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BOND UNIVERSITY
Dispute Resolution Centre

BOND DISPUTE RESOLUTION NEWS

Volume 18 · October 2004

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Recent Activities of Bond University Dispute Resolution Centre
Recent and Forthcoming Publications
Forthcoming Courses of Bond Dispute Resolution Centre
Common Hurdles to Settlement
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Thoughts & Themes
Bonding to Bond

Recent Activities of Bond University Dispute Resolution Centre

29-31 July 2004

Basic Mediation Course Marriott Resort, Surfers Paradise, presenters, John Wade, Laurence Boulle and Pat Cavanagh – click for feedback

23-26 September 2004

Advanced Mediation Course Sheraton Noosa Resort, presenters, John Wade and Laurence Boulle

15-17 October 2004

Basic Mediation Course with Laurence Boulle for Leo Cussen Institute, Melbourne, presenters, John Wade and Laurence Boulle

On-Line Mediation

Students at Bond University and Göthenburg University Sweden have been jointly undertaking a subject *Technological Innovations and the Law* involving a joint intellectual capital management venture. The course is coordinated by Associate Professor William Van Caenegem at Bond. As part of the course the students engage in an on-line mediation conducted by Professor Laurence Boulle using the platform of a UK commercial service provider, The Mediation Room (https://www.themediationroom.com/).

LAURENCE BOULLE

May Semester	Conducted LLM course in Mediation.
30 June-2 July	Gave key-note address at 7th National Mediation Conference, Darwin, Northern Territory and co-facilitated plenary discuss on mediator accreditation. Also performed in conference play – *Australian Mediation – The Play.*
5-6 July	Acted as one of the rapporteurs at the 3rd Annual UN Forum on Online Dispute Resolution.
September Semester	Conducted LLB ADR mediation course.
14 September	Gave two presentations on family law mediation to clients of Gold Coast law firm Shane Ellis.
23 September	Spoke to the Family Law Council at its Gold Coast meeting on developments in standards in family law PDR.
28-29 October	Attended members meeting of National Native Title Tribunal in Perth.

JOHN WADE

24-28 May	5 day mediation course at Pepperdine Law School.
2 June	Workshop at CEDR, London on Negotiation.
3 June	Workshop on mediation for Solicitors Family Law Association, London.
7 July	Negotiation workshop, Blakes, Perth.
8 July	Negotiation workshop Western Australia Law Society, Perth.
9-10 July	Advanced mediation workshop, Legal Aid, Perth, with Mieke Brandon.
22 July	Negotiation workshop, Blakes, Brisbane.
13 August	Meeting with mediators Woody Mosten and Mary Lund in Los Angeles.
16-20 August	Mediation course, SMU, Dallas Texas.
18 August	Evening lecture for Texas South Western Mediation Association on “The Last Gap in Negotiations”.
23-27 August	5 day Advanced Negotiation course, SMU, Dallas Texas.
30 September	Chair, 11th National Family Law Convention, Gold Coast “The Future of Family Law”.

BEE CHEN GOH

24 September	Delivered seminar on ‘Peace Research: Designing a new curriculum for International Law for Contemporary Needs’ for the International Law Group, Canterbury Law School, Christchurch, New Zealand.
5-6 November	Paper presentation on ‘Ideas of Peace and Cross-cultural Dispute Resolution' at the Conference on 'Exploring New Perspectives in Dispute Resolution Research ', Institute of Asian Research, University of British Columbia, Vancouver, Canada.

BOBETTE WOLSKI

18-20 March; 20-22 May;17-19 June	Three Evidence and Trial Advocacy short courses delivered to the Office of the Director of Public Prosecutions Queensland.
26-30 May	Conference paper titled “Teaching and Learning Skills” delivered at American Law

	School Association Conference, Hawaii.
2-7 July	Attendance at American Trial Lawyers Convention Boston.
17 July	Conference paper titled "Making Complaints Good for Business" delivered at the Business Educators' Association of Queensland 2004 Conference, Brisbane.
26-29 August	Teaching of Dispute Systems Design Postgraduate Intensive at University of Queensland.

PAT CAVANAGH

July	Co-presenter at University of Queensland Conciliation workshop held for Residential Tenancy Authority Queensland.
	Guest lecturer at University of Queensland Negotiation workshop.
September	Principal Presenter at Seminar for Financial Advisers on Common Mistakes of Negotiators in Corporate Debt Restructuring held in Jakarta, Indonesia.
	Presented one-day seminar to Hammonds solicitors, London, on Commercial Negotiation Strategies
	Presented one-day seminar to CEDR London on Advanced Commercial Negotiation Skills
	Presented five-day Advanced Commercial Negotiation for Bond University, Gold Coast.
October	Launch of In-House Negotiation Seminar and Workshop programmes in Australia, Hong Kong and U.K.

Recent and Forthcoming Publications

Wade J, "Dueling Experts in Mediation and Negotiation: How to Respond When Eager Expensive Entrenched Expert Egos Escalate Enmity" (2004) 21 *Conflict Res Q 419-436.*

Wade J, "Representing Clients Effectively in Negotiation and Mediation" (2004) *Australian Journal of Family Law* (forthcoming).

Boulle L, "Judicial Policies on Mediation and ADR: Australian Trends" Vol 15, No 7 July 2004 *World Arbitration & Mediation Report* p 194.

Boulle L, ADR Bulletin Vol 7 No 2, Book Review of Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook – Skills and Strategies* (2nd ed, 2004), Law Book Co, Sydney.

Boulle L, produced three issues of the *ADR Bulletin* published by Richmond Press.

DVD ON SALE

FLETCHER'S PARTNERSHIP DISPUTE

This DVD models segments of a role play of a problem-solving or "facilitative" mediation between two partners in an accounting firm. The two partners involved are in dispute about the value of their respective jobs, about tradition versus modernity, use of staff time, and the types of clients they should attract to their business.

The DVD is divided into eight abbreviated stages of the "problem-solving" mediation. The whole process can be viewed at once (30 minutes); or individual segments can be watched and discussed.

Viewing excerpts –

Dial up users click here to download

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Fill in the order form below and send to:

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Forthcoming Courses of the Dispute Resolution Centre

Bond University Short Courses				
2-4 December 2004	Marriott Resort, Surfers Paradise	Short course – 3 days	Basic Mediation Course* Download Registration Form	Boulle, Wade
DRAFT 2005 dates				
21-23 April 2005	Marriott Resort, Surfers Paradise	Short course – 3 days	Basic Mediation Course*	Wade
28-30 July 2005	Marriott, Brisbane	Short course – 3 days	Basic Mediation Course*	Boulle, Wade
22-25 September 2005	Sheraton, Noosa	Short course – 4 days	Advanced Mediation Course	Wade
14-16 October 2005	Melbourne	Short course – 3 days	Basic Mediation Course, in conjunction with Leo Cussen Institute. Phone 03 96023111 email: lpd@leocussen.vic.edu.au	Boulle, Wade
1-3 December 2005	Marriott, Surfers Paradise	Short course – 3 days	Basic Mediation Course*	Boulle, Wade
* This course also has a Family Mediation stream, run in conjunction with AIFLAM (Australian Institute of Family Law Arbitrators and Mediators)				

IN-HOUSE NEGOTIATION TRAINING
For details of popular individual course outlines on Negotiation see http://www.bond.edu.au/law/centres/drc/courses/index.htm

Common Hurdles to Settlement at Mediation

At the recent Advanced Mediation Course at Noosa in September 2004, the Bond team continued the tradition of requiring each of the participants (31 at this course) to complete a detailed "Mediator's Questionnaire". The accumulated answers provide many insights into life as a mediator.

