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# Minding the gaps: reflecting on the story of Australian mediation

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**Retrospective and prospective on ADR**

# Minding the gaps: reflecting on the story of Australian mediation

**Laurence Boulle**

*An edited transcript of the keynote address presented at the Fifth National Mediation Conference, Brisbane, Queensland, 17-19 May 2000.*

## Introduction

On the London Underground passengers are warned as they alight or disembark to 'mind the gap'. Whatever the potential symbolism in the warning, the gap refers merely to the area of descending gravity between the train and the platform, and the mind refers to the need to be mindful thereof. This is not a mediatable situation. No third party neutrals are required. The language requires no reframing, summarising or paraphrasing. It is delivered in a grey monotone and the speaker never varies intonation, pitch or accent.

(On Queensland Rail passengers — or customers, as they will soon become — are not invited to mind the gap. This is either because there is no gap, or QR does not mind. They are advised 'doors closing, please stand clear', but that is not a suitable title for an article.)

The relevance of this introduction is as follows: in the story of Australian mediation there are a number of gaps, in the sense of contradictions or incongruities. We might, in this early stage in our mediation history, be well advised to mind these gaps, in the sense of considering and reflecting upon their significance now and for the future.

The focus in this article is mainly on the Australian experience, which I shall approach in terms of some broad themes and issues. One foot will be in the accumulated knowledge of the discipline and the other in anecdote, personal reflection on practice and poetic licence.

## The mediation story

In his recent book, *Tips from a Travelling*

*Soul-Searcher*, Mr Costello reminds us of the social importance of storytelling. (This is Mr Tim Costello and not his brother Mr Peter Costello, another accomplished storyteller.) We all live out of stories, whether they are express or implicit. Families, clans, social groups and colleagues all have their stories to tell, and these tales contain lessons, morals, insights and inspirational guidelines for daily life.

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we now know it is not a passing fad, but we are also not zealots, we know that it has many models but we have faith in some core values.'

As mediation practitioners, theorists and onlookers, we have our own personal stories of our involvement in the mediation movement. Some of these are heroic dramas, others soap operas, and others more like fairytales. They provide themes of expectation and frustration, hope and disappointment, pathos and triumph, deriving from our individual involvement in the mediation movement. They provide themes and lessons for others who might be interested in, or trapped into, hearing about them.

What about Australian mediation? What story would it have to tell? Let us start the story in 1990, though this is for convenience only as the history of Australian mediation can be traced back to the community justice

programs of the early 1980s, industrial relations systems decades before that, and the traditional systems of dispute resolution centuries before then. But assuming that contemporary Australian mediation's birth was in 1990, it was accompanied by some of the following world events of that year:

- in Australia, the election of Bob Hawke to his fourth term in office;
- in Africa, the release of Nelson Mandela after 27 years of incarceration; and
- in Europe, the merger of East and West Germany into a single state.

That was also the time when we were promised the paperless office, and when the new technologies promised such abundant leisure time that special training would be required to cope with it. In regard to the paperless office, we now have more faith in the impending paperless toilet, and as regards leisure we now know that it has all been bestowed on the unwilling unemployed and very little on the over-worked employed.

This, in *Reader's Digest* version, is the story that Australian mediation might tell about itself.

I was conceived by a utopian dreamer and a pragmatic realist and was born in Nimben. (You will note that the power of a story should not be sacrificed by insisting on its being accurate in every detail.) I began life as a child of nature but was regarded in many quarters as being illegitimate. In my formative years I was nurtured by passionate believers, community activists, government agencies and some frightening zealots. I had many suitors, seducers and lovers and moved quickly from childhood innocence to adolescent experience. There were several kidnap attempts on my person by various professions, organisations and entrepreneurs in my early adulthood. (I was always doubtful that anyone would be prepared to pay the ransom.) Now as an immature adult I have many foster parents, guardians and mentors, have residences in many places, and speak with multiple accents. I have been artificially inseminated, cloned and genetically manipulated and expect to be DNA-tested soon. Currently my ethics and standards are ➤



➤ being scrutinised, questioned and publicly debated, though I personally have avoided too much introspection in favour of acting out in the world.

