



# MediationNews

## IN THIS ISSUE

- President's Letter
- The Lets Talk Code of Conduct
- Professional Code of Conduct for Mediators
- ADR Standards – recent developments
- Mandatory Mediation Litigation in NSW and South Australia
- A place for Mediation in Industrial Disputation



## President's Letter

*David Holst, ADRA President*



In this edition of Mediation News we would like to focus on the changing needs of ADR in Australia and how our organisations can play an important role in successfully managing that change. The Australian Dispute Resolution Association (ADRA) was established in 1987 with the following aims:

- Promote and encourage ADR throughout Australia
- Encourage and provide the exchange and dissemination of ideas
- Develop, maintain, and promote ADR standards
- Provide and support Education and research in the theory and practice of ADR
- Print, publish and circulate information pertaining to ADR
- Enhance professional skills of practitioners and administrators

Over the years members have participated in and contributed to the achievement of those objectives and despite many obstacles along the way there has been great progress. This progress was recognised by the Commonwealth Attorney-General's Department in the recently released report, "A Framework for ADR Standards". In its introduction the report acknowledged "Australian ADR is at an historic moment in its development. Initial pioneering work has led to the increased acceptance and use of ADR in many areas."

This statement is not news as we have all felt the significant lift in the acceptance and demand for ADR services both in the public and private sectors. We have also probably felt a little uneasy as the rapid growth increased the number of participants and reduced the level of control established organisations maintained over ADR practices and in particular the proliferation of ADR training programs.

The report produced by the National Alternative Dispute Resolution Advisory Council (NADRAC) was designed to review the current standards for Alternative Dispute Resolution (ADR) in Australia and make recommendations for the future. It concluded there was "overwhelming support for the development of standards for ADR, in order to maintain and improve the quality and status of ADR, to protect consumers and to promote Australia's international dispute resolution profile."

ADRA made a formal submission to the discussion paper "The Development of Standards for ADR" which formed the basis for consultation on the issues. ADRA were also the precipitating force in forming the "Lets Talk" forum which was responsible for the development of the proposed Code of Conduct for mediators. NADRAC has supported the development of the code and along with the other "Let's Talk" member organisations has contributed to the final product. We have reproduced a copy of the code in this publication as we believe a Code of Practice should be adopted by service providers and associations such as ours.

NADRAC stated in its recommendations that while individual service providers may wish to use their own codes, there were considerable benefits for ADR associations to develop a common code for their members and for sole practitioners.

Recommendation 2 in the report stated:

That all ADR service providers adopt and comply with an appropriate code of practice, developed by ADR service providers or associations, which takes into account the elements contained in Section 5.2 of the report.

The arguments for the development of standards for ADR revolve around the enhancement of ADR practice, however, they are also about educating the consumers and giving them the confidence in the services thereby improving the credibility of ADR in the community.

The process of developing uniform standards will not be easy as we have found in developing the Code of Practice. Even though the Code was written using existing codes which had been in operation for many years we often became "bogged down" in debating the negatives rather than the positives of how a code would benefit our members.

"NADRAC proposes a framework for the development of standards for ADR, in which responsibility is shared across service providers, practitioners, and government and not-government organisations. It proposes the following strategies:

- Facilitate the ongoing development of standards at the sector, program and service provider level, in order to improve the quality of ADR practice and to enhance the creditability and capacity of the ADR field.
- Implement particular standards, within a code of practice, in order to educate and protect consumers, and build consumer confidence in ADR processes."

The report supports self-regulation as the preferred methodology rather than direct regulation. This will require a commitment by the service providers and the associations to make it happen or circumstances will result in more direct regulation in response to problems raised by consumers. We have seen in industries such as Franchising where self regulation was not taken seriously and following on-going complaints the government was forced to act and create their own mandatory code. When this happens the resulting legislation is over prescriptive and creates many practical problems for those working in the industry.

"A Framework for ADR Standards" is a must read for those interested in the future direction of ADR in Australia.



**A Joint Project of...**  
 Australian Dispute Resolution  
 Association Inc. (ADRA)  
 South Australian Dispute  
 Resolution Association  
 (SADRA)  
 Victoria Association for  
 Dispute Resolution (VADR)



# THE LET'S TALK CODE OF CONDUCT

The following Code of Conduct for Mediators was developed by the Let's Talk Group in Sydney. The Let's Talk group was established in March, 1998 to discuss issues in relation to ADR practice. The idea for the group originated from one of ADRA's Peak Body Project facilitation meetings. Let's Talk is a non-commercial and non-proprietary network that provides an opportunity to representatives from ADR Organisations to discuss areas of common interest and develop initiatives that may benefit the fast growing ADR community.

The outcome of the early meetings was the identification of the desirability of a nationally accepted Code of Conduct for mediators. The Draft Code of Conduct was completed and circulated for comment to a number of organisations including NADRAC and responses from these organisations have been incorporated into the document.

The Code of Conduct was circulated and presented at the 5th National Mediation Conference in Brisbane and was forwarded to NADRAC as a response to their discussion paper on Standards. Reference is made to the Code in their recent publication "A Framework for ADR Standards" A majority of organisations have decided to endorse the document including the Dispute Resolution Committee of the Law Society of New South Wales, regarding how best to implement the code.

Let's Talk would welcome any comments from you. Please contact me for more information in regard to the Code of Conduct.

Val Sinclair

ADRA

(02) 92315822



## Professional Code of Conduct for Mediators

### Introduction

This "Let's Talk" is a non-commercial and non-proprietary network which provides regular opportunities to ADR providers and practitioners to discuss areas of common interest and develop initiatives which may benefit the ADR community as a whole.

The Code has been developed to provide minimum ethical and practice standards for mediation practice and may be endorsed for use by ADR organisations.

The document was prepared after a detailed review of several other documents already in existence. These included documents from American Bar Association, American Arbitration Association, Society of Professionals in Dispute Resolution (SPIDR), Community Justice Centres, Family Services Council Mediation Standards and The Institute of Arbitrators & Mediators Australia. Each document was reviewed against a base set of accepted criteria as outlined in the Law Council of Australia's Ethical Standards for Mediators. Modifications, alterations

and additions have been made in an attempt to develop a more accessible document for practitioners.

### PROFESSIONAL CODE OF CONDUCT FOR MEDIATORS

#### Scope

This Professional Code of Conduct has been developed for practitioners using facilitative mediation processes as defined by NADRAC. Professional bodies, organisations and individuals may have additional or other statutory requirements that are necessary to carry out the mediation process particular to their area of practice.

#### Preamble

Mediators acknowledge that they have ethical and practice responsibilities and duties. Practicing mediators accept that these responsibilities and duties relate to their clients; the mediation process; and their mediation colleagues.

This Code recognises that in mediation the parties have an equal opportunity to participate in the process and have the right to determine the outcome of the

dispute. Mediators, in their practice, are bound to uphold these basic principles at all times.

#### 1. Mediation - Definition

Mediation is a consensual process in which a person or persons neutral to a dispute (a mediator or mediators) facilitates discussions between the parties in dispute and assists them to reach a mutually satisfactory resolution.

#### 2. The Role of a mediator

A mediator facilitates communication, problem solving and negotiation between parties. A mediator has no advisory or determinative role concerning the content of the dispute or its outcome. However, a mediator may advise on or determine the process of mediation through which a resolution is attempted.

The responsibilities of a mediator include:

- informing the parties about the process;
- identifying any power imbalances;
- assisting the parties to:

*Continued on page 3*

- identify and isolate issues in dispute;
- identify their needs and interests;
- develop and consider options;
- negotiate a mutually acceptable outcome.

When appropriate a mediator may:

- address power imbalances
- assist the parties to record their agreements in writing;
- inform the parties of the importance of consulting with advisers to enable them to make informed decisions;
- suggest referrals to other professionals, organisations and dispute resolution processes.

### 3. Appropriateness of Mediation

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 a mediation session.

Examples where these assessments may occur include where:

- a person is put at risk by their participation or the safety of any 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 abilities of any party;
- the parties are not willing to participate and negotiate in a genuine effort to reach a negotiated agreement;
- another dispute resolution procedure may be more appropriate.

### 4. Neutrality

A mediator is a person who is a neutral to the dispute. This means that a mediator in their practice does not take a position in relation to the content or the outcome of the dispute between the parties.

