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COMMUNICATE INNOVATE COLLABORATE FACILITATE NEGOTIATE MEDIATE EDUCATE

COMMENTS ON NSW LAW REFORM COMMISSION

CONSULTATION PAPER 16

DISPUTE RESOLUTION FRAMEWORKS IN NEW SOUTH WALES

Stephen Lancken of Negocio Resolutions.

My CV is attached. I am a professional mediator and ADR practitioner with a long held interest in the regulation of my profession and how it interacts with other processes and institutions that offer access to justice in Australian Society.

I thank the Law Reform Commission for the opportunity to comment on the consultation paper.

I commend the comprehensive coverage of the Consultation Paper (the Paper) which will surely be a valuable resource for legislators considering more ADR legislation.

The Consultation Paper identifies the considerable diversity in which ADR is dealt with in legislation. I am of the view that there are advantages in providing for more standardised provisions while still allowing for the diversity of practice needed in differing jurisdictions. Those advantages include:

a) Lower compliance costs
b) Better understanding for all stakeholders of ADR process and practice
c) Support of the ADR profession to self-regulation as accreditation standards become a requirement to practice under certain legislation
d) Creation of a consistent body of law

I have been involved in drafting the submissions of the Law Society of NSW. The following is based on that draft as submitted to the Council of the Law Society for approval so may repeat those submissions.

I am also mindful that in relation to most of the current legislation that provides for mediation there has been little litigation about ADR process, suggesting that the market works out issues without the creation of more disputes (the only area where there is a body

of law about mediation appointment appears to be in the Farm Debt Mediation area). The need for further regulatory or legislative intervention is therefore not urgent.

GENERAL COMMENTS

In relation to the general comments about the value of ADR, particularly in paragraph 1.21 of the Paper, especially those comments relating to concerns about the appropriateness of ADR and whether it contributes to Access to Justice, I point out that much of the criticism of ADR comes:

a) Without the support of evidence. There is a need to gather evidence about the true value, risk and cost of ADR processes. I commend to the NSWLRC the recent draft report of the Productivity Commission in so far as it relates to ADR and its value, and in so far as it points out the lack of an evidence base; and
b) Without an understanding of the basic premise of consensual ADR, being that it is open to any party to end the process at any time. The power of a participant to leave the process is the ultimate protection against some of the concerns (such as power imbalances) identified.
c) From those with little knowledge of how processes work or worse, a fear that use of ADR might damage their business models.

I support the gathering of evidence to support the value or otherwise of ADR processes being imposed in legislation as a prerequisite to or as part of the process of litigation in Courts and Tribunals. Many of the issues raised in the Paper cannot be answered without such research.

I point to those schemes identified in the Paper that have been operating for some time without evidence of any downside or risk, in particular those now conducted by the Small Business Commissioner, under the the Farm Debt Mediation Act, the Workers Compensation Commission, the Health Care Complaints Commission and other examples identified in the Paper.

The introduction of the Paper identifies some of the central issues for legislators when considering ADR in legislation, such as the present confusion about what “mediation” is or who a “mediator” (or other ADR practitioner) is when these terms are used in legislation (including issues of accreditation); and the present confusing variety of provisions relating to such issues as confidentiality, protection from suit re defamation, immunity, privilege and satisfactory participation in an ADR process.

Much work has already been done to identify the issues and to recommend some answers. I commend to the Commission the work of the former NADRAC, in particular in its report ”*Maintaining And Enhancing The Integrity Of ADR Processes, From principles to practice through people”* that was published in 2012. I note that the Paper refers to this publication of NADRAC.

I recommend that before any changes in relation to these issues or the creation of new legislation (including an overarching piece of legislation regarding ADR or mediation that I suggest) that an experts panel be convened to advise in relation to any proposed provisions.

A CONSISTENT APPROACH TO THE LEGISLATION OF ADR

The challenges facing legislators when considering ADR legislation, as the Paper identifies, mostly relate to the technical considerations of best practice in ADR (particularly mediation), in relation to the appointment of mediators, how the process should be governed, and issues of confidentiality, privilege and participation as identified in Chapters 3 to 7 of the Paper.

This response does not seek to address these technical issues in isolation or on a chapter by chapter basis.

The first consideration is whether there is a need for legislation to address the inconsistencies in present legislation? Balanced against the value of consistency is the need to provide for diversity of practice and diversity of needs in different jurisdictions and types of dispute.

I am of the view that the inconsistencies in the manner in which legislation deals with the regulation of ADR should be addressed over time, while maintaining attention to the idiosyncrasies of different legislative regimes, programs, and Tribunals.