There are some moving themes in this story of Australian mediation: themes of rejection and acceptance, of survival and adaptability, of transformation, experience and accumulated wisdom. This is of course to apply very human attributes to an inanimate concept. But mediation in Australia has not only come a long way but it has had a profoundly inspiring effect on many people's lives when they have benefited from its offerings. And the movement of mediation travellers has developed into a remarkable community of fellow travellers.

The story of mediation is of course still being told, as is each of our individual mediation tales. Many issues have been resolved during the early years of mediation: we now know it is not a passing fad, but we are also not zealots, we know that it has many models but we have faith in some core values. However the story thus far includes a number of gaps or incongruities and it is to these that we shall now be mindful.

### **Gap between broad societal developments and mediation's underlying values**

Dispute resolution systems develop out of the social circumstances that they are designed to serve. This could be in the community, the village, the nation state or, increasingly, the globe. Traditionally dispute resolution processes have had system maintenance functions: in broad terms they maintain the societal status quo through their functions of compensating, punishing, distributing and restoring.

Mediation is developing in a context in which the value of social activities is located within the structure of the marketplace. If something does not have an economic value, it tends to be held in low esteem. Relationships are construed in contractual terms as we become customers not passengers, and consumers not citizens. Decisions in these relationships are deemed to be made in terms of self-interest

and not in terms of community concerns or altruistic factors. Caution, suspicion and risk assessment are consequences of this model of social interaction, rather than openness, collaboration and trust.

In the face of this widespread adversarial competition in all spheres of social life, the emergence of mediation seems in some senses to be a bit incongruous.

The first point to make about this incongruity is that there are many mediations and many mediator styles, a theme I shall return to later. We can no longer speak of mediation as a single set of principles and procedures. Moreover, some aspects of mediation actually share some of the value assumptions of the broader societal trends. They allow for the individualisation of disputes, they encourage participants to make decisions in light of their own self-interests and not in the public interest, they emphasise the private ownership of disputes and dispute resolution processes, and they diminish the need for judicial intervention and therefore the state's sphere of activity.

But of course mediation also has countervailing assumptions and principles. These include the ideals of collaborative endeavour, creative problem solving, empowerment and relationship preservation. If all human behaviour is individualistic and self-centred, as dictated by the dominant social system, then how do we accommodate communitarian values, connection, relationship building, transformation and altruism as implied in the aspirational ideals of mediation? That is the gap with which we are faced.

Despite the strength of the dominant economic forces, we are witnessing some interesting signs of change. These include adaptations to the adversarial features of the legal system — most recently encapsulated in the Australian Law Reform Commission's Report on Management Justice — in the development of new forms of community, in organisational practices in private and public sector institutions, in the alternative provision of services such as community banking, in attempts to create smaller autonomous economies, and in community participation in policy-making.

Furthermore, it is interesting to note that community surveys by Eckersley show that in

relation to future scenarios for Australia there is a big distinction between people's expectations and their wishes. Of those surveyed 66 per cent said that they expected a fast paced, internationally competitive society, with the emphasis on the individual, wealth generation and enjoying the good life. However, 80 per cent said they would prefer for the future a greener, more stable society, where the emphasis is on co-operation, community and family, more equal distribution of wealth, and greater economic self-sufficiency.

This suggests an alternative world view to that of individualism: namely, a relational one. In this view the focus shifts to transformation and moral growth as objects of social interaction. Some aspects of mediation have a better fit with this desired conception of society and will be referred to again later.

### **Gap between justice and efficiency in dispute resolution**

There has always been a tension between the demands of individualised justice and those of the efficient management of disputes — sometimes known as mass dispute processing. For those working as mediators and conciliators for agencies with massive case loads it is a daily burden.

