ADR Bulletin ADR Bulletin

Volume 4 Number 2

Article 1

7-1-2001

Practice in the legal mezzanine: a brief case study of a third sector ADR organisation

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Recommended Citation

Condliffe, Peter (2001) "Practice in the legal mezzanine: a brief case study of a third sector ADR organisation," ADR Bulletin: Vol. 4: No. 2, Article 1.

 $Available\ at: http://epublications.bond.edu.au/adr/vol4/iss2/1$

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contents

VOLUME 4 NUMBER 2

Practice in the legal mazzanine

| a brief case study of a third sector ADR organisation |
|--|
| First year of the Federal Magistrates Service |
| Arbitration in Asia18 |
| The dog that did not bark: mediation style22 |
| Emerging cultural norms for electronic communication24 |
| Working the triangles in Indonesia: mediating debt |

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Information contained in this bulletin is current as at July 2001.

Developments of ADR organisations

Practice in the legal mezzanine: a brief case study of a third sector ADR organisation

Peter Condliffe

A 'mezzanine' is defined by the *Collins English Dictionary* (Australian edition) as:

 \dots an intermediate storey, esp. a low one between the ground and first floor of a building \dots

In many ways the term is an apt metaphor for my term of employment with the Institute of Arbitrators and Mediators (IAMA) since I started with it on 31 July 2000. It is also, I suspect, an apt metaphor for the daily practice of many of you who may read this.

As practitioners who specialise in alternative dispute resolution, we are in many ways wedged between, on one hand, the ground floor of various formal legal systems with their age old rituals, tight professional differentiation and arcane language and, on the other, a first floor of the aspirations of (usually construction and/or commercial) communities and their legislatures which increasingly call for such things as empowerment, recognition, accountability, efficiency and other catchcries which have dogged professional groups increasingly since the 1960s.

The IAMA epitomises many of the tensions between the two floors and seems somehow to be wedged, sometimes uncomfortably, between the two. I further suspect that it has veered one way or the other over the years between ground and first floors.

Another way to think of the mezzanine is

in organisational terms. The IAMA is what is sometimes termed a 'third sector' organisation, wedged between the behemoths of government and corporate sectors. It incorporates elements of the other two more dominant sectors but is distinctly 'in between'.

It is the tension between these perceived dichotomies which will continue to provide the IAMA with some of its most interesting challenges over the next 25 years and fuel many ongoing debates. The ambiguities and contradictions of being wedged in the mezzanine will provide opportunities as well as causing some problems. In this article I want to indicate some of these problems and point towards some possible ways to manage them and, indeed, to transcend them.

Of course this is only a sketch and cannot hope to be comprehensive in any sense of that word. Also, as post-modernism reveals to us, history and the events that make it up are not only created by the teller but also by the audience. The audience changes it to suit its particular needs of the moment. Likewise, any prediction of the future depends upon one's interpretation in the moment.

A brief history

In 2000 IAMA celebrated its 25th anniversary. The creation of the IAMA \succ



The ADR Bulletin

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> was forged on the basic premise that there were more efficient and 'quasi-legal' dispute management processes, often staffed by non-legal practitioners, which could be applied to a range of construction and commercial conflicts. In doing this, the founding members were undoubtedly responding to the realities of the communitarian movement of the 1960s and 1970s, which laid out a grassroots challenge to established institutions. Quite rightly, it could celebrate years of distinguished achievement within the alternative dispute resolution (ADR) field, in which I include arbitration. This is particularly so as it has managed to weld together a polyglot group of professionals over many years — in itself a remarkable achievement. It has managed, amongst other things, to publish a quality journal, now called The Arbitrator and Mediator and has maintained leadership in the arbitration field.

The IAMA has established a solid and committed membership base comprising some of Australia's leading practitioners. Feedback from members would indicate that it experienced its heyday in the late 1970s to the mid-1980s from which time something of a decline has been perceived. Despite these problems, the organisation has many inherent strengths and potentials that can be improved and developed. It is on the cusp of some possibly momentous developments.

