) 8 *Australian Dispute Resolution Journal* 245.
- G Clarke and I Davies, "Mediation – When Is It Not an Appropriate Dispute Resolution Process?" (1992) 3 *Australian Dispute Resolution Journal* 70.
- D Cooper, "The Family Law Dispute Resolution Spectrum" (2007) 18 *Australasian Dispute Resolution Journal* 234.
- D Cooper and M Brandon, "Lawyers' Role Options in Family Dispute Resolution" (2011) 22 *Australasian Dispute Resolution Journal* 198.
- S Douglas, "Constructions of Neutrality in Mediation" (2012) 23 *Australasian Dispute Resolution Journal* 80.
- M Evers, "The Ethics of Collaborative Practice" (2008) 19 *Australasian Dispute Resolution Journal* 179.
- I Field, "Judicial Mediation, the Judicial Process and Ch III of the Constitution" (2011) 22 *Australasian Dispute Resolution Journal* 72.
- R Field, "FDR and Victims of Family Violence: Ensuring a Safe Process and Outcomes" (2010) 21 *Australasian Dispute Resolution Journal* 185.
- Justice R S French, "Hands-On Judges and User-Friendly Justice" (1991) 2 *Australian Dispute Resolution Journal* 73.

- R Garnett, "International Commercial Arbitration in Australia: Legal Framework and Problems" (2008) 19 *Australasian Dispute Resolution Journal* 249.
- T Gee, "Family Mediation: A Matter of Informed Personal Choice" (1998) 9 *Australian Dispute Resolution Journal* 179.
- P Gerber and BJ Ong, "21 Today! Dispute Review boards in Australia: Present and Future" (2011) *Australasian Dispute Resolution Journal* 180.
- K Hamilton and P Henry, "The Role of Counselling in FDR: Re-drawing Professional Boundaries" (2011) 22 *Australasian Dispute Resolution Journal* 166.
- S Hardy, "Online Mediation: Internet Dispute Resolution" (1998) 9 *Australian Dispute Resolution Journal* 216.
- H Hobbs, "The Dispute Resolution Act 2011 (Cth) and the Meaning of 'Genuine Steps': Formalising the Common Law Requirement of Good Faith" (2012) 23 *Australasian Dispute Resolution Journal* 249.
- D Kirkwood and M McKenzie, "Family Dispute Resolution and Family Violence in the New Family Law System" (2008) 19 *Australasian Dispute Resolution Journal* 170.
- O Litaba, "Developing Ethical Practice as a Family Dispute Resolution Practitioner" (2013) 24 *Australasian Dispute Resolution Journal* 36.
- C Liyanage, "An Effective Enforcement Mechanism For Online Consumer Arbitration Awards" (2011) 22 *Australasian Dispute Resolution Journal* 267.
- A Lynch, "Can I Sue My Mediator? – Finding the Key to Mediator Liability" (1995) 6 *Australian Dispute Resolution Journal* 133.
- M McIntosh, "A Step Forward – Mandatory Mediations" (2003) 14 *Australasian Dispute Resolution Journal* 280.
- T Peisley, "Blended Mediation: Using Facilitative and Evaluative Approaches to Commercial Disputes" (2012) 23 *Australasian Dispute Resolution Journal* 26.
- N Polak, "No Longer Neutral: Practitioner Power in Compulsory (Family) Dispute Resolution" (2009) 20 *Australasian Dispute Resolution Journal* 88.
- M Redfern, "The Mediation Provisions of Section 27 of the Commercial Arbitration Acts" (2001) 12 *Australasian Dispute Resolution Journal* 195.
- D Spencer, "Mandatory Mediation and Neutral Evaluation: A Reality in New South Wales" (2000) 11 *Australasian Dispute Resolution Journal* 237.
- D Spencer, "Remedies: A Bar to the Enforceability of Dispute Resolution Clauses" (2002) 13 *Australasian Dispute Resolution Journal* 85.
- D Spencer, "To What Degree of Certainty Must a Dispute Resolution Clause be Drafted?" (2003) 14 *Australasian Dispute Resolution Journal* 153.
- D Spencer, "Judicial Mediators: Is the Time Right? – Part II" (2006) 17 *Australasian Dispute Resolution Journal* 189.
- D Spencer, "IAMA's Fast Track Arbitration Rules" (2007) 18 *Australasian Dispute Resolution Journal* 200.
- Sir Laurence Street, "Binding and Non-binding Expert Appraisal" (1990) 1 *Australian Dispute Resolution Journal* 133.
- P Venus, "Court Directed Compulsory Mediation – Attendance or Participation?" (2004) 15 *Australasian Dispute Resolution Journal* 29.
- Hon M Warren AC, "Should Judges Be Mediators?" (2010) 21 *Australasian Dispute Resolution Journal* 77.
- J Zeleznikow, "Methods for Incorporating Fairness into the Development of an Online Family Dispute Resolution Environment" (2011) 22 *Australasian Dispute Resolution Journal* 16.

Australasian Institute of Judicial Administration: <http://www.aija.org.au>

- H Astor, "Quality in Court Connected Mediation Programs – An Issues Paper" (2001).
- K Mack, "Court Referral to ADR: Criteria and Research" (Australian Institute of Judicial Administration and NADRAC, 2003).

Australian Institute of Aboriginal and Torres Strait Islander Studies (Native Title Research Unit):
<http://www.aiatsis.gov.au>

- T Bauman and R Williams, *"The Business of Process – Research Issues in Managing Indigenous Decision-Making and Disputes in Land"* (Research Discussion Paper #13, 2004).

Australian Institute of Family Studies (AIFS): <http://www.aifs.gov.au>

- C Caruana, "Dispute Resolution Choices: A Comparison of Collaborative Law, Family Dispute Resolution and Family Law Conferencing Services" (2010) 15 *Family Relationships Quarterly* 12.
- R Kaspiew, J De Maio, J Deblaquiere and B Horsfall, "Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases, Final Report" (Australian Institute of Family Studies, Canberra, 2012) pp ix-x.

Australian Journal of Family Law (LexisNexis Australia): <http://www.lexisnexis.com.au>

- H Astor, "Making a 'Genuine Effort' in Family Dispute Resolution: What does it Mean?" (2008) 22 *Australian Journal of Family Law* 102.
- D Cooper and M Brandon, "How Can Family Lawyers Effectively Represent their Clients in Mediation and Conciliation Processes?" (2007) 21 *Australian Journal of Family Law* 288.

Australian Law Journal (ALJ) (Thomson Reuters (Professional) Australia Limited): <http://www.thomsonreuters.com.au>

- Sir Laurence Street, "Mediation and the Judicial Institution" (1997) 71 *Australian Law Journal* 794.

Australian Law Reform Commission

- "Family Violence – A National Legal Response" (Summary Report, October 2010).

Australian National Mediator Standards: <http://www.msb.org.au>.

- Australian National Mediator Standards, *Practice Standards* (2012).

The Belknap Press of Harvard University Press, Cambridge Massachusetts: <http://www.hup.harvard.edu>

- H Raiffa, *The Art and Science of Negotiation* (Harvard University Press, Mass, 1982).

Berkeley Technology Law Journal (University of California, School of Law): <http://www.btlj.org>

- A Stork, "The Use of Arbitration in Copyright Disputes: IBM v Fujitsu" (1988) *Berkeley Technology Law Journal*.

Building and Construction Law Journal (BCLJ) (Thomson Reuters (Professional) Australia Limited): <http://www.thomsonreuters.com.au>

- Justice R Giles, "The Supreme Court Reference Out System" (1996) 12 *Building and Construction Law Journal* 85.
- D Jones, "A Critical Analysis of the Means Commonly Adopted to Avoid Disputes in the Construction Industry" (1998) 14 *Building and Construction Law Journal* 31.

CCH Australia: <http://www.cch.com.au>

- S Hardy and O Rundle, *Mediation for Lawyers* (Sydney, 2010).
- J Hor, *Managing Workplace Behaviour: A Best Practice Guide* (Sydney, 2012).

Commercial Dispute Resolution Journal (LexisNexis Australia): <http://www.lexisnexis.com.au>

- J Kalowski, "In a Manner of Speaking: A Cross-Cultural View of Mediation" (1996) 2 *Commercial Dispute Resolution Journal* 200.
- K Reid, "Negotiating Strategies and Cross-Cultural Considerations" (1996) 3 *Commercial Dispute Resolution Journal* 37.
- D Spencer, "Exploding the Empowerment Myth of ADR" (1996) 3 *Commercial Dispute Resolution Journal* 13.
- D Spencer, "Mediating in Aboriginal Communities" (1996) 3 *Commercial Dispute Resolution Journal* 245.

Conflict Coaching International: <http://conflictcoachinginternational.com/>

- S Hardy and N Alexander, "REAL Conflict Coaching Fundamentals" (2012) *Conflict Coaching International*.
- REAL Conflict Coaching Practice Standards, available upon request from <http://conflictcoachinginternational.com>.
- REAL Conflict Coaching™ AGREEMENT (© Conflict Coaching International 2013).

Conflict Management in Higher Education Report

- R Brinkert, "Conflict Coaching" (2002) 2(2) *Conflict Management in Higher Education Report*.

Conflict Resolution Quarterly (formerly Mediation Quarterly) (Wiley InterScience): <http://www3.interscience.wiley.com>

- N Alexander, "The Mediation Metamodel: Understanding Practice" (2008) 26(1) *Conflict Resolution Quarterly* 97.
- R Brinkert, "Conflict Coaching: Advancing the Conflict Resolution Field by Developing an Individual Disputant Process" (2006) 23(4) *Conflict Resolution Quarterly* 517.
- L Charkoudian, C De Ritis, R Buck and C Wilson, "Mediation by Any Other Name Would Smell as Sweet – or Would It? The Struggle to Define Mediation and Its Various Approaches" (2009) 26(3) *Conflict Resolution Quarterly* 293.
- D Della Noce, "Evaluative Mediation: In Search of Practice Competencies" (2009) 27(2) *Conflict Resolution Quarterly* 193.
- N Ebner and C Getz, "ODR: The Next Green Giant" (2012) 29 *Conflict Resolution Quarterly* 283.
- N Katz and L Flynn, "Understanding Conflict Management Systems and Strategies in the Workplace: A Pilot Study" (2012) 30(4) *Conflict Resolution Quarterly* 393.
- J B Kelly, "Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention" (1995) 13 *Mediation Quarterly* 85.
- B Mayer, "The Dynamics of Power in Mediation and Negotiation" (1987) 16 *Mediation Quarterly* 75.
- B Menin, "The Party of the Last Part: Ethical and Process Implications for Children in Divorce Mediation" (2000) 17 *Mediation Quarterly* 281.

Conflict Resolution Consortium

- G Burgess, "Conflict Resolution Techniques: Their Origins and their Future" (Working Paper 84-9, March 1989).

Council of Law Reporting for New South Wales

- New South Wales Law Reports (NSWLR).

Council of Law Reporting for the State of Queensland

- Queensland Reports (Qd R).

Council of Law Reporting for Victoria

- Victorian Reports (VR).

Cinergy Publishing

- C Nobel, *Conflict Management Coaching: The CINERGY Model* (2012).

Dispute Resolution Magazine (American Bar Association): <http://www.abanet.org>

- J Krivis, "Taking Mediation Online" (1998) 5 *Dispute Resolution Magazine* 25.

eLaw Journal: Artificial Intelligence Review (SpringerLink): <http://www.springer.com/computer/ai/journal/10462>

- D Carneiro, P Novais, F Andrade, J Zeleznikow and J Neves, "Online Dispute Resolution: An Artificial Intelligence Perspective" (2012) *eLaw Journal: Artificial Intelligence Review* <http://www.link.springer.com/article/10.1007/s10462-011-9305-z>.

Emory Law Journal: <http://www.law.emory.edu/index.php?id=5063>

- T Terrell, "Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution" (1987) 36 *Emory Law Journal* 541.

The Federation Press, Sydney: <http://www.federationpress.com.au>

- L Behrendt, *Aboriginal Dispute Resolution* (1995).
- L Behrendt and L Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (2008).
- M King, A Freiberg, B Batagol and R Hyams, "Restorative Justice" in *Non-Adversarial Justice* (2009).

Greenwood Publishing: <http://www.greenwood.com>

- P Pedersen, *The Cultural Constructions of Conflict and Peace* (2009).

The Incorporated Council of Law Reporting for England & Wales

- Weekly Law Reports (WLR).

International Coach Federation (ICF): <http://www.coachfederation.org/>

- *ICF Core Competencies*, <http://coachfederation.org/icfcredentials/core-competencies/>.

International Journal of the Legal Profession (School of Law, University of Alabama): <http://www.law.ua.edu/jlp/>

- O Rundle, "Lawyers' Perspectives on 'What is Court-connected Mediation For?'" (2013) 20(1) *International Journal of the Legal Profession* 33.

International Social Science Journal: <http://www.wiley.com>

- K Spillman and K Spillman, "On Enemy Images and Conflict Escalation" (1991) 43 *International Social Science Journal* 57.

James Cook University Law Review: http://www.jcu.edu.au/law/law_review/

- S Hardy and O Rundle, "Applying the Inclusive Model of Ethical Decision Making to Mediation" (2012) 19 *James Cook University Law Review* 70.

John Wiley & Sons Inc: <http://www.wiley.com>

- R Baruch Bush and J Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco, 2005).
- G Furlong, *The Conflict Resolution Toolbox* (Ontario, 2005).
- A Taylor, *The Handbook of Family Dispute Resolution: Mediation Theory and Practice* (Hoboken, 2012).
- B Van Gramberg and J Teicher, "Managing Neutrality and Impartiality in Workplace Conflict Resolution: The Dilemma of the HR Manager" (2006) 44(2) *Asia Pacific Journal of Human Resources* 197.

Jossey-Bass (an imprint of John Wiley & Sons Inc): <http://www.josseybass.com>

- B Mayer, *The Dynamics of Conflict: A Guide to Engagement and Intervention* (2nd ed, New York, 2012).
- B S Mayer, *Beyond Neutrality* (San Francisco, 2004).
- M Moffitt and R Bordone, *The Handbook of Dispute Resolution* (San Francisco, 2005).
- C Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (3rd ed, San Francisco, 2003).
- C Moore and P Woodrow, *Handbook of Global and Multicultural Negotiation* (San Francisco, 2010).
- S Raines, *Conflict Management for Managers: Resolving Workplace, Client and Policy Disputes* (San Francisco, 2013).
- C Runde and T Flanagan, *Becoming a Conflict Competent Leader: How You and Your Organization Can Manage Conflict Effectively* (2nd ed, San Francisco, 2012).
- E Waldmann, *Mediation Ethics: Cases and Commentaries* (San Francisco, 2011).
- D Yann, *The Dictionary of Conflict Resolution* (San Francisco, 2002).

Journal of Dispute Resolution: <http://www.law.missouri.edu/csdr/journal/>

- J Macfarlane, "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" (2002) 2 *Journal of Dispute Resolution* 241.

Journal of Judicial Administration (Thomson Reuters): <http://thomsonreuters.com>

- D Potter, "Indigenous Youth and Restorative Justice in Western Australia" (2010) 20 *Journal of Judicial Administration* 92.
- B Wolski, "QCAT's Hybrid Hearing: The Best of Both Worlds or Compromised Mediation?" (2013) 22 *Journal of Judicial Administration* 154.

Journal of Law and Policy (Washington University Law School): <http://law.wustl.edu/journal/>

- C Izumi, "Implicit Bias and the Illusion of Mediator Neutrality" (2010) 24 *Journal of Law and Policy* 71.

Journal of Law Reform (University of Michigan): <http://students.law.umich.edu/mjlr>

- R Mnookin, "Divorce Bargaining: The Limits on Private Ordering" (1985) 18 *Journal of Law Reform* 1015.

Journal of Legal Education (Georgetown University Law Center): <http://www.law.georgetown.edu/jle>

- R Fisher, "Comment" (1984) 34 *Journal of Legal Education* 120.
- J J White, "The Pros and Cons of 'Getting to Yes'" (1984) 34 *Journal of Legal Education* 115.

Journal of Legal Education (Georgetown University Law Center): <http://www.law.georgetown.edu/jle>

- R Fisher, "Comment" (1984) 34 *Journal of Legal Education* 120.

Juta & Co, Cape Town, South Africa: <http://www.juta.co.za>

- M Anstey, *Negotiating Conflict: Insights and Skills for Negotiators and Peacemakers* (1991).

Law Council of Australia: <http://www.lawcouncil.asn.au>

- *Australian Collaborative Practice Guidelines for Lawyers* (2011).
- *Ethical Guidelines for Mediators* (2011).
- *Ethical Guidelines for Mediators* (2006).

The Law Society of New South Wales: <http://www.lawsociety.com.au>

- D Spencer, "The Good Faith Element in Alternative Dispute Resolution" (2000) 38 *Law Society Journal* 58.
- D Spencer, "The Vanishing Trial Phenomenon" (2005) 43(8) *Law Society Journal* 58.
- The Hon J J Spigelman, "Mediation and the Court" (2001) 39 *Law Society Journal* 63.

Legal Ethics (Hart Publishing): <http://www.hartjournals.co.uk/Le/index.html>

- J Mason, "How Might the Adversarial Imperative be Effectively Tempered in Mediation?" (2012) 15(1) *Legal Ethics* 111.
- B Wolski, "An Evaluation of the Rules of Conduct Governing Legal Representatives in Mediation: Challenges for Rule Drafters and a Response to Jim Mason" (2013) 16 *Legal Ethics* 182.

LexisNexis Australia: <http://www.lexisnexis.com.au>

- L Boule, *Mediation: Principles, Process, Practice* (3rd ed, 2011).
- P Condliffe, *Conflict Management: A Practical Guide* (4th ed, 2012).
- H Finlay and R Bailey-Harris, *Family Law in Australia* (4th ed, 1992).
- N M Spegel, B Rogers and R P Buckley, *Negotiation – Theory and Techniques* (1998).

LexisNexis UK: <http://www.lexisnexis.co.uk>

- J Dewar and S Parker, *Law and the Family* (2nd ed, Butterworths, London, 1992).

Loyola of Los Angeles Law Review (Loyola Law School, Loyola Marymount University): <http://www.llr.lls.edu>

- E D Green, J B Marks and R L Olson, "Settling Large Case Litigation: An Alternative Approach" (1978) 11 *Loyola of Los Angeles Law Review*.

McGraw-Hill Higher Education: <http://www.mhhe.com>

- D G Pruitt and S H Kim, *Social Conflict: Escalation, Stalemate and Settlement* (Columbus OH, 2004).

Mediate.com: <http://www.mediate.com>

- P Adler, "Expectation and Regret: A Look Back at How Mediation has Fared in the US", Paper presented at the 7th National Conference, Civil Mediation Council (London, 2 May 2013).
- C Noble, "Conflict Coaching: A Preventative Form of Dispute Resolution" (2002).
- C Noble, "Measuring Conflict Coaching" (2013).

Melbourne University Law Review (MULR): <http://mulr.law.unimelb.edu.au>

- B Creighton, "One Hundred Years of the Conciliation and Arbitration Power" (2000) 24 *Melbourne University Law Review* 839.

Monash University Law Review (Mon LR): <http://www.law.monash.edu.au/about-us/publications/monlr/>

- T Macdermott and J Riley, "ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances" (2012) 38(2) *Monash University Law Review* 82.

The New South Wales Bar Association: <http://www.nswbar.asn.au>

- C Bridge SC, *Effective and Ethical Negotiations* (12 February 2011).
- S Emmett, "The Bar in Mediation and ADR" (2001-02) *Bar News* (Summer).
- L Nottage, "Is (International Commercial) Arbitration ADR?" (2002) *Bar News* (Winter).

New Zealand Universities Law Review (NZULR) (Brookers NZ): <http://www.brookers.co.nz>

- C Bridge, "Family Mediation and the Legal Process: An Unresolved Dilemma" (1997) 17 *NZULR* 231.

Negotiation Journal: <http://www.wiley.com>

- J K Sebenius, "What Roger Fisher Got Profoundly Right: Five Enduring Lessons for Negotiators" (2013) 29 *Negotiation Journal* 159.
- W Ury, "The Five Ps of Persuasion: Roger Fisher's Approach to Influence" (2013) 29 *Negotiation Journal* 133.
- J Wall and T Dunne, "Mediation Research: A Current Review" (2012) *Negotiation Journal* 217.

Nicholas Brady Publications

- M LeBaron and V Pillay, *Conflict Across Cultures: A Unique Experience of Bridging Differences* (Intercultural Press, Boston, 2006).

Notre Dame Journal of Law, Ethics and Public Policy: <http://www.nd.edu/~ndjlepp/>

- M E Lafin, "Preserving the Integrity of Mediation through the Adoption of Ethical Rules for Lawyer-Mediators" (2000) 14 *Notre Dame Journal of Law, Ethics and Public Policy* 479.

