DISPUTE RESOLUTION IN THE 90s

Proceedings of the Conference

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CONTENTS:

GUEST SPEAKERS

TOWARDS THE FUTURE

Introduction and Overview

Proceedings of the 1990 ADRA Conference

Linda Fisher, ADRA President

The second national conference of ADRA provided a forum where ADRA's members and prospective members could meet, network, discuss ideas and exchange information.

ADRA's first conference in 1988 focused on cross-cultural disputing, drawing on expertise from mediators and those versed in cross-cultural issues. Although it provided no easy answers, participants felt that finally they were beginning to ask the right questions. Participation was limited to those working in the two areas.

This conference was much broader in scope and focus. In the two years that have elapsed, *mediation* has proliferated. New interstate organisations have been formed, federal and state money has been poured into programs - existing and new - and lawyers and counsellors (among other professionals) have enthusiastically embraced the concept of mediation.

There is, now, much being done in the name of ADR and DR. Much of it is called *mediation* or *conciliation* or *dispute settlement* - all of it alternatives to traditional legal processes and procedures.

Purpose
The ADRA Board, in planning the conference, had two objectives. **Firstly**, to showcase as much as possible so that practitioners could see what else was being done across the ADR spectrum and to compare what others were doing in the same area of specialisation. **Secondly**, to showcase mediation in a generic sense, for those who were new to the techniques, or who were from traditional legal areas.

Structure
Thus the two days of the conference were structured to ensure an increasing input from participants. The first day was intended for information and discussion on the many different ADR processes and programs available : within the court system (Family Court); having a base in legislation (NSW Department of Housing, Business & Consumer Affairs, the Anti Discrimination Board, Human Rights and Equal Opportunities Commission); having an investigative function in addition to a conciliation one (State Rail Authority, again the Anti Discrimination Board, Human Rights and Equal Opportunities Commission, Business & Consumer Affairs, the Ombudsman); innovations (Building Construction Arena, AIDS-related questions, in the International arena, teaching in the Law Schools); and finally, possible ideas for the 1990's (the US experience).

The afternoon of day 1 was designed to develop these programs and processes, with demonstrations of techniques used in ways that are different to *traditional*, ie community mediation models. This began the sharing of skills and techniques that was a feature of the conference. Thus, the afternoon programs encompassed sessions on arbitration, and a general introduction to mediation processes, Order 24 conferences, counselling, Federal Court mediation, legal private practice mediation, and Issues and Listings conferences.

Day 2 was devoted to applications of mediation - workshops designed to involve participants in the many ways that mediation is presently being utulised : family, neighbourhood, cross-cultural, commercial, racial, multiparty and juvenile. The afternoon of the second day was devoted to aspects of family mediation (DR and domestic violence) and to environmental matters in mediation - both of which sessions, led by Mr Chris Moore, were planned to allow audience involvement in a large group setting.

Participants were deliberately given a smorgasbord because we were catering for diverse tastes and palettes. Each delegate could choose however much or little was needed to satisfy his or her hunger. Our hope was that there would be enough goodies for each to sample a few tasty morsels. There were a couple of *old favourites* in the selection : the workshops on racial disputes and on cross-cultural elements in mediation were slotted in because of the tremendous interest shown in these topics two years ago, and to showcase what is now happening in these fields. Sessions on

multiparty disputes, juvenile disputes and commercial mediation recognised the increasing importance and use of these applications over the past two years.

Definitions
The conference committee chose not to buy into the "is it *mediation* or is it *conciliation* or is it ..." argument. We showed, rather, what is being done in the name of mediation at the start of the 1990's, and a range of alternatives to litigation in dispute resolution mechanisms generally.

Common Themes
Despite the diversity of presenters and topics, there were common themes and concerns in relation to DR and ADR processes.

* The *happiness* of the parties (that is, the concept of happiness vs a satisfactory outcome for the parties) seemed to be important.

This point was brought out by Mr Justice Rogers in his keynote address, and by Mr Ian Coddington in his paper on commercial mediation. This happiness comes, it seems, from involvement in the process itself, not simply the *good* or *just* outcome. The Hon Mr John Dowd, in his lunchtime address, made the point that people need some control in the proceedings and want to have their say. The point was made that people need to explain to others why they have taken their particular stand. Perhaps it could be, as Acting Chief Inspector Christine Nixon quoted :

> "...lawyers are artful thieves, who *steal* conflicts and depersonalise them".

If one accepts this viewpoint, then judicial settlement conferences (such as Order 24 conferences, and the Federal Court mediations) may not qualify as *effective* in mediation terms.

* An issue that was grappled with was the function of the mediator. For instance, questions that were covered were :
    * should a mediator be directive?
    * how far should a mediator go in reality testing?
    * where does one draw the line between information and advice?
    * should a mediator influence the parties to be *realistic* about their chances in court or at a tribunal?

These were important issues in the discussions on commercial mediation (Mr Ian Coddington), family mediation (Ms Ena Shaw), legislated conciliation (eg at the Anti Discrimination Board - Ms Leigh Baker. The added question here, of course, is :
    * is a conciliator working under legislation really mediating, really able to take a neutral role? If not, what are the differences in function and/or role?

* Settlement conferences (Ms Joanne Harrison - Supreme Court and Mr Alan Dawson - Federal Court) posed a problem to traditionalists :
    * how different are these?
    * is this mediation or *directive mediation* as Mr Ian Coddington calls it?

Mr Coddington's contention is that directive mediation is alright where there is no *ongoing relationship* (for example in Issues and Listings conferences). However, Mr Justice Rogers' cautionary tale about the Showground noise/residents dispute shows this may not necessarily be so.

