

Bond Law Review

Volume 11, Issue 2

1999

Article 6

Minding the Gaps - Reflecting on the Story of Australian Mediation

Laurence Boulle*

*Bond University, lboulle@bond.edu.au

Copyright ©1999 by the author(s). All rights reserved.

This paper is posted at ePublications@bond.
<http://epublications.bond.edu.au/blr/vol11/iss2/6>

Minding the Gaps - Reflecting on the Story of Australian Mediation

Laurence Boulle

Abstract

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.

KEYWORDS: mediation, Australia, dispute resolution

MINDING THE GAPS – REFLECTING ON THE STORY OF AUSTRALIAN MEDIATION

*by Laurence Boulle**

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 to 'Doors Closing. Please Stand Clear', but this 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

* Professor of Law, Bond University, Chair, National Alternative Dispute Resolution Advisory Council. This is an edited version of the key-note address delivered at the Fifth National Mediation Conference, 'Mediation: Past and Promise', held at the Sheraton Hotel, Brisbane, 17-19 May 2000. It draws on the following sources: Costello T, *Tips From a Travelling Soul-Searcher*, NSW, Allen & Unwin (1999); Boulle L, *Mediation: Principles, Process, Practice*, Sydney, Butterworths (1996); Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System*, Report No 89 (2000); Lyster R, 'The Corporatisation and Privatisation of Water Utilities: From Citizen to Consumer', Unpublished Paper, University of Sydney Faculty of Law (2000); National Alternative Dispute Resolution Advisory Council, *Definitions Paper on ADR*, Canberra (1997); National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR: Discussion Paper*, Canberra (2000); Jones M and Kriesler P, *Globalisation, Human Rights and Civil Society*, Sydney, Prospect (1998); Eckersley R and Jeans K, *Challenge to Change: Australia in 2020*, East Melbourne, CSIRO (1994).

MINDING THE GAPS - REFLECTING ON THE STORY OF AUSTRALIAN
MEDIATION

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 story-telling. This is Mr Tim Costello and not his brother Mr Peter Costello, another accomplished story-teller. 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.

As mediation practitioners, theorists and on-lookers 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 fairy-tales. 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 programmes 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;

(1999) 11 BOND LR

- In Europe, the merger of East and West Germany into a single state.

That was also the time when we were promised the paper-less 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 paper-less office, we now have more faith in the impending paper-less 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, organizations 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 soon to be DNA-tested. 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.

MINDING THE GAPS - REFLECTING ON THE STORY OF AUSTRALIAN
MEDIATION

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 to these that we shall now be mindful.

The 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, and 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.

Now the circumstances of our own society are complex and confusing, but it is economic theories and ideologies that are used to justify many current social developments: privatisation, corporatisation, de-regulation, out-sourcing, selling the blue-sky spectrum, and the like. Economic rationalism draws its inspiration from liberal political philosophy which promotes rationality, individual autonomy, equality, competition, liberty from others, and the protection of the private sphere. It assumes a model of human beings who are autonomous and rational and whose self-interested pursuit of their own satisfaction is regulated by the market. The markets are the divine oracles of the 21st century, and 'what the markets say' become our new articles of faith, even though they change their minds every 24 hours. Opposition, rivalry and struggle among individuals are necessary features of this world view. We compete for scarce resources, whether tangible or intangible, and enforce our rights through an adversarial system of adjudication.

Economic rationalism also glorifies the private sector and the privatization of traditional state functions. A strong state is seen as being essentially hostile to this philosophy and model of humanity. A small state system and less government is claimed to be more efficient and will oversee the activities of private utilities dispensing better services to consumers. Our social needs will be catered for by private enterprise and the market, with only a little help from Canberra.

(1999) 11 BOND LR

These themes also operate at the international level where we are witnessing the globalisation trends in trade, commerce and computer viruses. Globalisation involves all aspects of economic activity being increasingly controlled by firms and businesses which operate beyond national borders. It has four specific characteristics: increased foreign investment in local ventures, a reduction in national sovereignty, a shift in power from governments to financial institutions, and policies and practices of deregulation.