Ohio State Journal on Dispute Resolution: <http://moritzlaw.osu.edu/jdr/>

- B Beal, "Online Mediation: Has Its Time Come?" (2000) 15 *Ohio State Journal on Dispute Resolution* 735.
- E Katsh, J Rifkin and A Gaitenby, "E-Commerce, E-Disputes and E-Dispute Resolution" (2000) 15 *Ohio State Journal on Dispute Resolution* 705.
- NLJ Wood, "Can Judges Increase Mediation Settlement Rates? Of 'Coase' They Can" (2011) 26 *Ohio Stat Journal on Dispute Resolution* 683 at 683,687-689 and 691-699.

Oxford University Press: <http://www.oup.com>

- T Bennett, "The Role of Mediation: A Critical Analysis of the Changing Nature of Dispute Resolution in the Workplace" (2012) 41(4) *Industrial Law Journal* 479.
- U Magnus, "Mediation in Australia: Development and Problems" in K Hopt and F Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford, 2013).

Paul B Pedersen

- P B Pedersen, "The Cultural Constructions of Conflict and Peace" (paper published online at <http://soeweb.syr.edu/CHS/pedersen/report/conflictandpeace.pdf>).

Perseus Books Group: <http://www.perseusbooksgroup.com>

- L Susskind and J Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (HarperCollins Publishers, USA, 1987).

Polity: <http://www.polity.co.uk>

- O Ramsbotham, T Woodhouse and H Miall, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflict* (3rd ed, Cambridge, 2012).

Paradigm Publishers: <http://www.paradigmpublishers.com/Books/Features.aspx>

- K Avruch, *Context and Pretext in Conflict Resolution: Culture, Identity, Power and Practice* (Boulder, 2013).

Pepperdine Dispute Resolution Law Journal (Pepperdine University Law School): <http://law.pepperdine.edu/dispute-resolution-law-journal/>

- Pearlstein A, "Pursuit of Happiness and Resolution of Conflict: An Agenda for the Future of ADR" (2012) *Pepperdine Dispute Resolution Law Journal* 215.

Queensland University of Technology Law and Justice Journal: <http://www.law.qut.edu.au/ljj/>

- N Alexander, "Mediation and the Art of Regulation" (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 1.
- M Scott, "Collaborative Law: Dispute Resolution Competencies for the New Advocacy" (2008) 8(1) *Queensland University of Technology Law and Justice Journal* 213.

The Review of Litigation (University of Texas School of Law): <http://www.utexas.edu/law/journals/trol/>

- U Boettger, "Efficiency versus Party Empowerment – Against a Good-Faith Requirement in Mandatory Mediation" (2004) 23 *The Review of Litigation* 1.

Sage Publications Inc: <http://www.sagepub.com/>

- T Jones and R Brinkert, *Conflict Coaching: Conflict Management Strategies and Skills for the Individual* (2008).
- B Van Gramberg, "The Rhetoric and Reality of Workplace Alternative Dispute Resolution" (2006) 48 *Journal of Industrial Relations* 175.

Social Legal Studies (Sage Publications): <http://sls.sagepub.com/>

- H Astor, "Mediator Neutrality: Making Sense of Theory and Practice" (2007) 16 *Social Legal Studies* 221.

South Texas Law Review (South Texas College of Law): <http://www.stcl.edu/lr>

- K K Kovach, "Good Faith in Mediation – Requested, Recommended or Required? A New Ethic" (1997) 38 *South Texas Law Review* 575.
- J H Stark, "The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals from an Evaluative Lawyer Mediator" (1997) 38 *South Texas Law Review* 769.
- R P Schuwerk, "Reflections on Ethics and Mediation" (1997) 38 *South Texas Law Review* 757.

St James Ethics Centre: <http://www.ethics.org.au/>

- "What is Ethics?", <http://www.ethics.org.au/about/what-is-ethics> (accessed 15 January 2014).

Sweet & Maxwell, UK: <http://www.sweetandmaxwell.co.uk>

- English Reports (ER).

Taylor and Francis: <http://www.taylorandfrancis.com/>

- A Forsyth, "Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR" (2012) 25(3) *The International Journal of Human Resources Management* 476.
- A Lemonne, "Alternative Conflict Resolution and Restorative Justice: A Discussion" in L Walgrave, *Repositioning Restorative Justice* (Hoboken, 2012).
- G Maxwell and H Hayes, "Regional Reviews" in G Johnstone and D Van Ness, (eds), *Handbook of Restorative Justice* (Willen Publishing, Portland, 2007).
- W Roche and P Teague, "The Growing Importance of Workplace ADR" (2012) 23(3) *International Journal of Human Resource Management* 447.

Thomson Reuters Professional (Australia) Limited (incl Lawbook Co.): <http://www.thomsonreuters.com.au>

- I Bailey and M Bell, *Construction Law in Australia (3rd ed, Lawbook Co, 2011)*.
- R Charlton, *Dispute Resolution Guidebook (Lawbook Co, 2000)*.
- H Douglas, K Everton-Moore, S Harbidge and L Levy, "Restoring Justice" in *Criminal Process in Queensland and Western Australia* (Lawbook Co, 2010).
- L Fisher and M Brandon, *Mediating With Families (2nd ed, Lawbook Co, 2009)*.
- M Jacobs, *Commercial Arbitration Law and Practice (2004, looseleaf service)*.
- D Jones, *Commercial Arbitration in Australia (2nd ed, Lawbook Co, 2012)*.
- M Livermore, *The Family Law Handbook* (3rd ed, Redfern Legal Centre Publishing, 2013).
- T Sourdin, *Alternative Dispute Resolution (3rd ed, Lawbook Co, 2008)*.
- Australian Law Journal (ALJ).
- Commonwealth Law Reports (CLR).
- Federal Law Reports (FLR).

UBC Press: <http://www.ubcpres.ca>

- J Macfarlane, *The New Lawyer (2008)*.

University of California Los Angeles Law Review (University of California Los Angeles): <http://www.law.ucla.edu>

- C Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving" (1984) 31 *University of California Los Angeles Law Review* 754.

University of Geneva, Law School and Dept of Information Systems (Miralab): <http://www.online-adr.org>

- T Schultz, G Kaufman-Kohler, D Langer and V Bonnett, *Online Dispute Resolution: The State of the Art and the Issues* (E-Com Research Project, University of Geneva, 2001).

UNSW Law Journal (University of NSW): <http://www.unswlawjournal.unsw.edu.au/>

- M Hanks, "Perspectives on Mandatory Mediation" (2012) 35(3) *UNSW Law Journal* 929-952.

University of New South Wales Press (University of NSW): <http://www.unswpress.com.au>

- I Eilenberg, *Dispute Resolution in Construction Management* (2003).

Yale Law Journal (Yale Law Journal Co & Fred B Rothman & Co): <http://www.yalelawjournal.org>

- R Mnookin and L Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale Law Journal* 950.

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OVERVIEW

[1.05] Dispute resolution has grown in popularity, acceptance and formalisation over the last 35 years to become a major part of the strategy employed in civil disputes and an important managerial tool of business in Australia. The formalisation of dispute resolution has largely occurred through the introduction of legislation empowering courts to refer proceedings to a variety of dispute resolution processes, most commonly mediation. Further, the business community has seen the benefits of resolving disputes through non-adversarial methods and have instigated internal and external processes to resolve disputes at an early stage before they escalate to the point where curial resolution is sometimes the only way to resolve them. All of this has had the effect of increasing the number of organisations which train people in the

process and skills development of dispute resolution processes. Today in Australia, and across the world, dispute resolution is a significant tool in the administration of justice and the conduct of business.

Further evidence of the growth and formalisation of dispute resolution is the fact that nearly every law and business school throughout Australasia, Europe and the Americas teaches dispute resolution as either a compulsory or elective undergraduate subject despite the fact that Western law schools still teach adversarial appellant law in order to educate students to the doctrinal foundation of law. There are many postgraduate courses that offer a suite of dispute resolution subjects, which constitute specialist postgraduate qualifications in the subject such as the commonly available Master of Dispute Resolution and the newly emerging Doctor of Dispute Resolution. Thus, dispute resolution is firmly entrenched in the academic, legal, professional and business cultures of Australia and all signs indicate that its growth will continue.

ORIGINS OF DISPUTE RESOLUTION

[1.10] It is difficult, if not impossible, to track the origins of dispute resolution because negotiations between human beings are as old as the ability to communicate itself. For example, Aboriginal and Torres Strait Island people have been involved in their own form of dispute resolution via customary law for almost the entirety of their existence, put conservatively at somewhere between 40,000 and 100,000 years.

Aboriginal Dispute Resolution

[1.15] L Behrendt, *Aboriginal Dispute Resolution* (Federation Press, Sydney, 1995) p 7.

As in any complex society, traditional Aboriginal groups had their own legal system and methods of resolving disputes. People lived in small communities with large extended families. There were strong kin ties and notions of community and reciprocity. Such a close-knit environment necessarily required the existence of a complex workable system of resolving conflict and a method of communal decision making. Those processes needed to be able to produce effectively outcomes that members of the community would comply with.

The ability of the group to function harmoniously in its day-to-day existence was necessary for its survival. The closeness and interdependence of a community meant that it was imperative for disputes to be resolved quickly and without animosity. The resolution process had to provide a mechanism that would ensure parties would comply with the decision of the group thus ensuring that the social, political and economic status quo of the community would be maintained.



[1.20] The history of dispute resolution amongst Aboriginal and Torres Strait Islander people is not a matter of formal record, rather it is a fact that has been passed down from generation to generation as part of customary law and story-telling (as discovered by one of the authors after his experiences in designing and implementing a mediation program for a peak Aboriginal body in 1995).

Mediating in Aboriginal Communities

[1.25] D Spencer, "Mediating in Aboriginal Communities" (1996-97) 3 *Commercial Dispute Resolution Journal* 245 at 245.

Australian Aborigines have practised consensual problem solving, in one form or another, over the period of existence, popularly considered to be some 40 thousand years. During that period, they have developed a notion of community ownership of disputes and a determined approach to solving them. Because of this they have been described as superb negotiators and can be counted as one of the many pioneers of consensual dispute resolution.



[1.30] Having acknowledged the history of Aboriginal and Torres Strait Islander dispute resolution, albeit briefly, it is also possible to track the formalisation of Western dispute resolution in Australia. One starting point is the Commonwealth Constitution, which was passed by the Imperial Parliament of England in 1900 and came into force in Australia on 1 January 1901 when the Commonwealth of Australia was officially born. Section 51 provides that:

“The Parliament shall, subject to this Constitution, have power to make laws for peace, order, and good government of the Commonwealth with respect to:- (xxxv.) Conciliation and arbitration for the prevention and settlement of industrial disputes beyond the limits of any one State.”

The drafters of the Constitution clearly thought that the power to conciliate and arbitrate industrial disputes was an important safeguard for an emerging nation. An example of how important this safeguard was is arguably the fact that the conservative government of Stanley Bruce and Earle Page was brought down in the federal election of 1929 on the basis of an attack on the system of arbitration of industrial disputes. The Labor Party, who won office that year, successfully campaigned in that election that attacking the arbitration system was an attack on the standard of living of every Australian, thereby threatening the wellbeing of all working Australians.

Constitutional change

[1.35] The power granted under s 51(xxxv) and under Ch III of the Commonwealth Constitution led to the passing of the *Commonwealth Conciliation and Arbitration Act 1904*, which established the Commonwealth Court of Conciliation and Arbitration to hear applications for the making of awards and the resolution of disputes between employers and employees. The court was split into two separate bodies – the Commonwealth Conciliation and Arbitration Commission and the Commonwealth Industrial Court (now the Industrial Relations Court) – when it was found that it was unconstitutional for a court to exercise non-judicial power.

Public and private sector growth

[1.40] Dispute resolution in Australia functions in two distinct spheres. The initial sphere of influence was in the private sector with dispute resolution agencies, such as the Australian Commercial Disputes Centre, Lawyers Engaged in Alternative Dispute Resolution (LEADR – now known as Leading Edge Alternative Dispute Resolution), Mediate Today and The Accord Group offering dispute resolution services predominantly to the private sector. While these agencies are still operating successfully in Australia, the real growth in dispute resolution

services has taken place in the public sphere with these and other agencies providing dispute resolution practitioners to the court and statutory authorities that support dispute resolution programs.

Public dispute resolution has flourished under increasing legislation which provides non-adjudicative dispute resolution as a first step before litigation. Legislation has more than doubled in the last decade in Australia with nearly all courts, tribunals and commissions having mandatory or voluntary dispute resolution programs in place prior to parties proceeding to trial or hearing.

This topic will be discussed in more detail in Chapter 14. For the moment, the rise of dispute resolution in Australia is the history of the public and private sectors complementing each other to create a firm base of non-adjudicative dispute resolution dovetailing with adjudicative forms of dispute resolution to provide an array of methods to resolve conflict between people in dispute.

Conflict Management: A Practical Guide

[1.45] P Condliffe, *Conflict Management: A Practical Guide* (4th ed, LexisNexis Butterworths, Sydney, 2012) pp 114-117.

Introduction

Since Europeans arrived Australian history has been enthused with notions of individualism and battling the harsh climate and landscape of the frontier. We revel in the imagery of competitive sports and of a nation bonded through war. Yet we also have a strong and rich tradition of communal sharing and fellowship that has lent itself to the adoption of these new processes, not only during the last three decades but earlier as well. Our indigenous people also have a rich history that encompasses a range of processes we now identify as ADR innovations. As Astor and Chinkin (1992) point out, Indigenous communities in Australia have used a range of methods to deal with conflict (for example shaming, exclusion, compensation, initiation and training based upon a system of kinship-based law) for thousands of years.

The ADR movement draws heavily upon our history of collective dispute management, especially in the industrial relations system. A study of Australian history since European settlement reveals that non-litigious forms of dispute management have been practised in Australia since colonial times through arbitration provisions inherited from English law and the establishment of informal tribunal and ombudsmen systems. As well, the federal government, at a very early stage, developed a conciliation and arbitration system to manage the labour market although this progressively developed into a rather formal litigious system. These early developments were rather piecemeal and it was not until the late 1960s and 1970s that significant interest began to focus on informal dispute resolution, although the early focus was upon tribunal systems and arbitration. In the late 1970s interest in mediation-based approaches began. Most arbitration, ombudsman and tribunal systems provide alternatives to traditional litigation but do not necessarily provide for the self-determination of the disputant parties, which is central to mediation programs. It was this emphasis which tied mediation into the rise of communitarian and consumer rights ideals and projects of the time and which marks the beginning of the modern ADR movement.

The Modern ADR Movement

The beginning of the government-funded Community Justice Centres Pilot in 1980 (NSW) provided the initial impetus for the development of what we now recognise as a new movement that became "ADR". This pilot was followed by similar establishments in Victoria (1987) and Queensland (1990). The centres were modelled on community-based mediation services, which had sprung up in great

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profusion in the United States. These services, institutionalised within government bureaucracies, aimed at providing services to a long neglected and ill-used sector of conflict – community disputes. They also pioneered the use of mediation in public issue disputes, victim–offender mediation (sometimes called “conferencing”) and family mediation.

The legal profession quickly followed these developments and established a specially constituted forum, Lawyers Engaged in ADR (LEADR – now known as Leading Edge Alternative Dispute Resolution), to develop and lobby for the use of mediation within the legal system. Many universities and law schools now offer ADR or mediation courses. Other professions have been slower to embrace these new approaches but this is rapidly changing, especially in the environmental planning and human service fields. [115]

*Key Developments in Australia ADR***Key developments in Australian ADR**

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| 1892 | <i>Courts of Conciliation Act 1892</i> (Qld) is proclaimed. |
| 1904 | Arbitration and Conciliation Court (Cth) provides for informal conferences. |
| 1929 | <i>Conciliation Act 1929</i> (SA) provides for pre-trial interviews. |
| 1931 | <i>Courts of Conciliation Act 1892</i> (Qld) amended to streamline procedures. |
| 1974 | Consumer Claims Tribunal adopted neutral third party referees. |
| 1975 | <i>Family Law Act 1975</i> (Cth) provides for counselling and conferences. |
| 1975 | Institute of Arbitrators and Mediators Australia (IAMA) established. |
| 1977 | <i>Anti-Discrimination Act 1977</i> (NSW) provides for conciliation. |
| 1979 | Land and Environment Court (NSW) provides for conferences. |
| 1980 | <i>Community Justice Centres (Pilot Project) Act 1980</i> is proclaimed. |
| 1983 | <i>Community Justice Centres Act 1983</i> (NSW) provides for community-based services. |
| 1983 | Victorian County Court Building Cases List makes provision for referral to mediation. |
| 1984 | Norwood (SA) Community Mediation Service established. |
| 1985 | Noble Park (Vic) Family Mediation Centre established. |
| 1985 | Australian Commercial Dispute Centre (ACDC) established. |
| 1987 | Neighbourhood Mediation Centres established by Legal Aid Department (Vic). |
| 1987 | Formation of the Australian Dispute Resolution Association (ADRA), the first State-based ADR association, based in Sydney. |
| 1987 | Federal Court pilot ADR program begins in the NSW District Registry. |
| 1988 | ACT Conflict Resolution Service established. |
| 1989 | Establishment of Lawyers Engaged in ADR (LEADR), now known as Leading Edge ADR – a non-for-profit lobby, professional and service organisation. |
| 1990 | <i>Dispute Resolution Centres Act 1990</i> is proclaimed (Qld) establishing Community Justice Program now known as Dispute Resolution Centres. |
| 1991 | <i>Courts (Mediation and Arbitration) Act 1991</i> introduces voluntary (since 1997 mandatory) mediation to the Federal Court. |
| 1991 | Canberra Mediation Service established. |
| 1992 | “Spring Offensive” is initiated by Supreme Court of Victoria with review of waiting cases, many of which were referred to mediation. Equivalent “Settlement Week” occurs in NSW. |
| 1993 | Administrative Appeals Tribunal introduced mediation conferences. |
| 1994 | <i>Farm Debt Mediation Act 1994</i> (NSW) is proclaimed. |
| 1995 | Establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC) by the Commonwealth Attorney-General to monitor and promote the use of ADR. |

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| 1995 | <i>Family Law Reform Act 1995</i> establishes centrality of "Primary Dispute Resolution". |
| 1996 | <i>Native Title Act 1993</i> amendments gave increased emphasis to mediation before the Native Title Tribunal. [116] |
| 1996 | <i>Workplace Relations Act 1996</i> is [sic] referred to mediation for the first time in industrial disputes. |
| 2000 | NADRAC discussion paper, <i>The Development of Standards for ADR</i> . |
| 2004 | NADRAC discussion paper, <i>Who Says You're a Mediator? Towards a National System for Accrediting Mediators</i> , outlines the need for mediation accreditation and standards. |
| 2005 | National Mediation Conference appoints sub-committee to consider accreditation and standards for mediators. |
| 2006 | <i>Family Law Amendment (Shared Parental Responsibility) Act 2006</i> (Cth) is implemented, mandating mediation in cases seeking parenting orders. |
| 2007 | Introduction of new accreditation scheme for family mediators under the <i>Family Law Amendment (Shared Parental Responsibility) Act 2006</i> (Cth). |
| 2008 | Implementation (1 January 2008) of National Mediation Accreditation Standards through a committee convened by NADRAC. |
| 2010 | <i>Civil Dispute Resolution Act 2010</i> (Cth). Leading example of a statutory attempt to improve timeliness and party responsibility to settle disputes before litigation commences. |

Courts, banking, insurance, and other large institutionalised systems have now embraced mediation, in varying degrees, as part of their conflict management strategies. One significant indicator of this growth has been the proliferation of ADR related legislation that has emerged to deal with the increasing array of services. Since 1990, when there were a mere handful of Australian statutes referring to mediation, there are now well over 100 statutes nationally. This figure does not include legislation that includes references to other processes like conciliation, arbitration and case appraisal.

Like many broad based social movements ADR has not had many "Napoleons" to lead the way forward, but it has had many "champions" who through their dogged persistence and patience have achieved remarkable things. Their efforts have been mostly unheralded or known only in their own State or locality. Often the advances have necessarily been incremental and therefore without the drama of "the big announcement" so beloved of our political figures. However, even a cursory review of the following list, which includes only the salient points, provides an insight into the remarkable range and depth of the services now provided.

One of the largest, fastest growing and innovative areas of ADR practice is in family law. While the *Family Law Act 1975* has always emphasised the management of disputes by ADR processes, the *Family Law Reform Act 1995* reaffirmed the centrality of these alternative processes by designating them "Primary Dispute Resolution". The related Family Law Regulations contain very comprehensive statutory mediation protocols dealing with such issues as accreditation, standards, duties and obligations. The funding of outsourced community-based services by the Commonwealth grounded on these regulations (mainly to Relationships Australia and Centacare) has provided [117] the impetus for the development of new and innovative processes, supervision and research.