### 5. Impartiality

Impartiality in mediation means that a mediator acts without bias in relation to the parties and the subject matter of the dispute. If a mediator assesses that they cannot conduct the mediation impartially

then they must not mediate. If during the process a mediator believes they cannot remain impartial, they must withdraw even if the parties wish a mediator to continue.

A mediator demonstrates impartiality by:

- acting without bias;
- avoiding conduct that gives any appearance of bias (such conduct may include a mediator expressing an opinion concerning the dispute even if all parties wish a mediator to do so);
- not allowing personal views and interests to influence the process or the parties;
- not allowing a personal desire to achieve settlement to determine the process or the outcome.

### 6. Conflicts of Interest

#### Disclosing conflicts of interest

A mediator must disclose actual and potential conflicts of interest known to a mediator before the mediation begins. A mediator must also disclose any circumstances that a mediator considers might be perceived by a party to be a conflict of interest. Disclosure must also be made if conflicts of interest arise during the mediation. After making disclosure, a mediator may proceed with the mediation if all parties agree and a mediator is satisfied that the mediator can remain impartial.

Examples of conflicts of interest to be disclosed include:

- any present or past association, financial interest or other interest with a party or adviser which may cause a conflict of interest or be perceived as a conflict of interest.
- conflicts associated with recommending the service of others.

#### When a mediator should not proceed

A mediator must not mediate in the following circumstances:

- when there is a conflict of professional roles (for example, where a mediator is an adviser to one of the parties);
- when a mediator has a commercial relationship with one of the parties or a person associated with the dispute which will influence the neutrality and impartiality of a mediator.

### 7. Competence

A mediator must not mediate without the necessary competence to do so.

Competence in mediation comprises appropriate knowledge and skills that are acquired through education, training and experience. Mediator competencies may be regulated by statutory requirements. Information regarding the education, training and experience of a mediator should be available to the parties.

Persons administering a list of mediators should ensure that the education, training and experience of the mediators are of an appropriate standard.

### 8. Confidentiality

Subject to the requirements of law, a mediator is not to disclose any matter that a party or individual requires to be kept confidential. This generally includes anything said, done or prepared for the purposes of the mediation. In particular:

- Before commencing mediation and in private sessions a mediator must explain that mediation is confidential to the extent permitted by law and any limitations to confidentiality which apply in relation to the particular dispute.
- A mediator is not to disclose any matter that a party or the parties requires to be kept confidential unless given permission to do so by the party or parties or required by law.
- Under no circumstances should a mediator seek to use information gained in the course of a mediation session for personal gain.

#### Limits to confidentiality

Exceptions to the confidentiality of a mediation include:

- where statutory obligations apply;
- when there are reasonable grounds to believe disclosure to the appropriate authorities is necessary to prevent or minimise the danger or injury to any person or property, a mediator may be required to disclose information from the mediation;
- where information of a general quantitative nature that could not identify the parties, or the dispute, is to be used for research or evaluation;
- where information of a qualitative nature is used for research, or for evaluative or supervisory purposes, provided the consent of the parties has been obtained.

### 9. Termination of Mediation

A mediator may end the mediation or propose ending the mediation at any time if a mediator considers it is appropriate

*Continued on page 4*

or is advised by any party that:

- mediation is no longer considered suitable for any of the reasons previously outlined;
- there is no reasonable prospect of settlement;
- a party is abusing the process;
- a party wishes to terminate the mediation.

#### 10. Agreement


- If the mediation results in an agreement between the parties, a mediator may encourage and assist the parties to record the agreement in writing.
- The implementation of any agreement reached as a result of the mediation is the responsibility of the parties. A mediator is not responsible for enforcing the terms of the agreement.

#### 11. Publicity and Advertising

A mediator must not make any false or misleading statements including statements or claims as to the mediation process, its costs and benefits or the mediator's role or competence.

#### 12. Fees

The mediation fee may be paid by the parties to a dispute or some other party ('the client'). A mediator must fully disclose their fees to the client or the parties:

- as early as practicable and before mediation begins agreement should be obtained, preferably in writing, from the parties regarding fees and other expenses to be charged by a mediator;
- a mediator must not agree to a fee that is contingent upon the result or the amount of settlement. 



## DISPUTE RESOLUTION AT THE UWS SCHOOL OF LAW

The dynamic and progressive UWS School of Law is particularly proud of its extensive city based programs in the ever-expanding area of Dispute Resolution.

The School is one of the largest providers of Alternative Dispute Resolution (ADR) education and training in the country, and apart from undergraduate teaching in dispute resolution, the School offers a comprehensive range of postgraduate subjects for students from all walks of life. The postgraduate dispute resolution subjects are specifically directed at promoting excellence in professional skills and practice within an academic environment.

The dispute resolution subjects lead to awards in Legal Studies and the specialist Dispute Resolution awards:

- Graduate Certificate in Legal Studies
- Graduate Diploma in Legal Studies
- Master of Legal Studies
- The Graduate Certificate in Dispute Resolution
- The Graduate Diploma in Dispute Resolution
- The Master of Dispute Resolution

The subjects can also lead to a Master of Legal Practice or Master of Laws award and an SJD.

The Dispute Resolution subjects are designed to introduce a range of processes and skills effective in preventing, managing and resolving disputes, to enable graduates to resolve disputes constructively and assist others to do so. They also provide professionals and others with an enhanced competitive edge in the

market place as dispute resolution is an expanding area of practice for lawyers, business executives and other professionals.

On completion of a number of subjects, graduates are able to identify and analyse potential conflict situations, are skilled in processes necessary to bring people to agreement and are able to develop and design systems to prevent, minimise, manage and resolve disputes. In addition, they are able to apply the insights from the subjects creatively in their business and personal lives.

The School of Law runs approximately eighteen postgraduate ADR subjects each year, mostly in the Sydney CBD. As the School has built up a national reputation for its innovative and interdisciplinary ADR programs, such subjects are currently attracting participants from throughout Australia and New Zealand and the rest of the world.

For further information on the Dispute Resolution subjects and awards available at UWS have a look at the UWS Dispute Resolution web site at:

<http://adr.uws.edu.au>

The Dispute Resolution site contains detailed descriptions of all programs and individual subjects, timetable information, biographic details of all teaching staff along with hundreds of links to Dispute Resolution organisations, groups and agencies world wide. An on line journal, the EDR Journal (Electronic Dispute Resolution Journal), is also featured together with hundreds of pages of Dispute Resolution articles written by UWS staff and associated authors (some of whom have written extensively in the area).





## Introduction

The issue of standards for ADR has continued to attract comment within Australia by a range of bodies.<sup>2</sup> Recently, the National Alternative Dispute Resolution Advisory Council (NADRAC) has played a key role in the development of standards and has formulated a series of recommendations on standards that draws upon an extensive consultative process.<sup>3</sup> This approach has been in response to the suggestion that practice standards have an important role to play in the Australian dispute resolution environment.<sup>4</sup> It is recognised that standards may:

- Identify competencies, knowledge and skills required
- Assist to promote monitoring, review and complaint processes
- Serve as a guide for the conduct of ADR sessions, particularly in assisting practitioners to identify and address difficult ethical and other issues that may arise
- Assist to educate participants and others about ADR processes
- Assist to promote confidence in ADR
- Promote a policy environment
- Assist to promote a more cohesive regulatory environment.

NADRAC has raised a number of issues about the desirability of promoting one national standard and has recommended the adoption of a more flexible 'framework' approach.

## The recent work of NADRAC

NADRAC has noted that to date the development of standards has been hampered by the lack of a national representative body in the ADR area. As there is no peak ADR body and as ADR processes can be conducted at various levels throughout the society, setting uniform standards has been difficult (NADRAC also recommends that the feasibility of a peak body be explored).

To date, in the absence of national standards, many ADR service providers and professional bodies have established their own conduct provisions and standards that focus on the provision of the ADR service.<sup>5</sup> They are expressed in a variety of forms. Some appear as 'rules' that are annexed to or form part of the agreement between the neutral and the

parties. For example, it is common for mediation agreements to outline the roles and responsibilities of the practitioner and the parties, particularly relating to the costs, confidentiality, conflicts of interest, authority, privilege, liability and enforceability of any agreement reached.<sup>6</sup>

Other standards appear as separate guidelines or 'codes'. For example, a group that includes representatives of all major ADR bodies in Australia has developed some standards for mediators. The 'Lets Talk' project has been responsible for the formulation of a standard for mediation that may eventually be the subject of further elaboration (See this issue of *Mediation News*).

