

Innovation, influence or inhibition: The future of the governance of ADR. In whose interests?

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Part of diplomacy is to open different definitions of self-interest. **Hillary Clinton**

Précis

The practice and governance of ADR in Australia has changed rapidly over the last 20 years. Entities that were once quite small (LEADR for instance) are now much more robust and financially sound. Competition abounds not only between those with a commercial interest in providing ADR services but between those entities that serve the profession, the public and the processes that are encompassed by the term ADR.

The governance structure of the ADR field includes focus on the promotion of ADR, the accreditation, qualification and discipline of ADR practitioners, the provision of ongoing education for ADR professionals, training delivery, service and consulting services, lobbying, public relations the promotion of practitioners and the recognition of specialist qualifications such as legal, family or collaborative practice. Many people contribute to that governance by serving on boards and committees, teaching training, speaking and presenting and attending conferences and consultations.

Rarely does the field as a whole stand back and question whether the structures that are now in place are appropriate or delivering what stakeholders want and need to ensure that the field is viable, effective and delivering the very best for all of its stakeholders.

How do ADR governance structures best support the engagement and influence of governments and the general public? Is there still a “contest” between ADR and the law, do our politicians or judges really understand ADR and if so why not? How can practitioners be best supported to develop not just skills but sustainable business models that create value for clients and profit for practitioners? What holds back the field from reaching its potential?

¹ Managing Director Negocio Resolutions a for profit ADR provider, former Councillor NADRC, former director Mediator Standards Board Limited, a member of LEADR, a former member of IAMA, a member of the Law Society of NSW and a committee member of its DR committee

Acknowledgements

Many and varied contributions

To effectively engage an audience in a discussion about the future of the governance of ADR in Australia it is necessary (and appropriate) that I first acknowledge the work of the many people and institutions who have made extraordinary contributions that have allowed the field (or profession) to mature. I do not have the time or space in this paper to name them all except LEADR at whose 2013 'kon gres this paper was first presented.

Nothing in my presentation at 'kon gres or in this paper implies or is intended as a criticism of any person or institution who is involved in the ADR field. I accept without question the good intentions of all who have made contributions to the present maturity of the ADR field.

Personal Self Interest

It is vital that I acknowledge my own self-interest, biases and associations when I write or present about what might make our field more effective.

I am a professional mediator and run a consultancy that provides a complete range of ADR services including training in mediation, negotiation and conflict management as well as consulting services. I am a long term member of LEADR, and have been a member of many other "membership organisations" that have ADR interests including the Law Society of NSW (of which I was a councillor for a short period), ADRA and IAMA. I was a councillor of NADRAC between 2008 and 2013, an inaugural director of the MSB, served on the NMAS and have networks and relationships in all areas of government. I am a tribunal member and have served such institutions as the Workers Compensation Commission or NSW, the District Court of NSW and the Supreme Court of NSW as a costs assessor for the Chief Justice of NSW. Until 1999 I was a lawyer in private practice. I am a member of the NSW Law Society.

I acknowledge that in each of these roles I carry self-interest and prejudice that *may* colour my thoughts. Whenever I write opinion pieces or papers such as this I make a conscious effort to acknowledge to myself and the audience my

own self-interest. I doubt that I can ever completely avoid the influence of what I do and where I come from. By far the biggest influence on my thinking is my role as a private *for profit* provider of services. While I am a staunch believer in the social benefits of the philosophical underpinnings of ADR, I am not an evangelist or “do gooder”. If the benefits of the application of the philosophy of ADR are real then they have an economic benefit. In my view one class of beneficiary of that economic benefit should be the service providers. In other words ADR is not religion or calling. It embraces a professional and business activity.

I also recognise that my ideas and ruminations are based, in no small measure on my own personal anecdotal evidence, readings and discussions with others who have an interest. I thank all of those people who over the years have engaged with me in discussions and conversations about the governance of ADR.

This paper is meant to be a catalyst for further discussion rather than offering definitive analysis or solutions. I invite feedback, criticism and comment, to my **email** steve@negocio.com.au or by **phone** 0418 272 449. **Any feedback will be included in a final paper that I will publish in the future.**

Field or Profession?

In this paper I sometimes use the word *field* and sometimes the word *profession* when describing the people and institutions that are stakeholders in the discussion. I am aware that there is a genuine discussion taking place at the present time as to whether we are part of a field or profession and my use of either word in this paper is not intended to convey a view of what is the “correct” terminology to describe “us”.

When I use the words we or us in this paper it is meant to convey the collectivism of the stakeholders engaged in the delivery of ADR services or the governance of ADR in Australia.

What is a governance structure?

When I speak of governance structures, I refer to the interactions between institutions and individuals that define the playing field and rules of the ADR

field. Governance includes the rules about what ADR practitioners do, to whom, when and where, what qualifications are needed, how practitioners are recognised, qualified and employed, how the field is promoted, what legislation governs it, how ADR practitioners are regulated and organised in relation to their services, fees, promotion and practice, how businesses promote themselves and each other, where and how ADR practitioners gather to share stories and experience and to learn and grow, how people are excluded from practice, what allows them to participate, and who gets to make these decisions.