I favour the introduction of overarching legislation that identifies, in default of other specific legislation, the following issues:

a) Definition of Mediation, Evaluation, Conciliation, and other ADR processes;
b) Confidentiality provisions and requirements;
c) Privilege of communications;
d) Duties of ADR practitioners when the public interest is against confidentiality or privilege (for instance, future harm or criminal activity);
e) Non-disclosure of information;
f) Admissibility of evidence of what happens in ADR;
g) Privilege with respect to defamation;
h) Suspending limitation and prescription periods;
i) Satisfactory participation (for instance a requirement to act genuinely, reasonably, or in good faith);
j) The right of a party to terminate or withdraw from a mediation;
k) The enforceability of agreements reached in ADR, though I am concerned that any such provision not impinge upon existing common law or statute relating to the creation of or enforceability of contracts;
   Qualification of and appointment of mediators. In this respect I suggest that the legislation provide that qualification and appointment be dealt with by Regulation

(for instance Regulation may provide that for the purposes of certain legislation, a mediator must be Accredited under the National Mediator Accreditation Standards or to some other standard AND have other qualifications). Such an approach would allow the present practice of appointment as provided by regulation or defined in legislation to continue; and

l) The provision of ADR by Court officers such as registrars or Tribunal members or staff (in so far as they might be governed by different requirements). Issues of compulsion, immunity, etc. should be addressed in respect of such officers.

I propose that such legislation not apply to contractual ADR unless conducted pursuant to legislation, except to the extent that the parties do not otherwise deal with them in their contract. This allows freedom of contractual variation and supports diversity of practice, which is one of the valuable hallmarks of present ADR practice.

I propose that unless there is a policy imperative, and even if ADR is mandated by legislation, that the parties be free to contract as to the following (unless the legislation provides otherwise);

a) By whom and what an ADR practitioner is paid;
b) Practice standards for ADR practitioners (as these are covered by accreditation requirements);
c) Independence and impartiality (as these are covered by accreditation requirements);
d) Dealing with power imbalances; and
e) Immunity from suit for mediators.

I believe that there is merit (if overarching ADR legislation is proposed) in such legislation dealing with the default provisions for the appointment and process of ADR if parties use simple words like mediation, conciliation or evaluation in their contract. So, for instance, the legislation would apply to make certain a clause such as;

> *"If the parties are in dispute in relation to any matter arising out of this contract they will first attempt mediation".*

By legislating common practice for ADR in default of specific legislation (as suggested above) it would be possible to promulgate legislation that does not in the short term require the repeal or amendment of the 50 or so statutes that presently refer to ADR while allowing, over time and when reviewed, each of these legislative instruments to be brought into line with the overarching legislation, except where specific circumstances or policy imperatives dictate otherwise. In the long term the goal of just cheap and quick justice would be enhanced by there being less compliance effort needed to ensure individual legislation is addressed when in dispute by creating a common language about, understanding, and practice of ADR processes in NSW.

Such legislation would make NSW the leader in the support of ADR good practice in Australia and internationally.

I counsel caution and a wide ranging consultation and discussion before the creation of such legislation, that consultation to include at least the following:

a) All sectors of the legal profession;
b) The Judiciary and Courts;
c) Tribunals and their members;
d) The ADR profession through its various membership and accreditation bodies;
e) ADR experts and academics;
f) Government Agencies who administer ADR such as the Rural Assistance Authority, the Small Business Commissioner and the Health Care Complaints Commissioner etc.;
g) Legal Aid, Community Legal Centres and Pro-Bono interests; and
h) Frequent users of ADR such as Government agencies, Insurers, Banks and business interests.

An experts panel to advise Government would have great value in ensuring any legislation is appropriate and workable.

There is a risk that if legislation is introduced without proper consultation and support that the present confusion surrounding ADR as identified in the Consultation Paper will be exacerbated.

I also support the consideration of a triage service to identify the suitability of conflict to ADR processes and to support the consistent collection of data to determine how and what type of ADR is most effective. I have not formed a view as to where such triage service could be maintained but suggest that it is probably a valid function of the Attorney-General's Department and could be housed in that Department or one of the Courts, provided it is independent of the Court.

OVERALL OBLIGATIONS OF DISPUTANTS

I favour the sort of legislation that the Commonwealth has adopted known as the Civil Dispute Resolution Act that imposes on parties who seek to approach Courts an obligation to at least consider and, wherever appropriate, attempt ADR before litigating.

Our Courts are a finite resource and all citizens should be obliged to do their best to avoid calling on those finite resources except where necessary.

Far too many cases are filed in our Courts that are later resolved (and that could easily have been resolved with appropriate pre filing attention), thereby creating cost and waste.

The balance to such requirements is the need for easy access to Courts to ensure that the vulnerable are not exploited.