For example, one question is: "*What behaviours/beliefs/emotions do you see jamming negotiations/mediation?*"

Here are the most common hurdles as specified in the survey form:

		Never	Occasionally	Often
(a)	A lawyer who has given wildly optimistic advice?		**15**	**10**
(b)	Lawyers who themselves have become antagonistic/emotionally involved?	**2**	**12**	**9**
(c)	A client(s) who is not listening to his/her own lawyer	**1**	**17**	**6**
(d)	Poor summary and preparation of facts, BATNAS, offers, issues, transaction costs etc		**17**	**8**
(e)	Concentration on legal questions and missing commercial interests	**2**	**14**	**7**
(f)	Uncertainty of legal rules and the shadow of the law	**1**	**21**	**3**
(g)	Rollercoaster of emotion		**9**	**17**
(h)	"Entrapment" – disputants have invested too much in the conflict	**1**	**14**	**11**

The participants added in their own words, the following commonly experienced hurdles (based of course on their own perceptions):

1. Using mediation as a means of "getting back" at client.
2. Third parties –relatives in the background.
3. Using mediation to achieve goals not possible in court.
4. Lawyers talking; smirking; cross-examining.
5. Attachment of parties to *details*.
6. People with no legal advice; or bush lawyers.
7. Married couples with *negative* net worth.
8. Not ready to mediate; too early in the process.
9. Parties in an actual or perceived *strong bargaining* position (ie "won't budge").

10. Persistent belief in the *evil* of other side.
11. Different *stages* of *grief*.
12. One party wanting to *punish* the other via litigation.
13. “I want to talk to outsider …”.
14. Insurers who want to stall/pay little/wear out the applicant.
15. Too early – disorganised *information*.
16. Fear of settling because settlement would lead to a precedent/floodgate.
17. “It’s a matter of principle” speech.

Links and Interesting Reports

"Erosion of Legal Representation in the Australian Justice System" (83pp plus Appendices) link **www.lawcouncil.asn.au**.

This is one of a series of reports in Australia and elsewhere commenting upon the increase in number of LIPS (litigants in person in Australia – "pro se" in USA); the diminution of Legal Aid in Australia; the increase of pressure on judicial officers, and the costs of litigation; and the exodus of experienced lawyers from serving the poor.

It seems clear that the traditional models of organised advocacy are not suited to disorganised and emotional pro se clients; who owe no ethical or "repeat-player" duties to courts; and who have few other avenues of redress other than to wear out the already harassed judiciary, with pleas for help. (Luke Chapter 18, verses 1–5) Additionally, the under-resourced litigation system relies heavily on lawyers to settle over 90% of claims filed.

Thoughts and Themes

Weaknesses of the Problem-Solving (or Facilitative) Model of Mediation

(All models of "helping" having strengths and weaknesses – see G Egan *The Skilled Helper*)

The writer as mediator has used a problem-solving model of mediation on most occasions for 17 years. However, all models of "helping" overlap and have both strengths and weaknesses. (See G. Egan *The Skilled Helper* (California: Brooks/Cole, 1994); see the notable absence of a list of weaknesses of various "transformative" models of mediation in R.A. Bush and S.G. Pope, "Transformative Mediation", Ch 3 of *Divorce and Family Mediation* eds J. Folberg, A.L. Milne, P. Salem (NY:Guilford, 2004)).

It is a useful exercise to reduce client and self-deception to be able to specify some of the weaknesses of every, and especially of a favoured, mediation model.

For *general* diagnostic weaknesses of negotiation and all forms of mediation for the disputants, see J Wade "Don't Waste My Time on Negotiation or Mediation; This Case Needs a Judge" (2001) 18 *Mediation Q* 259; and for society, see D. Luban, "Settlements and the Erosion of the Public Realm" (1995) 83 *Georgetown L.J.* 2619.

Here then are some of the potential weaknesses of problem-solving, or facilitative models of mediation:

1. Problem-solving needs some analytical skills – how useful for highly emotional or non-analytical people?
2. Problem-solving analyses are difficult for people who are feeling overwhelmed or intimidated. Some degree of assertiveness is necessary by a person, representative or tribal member.
3. Problem-solving requires a person to be articulate – to what extent is it a "middle/upper-class" model?
4. Problem-solving involves time, information and transaction costs.
5. Problem-solving works on assumptions that humans know what is "good" for us; and how to achieve those "good" goals and needs. These assumptions are clearly false for some people most of the time; and for all people some of the time.
6. Problem-solving still requires reasonably accurate (expensive and often elusive) information or guesses about "rights", the various forms of "power", and "market rates". Wise decisions require some knowledge of alternatives or fall-back outcomes.

7. Some busy or budget-conscious clients want one stop shopping – process/respect/communication **and** information and advice.

8. Problem-solving encourages some people with weak "rights" and "power" to talk endlessly in the hope of creating sunk costs and concessions. (Such tactics may need responses of expert advice, case appraisal, market forces, or judicial decision).

9. Problem-solving requires counter-intuitive skills. There is a shortage of skilled problem-solving mediators available.

10. The labels of "facilitative" or "problem-solving" (or "transformative") are misleading as the actual practice is advice-giving "settlement" or "evaluative".

11. Some problem-solving mediators are over-regulated, over-legislated, rigid and indoctrinated with their learned model (eg in parts of UK). This is unhelpful as flexibility is needed.

12. Problem-solving negotiation or mediation usually involves four key hurdles (unless done with great skill – see Pruitt and Kim *Social Conflict* 2003):

    - loss of *information* ("We need information swaps to make wise offers and decisions. But you may use this information 'against' us")
    - loss of *image* ("I need to preserve my image as a ruthless positional negotiator, as I make money from that image in many future transactions")
    - loss of *position* ("Merely by being open to problem solving, I convey the coded message that I am willing to shift off my last position")
    - *counter-intuitive* skills such as patience, listening, acknowledging, reframing, summarising and packaging ("I do not want to sit around and hold hands with a bunch of difficult people")

13. Even a highly competent problem-solving mediator will remain unemployed if waiting for referrals from repeat users (eg some lawyers and insurance adjusters), who have never sat in upon and experienced a successful problem-solving mediation. These repeat clients have their own complex reasons for preferring evaluative or hybrid mediators.

J H Wade
September, 2004

CURRENT TRENDS IN DISPUTE RESOLUTION IN AUSTRALIA*

Professor John Wade

Director, Dispute Resolution Centre, Bond University

This article provides a helicopter view of some trends in dispute resolution in Australia, with random references to other jurisdictions. Thereby policy planners and practitioners who are dealing with conflict in the area of residential tenancies (or anywhere else) may be able to: locate their organisation and personal lives on the global map; feel normal; discover colleagues and fellow travellers who are attempting to manage conflict, proactively or reactively; anticipate future challenges; and develop options for responding to those future challenges. The article highlights the pressures on managers and practitioners to deliver effective services and examines not only the variety of dispute resolution services available, but also the practice computations within each service. It includes a diagnosis of the factors that service providers should consider, including accountability, legislative impact and how issues of cost, competition and practitioner-comfort might impact on quality, methods of practice and user satisfaction.

Epidemic of Regulation and Conflict?

As the planet decreases in size, social interaction increases. We cannot retreat so readily to our isolated valleys. This leads to an increased amount of national and international contact, and of formal regulation of those contacts. Even if "lawyers" are abolished, there are ongoing job opportunities for lawyers, renamed as regulators/planners/wordsmiths/interpreters/dispute managers.

The pace of life and of change means that:

(a) regulations and "laws" are drafted hastily (sloppily?) and in bulk;

(b) there are growing groups of lobbyists attempting to influence proposed regulations, or the next round of amended regulations;

(c) more interpreters, educators and commentators on the complex and new (ephermeral?) regulations are needed;

(d) specialist advocates, go-betweens and umpires are needed to argue over the actual interpretation of the new regulations in particular cases.

Many of these regulations are:

* A version of this article entitled "Current Trends and Models in Dispute Resolution and Possible Implications for Residential Tenancies" was delivered at the Third Australian Conference of Tenancy Tribunals and Associated Bodies on 29-31 August 1997.