Stakeholders in the discussion include;

- Individual mediators and ADR practitioners, some full time and many part time.
- Commercial ADR providers such as my own business Negocio Resolutions and many others such as The Trillium Group, The Accord Group, Mediate Today, Australian Mediators Association, Australian Dispute Resolvers to name just a few.
- Commercial providers of ADR training, including training in mediation, arbitration and negotiation.
- Not for profit ADR providers such as Relationships Australia and Unifam.
- Not for profit organisations such as LEADR, IAMA, the “ADRAs”, ACICA, CI Arb. Some of these are also membership organisations and in this paper I sometimes use the terms interchangeably,
- Government funded ADR service organisations such as ACDC, AIDC and community justice centres.
- Government agencies and tribunals such as Retail Tenancy Units, Farm Debt mediation agencies, Health Care Complaints units, government departments that engage in disputes, NADRAC, courts and tribunals that make use of and or deliver ADR services.
- Organisations that represent lawyers and other professionals such as the law societies and bar associations, accounting professional bodies etc.
- Consumers of services, including insurers and large agencies and individuals such as lawyers, their clients and the members of the general public who make use of ADR services to resolve disputes.

- Academic institutions that seek to teach the theory and practice of ADR. They are doing so in stand-alone degrees (e.g. UNSW and James Cook Masters in Law Dispute Resolution) or as part of other disciplines such as law, peace and conflict studies, and other social sciences.
- Law makers and politicians at all levels.

To demonstrate the complexity and difficulty of this discussion, in my own professional life I have had interests in each of the categories I list above (except that I am far from being a politician). I also recognise that the very nature of our diverse (and in Australia) federated society means that there are multiple sub-categories broken down by factors such as location, discipline and interest.

The manner in which all of these institutions and individuals interact is the 'governance structure' of ADR.

Michael Leathes² identifies the challenges that we all face in bringing together such a diverse group of stakeholders.

.. reality is that mediation is a highly fragmented field. Service providers are in strong competition with one another. This inhibits proper dialogue about the future and the ability of the main players to agree on concrete goals for the field. Mediation, like any other endeavour, has its sceptics — those prematurely disappointed in the future and unable or unwilling to change — as well as its visionaries and leaders who have already beaten a path through uncharted territory and appreciated that the future belongs to those who prepare now, and are willing to pursue bigger targets in the absence of an overall professional mission.³

² Michael Leathes is a Director, International Mediation Institute (2007-date); Chair, External Partnering Sub-Committee of the ADR Committee of the International Trademark Association (INTA) (2002-2005). Winner of the INTA's Volunteer Service Award for outstanding contributions to the advancement of the objectives of the ADR Committee (2003). Senior Fellow, then Member of the Board of the International Institute for Conflict Prevention & Resolution (CPR Institute) New York (2001-2006).

³ Leathes, Michael (2011) "Where in the world will mediation be in 10 years?", *ADR Bulletin: Vol. 12: No. 4, Article 1*. Available at: <http://epublications.bond.edu.au/adr/vol12/iss4/1>

Purposes of a governance structure

The stakeholders in the field of ADR have a variety of interests and concerns. These may include:

Strong representation with government.

Government policy can profoundly impact the way in which ADR is practiced. Legislation such as the ACT Mediation Act, the Civil Dispute Resolution Act, the Family Law Act as well as specialist legislation in the areas of Retail Leasing and Farm Debt has contributed to the growth of ADR and its use in a variety of contexts.

High public profile

So long as there is choice as to the method of dispute resolution and determination there will be competitive forces. It is imperative that ADR in its many forms has high public recognition and is thought of as reliable, ethical, valuable and safe. If not the field will not reach its potential.

Quality of services

High quality services breeds consumer confidence. Quality is supported, but not entirely ensured, by accreditation or licencing schemes and training. Every field or profession is only as strong as its weakest link. The greatest confidence is entrusted in those seen as providing professionally competent, reliable and consistent services. With the diversity and number of ADR service providers, this standard can be difficult to maintain.

Profit

Profit is important for commercial providers, and in creating excesses to use for their stated purposes it is also important for not for profits and membership organisations? How does the work of one set of stakeholders impact on the work of others and how does this impact of the ability to generate profit?

Wide range of services

There seems to be a general consensus that one of the greatest values of the ADR field is its diversity. This has led to challenging issues especially in the area of accreditation and licencing with some feeling that they do not fit in with the NMA standards, and others (such as arbitrators) not having any consistent national standard or qualification.

High educational standards

Some stakeholders see the practice of ADR at some time being recognised as a profession. This begs the question of what are the educational qualifications for such a profession.

Research and evidence of effect and value

Governments, funders, commerce and the professions sometimes seek to measure the value of ADR services. Motherhood statements that ADR is “better than litigation” or is cheaper, quicker, leads to higher satisfaction etc. are no longer sufficient. Academics are searching for data to analyse the value of and best practice for ADR. Sociologists and therapists would like to know more about how and why ADR is effective in dealing with conflict. Research leads to evidence of cause and effect,

which in turn supports best practice.

Ongoing education of ADR practitioners

There appears to be consensus that some form of continuing education and perhaps even supervision is necessary for ADR practitioners. Questions such as, 'what does CPD look like? who delivers it? and what are its goals?' are big issues for the field. While ongoing education boosts quality of services, rules about CPD which are overly demanding or rigid may limit the capacity of part-time practitioners to practice profitably.

Fellowship and support

The diversity of "membership" organisations is evidence of the demand for fellowship and support. The largest (like LEADR) support hundreds, even thousands, of members, with diverse interests. The debate about the desirable numbers forms of membership organisations is pregnant with possibilities.

Integrity, honesty and professionalism of service providers

While such interest appears to be self-evident, no profession let alone an emerging profession has a complete answer to the question of ensuring integrity, honesty, and professionalism of service providers. When one looks to other professions, it is clear that these matters can be ensured in a number of ways, including creating barriers to entry to practice, professional standards, regular re-accreditation, peer supervision, client feedback etc. Once again when it comes to issues of integrity, a field tends to be assessed by external stakeholders at its lowest common denominator, not its highest. While the rotten apple does not spoil the barrel, the barrel is certainly judged by its least palatable inhabitant.