Most conduct provisions and standards set out core principles with a detailed explanation of what those principles mean. Where the ADR processes are related to the court system or are community based, many 'standards' are in the form of codes of conduct;<sup>7</sup> others are expressed as guidelines<sup>8</sup> or as best practice models.<sup>9</sup> Some standards are contained in legislation and expressed as statutory obligations.<sup>10</sup>

Discussion about standards has also related to the extent to which standards need to be developed and whether lawyers and others are 'capturing' ADR processes and attempting to over regulate those processes. In this regard NADRAC has also expressed concerns about creating a national regulatory action or exclusionary standard.<sup>11</sup>

## The framework approach

NADRAC has noted that developing standards is an evolutionary process that can be supported by creating a 'framework' approach that does not support prescriptive standards.<sup>12</sup> The framework is comprised of

- guidelines that can be used to develop and implement standards
- a requirement for codes of practice to be developed and where applicable the enforcement of a code through appropriate means.<sup>13</sup> 'Code of practice' includes reference to a code of ethics, rules, guidelines benchmarks, policies and procedures.

The central approach taken by NADRAC is that ADR providers should adopt and comply<sup>14</sup> with a code of practice that takes into account the following elements—

- The process to be used - this includes information relating to all participants, how and when the process may or should be terminated as well as obligations after the process is concluded
- Informed participation – this includes obligations to make informed choices about participation, obligations relating to advertising and promotion and how and when parties will be informed about service provision
- Obligations in respect of access and fairness to
  - determine the appropriateness of the process
  - ensure the accessibility of the service
  - achieve fairness and confidentiality
  - maintain confidentiality
- Service quality – a description of the knowledge, skills and ethics required as well as quality assurance information
- Complaints and compliance information and obligations.<sup>15</sup>

The NADRAC approach is directed at all Australian ADR service providers. As NADRAC is a body created by the Federal Attorney General it has made recommendations that are also specific to the Commonwealth. These recommendations include that in any Commonwealth contract, compliance with the code should form part of the contract provisions.<sup>16</sup> In addition NADRAC has recommended that the Commonwealth encourage other government agencies to support this approach and to encourage compliance through consumer education activities.<sup>17</sup>

The NADRAC approach accepts that different industry and other groups will develop standards and codes. However, clearly many of the existing standards will require modification to comply with the guidelines suggested by NADRAC. Particular areas where work will be required are in the service quality, complaints and compliance and access requirement provisions. Each practice area will also require different content relating to process and other information.

NADRAC has suggested that ADR service providers need to have in place systems for managing complaints and that the feasibility of an ADR Industry

*Continued on Page 6*

Ombudsman should be explored.<sup>18</sup> NADRAC has also recognised that standards will evolve and that regulation should be based on self regulation.<sup>19</sup>

### Training and accreditation

The development of standards for ADR is closely related to issues surrounding the education, training and accreditation criteria for ADR neutrals.<sup>20</sup> For example, an understanding and maintenance of practice standards for ADR practitioners may be achieved by training, including refresher courses and by accreditation and re-accreditation requirements.

As noted by NADRAC<sup>21</sup> practice standards may also be maintained by codes of conduct, which may be entirely voluntary or may result in sanctions if breached. At present most codes of conduct are in the form of guidelines without any specified sanction for breach of the code.<sup>22</sup> However, sanctions may be indirectly applied through re-accreditation requirements. Practitioners who do not comply with an organisation's code of practice are unlikely to be re-accredited.<sup>23</sup>

NADRAC has suggested that a variety of basic competencies in knowledge, skills and ethics can be used to underpin more cohesive approaches to education and professional development.<sup>24</sup> The key competency areas apply to all ADR


processes and include references to ethical implications. In addition the key areas of competencies are grouped under specific headings with the key characteristics described in some detail<sup>25</sup> -

- *Knowledge*
  - o Conflict
  - o Culture
  - o Negotiation
  - o Communication
  - o Context
  - o Procedure
  - o Self
  - o Decision-making
  - o ADR
- *Skills*
  - o Assessing a dispute for ADR
  - o Gathering and using information
  - o Defining the Dispute
  - o Communication
  - o Managing the process
  - o Managing the interaction between the parties
  - o Negotiation
  - o Being impartial
  - o Making a decision
  - o Concluding the ADR process
- *Ethics*
  - o Promoting services accurately
  - o Ensuring effective participation by parties
  - o Eliciting information
  - o Managing continuation or

termination of process

- o Exhibiting lack of bias
- o Maintaining impartiality
- o Maintaining confidentiality
- o Ensuring appropriate outcomes

To the relief of many who are involved in training and education NADRAC has stated that

“NADRAC does not believe that there should be a single pathway for recognition and notes that different systems have evolved to meet the needs of particular sectors and services.”<sup>26</sup> 



<sup>1</sup> This material is extracted in part from a forthcoming text – Issues in ADR that is to be released by the Law Book Company in 2002.

<sup>2</sup> Eg The Family Law Council; the Law Council of Australia; The Victorian Law Foundation; The NSW Law Reform Commission and The Access to Justice Advisory Committee. The Australian Competition & Consumer Commission (ACCC) has released a guide on small and large business dispute avoidance and resolution: *ACCC Benchmarks for dispute avoidance and resolution - a guide* AGPS Canberra 1997. See also Department of Industry, Science & Tourism *Benchmarks for industry-based customer dispute resolution schemes* The Dept Canberra 1997. Standards Australia is currently developing standards for the prevention, handling and resolution of business disputes.

<sup>3</sup> National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards*, (Canberra, Attorney-Generals Department, 2001).

<sup>4</sup> Australian Law Reform Commission, *Issues Paper 25: Review of the adversarial system of litigation. ADR – its role in federal dispute resolution*, (ALRC, Canberra, June 1998) 141.

<sup>5</sup> National Alternative Dispute Resolution Advisory Council, *Op cit* at 41.

<sup>6</sup> The New South Wales Retail Tenancy Dispute Unit agreement incorporates all of these matters (2001).

<sup>7</sup> Eg NSW Community Justice Centres *Code of Professional Conduct for Community Justice Centre Mediators* 30 April 1998; ACT Conflict Resolution Service (CRS) *Code of Professional Conduct* 1990; Qld Dept of Justice and Attorney-General (Alternative Dispute Resolution Division) *Code of Ethics for Mediators for the ADR Division* May 1994.

<sup>8</sup> Eg NSW Law Society *Revised Guidelines for Solicitors who act as Mediators* 29 July 1993.

<sup>9</sup> Law Council of Australia has adopted model *Ethical Standards for Mediators* 7 December 1996.

<sup>10</sup> Family Law Regulation 59–73.

<sup>11</sup> National Alternative Dispute Resolution Advisory Council, *op cit* 50.

<sup>12</sup> *Ibid* 70.

<sup>13</sup> *Ibid* 71 – Recommendation 1.

<sup>14</sup> *Ibid* 72 – Recommendation 2.

<sup>15</sup> *Ibid* 98 – 99.

<sup>16</sup> *Ibid* Recommendation 6 - 97.

<sup>17</sup> *Ibid* Recommendations 7 & 8, 97.

<sup>18</sup> *Ibid* Recommendations 3 and 4.

<sup>19</sup> *Ibid* Recommendation 6.

<sup>20</sup> *Ibid* Recommendations 13, 14, 15, 16, 17 and 18.

<sup>21</sup> *Ibid*.

<sup>22</sup> Eg NSW Community Justice Centres *Code of Professional Conduct for Community Justice Centre Mediators*, Conflict Resolution Service (CRS) *Code of Professional Conduct*; Alternative Dispute Resolution Division of the Qld Dept of Justice and Attorney-General *Code of Ethics for Mediators for the ADR Division* May 1994; LEADR *Ethical standards for mediators* March 1998; Institute of Arbitrators and Mediators Australia *Rules for the conduct of mediations*.