(a) *drawing lines* - am I "in" or "out" of privileged categories? (for example, citizenship; refugee; worker's compensation; pension; child support; housing; driving licence; liquor licence; a nursing home);

(b) if I am "in" the necessary category, assessing quantum of payment;

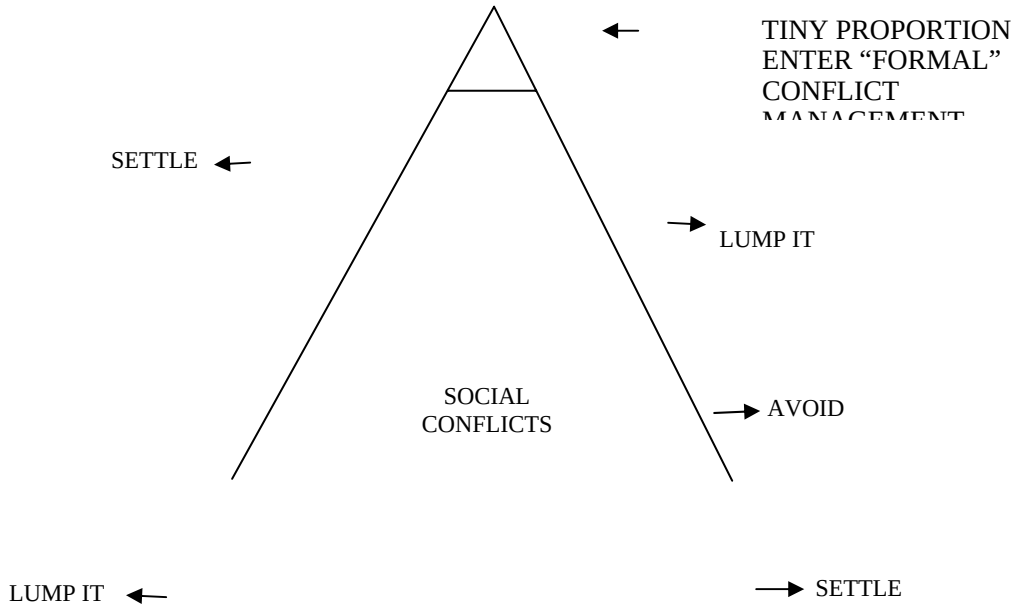
(c) specifying process for drawing lines and assessing quantum.

Economic Pressures: More for Less

One catch-cry post 1990 has been "more for less". Conflict managers such as judges, mediators, conciliators, counsellors, negotiators and lawyers are under constant pressure to provide more (fair, fast and informal) services for less money. Like health services, there is taxpayer and consumer influence to cut down Rolls Royce service and "treat" more people with Volkswagen, accountable, quality-assured services.

There are millions of conflicts in Australian society each year (a conflict being an actual or perceived divergence or competition of interests). Most of these are dealt with by "lumping" (that is, putting up with the problem someone gives in) or "avoidance" (don't discuss the problem) or negotiated settlement. A tiny proportion of conflicts enters into a "formal system" where a skilled helper tries to assist (see Figure 1).

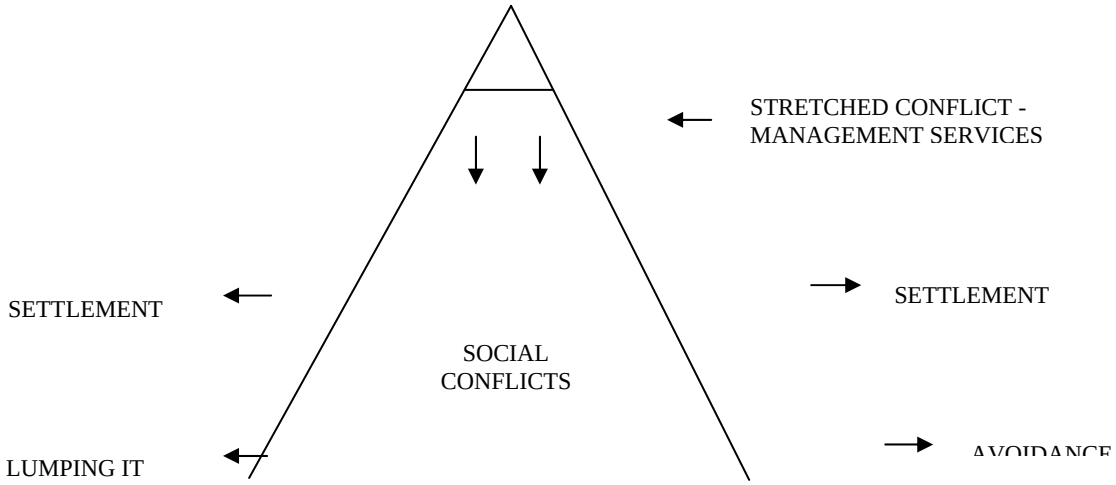
Figure 1 - Pyramid of Conflict I



Managers, customers and taxpayers are constantly attempting (with diminishing funds) to stretch the formal services further down the pyramid to "pick up" several thousand more conflicts each year, thereby giving at least some basic budget services to more citizens (see Figure 2). This pressure leads inevitably to low-cost, generalist tribunals, on-the-papers arbitrations, and mandatory, time-restricted mediations or

hearings. Additionally, traditional courts erect an increasing number of hurdles before disputants can even gain access to these expensive services. This drift leads to the widespread critique that "second-class" justice and dispute resolution systems are all that is available to the middle class and poor in Australia. There is persistent tension over whether the provision of new (cheap?) dispute resolution services, especially "mediation", is primarily aimed to reduce costs and queues to other, more expensive services (for example, reduce court backlogs), OR provide a satisfactory service to disputants.

Figure 2 - Pyramid of Conflict II



Stress and Burnout

Following from the previous point, conflict managers (like managers in many other occupations) are finding their work exhausting and stressful. Repeated studies, particularly of mediators, find that some are burned-out from dealing with high numbers of conflicted people each day, being paid poorly, and having quotas and "success" rates to fulfil.

Judges, tribunal members and child support officers likewise frequently report that case management, strict time limits for hearings, constant change of rules, lack of administrative support, political attacks, client distress and unprepared clients acting without any professional assistance are making their occupations exhausting.

Consumer Pressure

Partly due to high education levels, constant publicity about conflict, and a few time-rich, articulate and alienated conflict junkies, consumers of conflict management services band together in special interest groups to ask for better services (for example, groups of tenants, students, patients, men, women, children, parents, drivers, footballers, mental health workers, ratepayers, environmentalists, farmers, customers of banks, taxpayers and grey power advocates).

Predictably, these groups push for free or low-cost dispute resolution services which are "fair, speedy and informal". Parliamentarians can be worn down by these persistent lobby groups - but equally they are rarely willing to commit consistent funding and training necessary to provide "fair, speedy and informal" dispute resolution systems. There are few votes in such services.

Developing and Cataloguing Different Services

Like packets of breakfast cereal, there is a large number of different products in the dispute resolution supermarket. Most people are unaware of this breathtaking variety.

In Australia, certain dispute resolution models have not even been pioneered (for example, arb-med).

Dispute resolution services conceptually available include:

- arbitration of the papers
- arbitration
- investigative tribunals
- traditional judicial decision-makers
- time-limited judicial decision-makers
- specialist or non-specialist decision-makers
- early neutral evaluation
- various models of mediation or conciliation
- issue mediation
- range mediation
- med-arb
- telephone mediation
- baseball or best offer arbitration
- education and advice centres, videos, books, workshops self-help videos and books
- multiple models of "counselling" or therapy.

A client cannot use or be referred to the "right" process when the range of new processes is not even known to specialists, let alone to the public. A doctor obviously cannot refer a client to psychotherapy, physiotherapy, a gym, surgery, chemotherapy or a respite centre until (a) she knows about these alternatives and (b) has some confidence in the quality of these services.