Discipline and complaints mechanisms

Discipline and complaints mechanisms is a topic of its own, though it is also a sub-set of many of the previous interests. Is discipline and complaints handling an end in itself or is its value in supporting best practice and integrity needs?

Promotion

Promotion means different things depending on your perspective. There is promotion of the service of individuals, and the promotion of the ADR process. There is also a difference between promotion to institutions and business and promotion to the end service user or client, be they individuals or institutional. Every stakeholder has a different view of what characterises good promotion and in some cases, what one stakeholder considers good promotion is considered detrimental by another.

Training of new mediators

This interest supports revenue goals and the necessary growth and renewal of the talent pool of ADR providers. The quality of training impacts on the integrity and quality interests identified above. Congruity of training with service delivery is another issue to be addressed as is how training feeds into accreditation, licencing and ongoing training.

The table below seeks to relate the degree of concern that a group of stakeholders might have in the interests and goals of a governance structure identified above. In the table the numerical evaluations are for discussion, where a 3 represents a high level of interest and 0 suggests no or very little interest.

| | Ind. ADR provider | ADR "for profit" orgs | Gov/mt | Courts & Trib/nals | Consumer | Member orgs | Educ. Instit/s |
|--|-------------------|-----------------------|--------|--------------------|----------|-------------|----------------|
| Strong reps with government | 2 | 2 | 3 | 1 | 0 | 3 | 2 |
| High public profile | 3 | 3 | 2 | 1 | 3 | 2 | 1 |
| Quality of services | 3 | 1 | 3 | 2 | 3 | 2 | 1 |
| Integrity of services | 3 | 2 | 3 | 2 | 3 | 2 | 1 |
| Profit | 3 | 3 | 0 | 0 | 1 | 1 | 0 |
| Wide range of services | 1 | 2 | 3 | 1 | 3 | 1 | 2 |
| High education standards | 2 | 1 | 3 | 3 | 0 | 2 | 3 |
| Research and evidence of effect and value | 1 | 2 | 3 | 2 | 0 | 2 | 3 |

| | | | | | | | |
|--------------------------------------|---|---|---|---|---|---|---|
| Ongoing education | 0 | 0 | 2 | 1 | 2 | 2 | 3 |
| Fellowship and support | 3 | 1 | 0 | 0 | 0 | 3 | 2 |
| Integrity and honesty | 3 | 2 | 3 | 3 | 3 | 2 | 2 |
| Discipline and complaints mechanisms | 1 | 0 | 3 | 2 | 3 | 2 | 1 |
| Promotion | 3 | 3 | 2 | 0 | 1 | 2 | 1 |
| Training of new mediators | 0 | 0 | 2 | 2 | 2 | 1 | 2 |

It is my personal opinion that the field is not being well serviced by its governance structures in the areas of interest highlighted in *red*. My opinions are based on anecdotal evidence and personal observation, *not* evidence-based research. I would welcome readers' views.

- *Strong representation with government*

- My experience is that when government wants to speak to those that represent the field they struggle to find the right person or organisation. This sometimes results in there not being adequate consultation (although that failing also occurs for other reasons). One example is that the federal government did not know who to provide a grant to when it wanted to support a national accreditation scheme.
- Many people and institutions claim to speak for the field and so government is confused and wary of "favouritism".

- When policy issues are discussed within government there are many competing voices from the field, and that, in my view weakness the impact of all of them.
- I have been asked to give evidence and seen evidence given at government enquiries and committee meetings. There is no consistency as to whose views are sought; sometimes it is individuals, sometimes organisations, and sometimes no one from the field at all (for instance the Senate committee re the then proposed Civil Dispute Resolution Bill⁴).
- The anecdotal and covert voices of some who are not representative of the ADR field as a whole (particularly the legal profession who are overly influential) are heard by government more loudly than others. An example is the NSW and Victorian “reasonable steps” legislation).

- *Profit*

- Profit often is an important and vexing issue amongst my colleagues who are keen to learn how to make a business from ADR.
- The reality is that most people practice ADR part-time, needing to rely on other sources of income to supplement their ADR income.
- Rates of pay are woeful in organisations such as community justice centres and legal aid centres where much of mediation is conducted.
- Most family ADR is conducted by Family Relationship Centres, run by NGOs such as Relationships Australia or Interrelate who rely on employed mediators and need to be subsidised.
- The concern often expressed in discussions about accreditation is that many mediators are part time or employed rather than in the more profitable consulting arena, and are *unable to afford* even modest membership and accreditation fees.

⁴http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/civil_dispute_resolution_43/index.htm

- *High education standards*

- As tertiary education is not a pre-requisite to be a mediator, the practice of mediation is not yet seen as 'a profession'.
- There are a variety of standards such as the FDR standards, NMAS, and those of various conveners of panels and membership organisations.
- The NMAS standards that are maintained by the MSB provide minimum standards for accreditation requiring only 38 hours of mediator training, a minimalist proficiency entry to accreditation and no ongoing assessment of proficiency or competence. They do not require any tertiary qualification.
- I am not suggesting that any of these standards are inadequate, only that there is no consensus regarding minimum education levels, as exists for all other professions, such as medicine, law, teaching, and nursing.