This is not the occasion to debate the rationale for the moves towards economic rationalism and globalisation. The rationalist ideal has a long history in western society. Its foundations can be found in Plato, in the enlightenment, in the industrial revolution and in the earliest development of the modern consumer society. Moreover we certainly do not want an economy that is irrational.

However somewhere in the 1980s the liberal rationalist ideal was colonised by the economists who reinforced the rationalism and forgot the ideal. Thus critics of this philosophy express concern about its human rights implications, in particular for those most disadvantaged in the rough and tumble of the competitive market-place. They point to the emergence of private monopolies, corporatist practices, and the amoral nature of the market. Concern for the individual is not the only point of criticism. There is also apprehension about the future of community and societal institutions, about the future of the public interest in a context of competition, autonomy, self-reliance and social fragmentation.

Mediation is thus developing in a context in which the value of social activities is located within the structure of the market-place. If something does not have an economic value, it tends to be held in low esteem. Relationships are construed in contractual terms as we are becoming 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.

MINDING THE GAPS - REFLECTING ON THE STORY OF AUSTRALIAN
MEDIATION

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 individualization 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 organizational 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 was a big distinction between people's expectations and their wishes. Of those surveyed 66% percent 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% said they

(1999) 11 BOND LR

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.

Nevertheless we are not likely to see an end to the culture of individualism and competition in the near future, when social institutions and economic structures are so heavily based on it. The gap between dominant social forces and mediation's ideals invites us to ask the following questions:

- Is mediation being presented as a comforting band-aid for dealing with the inevitable increase of conflict being unleashed through competition, globalisation and other social forces?
- Will mediation be forced to perform all manner of unnatural acts in relation to the problems which are too complicated, too costly, too lengthy or too political to be dealt with by other systems?
- Will mediation be distorted so that it actually reinforces the broader social ideologies and therefore come to have a system-maintenance function?
- Will mediation be evaluated only in terms of the quantitative cost-benefit factors associated with the economic rational approach to life?

These are some of the big picture questions which the gap requires us to begin answering in the next decade of mediation's existence.

The Gap Between Justice and Efficiency in Dispute Resolution

This gap can be epitomized by the different approaches to body corporate disputes. The first is the 'No Pets Allowed' approach, a simple rule applicable to everyone. The second is the 'But My Dog is Different'

222

MINDING THE GAPS – REFLECTING ON THE STORY OF AUSTRALIAN
MEDIATION

approach, an exception to the rule to take account of Spot's individual characteristics.

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.

(1999) 11 BOND LR

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 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 multi-disciplinary 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 under-estimate the

MINDING THE GAPS - REFLECTING ON THE STORY OF AUSTRALIAN
MEDIATION

richness of these multi-disciplinary 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, multi-media - so too is the multi-disciplinary nature of mediation a factor we should acknowledge and honour.

Here I would like to refer to just two gaps between theory and practice.

The *first* is in relation to the mediator's role of advising, evaluating, expressing an opinion or suggesting an appropriate outcome. At this stage of mediation's life it is simply no longer acceptable to overlook this reality of modern mediation, whatever might be the niceties of definition and theory. Virtually all mediators have anecdotes of situations in which their clients have directly or indirectly requested more than just process contributions. In many situations they are looking for guidance as to what is allowed and allowable. The development of advisory mediation, med-arb, case appraisal, rights-based mediation, case management and similar procedures is evidence of this. It is accompanied by a mentality among practitioners that we might call the Just Do It mentality.

Now how do we bridge this gap caused by the development of practice beyond the available theoretical frameworks? I think one way in which this can be accomplished is by acknowledging the semantics and subtleties of language at play here. Thus when we ask the question of whether mediators should advise their clients on possible outcomes, we have fallen into the Closed Question semantic trap. What we should really ask is something along the lines of 'In what circumstances, in what contexts and with what packaging should mediators provide which forms of information and advice?' Elegant and streamlined, no, but appropriate and useful, yes. Nadrac is aware of this discrepancy in relation to its 1997 Definitions Paper and will probably be doing some exploratory work on reassessing its definitions next year.