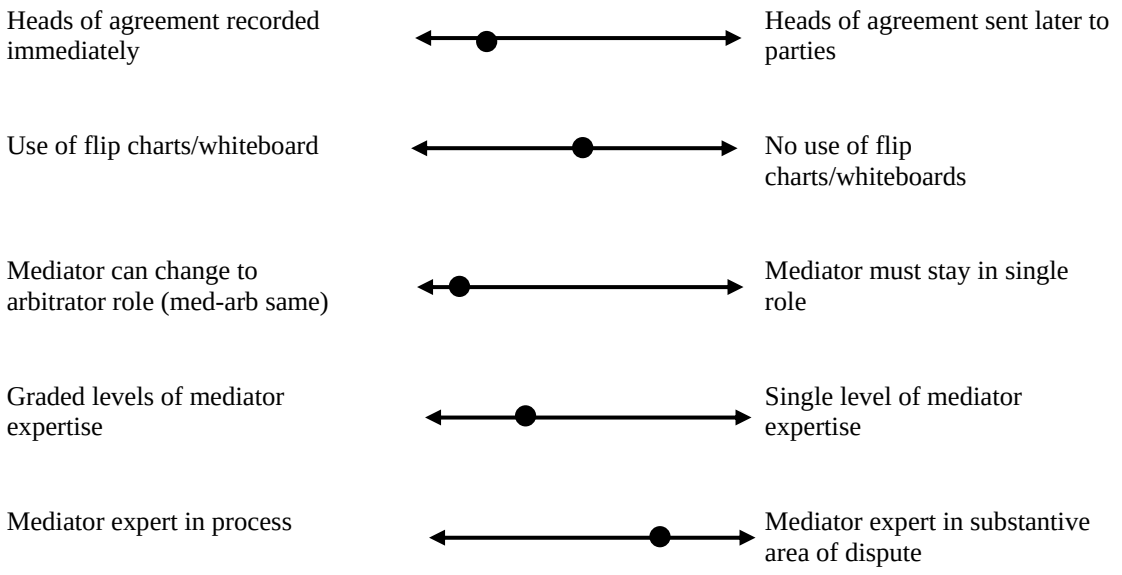
For example, it is a poor judgment to send a client to "counselling" or "mediation" when there are probably at 400 *different conceptual models* of counselling, and at least 20 different conceptual models of mediation. Of course, conceptual models then vary with the style and personality of the provider.

Figures 3, 4 and 5 set out three visual models which show how a "mediation" can be structured in a variety of different ways, and how many varieties there are in an "arbitral" or case appraisal hearing. The bead on each abacus can be moved to adapt the service for all or some clients. (These abacus models were developed at the Bond University Dispute Resolution Centre and by Sue Gribben for teaching mediation, case appraisal and arbitration courses.)

Figure 3 - The Mediation Abacus (or "Mediation" has many meanings)

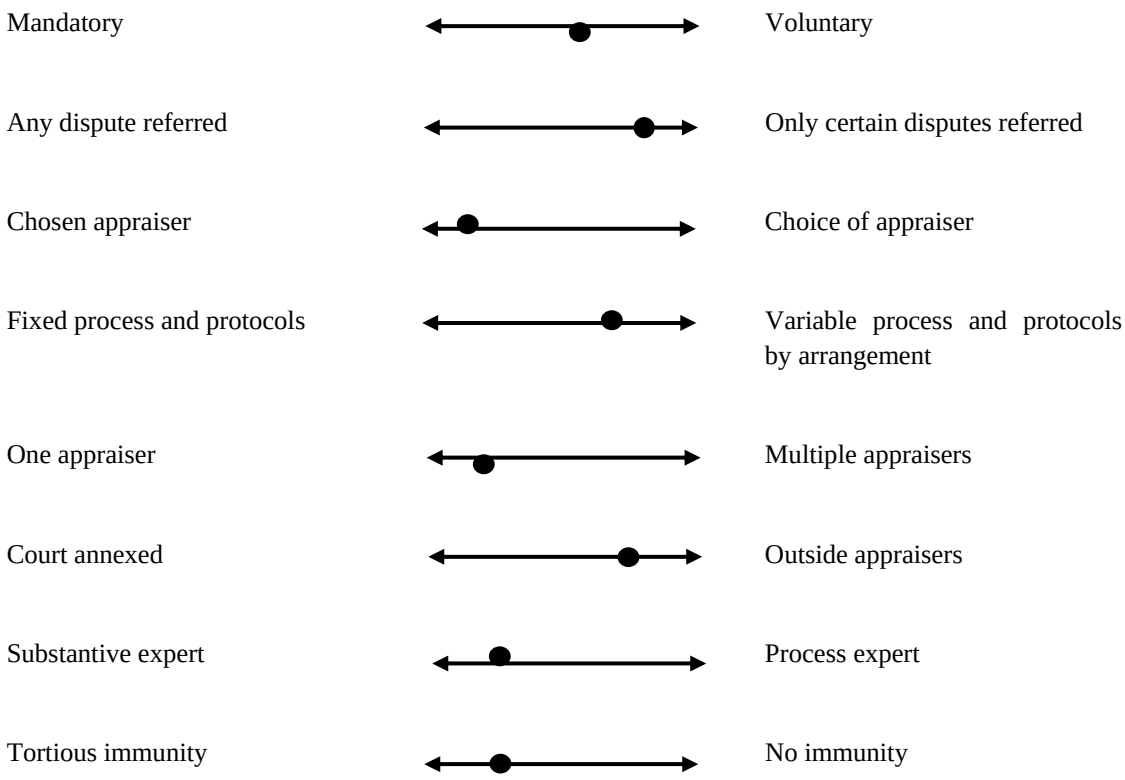
Therapeutic ←●→ Non-Therapeutic

Co-facilitator	Sole Facilitator
Same gender	Different gender
Same professional orientation	Different professional orientation
Variable physical settings and protocols	Fixed physical settings and protocol
No intake process with individuals	Lengthy intake process
Separate intake worker	Mediator and intake worker are the same
No intake contact/documentation	Lengthy intake contact/documentation
No lawyers present	Lawyers necessarily present
Cooling off	No cooling off
No solutions suggested	Solutions suggested
Without prejudice meetings	Signed detailed agreements
Multiple meetings	Single meetings
No compulsion	Strong compulsion to attend
Private meetings during process (caucus)	No private meetings during process
Two party dispute	Multi party dispute
Totally confidential	Not confidential
All kinds of conflict dealt with	Certain kinds of conflict dealt with



Some factors which influence the above variables are cost; time available to parties; time available to mediator; degree of hostility; wishes of parties; educational levels of parties; inequality of bargaining power; facilities accessible to mediators; training of mediators; and ideological commitment to a theoretical framework.

Figure 4 – Case Appraisal Abacus



Strong emphasis on due process		Minimal due process
Formal evidentiary rules		No formal evidentiary rules
Hybrid/Mediation		Pure Appraisal
Fixed time		Open time
Personal presence of disputants		Experts plus disputants
Intake meeting		No intake meeting
Specified documentation		Random or no documentation
Documents only		Documentation, submissions and testimony
Tick-a-box forms		Lengthy technical pleadings
No cross-examination		Unlimited cross-examination
Venue fixed		Venue negotiated
Extensive powers to subpoena		No power to subpoena
Taxpayer pays		User pays
Always have separate sessions		Never have separate sessions
No transcript		Transcript of whole proceedings
Precise figure		Range
Must specify number		Evaluates merits generally
No reasons given for evaluation		Detailed written reasons given