Significant reforms to the family law system were introduced in 2006. These require parties before the Family Court to attend a family dispute resolution service if they want a parenting order. Once they attend this service the parties can obtain a certificate that they have attempted dispute resolution and then may apply to the Court for an order. As well, a less adversarial hearing model in children's matters

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was introduced. Section 13C of the *Family Law Act 1975* empowers the Family Court, at any stage of the proceedings, to order that parties attend a conciliation, family counselling or family dispute resolution procedure.



THE “A” IN ADR

[1.50] Arguably the first person to coin the phrase “Alternative Dispute Resolution” (ADR) was American lawyer and academic Professor Eric Green, who was involved in a large commercial case regarding the alleged infringement of certain patents relating to computerised charge authorisation and credit-verification devices. The parties were on the trial trail with proceedings on foot and pre-trial discovery well underway. The parties agreed to run a mini-trial or senior management review process whereby the parties would attend a two-day “information exchange” chaired by a neutral third party – a former civil judge. The information exchange was just that, a chance to exchange information via the parties themselves presenting their sides of the dispute to senior management. The senior management were charged with the responsibility of resolving the dispute and the third party’s role was to moderate proceedings and effect a compromise. Green authored an article after his experience in that case and referred to the process as “an alternative approach” – ADR was born in the formal sense.

Settling Large Case Litigation: An Alternative Approach

[1.55] E Green, J Marks and R Olson, “Settling Large Case Litigation: An Alternative Approach” (1978) 11 *Loyola of Los Angeles Law Review* 493 at 493-511.

Introduction

Over 50 years ago, Judge Learned Hand told the Bar of New York, “As a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death.” Judge Hand’s remark is even more true today. The burgeoning costs and demoralizing delays of dispute resolution through formal, legal means are central to the crisis which so many now perceive in the American system of civil justice.

For the individual litigant efforts are being made to confront and resolve the crisis. By far the largest single cost of litigation is attorney’s fees. In this area, the OEO Legal Services Program and the Legal Services Corporation have made significant strides towards providing free counsel to the poorest Americans. Group and prepaid legal service programs have been started to provide legal services to middle income Americans at affordable prices. In addition, there is growing recognition that less formal mechanisms of dispute resolution may provide the best answer to the problems of expense and delay which beset individual civil litigants in our courts. For example, mandatory arbitration of smaller [494] civil suits in the federal courts seems inevitable; in Los Angeles, a pilot Neighborhood Justice Center has been set up to resolve minor disputes entirely outside the courts. Interestingly, however, while these and other innovations promise more efficient dispute resolution procedures for individual litigants, very little attention has been devoted to developing alternative dispute resolution mechanisms for the large corporate litigation that consumes hundreds of thousands of dollars in legal costs and hundreds of days in court and lawyer time.

Arbitration stands as almost the only well developed alternative to full-scale litigation for entities which find themselves embroiled in disputes [495] which cannot be solved through normal business negotiations. Yet, binding arbitration is often not acceptable to the parties. Convinced of the justness

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of its cause, a plaintiff may be willing to risk the compromise that reputedly so often characterizes arbitration awards; unsure of the nature and extent of its liability, a defendant may be unwilling to give up the protection of full pretrial discovery, strict evidentiary rules and well-defined substantive standards, especially when the damages claimed are in six, seven or more figures. For these and other reasons, many litigants and corporate attorneys approach arbitration "like a lonesome cat in a strange alley."

Moreover, in spite of binding arbitration's often being seen as simply too dangerous, surprisingly little thought has been given to the possibility that efforts at settlement might consist of something more than traditional non-binding negotiations between lawyers or corporate executives in which dollar bargaining is the primary focus. Indeed, the literature of litigation settlement is made up of little other than "how-to-do-it" manuals focusing, for example, on the resolution of personal injury cases.

[496] Yet merely because the legal difficulties of lower and middle income Americans may constitute more important social problems on most people's scale of values, it is important not to lose sight of the fact that the crisis in American civil justice extends beyond those groups into large case litigation. The problems of large case litigation are ones which affect the quality of civil justice as a whole. The pretrial paper wars and extended trials of many such cases play a significant role in clogging the dockets of our courts, both state and federal. Further, the extraordinary costs of litigating such cases affect not merely the corporations themselves, but, of necessity, their employees and shareholders, and the consumer.

There are several possible reasons why there has been a dearth of innovative ideas aimed at devising alternate dispute resolution mechanisms for large case litigation. Perhaps the corporate litigation bar should be blamed for a lack of imagination, for an unwillingness to take risks, and for a failure to apply careful cost-benefit analysis to their activities on behalf of their clients. Perhaps corporate managements should be blamed for too often allowing themselves to be insulated from the litigation process, either because they seek to avoid ultimate responsibility or because they mistakenly believe that the complexities of the process are for lawyers only. Perhaps the true culprit is the relative insularity of most American legal education:

Another barrier to the active participation of lawyers in the creation of new "justice-producing" institutions lies in the structure and content of legal education. Law schools rarely teach the essential skills of negotiation and mediation; rather, their concentration on the dissection of appellate court cases emphasizes the escalation of disputes rather than their prevention or early settlement ... The dearth of interdisciplinary study makes it difficult for lawyers to perceive alternative ways of dealing with different types of existing disputes and those likely to arise from emerging technologies.

[497] Whatever the reason, the failure of the corporate litigation bar to develop alternate dispute resolution mechanisms is particularly puzzling given another usual characteristic of their corporate clients. Most companies have a firm policy of attempting to avoid litigation by investigating and resolving disputes on a businesslike basis as promptly as possible. They generally "prefer the procedural uncertainties of private settlement techniques to the substantive uncertainties of the courts." It is common, for example, for corporate management faced with a ripening conflict with another company to schedule a meeting at which responsible employees from each company appear and present both sides of the dispute. In such circumstances the business principals of the companies sit as fact-finders and as judges. They may or may not consult counsel.

By contrast, once litigation is initiated such simple and informal attempts at dispute resolution rarely occur. Settlement discussions involving corporate management thereafter generally subordinate debate on substantive issues to a more direct consideration of what it will take to settle the case ...

Demon Litigation

Corporate executives and in-house counsel know that it can be disastrous for a company simply to be sued, let alone suffer an adverse judgment. There is no escaping one infallible premise – resolving the

Settling Large Case Litigation: An Alternative Approach cont.

dispute will be very costly. Payment will be either to the plaintiff, to defense counsel, or – worst of all – to both. House counsel and management also know that successfully defending a large lawsuit is frequently more costly than simply paying a large settlement to the plaintiff. Indeed, defendants are often convinced that this is the only basis for the suit in the first place.

[498] The cost of large corporate litigation also has a great impact on plaintiffs. Since the defendant is typically in possession of the money or property that is the subject matter of the dispute and has the use of it during the pendency of the suit, the defendant will often have both reason and the resources to drag out the litigation. A corporation with an unassailable claim and sufficient resources to prosecute fully a court case may find that discovery hurdles placed by the defendant between the summons at the starting line and the judgment at the finish have made the prize not worth the pursuit.

The cost of prosecuting or defending a large corporate lawsuit involving unresolved legal contentions, complex factual issues, many witnesses, and the usual roomfuls of documents may be divided into two basic categories – (1) pretrial discovery and motion costs and (2) trial costs. Discovery and motion costs usually accrue at a slower rate than trial costs, but build up over a longer period of time – often for two, three, or as many as five years.

Reliable figures are hard to come by, especially for pretrial costs of litigation, but one authority estimated in 1975 that the cost to the client of counsel's merely reading and taking notes on the documents produced in a moderately-sized civil litigation – defined as a case involving 10,000 documents of an average of ten pages per document and generating 5000 pages of transcript – is \$300,000. This figure did not include the more time-consuming process of searching the documents for combinations of facts and analyzing the assembled data. Allowing for inflation, which affects the legal profession as much as it does industry, these figures would be even higher today.

Indeed, there is a growing feeling among business-oriented attorneys and critical commentators that modern discovery practice, introduced as a great reform, is now more of a problem than a solution. One critic states:

Coupled with requests for class action treatment, discovery has been perverted into a vehicle for extracting substantial settlements, with [499] some defendants reluctantly consenting to this extortion in order to avoid years of involvement, enormous expenses and attorneys' fees, and the inordinate drain upon corporate time and energy that is inevitably involved in the defense.

But discovery and other pretrial costs are not the only factors that make suing or being, sued, even unjustly, a major economic event for a corporation today. Should the parties not reach a settlement after exhausting themselves in the discovery and pretrial motion phase of the litigation, costs escalate significantly in the immediate pretrial preparation phase, as counsel "staff-up" with experts, associates and paralegals. Costs increase again for the trial itself. In one extreme but not unique case, the SCM antitrust suit against Xerox, the legal costs during trial to SCM and Xerox combined have been conservatively estimated to be \$50,000 a day, five days a week, or over \$1,000,000 a month. Trial is expected to last five to eight months. The pretrial costs were likely even higher. The two sides took pretrial depositions from a total of 233 potential witnesses. Of course, the stakes are high – SCM seeks \$1.8 billion in damages.

Moreover, the tangible costs that show up directly on the income statement under "legal costs" are only a part of the actual costs of large corporate litigation. Management time and energy and technical resources diverted from normal activities to the litigation process are additional overhead items, with no productive possibilities, that increase the cost of goods produced or services rendered. Thus, prospect of an indirect as well as a direct drain on the corporate resources during two to five

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years of litigation is often a strong incentive for top management to seek some means of informally resolving litigation and getting employees back to productive work, even if it means paying money management feels is not owed.

There is a third party whose interests also must be recognized – the judicial system. Although comprising only a small percentage of cases, [500] large corporate litigation increasingly consumes a disproportionately large amount of judicial and lawyer resources, contributing to an already severe congestion problem. This problem is assuming crisis proportions in some places as delays run into four or five years and court systems approach the breakdown point.

In the federal system, the district court civil case load continues to show an upward trend, as it has for the last fifteen years. In 1976, 130,597 civil cases were filed in the district courts, compared to 117,320 in 1975 and 59,284 in 1960. This is an increase of 11.3% over 1975 and 120.3% over 1960. An even more disturbing statistic is that of the 136,753 cases pending in the district courts at the close of 1976 (exclusive of land condemnation cases), 9,414 had been pending for more than three years. Moreover, the trend is to greater delay. The percentage of cases pending for more than one, two, and three years in 1976 increased over 1975 by 25.5%, 23.5% and 24.5%, respectively.

The statistics for the federal courts of appeals are similarly alarming. The number of new cases docketed in 1976, showed a 10.5% increase over 1975, and a 281.7% increase over 1962. Altogether, 18,408 cases were filed for appeal in 1976, compared to 4,823 in 1962.

[501] Given such statistics, it is obvious that either radical reform of the dispute resolution process or a commitment of vastly more resources to the judicial system, or both, are necessary just to keep matters from getting worse than they already are. But private lawyers representing corporate clients increasingly disgruntled with large legal fees cannot wait for long term reform. The corporate litigator must explore every available dispute resolution mechanism that might be advantageous to the client ... [507]

Some General Observations

For the parties involved, the success of the Information Exchange was testimony enough to its value. For others who may be interested in similar experimentation, however, several additional aspects of the procedure might be pointed out. Every case is different, and what worked in the case discussed might not work at all in another situation. In considering whether to try a procedure like the one described or to create a new model, counsel and clients must consider many variables and make a cost-benefit analysis to determine the best way to proceed. In this analysis the following factors may be relevant.

First, very little of the money expended on the Information Exchange would have been wasted had the proceeding not resulted in a resolution of the dispute. The Information Exchange forced each side rigorously to organize the mass of facts and legal arguments which had been gathered over two and one half years of discovery and legal maneuvering, just as they would have had to do to prepare the case for pretrial and trial. The "introductory statements" were short versions of what would have been trial briefs, the "oral presentations" were outlines of what would have been trial evidence, and the exhibits were the same as those that would have had to be collected and organized for trial. Thus, the procedure as implemented demanded preparation by counsel and experts which would have been directly useful at trial had the case not been settled.

The only Information Exchange expenditures which were not related to activities which would have had to have been incurred in any case for trial were those relating to the negotiations which led to the Information Exchange and those for the time spent at the Information Exchange itself. For one of the parties, these amounted to approximately 25% of total Information Exchange expenditures. These non-transferable expenditures were the only monies risked by that party's management in carrying out the Information Exchange. Total costs to judgment would have been approximately ten times

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greater. Because management considered that it was thus risking a relatively small amount of money in order to avoid an [508] otherwise certain expenditure of a great deal more, it viewed the required financial investment as well worth the risk that the procedure might be a flop.

Moreover since the pending Information Exchange forced counsel to concentrate their efforts within several weeks, rather than over many months or years, there was no need for them to spend preliminary time to reeducate themselves on the case as crises or significant events occurred. The matter as a whole had to be mastered and kept in mind during the entire period. Because of this necessity for organizing the case in a short time, connections between relevant facts and legal theories, which might not otherwise have been made until pretrial or trial were made significantly earlier. Had the litigation continued, this would have fostered more focused discovery and pretrial preparation. In sum, had the case not been settled, the intensive time spent by counsel in preparing for the Information Exchange would likely have been worth significantly more to the client than the same amount of less focused time spent during the long pretrial phase of the case.

Apart from the prospects of earlier settlement and of the client's obtaining a better return per dollar in attorney's fees spent, there are other potential advantages for client and attorney alike from an Information Exchange procedure. Significantly, it may provide a means for a client to discipline its attorneys. For example, sometimes where there is little or no pressure coming from the court, defense attorneys approach a case – even an important one – in a relatively relaxed manner. Thus, they may not immediately investigate or organize the factual and legal aspects of the case in a sufficiently thorough manner to appreciate fully the true legal situation and proper settlement posture. In other circumstances, the lack of pressure sometimes leads attorneys into over-litigation, unnecessarily dotting "i's" and crossing "t's" with regard to both discovery and legal research. An attorney's judgment about what is essential may be controlled by the amount of time and associate resources available. In either case, the Information Exchange procedure can serve as a useful management tool, forcing careful and early analysis on the one hand and selective judgment on the other.

From the attorney's perspective, the Information Exchange procedure may have the equally important effect of involving and educating the client. In the end, decisions with regard to settlement and legal expenses must be made by the client's responsible executive. Often, however, attorneys feel that these executives do not devote enough attention to litigation and therefore are unable to make well-informed judgments. Even where corporate in-house counsel is actively involved in a case, it is [509] important for the outside litigator primarily responsible for the case to be able to deal with a decision making executive who actually understands the detailed allegations and facts of the case in more than a second-hand manner.

The Information Exchange provides an opportunity for educating an executive to make rational decisions about the litigation. This can pay off in more ways than just settling the case. Even if the Information Exchange does not lead to settlement, it will leave the business principals with a much more accurate understanding of the nature of the dispute and with a greater appreciation of counsel's later attempts to mobilize corporate employees to assist in pursuing or responding to resumed discovery and in preparing for trial. Moreover, the procedure provides the executive with an opportunity to actually see, hear and take the measure of the antagonists in a situation akin to that which will obtain at trial. Thus, for client and attorney alike, the Information Exchange which does not lead to settlement will by its very nature still serve to reduce uncertainty with regard to the other side's position. Especially where an Information Exchange provides an opportunity for free questioning of the other side with regard to its legal and factual arguments, there is a higher likelihood that one will ferret out the other side's "best case" than with traditional discovery techniques.

The Information Exchange described above came at a relatively late stage in the proceedings, after considerable pre-trial sparring and discovery. Communication had broken down and compromise through traditional settlement negotiations did not appear possible. Nevertheless, it seemed

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reasonable to believe that each party was still capable of acting with a minimum of rationality – desiring to resolve the case as favorably as possible, with the least expense and risk, and the least delay. What was crucial to the ultimate resolution was that litigators on both sides, conscious that there remained some remote possibility of creating an avenue of communication, did not simply throw up their hands and begin to gird for trial. Just as important, executives on both sides were willing to risk an untried procedure.

Thus, counsel devised a procedure which combined in a new way features of various well-known dispute resolution mechanisms. For example, the Information Exchange assured a particular form of participation for the parties – the opportunity to present proofs and arguments – which is basic to one scholar's definition of the adjudicatory process. However, unlike adjudication and arbitration, the Information Exchange [510] did not establish a win/lose situation. In this respect, it resembled mediation, conciliation or negotiation. The parties did set their own rules of procedure and select a third party to help resolve the dispute. In these respects the Information Exchange procedure followed an arbitration model; however, unlike an arbitrator, the advisor had no binding decision-making capacity. Yet his very presence – and the ultimate prospect of his advisory opinion – provided a strong incentive to the parties to be both credible and careful in their presentations. In essence, the advisor was akin to a mediator or conciliator, except that his charge was merely to help determine the probable victor at trial rather than also to facilitate compromise.

Had the case been at a different stage or had there been different crucial issues, the structure of the Information Exchange would surely have been different. For example, if the Information Exchange had come earlier in the litigation, before the bulk of discovery, a longer period of expedited, limited pre-Information Exchange discovery might have been necessary. Nevertheless, since reducing discovery costs is a primary incentive for trying such a procedure, it seems advisable to attempt such an approach as early in the case as possible. Realistically, however, the need for a formalized settlement procedure will rarely be appreciated until after traditional, informal negotiations have failed and discovery and other pretrial proceedings have brought home the realities of the process and stated the initial thirst for litigative combat. Further, the rather complex procedure described above seems better suited to cases involving mixed questions of law and fact – questions dealing with the legal consequences of a variety of factual circumstances – than with questions solely, or primarily, of law or credibility. Thus, for example, the procedure seems well suited to resolving an antitrust case where the “sticking point” to settlement is the scope and definition of the relevant market, or an unfair competition case where the crucial issue is the propriety of certain disputed business practices. By contrast, where a case turns solely on legal issues, summary judgment procedures are likely to provide a means to resolve it. But where a case primarily turns on factual disputes involving credibility, the kind of Information Exchange procedure described above is not likely to be any more effective in resolving the case than traditional settlement negotiations or arbitration. However, where the factual disputes are technical ones, requiring expert analysis and promising a “battle of the experts” at trial, a modified Information Exchange procedure involving a neutral expert might be the best approach. Thus, in a circumstance where, for [511] example, the performance of a product is at issue, a joint testing procedure carried out by each side's experts and a neutral expert might well provide sufficient data to foster a settlement through traditional negotiations, without the necessity of also having a full-blown Information Exchange.

Conclusion

Obviously the concept presented here is not a panacea. By itself it is no cure for the court congestion and delay that plague our formal dispute resolution system, or for the ruinous litigation costs that increasingly concern corporate executives. Even so, the success of this procedure should demonstrate to the corporate litigation bar that successful alternatives to million dollar litigation can be devised.

Settling Large Case Litigation: An Alternative Approach cont.

If such alternatives are to be developed and implemented, the corporate litigator must be familiar with the features of different dispute resolution mechanisms so that when faced with a situation in which an Information Exchange or some other dispute resolution proceeding seems appropriate, different characteristics can be borrowed from those traditional mechanisms. The end result, like a Dr. Seuss creation, may not be immediately recognizable as anything remotely familiar. But the only appropriate criterion is whether it will work.



[1.60] The statistics quoted in Green's article as to the costs of litigation and the workload of the various courts in the United States are somewhat dated but are an indication of the crisis facing litigants and governments at the time Green wrote his paper.

Argument has raged within dispute resolution circles about the use of the word "alternative" in alternative dispute resolution (ADR). The title of this book does not refer to the word "alternative" as its use is a misnomer. The *Macquarie Dictionary* defines alternative to mean: "affording a choice between two things, or a possibility of one thing out of two ... (of two things) mutually exclusive, so that if one is chosen the other must be rejected". If a plaintiff or defendant wishes to employ, for example, negotiation or mediation as a way to resolve a dispute, they do not employ it as an alternative to litigation, thereby forfeiting that right. They employ it as a process that is complementary to litigation. In other words, dispute resolution is not an alternative to litigation rather, it is one of a number of processes that seeks to resolve disputes before a court may have to adjudicate them.

Certainly philosophically and theoretically dispute resolution is alternative to adjudication, however, in terms of processes employed to resolve a dispute, both consensual and curial methods are not alternatives, rather they are complementary methods. Judges ordering mandatory mediation under the various pieces of legislation in Australia do not order parties to mediation to the exclusion of litigation in the sense of them being alternatives. Their Honours make such orders in the hope that time consuming and costly litigation may be avoided through a consensual resolution of the dispute – they see such processes as being complementary to litigation not an alternative to it.

The Language of Alternative Dispute Resolution

[1.65] Sir Laurence Street, "The Language of Alternative Dispute Resolution" (1992) 66 *Australian Law Journal* 194.

The Language of Alternative Dispute Resolution (ADR)

An exposition of the language of ADR will, I believe, be of use in dispelling some of the fog that is beginning to cloud the whole field of dispute resolution. The fog has been generated by well-intentioned, but misguided, attempts to introduce precision of terminology into a field that, by its very nature, does not lend itself to precision.