* The question of *premediation* or *preparation for mediation* was an important one, as seen in the diverse presentations on family mediation (Ms Ena Shaw), mediation in legal private practice (Ms Barbara Coddington), commercial mediation (Assoc. Professor Pat Cavanagh), juvenile mediation (Mr David Brodie), working with interpreters (Ms Dorota Jones), environmental mediation (Mr Chris Moore) and multiparty disputes (Mr David Purnell). The issues here are :
    * how does this affect the ensuing mediation?
    * does it alter the function of that mediation?

The whole intake process (vs intake procedures) assumes an importance not generally recognised in discussions on *the mediation process*, not the least because of its time-consuming nature. Given

its centrality to a successful outcome for parties in dispute, it would seem to be crucial for practitioners to debate :

- is it the role of intake to begin the process of equalising bargaining power and promoting effective negotiations between the parties (viz Mr David Brodie) or to provide the mediators with information on the issues deemed important to the parties?

If one were to agree with Mr David Brodie, then further issues would seem to be :

- who should be assigned to intake - agency staff or mediators?
- if mediators, how does this affect their neutral role or their perceived neutrality in the ensuing mediation?

* The similarities were clear between what Mr Chris Moore outlined in his session on environmental mediation and what came out of the workshop conducted by Mr David Brodie. Environmental mediation often operates as multiparty mediation (see also the workshop conducted by Mr David Purnell), taking the form of a series of meetings with each side, then joint mediation sessions. As Mr David Brodie said : "the group tends to work better than the individual". Mr Brodie stressed the importance of what Mr Moore called *the convening process;* this provides a link with those presentations discussed above.

* Allied to the notion of premediation is the issue of caucus :
  - should caucus be redefined to cover pre-mediation, or a series of meetings prior to joint sessions?
  - what effect does that different use have on the hallowed concept of *confidentiality of caucus*?

Indeed, when one speads of the *confidentiality of caucus*, it is important to clarify what exactly that means :

- is it that all issues are confidential to each party, **or** that all issues are confidential unless permission has been given to disclose to the other party **or** that issues are confidential if a party asks that they be kept so?

* An emerging theme, particularly in relation to environmental mediation or other multiparty disputes, was the use of principled negotiation, to try to ward off dirty tricks by any party. Mr Moore, in his exposition of environmental (and *public interest mediation*) outlined process and procedures, striking many cautions to be aware of in this area of specialisation. Ms Pam Kirk, in her lunchtime address, spoke of many of the same disputes as Mr Moore later touched on (eg the wetlands), and defined *public interest mediation* whereby various states have begun the institutionalisation of ADR processes to resolve huge environmental issues.

* The vexed question of the role and function of the meediator when there is a disparity in negotiating power between parties (generally economic or physical) was taken up by Mr Chris Moore (family mediation), Ms Dorota Jones (cross-cultural), Ms Anne Berry (racial) and Dr Greg Tillett (AIDS-related disputes). Ms Berry also tackled the difficulties posed in mediating where there is the bogey of legislation to back up a particular settlement, a view which was echoed by Ms Leigh Baker.

Given the widespread public interest around these issues, it may be that the mediating fraternity will need to further explore :

- is mediation appropriate when there is a large disparity in negotiating power?
- is mediation appropriate in cases of ongoing violence?

If the answer is "no", the further question would need to be:

- is there any other dispute resolving process more appropriate or effective, and why?

The philosophical issue here is:

- is the mediator a *neutral, impartial party* if s/he uses techniques to balance unequal negotiating power?

* The question of unequal negotiating power could certainly be related to the different ADR bodies, such as Community Justice Centres (which are government funded) or mediators in legal practice, compared with community based mediation services (which receive no government funding), as Mr Peter Maher pointed out.

* The theme of how ADR processes and programs can develop only if backed by governmental resources and initiatives ran through Ms Kirk's address (for example the use of arbitration in banking and securities disputes, in maritime disputes and the use of mediation by various governmental agencies in resolving disputes in the grain and jewellery industries). Ms Linda Fisher echoed this theme (innovative programs in the educational, criminal justice and juvenile justice arenas), as did Dr Greg Tillett (dispute resolution and AIDS) and Mr John Tyrril (disputes in the building construction industry). Ms Fisher, while maintaining that the *tangibles* - government money and resources - were necessary, spoke also of the need for *intangibles* - government support and backing for any new initiatives and the necessity for different government departments to work in close cooperation.
Mr Peter Maher (Southern Community Mediation Service) contended that government support and resources are not always necessary (even if desirable). His paper was an exposition of what a community based mediation service can achieve, with minimal government funding or recognition, and with the added burden of the *tyranny of distance* from the eastern (and more affluent) States.

* Mr Peter Maher further argued strongly that mediation does not need specialists, and that there is a danger in mediation's becoming too specialised (*or process bound*). Dr Greg Tillett, on the other hand, argued that only specialists can cope with certain areas of mediation. Subscribing to the *Tillett* view one could count Mr David Brodie (juvenile), Ms Ena Shaw (family), Mr Ian Coddington (commercial) and Assoc. Prof. Pat Cavanagh (commercial). Subscribing to the *Maher* view one could count Mr Alan Dawson (Federal Court),

* Allied to the theme of specialisation was the one put forward by Ms Nora Huppert, in her presentation on counselling as an ADR technique. Ms Huppert argued that historically the counselling and mediation movements were similar, and that mediation is now seeing all the problems of credentialling and professionalisation that counselling has already faced. Dr Carole Brown (Family Court Conciliation) discussed the differences and similarities between mediation and counselling, and argued for *therapeutic mediation* as practised by Family Court Conciliation Counsellors. The term *therapeutic mediation* is seen as a contradiction in terms for both purist mediators and counsellors, and the irony of the expression was acknowledged by Dr Brown.