- *Research and evidence of effect and value*

- I have now attended two NADRAC sponsored research forums, and more mediation conferences than I care to count. The constant discussion amongst academics is that there is little of no resource or appetite from the usual funders for robust research into ADR.
- As a consequence, even the most scholarly writings on ADR rely on anecdotal evidence and peer opinion (this paper being an example).
- There are very few academics concentrating on ADR in Australia (it should be noted that those that exist are incredibly energetic and productive)
- There are no top-ranking academic journals publishing peer reviewed articles discussing or reporting ADR research. This

means that academics struggle to achieve recognition from employers and funders when researching and writing about ADR⁵.

- *Discipline and complaints mechanisms*

- The MSB and NMAS are in their infancy. One of the most contentious issues has been that of discipline and complaints handling.
- Law Societies and Bar Associations have resisted any attempt to have mediators who are also lawyers subject to separate or distinct processes, even though law and ADR are different disciplines.
- This important function falls to Recognised Mediator Accreditation Bodies that are neither audited nor subject to any rules.
- If ADR practitioners are not NMAS approved or a Family Dispute Resolution Practitioner or subject to some other professional codes (e.g. lawyers) there is no systematic discipline or complaint mechanism.
- There is anecdotal evidence that consumers do not know who to approach if they have a complaint about an ADR practitioner.
- If you are practicing an ADR process other than mediation as a Nationally Accredited mediator, there are no discipline and complaints systems at all. Indeed some professional conciliators believe that they are not able to be accredited under NMAS.

- *Promotion*

- As there is no 'one single voice' for Australian ADR practitioners, those who have the strongest public relations machines tend to be taken as speaking for the field.

⁵ "There are more than 2,000 Law Journals on the current 2010 ERA Journal list. In contrast there are only 7 journals that are concerned with Alternative Dispute Resolution. There are only three ADR specific publications within Australia. None are ranked as 'A' Journals. 'Sourdin, T., "RESEARCH AND EVALUATION OF ADR PROCESSES –LEARNING FROM THE PAST AND PRESENT TO INFORM THE FUTURE" accessed at http://www.nadrac.gov.au/adr_research/Documents/ResearchandEvaluationofADRprocesses.pdf accessed 28th August 2013.

- There is little or no budget allocation for promotion of ADR by our institutions, membership and not for profit bodies.
- Mediation businesses tend to be “cottage” industry in size rather than institutional.
- There are many ADR “organisations” from whom the public, press and media seek comment. Sometimes the messages that they send are inconsistent with each other.
- There are no nationwide, universally recognised ADR institutions equivalent to courts, tribunals, hospitals or even schools which draw the attention of the media and public.
- Mediation in particular is practiced in private, behind closed doors, a fact that makes it hard to talk and write about.
- We tend to speak of mediation and ADR in terms of “success or failure” which equates to settlement or not. This reductionist discussion clouds a promotion of the real benefits of better decision making, better relationship and community, costs and time savings and satisfaction rates.

Why is our governance not addressing these issues?

Competition

Competition between service providers is not only essential for a profession, but healthy.

On the other hand, competition between different representative bodies and more seriously, between representative bodies and their members is not healthy. In my view, this type of competition is proving to be disastrous and a huge barrier to the development of the ADR profession.

In Australia, we have at least three not-for-profits (and perhaps more) fulfilling essentially the same role: each has a CEO, provides training and other services (in competition to each other and their “members”) and offer training and mediation premises that are not fully utilised. The three organisations I refer to are IAMA, LEADR and ACDC or AIDC (the organisation that ACDC is co-located with and runs the suite of rooms). I will send this paper to each of these organisations and ask them to comment in due course.

I am interested in the amount of profit they make from delivering training to the public and in-house to corporates and institutions in direct competition to their members.

When membership organisations deliver such services they are directly competing with members who deliver the same service to the same market. Just like if they offer referral services for a fee they compete with other businesses delivering a similar services, often delivered by members.

Competition between representative bodies and their members is not only unhealthy but in my opinion stifling of growth and progress. It is the biggest barrier to the development of a profession.

To use my personal business as an example, speaking in purist terms, I am in direct competition with LEADR, IAMA and ACDC. ACDC is subsidised by both the Federal and State governments and other not-for-profits provide an array of training services and facilitation services. This is over and above the competition that we as mediator trainers face from universities and other public learning institutions. Evidently, these institutions have very different cost and profit imperatives to private businesses and have no need to make a return on capital.

It is in my personal financial interests for the training businesses of those organisations to fail. They provide their training services at a lower price than I can because their general overhead costs are subsidised by members or government. The profit that they earn (if any) cannot (because of their constitutions) go back to the members (and I am one of them).

My membership fees are subsidising my competitors. That does not make any sense.

Why does any of this matter?

An economic rationalist would say it matters because a free and undistorted market is the best way to support growth. I do not subscribe to the Adam Smith⁶ school of thought that suggests that the capitalist economic model will inevitably lead to greater wealth and prosperity for us individually and

⁶ Smith, A. *An Inquiry into the Nature and Causes of the Wealth of Nations*

collectively. There are, however, economic and other reasons why having membership and other subsidised “not for profits” competing with commercial providers of services inhibits the development of our profession.

There is an understandable reluctance to invest capital in an enterprise that has as its main competitors many with a subsidised delivery model.

There are no robust for profit providers of the scale for instance of ADR Chambers in Canada⁷ which delivers a wide range of for profit ADR services.

The fact is in Australia the market for ADR services is most recognised through strong individuals such as Sir Laurence Street or other retired judges, and a few academics who also offer cottage ADR services, than through strong branded for profit providers.

We do not (for instance) in Australia have a well-developed for profit Online Dispute Resolution model in Australia as there is the USA and some places in Europe.

Commercial providers offer the best method of marketing innovative services.