If such legislation is contemplated;

- Parties must be free to leave processes without penalty if they have been attempted,
- A triage service would be of great value as this would educate parties in conflict to seek out the best process to address that conflict,
- Courts and judges need to be educated in process and the legislation so that they can appropriately apply costs penalties,
- The only penalty for a failure to engage in ADR or seek pre-trial settlement should be costs penalties.

QUESTIONS RAISED IN THE CONSULTATION PAPER AND RESPONSES

2. Existing statutory provisions - overview

2.1 (1) In what ways can existing statutory ADR provisions be improved?

(2) What areas require ADR provisions where none are currently provided?

(3) What existing ADR provisions are unnecessary?

Comments

- Refer to comments above.
- There is a need, where there is no current regime or definition of ADR or its various processes, for there to be some consistency in definition and understanding.
- It is not possible to say which ADR provisions are "unnecessary". All fulfil some legislative purpose, though the inconsistency and diversity between them may be creating some confusion.
- Some legislative requirements about duties to "act in good faith" or mediate or negotiate "in good faith" in my view suffer from being vague and difficult to interpret.

3. Existing statutory provisions - types of disputes and dispute resolution

3.1 Types of disputes

(1) Should the type or category of dispute determine what ADR provisions should apply in a particular case?

(2) If so, what ADR provisions should apply to what types of dispute?

Comments

- See comments above and below
- I favour a regime in which overarching ADR provisions are clear with the opportunity for them to be varied through specific legislation or regulation

3.2 A need for standardised terminology or a broad umbrella term?

(1) What problems have been caused by the lack of standard ADR terminology and definitions?

(2) In what circumstances would it be desirable to use standard terminology and definitions for ADR processes?

(3) In what circumstances would it be better to use a broader, more flexible term that incorporates the possibility of many different types of ADR?

(4) In what circumstances would it be better to use a narrower, more restricted term that limits the types of ADR that can be used?

Comments

- Comments above address these issues.
- The greatest problems in the non-standardised use of terms is confusion and a resultant lack of understanding among stakeholders about what is or is not appropriate practice in ADR.
- These problems may be restricting the uptake of appropriate ADR processes and the development of the field.

(5) What types of ADR are suitable for the different types of disputes?

Comments

- This question is too broad for a simple answer.
- I support a continuing exploration of ADR processes for different disputes.
- What is missing in NSW is an overall triage service for disputes that will allow best practice referral and the collection of meaningful data to answer this question.

3.3 Mediation

(1) What problems have been caused by existing uses and definitions of the term "mediation"?

(2) What problems have been caused by the absence of a definition of mediation?

(3) What definitions of "mediation" should be used in what circumstances?

3.4 Conciliation

(1) What problems have been caused by existing uses and definitions of the term "conciliation"?

(2) What problems have been caused by the absence of a definition of conciliation?

(3) What definitions of "conciliation" should be used in what circumstances?

3.5 Neutral evaluation

(1) What problems have been caused by existing uses and definitions of the term "neutral evaluation"?

(2) What problems have been caused by the absence of a definition of neutral evaluation?

(3) In what circumstances should neutral evaluation be used?

(4) What definitions of "neutral evaluation" should be used in these circumstances?

3.6 Arbitration

(1) What problems have been caused by existing uses and definitions of the term "arbitration"?

(2) What problems have been caused by the absence of a definition of arbitration?

(3) What definitions of "arbitration" should be used in what circumstances?

3.7 Expert determination

(1) What problems have been caused by existing uses and definitions of terms in the nature of expert determination?

(2) What problems have been caused by the absence of a definition of such terms?

(3) What terminology and definitions should be used in what circumstances?

3.8 Negotiation

(1) What problems have been caused by existing uses and definitions of the term "negotiation"?

(2) What problems have been caused by the absence of a definition of negotiation?

(3) What definitions of "negotiation" should be used in what circumstances?

Comments in relation to 3.3 to 3.8 above

- There are no pressing and immediate "problems" caused by any of the existing uses and definitions of the terms referred to above, though inconsistencies in use do cause confusion and have the potential to lead to satellite litigation and some problem.
- An absence of definition does create uncertainty. Some legislation does not even define.
- I support consultation with stakeholders to agree on standard definitions of ADR terms that will be the default definition for all legislation, absent a specific exemption in particular legislation to meet industry or other needs.
- The promulgation of standard definitions will make NSW a leading jurisdiction.
- The discussion and consultation regarding standard terms will support engagement in ADR as more people become aware of the differences between processes.
- Consistency in ADR language and legislation will educate law makers and raise awareness of ADR.
- Consistency in ADR language and legislation will educate lawyers about the benefits of ADR and raise awareness of ADR in the legal profession.
- Standard language allows for robust and useful judicial exploration of process.

4. Existing statutory provisions –initiating and participating in ADR

4.1 Compulsory referral

(1) In what circumstances should a referrer be required to refer matters to ADR?

