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Mediating in the family business

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Mock mediation script

Mediating in the family business

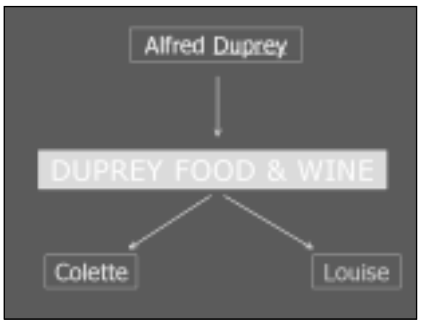
Dirk Feinauer

Feinauer Commercial Lawyers was invited by the Family Business Association to participate in their annual seminar weekend. An essential factor, and also a problem, in family run businesses is maintaining open and effective communication, particularly when a dispute arises. To illustrate this point Feinauer presented a mock mediation. The attendees ranged from new small business owners, to very large well established corporations. The intent of the mock mediation was to provide a general background to mediation as an alternative to litigation, while establishing substantive legal responses to common issues. A slide show shown in the background (some slides of which are used to illustrate points in this article) acted as a humourous counterpoint, highlighting the issues as they arose.

Narrator: Good afternoon ladies and gentlemen. Today, we will be taking part in a mock mediation in the Supreme Court of Western Australia.

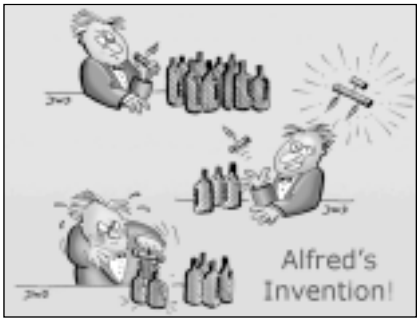
This mediation process bears no similarity to actual events or parties. Indeed we have taken some poetic licence with the mediation process in that what you will see today will be different in some respects from an actual mediation. For example, the lawyers will not be robed and the clients will most likely have a much smaller active role.

We are joining the DuPrey sisters at this mediation in respect of a dispute that has been in the courts for the last three years.



By way of background to the dispute, Mr Alfred DuPrey and his wife died in a tragic car accident some four years ago. Since then proceedings have commenced in the Supreme Court regarding the family company. The company, DuPrey Food and Wine, is a successful operator of a food and wine import business. The business has won several small business awards and has a strong standing in the business community for its accomplishments.

DuPrey Food and Wine sources food produce and wine export contacts overseas, imports the goods themselves, then on-sells the products to various wholesalers and businesses about town. Another aspect to the business is an invention that Alfred DuPrey worked on and developed, which had culminated in a patent.



Prior to his death, Alfred DuPrey took the view that commercialising this patent would be worth several million dollars.

As we join Colette and Louise and their legal representatives in the mediation, the current state of affairs reveals that Colette, who was Mr DuPrey's favourite daughter, and who has worked in the business from her teenage years onwards, has been made the sole director and chief executive officer of the company under the wishes of her father. Louise on the other hand has just returned from an ashram in India where she has spent the last 10 years getting in touch with her inner self.

Although the matter has just reached mediation, the legal fees expended by

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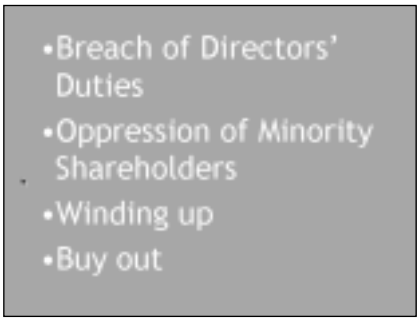
both sides have been significant due to the adversarial relationship between Colette and Louise.

[The mediator then explained the nature and purpose of mediation]

Mediator: Having explained my role, could each of the lawyers please set out their clients' respective positions.

Lawyer for Louise: Thank you Mr Mediator. If I may begin, for your benefit, to outline my client's claims against her sister. My client and the defendant are sisters and each hold 50 per cent of the shares in the family company. My client has taken a 'passive' role, leaving management of the company to the defendant while my client has pursued other interests overseas.

Under the defendant's control, the company has performed poorly, which my client alleges is due to mismanagement and impropriety. To summarise, my client's legal claims include, among others, breach of directors' duties and oppression of minority



shareholders, and my client has applied to court to have the company wound up on just and equitable grounds.