The fact that “*not for profits*” deliver most of the training in ADR in Australia suggests that ADR is a charitable endeavour, inhibiting the marketing of for profit enterprises.

Because membership organisations are known by the market to deliver ADR training and services, there has been a rush of for-profit venture to dress themselves up as not-for-profit organisations (for example Australian Mediation Association (AMA))⁸ which is owned by Callum Campbell and ADR.org⁹ owned by Derek Minus. This confuses practitioners let alone potential clients.

The Law Council of Australia owns a business known as Australian Institute of Family Law Arbitrators and Mediators (AIFLAM)¹⁰ which is not by any stretch truly an “institute” as is defined by Merriam-Webster¹¹ as

⁷ <http://adrchambers.com/ca/>

⁸ www.ama.asn.au not to be confused with the Australian Medical Association <https://ama.com.au/>

⁹ <http://www.adr.org.au/> Not to be confused with the American Arbitration Association www.adr.org

¹⁰ <http://www.aiflam.org.au>

¹¹ <http://www.merriam-webster.com/dictionary/institute>

an organization for the promotion of a cause : association <a research institute> <an institute for the blind> OR : an educational institution and especially one devoted to technical fields

The reason for the Law Council positioning this organisation as an institution is not explained. To me it is simply an attempt to promote some of its members. There is nothing wrong with that if it is overt.

None of the capital that has been created by organisations such as LEADR and IAMA is being used to enhance business models and create innovative services. Precious little of that capital is being used for marketing because, quite rightly, not for profits are not run by entrepreneurs interested in growing a market. Indeed such entrepreneurs are I would suggest, like me, reluctant to invest when their competition has such a profound price advantage.

The competition between organisations uses a great deal of creative energy, time and promotional costs. I am not sure that there is any benefit to the field in such competition.

We have at least 3 providers of “national ADR conferences” in this country, the national Mediation Conference, LEADRs ‘kon gress and IAMA. Are these conferences profitable, representative or strong?

Finally those organisations that see themselves as having the most to lose from ADR, such as lawyers or their law societies and all those who have the potential to profit from unresolved conflict, such as courts and tribunals, have much stronger balance sheets and lobbying ability than do the divided voices of the ADR field.

Confusion

As I discuss above, the competition between not for profits and commercial providers creates confusion of branding and identity for organisations.

What is worse is that in Australia the market still does not really understand the difference between ADR services and the courts. The general perception is that they are in competition (a perception brought about largely, I think, by our own eagerness to make comparisons of value between two very different services and institutions). How then could even a relatively educated member

of the public possibly understand the very real and defining difference between a *determinative* and *facilitative* model of dispute resolution as we like to call them?

I know from my own experience that many lawyers are expecting an opinion from me when they ask me to mediate (they are sometimes a bit disappointed when I decline) and that many employees, when their employer suggests mediation to resolve a workplace conflict, refuse to “be mediated” because they “have done nothing wrong”, even though my intake process clearly states mediation is by its nature in is not about right and wrong.

NADRAC and other organisations have done great work creating definitions of ADR processes. My experience is that those definitions are not well understood by clients, lawyers or even judges.

Further the loud voice of lawyers in the ADR field, particularly retired judges, suggests to clients that ADR is all about the law, a view that the lawyers are very happy to support. Notice for instance that the litigation departments of big law firms are now known as *Dispute Resolution* departments, many practice little and know less about mediation and other facilitative ADR processes¹².

AIFLAM is marketing a product known as the *Mediation Style Conference* on a page on their web site headed “*Find a Mediator*”¹³. Some of the lawyers who are identified as providing this service are also FDRPs, others have an unknown training but are not nationally accredited. All are lawyers. I am not sure what Mediation Style Conferencing is and how it is different to mediation.

My anecdotal experience is that government agencies, including some very large well-meaning departments, do not understand what ADR is, do not have the skills (or the will) to prepare a Dispute Management Plan for their departments and remain blissfully ignorant of the processes that are offered by the ADR field that could make their decision making not only more efficient, but fairer.

¹² See annexure A for some words taken directly from the web sites of some large law firms.

¹³ <http://www.aiflam.org.au/aiflam/pages/frmFindLawyer.asp?pid=117&action=&typ=mediator&styp=>

Two conservative Attorneys General repealed legislation designed to encourage parties to take “reasonable steps” to resolve their disputes prior to filing proceedings in Court. Both of these Attorneys General cited unspecified concern about increased costs and complexity, a claim that was made by the Federal Court in relation to similar Federal Legislation that was not repealed. The evils that judges and lawyers warned of do not seem to have materialised in relation to the Federal Legislation.

In short, the general confusion that exists about what ADR means, and how, when and why it is most effectively used is hampering the opportunities of the field to develop and organise itself.

Self Interest

Self-interest makes some people blind, and others sharp-sighted. **Francois de La Rochefoucauld**

I do not suggest that any person or organisation acts out of a conscious desire to further their own interests at the expense of others. Nor do I suggest anything but the best intentions of those who run and govern the membership and other organisations, RMABs, the MSB, universities or government owned agencies.

What self-interest does support is a powerful inertia to change, because some people and organisations and their own commercial aspirations are well served by present models. Why would these people and organisations be championing change?

Here are a few of the conflicts I perceive in present structures.

- Membership based RMABs compete with their members for training work.
- RMABs that accredit mediators as reaching the required competence are the same bodies that deliver the competence training required under the NMAS to reach the required standard.
- Most if not all of these membership organisations take membership fees from mediators that they accredit, after they have trained them. LEADR and IAMA for instance include a *complimentary* or reduced cost

membership (valued at \$270.00 for LEADR and \$445.00 for IAMA) with their 5 day training packages¹⁴.