<sup>23</sup> Eg One of the criteria for inclusion and continuation on LEADR's panels of mediators is an agreement to observe the ethical standards for mediators as laid down by LEADR: cl. 3(iii) & 4(iv) *Scheme for accreditation of mediators* Issued on 27 November 1997.

<sup>24</sup> National Alternative Dispute Resolution Advisory Council, *op cit* at 86 – Recommendation 17.

<sup>25</sup> *Ibid* 100 – 114.

<sup>26</sup> *Ibid* 81.



Most Australian jurisdictions have legislation that mandates mediation for litigants without their consent. Given that such mandatory schemes run counter to the philosophical underpinnings of mediation, that being the voluntary nature of the process, it is not surprising that litigants are seeking to avoid mandatory mediation. This article will discuss two recent cases.

In *Waterhouse v Perkins & Ors* [2001] NSWSC 13, the cause of action concerned an allegation of defamation that arose from the publication of a book entitled, "The Gambling Man". The notice of motion before the Court was an application, amongst other things, for an order for compulsory mediation under the Act.

Prior to the application coming before the court, the defendant had suggested mediation to the plaintiff who refused to participate in such a process. As an inducement to mediate, the defendants had offered to pay for the costs of the mediator and the venue. However, the plaintiff did not want to mediate the matter. So his Honour was faced with the unenviable task of deciding whether mediation should be forced upon an unwilling party, namely the plaintiff.

Levine J, noted the plaintiff's submission that an important ingredient of the remedy in a defamation action is the public vindication of the plaintiff. His Honour raised the question of whether it was impossible for mediation to provide public vindication of a successful plaintiff in a defamation case. His Honour had no trouble in answering that question in the affirmative.

His Honour suggested that a benefit of mediation may be to "take the edge off the acrimony" between the parties. In this respect his Honour reminded the plaintiff that given that he was an officer of the court (a legal practitioner) that any order to mediate made under Part 7B of the Act would require the plaintiff to participate in good faith. Levine J, hinted that failure to participate in a Court ordered mediation in good faith could result in a litigant being in contempt of Court.

Levine J, summarised the issues pertinent to the application before the Court in the following manner:

- (i) The matter had been running in part for ten years and was unlikely to be heard until the end of 2001;
- (ii) The hearing would be of at least six weeks in duration;
- (iii) The defendants were concerned about the extent of costs accruing;
- (iv) The plaintiff was clearly concerned about vindication;
- (v) Mediation can provide vindication for the plaintiff;
- (vi) The defendants have offered to pay the costs of the mediator and the venue;
- (vii) The plaintiff need only pay for his legal costs during the mediation;
- (viii) The total cost of mediating compared to litigating the matter could not be considered to be a disproportionate diversion of resources;
- (ix) Parties are obliged to act in good faith, therefore, the potential outcome should be viewed positively when compared against litigation; and
- (x) There is no rational reason for not ordering mediation in this case.

His Honour ordered that the whole of the proceedings before the Court be referred to mediation with the defendants paying the costs of the mediator and the venue as the parties may agree upon and for the plaintiff to pay his own costs in respect of his attendance at the mediation.

His Honour's judgment is important to civil litigators as we are now a little clearer on what the court will be looking for when making orders for a compulsory mediation, especially against the will of one or more parties to the dispute.

In *Morrow v Chinadotcom* [2001] NSWSC 209 litigation had commenced regarding the sale of shares in XT3 Pty Limited by the plaintiffs, Morrow and others to the first defendant, chinadotcom corporation. The cause of action is irrelevant to this paper, but suffice to say, the first defendant argued an application before the Court on the basis, amongst other things, that the parties had agreed to attempt an unspecified ADR process prior to litigation and should be held to that agreement.

The plaintiffs argued against the application on the basis, amongst other things, that before a court could refer a matter to mediation under the Act, the court would have to identify, "... something to single the particular controversy out from the ordinary course and to justify the parties being subjected to the burden of the additional time and money that a mediation involves."<sup>1</sup>

Before deciding the issue, his Honour canvassed the authorities on the issue of ordering an unwilling party to mediation under legislation giving a court the discretion to do so. There were no New South Wales decisions to assist his Honour. However, counsel drew his Honour's attention to two South Australian decisions that established that in appropriate cases a court should order an unwilling party to mediation and that in deciding when it is appropriate for a court to so order a party, such a decision should be based on the merits of the case.<sup>2</sup> However, ultimately Barrett J, was unmoved by these decisions.

His Honour stated that when one party to a dispute wants to litigate as opposed to participate in an ADR process, the court needs to think very carefully about compelling what could turn out to be an exercise in futility that will only increase the delay and expense of a final decision by a court. However, his Honour did acknowledge that:

"There will no doubt be some cases where such a course will be justified: where, for example, the Court perceives that emotional or other non-rational forces (including unreasonable intransigence) are at work and a proper sense of proportion may be introduced into the picture by the efforts of a third party skilled in conciliation."<sup>3</sup>

Barrett J, summed up by stating that given that two commercial parties engaged in a commercial agreement with the requisite advice regarding ADR processes, that:

"If, with the benefit of that knowledge and the advice of their solicitors, they do not all see sufficient value in resort to some alternative procedure of their own choosing there is, it seems to me, very little, if anything, that is likely to be gained by the Court compelling them to pay at least lip service to it".<sup>4</sup>

His Honour judged that mediation forced upon one of the parties, rather than with the agreement of all the parties, would be unlikely to achieve anything useful. Therefore, his Honour dismissed the application of the first defendant with costs and left the door open for the parties to seek mediation by private agreement.

One of the interesting elements of his Honour's judgment is the above but one quote, relating to the conditions under which the Court would consider it appropriate to order mediation under the Act when one or more parties are not willing to participate voluntarily. Whilst his Honour gives us an idea of the conditions for triggering an order under the Act, his Honour gives no examples of factual situations where the court will invoke the Act.


Barrett J's, references to "emotional or other non-rationale forces" and "unreasonable intransigence" leaves one

wondering what kind of factual situations his Honour had in mind before a court will invoke the Act.

Perhaps "emotional forces" are those forces where emotion is driving the dispute as opposed to substantive or forensic reasons for insisting upon a litigated resolution. Perhaps retribution being exercised by one party over another would be a trigger mechanism to invoke the Act. As for "non-rationale forces" and "unreasonable intransigence", perhaps the desire to prolong litigation so that one party will exhaust their financial resources is a case where the Act will be invoked.

Both the above reported cases provide a challenge for the Court. They challenge the Court to discover under what conditions it is appropriate to order mediation under the Act. Whilst the decision must surely be easy when all

parties to the dispute are in agreement of participating in mediation, the decision for the Court becomes problematic when one or more parties are unwilling to participate in such a process. Undoubtedly there will be further litigation on this vexing issue.

Given that many practitioners have been trained in mediation processes that are philosophically supported by the notion that the parties are free to enter into and to choose to end their participation in a mediation, David Spencer in his article "Mandatory Mediation Litigation in NSW and South Australia" discusses case law developments that may offer some challenges for the future practice of mediation in both mediation process and mediator skills. 

<sup>1</sup> [2001] NSWSC 13, at para 42.

<sup>2</sup> [2001] NSWSC 209, at para 39, citing *Hopcroft v Olsen* (Unreported, Supreme Court of South Australia, 21 December 1998, Perry J), and *Baulderstone Hornibrook Engineering Pty Ltd v Dare Sutton Clarke Pty Ltd* (Unreported, Supreme Court of South Australia, 7 June 2000, Perry J).

<sup>3</sup> Ibid, at para 44.

<sup>4</sup> Ibid at para 45.

## NOW AVAILABLE

### "Mediation in Education Franchises"

Stongly established mediation consultancy is now being offered for the following states:

N.S.W. /QLD / S.A. / W.A. / TAS

Good array of established services

Detailed information is available by going to:

**[www.conflictsolvers.com.au](http://www.conflictsolvers.com.au)**

Further enquiries to:

Fred Stern

**0412 102 801**

(Fred is an experienced mediator with over ten years experience in the field of mediation. He is well known in Victoria for a number of programs which are educationally based. This is your opportunity to join a strong growth area)

Please note: Franchises are sold on the basis that applicants have some mediation and training experience.