The British Academy of Experts recently established a working party upon the language of ADR with a view to seeing if it is possible to make some recommendations in respect of the more commonly used expressions. The decision to undertake this exercise derived from the Academy's recognition that, and I quote from its records:

There appears to be a vast difference of understanding and interpretation in respect of the terminology.

The Language of Alternative Dispute Resolution cont.

It cannot be doubted that litigation – the process of formal determination of a dispute by a court – stands clear and positive amongst dispute resolution procedures. It is indeed well that this process, the sovereign remedy of litigation leading to judicial determination, is clearly recognisable and understood. The area of inconsistency and confusion is in the classification of other mechanisms that make up the whole spectrum of dispute resolution procedures.

I have on an earlier occasion when invited to address this Institute expressed a deep commitment to regarding ADR as standing for “Additional Dispute Resolution”. I venture to quote my observations from the transcript of the proceedings in relation to the acronym ADR as short for Alternative Dispute Resolution. In so doing I note that the passage relates to the domestic environment rather than international commercial disputation.

It is not in truth “*Alternative*”. It is not in competition with the established judicial system. It is an *Additional* range of mechanisms within the overall aggregated mechanisms for the resolution of disputes. Nothing can be alternative to the sovereign authority of the court system. We cannot tolerate any thought of an alternative to the judicial arm of the sovereign in the discharge of the responsibility of resolving disputes between state and citizen or between citizen and citizen. We can, however, accommodate mechanisms which operate as *Additional* or subsidiary processes in the discharge of the sovereign’s responsibility. These enable the court system to devote its precious time and resources to the more solemn task of administering justice in the name of the sovereign.

I recognise that the phrase “Alternative Dispute Resolution” is by now far too deeply entrenched to be able to be recommitted. In making [p 195] this point, however, my purpose is not to increase the element of terminological uncertainty, but rather to remove preconceptions that have tended to develop out of the use of the word “Alternative”.



[1.70] The better way to describe such processes as conciliation, negotiation, mediation, arbitration and litigation is to refer to them simply as “dispute resolution”. Perhaps if a narrower definition is required, then another way to define these processes would be to divide them into either curial and non-curial dispute resolution or adjudicative and non-adjudicative dispute resolution (see [1.100]). Nevertheless, all the previously mentioned methods are ways of resolving disputes and, given the flexibility of our justice system, none of them are alternatives to each other, rather, they complement each other.

Sir Laurence Street coined the phrase “additional dispute resolution” and other commentators have used the phrase “assisted dispute resolution” to better describe the use of the “A” in ADR. In this book ADR will be referred to as “dispute resolution” and will mean non-curial methods of dispute resolution unless otherwise stated (see [1.95]).

DEFINING DISPUTE RESOLUTION

[1.75] The task of defining the various forms of dispute resolution that have developed over the years is a challenging one. While most processes have distinguishing features capable of description and differentiation to other forms of dispute resolution, the emergence of hybrid forms of dispute resolution has blurred the descriptive lines between the various processes. This development is only problematic from the perspective of ascribing a definition, which is of use in cases where contracts or legislation require an accurately defined dispute resolution process. Particularly from the contracts perspective, to satisfy the rules of contractual drafting, parties to a contract must know with some degree of certainty what process of dispute

resolution they are agreeing to participate in should a dispute arise under the contract. Otherwise the emergence of hybrid forms of dispute resolution is a healthy development as it is evidence that dispute resolution (see [1.95]) is adapting to serve disputants. Its ability to adapt is one of the strengths of dispute resolution and it should be practised and allowed to develop in this way.

Dispute Resolution Guidebook

[1.80] R Charlton, *Dispute Resolution Guidebook* (LBC Information Services, Sydney, 2000) pp 3-10.

The Definitional Dilemma

Dispute resolution schemes have proliferated over the last decade. For the dispute resolver and for the consumer of dispute resolution services life was simpler in regard to the choices available in the 1980's and even into the early 90's. One could negotiate, arbitrate, litigate, or mediate. When mediation and alternative dispute resolution began to enjoy "flavour of the month" endorsement, some dedicated litigators insisted that litigation was itself an alternative process, the rationale being that it was an alternative to the traditional way of settling disputes down the centuries, mortal combat ...

Dispute Resolution Processes and Definitions

The mediation definition has remained fairly constant since the first mediation program was introduced in Australia in 1980 and is quite [4] simple. However, for those seeking an understanding [sic] "what goes on" in mediation, this has become unnecessarily complicated and cloudy, due to initiatives to apply separate descriptions to different types of mediations such as "community mediation", "victim offender" mediation and to different philosophies applied and processes conducted under such banners as "expert mediation", "shuttle mediation" and so on. In order to not add to these complications, the definition of mediation discussed in this book is simple and traditional.

The dispute resolution processes and guidelines discussed in this book include conciliation, facilitation and early neutral evaluation, as well as complaint handling guidelines. Dispute resolution processes, such as expert appraisal, arbitration, mini-trial and expert determination, are not discussed. This is because, with the exception of arbitration, these processes are not widely used, and are variations of each other. The titles of these processes do, in a sense, speak for themselves ...

NADRAC Definitions

The National Alternative Dispute Resolution Advisory Council (NADRAC) developed definitions "primarily to assist NADRAC in its advisory role to the Federal Attorney-General". It states that the definitions contained in its paper "are benchmark definitions which will enable ready comparisons to be made regardless of the range of names which might attach to particular ADR processes". This is to "encourage a shared understanding of the particular [5] process under consideration or discussion". NADRAC's definitions have assisted with clarity and have been drawn on to describe the dispute resolution process discussed in this chapter.

Some practitioners argue that it really does not matter what process is adopted or what it is called, since the expression "mediation" is generic. This overlooks the *Trade Practices Act* provisions which contain the requirement to deliver to customers the particular service which is contracted to be provided. The NADRAC definitions should put an end to such arguments.

Mediation

Mediation is a process by which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the issues in dispute, develop options around these issues, consider alternatives and endeavour to reach an agreement which encompasses the underlying needs and interests of the parties.

Dispute Resolution Guidebook cont.

The neutral mediator has no advisory or determinative role in the content of the dispute or the outcome, which is entirely up to the parties. The mediator may, however, determine the mediation process, that is the steps and stages involved in the process, whereby resolution is reached or attempted.

In order to avoid complicating this description it is not intended to elaborate on the definition except to mention a couple of mediation methods in the interest of clarity:

Co-mediation

Co-mediation encompasses the description of general mediation. The only difference is that two neutral third parties (the mediators) conduct the session. The co-mediation model is commonly used in community mediations, matrimonial matters, disputes over wills and in some multi-party matters.

There are many rationales in support of the co-mediation model, one being "two heads are better than one". In a mediation involving matrimonial concerns, the co-mediators may be a male and a female. This is said to assist the parties in regard to a perception of gender balance, in that one or other of the parties does not feel disadvantaged by having a solo mediator of the opposite sex. [6]

Shuttle Mediation

NADRAC defines "shuttle mediation" as a separate process in itself. In shuttle mediation the parties do not meet face to face, but are located in different rooms and the mediator "shuttles" between them conveying the parties' viewpoints, settlement ideas and financial offers. Another shuttle method is where the mediator meets the different parties at different times for all or part of the process. The mediator in fact acts as a messenger.

However, there is no doubt that some mediators, under the guise of traditional mediation, use this method for the majority of the mediation session. The parties [sic] face-to-face contact is restricted to opening statements and to the closing stages. This practice is identified in this book as "shuttle mediation".

Expert Mediation

According to NADRAC, the role is the same as with any mediator, including the neutrality obligation. However, using the AS 4608-1999 description of conciliation, the third party may have input into the resolution by using his or her substantive expertise.

There are differing views on the benefits or otherwise of having an "expert" mediator, conduct a mediation. One school of thought is that a competent mediator should be able to mediate in any dispute regardless of the subject matter. This view is based on the premise that the mediator has no decision-making role and is merely in charge of the process, not the content.

Further, concerns about "experts" have been expressed in regard to the temptation to bring their own long-held views into the forum, compromise their neutrality, structure the mediation in a manner to coincide with their view and steer the parties and the process to such an outcome.

On the other hand some parties may feel comfortable with a person who they feel has some expert knowledge and understands the particular technical language and concepts. Certain complicated technical terminology may baffle a dispute resolver who is outside the technological loop and this may be detrimental to the efficiency of the process. Familiarity with the subject matter of a dispute may assist the dispute resolver in their reality testing role.

Separately, some government agencies, such as those operating a mediation program under a particular statutory scheme, may [7] conduct mediations along traditional lines, but provide the option for the mediator to call upon a third party, usually a departmental employee, to provide information on the legislative boundaries which may affect their decision making.

Dispute Resolution Guidebook cont.

The Strata Schemes and Mediation Services Branch has developed this useful option in their program. It provides the opportunity to clarify any legislative uncertainty, and can operate as a reality test to the more creative ideas which the parties have contemplated, thus promoting greater workability of this agreement.

Conciliation

This term often applies to matters which are the subject of a complaint, but not exclusively so. Complaint conciliation contrasts with dispute conciliation or expert mediation in the sense that in the latter processes there are usually two parties with a mutual dispute. In a complaint, there is usually one party who is aggrieved and a complaint target who, up to a certain point, may not have perceived that a dispute exists, but who may either voluntarily or by statute take part in the conciliation process with the aim of achieving a resolution.

The process employed by the dispute resolver in a complaint conciliation may be exactly the same as that in traditional mediation. Where a dispute exists, the conciliator is normally an expert in the subject matter of the dispute and can offer advice and suggestions as to the manner of resolution. This is discussed under "Expert Mediation" above.

In some statutory conciliation programs, the conciliator is empowered to make suggestions as to the terms of settlement, provide advice on likely settlement terms and may actively encourage the participants to reach an agreement which accords with their own ideas or the requirements of the statute under which the conciliation is attempted.

Each agency would have its own terms of reference in this regard. For example, the NSW Health Conciliation Registry uses the classic mediation process and the conciliator has no advisory or determinative role. Other programs have different practices which accommodate a customised application to their particular program (for example: Financial Services Complaints Resolution Scheme, Family Court, Equal Opportunity Commission, Aged Care Dispute Resolution Scheme). In some statutory schemes, participation may not be voluntary for a respondent to a complaint. It may be mandatory to attend once the complaint has been processed. [8] Processes employed under the conciliation banner do not always involve a face-to-face meeting nor even the parties speaking directly to each other at all. The conciliator may act as the conduit who speaks to one party at a time, usually by telephone, and transmits concerns and ideas from one party to the other without the parties actually speaking together. This is a variation on shuttle mediation. A confusing aspect is that this process can be described by a particular agency as "mediation", "facilitation" or even "case management".

Telephone conciliations can involve a three-way conversation whereby the conciliator conducts the meeting and assists the parties to speak together, minus the face-to-face contact.

Facilitation

There are several processes to which this term can apply:

- Generally, facilitation is undertaken with a group of parties. The facilitator is neutral in the sense of not usually having an advisory or determinative role. The task for the facilitator may be to identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. The facilitation process may conclude at this point and another process is then followed, or the facilitator may go on to assist the parties to develop options and consider alternatives in an endeavour to reach agreement. Sometimes the facilitator may suggest options, drawing on what the parties have said.
- A facilitator may be employed to assist in planning meetings being held by a company or organisation. The group of planners may have a mutually desired outcome, but have diverse views on priorities or how a desired end might be achieved.

Dispute Resolution Guidebook cont.

- Facilitated negotiation is a process in which the parties to a dispute, who have already identified the issues to be negotiated, utilise the services of a facilitator to assist in negotiating the outcome.
- A dispute resolver is sometimes employed to facilitate a public meeting, committee meeting or a workshop. A group of residents, for example, may be in conflict amongst themselves or may have a common interest whereby they seek to put their views to a government instrumentality via a public meeting. In the committee meeting context, a board of an organisation may be in dispute amongst themselves and require a neutral person to assist the flow of the meeting and ensure that everyone has the opportunity to put a point of view or a particular person or faction is not allowed to dominate. [9]
- A facilitator in the workshop context is not strictly a dispute resolver, but acts more as an [sic] wheel oiler to promote interaction from the audience and dilute any tendency to dominance by particular audience participants.
- An intake worker whose role is confined to bringing a matter to the mediation or conciliation table is described as a facilitator in some programs. The role here is to co-ordinate the holding and the arrangements for a meeting, usually following an approach by one of the parties to a dispute. The facilitator (so-called) will then contact the other party and discuss the benefits of a meeting. This person may have the role of supplying the names of several suitable mediators. The facilitator may then assist the parties in choosing a mutually agreeable person and then proceed to arrange the details of the meeting. A more appropriate term for such a person would be "co-ordinator". This would avoid confusion with the dispute resolving or dispute prevention role of a facilitator, although such a co-ordination needs to have negotiation and dispute resolution skills simply to get all parties to agree on arrangements.

Arbitration

This is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination. An arbitrator can be part of a court-annexed scheme, or the parties may choose an arbitrator who is not necessarily legally qualified. The choice of arbitrator may be based on his or her particular expert knowledge of the subject matter, for example an engineer or accountant.

Arbitration is a process which is most often confused with mediation in the public mind. The media commonly uses the term "arbitration" when it is in fact mediation that is the process being employed. As the two processes are the most diametrically opposed of all the alternatives, such erroneous references continue to perpetrate the definitional confusion. Of all the "alternatives", arbitration is a process as close to judicial determination as one can get and is often not classed as ADR.

Early Neutral Evaluation

Some Australian courts have an early neutral evaluation program for matters in the court list. This involves engaging an evaluator, usually a legal practitioner, who specialises in or practices extensively in the subject matter of the dispute, for example wills and estates. The process involves each side putting their case before the evaluator.

[10] The evaluator first encourages the parties to settle the matter along consensual lines and may take on a chair person's role at this point. If settlement does not occur through this consensual means, the evaluator will produce his or her evaluation of the likely court outcome based on what he or she has heard on the merits of each side's argument. The parties may then negotiate or attempt to negotiate a settlement based on the evaluation. Early neutral evaluation is a cousin to processes called expert appraisal or expert determination.

Dispute Resolution Guidebook cont.

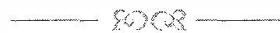
Med-Arb

This is shorthand for a process where mediation and arbitration are combined in one session. It is normally employed by statutory bodies dealing with consumer or injury claims or administrative appeals. The dispute resolver may first encourage parties to settle via a normal (although often truncated) mediation process. If settlement does not eventuate the mediator then has the power to give advice on outcomes or even impose a decision.

However, the process may be described as “mediation” to the parties and they may believe they are entering into a traditional mediation process. “Med-Arb” is a term which may be understood by insiders practising dispute resolution. It is not one which would be familiar to consumers, even though it is a process which is increasingly practised as statutory schemes continue to proliferate, particularly where there is a time limit on the session. Colloquially, it has been described as “speediation”.

Statutory ADR Schemes

Many statutory ADR schemes now exist. It is not possible to set out all or any of the variations a particular agency may inject into the classic equation. Cost considerations may mean that a time-limit is imposed – thus the “speediation” element operates. Whether they are described in the organisation’s literature as “mediation” or “conciliation”, it is important for a person entering into a dispute resolution process under the scheme, or for that person’s adviser, to check out the actual process to be followed and which they are expected to enter into. Many programs, run under the mediation or conciliation umbrella, may be conducting programs which operate somewhat differently from the simple or classic definitions described. Is the “mediation” being offered the classic process in which the parties take responsibility or is it something else, such as a Med-Arb arrangement? Is the proposed “conciliation” a face-to-face process, a telephone hook-up or a “no contact” shuttle method.



[1.85] Another important reason to embark upon the process of accurately defining dispute resolution processes arises because of the development of standards for practitioners of dispute resolution. A fuller discussion on standards being adopted by the dispute resolution profession will be discussed in Chapter 15 of this book. However, the following excerpt rounds out the discussion on defining dispute resolution and, in particular, mediation.

Mediation: Principles, Process, Practice

[1.90] L Boule, *Mediation: Principles, Process, Practice* (3rd ed, LexisNexis Butterworths, Sydney, 2011) pp 13-15.

There are several reasons for difficulties in defining or describing mediation. At the outset the term itself can refer to three different phenomena. It can refer to a set of aspirational values and principles such as self-determination and empowerment which could be operationalised in problem-solving or dispute resolution situations – an *aspirational* approach to the concept. It can refer to an analytical process involving discrete stages, steps, skills and techniques which mediators can contribute in problem-solving situations – the *procedural* approach. It can also refer to the occupational practice carried out by different kinds of mediators in different settings and with wide variations in procedure and mediator conduct – the *occupational* approach. As shown in the text there are divergences and inconsistencies among the aspirational, procedural and occupational approaches to mediation and its essential significance.

An early problem in capturing the definitional essence of mediation lay in the difficulty of obtaining direct information about what occurred in practice as most mediations are conducted on a private and

Mediation: Principles, Process, Practice cont.

confidential basis. This limitation has declined over time under the glare of surveys, case studies and increasing references in court decisions to what transpires in practice. Nonetheless, mediation remains a relatively unobserved and unobservable practice.

Another reason for definitional problems is found in the flexibility and open-ended nature of the language and terms used in defining or describing mediation. While these have some core areas of certainty they also contain a high degree of indeterminacy which precludes full clarity of boundaries. Concepts such as 'party self-determination' and 'mediator neutrality' have elastic meanings, as later discussions indicate, and the differences are exacerbated when mediation is examined in different cultures and legal systems.

[14] A further reason is the fact that mediation theory is derived in large part from other disciplines such as psychology and law, game theory and decision science, anthropology and sociology. While mediation theory draws from these disciplines in its theory construction, it is still developing its own explanatory and justificatory foundations. Mediation therefore lacks a strong sense of its essential attributes and is still constructing a coherent theory and accepted set of core features which enable it to be differentiated from other processes.

An additional reason is that the term 'mediation' is used in different senses by different groups and factors such as economic and professional self-interest cause groups to define and describe mediation for their own partisan purposes. There are political dimensions to defining and describing mediation which cause its meaning to be pulled and pushed in the service of different sectoral interests, such as lawyers, government agencies or community organisations. The different 'spheres of meaning' compete with one another for political control and hegemonic domination.

Finally, there is enormous diversity in mediation's practice. Clients adopt it for different purposes, mediators have significant variations in background, training, techniques and operational style, and it operates in varying social and legal contexts. In Australia mediation is encountered in high-end commercial disputes, in anti-discrimination cases, in neighbourhood conflicts, in problems among school students, and in numerous other social circumstances. There are significant differences between the situations of private commercial mediation and statutory forms of institutionalised mediation. The former are usually well-resourced, have few time limitations, and are often conducted by lawyer mediators; some forms of the latter are conducted by highly-trained mediators but resource and time limitations can render the process 'poor, short and nasty'.

This diversity of Australian mediation practice has contributed to the definitional challenges. As important as any theoretical or statutory definitions are *operational definitions*. These emerge from the actual practice of mediation, the intentions of those who promote it, and the attitudes and beliefs of mediation educators and trainers. What high-status mediators do in their practices, and are known to do, also influences the way mediation is defined. The process is being fashioned and shaped in the contrasting circumstances of commercial and family disputes, of private and agency-based services, of highly-priced and free services, of lawyer and counsellor mediators, and both with and without the use of professional advisers.

There is sometimes talk of 'classical mediation' or the 'orthodox mediation process' or the 'standard model of mediation', with other versions being [15] regarded as adaptations to, deviations from, or vulgarisations of the norm. However, while there are clearly limits to what can be classified as mediation, it is difficult to insist on the narrow orthodoxy these terms imply.

Despite the difficulties there remain imperatives to define mediation in numerous settings. These include situations in which various closely-related forms of dispute resolution are juxtaposed in legislation, in court and industry schemes and in multi-staged dispute resolution clauses: for example, mediation, conciliation, arbitration and case appraisal are all options in a single court context.' Differentiation is logically implied where there is more than one form of dispute resolution in a single

Mediation: Principles, Process, Practice cont.

context and practically impelled where there are compliance requirements and legal consequences flowing from the choice of process. Moreover, standard-setting and the increasing regulation of mediation require definitions for the sake of consistency and uniformity – neither mediation nor other ADR processes can be regulated unless they are first defined or described. Mediation standards generally, and accreditation systems such as the NMAS in particular, rely on inclusive definitions of the system.



SELECTING A DISPUTE RESOLUTION PROCESS

[1.95] Another issue related to defining processes of dispute resolution and the hybridisation of dispute resolution is the concept of “fitting the forum to the fuss”. This concept means simply first determining the type of dispute the disputants are dealing with and then matching the right dispute resolution process to the dispute that will best serve the disputants and give them the best chance of resolving the dispute. Often this means evaluating the disputants themselves and, based on their personalities, abilities and relationship with the other disputant, matching them with a dispute resolution mechanism that will serve them well.