- The NSW government continues to subsidise ACDC to deliver mediation training to the public and institutions.
- Trainers engaged to deliver courses by IAMA and LEADR are Individual also members of those organisations and in at least one case, a Board member of the organisation. As far as I know, an open tender or expression of interest process to become a trainer has never occurred. Trainers are paid daily fees.
- Each of the LEADR trainers (for instance) also delivers training either in their own businesses or consulting firms or for a university or other employers which in many cases is “in competition with” LEADR.¹⁵
- Some members are chosen to be coaches for LEADR ACDC and IAMA, and are paid for this work.
- In coaching, training or being in some other way being endorsed by an RMAB or membership organisation, some of its members are being promoted as to their professional qualifications. Other members do not receive the benefit of that promotion.
- There is not (as far as I am aware) an open and transparent method of choosing which members get the benefits that are offered as a trainer and coach.
- Boards of directors of the NGOs are mostly populated by members whose businesses are involved in ADR.
- The board of the Mediator Standards Board Limited (as an example) is populated only by members who practice, teach or otherwise are involved in ADR.¹⁶ There is not any independent board member with no interest in ADR.

¹⁴ <http://www.leadr.com.au/training/mediation-5-day>

¹⁵ For instance see <http://exceptionalpeople.com.au/index.php/what-we-do/transforming-conflict/> and <http://www.linkedin.com/pub/anne-sutherland-kelly/41/692/52b> and http://www.linkedin.com/profile/view?id=62617941&authType=NAME_SEARCH&authToken=H3m1&locale=en_US&srchid=118628951377984955000&srchindex=1&srchttotal=8&trk=vsrp_people_res_name&trkInfo=VSRPsearchId%3A118628951377984955000%2CVSRPtargetId%3A62617941%2CVSRPcmpt%3APrimary and <http://imimmediation.org/bradley-chenoweth> and <http://www.linkedin.com/pub/tania-sourdin/5/8bb/5a7> and <http://www.law.monash.edu.au/centres/acji/education-and-training/index.html> and <http://www.ninaharding.com/html/training.html>

¹⁶ <http://www.msb.org.au/about-us/msb-board>

I am not saying that disasters of the type that brought down Enron or the Australian Wheat Board because of unnoticed conflicts are likely to occur in the Australian ADR world. At the present time there are many highly principled and well-meaning people devoting their time and energy for the benefit of those who work in the field.

I do fear however that people with less moral fibre than our present leaders see the opportunity of becoming a powerful player in the training field (for instance) and take control of a LEADR or IAMA or another organisation with a credible public profile and uses it for their own benefit.

I fear that the status quo maintains the privilege of some and excludes the entry of others.

I think that some people will become disillusioned with the status and leave the field, or start their own organisations rather than support the collective good. This will further dilute our energies.

Infancy and Experience

The development of a profession and professional associations takes time. By way of example, lawyers started practicing in the UK in the mid-16th century and the UK Law Society (then known as “The London Law Institution”) first came together in 1823 and did not get statutory powers in regard to lawyers until 1907.

It took between 1842 and 1884 for the NSW Law Society to truly represent all solicitors in NSW and it did not get statutory power until 1935.¹⁷

What I mean to say is, it takes time for professions to work out how to engage collaboratively and sometimes the formation of professional organisations that cover the field is fraught with controversy and not a little pain.¹⁸

In the US there has been an effort to bring together like organisations to develop more powerful membership based organisations.

¹⁷ <http://www.lawsociety.org.uk/about-us/our-history/> and <http://www.lawsociety.com.au/about/organisation/history/index.htm>

¹⁸ See for instance Soudin, T. *Avoiding the credentialing wars: Mediation accreditation in Australia* <http://espace.library.uq.edu.au/view/UQ:194226>

The Association for Conflict Resolution has 17 chapters but still does not cover the whole country.

The Association for Conflict Resolution, Inc. (“ACR”), was formed in 2001 from the merger of the Academy of Family Mediators (“AFM”); the Conflict Resolution Education Network (“CREnet”), the successor organization to the National Institute for Dispute Resolution (“NIDR”); and the Society of Professionals in Dispute Resolution, Inc. (“SPIDR”)¹⁹.

Not even in the US is the field represented with panache and influence.

What should be done?

We need to begin to talk about governance issues.

I do not profess to have all of the answers. I do have some ideas and invite more discussion.

There have been a number of attempts which I know of to improve collaboration between IAMA and LEADR, ACDC, government, private providers, law societies and others. None have gone very far.

The NMAS showed that collaboration was possible, even if slow and some might say tortuous. Nonetheless, a set of Standards was agreed and the MSB was created. Perhaps we are suffering some “governance fatigue”.

I know that there are lots of committees, boards, and work to do in ADR governance. Perhaps we need one more think tank in the short term. Perhaps we call it a think tank for Collaboration in ADR (CARD)

Such a think tank could have the following characteristics;

- It should be run like an interest based mediation, with agendas, identifying interests, brainstorming ideas, and finding the best options.
- It could first identify and have agreed its purpose and that purpose should be endorsed by stakeholders.
- It could have a chair or convener with no interest in making money or governing ADR in Australia.

¹⁹ <http://www.acrnet.org/Page.aspx?id=1385> vn

- Its contributors should not “represent” organisations rather be committed to finding optimal solutions.
- People who wish to participate must identify openly and transparently all of the “hats that they wear” and conflicts they have. I would envisage a register of interests. The big questions are about how we chose the people who are involved, what is the selection, who is included and not included?
- It should have a long lead time.
- It should ask stakeholders, particularly practitioners, government and industry what is wanted and needed in an ADR governance structure.