* Many workshop leaders and panel presenters (Ms Leigh Baker, Mr John Tyrril, Dr Hilary Astor and Dr Christine Chinkin, Mr Chris Moore, Ms Stella Cornelius and Ms Helena Cornelius) spoke of the whole range of techniques in the ADR cornucopia (for example, arbitration, mediation, counselling) and the importance of choosing the most appropriate. This fitted in with Mr Justice Rogers' opening remarks, and with Ms Pam Kirk's overview of DR in the USA.
The issues these presenters raised included the following, which could be the subject of further research :

  * does the choice of dispute resolution process depend on the disputants, the type of dispute, the time available or the resources at hand?
  * when is mediation not the most appropriate DR mechanism?

* Apart from counselling (Ms Nora Huppert), another ADR process from that cornucopia which was featured on the programme was arbitration. Ms Pam Kirk outlined the procedure as practised by the American Arbitration Association, and this was filled out at the session conducted by Mr John Muirhead. Mr John Tyrril, in his paper (building construction disputes) also spent time outlining the process Although more costly and taking more time than mediation, it obviously has a place as a legitimate DR process.
For instance, the perceived voluntariness of mediation is placed at one extreme of the DR continuum and the perceived coercion of arbitration at the other. However, a question that needs consideration would have to be :

  * what is the difference (in degree or in kind) between a binding or non-binding arbitration decision where the parties voluntarily enter the process, and mandatory mediation where the parties are forced into the process though the decision is nominally theirs?

* Mandatory mediation (for example Federal Court under Order 10, Family Court under Order 24) was seen by purists as a contradiction in terms. The question :
    * is mandatory mediation a contradiction in terms?

could be further explored in relation to various Law Reform Commission of New South Wales recommendations.

* Mr Alan Dawson (Federal Court mediation) and Mr Michael Northcote (Order 24 Conferences) in their workshop presentations made the point that ADR will vary according to the Registrar and/or Judge acting as a third party neutral, but that whoever they are, they are agents of reality, neutrals, helping *forcefully* to achieve settlements where everyone can be winners. Ms Joanne Harrison shares this view.

If one is mediating under severe time constraints (Ms Joanne Harrison, Mr Alan Dawson, Mr Michael Northcote) :

* is the only way to achieve settlements to "create an *ulcer* syndrome", as Mr Alan Dawson claims?

* The lawyer as mediator in Family Law matters (Ms Barbara Coddington) gave a different perspective to that supplied by Dr Carole Brown of the counsellor as mediator, and by Mr Michael Northcote of the Registrar as mediator. Together with the presentation by Ms Ena Shaw on a model of family mediation utilising community mediators, it meant that mediation between separated and separating couples was covered extensively. In answer to Mr Michael Northcote, Ms Coddington's view seems to be that :
    * *mediation* in Order 24 conferences is not mediation because it is not voluntary, and perhaps is ineffective in the long term because of time restraints.

* Keeping costs down as a function of ADR was spelled out emphatically by the Hon Mr John Dowd in his lunchtime address. This point was taken up by Ms Leigh Baker (ADB) and Ms Joy Middledorp (Department of Housing). Dr Greg Tillett (concluding overview) agreed with Mr Peter Maher however that cost-cutting should not be a criterion on which to implement a service or to judge an effective service, strenuously arguing that it is "quality, appropriateness and effectiveness" that we should be aiming for.
* Somewhat allied to the notion of cost-effectiveness was the common theme in bodies set up through legislation (the Ombudsman, Business & Consumer Affairs, the ADB, Department of Housing and Equal Opportunities Commission) of service to the community.

* The question of whether ADR can or should address the root causes of structural discrimination, or of disputes in general, was taken up by Ms Leigh Baker (ADB) and Dr Greg Tillett (AIDS-related disputes). Ms Baker's concern was how ADR addressed this discrimination, while Dr Tillett spoke of cases where the dispute can be resolved, but not the conflict. A fundamental question would seem to be :
    * is mediation's role primarily to achieve *dispute resolution* or bring about *conflict management?*

* Associate Professor Pat Cavanagh's contention is that the larger the sum of money, the easier the dispute is to resolve, for in these cases "pragmatism wins the day and *principle* goes by the board". His assertion is that *principle* impedes the negotiating process - with straight economic common sense negotiations, the appeal is to the hip pocket nerve. Although this assertion may have offended many purists, it has a direct link with Dr Greg Tillett's presentation on AIDS-related disputes where it is clear that the hardest disputes to resolve are *values* based - where often all that someone clings to is *principle*.

* The educative need and role of ADR and ADR practitioners was spelled out by presenters as diverse as Ms Barbara Coddington (legal private practice), Mr Murray McWilliam (State Rail Authority), Dr Hilary Astor and Dr Christine Chinkin (Teaching ADR in Law Schools), and the Hon Mr John Dowd.

* Allied to this was the theme of needing to pursue the expansion of ADR techniques and processes for use in the community, and of building on the achievements to date. This vision of posssibilities for ADR in the 1990's was brought out by Mr Murray mcWilliam (State Rail Authority), Mr Justice Rogers (Keynote address), Ms Linda Fisher (further alternatives - the US experience),

Acting Chief Inspector Christine Nixon (in her Friday evening after dinner address), Ms Leigh Baker (ADB) and Mr Chris Moore (environmental disputes).

Future Directions
Our next convference in 1992 will, I believe, be more practitioner-based. We should now begin to try and answer the questions listed above, and in Dr Greg Tillett's concluding overview. Further, in another two years the number of practitioners will have increased sufficiently to warrant a focus on deeper philosophical and practical issues. I envisage topics being included such as

* How neutral is a mediator?
* Mediation and therapy - where is the line?
* What is mediation?
* Mediation - the ethical dilemma
* Mediation by telephone
* Using personality systems to decipher conflict dynamics
* Gender bias in mediation

many of which issues surfaced by the end of the present conference.