Alternative Dispute Resolution

[1.100] T Sourdin, *Alternative Dispute Resolution* (4th ed, Lawbook Co., Sydney, 2012) pp 446-4521.

Should an ADR Processes be used

A threshold issue is whether an ADR processes should be used. It has been suggested that there are certain disputes that should never be referred to ADR processes. NADRAC has indicated that this issue is an important one to consider when creating standards for mediators. Many professional ADR organisations have also considered this issue. For example, the “Let’s Talk” group in Sydney has proposed a professional code of conduct for mediators. In the “Let’s Talk” code, there was some discussion about disputes where mediation may not be appropriate:

- Mediation may not be suitable for all conflicts or for all parties. If a mediator in consultation with the parties makes an assessment at any stage that mediation is not suitable, a mediator has a responsibility to not commence mediation or to end the mediation session.
- Examples where such an assessment may occur include where:
 - a person is put at risk by the participation, or the safety of the person is in doubt, as a result of the mediation;
 - a participant’s mental capacity is impaired by drugs, alcohol, psychological disorder or emotional disturbance resulting in their inability or incapacity to negotiate in their best interests and on their own behalf;
 - the power imbalance is such that it will significantly and adversely affect the negotiating ability of the party;
 - the parties are not willing to participate or negotiate or are unable to reach a negotiated agreement;
 - another dispute resolution procedure may be more appropriate.

Arguably, the emergence of much more comprehensive screening and assessment tools in the family area (see Chapter 3) do not focus as much on whether ADR is [447] appropriate but instead on how it takes place. However, there are issues about whether intake and assessment are part of the mediation

Alternative Dispute Resolution cont.

process and whether these processes are also covered by protections in relation to confidentiality and admissibility (see Chapter 12). In respect of all ADR processes, additional criteria have been proposed that raise issues about the need for public, adjudicative, and binding processes. These criteria are:

- when a definitive or authoritative resolution of the matter is required for precedential value, and the ADR process is not likely to be accepted generally as an authoritative precedent;
- when the matter significantly affects persons or organisations that are not parties to the ADR process;
- when there is a need for public sanctioning of conduct, or where repetitive violations of statutes and regulations need to be dealt with collectively and uniformly (this could arguably promote a test-case approach where some disputes are determined within the court system and others are referred to ADR processes);
- when a party or parties are not able to negotiate effectively themselves or with the assistance of a lawyer.

The Supreme Court of New South Wales ADR referral criteria were developed in 1995 by the author of this book. The criteria recommended that the premise of “no case is *not* suitable for referral” should operate in the first instance. The decision to specifically advise and recommend parties of ADR options could be positively exercised after reference to a checklist of factors in respect of each process.

What Type of ADR Process?

The Supreme Court of New South Wales, in its 1995 ADR Steering Committee Report, recommended developing positive criteria for referral [448] to ADR processes. Factors favouring referral to mediation, evaluation and arbitration have been developed and are detailed below.

Factors favouring mediation

Relevant factors favouring referral to mediation include whether:

- the matter is complex or likely to be lengthy;
- the matter involves more than two parties;
- the parties have a continuing relationship;
- either party could be characterised as a frequent litigator, or there is evidence that the subject matter is related to a large number of other disputes;
- the possible outcome of the matter may be flexible and differing contractual or other arrangements can be canvassed (poor compliance rates in similar types of matters could be considered in respect of this factor);
- the parties have a desire to keep a matter private or confidential;
- the parties can reach a view as to likely outcomes should the matter proceed further – that is, whether it is an appropriate time for referral;
- the dispute has a number of facets that may be litigated or argued about separately at some time in the future.

In the family law area, it was previously proposed that mediation not be used, or, more recently, (see Chapter 3) that safeguards be put in place where:

- there is a history of violence or fear of violence between parties;
- there are allegations of child abuse or sexual abuse, or a serious personal pathology;
- a party is unwilling to honour basic guidelines of the mediation process;
- “one of the parties is so seriously deficient in information that any ensuing agreement would not be based on informed consent”;

Alternative Dispute Resolution cont.

- the parties are not bona fide and the process is used as a “fishing expedition”;
- counselling or therapy may be required;
- the parties may reach an illegal agreement or disadvantage an unsuspecting third party.

Factors favouring (non-binding) evaluation and conciliation

Relevant factors favouring evaluation and conciliation include whether:

- the matter involves expert or legal issues; [449]
- liability is not an issue;
- an expert opinion has previously been sought (if it has, and the dispute relates to a difference in expert opinion, then evaluation by an expert may be particularly helpful);
- a party to the dispute is a government entity or an insurer;
- the parties have a desire to keep a matter private or confidential.

Factors favouring arbitration

Relevant factors favouring referral to arbitration include:

- whether an insurance company is liable in full or part;
- where receiving a binding opinion is relevant;
- where parties wish to avoid negotiations with the other side;
- where a matter involves the quantification of a dispute.

There is also a clear link between the objectives of different programs and the contents of the referral criteria. For example, the primary objective of the first Early Neutral Evaluation program that originated in the Northern District of California was:

not settlement but rather ... to promote early, efficient and meaningful communication about disputes and to make parties and counsel confront and assess their situations early and realistically.

Under these circumstances, it is likely that the objectives of the program would dictate that broad referral criteria operate. The general objectives discussed in Chapter 1 may also assist to create additional referral criteria.

Ripeness for Referral

The question of the timing of any referral process is usually acknowledged as an important factor in the eventual resolution of any dispute. “Ripeness” for mediation is said by some writers to be an important factor. However, this factor may be less important than previously thought. Goldberg and others have indicated that it is not necessary for all issues to be apparent and readily addressed to enable processes such as mediation to succeed.

However, in the past mediation referral programs have cited “the stage which the case has reached” and the “extent of time pressure for resolution” as [450] important factors in determining appropriateness for mediation. This may be partly because, in some instances, disputants may need to incur costs to appreciate the issues involved in the litigation. Also, as one respondent to a survey relating to the Commercial Division of the Supreme Court of New South Wales has noted:

The higher level of legal costs helps to focus a party’s mind on the “reality” of expensive, time-consuming litigation.

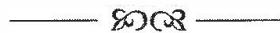
Awareness of legal costs and other potential costs (loss of opportunity and profit costs, costs in stress, management time costs) can be important in providing an incentive to negotiate or mediate. In addition, ripeness considerations may relate to the emotional state of the disputants and whether or not, for example, a grieving process has commenced or been completed (in respect of a lost

Alternative Dispute Resolution cont.

relationship). Some ADR processes can assist parties to move through cycles of change and prompt development of outward-looking approaches. For those within the litigation system, the provision of hearing dates and interlocutory events may provide a “sword of Damocles”.

It is probable that “ripeness” should be considered in the context of any referral process; however, it should also be weighed against the cost savings that may occur in any referral. It may be that re-referral mechanisms which can be triggered after a determination that a matter is not “ripe” are necessary. The lack of contingency fees in Australia may also make “ripeness” a more important factor than is the case in United States systems.

“Ripeness” will also be relevant in determinative processes such as arbitration. A lack of information in such processes can have an impact on whether they can [451] proceed. However ADR processes can have an important catalytic effect and may prompt early action and discourage “languishing” by ventilating issues. Ripeness is also an important factor in determining where referral processes should operate – in a multi-door court, a multi-option site, or in combination with an array of referral procedures. In terms of the timing of referral, it has been noted that it seems to “... be accepted that there is no automatically right or wrong time for referral; however, a system of automatic referral at a certain stage in the litigation process will inevitably result in some inappropriate referrals”.

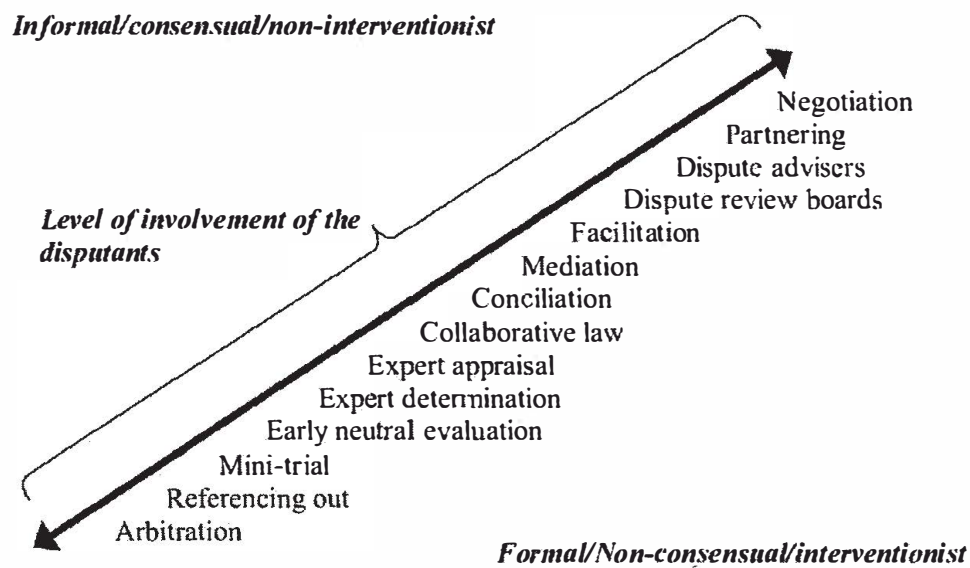


[1.105] When parties decide to use a dispute resolution process, notwithstanding the matters raised in the previous extract, they may simply select a dispute resolution process based on the level of:

- informality;
- consensuality;
- intervention.

In this respect parties have the flexibility to choose a process that will best suit their needs. Those needs may revolve around the level of informality available to explore a wide variety of materials pertaining to the dispute, which, in a court of law, may be prevented by the rules of evidence. Further, a party may just enjoy a more informal setting in which they can explore options for settlement rather than get bogged down in facts and the history of the dispute. They may also prefer a process that is more consensual in its approach to resolution, that is, a process that seeks agreement between the parties as the basis of resolution as opposed to having a solution imposed on them. Finally, parties may prefer a process that features less intervention from a third party neutral and which seeks to ensure that the parties themselves drive the process and the outcome. Conversely, they may prefer a process that ensures a higher level of intervention, which will not require of the parties an onerous level of participation. Figure 1.1 sets out the degree of informality, consensuality and intervention in the most popularly practised dispute resolution processes in Australia.

Figure 1.1 The degree of informality, consensuality and intervention in the various dispute resolution processes



[1.110] In relation to the term “dispute resolution” as it used in this text, unless otherwise stated, the term will be used in its generic sense to mean any form of non-curial dispute resolution. Thus, expert determination, referencing out (or refereeing), arbitration and litigation, are not classed as methods of dispute resolution unless otherwise stated. The inclusion of chapters dealing with these methods, other than litigation, is to ensure a full picture is given of all processes outside court proceedings. Further, in relation to litigation, judicial review by the many tribunals set up at federal, State and Territory levels is not to be included in the term “dispute resolution”. However, mediations, conciliations and other non-adjudicative processes held within the purview of those courts and tribunals are of course included within the term “dispute resolution”.

THE LEGAL PROFESSION AND DISPUTE RESOLUTION

[1.115] Dispute resolution has been adopted, or some might say appropriated, by the legal profession. Under the various statutory dispute resolution schemes, the lists of mediators, conciliators and arbitrators are dominated by lawyers. The various courts and tribunals in Australia are themselves encouraging their own judges, registrars and members to be trained in dispute resolution, such training being conducted both locally and overseas. The Victorian Law Institute and the NSW Law Society has for a number of years held the “spring offensive” and “settlement week” respectively where, with the co-operation of the courts and legal practitioners, litigants pursuing matters in the court lists are offered the opportunity to resolve their disputes via mediation.

Solicitors and barristers in all jurisdictions in Australia are embarking upon training in dispute resolution to better represent their clients at the various dispute resolution processes being offered both privately and in the public space. Most State and Territory Law Societies

and Institutes and Bar Associations have dispute resolution committees that promote the use of and professional development in dispute resolution.

The dispute resolution processes themselves have taken on the aura of legal proceedings in terms of legal representation, the limits of confidentiality and disclosure and the contractual style settlement agreements drafted upon resolution. In every way, dispute resolution is generally being conducted in “the shadow of the law”. In the following extract Professor Laurence Boulle explains more fully the notion of dispute resolution operating in the shadow of the law.

Mediation: Principles, Process, Practice

[1.120] L Boulle, *Mediation: Principles, Process, Practice* (3rd ed, LexisNexis, Butterworths, Sydney, 2011) pp 185-187.

Despite portrayals of mediation as an alternative to law and litigation, it always operates in the ‘shadow of the law’. The expression signifies different [186] factors: that in mediation parties operate with some understanding of their legal rights and obligations, with an expectation of how the dispute would be resolved through the legal process, and with some knowledge of the time, costs and risks associated with litigated outcomes. It also signifies that there may be subsequent litigation on matters arising in mediation such as unlawful party conduct, breaches of confidentiality and challenges to enforceability of mediated settlements. Finally, it suggests the potential relevance of the legal system for all mediations, for example in relation to judicial interpretations of ADR legislation, Agreements to Mediate and relevant court rules. In a more symbolic sense law’s shadow is also relevant in legitimising certain narratives encountered in dispute resolution, namely those consistent with dominant social values, and in marginalising others which are inconsistent with them. In all these respects mediation is said to operate in the shadow of the law.

The extent of the law’s shadow varies considerably. The shadow will be deep where a dispute has been packaged and defined as a legal one, where lawyers have taken active roles in its processing, where each side has Senior Counsel’s opinion and where mediation takes place on court referral or with involvement of a court or tribunal official. The deep shadow extends a strong legalism to the operation of mediations, with negotiating parties influenced by a dispute’s likely litigated outcome, and there are greater prospects of subsequent litigation whether or not mediation produces a settlement. Where mediation involves a neighbourhood or organisational dispute with little legal content and it is conducted through a community dispute resolution service, the shadow of the law, in all its senses, will be much weaker.

There is therefore a dialectical relationship between mediation and the legal system. Despite the legal shadow overhanging mediation, its existence constitutes both a complement and a challenge to the formal system. As Alexander points out, ADR and mediation interact interdependently with the justice system and their procedures and philosophies have reshaped the contours of legal processes. While ADR might have led to reductions in court hearings and changes in the work practices of some courts, the introduction of mediation into civil procedure systems has revitalised the litigation process. There is evidence that while litigants have a preference for ADR processes over litigation in many situations, the use of ADR processes has also increased satisfaction with litigation. The informality and flexibility of mediation and [187] its potential time and cost savings have contributed to reformulations of court rules and practice directions. The exposure of legal practitioners to mediation has caused some lawyers to become less legalistic, more client-centred, more collaborative and more self-reflective.

There is also evidence that the language of mediation has changed aspects of legal discourse. This has been evident in terminological changes in family relations, from ‘custody and access’ to ‘residence and contact’, and more recently to ‘parenting arrangements for the children’. There is some evidence

Mediation: Principles, Process, Practice cont.

of substantive law changing under the influence of mediation practice, for example towards acceptance of shared parenting arrangements for children which had previously been avoided and for which there is now a statutory presumption. Another aspect of mediation's influence on the formal justice system derives from the fact that in providing a 'competing' dispute resolution process it has led courts to become more concerned about efficiency, effectiveness and client satisfaction; they now inform the public about their services and even promote their 'products' in the dispute resolution market.

The influence of mediation and ADR and the changing functions of the courts can challenge constitutional principles. The further development of litigation management systems and court-connected ADR, and in particular the evolution of judicial resolution and mediation systems, may be limited by Ch III of the Commonwealth Constitution, as may be additional changes to the basic features of the adversarial system. The roles of judges as case managers, as facilitators of settlements and as mediators have yet to be called into question in terms of constitutional principle. If this does occur it may be found that there are limits on the extent to which there can be further combinations of litigation, case management and mediation at the Commonwealth level.



[1.125] Despite the fact that much dispute resolution is practised in the shadow of the law, it is not only legal practitioners who are involved and not all dispute resolution processes are legalistic in nature. For example, the work of the Community Justice Centres of New South Wales and the Queensland Dispute Resolution Centres, albeit funded by the respective Attorney-General's Departments and accepting many referrals from the New South Wales Local Court and the Queensland Magistrates Court, strive to keep their mediations out of the shadow of the law. Their focus is very much on reaching a consensual agreement between parties, often in a form not found within the court structures, who are predominantly people living within the same community.

Further, private provider organisations, such as UniFam and Relationships Australia, although government-funded to varying degrees, seek to assist families by offering, amongst other things, mediation services that help people avoid costly litigation. However, even these service providers, while being client-driven, are required to ensure that their mediators meet the practice requirements of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) – a new system of accreditation that came into force on 1 July 2009 which sets out the qualifications of family law dispute resolution practitioners operating under the *Family Law Act 1975* (Cth).

[1.130] Practising dispute resolution in the shadow of the law raises the issue of how a lawyer's role in a dispute resolution process sits with the role of the same lawyer representing a client in the adversarial justice system if the dispute proceeds to litigation. Given that lawyers are trained in adversarial justice, the question arises as to whether lawyers are ill-equipped to participate in achieving consensual outcomes through dispute resolution.

In their landmark paper Anne Ardagh and Guy Cumes suggest a more central and proactive role for lawyers engaged in the resolution of disputes. Further, they suggest some important factors for the structural reform of mediation in the legal sphere.

Lawyers and Mediation: Beyond the Adversarial System?

[1.135] A Ardagh and G Cumes, "Lawyers and Mediation: Beyond the Adversarial System?" (1998) 9 *Australian Dispute Resolution Journal* 72 at 73-79.

Lawyers in Mediation

Dissatisfaction with present legal processes and pressure from courts, government and the private sector for reform of the adversarial legal system have encouraged Australian lawyers to embrace mediation. The movement of [74] lawyers into mediation may be seen as a desire to meet a changing demand and to control a perceived expanding area of legal services. The problem with lawyers moving into this area is that they bring their legal "baggage" with them, that is, their adversarial legal culture. Conflict is managed by lawyers within the domain of the law as they perceive it and as they have their clients understand it. In lawyers' education and management of disputes there is little or no recognition of parties' underlying needs and how these might be satisfied outside legal norms. Asking lawyers to practise facilitative mediation is anomalous without a radical change in legal education, philosophy, training and development of skills. Lawyers' concerns are with facts and certainty; from this follows a legal solution to the dispute. Mediation's focus is with feelings and ambiguity; and from the drawing out of feelings and perceptions comes resolutions to the conflict. If lawyers are to be mediators and/or to participate as lawyers in mediation sessions, a lessening of emphasis on legal methods and solutions is necessary.

Lawyers can practise in relation to mediation processes in the following ways: (a) lawyers as mediators; and (b) acting for a client within a mediation process. *Lawyers as mediators* can be divided between those who act as genuine neutral third persons to facilitate a dispute resolution process between two or more persons and those who "mediate" a dispute between their own client and another party (with or without representation) in an informal, ad hoc arrangement. If lawyers act as "mediators" in the latter sense, in the absence of a third party neutral, the role they perform is merely to effect a settlement between disputing parties, rather than, permitting parties to express and develop a range of options arising from their own interests and needs. In other words, this is a misuse of the terminology and procedure of mediation: a lawyer cannot be a neutral where his or her own client is concerned and therefore any matter that should be mediated must be referred by the lawyer to an independent, neutral third person.

The role of *lawyers acting for clients within a mediation process* facilitated by a third person has been analysed by Sordo who points out that the lawyer's role is one of advice in the mediation session rather than representation of a client. Acting in the clients' interests (which Sordo says is part of the lawyer's duty in mediation) may be problematic, if it undermines the client's independence of input. Mediation is the maximisation of the client's interests and needs as identified by the client, not the orchestrated presentation of a case by a lawyer on behalf of a client. There may be a conflict of interest between the lawyer's duty to a client and their duty to allow the free operation of a genuine mediation process. Sir Laurence Street has observed that lawyers who do not understand that their role is not one of advocacy are "a direct impediment to the mediation process".

Lawyers' traditional role is one of advice and representation in the area of substantive law and legal rights. There will always be a place for this. People do not always want to settle matters themselves; they look for an agent to act for them. Moreover, in the present system, citizens do not know how to proceed in the complicated procedures of the law. Additionally, citizens may not know that there are alternative dispute resolution methods. Hence they have no choice but to instruct a lawyer.

[75] Given this traditional lawyer/client relationship, control by lawyers of mediation services may add an extra difficulty for citizens in their access to dispute resolution services. It could set up a barrier to personal, direct and inexpensive alternative dispute resolution methods. Further, it could be seen as

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merely adding an extra arrow to the lawyer's quiver instead of giving citizens a real choice of services or a real alternative to the legal culture. The question then is: will lawyer mediation merely become a further tool and tactic in the adversarial process?

Criticism has been levelled at what some see as an "ADR industry" occupied by "opportunistic lawyers" usurping the field of mediation: "the colonisation of mediation by lawyers in government and private practice ... will mean that mediation skills will become professional artifacts ... locked up within the lawyering role, not to be shared, but to be given down, at a fee". It can be argued that lawyer mediation is a way of containing and preserving dispute resolution services within the profession and infusing legal culture into general dispute resolution processes.