(2) How should provisions requiring such referral be expressed?

Comment

- Mandatory referral and mandatory pre-trial protocols need careful consideration. There are some excellent examples of mandatory referral or consideration creating useful fora for the resolution of disputes as referred to in this submission. Any mandatory referral must address the specific industry need and/or the needs of disputants.

4.2 Discretionary referral

(1) In what circumstances should a referrer be able, but not required, to refer matters to ADR?

(2) How should provisions enabling but not requiring referral to ADR be expressed?

(3) In what circumstances should a provision set out the conditions to be met before a referrer can refer a matter to ADR?

(4) How could such conditions be expressed?

Comment

- Provided referrers are well trained in triage and/or mapping to ADR, I see no limit on circumstances that a referrer should not be able to refer to ADR. This approach has proved very successful in the Courts and Tribunals (for instance the AAT, Federal Magistrates Court, and NCAT).
- I refer to my previous comments re definitions etc. It is useful if referrals are made consistently and providers are aware of the services that they are obliged to provide. Consistency of use of terminology will assist ensure that appropriate process is applied.
- The primary consideration in any referral should be to ensure that no party is harmed or disadvantaged.

4.3 When one or more party applies for referral

(1) In what circumstances should one or more parties to a matter be able to request that the matter be referred to ADR?

(2) In what circumstances should a referrer have a discretion to deal with an application for ADR?

(3) How should provisions which set out the referrer's discretion to deal with an application for ADR be expressed?

(4) In what circumstances should a provision set out the grounds on which a referrer could dismiss an application for ADR?

(5) How should provisions that set out the grounds on which a referrer can dismiss applications be expressed?

Comment

- See comments re paragraph 4.3 above.
- I can see little danger in referrals being made where one party believes that there is a benefit in ADR. There may be costs issues that can be dealt with by way of special costs orders.

4.4 Where an attempt at ADR is required before proceeding

(1) In what circumstances should parties be required to attempt ADR before a matter can proceed?

(2) How should such provisions be expressed?

Comment

- See comments above re mandatory ADR.

4.5 Where the referrer conducts the ADR

(1) In what circumstances should provisions allow a referrer to conduct the ADR proceedings?

(2) How should such provisions be expressed?

Comment

- I oppose Court and Tribunals providing ADR as part of their service. This creates a risk to the integrity of the Tribunal and the ADR process.
- If it is economically and otherwise feasible, ADR should be provided at arm's length to the Courts or Tribunals where determinations are to be made.

4.6 Referral to other bodies for ADR

(1) In what circumstances should a provision deal with referral to other bodies for ADR?

(2) How should such provisions be expressed?

4.7 Obligation to participate

(1) In what circumstances should a provision require parties to participate in or attend ADR processes?

(2) How should such compulsory provisions be expressed?

4.8 Voluntary participation in ADR processes

(1) In what circumstances should a provision give the parties a choice to participate in ADR processes?

(2) How should such a provision be expressed?

4.9 Good faith participation

(1) In what circumstances should a provision require parties to participate in ADR in good faith?

(2) How should such provisions be expressed?

4.10 Consequences of failure to participate

(1) In what circumstances should a provision deal with the consequences of a party's failure to participate in ADR?

(2) How should such provisions be expressed?

Comments in relation to 4.7 to 4.10 above

- Careful consideration and extensive consultation is needed to determine what, if any, amounts to satisfactory participation in ADR.
- I support a soft touch approach that expresses satisfactory participation in terms of willingness to listen and engage. There must be no requirement to resolve.
- I consider that conduct requirements such as good faith risk satellite litigation and need careful consideration.
- I refer to the report of the former NADRAC.

5. Existing statutory provisions – practice, procedures and enforcement

5.1 Practice and procedure of ADR sessions

(1) In what circumstances should provisions set out the practice and procedures for ADR sessions?

(2) How should such provisions be expressed?

(3) In what circumstances should provisions allow ADR practitioners to determine the procedure that should be followed?

(4) How should such provisions be expressed?

5.2 Representation of parties

(1) In what circumstances should provisions deal with parties' representation in ADR sessions?

(2) How should such provisions be expressed?

5.3 Presence of other people in ADR sessions

(1) In what circumstances should provisions deal with the presence of other people in ADR sessions?

(2) How should such provisions be expressed?

5.4 Adjournment of the ADR processes

(1) In what circumstances should provisions deal with the adjournment of ADR processes?

(2) How should such provisions be expressed?

5.5 Provisions allowing parties or ADR practitioners to terminate proceedings

(1) In what circumstances should provisions deal with the parties' ability to terminate an ADR session?

(2) How should such provisions be expressed?

(3) In what circumstances should provisions deal with an ADR practitioner's ability to terminate an ADR session?

(4) How should such provisions be expressed?