The organisation has demonstrated its resilience and talent by achieving many things in the last year. These achievements have included:

 the establishment of a continuing professional development program;

- a new mediation accreditation policy;
- a new and improved website (<u>www.iama.</u> org.au);
- the development of closer links with LEADR:
- · review of the practice rules;
- the introduction of new industry/consumer schemes;
- a better integrated membership database and follow up system;
- a national mediation and conciliation course; and
- the introduction of new nomination fees and related procedures.

Despite these achievements, there are many questions that members of the IAMA and other third sector organisations are entitled to and bound to ask about where their organisation is going.

It is difficult to summarise or ascertain completely what may have caused the perceived decline in 'third sector' organisations, particularly those in the ADR field, from which the IAMA is not immune. But there are probably a number of external factors relevant to the IAMA, that have contributed as follows:

- the emergence of a more competitive environment amongst professional service organisations;
- the rise of a range of ADR procedures, particularly those perceived to be more efficient than arbitration;
- a better educated, sophisticated and discerning client base;
- the change of work habits and expectations of workers, especially as this relates to the ability to provide time to

continued on page 16 ➤

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vol 4 no 2, June 2001

'... we, in western societies, are facing the severe decline of social capital. Third sector organisations provide much of that social capital but the essential fuel for this — voluntary labour — has been declining.'

> continued from page 14

professional development activities;

- the emergence of ADR as a field of competition within and between various professional groupings;
- the perception of arbitration as a relatively rigid and expensive procedure; and
- the ability to develop a viable and visible regional and international corporate practice while regional competitors have emerged.

These various factors are played out against the wider backdrop of significant societal change affecting corporate and organisational roles.

Third sector

The IAMA belongs to that often forgotten part of the Australian community that is sometimes termed by theorists and academics as the 'third sector'. We reside alongside a wide variety of organisations including clubs, charities, churches, unions, co-operatives and so on. These organisations are distinguished by a number of factors including a tendency to be democratically governed, initiated by private interest and initiative and limited or constrained in their economic behaviour. They often have superordinate goals to some higher ideals and to

serve their membership and/or the public good. They are very unlike business or government organisations.

Professor Mark Lyons of the University of Technology in Sydney, in his book *Third Sector* (Allen and Unwin, Sydney 2001), estimates that they contribute 3.5 per cent to GDP and turn over \$57 billion compared to the current expenditure of about \$52 billion by State and Territory governments. They mobilise most of the 2.3 million volunteers in the country and employ over half a million people. Despite all this, Professor Lyons and others who study them say they are in decline. Membership and voluntary contributions have fallen off.

As Francis Fukuyama, author of *The End of History*, argues in his brilliant polemic on human nature and the reconstitution of social order titled *The Great Disruption* (Profile Books, London 1999) we, in western societies, are facing the severe decline of social capital. Third sector organisations provide much of that social capital but the essential fuel for this — voluntary labour — has been declining. For example, volunteering in Australia has fallen from almost a third of the population in the early 1980s to less than 20 per cent. In the 'Olympic city' of Sydney, which lauded its volunteers at the Games, it

| Old and new boards | | |
|---------------------|----------------------------------|--|
| Old boards | New boards | |
| Administration | Governance | |
| Little diversity | Much diversity | |
| Few computer skills | E-commerce E-commerce | |
| Loyalty | Split loyalties | |
| No competition | A lot of competition | |
| Meetings central | Variety | |
| Provider driven | Member driven | |
| Management | Leadership | |
| Managing finances | Utilising finances strategically | |
| Committees | Ad hoc | |
| Non-profit | For profit | |
| Maintenance | Development | |
| Agenda driven | Mission driven | |

The ADR Bulletin



➤ has fallen to 12 per cent.