It is of little value to the consumer to take a dispute to a lawyer who starts a legal process which costs the client in lawyer's fees, court fees, time, emotion and entrenchment of positions; then to be referred by the court during the course of the proceedings to mediation. Such a referral to the Law Society Mediation program in New South Wales incurs a financial cost of several hundred [sic] of dollars. Lawyers' control of this process is amplified by the requirement that the Law Society panel of mediators is restricted to New South Wales solicitors.

Lawyers should, at the very least, not have a monopoly on dispute resolution services. There are other helping professions and dispute resolution services which involve different non-legal skills which can be applied at different times or stages of a dispute. The existence of other dispute resolution services prevents the exclusive domination of the field by lawyers and provides an alternative, beyond the adversarial system.

Beyond the Adversarial System: A New Ideal

Litigation is a process, which includes both pretrial and trial stages of legal proceedings. Although the final stage of litigation is the trial, the litigation process commences at a very early point in the lawyer's contact with the client. All the stages of the process are contained within an adversarial culture. Mediation as typically used by lawyers is but a stage in the litigation process, not beyond the adversarial system.

We advocate as an ideal a distinct and separate process of facilitative mediation within a structure which is beyond the adversarial system, outside the control of legal practitioners and outside traditional legal processes. This structure could include lawyer-mediators, but not be restricted to them or controlled by them.

One form of this model may be the incorporation of early dispute resolution services within the court structure. However, in order for this to be an alternative to the adversarial system, it would need to be accessible, free and community based; informal and separate from adversarial legal processes; not [76] merely a referral from legal proceedings to mediation, but a genuine, first instance of dispute resolution involving non-court personnel.

Such an ideal mediation service can be distinguished from the so-called "ADR industry" including lawyer-mediation. The latter is a form of professional, private ownership of dispute resolution. Mediation as an alternative to the adversarial system should apply the principles of fairness through the provision of inexpensive, equitable, efficient and speedy access to justice. If mediation is to be beyond the adversarial system, more basic reform is needed than simply giving lawyers short courses (four days) in mediation processes. Nevertheless, short courses may serve an educative function for lawyers about mediation processes. According to recent research, lawyers have limited experience in referring cases to mediation, representing clients in a mediation and acting as mediators.

Structural Reform

The fundamental premises of reform must be based upon structural reform and the key principles of fairness. The principles of an ideal alternative structure, distinct from lawyer-and/or court-annexed mediation, include:

Lawyers and Mediation: Beyond the Adversarial System? cont.

- Non-extension of an initial chosen professional practice (for example, law)

The practice of mediation should be independent of (outside of) any other professional practice.

- Provision of a philosophical rationale for mediation

Mediation is based upon a set of philosophical premises that are quite different from traditional lawyer practice. Lawyers are paid to fix other people's problems, to manage and eliminate conflict, rather than to facilitate individual resolution processes. Conflict is categorised and compartmentalised by rules and legal remedies and resolution is sought through the tactics of law-based solutions. In contrast, mediators have no stake in the dispute or in the desirability of having it resolved. They view disputes as an opportunity for others to restructure or reframe their social, personal, business or organisational relationships.

- Provision of specialised skills and training

Mediators are trained from the outset to facilitate discussion between disputants with a view to encouraging them to see the other person's point of view and to negotiate a fair result, not a win/lose situation. Lawyers act on the instructions of, and in the interests of, their clients and their skills are developed to maximise their potential to win or to achieve the most favourable result for their client.

[77]

- Support for a system that is organisationally based

An organisational basis means that mediators are initially selected, employed with and responsible to a director or manager. They are given lengthy standardised training and if deemed suitable are selected for accreditation for an initial trial period. Reaccreditation may be possible. Such a model exists within the New South Wales Attorney General's Department (Community Justice Centres) and in other Australian jurisdictions, for example, the Australian Capital Territory. This model could be either extended or it could be adapted within the organisational structure of courts. This would establish mediation as a form of free public ownership of dispute resolution which would involve a partnership between community and government, based upon the notion of public trust.

Lawyer-mediators are basically self-selecting and lawyer-mediation training has not been standardised or accredited. In fact, this was rejected by the New South Wales Law Reform Commission a few years ago. To quote one lawyer-mediator, "the absence of uniform standards and lack of any general standards or monitoring means that there is no guarantee of competence by people calling themselves specialists, nor any bar to any of us (lawyers) holding ourselves up as experts". The same author notes that, in contrast, New South Wales Community Justice Centres do not allow mediators who were trained many years ago "to sit on a panel until kingdom come without any training or reassessment occurring".

- Institution of a legislative base

Legislation ensures accountability and control of the process of mediation and of the mediators. This includes supervision of mediators in the sense that they must account for each session which they conduct by way of a written report to a co-ordinator who is responsible for reading each report and following up where necessary. This is an important part of quality control, consumer protection and community service.

Lawyers are not supervised as mediators or accountable to an organisation in the sense that each mediation session they perform is overseen by a manager or regulatory process. Lawyer-mediation is essentially self-regulatory, although the legal profession and lawyer mediation in the broad sense is regulated by law societies which provide guidelines for lawyer-mediators.

- Encouragement of community representatives as mediators and enhancement of the democratisation of the justice system

Lawyers and Mediation: Beyond the Adversarial System? cont.

Wide community participation in dispute resolution is analogous to the jury system, employing people with non-legal backgrounds as direct participants in the justice system. It also ensures broader consumer confidence and trust in the system.

Principles of Fairness

Principles of fairness include the following:

- accessibility of persons to dispute resolution mechanisms and services in terms of affordability, equity and fairness; [78]
- efficient and speedy resolution of disputes;
- empowerment – the control by the disputants of the dialogue, the ownership of the outcome and the ability to make real choices;
- participants' knowledge and understanding of the process;
- personal and active (rather than passive) participation;
- principles of natural justice;
- impartiality of mediators and the opportunity to be heard.

What these fairness principles require for lawyers is that in order for persons to have affordable, equitable, efficient and speedy resolution of disputes, lawyers need to apprise clients of, and be willing to refer them immediately to, mediation services, rather than starting into litigation processes. The dilemma here is that the lawyer stands to lose the client (that is, the business opportunity).

Lawyers need to inform clients of alternative processes to the resolution of their disputes in order to empower them, allow ownership of their own disputes and give them the opportunity to exercise real choice. Only in this way can clients have the knowledge and understanding of all available processes of dispute resolution.

In order for clients to hear each other and participate without hindrance, a lawyer's role within the mediation process should be limited. Perhaps it is preferable that lawyers not be present in the mediation so long as the client has the opportunity to consult a lawyer either during the process, or after it, about any formal agreement to be made.

These considerations raise the question whether legal issues and procedures can be separated from what, the parties really or ideally would want. While ever lawyers participate in mediation, their background, training and professional and ethical obligations will almost always require the law to take precedence over the client's non-legal interests and needs. In those cases where law and procedure can be separated from parties' interests, for example, in a dispute over access, to children, or a dispute over the provision of a service, adversarial representation and mediation without legal representation should be quite separate processes.

Conclusion

In this article we have examined, first, the role of lawyers in mediation and questioned whether the participation of lawyers in mediation sessions is different from the traditional negotiation and settlement practices of lawyers and, secondly, whether mediation by lawyers effects real change in society, in legal culture and in the structure, cost and control of dispute resolution processes. We have argued that mediation could be a real alternative to the adversarial system if established as a formalised, structured dispute resolution system, independent of the legal profession. This requires a partnership between the community and the state and a new paradigm of dispute resolution, beyond the adversarial system, where mediation is accessible and understandable.

[79] This proposal may create a dilemma for lawyers if it requires them to choose between their role as traditional lawyers or as mediators. Can they do both equally well? It has been observed that "it is

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difficult to understand ... how lawyers can become mediators on the basis of qualifications and experience in a discipline which is, in fact, the antithesis of mediation". For lawyers to be mediators, legal education needs to provide training and skills to enable lawyers to be dispute resolvers in the broadest sense. Perhaps such education may lead to a profession, divided into mediators and litigators, that is, the alternative dispute resolvers as opposed to the traditional lawyers.

Ultimately there needs to be fundamental change in the way lawyers proceed if we are to move beyond the adversarial system. Facilitative mediation is a process which addresses many of the deficiencies of the adversarial system. Lawyers have a critical role in fostering or hindering its development as a primary dispute resolution system. Presently the incorporation of mediation as a stage within the adversarial system retards meaningful reform of the legal system. Mediation must be realistically incorporated into primary dispute resolution processes at the earliest stages of a dispute, actively embody principles of fairness and ideally be structurally separate from adversarial processes, practices and institutions. We advocate a rethinking of the relationship between lawyers' practice and mediation in order for real change to begin.



[1.140] The reference by Ardagh and Cumes that standards and accreditation do not apply to mediation conducted by lawyers or others was remedied by the introduction in 2008 of the Approval and Practice Standards for mediators. This now means that lawyers and others seeking to act as mediators for the courts and other statutory schemes must be accredited by the National Mediator Accreditation Scheme. This will be further discussed in Chapter 15.

The principles of an ideal alternative structure as discussed by Ardagh and Cumes are still relevant today, as are their principles of fairness. It is material to note that their first fairness principle, that of access to dispute resolution, has yet to be achieved. Only those people or organisations that are financially able can access court annexed dispute resolution, as proceedings need to be commenced to allow such access. While State and Territory governments have taken the responsible decision to set up community or neighbourhood justice centres, these are generally restricted to low level community-type disputes, leaving out the vast number of people in civil and commercial disputes that cannot afford to commence proceedings in court. Australia still has a long way to go to provide non-curial dispute resolution to the financially disenfranchised masses.

[1.145] If one accepts that the roles of the lawyer, that of advocate for adversarial justice and of non-curial dispute resolution can be reconciled, then the next issue is whether dispute resolution is part of the practice of a lawyer and if so, do lawyers have a duty to advise their clients about dispute resolution options before accepting instructions to proceed to litigation?

Liability of Lawyers to Advise on Alternative Dispute Resolution Options

[1.150] D Spencer, "Liability of Lawyers to Advise on Alternative Dispute Resolution Options" (1998) 9 *Australian Dispute Resolution Journal* 292 at 292-298.

Introduction

All lawyers in Australia assume several duties upon being admitted to their respective Supreme Courts. The objects of these duties include clients; the respective courts of admission; other members of the profession; and, some say, the public. One of the many duties lawyers have to their clients is the duty to advise them in a competent manner. This usually means providing clients with the correct legal advice, setting out their rights and the benefits or otherwise of the various forms of dispute resolution. It could also be said that the duty to advise includes peppering any such advice with a view to resolving disputes in the shortest possible time and with a minimum of cost to the client ... [293]

Is ADR Part of Legal Practice?

Lawyers have become the natural adoptive parents of ADR. Disputes have a tendency to climax in court action and the architects of litigation are clearly lawyers. In this respect, lawyers have an understanding of the adversarial problem-solving techniques employed by most courts in the Western world and they have an understanding of legal and evidentiary issues which may have a bearing on the effectiveness of an ADR process. Hence, from a philosophical and practical viewpoint, lawyers are inextricably linked to ADR. Therefore, it is not surprising to find that lawyers dominate the practice of ADR in Australia.

The link between lawyers and ADR is now so well established that organisations such as Lawyers Engaged in ADR (LEADR) conduct ADR training courses especially for lawyers who may be involved in representing their clients, or who wish to become ADR practitioners themselves. The New South Wales Law Society has a Dispute Resolution Committee which advises on policy issues involving ADR, as well as maintaining a panel of third party neutrals. On 30 August 1995, the New South Wales Law Society, in conjunction with the New South Wales Law Foundation, launched the Mediation Information Kit. The kit states its aims and objectives as being "to disseminate information among the legal profession on the use of mediation to promote negotiated settlement of disputes and the early resolution of litigated matters." The kit also lists reasons why practitioners should use mediation, the second of which states, "expansion of solicitors' practices by the provision of an additional service as an alternative to litigation particularly in situations where litigation is neither cost-effective nor desirable." The kit contains several documents setting out the Law Society's mediation model, guidelines, precedents, mediation initiatives, index of government and non-profit organisations offering alternative dispute resolution, and recent legislative developments in the field of mediation and early neutral evaluation. Page 1 of the guidelines states:

[294] The Council [of the Law Society of NSW] has approved the revised guidelines and resolved that the activity of mediation by solicitors, subject to the revised guidelines, be declared to be appropriate to be undertaken as part of a solicitor's practice.

From the information contained in the mediation information kit, it would seem that the New South Wales Law Society sees the use of mediation as a method of expanding the business of lawyers by providing additional services. It is also clear that it sees ADR as being a legitimate part of legal practice ... One way of establishing whether mediation is part of the practice of law is to consult the insurers of lawyers, that is, those who determine what areas of practice are deemed to be within the purview of legal practice and therefore to be included under the insurable heads of cover. In New South Wales, solicitors pay professional indemnity insurance through the Law Society's Master Policy, which provides that those solicitors who, as part of their legal practice, act as mediators will be entitled to indemnity under that insurance policy.

Liability of Lawyers to Advise on Alternative Dispute Resolution Options cont.

Further, solicitor lawyers who conduct mediations under the Law Society's Mediation Program (such as the various settlement week activities and when mediating under the Society's model dispute resolution clause) are specifically covered under the Law Society's Errors and Omissions Policy which covers all the Law Society's activities.

In answering the initial question of whether ADR is part of the practice of law, we are now in a position to draw on some conclusive proof that would allow us to answer the question in the affirmative. First, there is the philosophical argument that lawyers are proponents of ADR by virtue of their professional involvement in litigation. Secondly, the existence of the New South Wales Law Society's Dispute Resolution Committee is proof that the lawyers' governing body considers that ADR forms part of legal practice. Thirdly, the New South Wales Law Society has produced a Mediation Information Kit which encourages lawyers to advise their clients of mediation options and provides specific instructions for their conduct ... Finally, specific directions under the New South Wales Law Society's Master Insurance Policy go to some lengths to advise lawyers that they will only be covered for [295] professional indemnity insurance if, when acting as a third party neutral, they do so as part of their ordinary course of legal practice, and not as a business in its own right.

Another persuasive argument that ADR forms part of legal practice is its adoption by the courts themselves. Most States of Australia have passed ADR legislation which generally provides that courts may refer matters in their lists to a variety of ADR processes, most commonly, mediation, early neutral evaluation and arbitration. Many courts have formed panels of ADR practitioners for use in court-referred ADR and a high proportion of those practitioners are lawyers.

Given the above evidence, it is possible to state that ADR is considered by the legal profession as a legitimate part of the practice of law. After establishing this hypothesis, it is now possible to move on and pose the question, do lawyers have a duty to advise clients of ADR options?

Duty to Advise

[There are] two important issues in the question of the duty to advise clients of ADR options. The first is the subject of competition for services. If lawyers do not advise of ADR options, then clients will seek that information from other lawyers or non-lawyers. The second issue is that of lawyers leaving themselves open to professional negligence actions. These two issues are compelling reasons for lawyers to advise clients of ADR options ... [296] Australia is experiencing a growth in ADR legislation and service providers ... many individuals and organisations are using ADR clauses in contracts, or seeking out the services of ADR providers to avoid lengthy and costly litigation ... the various representative bodies of lawyers, the judiciary and the legislature have accepted the role of ADR in the practice of law and are encouraging its use ... [297] In an effort to reconcile the dilemma a lawyer has between the duty to the client to advise of the most cost-efficient methods of resolving the dispute and the potential loss in fees through giving such advice ... the solution lies in the philosophical underpinnings of the legal profession. That is, "As a profession, the lawyer must subordinate his [sic] self-interests to those of the client" he suggests that the benefits of ADR are that lawyers can dispose of their cases more efficiently, have fewer problems in recovering fees with clients who are likely to be more satisfied with the fees and the professional service, and participation in a process that is more professionally satisfying than the traditional adversarial one.

Indeed, as more and more clients recognize the advantages of ADR, they may expect their lawyers to discuss the appropriateness of alternative procedures and use them when in the client's best interests. The failure of lawyers to do so may find the sophisticated client shopping for a new lawyer.

The Hon Mr Justice de Jersey, of the Queensland Supreme Court, delivered a similar but more vehement message to the Australian Bar Association, at the ABA Conference in 1990. His Honour fired a poignant salvo at the Bar, stating that the public perception of lawyers is that they take matters to

Liability of Lawyers to Advise on Alternative Dispute Resolution Options cont.

court because they earn more money. In this respect the public have become distrustful of lawyers. His Honour made it clear that the Bar holds a privileged position in society because it serves the vital public interest, but, "Unfortunately at the moment it is not serving that interest to a large extent. That is because fees are so high that middle income earners are denied recourse to the courts." Justice de Jersey suggests that embracing ADR solutions would assist to promote the public interest as well as justifying the Bar's privileged position in society. His Honour, like other ADR advocates, concedes that the use of ADR equates to a reduction in the costs of legal services. However, he suggests that the Bar seize the benefits of ADR, namely, the prospect that the reduction in legal costs may enhance the public perception of the Bar, as well as increasing the Bar's capacity to serve the public interest. His Honour sounds a warning to lawyers who do not embrace ADR: "Lawyers who plough on in the traditional way do so at their peril. The peril is that they will lose their clients. They will end up with dissatisfied clients. Word will get around. They will be perceived to be interested principally in large fees. I think that a clear sighted recognition of the ADR trend is important to the future of the Bar."

[298] His Honour states that the rationale of survival is the wrong reason to embrace ADR, and goes on to suggest that helping litigants is a better reason.

[The] second issue is that of the threat of litigation against lawyers who do not appropriately advise their clients on ADR options. This issue is generally of great concern to lawyers as litigation can not only result in damages payouts affecting cash flow and insurance premiums, but in the case of a lawyer struck from the roll of legal practitioners, the ability to practice law ad infinitum. However, is this a realistic outcome for a failure to advise appropriately? Given that society is allegedly becoming more litigious, commentators on the development of ADR believe it is very much a realistic outcome where a client is dissatisfied with the litigation process. Two American family lawyers are on record as saying:

The lawyer's duty to advise a [domestic relations] client about the option of private mediation is a key element of the family lawyer's ethical responsibility, and that the failure to do so could result in malpractice exposure.

Moberly goes further and states that not only could a failure to advise of ADR options be the subject of a malpractice or negligence suit, but could result in charges of violation of professional responsibility. Proving such charges will be discussed later. Needless to say, such a threat over a mere failure to advise is cause enough for any lawyer to think twice before omitting to give advice on ADR options.

While there appear to be some proponents of the view that failure to advise should constitute, and will constitute when tested in court, some form of professional misconduct, there are others who disagree. New Jersey lawyer Michael Prigoff believes that making a failure to advise punishable by professional discipline and/or a negligence suit is placing too much of a burden on lawyers. He suggests that there are already enormous burdens placed on lawyers when acting for clients to avoid any allegation of negligence. He cites the requirement of a written costs agreement in every matter as one of those burdens, a situation recently replicated in New South Wales with the 1993 amendments to the *Legal Profession Act 1987* (NSW). To enable a client to sue successfully for negligence because the lawyer did not advise of ADR options would mean lawyers having to embark on lengthy, and costly, verbal and written advice to clients. At a time when lawyers are being criticised for increasing legal costs, this requirement would do nothing to assist in the more cost-efficient delivery of legal services to clients.

It is interesting to note that Prigoff agrees with Professor Sander on the professional obligation to advise clients accordingly and he concedes that he himself always discusses ADR options with every litigation client. His main concern seems to be the formalisation of that process, brought about by legislatively enshrined sanctions:

[T]he proposal to make this responsibility a matter of professional discipline or malpractice liability is overkill and unfair micro-management of the practice of law. In the real world of clients and lawyers, it unfairly burdens the Bar and will prove counterproductive to the goals

sought by ADR, at least with respect to smaller disputes.



[1.155] If it is agreed that lawyers have an obligation to advise their clients about non-curial methods of resolving disputes, what becomes of the lawyer engaged to mediate and the role of that lawyer as an “expert” in mediation and the law? Is the lawyer as mediator expected to provide legal advice, particularly when a party’s rights are being compromised in mediation? Noone picks up on this critical point in the following extract and traverses the issue of immunity from liability for lawyers acting as mediators.

Lawyers as Mediators: More Responsibility?

[1.160] M A Noone, “Lawyers as Mediators: More Responsibility?” (2006) 17 *Australasian Dispute Resolution Journal* 96 at 100-103.