5.6 Provisions regarding the conclusion of ADR processes

(1) In what circumstances should provisions deal with the conclusion of ADR processes?

(2) How should such provisions be expressed?

Comments in relation to 5.1 to 5.6 above

- These matters should be left to ADR providers, as guided by practice standards applied when accredited. There is no need to legislate these matters.

5.7 Costs of ADR

(1) In what circumstances should provisions deal with the costs of ADR?

(2) How should such provisions be expressed?

Comment

- I believe that a statutory default position stating that the costs of ADR form costs of the cause, unless otherwise agreed or ordered, would do much to avoid ongoing inconsistency and confusion.

5.8 Enforceability of agreements

(1) In what circumstances should provisions deal with the enforceability of agreements arising from ADR processes?

(2) How should such provisions be expressed?

5.9 Other impacts of agreements and other outcomes of ADR

(1) In what circumstances should provisions deal with other impacts of agreements and other outcomes of ADR?

(2) How should such provisions be expressed?

Comment

- I do not see any need for such legislative intervention.
- Parties to ADR should maintain the freedom to contract as they see fit.

6. Existing statutory provisions - ADR practitioners

6.1 Appointment and accreditation of ADR practitioners

(1) In what circumstances should provisions deal with the appointment and accreditation of different types of ADR practitioners?

(2) How should such provisions be expressed?

6.2 Control and independence of ADR practitioners

(1) In what circumstances should provisions deal with the control and independence of different types of ADR practitioners?

(2) How should such provisions be expressed?

6.3 Miscellaneous powers and obligations of ADR practitioners

(1) In what circumstances should provisions set out the powers and obligations of different types of ADR practitioners?

(2) How should such provisions be expressed?

6.4 Immunity of ADR practitioners

(1) In what circumstances should provisions deal with the immunity of ADR practitioners?

(2) How should such provisions be expressed?

Comments in relation to 6.1 to 6.4 above

- See above re accreditation. Legislation (if considered) should support the continued self-regulation of the ADR "profession".
- There is no policy reason why ADR professionals should be offered immunity. There are cheap and accessible insurance options for accredited ADR professionals.
- Powers (if any) of ADR professionals should be inherent in definitions.

7. Existing statutory provisions – Use of information

7.1 Non-disclosure of information

(1) In what circumstances should provisions deal with non-disclosure of information?

(2) How should such provisions be expressed?

7.2 Inadmissibility

(1) In what circumstances should provisions deal with inadmissibility of evidence in later proceedings?

(2) How should such provisions be expressed?

7.3 Privilege with respect to defamation

(1) In what circumstances should provisions deal with the privilege with respect to defamation in ADR processes?

(2) How should such provisions be expressed?

Comments in relation to 7.1 to 7.3 above

- NADRAC has offered a very useful starting point for discussion re these issues.
- I support a wide ranging discussion about these issues and a default codification to create certainty.
- Perhaps an expert panel is the best way for Government to obtain advice in relation to these issues.

8. Types of provisions generally not included in statutes

8.1 (1) What other types of provisions could be included in statutory schemes for ADR?

(2) In what circumstances should they apply?

8.2 Applying practice and accreditation standards

(1) In what circumstances should provisions apply practice and accreditation standards to ADR practitioners?

(2) How should such provisions be framed?

(3) What alternatives are there for dealing with practice and accreditation standards?

8.3 Enforcing practice standards

(1) In what circumstances should provisions enforce ADR practice standards?

(2) How should such provisions be framed?

(3) What alternatives are there for enforcing ADR practice standards?

8.4 Ensuring independence and impartiality

(1) In what circumstances should provisions aim at ensuring independence and impartiality of ADR practitioners?

(2) How should such provisions be framed?

8.5 Identifying and managing power imbalances

(1) In what circumstances should provisions identify and manage power imbalances between participants in ADR sessions?

(2) How should such provisions be framed?

Comment in relation to 8.1 to 8.5 above

- I believe that it is the role of the Courts to deal with power imbalances. Mediators need to be trained and certified to ensure that power imbalances are not abused in ADR.

8.6 Suspending limitation and prescription periods

(1) In what circumstances should provisions suspend any limitation and prescription periods while ADR is attempted?

(2) How should such provisions be framed?

9. The regulatory framework

9.1 Relationships between various forms of regulation

(1) How should ADR be regulated in different contexts?

(2) What role should different forms of regulation play?

9.2 Acts and Regulations

(1) What role should Acts and Regulations play in regulating ADR?

(2) In what circumstances would provisions in Acts and Regulations be appropriate for regulating ADR?

(3) What provisions that regulate ADR in current Acts and Regulations are inappropriate?

9.3 Contracts

(1) What role should contracts play in regulating ADR?

(2) In what circumstances would contractual provisions be appropriate for regulating ADR?