Further, my client has had to apply to court to compel the production of company books and records so we can get some bearing as to the actual underlying financial position of the company, and its worth.

A valuation of the company has been offered by the defence, but this is well below that which we believe the company is worth. If the company had been properly managed, it would be worth at least $10 million.

In the interests of a speedy resolution my client is proposing that this matter be resolved, in the context of this mediation, by my client selling her shares for the sum of $5 million or a figure determined by an independent valuation.

The purchase price will have to be paid to her immediately. My instructions are that this is a requirement to settlement. If the defendant cannot comply with this demand my client will press ahead in court and seek the winding up of the company.

My client wishes me to convey that she is reluctant to take this course as it has been her family's company, but at the end of the day, as a shareholder and one of two daughters, my client has lawful rights.

Mediation is a process that is carried out on a 'without prejudice' basis. This means that any information disclosed by the parties cannot be used subsequently in litigation.

Lawyer for Colette: Clearly my client denies any wrongdoing in relation to any of the matters alleged by you on behalf of your client. My client, Colette, is the older sister. She is the one who has worked in the business night and day for the last 10 years, and is the only one with an intimate understanding of how the company should be run.

Your client Louise, on the other hand, has chosen to pursue her studies in India for the last 10 years.

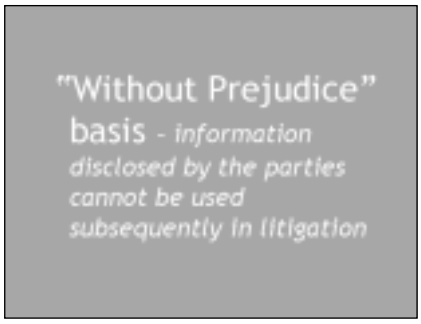
My client feels that Louise does not have the business acumen to appreciate how the business works and what the financial underpinnings to the company are. In any event, Louise has been generously rewarded in the past through company dividends.

In fact, it is those large dividend payments which have supported her lifestyle and given her the opportunity to pursue her chosen studies over the last 10 years.

Mr Mediator, I can only reiterate that my client denies any wrongdoing, particularly in relation to the issue of the books and records of the company. My client is in the process of compiling these, and they should be with you shortly.

In the circumstances, my client simply cannot see any justification for a buy-out.

Narrator: *Mediation is a process that is carried out on a 'without prejudice' basis.*



This means that any information disclosed by the parties cannot be used subsequently in litigation. This allows the parties to openly discuss their positions without fear of harming their chances in court if the mediation should fail.

Mediator: As you are aware, mediation is not a process that is concerned with who is wrong and who is right. It is important therefore that we try to use non-adversarial language in dealing with this matter.

Having basically had an outline

of the respective issues, perhaps the parties want to quickly address each other as to what they want to achieve. Shall we start with Louise?

Louise: Colette, you are not accepting the love of the guru, you are not listening to your inner voice. I don't want it for myself, I want it to better the world. You're sitting on a pot of gold and it is our duty to share that with the Guru.

Colette: You're being immature as usual. I have been working hard in this business for years now. Your unrealistic demands are putting enormous pressure on us financially. I can't raise this type of money at the drop of a hat. Just hang on and see the patent commercialised and we will all be happy. If Dad were alive now, he'd ban you from the house!! Although since you choose to live in a hovel in India this wouldn't mean anything to you.

Look, Dad appointed me as the director because I am obviously the only one responsible enough to look after the company's affairs.

Mediator: The parties seem to have reached an impasse as to where they sit so maybe we can briefly adjourn into private session.

Narrator: *During the course of mediation it is quite common for the parties to break for a private session. During these sessions parties can discuss matters privately with their lawyers. This gives the parties a chance to consider issues raised in the mediation sessions, to evaluate any offers made, to formulate counter-offers or just to plan their next move.*

Today, for practical purposes, the parties will remain seated although in reality they would each retire to a private room. Although the mediator may attend and indeed take part in these private sessions, the discussions are completely confidential. The mediator is prevented from disclosing to the other side what has been discussed in the private session, other than with the consent of the parties.

Private session 1

Colette: I can't believe that she is doing this to me. I am so upset.