We must work out ways of funding our governance structures that do not rely on the delivery of training by those that govern and accredit.

We can seek a funding model for governance that allows our governing organisations to be truly independent and not compete with its members.

We can separate the functions of training, accreditation and the setting of standards.

We can invite truly independent governance experts onto the boards and structures that exist and are to be created.

We can get advice from other jurisdictions, professions and academics who know more about governance and less about ADR.

We can all agree to collaborate to find the best solution, not the one that best suits individuals or single organisations in this moment.

We can stop the competition between not for profits.

We can work together to educate present and prospective clients about what ADR is and how it is different (not better) than the exercise by the judicial arm of government of coercive power to end disputes.

We can practice as a profession, collectively, the facilitative skills that we bring to processes every day.

We can address issues that are missing like;

- Pro bono ADR
- Public interest ADR
- Public education in schools and universities

We can engage with all governments and demonstrate that we can speak with a single voice, lobby our politicians, contribute to policy debate, and influence the public consciousness to understand and embrace collaboration over competition.

We can be innovative, even bold in our thinking, not content to accept something as the best way simply because it is the way things are done now.

In other words as a field we can *walk the talk*.

Leathes is of the opinion that reaching professional status for ADR practitioners is essential and that this requires the collaboration and dialogue of all “on the services side”. He identifies that 7 things need to occur to achieve professionalism and what he calls *pie expansion*. Some of these ideas may be controversial and I am interested in the views of the field and its stakeholders. His ideas are at least a starting point to the brainstorming that goes to finding the best decisions. He suggests;

1. A peak body

Mediators, providers and trainers, with the help of government, create a professional body. The leader is not an active mediator, trainer or provider. The supervising board or council includes representatives of all the stakeholder groups. Everyone participates pro bono in professional development and best practice sharing. (Emphasis added)

2. A funding plan

A realistic five-year funding plan is put in place. Government provides seed funding. Overheads are kept low and bureaucracy avoided. The internet is leveraged.

3. No self interest in the peak body

The professional body does not earn any income from the provision of services. It is entirely non-profit and registered as a charitable institution if possible. (Emphasis added)

4. Leverage what already exists

There is be no re-invention of the wheel, but there is cultural adaptation. Lessons are drawn from and shared with professional bodies in other fields. All national professional bodies are linked up globally. Transparency and quality characterise this and all other national professional bodies for mediators. There is a strong mission to encourage and develop young mediators.

5. High level accreditation

High-level training and independent assessment standards are set and applied. High competency is accredited or certified. User feedback summaries are required.

6. Inclusiveness

The body is open to all who meet the quality criteria set, irrespective of background and other professional qualifications.

7. High Ethical standard

There is a strong code of ethics and an independent review body to apply it.²⁰

As Leathes says

the future belongs to those who prepare now, and are willing to pursue bigger targets²¹

Conclusions

²⁰ Leathes, M.

²¹ Leathes, M.

I mostly agree with Leathes and would add that what we need is honesty and integrity.

Honesty about who we are and what we want.

And the integrity to accept and embrace our individual interests and balance those interests with our collective needs.

If the field of ADR is to have real influence then we need strong institutions and strong business models that support individuals and organisations to lobby, cajole and hassle government, civil society and the powerful institutions of our society, particularly legal institutions that have a particular view of justice that treats ADR as an add-on that supports the more important justice system manifested in the courts and legislation, rather than an integral contributor to the way our society is ordered.

Steve Lancken

'kon gress September 2013

Feedback and ideas are invited to steve@negocio.com.au or by phone at 0418 272 449

LEADING LAW FIRM has one of the leading practices in commercial litigation and dispute resolution in the region. Many of our litigation partners are recognised as world leaders in their field and market research shows that our accomplished litigation practice has 'put airspace between itself and its competitors'

With more than 220 lawyers, our dispute resolution team has the resources and expertise to assist in any dispute. In Australia's highly regulated commercial environment, our specialists can help you identify regulatory risks and respond appropriately.

We act in some of Australia's most significant disputes, including class actions, public and private investigations (including inquiries by ASIC, the ASX, the ACCC, the ATO, APRA, Royal Commissions and Senate inquiries), and competition cases. We frequently assist with the Australian component of major international disputes, and have the capacity to conduct matters in jurisdictions throughout the region.

We appreciate that our clients' first priority is to manage and minimise risk. Our aim is to give clients a thorough and clear assessment of their position, the various options available, and a recommendation on how best to achieve a timely, commercial and cost-effective solution. We use innovative technology and processes to achieve significant efficiencies for our clients.

Our aim is to help clients avoid litigious disputes but, where litigation is unavoidable, we pursue it rigorously, innovatively and efficiently. (emphasis added)

Our relationship focus

We strive to build strong relationships by getting to know our clients. We use our extensive resources to stay abreast of relevant issues and to keep our clients informed.

Our approach is to provide straightforward advice. We regard our clients' interests as a priority at all times. We clearly scope all new matters with you, so that we both know what is expected in terms of legal advice, time frame and costs.