9.4 Codes of practice and guidelines

(1) What role should codes of practice and guidelines play in regulating ADR?

(2) In what circumstances would codes of practice or guidelines be appropriate for regulating ADR?

(3) What should the codes of practice or guidelines contain?

9.5 Model provisions

If Acts and Regulations, contracts or guidelines were to be used to govern ADR in different contexts:

(a) what model provisions could be developed, and

(b) how could they be applied?

Comments in relation to 9.1 to 9.5

- Comments appear above.

Steve Lancken

Director
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COMMUNICATE INNOVATE COLLABORATE FACILITATE NEGOTIATE MEDIATE EDUCATE

CURRICULUM VITAE

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Accredited Specialist Commercial Litigation and Mediation

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Secondary Education	Newington College Stanmore, Higher School Certificate 1975
Tertiary Education	University of New South Wales BA LLB1981
	Sydney University MPACS (Masters Degree in Peace and Conflict Studies) 2011
Admitted as a Solicitor	9 July 1982
Accreditation	Specialist Accreditation: Commercial Litigation. **Law Society of NSW**
	Accredited Mediator. **NMAS**
	Registered mediator **ACT Mediation Act**
	Mediator Pursuant to **rule 1177 of the Court Procedures Rules 2006 (ACT)**
	Accredited Mediator **LEADR, ACICA and Australian Commercial Disputes Centre**

1 Career Summary

Since 1999 I have specialised in mediation and negotiation and have engaged in advanced study in Peace and Conflict Studies at Sydney University. I am a highly experienced facilitator of processes such as conferences, mediation and group decision making with a special interest in people who have been or are in conflict situations. My practice and teaching focusses on effective communication and decision making, alternative justice and dispute resolution methods. I teach, consult and practice in all areas of conflict management and systems design. Over the last 2 years I have been teaching a course called Conflict in Organisations to postgraduate students at Sydney University.

1982 to 1999

Lawyer then Partner Owen Hodge Lawyers

Specialising in injury and insurance for plaintiffs and then acted for corporate defendants in insurance and banking and finance litigation

Clients included insurers, banks and insolvency practitioners

Senior partner 1995 to 1999

Retired from partnership to pursue career in ADR

1994 to present

Costs Assessor Supreme Court of NSW

1998 to 2002

Board Member St George Community Housing Co-Op Limited

1998 to 2002, Chair 2002

1993 to 1998

Member Hurstville Board of Governors

1993 to 1998

1999 to present

Consultant Mediator and Arbitrator

2002 to 2012

Australian Principal, The Trillium Group

This organisation offers conflict consulting and skills training in mediation and other ADR processes. The company operates throughout the world

2002

Councillor Law Society of NSW

2002 to present

Arbitrator and Mediator Workers Compensation Commission

2003 to present

Adjunct lecturer Conflict Management, AGSM and University of NSW and Program Director Executive Programs

2005 to 2008

Board Member Cumberland Housing Co-Operative Limited

2008 to 2013

Councillor National ADR Advisory Council
Appointed by the Attorney General of Australia

2011 to present

Lecturer, MPACS, Sydney University
ADR and Conflict in Organisations

2011 to present

Volunteer Indigenous Community Volunteers

2012

Managing Director Negocio Resolutions

2 Qualifications, Accreditations, Appointments, Associations

Qualifications

Bachelor of Laws and Bachelor of Arts ***University of NSW 1981***
Master Peace and Conflict Studies ***University of Sydney 2011***
Accredited Specialist: Mediation & Commercial Litigation ***Law Society of NSW***

Accreditations

Arbitrator and Accredited Mediator ***NMAS***

Accredited Mediator ***ACDC/LEADR/Retail Tenancy Unit/ Workers Compensation Commission***

Accredited Farm Debt Mediator

Accredited Mediator ***Hong Kong International Arbitration Centre***

Mediator ***Law Society of New South Wales***

Appointments

Arbitrator ***District Court of NSW & Local Court of NSW 1984 - 2005***

Mediator ***Supreme Court, Land and Environment Court, District Court and Local Court (NSW)***

Costs Assessor ***Supreme Court of NSW 1994 - present***

Arbitrator and Mediator Workers Compensation Commission of NSW

Mediator ***Retail Tenancy Unit (NSW)***

Chair Settlement Week Steering Committee, ***Law Society of NSW***

Adjunct Lecturer ***Australian Graduate School of Management***

Conciliator ***Health Care Complaints Commission NSW***

Chair Independent Property Impact Assessment Panel ***Cross City Tunnel and Lane Cove Tunnel***