The *second* gap is in relation to some of the aspirational aspects of mediation. Here we have the converse situation in that it is the theory which has developed beyond the practice. This is particularly evident in the writings of the *transformative* mediation school. While the mansion of mediation has many rooms, the transformative model is more like a verandah that has been added without a development application. It challenges the *evaluative* and *problem-solving* models of mediation

(1999) 11 BOND LR

which predominate in practice by requiring some added value in the form of recognition and empowerment for the parties. Now these aspirational features do not reflect the goals of the everyday mediations I see, hear about and read about, in which pragmatic settlement is the norm. However they do create a serious challenge for all mediators and many in Australia have in recent years been inspired by a greater vision of their craft.

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 and 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.

The 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.

MINDING THE GAPS - REFLECTING ON THE STORY OF AUSTRALIAN
MEDIATION

There are two possible responses to this disjunction, one on the demand side and the other on the supply side.

As regards *demand*, we are required to ask why, if mediation, in the right time and place is such a 'good thing', there is so little expressed demand for mediation services? If there are objective needs for the process, why are there not the subjective demands? There are several possible reasons for this: individuals' lack of understanding about the process, too little community education about its strengths and shortcomings, deeply-rooted traditions of adversarial adjudication, bad experiences of or anecdotes about mediation, the tendency of people to lump conflict for a considerable time after which it is too difficult to put the genie back in the bottle, and so on.

Recently I have been stimulated by the views in the literature which identify in the Christian religious tradition an aversion to the notion of bargaining and compromise. All practitioners have been confronted by clients who wish to be vindicated on a matter of principle, and all conflicts can be elevated to matters of basic value. Where religious doctrine draws strong contrasts between good and evil with little room for compromise between the two it is easy to elevate everyday disputes over barking dogs, personal injury claims and workplace discrimination to a quasi-religious level. This can be contrasted with the Judaic tradition in which bargaining and compromise, even with God, have a greater measure of acceptance. In this context negotiation and mediation do not invoke any quasi-religious resistance. However whatever my initial attraction to these views, my postgraduate students regard them as somewhat flaky.

Whatever the source of the problem it is surely correct that the demand side should be dealt with less by compelling people to mediate and more through appropriate education and marketing. After all what is wrong with informed consent? And here I do think that definitions, while they may change over time, are important. Research studies suggest that family law clients, and sometimes their lawyers, understand the term mediation to include a wide range of professional services, including round-table negotiations, and the Family Court itself now uses the term mediation generically to include other primary dispute resolution services such as counselling. It seems to me that these tendencies need the mediation movement's immediate and ongoing attention.

(1999) 11 BOND LR

This brings us to the *supply* side of the gap. If mediation is not spontaneously sought, and if there are many individuals who are resistant to the practice for a variety of reasons, we are justified in suggesting the need to be more selective in referring matters to mediation. This is not incompatible with mandatory mediation. But it involves us taking more seriously the difficult diagnostic function which gatekeepers to dispute resolution forums are required to perform in screening and streaming. NADRAC is currently surveying service-providers to establish what criteria and protocols are used in referring matters to different forms of ADR. The results to date suggest that at the best the systems are extremely rudimentary.

The supply/demand gap in mediation may be with us for a long time. On the negative side, human behaviours and attitudes are notoriously slow to change despite structural reforms. On the positive we should be encouraged by the significant changes which have occurred in the last decade within the legal culture, government, organizational thinking and so on.

The Gap Between Mediation as a Life-skill and Mediation as an Occupational Practice

The term mediation can refer to one of three different things: a set of values, principles and philosophical assumptions about dispute resolution, a set of social skills applicable in many different settings, and an occupational practice provided on a reward basis. Reference is made here to the gap between the second and third meanings of the term.