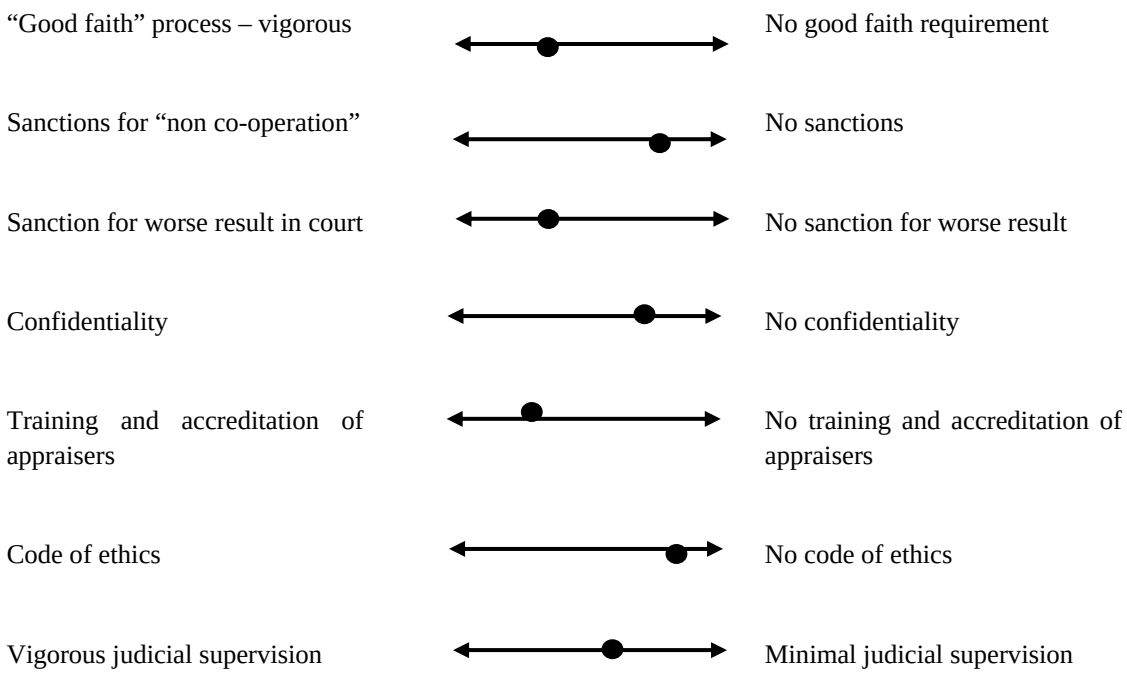
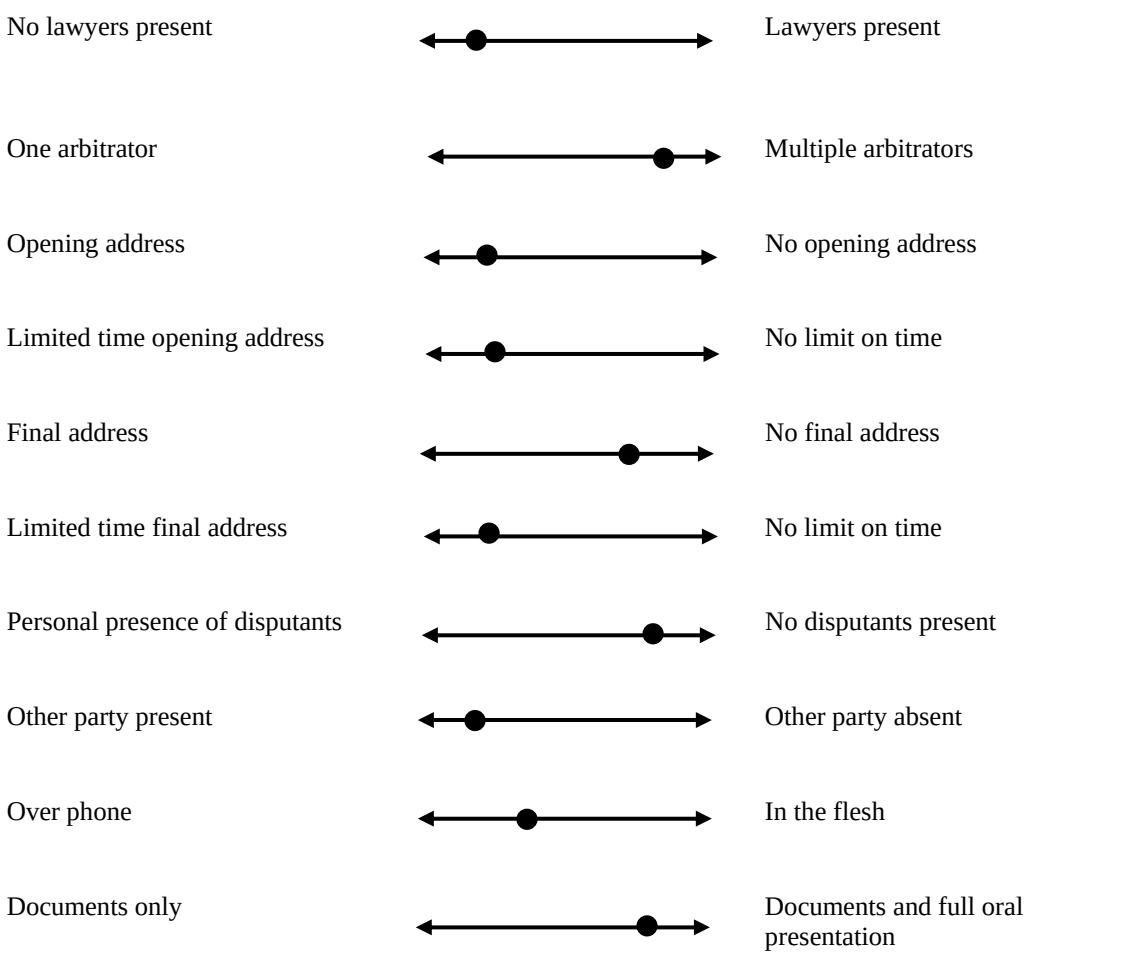


Figure 5 – The Arbitration Abacus



Strict time limit		Flexible time limit
Record of proceedings maintained		No record of proceedings maintained
Minimum cross examination		Detailed cross examination
Limited number of witnesses		No limit on witnesses
Limited number of expert witnesses		No limit on number
No discovery		Limited discovery
No discovery		Full discovery
Tick-a box-forms		Technical pleadings
Limit on pages submitted		Technical pleadings
Oral evidence permitted		No oral evidence permitted
Affidavit evidence permitted		No affidavit evidence permitted
Money security required		No security required
Limited issue arbitration		Complete arbitration
Range arbitration		Complete arbitration
Mediation before arbitration		Arbitration before mediation
Standard off-the-shelf agreement		Custom-built agreement
Comprehensive preliminary meeting(s)		No preliminary meeting

One Adjusted Abacus Model for Residential Tenancies Conciliation/Mediation

A mix-and-match telephone mediation model for residential tenancies' intake officers and conciliators was devised in early 1997. The model process is accompanied by possible standard comments by the facilitator.

Table 1 - Telephone Shuttle Conciliation Process

Party - A **Phone Call** (Tend to telephone *claimant* first)	**Possible Language**
1. *Introduce yourself*	
2. *Time* (is this suitable, quiet place?)	
3. *My job*	"My role is as a Dispute Resolution Officer. .."
4. "Are you aware there is a disagreement about " 16 Smith Street (or claim) ...?" • Reduce shock • Identify property	"Have you spoken to x about this?" "May I suggest that x telephone you direct?"
5. *Accredit oneself* (number of disputes per month ...; % choose to agree on something quickly ...)	"My role is to try to sort this out quickly ...; to assist you to make choices . . .; to help you sort this out"
6. *Pad and pen*	"Could you grab a pen and paper to scribble out some notes"; "I'll be taking a few notes too"
7. *Products available* • Shuttle telephone negotiation • Teleconference • Face to face negotiation • Small Claims Tribunal (SCT)	
8. Confidentiality	"Before we start, can I emphasise that if there is anything you do *not* want me to mention to x, you should say so before I telephone x, okay?"
9. Can you tell me *data* (background) and *concerns?*	"I only have a thin file dropped on my desk. Help me to understand what this is all about. . ."
10. *Summarise list of concerns*	"So am I correct?... You have four things…" "Anything else?".
11. *Prioritise*	"Out of this list, which is most important for you?

12. *Any possible easy agreements?* • List	"Apart from the differences between you, are there any rays of light…?"
13. I will telephone other person: • "With your permission, I will let them know how you feel; see the problems" • "I will see if a quick negotiation/solution is possible" • "In my experience, it is helpful …"	• "In my experience, it is always worth telephoning the other person to see what can be done. .." • "Is it worth me telephoning ...?" • "I have to call the other person . . ," • "Most people are interested in exploring a quick solution, rather than this dragging out for months"
14. Package offer? (Authority to settle) • "Would you be willing to package an offer and I will carry this as a messenger?" • Write out offer and summarise - "Is this correct ...?"	• "To what extent are you *authorised to* make offers?" • "What if ..." • "My experience of magistrates is that claims are often split; busy *(create doubt)* • "Looking for an outcome you can each live with" • "This is very important to you, but to a magistrate (s)he's heard it all before" - "a standard carpet dispute". • "In my experience, an offer worded like that will create a Mexican standoff (stalemate); would it be wiser to …?" • "Would you be prepared to make any movement …?" • "Is there any flexibility..."
15. *Logistics* • "Would you like to think about this overnight?" • "When you are available ... ?" • "This is my time frame, 3 days, and then I drop out and refer you on to the next step"	
16. *Party B* Repeat Stages 1-12	
17. *Make offer to one party over the phone.*	• "Please write offer out as I read it to you" • "No comment until you have heard whole package…"
18. *Discussion and counter offer* • Create doubt • Expand chips	• "What if (s)he is willing to move on issue 1, would you be prepared to move on issue 2" • "Would it be worth me talking

• Time away from office • Delay • In negotiations, you never get everything you want • If you go to the tribunal all you'll get is a piece of paper; how will enforce against a mobile tenant? - "you'll each say nasty things about each other; judges are not interested"	directly to the owner who may be expecting you to fight to the death; and then blame you for a bad outcome at the tribunal?" • "I know this is difficult for you, but in my experience..." • `What if ..."
19. *Assist to fill inform on agreement*	• "I'll send out form for each of you to sign" • "I'll read this to you to see if I've used the right words . . ."
20. Winding up procedures	• "There are a few simple administrative steps". • "Please be patient. We don't want to lose the progress we've made ..." • "These forms must be returned to me by 4:00 pm Thursday ... or taken to Post Office by. .."