Principal practice areas

We have a depth and range of experience across many areas, including:

- administrative law
- arbitration
- banking & financial services (including consumer credit)
- class actions
 - shareholder class actions
 - product liability actions
 - other representative proceedings
- commercial and contractual disputes
- competition law/trade practices
- construction and building
- corporate insolvency and restructuring
 - workouts and restructures

- asset recovery
 - general insolvency advice and litigation
- corporations law
 - continuous disclosure
 - applications under the Corporations Law
 - examinations by liquidators and administrators
 - securities litigation
 - breach of directors' duties
- defamation and media law
- environment & planning
- fraud
- insurance and professional indemnity
- intellectual property
- International business obligations
 - anti bribery and anti-money laundering
 - sanctions
 - disaster management
 - international trade and investment laws
 - legal/litigation risk minimisation for large-scale projects or investments in high-risk jurisdictions
 - business human rights obligations
 - financing
- public inquiries
 - royal and special commissions
 - coronial inquests
- product liability
- resources & energy and infrastructure
- regulatory investigations and compliance
 - ASIC/ASX investigations
 - APRA, ATO, ACCC investigations
- taxation
- workplace relations/occupational health & safety

NB this list DOES NOT INCLUDE MEDIATION

The law firm whose web site page called Dispute Resolution says as follows. Note that not one mediation example is given. Note also that it has many other pages dedicated to determinative dispute resolution methods.

LEADING LAW FIRM has a leading and truly global dispute resolution practice. Our strength is not only our exceptional legal knowledge, but also the depth of our experience across industries.

Our market-leading contentious regulatory practice aims to minimise our clients' exposure to risk and offer solutions to clients involved in disputes that are practical, competitive and commercially focused.

Together with our investigations practice, we have represented clients in relation to some of the most complex and strategically important investigations across all sectors.

We are sophisticated users of alternative dispute resolution procedures in addition to traditional processes of litigation and arbitration, including:

- pre-litigation disputes management
- risk management
- mediation, expert determinations, adjudications, mini-trials, negotiations and bespoke processes to resolve disputes

As a firm we are strongly committed to alternative cost options for clients. Our office in Belfast, which focuses on the document review in major contentious cases, enables us to offer clients an attractive combination of quality, efficiency and pricing. Additionally, our unique in-house advocacy unit provides a number of benefits for clients including ease of instruction and reduction in cost.

Recent experience

- **Gazprom:** advising in the English High Court victory in relation to its dispute with SeaDrill, the Norwegian drilling rig contractor, over the damaged jack-up drilling unit in the Bay of Bengal, offshore India
- **Eurotunnel:** advising in its ground-breaking successful arbitration claim valued at approx £30 million against the British and French governments for failing to resolve problems relating to clandestine migrants entering the UK. The arbitration was handled by Paris / London arbitration team
- **BSkyB:** advising on its successful claims against EDS (now part of Hewlett Packard) for deceit, negligent misrepresentation and breach of contract arising out of the installation of a new customer relationship management system. The contract claim was capped at £30 million, but our success in proving fraud meant that BSKyB was awarded £318 million, and this success was recognised with the Litigation Team of the Year award at each of The Lawyer Awards 2010, The Legal Week Awards 2010, and the Legal Business Awards 2011
- **Centro:** advising a number of entities in relation to multiple related shareholder class action proceedings in the Federal Court of Australia. The parties (some 20 in number) agreed to resolve the class actions after nearly 11 weeks of trial, and the Federal Court approved the terms of settlement in June 2012
- **Metcash:** advising in successfully defending an application by the Australian competition regulator, the ACCC, to injunct it from acquiring the Franklins supermarket business in the State of New South Wales in the first merger to proceed to an Australian court since 2003 (*ACCC v Metcash Trading Limited* [2011] FCA 967)

And that same firm trumpeting its ADR credentials says

The delivery of innovative, creative and cost-effective solutions through ADR has, for many years, been a pivotal aspect of our pre-eminent dispute resolution brand. Our award-winning ADR practice encompasses our entire disputes division, and extends to our international network of offices.

We have a deep understanding of how corporates develop and refine strategies for using ADR at both the policy and operational level.

We have extensive expertise in a wide range of ADR processes including:

- mediation – we are committed to leadership in **mediation advocacy** and understand the critical role of cultural and communication styles in international negotiation and ADR
- expert determination – we have a wealth of experience in advising on expert determination, in particular in relation to energy, projects and completion account disputes
- adjudication – we have advised and acted in relation to many adjudications, including three of the largest adjudications ever conducted in the UK, international construction disputes involving bespoke variations on the UK adjudication procedure, and adjudications conducted under Australian Building and Construction Industry Security of Payment legislation
- bespoke solutions and other ADR processes – we have experience in designing and executing multi-stage, bespoke ADR solutions for the largest international commercial disputes, as well as conducting early neutral evaluations and baseball arbitrations

Recent experience

- **mediations are by definition confidential.** By way of example, we mediate a wide range of disputes across all major sectors. These *are typically of high value and complexity, and often involve cross-border issues*
- **advising a consortium of leading multinational energy companies** in expert determination proceedings against a Central Asian Republic. The case concerned budget and schedule disputes worth US\$9 billion in a high-profile politically significant dispute concerning one of the world's largest oil and gas projects
- **successfully defending London's major public transport supplier** in a test case adjudication brought by its contractor for £240 million. In the short time frame permitted, we prepared detailed written submissions, 21 witness statements and four expert reports
- **a FTSE 250 company:** advising in relation to its dispute with a government department regarding the interpretation of particular contractual provisions referred to non-binding ENE.
- **Lend Lease group of companies:** acting in relation to the World Trade Centre clean-up litigation, where over 18,000 plaintiffs sued the City of New York and several prime contractors for respiratory diseases alleged to have resulted from the WTC

clean-up operations. The litigation is reported to be one of the largest mass tort actions in the United States. We drove a resolution which involved a mass settlement and the enactment of federal legislation in the United States (the *James Zadroga 9/11 Health and Compensation Act of 2010*), the result of which now means that Bovis Lend Lease's exposure is effectively limited to available insurance.