Legal Practitioners as Mediators

The legal profession was initially skeptical of the developments in ADR. The development of mediation was in part a reaction to the traditional adversarial legal dispute system. People were dissatisfied with a number of aspects of the legal system, including the dominating and controlling role of legal practitioners. But in less than a decade, the legal profession had co-opted and embraced mediation into the scope of its professional services. The establishment of organisations like Lawyers Engaged in Alternative Dispute Resolution (LEADR), the development of specialist sections within legal professional associations and development of courses on ADR in law schools are all indications of the institutionalisation of mediation. A number of lawyers act as mediators but a much larger [101] number are now involved in mediations representing their clients. Mediation is now an integral part of the litigation process.

Status of a Legal Practitioner

The legal profession is a regulated and licensed occupation and to practise law a person must first be “admitted to practice” (a one-off event) and then annually obtain a “practising certificate”. Unqualified legal practice is an offence punishable with up to two years imprisonment.

When a person is admitted to legal practice they become an officer of the court. As a result of this status, a legal practitioner owes various duties to the court and the administration of justice. These duties include acting with frankness, candour and honesty in relations with the court, and not engaging in abuse of process or bringing administration of justice into disrepute. Concurrently a legal practitioner has a fiduciary relationship with his or her client. A lawyer owes undivided fidelity to the client’s interests, unaffected by personal interests or any other person. They are bound by strict codes of fiduciary duties including confidentiality and conflict of interest.

Lawyers’ Liability

Legal practitioners are bound by both legislative and common law duties and codes of behaviour. Lawyers’ duties of skill and care are derived both from the contract of retainer (a tortious duty to take reasonable care) and as a fiduciary. Lawyers, like psychologists and other professionals who act as mediators, remain liable for breaches of their own professional codes of conduct. Some State law societies have adopted guidelines for solicitors who act as mediators and a breach of these could warrant a finding of unprofessional conduct. For instance, it is generally accepted that legal practitioners should not act as a mediator in a case involving their own client, although this is not specifically prohibited.

Lawyers as Mediators: More Responsibility? cont.

Similarly, the Law Council of Australia's *Ethical Standards for Mediators* states that a mediator must disclose all actual and potential conflict but can proceed if the parties agree and the mediator considers he or she can properly discharge his or her duties. In the comment to the standard, it states (inter alia):

In particular a mediator who is a partner or an associate of any representative retained by either of the parties should not act as mediator without the fully informed consent of all parties.

This approach contrasts with the basic fiduciary principle that, in a contentious matter (a dispute), a lawyer or the lawyer's firm must not represent two or more clients whose interests may conflict.

The justification for the departure from this principle for lawyers in mediation might be (as noted by the judge in *Tapoohi*) that, absent some specific agreement, a mediator does not act for a party in the same sense that a lawyer acts for a client.

The mediator is required to stand back from this conflict, to assist the parties to resolve it; it is not to promote the interests of one party perhaps to the disadvantage of the other.

However, this issue is not so straightforward if the mediation is evaluative or the mediator proffers advice or encourages certain settlement options. [102]

Lawyers' Immunity

Lawyers generally cannot contract out of liability for services they provide. At common law, lawyers cannot, by means of an exclusion clause in the retainer agreement, reduce their standard of care or exempt themselves from liability for default in the performance of their professional responsibilities. In Victoria, lawyers are legislatively prohibited from contracting out of liability to their clients unless this is permitted by other legislation such as the professional standards scheme.

[A]n Australian lawyer ... must not make any agreement ... with a client to the effect that the ... lawyer will not be liable to the client for any loss or damage caused to the client in connection with legal services to be provided ... but for the agreement the ... lawyer would be liable.

If a lawyer does enter into such an agreement, it is said to be void.

Three policy reasons for prohibiting lawyers from limiting their liability are: (a) public confidence in lawyers and the justice system would be diminished if lawyers could avoid actions for negligence by having a broadly worded exclusion clause in the retainer agreement; (b) the public service aspect of professionalism is inconsistent with the notion that lawyers can exclude liability to their clients; (c) and by including an exclusion clause in the retainer, the lawyer is putting personal interests above those of the client, which is a conflict of interest and duty. Although there have been attempts to include exclusion clauses in retainer agreements, the courts have not accepted them.

The one exception to unlimited liability for legal practitioners is the advocate's immunity. The High Court recently affirmed the principle that barristers and solicitors are immune from claims of negligence in relation to conduct in court or conduct intimately related to court. This is in contrast to developments in the United Kingdom and New Zealand, where the immunity has been abolished or diminished. The reasons for maintaining the immunity were the "unique and essential function" of the judicial system as part of government structure in the "quelling of controversies" and a concern to have "finality". Previous policy grounds used to support the immunity were disregarded.

Issues for Lawyers Acting as Mediators

Although there are no cases which set out the standard of care required of lawyers who act as mediators, the cases governing lawyers' standard of care may give some guidance. The standard of care is that of a qualified, competent and careful lawyer in the given circumstances in the practice of

Lawyers as Mediators: More Responsibility? cont.

their profession. A lawyer is not guilty of negligence merely because they have committed an error [of] judgment unless that error is gross. If a lawyer holds themselves out as an expert, they will be subject to a higher standard of care than a non-expert.

The promotion of lawyers as mediators by their professional organisations for “their special skills, training and experience” would imply a level of expertise above that of other mediators. It is likely that the standard of care required of them will be high. Additionally, it is likely that the courts will impute a term into the agreement to mediate to ensure that the service (mediation) will be provided with a higher standard of care and skill where mediators hold themselves out as having particular expertise or knowledge in the subject matter. [103]

Detail of the appropriate standard of care needs to address aspects of process, legal advice and protection of rights. Much will depend on the nature and form of the mediation. For instance, when a mediator is developing options, considering alternatives and leading participants toward settlement, can they provide legal opinion?

If reality testing really means bestowing legal advice or making statements such as “in my experience the court will not give you that” to what extent can the mediator be held accountable if their views are erroneous and should such assertions be made in any event?

The response to these questions will depend on the nature of the mediation being undertaken and whether the parties are legally represented. As noted previously, evaluative mediation is more likely to give rise to actions against the mediator from parties who claim they were given “bad advice”. There seems to be general agreement that restricting the mediator’s involvement in matters of process entails fewer liability risks for the mediator. Once a mediator provides legal advice to the parties, the standard could become that of a lawyer acting in a conventional legal practice. If this is the situation then the lawyer may face professional conduct issues, such as conflict of interest.

It is common practice for mediators to get the parties to sign an agreement to mediate. One of the clauses in these agreements grants immunity from liability. However, when the mediator is a legal practitioner, there is real doubt about the appropriateness and lawfulness of such exclusion clauses. Lawyers are not generally permitted to limit their liability and yet the Law Societies’ precedents contain such an exclusion clause:

The mediator will not be liable to a party for any act or omission in the performance of the mediator’s obligations under this agreement unless the act or omission is fraudulent.

There is a stark contradiction between unlimited liability in most areas of legal work and limited liability when lawyers work as mediators. Given the recent High Court case on advocates’ immunity it seems most unlikely that when these exclusion clauses are tested a court would find them valid. As the High Court illustrated, they discounted a range of public policy reasons that had previously justified the immunity, including the special status of lawyers performing advocacy; implications for standards of advocacy; divided loyalty; the witness analogy; and the flood gates argument. The critical policy reason underpinning their decision to retain the advocates’ immunity was the need to have finality of the “quelling of controversies” by the courts.

On the basis of this reasoning, it is unlikely the courts would support immunity for a lawyer acting as a mediator. The courts could see this as abrogating their critical role within the justice system and would not support an immunity that prevents them from having the final say on disputes. As a result, the validity of these exclusion clauses in the agreements to mediate between lawyers and the parties is most uncertain.

Additionally, the relevant legal professional indemnity insurance schemes provide cover for mediations conducted by lawyers if they form part of the normal work of the legal practice. Given this approach, it would seem illogical for lawyers to simultaneously be permitted to sign agreements containing exclusion clauses. The public policy reasons generally prohibiting exclusion clauses in a lawyer’s

Lawyers as Mediators: More Responsibility? cont.

retainer could apply equally in the context of a lawyer acting as mediator signing an agreement with the parties. This is the case especially if one or more of the parties are not legally represented. [104]

Conclusion

[I]f a mediator remains within the confines of the pure mediation model, immunity is unnecessary. The very definition of mediation protects the mediator from liability. A mediator's role is to assist the parties to reach mutually acceptable settlements.

The extent of potential liability of mediators is still open to speculation and most uncertain. It is unlikely to be tested before the courts while there is widespread use of immunities for mediators. However, the use of immunities is subject to critique and the extent of the immunity is likely to change in the future.

When lawyers act as mediators, they need to be conscious and cautious about their mediation style in order to avoid potential liability and fulfil their professional responsibilities. In all other areas of their work, they act for one client, are partisan, and give advice. In mediations, lawyers need to be mindful of the need to be impartial and treat the parties fairly without bias. To prevent the prospect of claims against them, lawyers acting as mediators need to practice facilitative mediation and clearly differentiate their role as mediator from that of legal advisor.

The prospect of a court finding that a lawyer acting as a mediator has fiduciary duties may well be higher because lawyers are often chosen for their expertise, knowledge, skills and their familiarity with the nature of fiduciary duties. This includes an understanding of the duties of trust and confidence. Lawyers need to be vigilant in identifying conflicts of interest irrespective of the Law Societies' guidelines.

Finally, the impact of a lawyer's duties as an officer of the court has not yet been fully explored in the context of mediation. However, lawyers who act as mediators should be concerned about the lawfulness of exclusion clauses in agreements to mediate. More importantly, lawyers acting as mediators should fulfil their professional responsibilities and not seek immunity in mediation. In the context of the general critique of mediators' immunities, lawyers should be enhancing the administration of justice by leading the way and deleting these clauses from their agreements to mediate.



[1.165] Dispute resolution is part of legal practice and lawyers have a duty to advise their clients of non-curial methods of resolving disputes. Lawyers may be liable to clients should they confuse their role of court advocate with dispute resolution advocate, and in the latter case, adopt an evaluative form of dispute resolution that seeks to advise parties rather than allow parties to reach their own conclusion to the dispute. Alternatively, can lawyers wear "two hats" and competently represent clients in both adversarial and consensual proceedings in and out of court? Cooper explores this issue in the following extract.

The 'New Advocacy' and the Emergence of Lawyer Representatives

[1.170] D Cooper, "The 'New Advocacy' and the Emergence of Lawyer Representatives in ADR" (2013) 24 *Australasian Dispute Resolution Journal* 178 at 181-186.

Professional Obligations of Lawyers as Dispute Resolution Advocates

There are several key obligations that lawyers owe to their clients when representing them in negotiations, mediations and conciliations, the following are those most relevant to the current discussion. [182]

The 'New Advocacy' and the Emergence of Lawyer Representatives cont.

The Duty to Consider Settlement

Wolski asserted that lawyers owe a duty to their clients to consider settlement. This is supported by the Law Council of Australia's *Model Rules of Professional Conduct and Practice*:

A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner 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 interests in relation to the litigation.

These model rules are not binding on legal practitioners, but there are mirror provisions contained in professional conduct rules throughout Australia that are binding and enforceable. Duties of lawyers to encourage clients to consider settlement are also contained in legislative obligations in most areas of Australian law. It is this duty that imposes an onus on lawyers to work with clients to ascertain the most appropriate dispute resolution processes for their dispute and to advise them of the advantages and disadvantages of these alternatives. There may be particular reasons why in some cases court proceedings must be preferred – for example, where the other client is not prepared to make full disclosure of essential information or where there is extreme urgency and the case will be prejudiced by any delay.

The Duty of Loyalty to the Client

Perhaps the obligation most relevant to this discussion is that legal practitioners owe a duty of loyalty to their clients and must act in their client's best interests to advance their cases. The Law Council of Australia's *Model Rules of Professional Conduct and Practice* state:

A practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence ...

This notion of acting in the client's best interests was described by Moynihan J in *Legal Services Commissioner v Baker*:

The lawyer should put the client's interest first and treat the client fairly and in good faith, giving due regard to a client's position of dependence upon the practitioner.

This obligation remains relevant in dispute resolution settings outside of court. As Macfarlane stated, "[t]here is no lessening of the lawyer's responsibility to achieve the best possible outcomes for his client in client resolution advocacy".

It is this duty that must be at the forefront of dispute resolution advocates' minds. Although trained as to the advantages of integrative negotiation and collaborative and problem-solving [183] approaches, legal practitioners must ensure that their clients achieve the best possible outcomes, subject to following their instructions. Macfarlane describes this in terms of "the goal of the conflict resolution advocate is to persuade the other side to settle – on her clients' best possible terms".

Dispute resolution advocates will to some extent always be, "adversaries" because lawyers, on opposite sides of legal cases, have obligations to remain loyal to and promote the interests of their clients. As a commercial litigator has explained:

I see a completely different form of adversary process. You can call it a mediation because we're working together to come up with a deal, but we're still adversaries – I'm still trying to get the best possible deal that I can.

A distinction can be drawn, however, between lawyers as adversaries acting in their clients' best interests and lawyers behaving in an adversarial manner that some might argue is more appropriate in a courtroom. The latter is not suitable conduct for dispute resolution advocates; for example, antagonistic questioning of a client imitating cross-examination. Macfarlane certainly envisages that lawyers as "conflict resolution advocates" fall within a non-adversarial practice framework. Following

The 'New Advocacy' and the Emergence of Lawyer Representatives cont.

this approach, at this stage of the investigation, dispute resolution advocacy can continue to be described as falling within the realm of non-adversarial practice.

The Duty of Competence and Diligence

In recent times, specific guidelines have been developed for dispute resolution advocates that fall within the general duty of competence and diligence. The Law Council of Australia has produced *Guidelines for Lawyers in Mediations*, which are not binding and state that “[i]t is not intended that that the guidelines derogate in any way from the usual obligations imposed on lawyers by law or any ethical rules, professional conduct rules or standards”. In relation to the role that lawyers should play in mediation, they provide:

Mediation is not an adversarial process to determine who is right and who is wrong. Mediation should be approached as a problem-solving exercise. A lawyer’s role is to help clients to best present their case and assist clients and the mediator by giving practical and legal advice and support ... The skills required for a successful mediation are different to those desirable in advocacy. It is not the other lawyer or mediator that needs to be convinced; it is the client on the other side of the table. A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result.

It is interesting to note that similar guidelines in New South Wales espouse this same language and provide that the role of legal practitioners in mediation is:

To participate in a non-adversarial manner. Legal representatives are not present at mediation as advocates, or for the purpose of participating in an adversarial court room style contest with each other.

It is argued that neither provision is completely accurate when stating that lawyers are not present at mediation as “advocates”. Rather, it is suggested – that lawyers should not take on the role of *aggressive adversarial* advocates; however, it is fitting for them to act as *assertive dispute resolution* advocates or, as Macfarlane has termed them, “conflict resolution advocates”. The reference to [183] participating in a non-adversarial manner highlights that the use of extreme positional bargaining or aggressive and hostile behaviour towards the opposing lawyer or client is inappropriate in mediation settings.

The Duty to Give Legal Advice

The advantage of clients having legal representation during mediation and conciliation processes is that they have the benefit of legal advice before, during, and after the process. Lawyers can reality-test offers and counter-offers with clients and ensure they are aware of the pros and cons of any proposed settlements. They can advise as to how negotiation offers compare with likely court outcomes and weigh up the benefits of early settlement as opposed to paying the legal fees required to reach judicial decisions.

Wolski has highlighted that this involves providing the client with information and advice to:

enable the client to make informed decisions about what is, and what is not, in the client’s best interests by advising the client of the relevant law, the issues in the case, the client’s possible rights and obligations, the options available to the client and the likely consequences of those options.

In this context, lawyers must be careful not to unduly coerce their clients to settle. However, it has been held that advice to accept a settlement “is not negligent merely because a court subsequently considers that a more favourable outcome would or might have been obtained if the original dispute had been litigated to judgment (or a more favourable compromise would or might have become available later)”.

The 'New Advocacy' and the Emergence of Lawyer Representatives cont.

The Duty to Follow the Client's Instructions

The final relevant obligation is the duty to follow the client's instructions. This duty can conflict with lawyers taking collaborative and problem-solving approaches if clients have not been educated in these strategies. Lawyers must coach their clients as to how to engage in integrative negotiations. Legal practitioners are bound to follow their clients' instructions and this can cause difficult issues in dispute resolution when lawyers may perceive their clients have unrealistic expectations and are seeking improbable settlements.

The New Advocate

There are many examples of where lawyers will need to "advocate" for their clients in dispute resolution settings. In court-connected conciliation processes, lawyers often put forward positional offers, particularly where financial issues are concerned, and provide the relevant facts in support. Conciliators form views about appropriate ranges for settlement, based on this information. This is because legal negotiations generally take place in "the shadow of the law". If settlement is not achieved, conciliators may have to make recommendations for procedural orders, such as for the filing of further documents. If Party A is alleging that full discovery has not been made and Party B is withholding information, Party A, via his or her lawyer, will need to convince the conciliator that orders are required for the discovery of further documents, which may be crucial to a fair determination of the case.

[185] Even in facilitative mediation processes where integrative negotiations are being employed, lawyers cannot always act "co-operatively" because they have overarching obligations to act in their client's best interests. Although the general aim of mediation is "to reach an agreement which accommodates the interests – and needs of all the disputants", this will not always be possible. In some cases an offer that accommodates the needs of one party may not meet the needs of the other client. An example is a family law scenario where both parents want the child to live with them for the majority of the time. On this particular issue, one parent will be a "winner" and one a "loser", even if the parents agree to a half-time arrangement because this was not the outcome that either party was seeking. Also a half-time arrangement, although a "compromise" in terms of interest-based negotiations, may not be in the best' interests of the child.

Wolski makes this point when stating that:

However, it is not possible to rule out competitive negotiation and lawyer dominance in mediation ... and there is no absolute prohibition on lawyers acting competitively (rather than co-operatively) in mediation ... The primary obligation on legal representatives (aside from their duty to the court) is to further the interests of their clients. Sometimes a client's interests will be best, furthered by an adversarial advocacy approach, just as might be the case in negotiation ... An adversarial approach is all the more suitable in, settlement' and evaluative models of mediation.

It is suggested that even an adversarial advocacy approach can fall within the realm of non-adversarial practice if one includes lawyer engagement in dispute resolution processes that occur outside court, if necessary to protect the client's best interests.

This is not to say that aggressive adversarial behaviour or "zealous advocacy" should be promoted. An understanding of and an ability to implement integrative negotiation strategies and collaborative behaviour forms the core knowledge and skills of an effective dispute' resolution advocate. However, the role is a complex one and must be flexible and responsive to the particular situation at hand. In practice, not all lawyers are trained in integrative negotiation and, not all choose to implement this model. In some cases, legal practitioners may find themselves with opponents who are acting in aggressive and positional manners. In such instances they may have to counter such tactics themselves with assertive or positional negotiation. Further, not all clients genuinely want to take a collaborative

The 'New Advocacy' and the Emergence of Lawyer Representatives cont.

approach and might be using a process such as mediation as a delaying tactic or “fishing” expedition. Although lawyers should not assist clients to use dispute resolution for such adverse means, they will need to be able to identify such tactics, learn how to respond to them and educate their clients on the benefits of taking a more collaborative approach.

Conclusion: Dual Challenges

The dispute resolution advocacy role of lawyers is an important one, particularly because the majority of legal disputes settle before reaching an adjudicated decision. The “new lawyer” and, in particular, the “new advocate” is spending the majority of the working week acting for clients in dispute resolution processes outside of court – that is, in non-adversarial settings.

The analysis in this article has demonstrated that dispute resolution advocacy can be categorised as a subset of non-adversarial practice. Dispute resolution advocates will to some extent remain [186] adversarial and at times might have to advocate for their clients when seeking to obtain the best possible deal. They are, however, still engaged in non-adversarial processes in terms of dispute resolution as distinct from adversarial court proceedings. Lawyer representatives acting in negotiation, mediation and conciliations should not engage in aggressive “adversarial” behaviour that belongs in a court environment, such as antagonistic questioning or extreme positional bargaining.

The challenge for lawyers is, as Macfarlane has argued, to become accustomed to wearing “two hats” and be competent and efficient both when representing clients in judicial settings as “court advocates” and when acting for clients outside of court as “dispute resolution advocates”. It is suggested that in both settings they can engage in client-centred practice: take a problem-solving and holistic approach, identify the clients’ underlying interests, and analyse the conflict. In each context they should identify the issues, formulate a dispute resolution strategy, and look for legal and non-legal solutions. When engaged in both forums, lawyers can be settlement-focused, seeking to resolve their clients’ cases as quickly and cost-effectively as possible, while keeping conflict to a minimum.

There is a challenge for law schools in training future lawyers to be competent not just in non-adversarial practice but also in the specifics of dispute resolution advocacy. Ideally, law students would be introduced to non-adversarial practice at an early stage in their studies and then given the opportunity to learn higher level knowledge and skills in dispute resolution advocacy at the end of their degree, just before they enter the workplace. Future lawyers need to be educated about a range of models, including distributive negotiation, evaluative mediation, and conciliation processes. In addition, knowledge of their professional obligations and the skills to balance these duties is essential so that future dispute resolution advocates will abide by the duty of loyalty and seek to advance and protect their clients’ interests, whether representing them inside or outside of court.