## Asia Pacific Mediation Forum

Reconciliation:

A Conversation Beyond Cultural Boundaries

**Adelaide, South Australia  
29 November -1 December 2001**

### REGISTER NOW!

Early-bird registration and list of speakers now available on the conference website:

<<<http://www.unisa.edu.au/cmrg/apmf>><http://www.unisa.edu.au/cmrg/apmf>>

Keynote speakers include Nobel Peace Prizewinner, Dr Jose Ramos Horta

### OTHER SPEAKERS

Opening Address: Dr Lowitja O'DONOGHUE

Keynote Workshop: Commissioner Jan Jung-Min SUNOO: Cross-Cultural Mediation

Keynote Speaker: Graeme NEATE, President, Australian National Native Title Tribunal

Keynote Workshop: Professor Michael LANG: Developing Excellence in Mediation Practice: The Path To Artistry

Keynote Workshop: Chris Sickles MERCHANT: Designing Conflict Management Systems

Keynote Speaker: Associate Professor Kay SCHAFFER: Telling, Witnessing and Responsibility: Reconstituting The Body Politic  
CULTURE STREAM -  
PRACTICE THEORY STREAM -  
PRACTICE VALUES STREAM  
INDIGENOUS (AUSTRALIA AND NEW ZEALAND) STREAM  
PRACTICE SKILLS STREAM -  
ASIA PACIFIC PAPERS STREAM  
CONFLICT MANAGEMENT IN ASIA

### PACIFIC COUNTRIES

The Philippine Islands Taiwan Singapore  
Indonesia Thailand Malaysia Cambodia  
East Timor Canada New Zealand  
Australia United States

### ADVANCED SKILLS WORKSHOPS - POSTER SESSIONS

This conference is convened by the Conflict Management Research Group, University of South Australia and sponsored by the World Mediation Forum, the Hawke Institute, UniSA and the Royal Australian Navy.

Conference Executive: Dale Bagshaw, Shirli Kirschner, Lesley Gruit.

Please contact Ann Braybon - [ann.braybon@unisa.edu.au](mailto:ann.braybon@unisa.edu.au) - the Conference Organiser, if you require further information.

<<APMF Promo.doc>>

David Baker

Doctoral candidate, School of International Business

Ausdispute Website Administrator

(<<http://www.ausdispute.unisa.edu.au>><http://www.ausdispute.unisa.edu.au>), Conflict Management Research Group.

University of South Australia.

Address: Room 2-36, Way Lee Building, City West Campus.

Telephone: +61 8 8302 0485. Mobile: 0418 891 807.



### Have you visited the website yet?

It is only a mouse click away at [www.ausdispute.unisa.edu.au](http://www.ausdispute.unisa.edu.au)

It is really cool. Or maybe, more like, airconditioned.

It's very young, sort of needing to be supported, coaxed along, you know, appreciated, made welcome.

You can see

- a Directory of DR associations, organisations and individual practitioners in Australia;
- dispute resolution employment opportunities;
- education and training opportunities;
- important diary dates including national and international conference information;
- relevant articles, newsletters, conference papers;
- discussion pages for academics, students and practitioners to discuss current issues;
- new developments in the field at a national and international level;
- network opportunities for special interest groups;
- important links between DR associations and organisations within Australia and overseas;
- links to other relevant web sites.

Have a look at the Directory where you can see the dispute resolution webpages of colleagues from around Australia. They are very impressive. And sooooo inexpensive. Your own web page that you can edit anytime you want. What a steal!!!

And check out the pages for SADRA and ADRQ and maybe ADRA, VADRA and Let's Talk if they are up by the time you read this. They are in the Useful Links page.

If you want some assistance or advice or want to make suggestions (or nice compliments??) Contact the Web Administrator, David Baker at [david.baker@unisa.edu.au](mailto:david.baker@unisa.edu.au) or 0418 891807.

### Marketing ADR in Australia ...interested??

Three significantly placed commentators will discuss this on an email-based discussion list this month. If you want to join in or monitor the discussion,

email: [david.baker@unisa.edu.au](mailto:david.baker@unisa.edu.au) or

visit: [www.ausdispute.unisa.edu.au](http://www.ausdispute.unisa.edu.au).

(Other issues will be discussed during 2001)

### Asia Pacific Mediation Forum in Australia...interested?

Visit [www.ausdispute.unisa.edu.au](http://www.ausdispute.unisa.edu.au) for more information

### Free email Update about ADR...interested?

If you want to see the latest edition, visit [www.ausdispute.unisa.edu.au](http://www.ausdispute.unisa.edu.au) or to be put on the mailing list email [david.baker@unisa.edu.au](mailto:david.baker@unisa.edu.au) saying 'subscribe'.

### Read Mediation News on the web?...interested?

You can read past editions on [www.ausdispute.unisa.edu.au](http://www.ausdispute.unisa.edu.au) and the current one if you are a member of SADRA, ADRA, VADR and ADRAQ. Further information from [david.baker@unisa.edu.au](mailto:david.baker@unisa.edu.au) or the Associations on the website.



## PLACE FOR MEDIATION IN INDUSTRIAL DISPUTATION

**Margo Humphreys Mediation practitioner.**

Dispute prevention is enshrined in the Workplace Relations Act 1996 in the form of conciliation and arbitration, however, in the current industrial system participants may consider the use of mediation as an alternative dispute resolution process.

In an address to the Industrial Relations Society of Australia 1999 National Convention, Justice Boulton, Senior Deputy President of the AIRC, stated that the 'focus of the work of the Commission is now more on the adjudication of termination of employment matters and the performance of functions in relation to the maintenance and simplification of safety net awards and the negotiation and certification of agreements - rather than on its traditional dispute settlement role...the focus of the system has changed from conciliation and arbitration for the prevention and settlement of industrial disputes to a concern about improving the efficiency and productivity of Australian workplaces.'<sup>1</sup>

This changed perspective, moving from a centralist award system, to an enterprise focus, has called for far greater emphasis on workplace negotiations as opposed to industry bargaining. Agreements can now be negotiated directly between individuals and their employers reach an Australian Workplace Agreement (AWA), or a Certified Agreement (CA).

### **A role for Mediation**

A former Judge of the NSW Industrial Relations Commission, Jim Macken, a practising mediator, states that 'with respect to enterprise bargaining, mediation can be most beneficial to the parties at the time of negotiation, and even more so at re-negotiation of an agreement... it should not be seen as an anti-union or anti-conciliation/arbitration device, but rather as a tool for unions and others to adopt in order to achieve a focussed, non-adversarial and sustainable outcome.'<sup>2</sup>

He believes that 'the move to full decentralisation of wage fixation, excluding the safety net arguments, should be accompanied by as broad based a support system as possible. Both the substantial and 'tried and true' conciliation and arbitration systems, as well as a voluntary user-pays mediation adjunct, have a continuing role to play in the emerging make up of industrial

relations in Australia. The parties should be free to choose the mechanism they believe will provide most benefit in any given situation.'<sup>3</sup>

### **Examples of how industrial mediation is practised**

So how is industrial mediation practiced? Two published examples of industrial mediation, by Jim Macken, with co-author Gail Gregory, and Ed Davis and anecdotal reflections by a third industrial mediator, Barrie French are reviewed with the focus on the mediation models utilised by the mediators.

#### **Jim Macken and Gail Gregory**

Jim Macken has extensive industrial relations experience as a Judge, NSW Industrial Relations Commission, 1975-1998 and as a professional mediator.

Gail Gregory has a background in the nurses union and is employed by the NSW Labor Council

Jim Macken and Gail Gregory are co-authors of "Mediation in Industrial Disputes"<sup>4</sup>. They write that mediations in the Australian industrial arena are different to other types of mediations, but generally the principles are the same as those of any commercial or other dispute.