There are of course many conceptions of justice and competing models of justice. Adversarial litigation, based on procedural fairness, the right to present your case, and the objective application of legal rules by impartial adjudicators, is one such model.

ADR and mediation provide another vision of justice that emphasises the direct participation of parties in the dispute resolution process and the focus on personal and commercial needs and interests rather than on legal rights. In the early days of mediation's life story we referred in particular to the procedural benefits of mediation: its informality and flexibility, its lack of technicality or rigidity, the direct and continual involvement of the parties in the resolution of their problems, and the like. In training courses we were told, and in turn told others, to rely on the process, and the survey studies regularly identified significant party satisfaction in this aspect of the system. ➤



➤ Then along came efficiency. Now efficiency is a problematic concept in this context since it would be difficult to argue that a justice system should be inefficient — we would as little want inefficient dispute resolution as we would want inefficient banks, telephone systems or tax systems. And of course in many respects mediation is an efficient process, particularly in comparison to litigation which, in all fairness, never claimed to be an efficient system. Rigorous, exacting, procedurally correct, yes, but efficient no.

Yet the very concept of efficiency raises concerns in this context. This seems to be because it has a cold, hard edge, an emphasis on quantitative factors, and often on very short term quantitative factors of time and cost. It does not accommodate the qualitative factors which are denoted by the concept of effectiveness: client satisfaction, compliance with quality and standards, and durability of outcomes over time.

There can be little doubt that in mediation practice the demands of efficiency are putting strains on the process/content distinction. We know that in many quarters the emphasis is increasingly on getting an outcome, and less on the process used. The tell-tale signs are found in the annual reports of courts, tribunals and agencies providing mediation and allied services (with some exceptions, such as the Federal Court). They make quick and easy comparisons based on single statistical indicators of short term settlements, regardless of the quality of the processes used to achieve them. And if settlement rates are the only indicators of success, there will be pressure to increase them each year.

At the same time many practitioners would nowadays admit that they are less secure about asserting that what is important in mediation is the process and not the outcome. Many factors have been pushing and pulling mediation into its advisory, evaluative, settlement and gladiator forms. One of them, about which we feel distinctly uncomfortable, is some research which tentatively suggests that for many clients themselves the mediated outcome as measured against their prior

expectations is a more satisfying factor than some of the process factors traditionally promoted.

Nevertheless I would suggest that with this gap the mediation movement should strongly resist those bureaucrats and number crunchers, both private and public, who relentlessly pursue single factor and short term indicators of mediation's effectiveness in favour of the multitude of other factors of effectiveness that I have mentioned before.

'... the mediation movement should strongly resist those bureaucrats and number crunchers, both private and public, who relentlessly pursue single factor and short term indicators of mediation's effectiveness.'

### Gap between mediation theory and practice

I have suggested before that mediation is practice in search of theory, which indicates that much of modern mediation practice takes place while its theoretical framework is still being developed.

Perhaps all professions and occupational practices are affected by this particular gap. One of the reasons why it is so acute in mediation is, I think, because of its multidisciplinary origins. Mediation is a discipline derived from many others: from the social sciences, from management, from communication, from law and from many other primary disciplines. That is a problem in terms of developing coherent theory, but also a source of enormous strength. I think we should not underestimate the richness of these multidisciplinary origins. While many of the established professions battle for exclusivity over turf, mediation

incorporates them inclusively. As with all the other 'multis' — multiculturalism, multi-skilling, multimedia — so too is the multidisciplinary nature of mediation a factor we should acknowledge and honour.

I think that this gap might be well dealt with in mediation training and in the development of standards which are currently under review. I think it is in these contexts that we can try to blend some of the theoretical vision with the practical realities and form some compromise between the differing perspectives. Case studies, hypotheticals, illustrative examples and role plays seem to be the crucibles in which we can attempt to achieve a narrowing of the gap on this point.