Member Experts Working Group Commercial Arbitration Act

Councillor ***NADRAC 2008 -2013***

ACDC Panel of Mediators ***2013***

ACICA Panel of Mediators ***2013***

Associations Past & Present

Member ***Law Society of NSW and St George and Sutherland Law Society***

Fellow ***Australian Institute of Company Directors***

Associate Member ***Institute of Arbitrators and Mediators Australia***

Associate Member ***Chartered Institute of Arbitrators***

Member ***LEADR (Lawyers Engaged in Alternative Dispute Resolution)***

Member Dispute Resolution Committee ***Law Society of NSW 2000 to 2005***

Member Litigation Law and Practice Committee ***Law Society of NSW***

Member ***Corporate Lawyers Association***

Member ***Australian and New Zealand Sports Law Association (ANZSLA)***

Member ***Insolvency Practitioners Association of Australia***

Member Mediation Group ***Hong Kong International Arbitration Centre***

3 Professional Education & Development

Specialist Accreditation Mediation and Commercial Litigation ***1994***

Mediation Workshop ***Harvard University Law School 1994***

Advanced Arbitration Course ***Institute of Arbitrators Australia 1994***

Intensive Mediation Course ***Australian Commercial Disputes Centre 1990***

ADR Workshops Levels 1 & 2 ***The Trillium Group, Sydney 2000***

Australian Institute of Company Directors Course ***1997***

4 Specific Experience & Practice Areas

- Mediation and arbitration of numerous disputes over work grievances, discrimination, wrongful dismissal and workplace abuse (in corporate, school, hospital, club & government agency environments).
- Mediated and investigated numerous disputes relating to workplace bullying and harassment in the private and public sector.
- Advising Government on dispute resolution systems.
- Conciliation of doctor/patient disputes for the Health Care Complaints Commission of NSW.
- Mediation of land issues between Native Title claimants, pastoral lease holders and a state government.
- Facilitated dialogue and community consultation for local and state government agencies (including dispute resolution with community and special interest groups).
- Conciliation and arbitration for a large number of Workers Compensation matters.
- Mediation and arbitration in numerous commercial, professional, partnership, lease and property disputes (including a multi-million dollar dispute in family businesses).
- Conduct of a wide variety of commercial litigation including such cases as *Amann Aviation v Commonwealth* to the High Court, lengthy and complex commercial litigation in all jurisdictions including District, Supreme and Federal Court.
- Appeared as an advocate in the Local, District and Supreme Court and the Court of Appeal.

- Conduct of litigation for such clients as St George Bank, GIO, Catholic Church Insurance and Primary Industry Bank of Australia.
- Conduct as a mediator and arbitrator of numerous matters for claimants and defendants in personal injury and insurance law (including multi-million dollar personal injury disputes, medical negligence, Lawcover, product liability and occupier's liability cases).
- Advocacy, mediation and arbitration in building, construction and general commercial matters (including a multi-million dollar building claim heard over 15 days and a major power station construction).
- Negotiation of Enterprise Bargaining Agreements.
- Sports Law (including Tribunal Chair, hearing an appeal against a failed Olympic Games selection; mediation of a dispute between a national sports body and a sponsorship partner; and mediation of a dispute concerning the trainer's fee for a thoroughbred racehorse).
- Chair of the Independent Property Impact Assessment Panel (IPIAP) for the CrossCity Tunnel and Lane Cove Tunnel Projects in Sydney.
- Mediation between a state owned resource corporation and a contractor alleged to have negligently caused $6.5 million damage to corporation assets.
- Mediation of a dispute between a telecommunications supplier and a third party vendor
- Mediation of many debt and insolvency disputes, acting for a number of Sydney insolvency practitioners in a variety of case types (including significant bank debt recovery actions arising from rural and general commercial lending).
- Many mediations involving issues of property estates and retail leases (for example, a dispute over a will involving significant assets including real estate, bloodstock and a share portfolio).
- Panel Member in the Retail Lease mediation scheme.
- Construction disputes including $50 million dispute relating to construction of a power station.

5 Teaching, Training and University Courses Conducted

Conflict in Organisations ***Centre for Peace & Conflict Studies, Sydney University.***

Conflict Management (Master of Business Administration).
Australian Graduate School of Management.