They believe that 'in industrial mediation the presence of extraneous factors is usual rather than rare and much more common than their presence in commercial mediation. Political, social and factional factors are often the underlying cause of the dispute rather than the issues that are presented to the mediator for settlement. Such matters can be the cause of the pressures that led to the mediation and can explain at times the fears that parties have over the result of the mediation.'<sup>5</sup>

Mediator preparation is the most important part of the Macken and Gregory process. They believe that 'the mediator should devote as much time as is necessary ...on the background to the dispute, the history of the relationship between the parties and the hidden factors which may make mediation difficult....It will be rare that the parties to the mediation do not have an entrenched attitude to the issues at stake ...frequently rank and file pressures on union officials, or board pressures on industrial relations managers, prompt the adoption of hard line attitudes toward the mediation.'<sup>6</sup>

Their description of the process of the mediation includes:<sup>7</sup>

- a pre-mediation conference
- at the mediation itself, an explanation of:
  - the ground rules, already agreed upon at the pre-mediation conference
  - the mediator's role, including that parties must reach agreement themselves, and mediator neutrality
  - obligations by the parties to approach the issues with a view to settlement
- parties respective statements, including a statement of their positions (which are acknowledged as being 'ambit' statements)
- identifying the issues, and dealing with one issue at a time
- exploration of options
- road testing the options
- written terms of agreement, prior to dispersal of parties to the mediation

Having described their generic mediation process, Macken and Gregory also stipulate that 'there are no absolute rules for the conduct of any mediation. The wishes of the parties, the nature of the issues and many other factors act together to make sure that every mediation is unique and will require a somewhat different approach to be taken by the mediator.'<sup>8</sup>

With respect to the degree of mediator intervention when assisting the parties to problem solve, or identify solutions, Macken and Gregory write - 'today the idealisation of mediation as a stand-alone method for the resolution of disputes has fallen out of favour in most countries of the world. An interventionist approach by the mediator where the parties allow this to be done is proving to be the most effective method of mediation....both unions and employers have come to accept that the process of conciliation of disputes will often have to culminate in an arbitration, not because agreement has not been reached, but because one or both of the parties have to have the terms of the agreement 'arbitrated' in order to

Macken and Gregory see mediation as being an appropriate tool in the following industrial matters:<sup>10</sup>

- 'enterprise agreements
- common cause between unions in the same work place, who have differing views on the content of an enterprise agreement
- union amalgamations
- intra-union disputes'

They recognise that mediation would be inappropriate in the following circumstances: <sup>11</sup>

- where the issues involve intractable animosity between the parties
- where the applicable legal principles are not clear and a judicial outcome is required
- where the matter touches on an important industrial principle
- if the matter is relevant to the public interest
- where legal precedent may need to be considered

#### **Professor Ed Davis**

Director of the Labour-Management Studies Foundation

Macquarie Graduate School of Management

Professor Ed Davis' Mediation within enterprise bargaining: New South Wales Fire Brigades 1995 Australian Dispute Resolution Journal February, 1998<sup>12</sup> writes: 'in 1994 the NSW Fire Brigades Firefighting Staff Award made provision for an independent mediator to determine whether a round of pay increases should be implemented in the following year. The independent mediator was required to base his decision on the extent of progress in several areas of workplace reform.... The role of the mediator was also to arbitrate over specified issues, if necessary.' <sup>13</sup>

After being approached by both the Department and the union Davis agreed to mediate.

The description of the mediation process includes: <sup>14</sup>

- a pre-mediation meeting, wherein it was agreed that the parties attending the mediation should have the authority to sign off agreements reached
- at the mediation session itself initial discussion included the following:
  - agreement of ground rules
  - freedom to discuss options
- a willingness of involvement by both parties to proceed

- an agreement that both parties should be prepared to make concessions, and
- the matters agreed upon would be written down and signed before the end of the mediation
- the parties then moved into separate rooms to list the issues, ideal outcomes, identify roadblocks, and the path to resolution
- three issues were identified, with one only to be discussed at the first mediation session
- the mediator moved between the two rooms, established commonality between the parties, and attempted to diminish the differences
- the parties were brought back together when there appeared to be a good prospect of resolution
- a draft proposal was considered, prepared for signature, and the session was concluded
- a further session was arranged for discussion of the remaining two issues
- at the following session, only one of the issues was resolved, and the mediator made a recommendation re the remaining issue to the Commissioner of Fire Brigades.

#### **Barrie French**

Adjunct Professor of Law, University of Technology, Sydney, Industrial Law teacher at the NSW Trades and Labor Council.

Barrie French is a former Commissioner of the NSW Industrial Relations Commission (1991-98), and has been an industrial advocate and adviser since 1949. At different times in his advocacy career he has represented both employers and unions. French has also practiced as an industrial mediator in industrial disputes.

His description of the mediation process includes:

- separate pre-mediation discussions with all persons involved - wherein he identifies the individual issues, bottom lines and hidden agendas
- a group conference
- he may also organise an informal gathering where the parties are invited to mix, talk freely, and get to know each other in a different context
- a further conference may occur, at which point an agreement is often

reached (with or without recommendations).

French indicates that because his methodology is to talk to everyone involved some of the more complex mediations involving a number of issues have taken months to resolve. He is also aware that the mediated outcomes usually 'stick'.

He is very aware that often the parties will want to agree, but can't either be seen to be agreeing with each other because of constituent face saving, or, because the best solution isn't the one which the constituents can openly agree with. French will recommend to the parties, when requested, the best solution for their particular situation. This, he believes, allows the parties to inform their respective constituents that they were advised what outcome would best resolve their differences.

He identifies his mediation style as 'somewhat interventionist', however, he stresses that he doesn't force the parties to accept a decision. If the parties can't come to an agreement he closes the mediation.

The types of industrial mediations he has practiced include:

- enterprise bargaining agreements
- grievance disputes
- new award disputes
- manning disputes
- productivity disputes

#### **Observations on the mediation styles**

Macken/Gregory and French acknowledge that in industrial relations the most important work lies in the pre mediation homework. This includes speaking to the parties well before the mediation in order to establish what is really behind the dispute, the relationship of the parties, the factionalism within each party and any potential problems with decisions that may be reached, either legally, or with their respective constituents.

Given the history of conciliation and arbitration legislation, the expectations of the constituents, the often political nature of industrial decisions and face saving measures needed by the parties these mediators acknowledge that giving an opinion about the optimal outcomes of the disputes produces an interventionist model of mediation that accords historically with industrial practice.

Davis describes an hybrid med-arb model as the parties involved in the Davis


*Continued on Page 12*

mediation sought an arbitrated agreement as well. That is, at the conclusion of the mediation Davis was expected to hand down a decision that the parties would follow, if they could not agree. This aspect conforms to legislative industrial authority.

## CONCLUSION

These practitioners identify a range of mediation processes that have been developed in response to the requirements of particular industrial disputes. The continuing development of a range of processes should enable parties to choose the mechanism they believe will provide most benefit in any given industrial situation.

## REFERENCES

- <sup>1</sup>. Boulton JA, Justice, (October 1999), speech to the Industrial Relations Society of Australia 1999 National Convention, The Changing Role of the Commission, (online) [http://www.airc.gov.au/my\\_html/Boulton231099.htm](http://www.airc.gov.au/my_html/Boulton231099.htm)
- <sup>2</sup>. Macken JJ, & Gregory G, (1995), Mediation of industrial disputes, The Federation Press, Sydney, pg 23
- <sup>3</sup>. Ibid, pg 28-29
- <sup>4</sup>. Ibid
- <sup>5</sup>. Ibid, pg 52
- <sup>6</sup>. Ibid, pg 53
- <sup>7</sup>. Ibid, pg 51-59
- <sup>8</sup>. Ibid, pg 59
- <sup>9</sup>. Ibid, pg 94/95
- <sup>10</sup>. Ibid, pg 70-79
- <sup>11</sup>. Ibid
- <sup>12</sup>. Davis E, (1998), Mediation within enterprise bargaining: New South Wales Fire Brigades, Australian Dispute Resolution Journal, February 1998, pp 5-10
- <sup>13</sup>. Ibid
- <sup>14</sup>. Ibid 



# “SOS” SETTLEMENT ONLINE SYSTEMS

When crossing the final gap prevents parties reaching an agreement and the parties are at an impasse an innovative service now offers an online settlement service that may be an option for the parties to consider.

## New Financial Settlement and Dispute Resolution Service

A web-based consensus-oriented process for resolving financial disputes SETTLEMENT ONLINE SYSTEMS “SOS”, is now available online or offline in Australia and is proving to be an invaluable part of the mediator’s ‘tool kit’.

This new independent ADR service offers a speedy and cost efficient settlement process for any type of financial claim where the issue is one of quantum. Developed by two lawyers and mediators, SOS provides a confidential, automated negotiating process that encourages both parties to a financial dispute to reach a fast, cost effective final settlement without having to go to court. Negotiations are without prejudice as positions are never disclosed because neither party ever sees what the other party has demanded or offered.