Although many different models of conflict management may be developed and publicised, one stark marketing reality is that customers and brokers are wary of the new - they prefer old and comfortable interventions such as lawyers' letters of demand, self-help, lumping it or threats over the telephone. New products must be modelled and marketed persistently for years before disputants become comfortable with using or recommending them.

One of the major research tasks for the future is to study what exactly a "successful" conflict manager (mediator, judge, arbitrator, facilitator, counsellor) does.

Diagnosis

A major or ongoing challenge for all service providers is how to diagnose with reasonable accuracy: Which conflict management process for which conflicts at which time? There is rarely enough money to send disputants sequentially to "counselling", negotiation via lawyers, facilitative mediation, early neutral evaluation, evaluative mediation and finally a binding umpire. Moreover, multiple processing of a conflict usually escalates the original conflict, and spins off a galaxy of side-conflicts. (Conversely, multiple processing is, arguably, exactly what some disputants need in order to reach a stage of exhaustion by attrition, pain and expense.)

Taxpayer-funded Medicare cannot afford to send patients for sequential trial-and-error treatments. It relies upon clients lumping the problem, avoiding professional help or

being diagnosed to *the* "right" treatment fairly promptly. Likewise dispute resolution services.

Some rudimentary check lists have emerged to assist with diagnostic guesses. Realistically, most disputants and conflict management services do not have either the resources or the expertise to interview clients at length and to discuss options. Whatever is available, respected and cheap is tried. Current random diagnostic methods include the following:

(1) There is a respected judge in San Francisco who "diagnostically" sends all the even numbered disputes in his list to mediation, and all the odd numbers to early neutral evaluation.

(2) During some settlement weeks, *all* those awaiting court are referred to mediation.

(3) Some Supreme Courts in Australia mandatorily send all awaiting court cases to mediation unless one or both of the parties can convince a judge that there is some "special reason" not to go. (ie the rules reverse the onus of proof).

(4) Most family mediation services have extensive written intake questionnaires which aim to screen out conflicts where there is extreme inequality of bargaining power, or a history of repeated violence. (Where do those excluded clients end up? Anecdotally, it appears that many clients who are excluded from a professional service by a benign screening process end up alone "in the wilderness".)

(5) Some lawyers only send disputes to mediation when the conflict has escalated to vitriol; or there is "too much emotion"; or when the clients refuse to listen to legal advice; or when the lawyer on the other side is mad, bad or lazy. That is, perceived "disaster" cases are moved off the lawyer's desk.

(6) Other lawyers have a stable of potential mediators and intuitively send disputants to mediators whose personality might "suit" the disputants.

"Success" and Statistics

Every dispute resolution service (court, tribunal, mediation, counselling centre) is wise to set aside a substantial yearly budget to: define the various meanings of "success" in their service; and collect ongoing statistics and customer surveys on various meanings of success. This expensive process is, first, *a survival strategy in an* era when government funds are quickly moved away from one service to a trendy new one; secondly, an essential reality check *on quality* of services; and thirdly, an essential *marketing tool* for the service.

In the 1980s, there was a tendency to require only "new kids on the block", namely mediation services, to keep surveys of client satisfaction. The "old kids", especially courts and tribunals, did not have to justify the status quo. Those services fried or basked in anecdotes, wonder and horror stories. Now, nearly every service (except perhaps the High Court of Australia, and various Courts of Appeal?) tries to record some measure of "success" in a systematic way. Even traditional monopolies must compete for cash and clients.

It is important to note that it is very difficult to compare "success" rates between different services (courts, lawyer negotiation, conciliation, self-help, etc). This is because comparison would require large random groups to go through different services, and outcomes to be measured over, say, a two- or three-year period. Such comparative studies are very expensive and logistically complex. Politicians want the comparative studies but usually not the delay and expense of accurate studies.

Nevertheless, anecdotes abound that structured "mediation" outcomes are better, cheaper, faster, fairer and more durable than "court" outcomes. These anecdotes must be treated with caution, at least because courts may be handling more entrenched and conflicted disputants (that is, they are "treating" different samples).

Despite the above reservation, there are now many surveys in Australia and various states of the United States of America which consistently show that highly trained, debriefed, *problem-solving* mediation services (especially in family and workers compensation disputes), staffed by well-paid mediators, who use an intake process, are consistently "successful" in that they have moderate to very high

(a) levels of settlement;

(b) durability of settlements (the "stickability" factor);

(c) customer satisfaction in that the customers would use the service again, and would refer friends;

(d) customer satisfaction in that the customers say: "I was listened to", "I had a sense of control". (In the United States, these are sometimes referred to as the "dignity factors".)

(e) numbers of settlements which were in the range of objective outcomes as advised by the parties' lawyers; and

(f) preservation of the disputants' ability to talk to one another in the future (though rarely "improvement" of communication skills).

These are consistently impressive "success" results, and are daunting for other service providers (for example, lawyers, courts and tribunals) to emulate. Conversely, there are many anecdotes that untrained lawyer mediators, with some notable exceptions, who use a settlement or evaluative model of mediation have low levels of customer satisfaction; and gossip is powerful.

Customer Complaints and Horror Stories

Even when managed well, every dispute resolution service (court, tribunal, mediation) should expect a parade of disgruntled customers. Conflict managers should predict and prepare for normal patterns of conflict!. First, this is because, as a wild estimate, a well-run mediation or conciliation service should expect every 20th customer to be seriously disgruntled; and a well-run decision-making service should expect every fifth customer to be seriously disgruntled. For every kind of service, say every 50th customer will be a *conflict junkie with some major psychological* dysfunction who will transfer his or her hostility from one "helper" to another (until his or her death occurs).

Of course, these guesstimates will escalate in number if any service is managed or run poorly, particularly if the service-provider lacks excellent communication skills,

respect for customers and "due process". "Due process" is considered by some economic rationalists to be dispensable legal rules which increase lawyers' wealth. No doubt "process" will always enrich someone. However, to omit a substantial dose of "due process" or "procedural justice" in any conflict-management or decision-making process is to invite raging grievances in many cultures, including "Australian" culture.

Secondly, all dispute resolution services (including outstanding services) walk between the devil and the deep blue sea. They are usually required by legislation, Australian Standard 4269 of 1995, TQM and/or internal management policy, to do the impossible - namely, be "fair, just, economical, informal and quick". Emphasise one of these attributes and the others diminish. Also, disputants often change as the process goes along. They want "cheap and quick" to begin with, until the outcome emerges when they want "fair and just" (on their personal criteria).

Moreover, each of these words can be rephrased by a critic - "quick" translates to "superficial" or "lacking due process"; "informal" translates to "disorganised"; "economical" translates to "low quality"; "just and fair" translates to "just" only on *your* standards, not *mine* or the average Australian's.

Thirdly, coupled with a steady stream of aggrieved customers looking for someone to blame for life's problems (or for poor-quality services), is a voracious media looking for a moment of anguish to fill an approaching screen, sound or page deadline. Apparently the media's interest is often not to investigate "the truth" or a balanced view of the complaint, as collecting perceived truth or balance is ponderous, expensive, boring, confidential and post-deadline.

Fourthly, few dispute resolution services (court, tribunal, mediation service, etc) are in a position to defend themselves openly in relation to complaints from a particular client. A defence would usually involve:

- breaching confidences about a client's statements and behaviour;
- potentially compounding the psychological distress or illness which affects some clients;
- conducting an inevitably inaccurate and sensationalised trial by media; and
- failing to observe important concepts of due process.