Enrolment and Participants
Our enrolment was encouraging - 120 participants from all States of Australia, from New Zealand and from America. The full list of participants is outlined in Appendix

Evaluations
Evaluations were completed by a good number of our delegates. The full questionnaire and answers are summarised in Appendix B. Participants were asked to score sessions on the basis of content and presentations and to make overall/general comments. These evaluations will be kept in mind when ADRA plans its next conference, and we thank those participants who diligently and honestly took time to comment.
On the whole, the comments were encouraging, praising presenters for the time and effort spent in preparation and presentation. Some negative comments were received on some of the later sessions, and it seems that not all workshops offered the experiential component we would have wished. Like the curate's egg, the conference was only bad in parts.

Thanks
ADRA was fortunate to have attracted some sponsorship, and we gratefully acknowledge the contributions of the Law Foundation of New South Wales and the Law Book Company. Their sponsorship meant that ADRA was able to keep the conference fee at a realistic level, bearing in mind the added expenses of our interstate delegates. The Commonwealth Bank once again provided folders and stationery, which saved us some expense. Community Justice Centres, too, provided photocopy, fax and office space, and ADRA thanks the Director and staff for their continued support. ADRA also extends thanks to the Executive Director of the Family Mediation Centre for ensuring that Mr Chris Moore was available to participate in the conference.

I wish to thank those speakers and workshop leaders who provided copy of their presentations for publication. Regretfully, not all speakers or workshop leaders complied with our request. In some cases, it was possible to obtain a transcript from the tape of the presentation and this was then edited.

I would like to pay tribute to the conference committee, which worked tirelessly to ensure the smooth running of the conference, and particularly to Terry Nixon, our conference organiser. Terry's unfailing good humour and energy have remained undiminshed since the conference and she has been a source of support and practical good sense to me in the editing of these papers.

Keynote Address

Justice Andrew Rogers : Chief Judge, Commercial Division of the Supreme Court of NSW

When I arrived, your President Linda Fisher told me that she was looking forward to my speech, because she had heard me speak on a previous occasion. I am bound to tell you that if I had given this speech 5 years ago, you would have heard an overview of ADR, and an excited revelation of the green fields that lay ahead of us in introducing and developing it in Australia. I must say to you, that 5 years on, I am a much sadder and, I hope, a wiser man but I rather doubt the latter proposition. What I want to share with you is a rambling anecdotal survey of how I see ADR from where I sit, and what it is that we can hope to achieve in developing it and introducing it in new areas. Let me say at once that my experience will not replicate yours, or those of many of you. You work in different areas from mine and perhaps your fields of endeavour are more fruitful than mine has proved to be. The reason I will weary you with the recital of what has happened to me in the last 5 years is because I hope it will prove instructive in trying to develop ADR overall.

If I may be biographical for a moment, one of the few great things about being a judge is that every 5 years a grateful government gives you a sabbatical for 6 months. We decided to go to the United States where my wife did a postgraduate course in shopping, and whilst she was doing that, amongst other activities I audited a course in alternative dispute resolution at Columbia University. *Alternative Dispute Resolution* to me was the name of a new drink at the time - I knew absolutely nothing about it. I returned home and I felt a bit like "Moses with the Tablets". As it happened, purely by chance, the Corporate Lawyers Association who had just formed their Association, had asked me to give a speech at their first meeting. I spoke about ADR. Sir Laurence Street, the Chief Justice, was very interested and so the Australian Commercial Disputes Centre was established. We were full of hope that we had found the way for commercial people to solve their own commercial disputes. I am bound to tell you that, looking at it 5 years on I am filled with great disappointment. The Australian Commercial Disputes Centre will tell you that they are doing very well, they have solved a lot of difficult disputes, they have saved people a lot of money, but the fact of the matter is that, in the Court, our filings are increasing by leaps and bounds, we are busier that ever and disputes are just not being solved as they should be, by alternative dispute resolution methods. What is the reason this is not happening? Let me give you an instance of how unfortunate it is for the community as a whole that we are not practising alternative dispute resolution. There is a case in the Court in which a group of developers is claiming breaches of contract by Estate Mortgage and Burns Philp. You have all read about it, I need not enlarge on the problem. What I said to the people, I think at the first directions hearing, with the Corporate Affairs Commission and the Australian Securities Commission present, was something like this. "There is a finite amount of money available. There are a lot of people being hurt - the unit holders, depositors, the developers, the people who have taken shops in the shopping centres. There is even difficulty at Burns Philp. Estate Mortgage has gone under. It requires some global exercise in which somebody can sort out how, to the greatest advantage of all, whatever money is available may be used to finish developing the shopping centres that can be developed, to sell off the ones that cannot be developed, to help those who are in immediate need, and generally practice a bit of sensible commercial resolution to what, in many instances, is a personal tragedy. Without developing it, there are unit holders who have put their life savings into this organisation, and who are thrown back on governmental "handouts". All I got was a shrugging of shoulders and the words : "Well, if you can solve it, that is great, but do not look at us". That was the attitude of governmental bodies, of Burns Philp, of the developers, and everybody else. Let me ask you rhetorically, "What's wrong with us? Why is it that we cannot confront what is a real problem and approach it in a sensible fashion?" Instead, a judge will hear this case, some other judge in the Federal Court in Melbourne will hear another case.

Let me be frank about this : I am very happy and proud to be a member of the legal profession. It is entirely too facile to blame the lawyers for the present problems. I am **not** proud to be in a situation where the money will disappear in lawyers' fees and it will achieve effectively nothing at all for the common good. I would have thought 5 years ago that this is the sort of situation for which ADR was classically suited : finding a commercial, sensible solution amongst all those who are affected to a situation which in some cases, at least, is pregnant with personal tragedy. And yet, we have not the mechanism, we do not have the will, and that's where the system has failed us.