SOS can be used successfully in a wide range of dispute situations with which mediators are familiar, including:

- Insurance claims of all types (eg personal injury, public liability)
- Contractual disputes
- Workplace and employment related disputes
- Franchise and landlord/tenant related disputes
- Consumer complaints
- Family law and relationship disputes involving money

for further information:

[www.settlementonlinesystems.com.au](http://www.settlementonlinesystems.com.au)



# UNIFAM MEDIATION TRAINING

## A FRAMEWORK FOR MEDIATION PRACTICE

A four day mediation course incorporating:

- The theoretical aspects of mediation
- Preparing a Mediation session
- Learning the process
- Developing some practical skills
- Ethical considerations for mediation practice

### A FRAMEWORK FOR FAMILY LAW MEDIATION

Designed to build a Mediation Skills training for those wishing to practice in the Family Law area

A three day course incorporating:

- Theoretical background - Families and Separation
- Family Law Legislation and provisions
- Family Mediation Planning sessions
- Family Mediation processes
- Advanced Mediation Skills

### RING UNIFAM'S COLLEGE OF EDUCATION ON

(02) 9891 1628 for further information



## The South Australian Dispute Resolution Association (SADRA)

invites you and other interested persons to attend our  
**PROFESSIONAL EDUCATION FORUMS**  
to be on Monday evenings throughout the year.

Monday 24 September: Deconstructing mediation: a practical approach!

We would encourage you to put the dates in your diary now.  
Details of times and venues will be posted on the SADRA website <http://www.ausdispute.unisa.edu.au/>

**AFMA**  
Australian Family Mediation Association  
Ross House 247 Flinders Lane Melbourne Vic 3000

The Australian Family Mediation Association was launched in Melbourne in February 1999. Our goal is to support, promote and develop the use of family mediation in Australia. Anyone interested in joining or finding out information about AFMA, please contact Dawn Rees –

By Telephone: (H) (03) 9523-6565

By Fax: (03) 9523-6464

By Email:  
[dawnr@vla.vic.gov.au](mailto:dawnr@vla.vic.gov.au)



## NEW SOUTH WALES

LEADR, National Dispute Centre  
Level 4, 233 Macquarie Street,  
Sydney, NSW, 2000  
Tel: 1800 651 650

(02) 9233 2255 Fax: (02) 9232 3024

leadr.com.au

*Lawyers and Mediation Workshops*, 4 day course,

teaches mediation skills and philosophy.

*Refreshers to assist with Accreditation.*

*Advanced Mediation Workshop*

leadr@fl.asn.au

Mediate Today

Contact: Lorraine Djurican

Tel: (02) 9223 2255 Fax: (02) 9223 6058

Relationships Australia

5 Sera Street, Lane Cove, NSW, 2066

Tel: (02) 9418 8800 Fax: (02) 9418 8726

Contact: Louise Roseman Tel: (02) 9327 1222

Mediation Training

Relationships Australia (NSW)

42 Hour Mediation Course (Sydney)

- held on Thursdays 5.30-9.00pm and Saturday 9.30am-5.00pm for 4 weeks
- includes catering and comprehensive handbook
- 16 Week Mediation Course (VETAB Accredited) (Sydney)
- held on Wednesday 12.00-6.00pm for 16 weeks
- includes light refreshments and comprehensive handbook
- Six day Mediation Course (Sydney)
- held on Thursday and Friday for 3 weeks
- includes catering and comprehensive handbook
- Six Day Mediation Course (Wollongong)
- held on Mondays and Tuesdays for 3 weeks
- includes catering and comprehensive handbook

Continuing Mediator Education Program (Sydney)  
Building on Understanding of Family Dynamics/Child Inclusive Mediation Practice  
Assessment for Mediation/Graceful Termination of Mediation

For further information including course Fees contact: David McGuiness

Tel: (02) 9327 1222

The Accord Group

Level 2, 370 Pitt Street, Sydney, 2000

Tel: (02) 9264 9506

Fax: (02) 9264 8268

*Commercial Mediation Training*, 4 day

Course. Also runs in-house courses in conflict resolution and negotiation skills.

Australian Commercial Disputes Centre

Level 6, 50 Park Street, Sydney, 2000

Contact: Linda De Rosa

Tel: (02) 9267 1000

Fax: (02) 9267 3125

Commercial Mediation Course

3 day course, plus optional evaluation day.

Workshop Grievance Mediation Course

3 day course, plus optional evaluation day.

Local Government Planning and Development Mediation Course  
3 day course, plus optional evaluation day.  
Complaint Management Course  
1 day course

Conflict Resolution Network

PO Box 671, Dee Why, NSW, 2099

Contact: Christine James/Jo Buckley

Tel: (02) 9972 3955 Fax: (02) 9972 9620

cmme@bigpond.com

Mediation Skills Training

4 day course

In-house training tailored to your needs.

REFS, see under Victoria

## VICTORIA

A Winning Way, Conflict Management

Centre, Brighton Beach, Victoria

*Monthly-Practise Perfect Mediation Workshops*

- 2 days of coached mediation process practise
- achieving demonstrated competencies to levels of excellence (as recommended by the NADRAC Report to the Commonwealth Attorney-General, April 2001)
- workshops designed to meet the needs of all participants
- small class sizes with experienced and gazetted mediator teachers
- prerequisite - previously completed (or completing) a mediation course
- offered during the first week of each month February to November
- special rates available for low income earners and f/t students

Contact: Vanessa Richardson

Tel: (03) 9598 1443 Fax: (03) 9598 6307

awinningway@ozemail.com.au

Barwon Parent and Youth Mediation Service

Geelong, Victoria

Contact: Steven Smith

Tel: (03) 5223 2966 Fax: (03) 5229 0102

info@byas.asn.au

Professional Mediation Training

3 day course- Mediation available for

parent/adolescent at no cost. Peer

Mediation available to schools.

Council of Adult Education

Centre for Professional and Enrichment Programs

256 Flinders Street, Melbourne, Vic, 3000

Contact: Margaret Jones/ Richard Taylor

Tel: (03) 9652 0629 or (03) 9652 0738

*Mediation an Introduction*, 12 hour course for people in management and human resources fields.

*Dealing with Conflict*, 5 weeknight

course to improve skills and confidence

in conflict management.

Dealing with Anger and Communicating

Across Cultures in the Workplace

Family Mediation Centre

Level 4, 1001 Nepean Highway,

PO Box 2131, Moorabbin, Vic, 3189

Contact: Marie Garric

Tel: (03) 9555 9300 Fax: (03) 9555 1765

family@mediation.com.au

http://www.mediation.com.au

Family Mediation Training Courses.

Mediation Training Levels 1 and 2.

International Conflict Resolution

Centre, University of Melbourne, Carlton

Contact: Ms Helen J Fawkner

Tel: (03) 8344 7035 Fax: (03) 9347 6618

Managing Conflict in Planning Dispute

Resolution and Facilitation Skills for

*Planners*. To be announced.

Mediation by Distance Education

A 40 hour course conducted by the

ICRC and Deakin University. Combined

With a 2 day workshop in practical skills.

Advanced Mediation Skills Enables

participants to refresh skills, further

knowledge about 'difficult'

situations, & current thinking.

www.icrc.psych.unimelb.edu.au/icrc

La Trobe University

School of Law and Legal Studies,

Bundoora, Vic, 3083

Contact: Tom Fisher

Tel: (03) 9479 2423 Fax: (03) 9479 1607

Email: T.Fisher@latrobe.edu.au

Family Law for Mediators

Subject part of Graduate Diploma in Family Law

Relationships Australia

46 Princess Street, Kew

Contact: Ena Shaw

Tel: (03) 9432 3033

pres@rav.org.au

*Introductory Mediation Course*,

two and a half day course includes

the effects of separation on children.

*Intermediate Mediation Course*,

3 day course includes cultural issues

and intake procedures.

www.relationships.com.au

REFS Mediation and Conflict

Resolution Training

*Part A*. An introduction to the process and principles of mediation, using the REFS co-mediation model. Develops an understanding of the use of mediation as an early intervention strategy in conflict.

*Part B*. Assists mediators to develop negotiation skills, handle common problems, overcome barriers in mediation, and introduce participants to other models and Conflict Resolution.