Therefore every dispute resolution service should be prepared for critical assaults yearly or even monthly, via the media or via politicians in the service of, or used by, disgruntled customers. The assaults will be accompanied by horror stories about bias, ignorance, failure to listen, undue pressure, failure to communicate and inequality of power.

Waiting for these inevitable attacks to occur and only then reacting is a recipe for trouble. Services must be prepared in advance with complaint handling systems, as well as extensive client evaluations and statistics measuring multiple criteria of "success".

Commissions, Investigations and Inquiries

Given the inevitable incidence of client complaint mentioned above, coupled with constant pressure on politicians to invent new solutions to social conflict, every major dispute resolution service should expect to be "investigated" regularly by a committee

of inquiry. (Once again, all of these predictable dynamics require anticipatory action by dispute resolution services.)

"Inquiry" dynamics include:

- hasty assembly of the committee of inquiry;
- with members who are busy;
- with members who do not represent the diversity of views in the field;
- an agenda driven by either a politician's cost-cutting predetermination or a zealous lobby group;
- the committee's failure to understand or observe due process;
- secrecy and paranoia about what process or agenda is "really" being pushed during the inquiry;
- a lengthy and delayed report which is either misinterpreted or not read;
- a political decision to abolish, reconstitute, amalgamate or reduce the dispute resolution service which may or may not be supported by the inquiry report;
- the service may be changed to contain fewer or more lawyers; more or less of a particular lobby group; more substantive experts or more process experts; more speed and less procedural justice; more speed and less due process for poor people and "small claims", etc.

Managers of large dispute resolution services are often profoundly aware of these predictable and dangerous dynamics of investigative committees or inquiries.

Process, Substantive and Interest-group Experts

Dispute resolution services will be challenged continually by *who* to appoint *and how* to minimise each appointee's weaknesses and maximise their strengths. Appointees can be competent/expert in:

- process (for example, adjudication, or problem-solving mediation);
- "substance" (domestic housing rentals; taxation; commercial building; personal injuries, etc); and/or
- understanding a particular interest group (for example, men, women, Vietnamese, builders, manufacturers, etc);
- emotion and the grieving process.

Dispute resolution services will presumably experiment with the four different kinds of appointees by: mixing strengths by use of tribunal panels or co-mediation; attempting diagnosis and matching needs of a particular conflict with a particular service provider; constant education and multiskilling of service providers (for example, judges, mediators, arbitrators); and periods of apprenticeship and debriefing with mentors. One irony is that almost all conflict management services are subject to appeal, review or supervision by a traditional court or magistrate. The expertise of this supervisory culture usually is in "fair" *process* or "due process" rather than substantive knowledge, or the interests of competing groups, or there is a *historic*

tension over whether to increase or reduce the supervisory shadow of those who are experts in (expensive) due process.

Second Wave of Mediation Research

The "first wave" of mediation research over the last 20 years in the United States, Canada and Australia has established that well-trained mediators using problem-solving models of mediation consistently have reasonable to high rates of "success", on a range of meanings of "success".

Joan Kelly[1] has suggested that there is a second wave of mediation research now to be done. Ironically, courts, arbitrators and tribunals have scarcely begun the first wave of research, although all are now under considerable funding and marketing pressure to do so.

The second wave of mediation research questions can apply equally to all dispute resolution services. Kelly's seven suggested important future research questions are:

(1) Taxonomy: What categories of mediation exist?

(2) Diagnosis: Which conflict types should be referred at what time to what kind of mediation?

(3) Diagnosis: What adaptations should be made to each mediation process to provide for cultural and language differences?

(4) What micro-skills does a successful mediator use?

(5) Can systematic comparisons be made of costs, user satisfaction, settlement rates and durability of: different models of mediation; different models of negotiation; negotiations conducted by clients or by (legal) agents; different models of counselling; door of the court settlements; imposed (judicial) decisions; and imposed (arbitrated) decisions.

(6) What are the referral practices and values of gatekeepers to various dispute resolution services?

(7) How can mediation (or other dispute resolution services) be marketed more effectively and standards improved?

Legislative Avalanche: Mandatory Changes to Negotiation Practices

It seems clear that, at this time of rapid social change, most legislators know little about mediation, let alone its multiple forms. This ignorance is not surprising as few have attended mediations in the manner we all may have used other professional services such as doctors or dentists.

Nevertheless, legislators are all under pressure to cut conflict costs, and to provide *some* dispute resolution service (whether diagnostically appropriate or not). Thus mandatory mediation clauses are routine in new legislation.

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[1] *See* Joan Kelly, "A Decade of *Divorce* Mediation *Research* - *Some* Answers and Questions" (1996) *34 Family and Conciliator Courts Review* 373 on a range of meanings of "success".

Other emerging "standard" features of Australia legislation (apart from mandatory mediation) are routine attempts to change what is perceived to be a dysfunctional culture of aggressive and "positional" negotiation.

Legislative Attempts to Change Negotiation Culture

Perceived Problem in Culture of Negotiation	Standard Legislative Response
1. Opening negotiations with a positional or "ambit" (ambitious) offer.	1. Only *one* offer must be filed in court with a short time limit after a formal claim is made.
2. Employing "duelling experts" who inevitably are paid to give opposite conclusions.	2. Only one joint expert can be initially appointed.
3. Client ignorance of transaction costs of continued conflict or of a "court" hearing.	3. Mandatory forms filed setting out a range of estimated client costs.
4. Filing formal claims as a routine and inflammatory method to open negotiations.	4. Once filed, strict time limits and case management push the conflict quickly towards a hearing (ie client loses control).
5. A junior person attends formal negotiations.	5. Mandatory attendance by a senior officer with authority to settle.
6. Lawyer or skilled helper unnecessarily escalating conflict due to ambit claims, emotional entanglement, jargon, "no-stone unturned" discovery and cross-examination or sloppiness.	6. Traditional "lawyers" excluded from the hearing and mediation rooms.
7. Chaotic data.	7. Mandatory filing at an early stage of actual and issue summaries.
8. Withholding of key information and witnesses in order to "ambush" later.	8. Mandatory early disclosure; mandatory exchange of witness statements; exclusion of all undisclosed evidence.
9. Strategic stalling and inaction in order to avoid facing a problem, or to cause inconvenience, expense or attrition.	9. Mandatory time limits; regular costs orders against lawyers..
10. Unwillingness to *focus and* make or respond to a "reasonable offer".	10. Vigorous awarding of costs in favour of reasonable offers; against ambit offers; mandatory single, filed, early written offers.
11. Filing a court application as opening negotiation move.	11. Mandatory written notice of intention to start a case.

Data Chaos

A recurring feature of conflict is "data chaos". This is particularly apparent where disputants are acting without expert assistance. This growing trend of self-help is known as the "pro se" movement in the United States of America and the "LIPS" movement in Australia ("litigants-in-person"). These disputants arrive in court or at a mediation with a suitcase full of chaotic paper, or with no paper at all.

Even when "lawyers" are acting for disputants, data chaos is a common feature of the early stage of conflict as:

- A lawyer may be unwilling initially to spend a client's money to collect and summarise data - rather, "we will go along and see what happens".
- Sanctions are rarely imposed on a lawyer for having initially chaotic data.
- Lawyers may have an office management system which allegedly cuts costs by collecting and summarising data *later,* rather than *earlier.*
- If a dispute does not settle immediately, the costs of early preparation may cause a client to be disgruntled (one aspect of "principal/agent interest divergence").
- Young lawyers may too quickly translate conflict into legal categories and jargon. (Young specialist helpers tend to define problems and remedies in the terms of their own expertise.)
- Negotiation culture favour ambit claims first and then lets the facts and rules evolve with the passage of time.
- There is a difficult risk management question of whether to negotiate early with "incomplete" factual probabilities, or negotiate later after spending time and money locating more pieces in the data jigsaw (knowing that "all" information will *never be available* or accurate, and at best can be summarised in the form of probable/possible range, risk and transaction cost).