This throws up the first point I was seeking to make. To me, ADR is not an answer to a crowded court list. You should never, in my view, practise ADR merely to solve the problem of over-crowded courts. You should go to ADR because you are satisfied that for that dispute or that problem, it is the best method for resolving the outstanding dispute. And if we cannot do that, then we have failed the clients, the community and ourselves.

I do not regard ADR, as some lawyers do, as some sort of competition for the courts. There are cases that have to go to the courts whether we like it or not. But going to court is now recognised as one of the most stressful, unhappy experiences that anyone can undergo. Let me just illustrate this. Since the last century, there has developed a new trend in judicial approach. In order to achieve justice between the parties you have to allow amendments to pleadings, at any and every stage even up to a point when the evidence is finished, the addresses concluded, and really, the case has effectively ground to a standstill. There is a respectable rationale for that. Clients should not be punished for the lawyers' forgetfulness, the lawyers' mistakes, the lawyers' errors. If the lawyer thinks of some proposition which he had failed to advance, or couch in appropriate legal terminology, the client should not suffer for that. The matter should be capable of adjustment. Amend the case, the evidence or whatever, and protect the other side by an order for costs. It has been laid down by every court from the High Court downwards in Australia, by every court from the House of Lords down in England, that as a general rule, provided that you can cure the prejudice to the other party by an order for costs, you should grant an amendment. To me, one of the great developments in the last few years was when, in 1987, Lord Griffiths, in the House of Lords, said that in considering whether to grant an amendment or not, you have to bear in mind that justice cannot always be measured in terms of money. In my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations. Anxiety is occasioned by facing new issues, the raising of false hopes and disappointment of the legitimate expectation that the trial will determine the issues one way or the other. The Court of Appeal in New South Wales said a couple of years ago following on Ketterman that this is all very noble but it does not represent the law of Australia. Here you cannot have regard to matters such as that. I am glad to tell you that the other day, on the 5th September 1990, the High Court gave a judgment in which they recognised that Ketterman is sound common sense and good law. Now the points that I wish to draw from this last decision which I will enlarge on in a moment are twofold : firstly, that you have to have cases such as this one, so that the High Court can get an opportunity of setting the law aright, to lay down the principles for Australia which should govern us in curial litigation. And secondly that sometimes there is a recognition, albeit in passing, by the courts of the tremendous strain and difficulty which is cast upon litigants by having to participate in litigation. Lawyers tend to regard going into court as routine. If you are a judge listening to lawyers is something routine. You tend to forget at times what a tremendous strain it is upon the person in the witness box, upon the person who is not necessarily in the witness box but is wondering how the case in going, understanding not all of it, to follow what is happening. It is that sort of thing that made me think back in 1985 that there must be a better way. It seems to me at any rate such a self-evident truth that I cannot understand why others cannot see it the same way.

What are **we** doing, or what are we not doing, which results in ADR not progressing, or being adopted **as** it should be?

May I just **spend** a minute on this decision of the High Court with you, not because I want to give you a crash course in legal education - I promise you I will not do that - but because to me it is so instructive as to the sort of things that can go wrong with our system and that need to be righted in the way that it was corrected in this particular instance. It all arose out of the **Voyager** being sunk by the **Melbourne** back in 1964. The proceedings were not commenced for 20 years until 1984, and there were all sorts of legal reasons for it that I will not bother you with. There was then a deliberate decision made by the Commonwealth Crown Solicitor that he would not rely on the Statute of Limitations, which of course would have been an absolute bar to the action being commenced that late. Successive Ministers of Defence said that the Commonwealth would compensate people who had been injured and there would be no reliance on the Statute. In November 1985, for some reason, that policy was reconsidered, the Commonwealth in early 1986 asked for leave to amend, to plead the Statute, which would have meant that of necessity the plaintiff and all the other plaintiffs with similar claims would have lost. There was no answer to the Statute. The matter came before a single judge in the Supreme Court of Victoria, went to three

judges in the Full Court, went to seven judges in the High Court. And yet, the only question that all these judges had to spend time determining was a simple one : In the circumstances was it fair that the amendment should be granted? Would it occasion prejudice which was not curable in costs? Now there was a division of view in the High Court : Some judges said that the Commonwealth was estopped from relying on the Statute, others said the Commonwealth had waived the Statute. But, importantly for the point I am making, some of the judges said : "What the Commonwealth has done was unconscionable, unconscientious, unfair, should not be allowed, but" - they said - "the only remedy that was required was that the plaintiffs should be paid the costs which had been thrown away". And you see, this is where the strain of litigation comes in. Here was this chap, who started his action in 1984, and was allowed to go until early 1986 under the belief that the Statute would not be pleaded against him. Was it sufficient - or would it have been sufficient just to pay him the costs that had been thrown away? I think all of us here would agree that it would not have been.

There is a deeper underlying point in this whole case that I want to take up with you. What would the ADR process have done in order to provide justice in this case? Is not the answer that, back in 1964, when the **Voyager** went down, there should have been some proper method of compensating those who, through absolutely no fault of their own, were badly injured, or the relatives of those who lost their lives. Why did that not happen? I say to you that those of us who believe that there is a better way than court-conducted litigation, have failed the community because we have failed to convince people that there is indeed a better way. You feel frustrated but the fault somehow or other must lie in us. If it is so obvious that there is a better way, why cannot other people see it? So long as we cannot practice ADR in cases such as that of the **Voyager**, we have to rely on the court system.

Let me give you another instance. One of the great anecdotal successes of ADR is the performance by President Carter at Camp David where he managed to forge a Peace Treaty of sorts between Egypt and Israel. Whenever challenged to the core of one's beliefs, the Camp David exercise is brought up as an indication of how successful ADR can be in bringing together the irreconcilable. With that, contrast if you will, the failure of the Arab League in Jedda to bring about some settlement of the Kuwait dispute. It seems to me that there is a great lesson to be learned in contrasting the two episodes and the two exercises and in trying to work out what it was that made one a success and the other a failure.