### Gap between the supply of mediation and the demand for it

In Australia at present mediation and other forms of ADR are thriving where they are connected to courts, tribunals, government agencies or industry bodies. In all these contexts parties are influenced, encouraged or required to enter into mediation or some other ADR process. They are conscripts and not volunteers for the respective service.

Outside these contexts there is no evidence of a growing spontaneous demand for mediation services. There is hardly a private mediator, or wannabe mediator, who would not appreciate an increased demand for his or her professional skills. This paradox has affected many mediation trainees over the last decade. Some, in despair, have moved on to pyramid selling, internet shares and the occult — and some have even returned to mediation the wiser for it.

We now accept that mandatory or quasi-mandatory mediation is a fact of life in many Australian contexts and the literature provides some justification for its existence. It is too late to say that mediation is an essentially voluntary process. However, there should be lingering unease about the gap between the ongoing compulsion to use mediation and the continuing absence of popular demand.

Whatever the source of ➤





➤ inconceivable that peer mediation programs in schools should be subject to the same standards and policies as these. Here the emphasis should be on voluntarism, peer involvement, and community service in the best traditions of these terms.

### Gap between what works and our understanding of what works, and why

As skilled helpers mediators need to develop an increasingly sophisticated understanding of conflict and its ramifications; of what micro skills, and mini-micro skills, are suitable for what disputes and what situations within disputes. This would narrow the gap between knowing intuitively and knowing systematically, and the gap between knowing and thinking we know. I sometimes think that our generation of mediators are like the barber-surgeons of the 17th century, performing all manner of external procedures without any real understanding of internal anatomy. It took centuries of dissection and grave robbing for the scientific understanding of anatomy to equip surgeons with a less superficial knowledge of their craft. Perhaps the phenomenon of conflict, its sources, nature, escalating factors and suitable interventions, is the mediator's equivalent of the surgeon's anatomical knowledge. What the equivalent of the grave robbers is remains to be seen.

Yet in the inexact human science of conflict management explanatory factors are hard to identify with such precision. In the human sciences it is simply not as easy to delineate cause and effect as it is in the natural sciences. The explanatory factors could be as unscientific as ritual, timing, coincidence, the force of circumstances, serendipity, instinct and good luck. After all, even in the medical sciences we know that the red pills do actually work better than the white pills.

This, then, seems to be another gap which we shall live with at least for the next decade. Certainly life long learning requires us to be reflective, inquiring and analytical, but none of

these will provide us with scientific certainty about our craft. These are interesting issues are for future speculation. As Wittgenstein concluded his *Tractatus*, 'About that which we cannot speak, we must remain silent.'

### Guidelines for the gaps ahead

It is clear that not only will many of these gaps be with us for some time, but others will open up in the times ahead. Here are some summarising views.

There are many different forms of mediations and many different styles of mediators, and all mediators are subject to an enormous range of economic, social and political pressures, regardless of their individual station in life. As a group of practitioners and theorists of mediation from a range of disciplines they should strive to retain the initiative in the following areas:

- establishing and maintaining the essential core values and principles which go with this calling;
- insisting on being heavily involved in the development of standards, competencies and ethical codes;
- maintaining 'biological diversity' in this field, or fields, and avoiding the extinction of the marginal, the alternate, the traditional or the unusual;
- resisting all attempts to be used as the dumping ground for disputes which are too hard for other processes;
- insisting that mediation skills and techniques be measured by a range of factors, especially the qualitative factors mentioned earlier; and finally,
- to develop mediator skills, techniques and standards in accordance with the developing understanding of the field.

I mentioned earlier that Australian mediation has come a long way. At a conference in London last year I heard Australia referred to as one of two 'mature' ADR systems. But inevitably this is work in progress and there is a distance yet to travel. We live in an age of life long learning. ●

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'It is my view that for all the well documented reasons there needs to be a slow movement towards the development of competency standards, codes of conduct and ethical obligations in some areas of mediation practice ...'