Lawyer for Colette: Colette, I understand that you are upset at your sister, but it is important to try to stay calm so that we can deal with the issues raised by your sister's lawyer constructively, and also so that we can talk to your sister in a constructive manner.

Before we go on, there is something I need to bring to your attention. My office has just received a fax, which they have run down to me here. You know how your father brought home a will kit from the newsagency and filled it out himself? And he very simplistically said that he left his shares in the company to 'all' his children? Well, when he wrote that he was leaving his shares to 'all' of his children, it appears that that may now mean more than just you and Louise.

Colette: What?

Lawyer for Colette: The fax I received is from a Janet Smith. She claims to be the love-child of your father born out of wedlock during a visit to a trade fair in Paris in 1972. That will need to be looked into – but it could well mean that the company will need to be split up into three lots of shareholders as opposed to two, as we previously thought.

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Colette: You've got to be joking.

Lawyer for Colette: That's not the worst of it. It seems from the fax that Janet Smith is also a patent attorney. She claims, in her fax, that in checking out the value of the company, it has come to her attention that, as she claims, your father may have been in discussions regarding his invention prior to the patent being taken out. This could mean that there was a premature publication of the relevant facts, and this in turn may cause the patent to lapse.

Colette: This cannot be happening.

Lawyer for Colette: I understand this has caught you by surprise. The fax only just arrived at my office so it is a surprise to me too. Clearly the claims raised by Janet Smith will need to be looked into, and may need to be taken into account in terms of any resolution you are able to make with Louise today.

What we need to do today is to try to focus on finding a solution here because your sister is asking for a lot of money, and you seem to have your fair share of problems.

Colette: Problems? You're telling me! Obviously when Dad helped me buy my 'modest' home using the company as security, we were all thinking that we would be doing a whole lot better than we are.

The Tax Office is after us and we are having difficulties paying the bills. I didn't tell Louise about it because she would only use it against me.

Not only that, I've got enormous pressure on me personally because I haven't been able to keep up with the mortgage payments on my house and the bank may well now move against the company for the security. And that's not even mentioning my growing levels of personal debt, I just don't know where my money goes. I don't sleep some nights just worrying about all of this stuff. We have got to sell this patent.

- Tax
- Personal Debt
- Company as security
- Land - transferred personally to Colette

I wish Dad had put something into the Shareholders Agreement about times for payments and all the rest of it. If I could pay Louise out over a period of time, it would be much easier.

Lawyer for Colette: As to your personal liabilities, you may have to consider liquidating your house and perhaps downsizing. Any effort that you can make to find the funds to meet your personal debts is something you should seriously look at.

Bankruptcy has many lasting consequences, including being disqualified from sitting as a sole director of your company. And in light of your desire to retain control of the company as the sole director, you may need to explore all options of raising funds to meet your personal debts.

If things with the company are as bad as you say, there may be an issue of insolvent trading. Have you considered whether your business is currently insolvent? As the sole director of the company there is a real possibility that you could be found to be personally liable if the company is found to have been trading while insolvent.

As the sole director of the company there is a real possibility that you could be found to be personally liable if the company is found to have been trading while insolvent.

Lawyer for Colette: Well maybe that is something the Court can look at, but the Court will want to see the company valued. Maybe that is something you can consider proffering to the other side today.

You didn't tell me before that the company was in such a dire financial situation. If that's true, would you consider going into voluntary administration? Voluntary administration may be a good way of trying to steer the business and the company out of trouble.

Colette: Voluntary administration? I guess if it will help keep the wolves from the door it's worth looking into. But what about my personal liabilities?

- Directors' Duties to Company
  - Duty to prevent Insolvent trading
- Sole Director

Colette, this is the first time that you have raised with me the financial problems of the company and also your own financial problem. This is a good time to let me know whether there is anything else you should be telling me. In order for me to do my job, I need to know these details. I understand that you may feel embarrassed airing your

dirty laundry, so to speak, but rest assured that anything you disclose to me is subject to solicitor-client privilege, so you can feel protected in that sense.

I can't give you the best advice or represent you here today properly if I don't have all the pertinent facts.