Let me, if I may strain your patience with two more illustrations. As you, or some of you, will know, we have been practising quite successfully a Common Law Delay Reduction Programme by sending out personal injury claims to Arbitration. That is really a foreshortened hearing where the plaintiff and the defendant present a lawyer, who is sitting as the Arbitrator, with their respective stories. He gives his assessment of what is fair, and more often than not the parties accept that as the appropriate measure of compensation. A barrister was telling me that his client was awarded in this fashion, $500,000, and the barrister thinks that was a fair measure, and indeed, the client has no complaint to make about the amount he received. What the client was complaining about, was that he was taken to a poky little room, there was this lawyer who looked like somebody off the street, like himself, and who listened, with exemplary patience no doubt, said "$500,000", and the plaintiff somehow or other got the impression that what he got was not a fair shake. He did not get a proper hearing. Well, how do we avoid that? How do we reconcile the need for expedition, the need for informality, the need for a fair resolution, with making the disputants feel warm.

Just to conclude this segment of what I am talking about let me give you a personal experience. Very shortly after I was appointed I was sitting as the Vacation Judge, and somebody wanted to have a rock concert at the Showground. Needless to say, all the people living around the Showground were not exactly thrilled by that prospect and there was an application that I should stop the rock concert. I felt that there could be a better way of tackling the problem. All the neighbours had filed affidavits and as you can imagine, the Vacation Court is really a very busy place. I read the affidavits before I went into court; there were two sound experts there. I said, "Look, my first impression is this : why do not you sound experts go outside, work out what the common ground is between you, and then come back and I will solve what you have not been able to agree on?" They did that. Subsequently, I encountered one of these objectors at a party, and he said, "We were not dissatisfied with the result, but you did not give us a fair go. We were not

heard". He heard me say that I had read the affidavits, but nonetheless, the impression that he got was that I did not listen to his complaints.

In the perfect world - in which we do not live - the ideal would be, if you could afford it, to give every person with a grievance, with a dispute, with a difficulty, as much time as they need to expound their grievances. The courts certainly cannot do it. If the truth be known, ADR cannot do it. We cannot satisfy the people who want all the trappings, like the person who got the $500,000 in the arbitration. If you practise a workmanlike resolution of a dispute such as the Showground, you may achieve substantial justice but you are still not going to have happy customers.

What is the answer? It seems to me that so far as the area in which I work is concerned, what we have to do is the following. First of all, it is well established that somewhere around about 90% of cases are settled without a final determination by a judge. How do we identify the 10% that need an input? It seems to me that the answer is that we need more information from the start of the case, in order to try and segregate those cases which are going to be disposed of by settlement, as distinct from having to go to court. For that reason, very soon after I became a judge, we introduced what are called Directions Hearings. The lawyers are supposed to come along and tell you the facts. That has been a marginal success but it is not really working well for this reason: the lawyers do not prepare the cases until the last possible moment. They are too busy fighting the actual cases that are on that day, so that at the Directions Hearings you get a truncated version, and you are struggling with an inadequacy of information. It happens time after time, that a case is called on for Hearing, and I say to the plaintiff's barrister, "Tell me what your case is". I question him about various aspects that strike me, I do the same thing with the defendant, and then at the end of it, they say, "Could we have half an hour". They drag their clients out, and talk them into a settlement, and it is all over. What I would like to point out to you is that I did not do anything in those cases to try and achieve a settlement. I did not try to mediate, I did not try to conciliate, I did not try any of the techniques so beloved by us all. I was merely searching for information, and trying to pinpoint where areas of difficulty might present themselves. You cannot do that until the lawyers are in possession of sufficient information to be able to present it to you. To me, the most instructive thing that I had ever encountered was in China. We were there for, I guess, 3 weeks, and I met a lot of Chinese judges, and each of them I asked, "Explain to me if you will, why it is that you people manage to solve cases by settlement rather than by determination?" I must confess to you that, like so many other of life's minor mysteries, the solution did not present itself until towards the very end. I really was not getting an answer that to me was workable. The point I was putting to these people was, "How can you try and achieve a resolution when the case is just starting, before you really know all the facts?" And that is the question to which I was not getting an answer. And finally someone said, "Well, you've got it wrong. When the case starts I do know all the facts, because people have been searching, inquiring - you know this civil law method of the judge or somebody on behalf of the court, investigating what the situation is, building up a dossier for the judge - so that when the Hearing commences, most of the hard work of information gathering had been accomplished". Now, the point I am making is that, unless we devise some appropriate method of information gathering, we are going to have people who, one way or another, will be dissatisfied with our methods of settlement. Some of you may know that in Queensland, the commercial work had been done by a very accomplished judge, who introduced mediation conferences before a judge other than the person who was going to hear the case. He got quite a number of settlements. He also got people, who having settled, were dissatisfied. Not that day necessarily, not the following day, but after they had talked to their wife, taken their dog for a walk, consulted the neighbours. Then they decided that really they should not have settled. That to me is one of the great dangers and difficulties of any mediation or settlement exercise that, having achieved it whilst in possession of only some of the necessary information, you will finish up with unhappy and dissatisfied people. The answer that is proffered is that they should not be unhappy or dissatisfied because even if you, the neutral or facilitator - call yourself what you will - do not know all the facts, they know all the facts and they should be able to be satisfied that they are settling with the full knowledge of all the relevant circumstances. To me, that is a fallacy.