MODEL RULES OF PROFESSIONAL CONDUCT AND PRACTICE

[1.175] The Law Council of Australia represents the legal profession at the national level to promote the administration of justice, access to justice and general improvement of the law and, in executing these roles, it advises governments, courts and other federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council drafted a set of *Model Rules of Professional Conduct and Practice (Model Rules)* in February 1997. Between 2000 and 2002 a committee of the Law Council amended those rules, which were ultimately adopted by the Law Council on 16 March 2002.

The Model Rules seek to provide a national standard of conduct amongst legal practitioners and it was envisaged that this standard would ultimately be adopted by each of

the State and Territory law societies and the institutes. The Rules apply principally to legal practitioners practising as solicitors, or as barristers and solicitors. The term “practitioner” is used throughout to refer to persons practising as solicitors, or as barristers, or as barristers and solicitors or incorporated law firms. The Advocacy Rules, which are contained within the Model Rules, apply to all practitioners who are engaged in advocacy, whether or not their predominant style of practice is that of a solicitor or a barrister. In particular, Model Rule 12.3 relates to the advice on dispute resolution alternatives to litigation and states:

“12.3 A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner 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 interests in relation to the litigation.”

Notwithstanding the differences between State, Territory and the federal jurisdictions, the following table illustrates the relationship between the Model Rules and those implemented by the State and Territory bar associations and law societies. While the Model Rules are reflected in most jurisdictional iterations, they have not been implemented verbatim in any jurisdiction. It is also noteworthy that there is considerable commonality between the Law Council’s Model Rules and the Australian Bar Association’s Model Rules of 2002.

TABLE 1.1 Law Council of Australia Table of Compliance with Model Rules

| Jurisdiction | Relationship with the Law Council’s Model Rules |
|------------------------------|--|
| Australian Capital Territory | The Law Society of the Australian Capital Territory’s <i>Legal Profession (Solicitors) Rules</i> of July 2006 draw heavily on the Model Rules though they also contain several variations to account for specific local conditions. The Australian Capital Territory Bar Association’s <i>Barristers’ Rules</i> , consolidated in March 2006, draw heavily on the ABA’s <i>Model Rules 2002</i> . The ABA’s Model Rules are very similar to the Law Council’s Model Rules contained under the section headed Advocacy and Litigation. |
| New South Wales | The Law Society of New South Wales’ <i>Professional Conduct and Practice Rules</i> which commenced December 2005, draw heavily on the Model Rules though they also contain several variations to account for specific local conditions. The New South Wales Bar Association’s <i>Barristers’ Rules</i> , consolidated April 2001, draw heavily on the ABA’s <i>Model Rules 2002</i> . The ABA’s Model Rules are very similar to the Law Council’s Model Rules contained under the section headed Advocacy and Litigation. |
| Northern Territory | The Law Society Northern Territory’s <i>Rules of Professional Conduct and Practice</i> of April 2002 draw heavily on the Model Rules though they also contain several variations to account for specific local conditions. The Northern Territory Bar Association’s <i>Barristers Conduct Rules</i> of March 2003 draw heavily on the ABA’s <i>Model Rules 2002</i> . The ABA’s Model Rules are very similar to the Law Council’s Model Rules contained under the section headed Advocacy and Litigation. |
| Queensland | The Queensland Law Society’s <i>Legal Profession (Solicitors) Rule</i> of July 2007 draw heavily on the Model Rules though it also contains several variations to account for specific local conditions. The Bar Association of Queensland’s <i>2007 Barristers Rule</i> of July 2007 draws heavily on the ABA’s <i>Model Rules 2002</i> . The ABA’s Model Rules are very similar to the Law Council’s Model Rules contained under the section headed Advocacy and Litigation. |
| South Australia | The Law Society of South Australia’s <i>Rules of Professional Conduct and Practice 2003</i> of March 2003 draw very heavily on the Model Rules with only very minor adjustments to account for local conditions. The South Australian Bar Association’s <i>Barristers’ Rules</i> of September 2005 were developed by the South Australian Bar Association specifically for South Australia. They are drawn from a variety of sources including the ABA Rules and the Rules of various law societies. |
| Tasmania | In Tasmania, the <i>Rules of Practice 1994</i> set out guidelines for legal practitioners that are contained in State legislation independently of the Law Society of Tasmania. However, despite the introduction of the <i>Legal Profession Act 2007</i> , Tasmania has yet to incorporate the Model Rules to the extent of other States and Territories. |

| Jurisdiction | Relationship with the Law Council's Model Rules |
|-------------------|---|
| Victoria | The Law Institute of Victoria Limited's <i>Professional Conduct and Practice Rules</i> , September 2005 (as amended) are based on the Model Rules though they contain several variations to account for local conditions. The Victorian Bar's <i>Practice Rules</i> of August 2005 are based on the ABA's <i>Model Rules 2002</i> . The ABA's Model Rules are very similar to the Law Council's Model Rules contained under the section headed Advocacy and Litigation. |
| Western Australia | Though the Law Society of Western Australia's <i>Professional Conduct Rules</i> of December 2005 cover broadly similar topics to those dealt with by Model Rules, it is by way of a different approach that leaves unclear to what extent the Model Rules were relied upon. The Western Australian Bar Association's <i>Conduct Rules 2006</i> of February 2006 draw heavily on the ABA's <i>Model Rules 2002</i> . The ABA's Model Rules are very similar to the Law Council's Model Rules contained under the section headed Advocacy and Litigation. |

[1.180] The Model Rules take into account the rise of dispute resolution within the space previously occupied exclusively by litigation. Under r 12.3, legal practitioners must themselves have an understanding of the various non-adjudicative methods of resolving disputes.

In a further effort to establish a national legal profession, the Law Council of Australia has developed the *Australian Solicitors' Conduct Rules* (Solicitors' Rules). These rules appear to supersede elements of the Model Rules of Professional Conduct and Practice, although do not explicitly state as such. The Rules were adopted by the Law Council in June 2011 and each State and Territory are encouraged to adopt the Rules to ensure a common standard of behaviour by all solicitors practising across Australia. To date, only South Australia (adopted on 25 July 2011) and Queensland (adopted on 1 June 2012) have adopted them, with other States and Territories yet to follow. Rule 7.2 states:

A solicitor 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 solicitor 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 interests in relation to the litigation.

Like the Model Rules, the Solicitors' Rules are not laws. A breach of them does not result in a penalty or disciplinary action against the offending solicitor. Rather, a breach of the Rules may form the basis of a finding by a relevant body that a legal practitioner has committed an act that may lead to a finding of unsatisfactory or unprofessional conduct which may result in disciplinary proceedings against the practitioner by their respective law society or institute.

Role of the Bar

[1.185] The following extract discusses the role of the Bar in the promotion of and compliance with statutory requirements for dispute resolution. It should be noted that references to s 110K of the *Supreme Court Act 1970* (NSW) are now embodied in s 26 of the *Civil Procedure Act 2005* (NSW). References to s 27 of the *Commercial Arbitration Act 1984* (NSW) are now embodied in s 27D of the *Commercial Arbitration Act 2010* (NSW) although s 27D has been drafted in such a way that it nullifies some of Emmett's concerns in relation to confidentiality. References to r 17A of the *NSW Barristers' Rules* are now embodied in r 38 of the *NSW Barristers' Rules* adopted on 8 August 2011. The *Legal Profession Act 1987* (NSW) has been superseded by the *Legal Profession Act 2004* (NSW). Finally, references to the *Trade Practices Act 1974* (Cth) are now embodied in *Competition and Consumer Act 2010* (Cth).

The Bar in Mediation and ADR

[1.190] S Emmett, "The Bar in Mediation and ADR" (2001-02) *Bar News* (Summer) 25 at 25-27.

Recent Developments in Mediation and ADR Beyond the Bar

There now exists a myriad of Commonwealth and State enactments dealing with mediation. In several instances, this legislation compels mediation or other dispute resolution processes prior to the enforcement of rights, for example, *Farm Debt Mediation Act 1994* (NSW), *Retail Leases Act 1994* (NSW), *Native Title Act 1993* (Cth). In addition, the Federal Court and the Supreme Court have power to order parties to mediation without the consent of the parties. The District Court and the Local Court have powers of referral only with consent of the parties. Mediation has long since been used in the Family Court, Land and Environment Court and Local Court where there are nearly always emotional, financial or historical issues beyond the purely legal issues. Similarly, conciliation has long been used in industrial tribunals.

Below are some of the more relevant recent developments in the ADR area. "ADR" has become the general term for processes by which disputes are resolved outside the court system.

The new frontier for ADR is in conflict *avoidance* and *conflict management*, rather than just conflict *resolution*. However, it is the conflict or *dispute resolution* aspect of ADR that has particular relevance for the Bar and which intersects with and confronts the Bar's traditional role as that of advocate only.

Section 110K Supreme Court Act 1970 (NSW)

From the NSW Bar's point of view, probably the most relevant recent amendment is s 110K *Supreme Court Act 1970* (NSW), which came into force on 1 August 2000, empowering the Court to order parties to mediation or neutral evaluation without their consent.

There concerns worthy are of consideration about a process that is untransparent, largely unregulated and seemingly operating without universally accepted, endorsed or enforceable standards of conduct. These concerns are particularly valid from a court's point of view in circumstances where it can make orders compelling parties to participate in a process that may not be the parties' process of choice and may be a further hurdle to access to the courts.

On one level, this lack of regulation and transparency is a serious problem with mediation as it currently stands – there ought to be concerns about compulsory processes without satisfactory supervision.

On another level, the flexibility and confidentiality are the very reasons for the popularity of the process where the commercial world is much more concerned with cost effective, pragmatic dispute resolution management.

An origin of these concerns and tensions may lie in s 27 of the *Commercial Arbitration Act 1984* (NSW), whereby an arbitrator may, with the consent of the parties, also act as "mediator", although if so acting must observe the rules of natural justice and not engage in private conferencing.

I would suggest it is unfortunate to describe such a process as "mediation" where it prevents such a fundamental step in a mediation process as private conferencing. It is the absence of any determinative or advisory role on the part of a mediator that enables use of such strategies. Once a mediator trespasses into either the determinative or advisory role, the risk exists of perceived or actual compromising of the very neutrality that is central to the parties' confidence in the use of mediation.

Of course, parties may agree to hybrid or varied processes. However, the integrity of the process selected is highly dependent on the parties being able to make properly informed choices, perhaps necessarily on advice from appropriately trained and skilled advisers. This is not a simple task where there exists such a plethora of processes and definitions that are still not yet consistently accepted by ADR practitioners themselves.

*The Bar in Mediation and ADR cont.**Commercial Contracts*

Many commercial contracts now contain conditions making mediation a pre-requisite to commencing litigation. This form of conflict management is prevalent, for example, in the regulation of infrastructure utilities (such as electricity, telecommunications and rail) in accordance with Part IIIA of the *Trade Practices Act 1974*. In disputes concerned with access to monopolistic utilities, the ACCC approves regimes for resolution that involve an integrated form of negotiation, mediation, expert determination and arbitration, often in the early stages without lawyers.

These regimes are directed to avoiding potential litigation and the involvement of lawyers and as such are readily embraced by the relevant industry users. Generally, the courts will uphold their terms provided the clauses are sufficiently certain. (See: *Morrow v Chinadotcom* [2001] NSWCA 82; but see also *Elizabeth Bay Development Pty Ltd v Boral Building Services* (1995) 36 NSWLR 709; *Hooper Bailie Associated Limited v Natcon Group Pty Limited* (1992) 28 NSWLR 194.)

There is a move within organisational industries to use "mediation" as, almost, a dispute resolution management process that identifies how the issues of the dispute, once distilled; are most effectively managed and resolved. For example, it may be that some issues in a dispute are best resolved by consensual methods whereas other issues may need either expert determination (binding or non binding), arbitration, court determination or a combination of the above. The value of this type of mediation as a tool in the crystallization of different parts of a dispute and the mechanics for their future resolution is now emerging as an effective conflict management process.

Regulatory Bodies

Regulatory and semi-regulatory bodies are increasingly using compulsory mediation or binding arbitration or both rather than the courts. To mention two prominent examples: the World Intellectual Property Organisation (well known as WIPO) manages disputes arising from the regulation and registration of internet domain names by way of binding arbitrations that are often conducted on the papers only and thereby are significantly [26] more cost effective; the National Registration Authority manages disputes in Australia between chemical owners and potential lessees of the use of the chemicals in compounds by way of mediation and or binding arbitrations. Also, s 144 of the *Legal Profession Act 1987* (NSW) provides for disputes between clients and legal practitioners to be referred to mediation, although participation is voluntary ...

Barristers' Rule 17A states:

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 these alternatives as to permit the client to make decisions about the client's best interest in relation to the litigation.

In light of the introduction of Rule 17A in January 2000, barristers need to address the requirements of the Rule and their ability to comply.

One can readily envisage a scenario where a disgruntled client who has lost a case becomes aware of Rule 17A and alleges that the barrister's failure to comply resulted in the client being unaware or not understanding the alternatives available and that, as a result of this failure to inform, the client has lost the opportunity to resolve the case on more favourable terms and should therefore be compensated. Even without identifiable damage, the barrister may still be vulnerable to a professional conduct complaint.

A number of questions arise for the barristers regarding compliance with this provision:

- 1 What are all the *alternative processes* available to a client to fully-contested adjudication?
- 2 What are the *elements* of each of these processes?

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- 3 What are the *possible outcomes* for a client in respect of each of these processes?
- 4 What is involved in *preparation* for and what is the time and cost of each of these processes?
- 5 What will *fully-contested adjudication* involve for the client, including outcomes?
- 6 How does a barrister assess which of the processes is reasonably available to a given client?
- 7 What constitutes *reasonable grounds for a belief* by a barrister that a client has such an understanding of the alternative processes?
- 8 What is the meaning of “the clients best interests in relation to the litigation”?
- 9 What is the level of understanding required by the client to excuse the barrister from discussing alternative processes?
- 10 Are there any other *circumstances which excuse discussion* of the alternatives (e.g. urgency of interlocutory steps)?
- 11 Is *discussion with the instructing solicitor sufficient* to satisfy a barrister of a client’s understanding of the alternatives?

The first question – what sort of alternatives for compliance are available – is one to which the Bar must give particular thought given that Rule 17A specifically imposes a requirement on a barrister to inform about “alternatives”. This may not be as readily answerable as one might think. Even the courts do not speak of the same alternatives in their ADR referral sections. For example, the Supreme Court (s 110K *Supreme Court Act 1970*) and the District Court (s 164A *District Court Act 1973*) speak of mediation or neutral evaluation, whilst the Federal Court (s 53A *Federal Court of Australia Act 1976*) speaks of mediation or arbitration. Below are three of the more relevant of many categorisations, which further highlight the difficulties in determining which “alternatives”:

- i National Alternative Dispute Resolution Advisory Council (NADRAC) states that processes involving third party intervention fall into three broad categories (see NADRAC Definitions March 97, and unchanged by NADRAC Report 2001):
 - Determinative (adjudication, arbitration, expert determination, references)
 - Advisory (early neutral evaluation, case appraisal, conciliation)
 - Facilitative (mediation, facilitation, conciliation)(There is a real debate in the ADR industry as to the overlap, if any, between mediation and conciliation and the extent to which any advisory role by the neutral is appropriate in mediation. The difficulty is enhanced by the plethora of definitions both within Australia and internationally. There is currently a subcommittee of the United Nations examining the UNCITRAL Rules in respect of this issue.)
- ii In the Barristers Resolution Service the following alternative processes are identified:
 - Arbitration
 - Expert determination/references
 - Early neutral evaluation or appraisal
 - Mediation
 - Conciliation
- iii The Law Reform Commission purports to map these processes on a continuum from the least to the most adjudicative:
 - Negotiation
 - Mediation
 - Neutral evaluation

The Bar in Mediation and ADR cont.

- Conciliation
- Expert advice and assessment
- Arbitration

However, whatever the appropriate alternatives and definitions, there has been a growing demand for an integrated approach to the various processes.

I would suggest that a barrister's obligation is to turn one's mind to the intention of Rule 17A and its pragmatic compliance. The questions raised above simply illustrate the need for careful consideration of the duty imposed. [26]

Barristers in Mediation

It is important for the Bar to consider the role it will take in these sorts of consensual dispute resolution processes. The important point to stress is that alternative means of dispute resolution are not just a vast set of ill-defined processes. ADR has come to be perceived as an industry in itself closely interwoven with litigation.

It is obviously important that compromises reached through mediation be achieved against a background of an informed understanding of a party's rights and the remedies available through the courts, [27] together with an assessment of the likely outcomes from a court. Solicitors are effectively carrying out this role more and more often without recourse to the Bar.

In a mediation it can be very useful to have the benefit of the skill of an advocate. However, where that skill is perceived as the only constructive role for a barrister, then it is often not seen as adding sufficient value. The barrister's role should be seen more in terms of advising the client in facilitating a settlement with which the client can live rather than a settlement with which the barrister can live. Mediation is not there to enforce a party's legal rights, but to manufacture a mutually tolerable resolution. Consensual resolution will usually have a greater prospect of acceptance and endurance than adjudicated outcomes, because it fosters communication among parties and creative consideration beyond rights-based parameters for dealing with conflict.

There is a perception among solicitors and dispute resolution practitioners that barristers tend to see the dispute in terms of court outcomes only and often ignore the wider issues which can lie at the heart of a conflict. Failure by legal advisers to address these issues is a common impediment to settlement.

Mediation provides parties with an opportunity to identify and explore these relevant personal factors in a confidential forum where voluntary participation is founded in good faith. Whilst the notion of "good faith" has difficulties for lawyers in terms of certainty, it is a notion that is well understood and embraced by parties participating in a mediation process and is a fundamental cornerstone to the success of that process – it is also one of the distinguishing features between mediation and structured settlement negotiations. It is a tool to facilitate constructive discussions and is not intended for use as a weapon between parties. Similarly confidentiality of discussions is a tool which should facilitate full and frank disclosure and discussion of issues thereby offering parties the best opportunity for teasing out resolution options for consideration.

The absence of a desire of a party to participate in that spirit (despite the statutory obligation to participate in good faith imposed by s 110L of the *Supreme Court Act 1970* (NSW)) may be a relevant factor for a court to consider before it makes a mandatory order to mediate.

If barristers are to remain advocates only, rather than dispute resolution advisers (and all that those three words import), they need to appreciate the effect that that will have on the Bar's traditional work and its perceived ability to participate in mediation, ADR and dispute management.

Finally, all this highlights the need for an understanding of these various ADR processes, their proper definitions and uses coupled with a universally accepted standard of conduct and accreditation.

The Bar in Mediation and ADR cont.

One of the practical difficulties with a universal standard has been the administrative framework it would require and the enforceability of any sanctions or licenses [sic] to be applied. Within professional bodies, such as the Bar Association, many of these concerns can be accommodated.

Similarly, appointment to various panels can go some way to identifying, adopting and enforcing a standard of skill, experience and conduct. However, the field of dispute resolution practice is far wider than that being conducted by professionals and panels.



[1.195] While Emmett’s article is a little dated, mainly because of the changes to legislation, it still has currency in the debate over the role of the legal profession in dispute resolution. In particular, his list of questions for barristers who are required to comply with r 38 of the *NSW Barristers’ Rules* is still on point for advocates practicing in our courts today and raises real issues about the level of compliance required of the legal profession.

[1.200] There have been no cases litigated in Australia where a legal practitioner has been sued for failing to advise a client of dispute resolution options. However, there have been a number of cases in Australia where legal practitioners have been successfully sued for failing to advise clients of certain information or tendering incorrect advice: see *NRMA Ltd v Morgan* (1999) 31 ACSR 435; [1999] NSWSC 407 (although later reversed by the NSW Court of Appeal in *Heydon v NRMA Ltd* [2000] NSWCA 374); *Feletti v Kontoulas* [2000] NSWCA 59; *Vulic v Bilinsky* [1983] 2 NSWLR 472. It is only a matter of time before the issue of a legal practitioner failing to advise a client on dispute resolution options comes before a court under an action for common law negligence or for professional misconduct or unsatisfactory professional conduct pursuant to relevant State and Territory legislation regulating the legal profession.

[1.205]

Questions

1. What are the historical origins of dispute resolution?
2. Has dispute resolution flourished in the private or public sector or both?
3. Should there be an “A” in Alternative Dispute resolution? If so, what should it stand for?
4. How do you define dispute resolution?
5. What factors should be considered when choosing a dispute resolution process?
6. Should the legal profession be as involved in dispute resolution as they currently are?
7. Does the training of lawyers prevent them from being effective dispute resolution practitioners?
8. Should lawyers properly advise their clients of dispute resolution options? If so, how can they properly do so?