Narrator: *In preparing for mediation it is vital that a solicitor is given all the relevant information about a situation by her or his client. It is also very important that the solicitor knows what the goals and parameters of his or her client are. If not, the mediation may well turn into an ambush and the chance to strike at a fair compromise may be lost.*

It is also very important that the solicitor knows what the goals and parameters of his or her client are. If not, the mediation may well turn into an ambush and the chance to strike at a fair compromise may be lost.

Mediator: Well, these matters raise a number of sub-issues don't they? Do I have your consent to disclose this to the other side?

Colette: No, don't tell the other side! I've been spending a lot of money fighting them in court over technical issues just to buy some time! We managed to catch them out on getting their pleadings in order and that has given us some breathing space.

Mediator: Why don't I go and see how Louise is going in her private session and if there are any shifts in her position?

Private session 2

Louise: I am getting a bad vibe from my sister. I have been on this amazing spiritual journey in India and my guru has told me that I am near to finding true enlightenment.

But I want to give the $5 million that I have always anticipated would come from the company to Guru Baba to develop the ashram.

I am against confrontation, but Guru Baba says I must fight for what is mine and I will go to court if I have to. I have to be one with my destiny. I am on this path and I must follow it to the end, I need the money and so does Guru Baba.

Lawyer for Louise: Louise, while we have this moment, I have to mention that just before we came into the mediation, my office examined the weekly Writ List and found Colette is being sued by her bank for defaulting on some type of liability. What is even more concerning is that it appears not only Colette is being sued, but the company is being sued by the bank as well, which may impact on your prospects of recovery at trial. This may also explain Colette's reluctance to provide us the company books. It may be that bank debts are secured against both Colette and the company. Are you aware of any such arrangement?

Louise: I have no idea.

Lawyer for Louise: Well what if the company is not worth what you think it's worth?

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Louise: I do not accept your negative thoughts, my share is worth $5 million, you just need to visualise, believe and it will be so.

Lawyer for Louise: Louise, in terms of the value of your shareholding, as I have explained to you in the past, we need to have this company valued by professionals – remember, that is why we submitted potential expert valuers to your sister.

Aside from the issue of the valuation figure, I am also concerned about how the buyout is structured as it may have serious capital gains tax implications for you.

- Capital Gains Tax (CGT)
- Winding Up company
- Liquidator - gathers assets

It is important that you obtain specialist accounting advice in respect of how we structure any deal. It may be that the payments may be made over time and made to be income by creating a work position for you, instead of you receiving a capital lump sum.

Louise: Work? But what about my spiritual path? If I must then I will call on the spirits to help me close her down or wind up the company.

Lawyer for Louise: Certainly you may press on to wind up the company, and if you are successful the liquidator will pursue the sale of the company's assets, including the patent, but the liquidator will have to pay out all creditors and its fees first. Winding up is one way to proceed if we cannot find agreement but I think you should consider other avenues first.

Louise: The Guru Baba says that I could be of assistance to the path by having a business of my own. Guru Baba thinks high quality health food supplements and herbal nutritional additives would be a good business. He can source them in India and I can bring them here and sell them. That way I can promote healthy living here! I was thinking of calling it 'DuPrey Health Foods'.

Lawyer for Louise: Well, such a business plan will require careful consideration and as such, it is probably not the best time to be giving me this information now. Instinctively, I have some concerns. Given the similarity of the name you propose with that of the family business, claims may arise of misleading and deceptive conduct or passing off.

- Business name - IP issue
  - Misleading or Deceptive conduct (Trade Practices Act)
  - Passing off

You should tidy this up earlier rather than later, and it may even be worth giving thought to getting the company's agreement in the context of the mediation process before it becomes a problem.

Louise: I hear your negativity again, just breathe deeply and feel the solution. There is no need to complicate things; Guru Baba has already foreseen the future, now we just need to make that happen.

Lawyer for Louise: Well, we have an excellent opportunity now to find a solution to this problem. Your sister is here and she is willing to talk, which is something the two of you haven't managed for a long time. Let's see if we can find a way to package a deal that gets you what you are looking for, but which Colette can live with. If that fails and Colette doesn't come to the bargaining table with an offer that suits you, we can always proceed with the court action. But with these new actions being brought against her by other parties I would be surprised if she doesn't try to make progress today. Let's listen to what she has to say.

Mediator: Look, I've spoken to each of the parties in respect of their personal remarks. Why don't we bring everybody back?