It disregards the role to be achieved by the neutral or facilitator, who cannot, in my view, properly exercise or discharge the function entrusted to him or her unless the neutral or facilitator has the information also. One of the matters that I do not believe has been sufficiently explored in Australia is, the ethical problems that confront neutrals and facilitators, as well as the persons engaged in the exercise of achieving a settlement. As many of you will know, one of the great changes that has

been achieved on the Australian commercial scene has been Section 52 of the Trade Practices Act, which, in a totally unexpected way, has introduced the obligation of good faith between people in business. You cannot practise misleading or deceptive conduct. I am still waiting for the first case, which will come up sooner or later, when somebody will say, "Look, tne other side's lawyer was guilty of misleading or deceptive conduct". All of us here who are lawyers know of situations where your client (for the sake of argument, an insurance company) says. "We just want to be out of this case, you can go to $500,000". You go up to your opponent, and you say, "Look, I've only got $300,000 in the bag, take it or leave it - you've got a big fight on your hands". Ultimately the fellow comes back and says, "Alright, I'll take $350,000" and then you say to him, "Well, I've got to ring up and talk my people into settling". Instead of going to a phone, you go and take a walk around the block and come back wiping your brow, and saying, "Well, I managed to get them up to $350,000". Well now, if that's not misleading or deceptive conduct, I do not know what is. And yet, it's the bread and butter of lawyers achieving a settlement. Is that sort of thing ethical conduct? Should it be allowed? Should "puffing" be allowed? It seems to me that we are working in an area, with all the best intentions in the world, where we have imperfectly worked out the fields of reference within which it is permissible to operate.

What ethical limitations should apply to a mediator? In this company it is perhaps taking one's life in one's hand to ask what training should be required of mediators and facilitators.

I have gone on far too long with the problems. let me conclude with a bit of good news.

The good news is that a Court of Appeal in Californ..a has just held that facilitators, neutrals, and people in that position, are entitled to quasi-judicial immunity in respect of the work they do, so they cannot be sued for defamation, negligence, this, that and the other thing. The reason I mention it is this: I am profoundly apprehensive that the good work that all of you and those that you represent are doing, could come under challenge unless there is some appropriate protection urgently conferred on all people engaged in ADR, and in arbitration work.

PANEL DISCUSSIONS

PANEL A

Report	Louise Rosemann

Presentations

NSW Department of Housing : Tenancy Service	Joy Middledorp
Business & Consumer Affairs	Geri Ettinger
Anti-Discrimination Board	Leigh Baker

Panel A : Report

The three speakers, Ms Joy Middledorp of the Department of Housing, Tenancy Service, Ms Geri Ettinger of the Consumer Claims Tribunal and Ms Leigh Baker of the Anti-Discrimination Board, each provided an overview of the dispute resolution services provided by their respective departments to the public of New South Wales.

A common theme which emerged was that each service is underpinned by Government legislation which provides, to a greater or lesser extent, guidelines for its operation. Their services operate on similar philosophies of providing "quick, cheap and easy" alternatives to legal redress, as far as possible. Although each of the speakers outlined a step-by-step conflict resolution process it was apparent that there were significant differences in the procedures utilised. The Tenancy Service uses a process of on-the-phone "mediation" or shuttle negotiation prior to arbitration and the Anti-Discrimination Board uses conciliation and investigation before arbitration, while the Consumer Claims Tribunal uses a mediation-arbitration process with the same Referee attempting to mediate the dispute prior to arbitrating if mediation is unsuccessful.

The questions from the floor highlighted both a strong interest in the variety of conflict resolution services available and the need for standardisation of the terminology used to describe alternative dispute resolution processes, thus enabling more accurate comparisons to be made between processes and services.

Louise Rosemann, State Rail Authority, Employee Complaints' Service

New South Wales Department of Housing : Tenancy Service

Joy Middledorp, Officer-in-Charge, Information & Liaison

The New South Wales Department of Housing now administers three pieces of legislation and a code of practice which require public servants to do more than just give information.

These require us to attempt to resolve disputes between parties. Now, whether attempting to resolve disputes the way we do is "mediation" or "conciliation" I'll let others decide or dispute. We call what we do "mediation"! This presentation will give you an overview of the Department of Housing Tenancy Service, how we attempt to prevent and resolve disputes and how we see the services operating in the future.

The three pieces of legislation that require the department to attempt to resolve disputes and the approximate number of people they affect are :-

ACTS	RESIDENTS/TENANTS AFFECTED
Residential Tenancies Act 1987	1,000,000
Retirement Villages Act 1989	60,000
Community Land Management Act 1989	Unknown as yet

Because the Residential Tenancies Act has an impact on such a large proportion of the population of New South Wales, it generates the highest number of inquiries and mediations so I will concentrate on it and later briefly discuss the other legislations' requirements.

To give some background : Until November 1989, no comprehensive legislation setting out tenancy rights or obligations existed. Furthermore, contractual agreements between landlords and tenants could only be enforced through the local courts. Disputes about bond money were heard by the Consumer Claims' Tribunal. The tenancy service commenced operation in October 1986 offering an information and mediation service as prescribed by the Residential Tenancies Tribunal Act.

This Service aimed to foster housing stability by educating people how best to manage their tenancy relationships. This ultimately supports people's housing choices.

The landlord and tenant relationship is more like a commercial relationship than a personal relationship as it is usually one-off and the parties are involved in a financial transaction. A landlord and his tenant have different interests : the landlord has an investment, and the tenant a home. However, the benefits to each of maintaining their relationship can be the same : cost effective.

Disputes can be expensive. A landlord with a happy tenant will save the cost of agent's fees, rent arrears, advertising and possible damages. A happy tenant remains at premises longer and takes care of the valuable asset that is his home. A tenant in a stable renting relationship saves on the costs and associated dislocations of moving. Often, keeping the same premises results in lower rents.

The Residential Tenancies Act allows a 3 pronged approach to the tenancy relationship : prevention, intervention and imposed decisions.