*Part A and B combined* comprise a Nationally Accredited Short Course in Mediation and Conflict Resolution.

Training will be offered in the New England Region (NSW), Queensland, SA, Tasmania, and Vic. Dates available on website.

Training is also offered on a consultancy basis. REFS delivers peer mediation and association programs in schools.

Other training available on request.

Contact: Michael White, Training Co-ord.

Tel: (03) 9877 7261 Fax: (03) 9877 5084

Email: refrain@refs.asn.au

www.refs.asn.au



## COURSES & TRAINING

### QUEENSLAND

Alternative Dispute Resolution  
Branch, Dept. of Justice GPO Box 149,  
Brisbane, QLD, 4001 Tel: (07) 3239 6277  
Fax: (07) 3239 6284 *Mediation Skills  
Course*, 5 day introductory course for people  
wishing to gain a basic understanding of  
mediation process and essential skills.

Relationships Australia  
159 St. Paul's Terrace, Spring Hill, QLD, 4000  
*Diploma of Mediation (Co-Mediation)*  
Contact: John Cleary Tel: (07) 3831 2005  
Fax: (07) 3839 4194 sh@relateqld.asn.au

Master of Dispute Resolution  
www.bond.edu.au/law/index.htm  
email: law@bond.edu.au. Dispute Resolution  
Centre, Bond University, Gold Coast,  
QLD 4229. Tel: (07) 5595 2039 Fax:  
(07) 5595 2036 Email: drc@bond.edu.au  
3-day Basic Mediation Course  
4-day Advanced Mediation Course

### SOUTH AUSTRALIA

Dale Bagshaw, Director, Conflict Management  
Research Group, School of Social Work &  
Social Policy, University of South Australia  
St Bernard's Road, Magill, South Australia 5072  
Tel: 61 8 8302 4375/8, Mob: 0413 536 136  
Fax: 61 8 8302 4377 email: dale.bagshaw  
@unisa.edu.au Personal website address:  
[http://www.unisanet.unisa.edu.au/staff/  
Homepage.asp?Name=Dale.Bagshaw](http://www.unisanet.unisa.edu.au/staff/Homepage.asp?Name=Dale.Bagshaw)  
Conflict Management Research Group  
website address: [http://www.humanities.unisa.  
edu.au/cmrg/](http://www.humanities.unisa.edu.au/cmrg/) The Australian Dispute  
Resolution Directory website address:  
<http://www.ausdispute.unisa.edu.au>  
Program Director: Master of Social Work;  
Master of Conflict Management; Graduate  
Diploma in Conflict Management; Graduate  
Certificate in Mediation. Program information  
and course outlines available on the following  
website: [http://www.unisa.edu.au/discipline/  
eas.htm](http://www.unisa.edu.au/discipline/eas.htm). Visit our special Culture of Peace  
News Media Network (CPNN) website.  
CPNN is a global website established in  
partnership with the International Conflict  
Resolution Centre at The University of  
Melbourne and UNESCO for the year of  
Culture and Peace: <http://www.peacekeys.com.au>

### TASMANIA

Positive Solutions formerly trading as  
Community Mediation Service Tasmania  
11 Liverpool Street, Hobart, Tas 7000  
Contact: Lyn Newitt or Megan Kube  
Tel: (03) 6231 1301 Fax: (03) 6231 1969  
Email: manager@positivesolutions.com.au  
www.positivesolutions.com.au. A Registered  
Training Organisation, offering nationally  
accredited courses in: Mediation Skills &  
Conflict Management. (12726 QLD) 5 day  
course plus 2 day skills audit. *Dealing With  
Conflict* (NCS 005) *Negotiation Skills* (NCS 009)  
Other courses available are: *Family & Child  
Mediation*, a 6 day course.  
Tailored courses to meet your needs.  
• Negotiation Skills (NCS 009)  
Other courses are provided:  
• A 6 day Family & Child Mediation course  
• Tailored courses to meet your needs.



## UNIVERSITY CERTIFICATES DIPLOMA, DEGREES

### NEW SOUTH WALES

#### Southern Cross University

Bachelor of Social Science with Counselling and Mediation Studies Major  
Bachelor of Legal Studies

#### University of Western Sydney

Graduate Certificate in Commercial Dispute Resolution

#### University Of Technology

Faculty of Law, Post Graduate Studies  
Graduate Certificate in Dispute Resolution  
Master of Dispute Resolution

#### Macquarie University

Graduate School of Management  
Post Graduate Diploma in Conflict Management  
Macquarie University School of Law also offers various courses

#### Charles Sturt University

Graduate Certificate in Dispute Resolution (by Distance Education)  
<http://www.csu.edu.au>

### SOUTH AUSTRALIA

#### University of South Australia

Division of Education, Arts and Social Sciences  
Graduate Certificate in Mediation (Family)  
Graduate Diploma in Conflict Management  
Master of Conflict Management

### VICTORIA

#### La Trobe University

School of Law and Legal Studies  
Graduate Diploma in Family Law Mediation  
Graduate Diploma in Conflict Resolution  
Graduate Certificate in Conflict Resolution

### QUEENSLAND

#### The University of Queensland

(T C Beirne School of Law)  
Graduate Certificate in Applied Law

email: t.booth@mailbox.uq.edu.au

www: <http://www.uq.edu.au/law/>

## SADRA Committee

### *Chairperson*

Natalie Fuller email: naf@senet.com.au

### *Secretary*

Melana Virgo  
Melana.Virgo@courts.sa.gov.au

### *Treasurer*

Rod Foster  
email: samwise@ozemail.com.au

### *Newsletter Editor*

Rosemary Thompson  
tompa@box.net.au

### *Committee*

David Baker 0418 891 807  
email: david.baker@unisa.edu.au  
Dale Bagshaw (08) 8302 4375  
email: dale.bagshaw@unisa.edu.au  
John Connell (08) 8223 4566  
email: bigjack@picknowl.com.au

Associate Professor Kathy Mack  
(08) 8201 3627  
email: Kathy.Mack@flinders.edu.au

Franca Petrone (08) 8201 3737  
email: Franca.Petrone@flinders.edu.au

## VADR Committee and Office Bearers

### *President*

Eileen Dethridge  
Ph/Fax: (03) 9486 4398

### *Vice President*

Robin Saunders

### *Treasurer*

Jane Picton

### *Secretary*

Robin Rankin

### *Newsletter*

Sandy Cahir cscahir@alphalink.com.au

### *Committee*

Ray Campagna  
Elvira Jensen  
Jock Noble  
Vanessa Richardson  
Michael White  
Lorraine Stabey

ADRA, VADR and SADRA accept no responsibility for the accuracy of material printed. Views expressed do not necessarily reflect those of the Associations. Material may be copied from the newsletter if acknowledgement is made.

## ADRA Board of Management

### *President*

David Holst (holst@mediate.com.au)

### *Deputy President*

Allan Parker

### *Secretary*

Ursula Schiappi

### *Treasurer*

Val Sinclair

### *Membership Secretary*

Salli Browning

### *Newsletter Editor*

Marilyn Scott (m.scott@law.uts.edu.au)

### *Committee*

Ruth Charlton  
Eddie De Sousa  
Ian McKendry  
Tania Sourdin  
Louise Rosemann

ADRAQ

### Deadline for Articles for Next Issue of Mediation News

The deadline for articles for the next issue of *Mediation News* is 28 February 2002.

Please send articles, letters, news items, book reviews (preferably on disk), to:

*Mediation News*, C/- Sandy Cahir,  
Email: cscahir@alphalink.com.au

# MediationNews

A Joint Project of  
Australian Dispute Resolution Association Inc. (ADRA)  
South Australian Dispute Resolution Association (SADRA)  
Victorian Association for Dispute Resolution (VADR)

Design, Layout and Print Management – Inprint Design, Bedford Park, South Australia, Phone: (08) 8201 3223 fax: (08) 8201 3238 email: Lee-anne@inprint.com.au

Mediation News  
Print Post Approved  
PP255003/01474

If undelivered,  
please return to:  
Mediation News  
c/o Inprint  
GPO Box 2100  
ADELAIDE SA 5001



SURFACE  
MAIL

POSTAGE  
PAID  
AUSTRALIA