I strongly suggest that the parties concentrate on finding some kind of compromise or way forward. As it is, the environment of litigation places the ultimate decision making power in the hands of a third party, being the judge.

Return to mediation

Mediator: Thank you for joining us again. I have had the opportunity of talking with and listening to each party and I have gained some insight as to what motivates each of them.

I strongly suggest that the parties concentrate on finding some kind of compromise or way forward. As it is, the environment of litigation places the ultimate decision making power in the hands of a third party, being the judge. He or she will have a limited period of time to determine the dispute and the outcome reached might be one that is not agreeable to either side.

You both have an opportunity to communicate your positions to each other and to resolve this matter yourselves. What avenues are there to move forward?

Colette: I can't talk to her.

Louise: Colette, you must open yourself up to the possibilities.

From my client's perspective it would be useful to document this broad agreement in a Heads of Agreement to be signed today to show agreement to these initial steps.

Mediator: Well, have you considered the costs of the mediation?

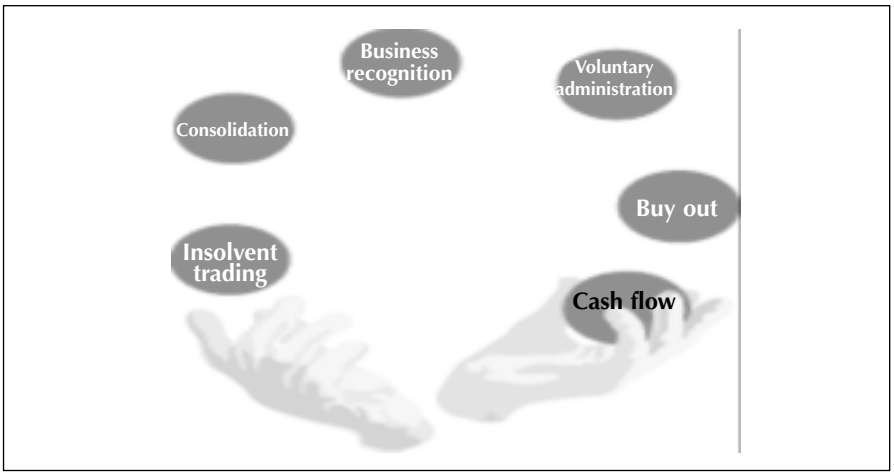
Louise: Guru Baba says money does not have meaning once we are on our spiritual path, he says I must spend as much as it takes.

Colette: Well, I have considered the costs of the mediation and it is putting a cash flow burden on the company.

(Directly to Louise) Look Louise, you know this is Dad's business and you know what it meant to him. Don't you remember how passionate he was about it? I want to keep it going, for him, for all of us. I guess I haven't had many opportunities over the last few years to actually talk with you. Dad worked for many years in this business at great cost to himself and his own health. Did you know that Dad hadn't had a single holiday in the 20 years prior to his accident? 20 years! All I'm trying to do is keep the thing afloat. We have done so well so far. What about the family business awards we have won previously, let's not throw that all away.

Louise: Colette, I feel your pain. But my life is committed to the ashram. I need to explore this path and to do that I need the money to help the journey.

Colette: And I don't want to stop you from doing that I am just trying to juggle everything. Why don't we go ahead and value this company. That's a start at least.



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Louise: Yes. I feel that we are progressing towards the light. I'm happy with that.

Lawyer for Colette: It appears my client is agreeable to a valuation of the company. I must point out that on initial examination of the financial position there are cash flow issues that will affect the ability to pay out a $5 million lump sum. My client is seeking to consolidate this position, through the liquidation of personal assets and injecting the funds into the company.

Lawyer for Louise: Well, certainly a valuation from my client's perspective has been fundamental to progressing towards a resolution, and I am sure that my client is pleased to hear of the defence putting together a buy-out.

From my client's perspective it would be useful to document this broad agreement in a Heads of Agreement to be signed today to show agreement to these initial steps. We should then consider how to best structure this proposed buy-out.