In the writer's opinion, a well-trained and exacting intake process is vital to confront the dynamics which lead to data chaos. Without this, subsequent dispute resolution meetings will be dogged by frustration, adjournments and client dissatisfaction. This raises again the tension between "quick and cheap" ("Let's get together quickly"; "Let's go along and see what happens"; "This will settle if we are both reasonable") and "fair and just" ("There's no point meeting until we've collected more facts"; "A meeting will just be a pooling of ignorance unless we both have expert advice on likely outcomes, risks and cost").

Importance of Intake and Preparation

The old adage states that only three things matter in negotiation, mediation and advocacy -- preparation, preparation and preparation. Many dispute resolution services, whether courts or conciliations, require intake or preparatory meetings. These may include education nights, seminars, videos and interviews. Intake meetings cover a variety of predictable issues with a disputant: What information do I still need? Who should be present/not present? What is my BATNA, WATNA and PATNA? What process will be followed at a formal joint meeting? What third parties or outsiders will be influencing the process and outcomes? What is the range of possible/probable outcomes? What range of emotional, time and financial costs attach to each stage of the formal process?

There is an inexorable cost-cutting pressure to reduce or eliminate intake procedures as either "too expensive", or "unnecessary". In the writer's opinion, this is a false economy which almost guarantees the eventual failure and demoralisation of the formal dispute resolution process. Even the most brutal, abbreviated cost-cutting legal aid mediation conferences should begin with a ten-minute intake in the corridor or over the telephone with each of the disputants.

One repetitive feature of well-trained intake procedures is that disputants do not feel threatened by "mere" friendly education. Many conflicts accidentally appear to settle during intake when parties ask the intake officer to make a "few" "quick" shuttle telephone calls on their behalf. This dynamic requires the intake officers to be multiskilled and well-resourced. It is also a pleasant surprise for the cost-cutting manager of the dispute resolution service.

The "Quality Creep": The Tensions between Quality and Quantity of Services

In an era of "more for less", there is a difficult balance to be struck between the quality and quantity of any service. There is a strong tendency for the quality of many dispute resolution services to slide downwards, in order to process people more quickly. For example, mediation projects (such as Queensland Legal Aid and Family Court), clearly evaluated as "successful" on multiple criteria, have had intake shortened, co-mediation changed to sole mediation or session times shortened.

Court-annexed mediations appear to be conducted often by barristers or former judges some of whom are unskilled and uncomfortable with a model of problem-solving mediation; slide too readily into a lawyer-comfortable shuttle settlement or evaluative model of mediation; schedule the mediation sessions without any intake, and for short single sessions; run mediations without clients being present; and seem to encourage the view among disputants that the mediation is just another procedural hurdle before settlement at the door of the court. This "lawyer-comfortable" model of mediation appears anecdotally to be producing steadily decreasing rates of "success" except for personal injury disputes. Apart from the decreasing rates of durable settlements, this lawyer-comfortable model misses the two key measures of mediation quality for clients, namely "I was listened to" and "I had a sense of control" (as compared to losing control to professionals).

Predictable Cost-cutting Measures

There is an array of predictable measures which are taking place in dispute resolution services with a primary aim of reducing costs. These measures are particularly occurring for conflicts over "small" amounts of money, though they are also climbing into conflicts over "large" amounts of money. Set out below are examples:

- User-pays or steadily climbing filing fees.
- Repeat "corporate" users (for example, insurance companies; banks; government agencies) pay substantial "filing" fees.
- If a government or corporate disputant appeals and loses, the loser must pay all the other person's appeal costs (the citizen or "small" disputant does not pay costs upon loss).
- Multiple specialist tribunals or services are amalgamated into one generalist tribunal.

- The dispute resolution services are staffed by cheap, part-time workers.
- The services have no special accommodation.
- The workers are paid fixed sums for each case completed; no salaries.
- No lawyers or professional advocates are permitted in the meeting or hearing.
- Written forms are reduced to simple English with a variety of tick-a-box categories.
- Educational evenings and -seminars are held to help do-it-yourself disputants understand alternative processes, and fill in forms. Fixed meeting/hearing dates; no adjournment permitted.
- Vigorous case management to ensure disputants are "ready" for the meeting/hearing.
- Guaranteed times between the date of filing and when a decision is issued.
- Mandatory disclosure within short time frames; all evidence of witnesses to be written and exchanged; no "new" evidence or facts can be produced unless already disclosed; heavy costs penalties for non-disclosure.
- Meetings/mediation/hearings in shifts into the night.
- Written reasons for decisions or written reports not provided other than in exceptional circumstances.
- Mandatory written, single and filed offers to be made within a short time of making a formal claim.
- All argument and evidence reduced to writing at the disputant's own expense.
- Oral presentations restricted to a short time period. Oral presentations by telephone or video.
- No cross-examination permitted.
- No appearances at all; decisions reached on papers.
- Total "hearings" or "meetings" reduced to a specified hour limit.
- No appeal or supervision by courts except in dramatic and specified circumstances.
- No duelling experts permitted initially (for example, doctors, builders, valuers, accountants, lawyers); rather a court appointed or jointly appointed sole expert gives a report.
- Umpires or mediators have multiple roles (for example, data collector; data summariser; investigator; cross-examiner; adviser; mediator first - then umpire).
- No rules of evidence.
- No reporting system; or system of written precedents.
- Limited intake; or intake with lowly paid workers.
- Mandatory early neutral evaluation on the papers.
- Mandatory mediation with poorly paid, time-limited mediation.

- Short judgments or reports guaranteed within X days of a hearing/meeting.

As already mentioned, combinations of the above cost-cutting measures will tend to increase to the extent that either the taxpayer is paying for the service or the dispute is labelled as about "small" amounts of money or resources.

Quality Control

Straining with the move for less expenditure on (certain) dispute resolution processes is the cry for more quality. A variety of quality control measures are being debated and implemented. Some services already have traditions of very high quality control. These measures include:

- written definitions of minimal aspirational service standards and competencies;
- peer or mentor supervision;
- mandatory debriefing; mandatory client surveys;
- clear published records of various measures of success, including client satisfaction levels;
- complaint procedure for clients;
- mandatory continuing education for service providers;
- initial competency and knowledge-based "accreditation" established at several levels of expertise;
- eventual connection to the study of theory, systematised practice and critiques at universities;
- extensive ethical codes and training in ethics;
- disciplinary procedures and tribunals for accredited members;
- liability for professional negligence;
- mandatory professional insurance for accredited members;
- gradual exclusion of non-accredited members from the ability to practise;
- regular collegial support and meetings.

Obviously, all these measures of quality control and "professionalisation" have dark sides similar to other service monopolies. The blossoming of "alternative" dispute resolution services in the 1970s was partly in reaction to the diagnostic myopia, inefficiency and high cost of traditional monopolies (for example, legal services). And so the vision-to-institution-to-vision cycle will continue.

Turf Wars

Conflict management services have not always handled our own conflicts astutely. There has been a history of lawyers, counsellors, mediation services, tribunals and courts competing for control of limited funds and customers. Within each of these groups there is also competition to create submonopolies so that only "self-accredited" or "specialist" groups receive a guaranteed stream of interesting and well-paying customers (and other providers do not!) Accordingly, arbitrators and mediator groups constantly attempt to lobby for *legislative* monopoly for "their own"

organisation; or standard form *contractual* clauses which give a monopoly for "their own" members.

The mediation/conciliation movements in the Western world in particular have many more would-be providers than customers. With mediation, this is partly because the majority of disputants will not readily use an unfamiliar service despite systematic reports of high customer satisfaction from structured mediation services. Potential customers are also discouraged from using even skilled mediators because of the traditional risks of problem solving negotiation - namely position, data and image loss and the need to learn new communication skills.

Because of these and other factors, turf wars are likely to continue between multiple service providers in the dispute resolution industry. To repeat, this raises two further important research questions: Who are the gatekeepers or brokers referring clients to the multiple dispute resolution services? What values and practices are and should be exhibited by such gatekeepers or brokers?

Conclusion

This article has given a helicopter glimpse of some of the grand themes and issues in the dispute resolution industry in Australia and elsewhere. No doubt there are more. How these themes apply to a particular dispute resolution service, and what problem-solving options exist for each theme, are vital tasks for each organisation to address and record.

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