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The mediator interview: Patrick Cavanagh

After many years in legal practice you turned to ADR. Why was that?

In 1984 I returned to university as a mature age student. One of the courses I was offered as part of the LLM was Mediation. One year later with an LLM and something claiming I had a specialisation in the area, I took a job with the Australian Commercial Dispute Centre (ACDC). This was based in Sydney and was the first commercial ADR organisation in Australia. I recall that my official job was Executive Officer. The reality is that I was a salesman for mediation. So for three years my job was to promote mediation by marketing the concept to both lawyers and to the commercial community.

What was the attitude of the legal profession to mediation and ADR in the late 1980s?

The reaction from the legal community was essentially hostile. The need for mediation in the commercial area was recognised by the business community which was aggrieved at the length of, and wait for, court determinations and the costs involved. The legal community's view was that it would be 'business as usual' within a short time and that mediation was 'flavour of the month'.

Were there any significant influences in those pioneering mediation days?

The commercial mediation movement in Australia was started by the ex-Chief Justice of New South Wales, Sir Laurence Street. He took early retirement as Chief Justice and was an endless proponent and speaker in favour of ADR. His endorsement was responsible for the success of mediation.

Although, as indicated earlier, much of the legal community was openly hostile, a section of that community was astute enough to see that the changes were unavoidable and they formed their own lawyer-friendly ADR organisations, such as LEADR. That organisation

continues 25 years later with an expanded identity and has helped to move mediation into the mainstream.

The early opponents to ADR have now accepted that mediation is a mainstream movement and the 'business as usual' model that they advocated is a distant memory.

What has been the predominant nature of your mediation practice?

I have now been practising as a mediator for 25 years and generally mediate disputes that have a commercial character, are court-connected and are reasonably complex multi-party matters.

You spent some years mediating in Jakarta, how did that come about?

In 2001 I received an invitation from the United States Agency for International Development to take up a position as senior mediator in a corporate debt mediation and restructuring program in Indonesia. This program was aimed at settling disputes between syndicated international banks and local borrowers. The average amount in dispute was US\$250 million and at the end of the three-year program we had bench-marked US\$21 billion in settlements.

The most interesting element of the numerous negotiations was the low level of negotiation skills by participants and the universal negotiation issues that seemed to arise independent of jurisdiction or subject-matter.

You have also done many years working as a mediator for Legal Aid Queensland, mainly in matrimonial disputes. How does this differ from your commercial mediation work?

After acting as a mediator-chairperson in Legal Aid conferences the most striking element to me has been the similarities that exist in the participants' style of negotiating with those undertaking high-value, legally complex commercial disputes.

The similarities are:

- the instinctive rush to positional negotiating styles;
- a refusal to concede any strength or viability in the other's position;
- the inability to look for alternative, interest-based solutions that concede any ground to the other party;
- the limited negotiation and communication skills of their professional advisers and their deluded belief that they are skilled negotiation practitioners.

What do you always take into mediations with you?

The fundamental belief which I take to each mediation is that the mediator must establish empathy with the parties. The empathy is important as it is essential that parties provide information to the mediator. If the parties know and like a mediator then the information will be provided. An essential skill for the mediator is to obtain information from the parties so that settlement options can be created and evaluated.

What about mediator attributes?

A crucial ingredient for a mediator is to be an excellent communicator with all kinds of individuals from different socioeconomic backgrounds.

What is the most frequent difficulty you encounter in mediations?

Regretfully most of the commercial and legal negotiators that I see as a mediator regard mediation and negotiation as opportunities for an adversarial debate in which each party adopts a fixed view and then argues in favour of the view. This is a recipe for a failed mediation or negotiation and requires a significant cultural shift.

You have also done a considerable amount of mediation teaching and training in different settings. How has this contributed to your practice?

I have been fortunate to teach in diverse locations to assorted commercial audiences. As a teacher I consciously try to duplicate what I do as a negotiator and mediator:

- demonstrate an interest in the subject, a curiosity as to outcome, and open communication with students and participants;



- constantly use the mediation communication skills of listening, acknowledging, reframing, summarising and questioning — with a self-deprecating use of appropriate humour.

These teaching attributes engage the students, allow information to be transferred in a relaxed, informal and hopefully retentive format — exactly the opposite of how most teachers/educators undertake their role.

What are your predictions for the next 10 years of mediation practice in Australia?

Predictions are dangerous. The best line I have read was from John Kenneth Galbraith, the late economics guru. His comment when asked for economic advice was that economic predictions make astrology look respectable.

However, despite this advice my view is that mediation will continue to expand because the alternative does not exist — an ever-expanding pool of negotiation expertise that would make a mediator redundant. This refusal by parties to acknowledge this professional skills deficit will ensure that those who have and develop these skills can look forward to a long and profitable career. ●

Pat Cavanagh is a Brisbane-based mediator, trainer and dispute resolution consultant and is Adjunct Associate Professor at Bond University. He can be contacted at <patrick.cavanagh@settle.net>.

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- LEADR is holding **Mediation Workshops** in Adelaide on 16–20 March; 31 August–4 September; in Alice Springs on 31 August–4 September; Brisbane on 9–13 March; Canberra on 4–8 May; Darwin on 11–15 May; Hobart on 25–29 May; Melbourne 19–23 April, 1–5 June and 11–15 October; Perth on 18–22 May and 26–30 October; and Sydney on 15–19 February, 19–23 April, 21–25 June, 16–20 August, and 18–22 October. They will also be running **CINERGY Conflict Coaching Workshops** in Sydney on 22–25 February and in Melbourne on 2–5 March. For further information go to <www.leadr.com.au/training.htm>.
- ACDC is offering **Mediation Training** in Sydney on 22–26 February, 24–28 May, 9–13 August, 18–22 October. **Accreditation** dates include 3 March, 3 June, 17 August and 27 October. For further information, visit <www.acdcltd.com.au>.
- The 5th Asia-Pacific Mediation Forum Conference **will be held** in India from 21–27 November 2010. For further information go to <www.apmec.unisa.edu.au/apmf>.
- **National Mediation Conference** will be held in Adelaide on 7–9 September 2010. For

further information go to <www.mediationconference.com.au/>.

- The **Bond University Dispute Resolution Centre** has upcoming courses including **Basic Mediation** on 18–21 March on the Gold Coast; **Family Dispute Resolution (Legislation and Skills)** in Sydney from 20–24 April; **Mediator Assessment** course on Gold Coast 12–13 February; **Global Negotiation Course** in Lyon, France on 30 August to 4 September. For more information email <drc@bond.edu.au> or visit <www.bond.edu.au/law/centres>.
- **Non-Adversarial Justice: Implications for the Legal System and Society Conference**, Melbourne, 4–7 May 2010. Further information, including details about abstract submission can be found at <www.law.monash.edu.au/nonadvj/>. The full conference flyer can be found at: <www.aija.org.au/NAJ%202010/NAJ10%20Infolyer&Reg.pdf>.
- **Mediator Style Training** is running **Mediating Personality Workshops** on 29 August and 7 November in Perth; 8 August and 3 October in Sydney; 25 July and 17 October in Melbourne; 22 August in Adelaide; 12 September and 31 October in Brisbane; 28 November in Townsville; 19 September in Canberra.

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