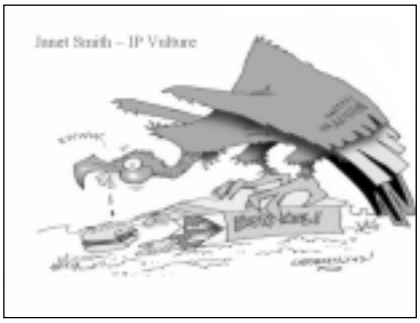
Lawyer for Colette: We can draft up a buy-out plan for you and your client to look at within the next few weeks. I'm sure there will be opportunities for us to discuss and agree on the fine print. But if we broadly agree that we will put a proposal to your client to buy out her half share of the company based on a valuation that is accepted by the parties, then that will be a big step forward.

Colette: And we can also discuss the structure of the payments. Maybe after I've evaluated my financial options we can see how realistic it would be to make a first lump sum payment and then stretch the rest out over a longer period?

Louise: The time is imminent … I'm not going to wait forever for enlightenment you know.

… if we broadly agree that we will put a proposal to your client to buy out her half share of the company based on a valuation that is accepted by the parties, then that will be a big step forward.

Narrator: The mediation was subsequently adjourned. As it turned out, a DNA test showed Janet Smith was not a child of the late Mr DuPrey. Rather, she was a professional IP vulture who made her living out of attacking patents to try and gain a commercial advantage for her amoral business clients.



It turns out her allegations as to the patent were unfounded.

The company was floated on the stock exchange to great fanfare. Colette was able to pay off all her debts as well as the debts of the company and Louise in fact managed to obtain the $5 million she was after.

Louise's ashram in India became the leading ashram for her cult. However, after two years, the ashram folded amidst allegations of sexual misconduct against the guru. ●

Dirk Feinauer is Principal of Feinauer Commercial Lawyers, Perth and can be contacted at dirkf@feinauer.com.au.

diary and happenings

- UnitingCare *Unifam* is offering two VETAB accredited programs in 2004, the **Framework for Mediation program**, which is a five day introduction to ADR, and the *Certificate IV in Community Mediation program*, which is a nationally accredited qualification, including a Mediation Placement Program. Contact (02) 9633 4555 or <uute1@unifamcounselling.org> to enrol or to receive a course brochure.

- The Centre for Effective Dispute Resolution (CEDR), UK, is holding its **9th International Summer School** on 22–28 August 2004 at Lake Maggiore, near Milan, Italy. The cost of the program is £4510 which includes training materials, a copy of The CEDR Mediator Handbook, six nights five-star accommodation and all meals. There are only limited places. Visit <www.cedr.co.uk>, email <training@cedr.co.uk> or call +44 (0) 20 7536 6000 to register or for more details.

- The Association for Conflict Resolution will be holding the ACR Fourth Annual Conference on '**Valuing Peace in the 21st Century: Expanding the Art and Practice of Conflict Resolution**' on 29 September to 2 October 2004 at the Sacramento Convention Centre, Sacramento, California. See <www.acrnet.org> for more details.

- The Institute for the Study of Conflict Transformation, Inc at Hofstra University School of Law is hosting the First National Conference on Transformative Mediation entitled '**Looking Back, Looking Forward: Transformative Practice Ten Years after "The Promise of Mediation"**' on 7-8 November 2004 in Philadelphia, PA. For more information visit <www.transformativemediation.org> or email <jenniferjorgens@earthlink.net>.

- ADRA is also holding a seminar on **Youth Justice Conferencing** at 5.30pm on 26 August 2004 at 170 Phillip Street, Sydney, to be hosted by Jenny Bergen, Department of Juvenile Justice. Contact 02 9231 5822 for more information.

- The Australian Commercial Disputes Centre (ACDC) has released the dates of its forthcoming courses in June 2004. Available courses include '**Stage 1: Dispute Avoidance Communication Skills**', '**Stage 2: Mediation-Conciliation Basic Level Process Certificate**', '**Stage 3: Mediation-Conciliation Intermediate Level Practising Certificate**', '**Concilio-Arbitration and how do you do it?**', '**Advanced Negotiation Techniques for ADR**', and '**Risky Business – Getting IT Right**'. Contact 02 9267 1000 or <info@acdcltd.com.au> or visit their website at <www.acdcltd.com.au> for more information.

- LEADR will be holding its **8th LEADR International Mediation Conference** at the Swiss Grand Hotel, Bondi Beach on 10-11 March 2005. Contact 02 9251 3366, <leadr@leadr.com.au> or visit <www.leadr.com.au> to express interest or for further information.

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