Five-day Personal Injury Mediation Course ***Hong Kong Law Society.***

Coaching and Assessing of Mediators ***Construction Industry, Development Board of Malaysia; Hong Kong International Arbitration Centre (Mediation Group).***

Training and Assessing of Mediators ***The Accord Group; Law Society of NSW; Institute of Mediators and Arbitrators; Global Mediation Services, The Trillium Group.***

Representing Clients in Mediation ***College of Law; Coudert Bros Lawyers***

ADR, Advanced ADR, Applied Negotiation and Difficult Conversations Workshops***; The Trillium Group (Toronto, Vancouver, Canada, Hong Kong, Sydney, Perth, Brisbane, Canberra, Townsville & Melbourne).***

6 Publications & Seminars

Publications

AS 4608: Standard for the Prevention, Management and Resolution of Disputes ***Australasian Dispute Resolution Journal Dec 2001***

ADR for Insolvency Practitioners ***The Insolvency Bulletin Dec 2000***

The Preliminary Conference: Option or Necessity? ***Australasian Dispute Resolution Journal Aug 2000***

The Benefits of Mandatory Mediation ***Lawyers Weekly Aug 2001***

Compulsory Mediation in Asia ***Asian Dispute Review Sept 2001***

Litigation: Is refusing to mediate worth the risk? ***Law Society Journal Apr 2004***

Mediation: What cases will a court refer to mediation over the objection of one of the parties? ***Law Society Journal Sept 2002***

The responsibility of the neutral party in respect of mediation confidentiality ***ADR Bulletin July 2004***

Reasonable, Cheaper Way to Avoid Filing ***The Australian Apr 2004***

Common Ground on Access to Justice Reforms ***Law Society Journal Dec 2009***

Courts Require Clarity from Lawyers Engaged in ADR ***Law Society Journal Sept 2009***

Lawyers as Conservationists ***Law Society Journal Sept 2008***

Courts Apply Old Principles to New Situations ***Law Society Journal Apr 2009***

Reflections on 'tactics' in negotiation and conflict management ***ADR Bulletin Dec 2007***

Pre-litigation dispute resolution – What new requirements will mean in practice ***Law Society Journal Feb 2011***

Let's be Reasonable ***Lawyers Weekly Oct 2011***

Litigation – Court finds reasonable steps vacuum ***Law Society Journal Dec 2011***

Good faith bargaining – how "good" is it really? ***Law Society Journal* 2012**
Make me an offer I can't refuse ***Lawyers Weekly Apr 2012***

Lawyers & Mediation: What's the right direction for resolution? ***Lawyers Weekly Aug 2012***

Fair Work Act Negotiations - Failure to Bargain may jeopardise your interests ***Law Society Journal Sept 2012***
Mediation: Talking about a resolution **Lawyers Weekly Sept 2012**
Judging Mediation **Lawyers Weekly Dec 2012**

Seminars Conducted

Part 7B, Supreme Court Act 1970, Reference to Mediation ***College of Law***

Innovative Dispute Resolution for Corporations ***Australian Corporate Lawyers Association***

'Compulsory' Alternative Dispute Resolution Young Lawyers, ***Law Society of NSW***

ADR and Medical Negligence ***NSW Legal Conference***

Representing a Client in ADR ***College of Law***

ADR Processes for Personal Injury Cases ***College of Law***

ADR Processes in Commercial Litigation ***College of Law***

Winning the War without the Battle ***Sparke Helmore***

What You Should Know About Mediation ***Master Builders Association of Malaysia***

Is Litigation the Answer? Law Society Specialist Accreditation Program

Personal Injury Revisited ***College of Law***

Preparation and Management of a Civil Trial: ADR Issues ***College of Law***

ADR for Medical Negligence Disputes ***NSW Legal Conference***

Environmental ADR ***Law Society of NSW***

Mediation Demonstration and Panel Discussion ***Young Lawyers***

The Art of Settlement ***College of Law***

Mediation Demonstration and Update ***Lighthouse Club of Kuala Lumpur***

Improving Your Practice with ADR ***NSW Legal Conference***

Court Ordered ADR: Does it Work? ***Hong Kong Mediation Council***

Workers Compensation ***State Legal Conference (NSW) 2001 to date***

Negotiation for Lawyers ***State Legal Conference & College of Law 2005 to date***

Negotiation/Collaborative Problem Solving ***Various Law Firms***

Finding the answers to effective mediation ***Tonkins Workers Compensation Conference 2012***

Effective Contract Drafting and Negotiation ***Marcus Evans 2008 to date***

In-House Counsel Day - 'Conflict Resolution within an organisation' ***Legalwise 2013***

'Ethics in relation to negotiation and mediation' ***Corrs 2013***

The unique role of the insurer in mediation, ADR and settlement conferences ***NSW Claims 2013***

Negotiation Business and "legal" outcomes, without giving in…Breaking down positions and creating value ***State Legal 2013***

The Bullying Session ***State Legal 2013***

A New Approach to Winning Negotiation Skills ***College of Law 2013***

Negotiation Tips & Traps (Rule 42.1.6.3) Professional Skills ***College of Law 2013***

Negotiating through Conflict ***The Law Society 2013***

"Dealing with difficult parties at mediation" ***CAS Conference 2013***

Solicitors as Executors ***The Law Society 2013***

Negotiation Skills Seminar ***Clinch Long Barrow 2013***

Innovation, Influence or Inhibition ***Kongress LEADR 2013***