Many third sector organisations now face stiff competition from commercial competitors in a governmental policy framework that gives this concept (competition) precedence. Despite often subsidising and supplementing essential services, third sector organisations are frequently ignored in policy debates and have been heavily burdened (along with small business) over several decades by steadily expanding regulatory frameworks and the new tax regime.

The impact on management of professional associations in recent times reflects a range of these and other related issues. This is highlighted by a report from the American Society of Association Executives called Facing the Future: A Report on Major Trends and Issues Effecting Associations (1999, US). It describes the generational changes in the last 20 years between 'old' and 'new' boards of these organisations. These are listed in the table opposite.

Many members would be well aware of these issues and it is not the purpose of this article to go over them in any detail. However, it is pertinent to keep them in mind as we concentrate on how we move into and make the future of the organisation.

ADR field

Over the next 25 years there will also be continuing change within the ADR field with four major trends intensifying and continuing.

- 1. Internationalisation as the economy globalises and the communication revolution continues, many more disputes will extend beyond national boundaries. One offshoot of this will be a further emphasis upon processes that are not hemmed in by the relatively rigid legal and procedural processes defined with jurisdictional limits. There will be a move to more informal processes in the international arena. The IAMA will have to become part of these processes and move from a local to a regional and international stance.
- Computerisation the use of the internet to help manage conflict, now in its infancy, will grow exponentially over the coming decades. We need to expand our resources in this area and be prepared to innovate.

- 3. Increasing regulation it is likely that there will be increasing expansion in the number and range of regulations seeking to place boundaries around the conduct of a variety of ADR processes. There are now well over 100 pieces of legislation in this country that have ADR related provisions. As well there is likely to be an increasing amount of case law relevant to the ADR practitioner. This may place some strain upon the continuing practice of what is sometimes termed 'evaluative mediation' (more accurately termed conciliation or non-binding arbitration).
- 4. Institutionalisation from its beginnings in community based and government programs to its present position in business, universities and government bureaucracies, the ADR movement will continue to expand rapidly and move into all of our major social systems. People use these processes for a variety of reasons cost, privacy, timeliness and low risk. Increasingly, they will use them simply because they have the opportunity for the first time or because they have no other choice.

The reassuring thing is that most of us are not like the 1920s blacksmith who saw a horseless carriage go by and wondered what it had to do with him.

Strategic management

To manage these various issues requires a strategic approach. This is an approach that encourages not only looking at long term and short term issues but also works at the macro level as well as the micro level. It is these levels I want to focus on now.

Macro level management

Probably the first thing to do in macro level management is establish a number of operational principles. They are the things an organisation must constantly be guided by. The IAMA's essential operational principles include:

- setting and communicating clear organisational objectives;
- developing the organisation to be ready for and accustomed to change;
- · focusing on the future;
- · integrating our planning;
- maintaining our hybrid and polyglot nature; and

 being decentralised while maintaining central oversight and control.

Micro level management

At the micro level there are a number of issues that require fairly urgent attention in any organisation. For the IAMA these include:

- administration of committees and subcommittees;
- · membership records and tracking;
- · financial recording and reporting;
- collaboration/communication between Chapters;
- staff supervision and employment;
- professional development and training development; and
- profile development.

Conclusion

Many of the administrative issues that the IAMA faces are shared by most third sector organisations and cannot be blamed upon a lack of zeal or competence in those who have tried their best in the past. The speed of decision-making and communication in our economy and society has dramatically increased at the same time as the average professional/worker's voluntary time has decreased. As the general level of social capital has declined, much of the gap has been filled by corporations not burdened by democratic principles of decision-making or superordinate goals related to community or professional advancement.

In the ADR field we are increasingly confronted with an array of corporate competitors many of whom will have cross-border affiliations and ownership. Such organisations need to find the resources to provide the professional administration required to meet the extra demands this rapidly changing environment is bringing. They must also continue to oversee the voluntary and democratically governed membership that is their hallmark in most instances.

The next 25 years of IAMA's existence as an organisation will be rather different to the first 25. lacktriangle

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