In the NADRAC deliberations leading to its Discussion Paper on Standards we were struck by the extraordinary diversity of situations in which ADR is conducted. Mediation is practised at the highest levels of international diplomacy and in primary schools in South Australia, by traditional elders in the rural outback and by full-time officials of the Administrative Appeals Tribunals, by volunteer community mediators in drafty community halls and by unqualified luminaries through the pages of the press.

MINDING THE GAPS - REFLECTING ON THE STORY OF AUSTRALIAN
MEDIATION

This extraordinary diversity is one of the reasons why it is so difficult to be prescriptive about competency standards and ethical obligations, and for that matter about many other aspects of mediation practice.

In some contexts mediation has been institutionalized and professionalised to a fairly high degree. It has educational programmes, occupational organizations, codes of conduct, a developing literature and international conferences. But these factors are entirely absent from other mediation systems where its techniques are promoted as a life-skill, as an elaboration of good inter-personal techniques, and, dare we say, as an application of good common sense in 12 steps or two triangles. In my experience, the mediation in what we might call the amateur ranks is often as skillful and wise as that in the professional league.

Now this seems to be a gap, or series of gaps, that we should not only tolerate but even encourage. This can be shown in relation to mediation standards. 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, for example where professionals earn several thousand dollars a day in mediations referred by compulsory court order. However it is inconceivable that peer mediation programmes 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.

The Gap Between What Works and Our Understanding of What Works, and Why

Here I should like to refer to a mediation case study. This will be by way of an immodest personal anecdote. As the Australian author Peter Goldsworthy has pointed out, while humility is a good thing the ego can only take so much of it.

This was a case involving mortgage lending. It occurred, surprisingly, on the Gold Coast. The investor, whom we shall call Bob, lent \$150,000 to a developer on the security of a second mortgage. The developer crashed and returned to the south. The value of the land was just adequate to cover the first mortgagee, and the agent's commission. There was

229

(1999) 11 BOND LR

nothing left for the investor Bob, who was in his eighties and had had three previous disasters with mortgage lending. He commenced an action for professional negligence against the valuer, whom we shall call Pat, whose valuation exceeded by 100% the current market value of the property. This valuation had been prepared for the first mortgagee and assigned to the second, there being no professional relationship between the investor and the valuer.

The story thus far does not sound auspicious for mediation. The defendant did not have the money lost by the investor, there was no past or future relationship between the mediating parties, liability was in dispute, there was no professional indemnity insurer, and nor were other possible defendants, such as the plaintiff's original solicitor, involved in the litigation or the mediation.

In pre-mediation preparation, it became apparent that the valuer Pat was prepared to reach a commercial settlement but could offer very little in the way of hard cash. He was still recovering from his second matrimonial property settlement. It was suggested in this preliminary stage that non-monetary benefits should be seriously considered. This option was accepted and the valuer's opening statement began as follows: 'Bob, I've never met you before, and I just want to say that I'm really sorry that this has happened to you.' This was accompanied by direct eye contact, open body language and the other appropriate non-verbals taught in the A1 School of Mediation Training. Settlement was achieved five hours later.

Now we live in an age which looks for explanatory factors for everything. As reflective practitioners, mediators need to have the curiosity of five-year olds and to be searching continually for the reasons why mediations do or do not reach successful outcomes.

In this case there were a number of possible explanatory factors for the settlement:

- That Bob's non-commercial needs were met by the valuer's acknowledgment of his loss and expression of regret;
- That Bob was exhausted, disillusioned and did not have the stomach for litigation, going to the media, or other dispute resolution options;

230

MINDING THE GAPS - REFLECTING ON THE STORY OF AUSTRALIAN
MEDIATION

- That the mediator defined the dispute constructively in mutualised, generalized and non-legalistic terms;
- That the solicitor for the plaintiff, the solicitor for the defendant, and the barrister for the plaintiff were former students of and had done ADR courses with the mediator.

Here then is the gap. 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

(1999) 11 BOND LR

It is clear that not only will many of these gaps be with us for some times, but others will open up in the days 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.