1. It aims to prevent problems and assist people solve their problems through a high quality information service.
2. It requires us to investigate and attempt to resolve disputes when parties have failed.
3. It establishes the Residential Tenancies Tribunal as the final arbiter of disputes.

In total last financial year the Tenancy Service served 55,223 people. The majority of these contacts were, in order of frequency, by telephone, presentations, counter interviews, correspondence and mediation.

Summaries of each level of service

1. The information service tells people their rights and obligations and suggests possible actions and likely outcomes. When a person finds out their rights, informs the other party in a particular way and tells of possible other action, an agreement is often reached. For example, a landlord must maintain and repair premises. If this is not happening, we suggest the tenant tell the landlord that he is aware that it is necessary by law and perhaps show the landlord the agreement and the booklet that clearly states it. If nothing is done the tenant can end the agreement, lodge a complaint, or go to the Tribunal. If the landlord knows these are the options and the tenant is prepared to use them and is protected from retaliatory eviction, it is really much easier to attend to repairs. There are far fewer mediation requests and tribunal applications than general inquiries, and this indicates information and strategic thinking often resolve disputes.

2. The Tenancy Service in Sydney has 7 information officers who, when they are experienced and thoroughly knowledgeable about the laws, attempt to resolve disputes.
The mediator's human personality, coupled with knowledge, is broadly the essence of success.
We are not selective about offering our services. It is an option for any party in a renting relationship. The Laws do not cover all renting relationships, for example boarders and lodgers, but this does not affect the way we make our services available. Where the law is applicable we tell the parties so. However we generally do not offer our services when an agreement is being ended unless we are specifically asked to try and obtain more time. Usually we offer our services for disputes during an agreement. People can complain by writing a letter about their problem or signing or completing our complaint form. In emergencies, namely threat of illegal eviction or lock out, we will take the complaint over the telephone. Guidelines exist to help officers carry out mediations. The emphasis - **after checking that the person has tried to sort out the problem with the other party** - is on giving options within the legal framework and only contacting parties after preparation and contemplation of the case. The mediation officer always checks first with the complainant and discusses a range of outcomes. A wider spectrum of possible results enables the increased chance of resolution in this process. Officers are reminded that they cannot take sides although one party has asked us to try and sort out the problem. It is also stressed that the power relationship between landlord and tenant is extremely unbalanced, the field is quite emotional, and consequently negligence can not be tolerated because a relationship could be jeopardised.
As mentioned before, the relationship between landlord and tenant is more like a commercial than a personal relationship. As such, telephone mediations have proved ideal, connecting people from various areas and ways of life at minimal cost. Parties need to do little more than discuss the issues. We help them think of ways to solve the problem for mutual benefit.
To our credit, respondents do not misunderstand our intentions and reason for contact. Maybe it is their perception that we are neutral and know much about the law of their contract. Both parties have confidence in us.
Furthermore, most people realise that they benefit by obeying the law. if during a mediation, we discover a breach in the law, we tell people the actions are an offence, and what the possible consequences could be. It is up to a complainant to decide whether they wish the matter to go further. The file is referred to "Investigations" for information or action.
The Tenancy Service has clear guidelines for staff, who also attend courses such as counselling, conflict resolution and assertive communications.

3. If mediation is unsuccessful or not requested, parties can make an application to the Residential Tenancies Tribunal. This costs $20 or $10, or if necessary the fee can be waived.
Hearings are open to the public and in a fairly formal setting. The Tribunal bases its decisions on the merits of each case rather than on legal technicalities or forms.
Tribunal members are legally qualified and the Act requires them to attempt to conciliate before imposing a decision.
The Tribunal's method on conciliation varies with each member. Some members clear the room of all but the applicant and respondent and conciliate. Other members suggest the parties leave the room and come back after discussing any possible agreements. If parties come to an agreement at this stage, the Tribunal can make orders to that effect.

The Tribunal's orders are final. Applications can be made to have the order varied or set aside if a party was not present, or for some other reason that would have an impact on the situation. In other words, there must be good reason. All other appeals go to the Supreme Court on a point of law or denial of natural justice.
Apart from assisting individuals, the legislation allows the Tenancy Commissioner to represent tenants, if the tenant consents and the case has public interest. The Commissioner can also intervene as a third party for the same reasons and in order not to upstage the tenant's point of view. Clarification of law through such cases promotes understanding and compliance with the law.

Retirement Villages

More people are seeking retirement villages as a convenient form of housing. The Retirement Village industry is regulated by the Retirement Villages Act and the Retirement Village Industry Code of Practice. The code is the major instrument by which the industry is regulated. The Code provides for the full disclosure of information to prospective residents and residents, so that rights and obligations of both parties are fully understood. The Code also allows resident participation in some decision making. Of interest today are the dispute resolution procedures established by the Code.
Apart from information and mediation - which the Tenancy Service can provide - the code established a three tier structure of dispute resolution :

1. Each Village must have a Village Disputes Committee comprising :
   - a person appointed by residents;
   - a person representing the management;
   - a person agreed to by both the resident and management representatives.

The role of the Village Disputes Committee is to hear and mediate upon disputes between residents, or residents and management in accordance with its Charter. The Charter is decided upon by both residents and management.
The Committee must advise the parties to the dispute, in writing, of its decision within 30 days of receiving notice of the dispute.
If the Village Disputes Committee cannot or is unable to resolve the matter, an Industry Appeals Panel can hear the matter.

2. Applications, in writing, to an Appeals Panel (of 3 persons who are external to the industry and nominated by relevant industry and consumer bodies) may be made in the following circumstances :
   - where the Village Disputes Committee declines to hear or determine a matter;
   - where either party to a dispute is dissatisfied with the determination of the Village Disputes Committee;
   - where a party to a dispute is able to establish to the satisfaction of the Appeals Panel that, in the circumstances of the case, the Panel should deal with the case without requiring it to be first referred to the Village Disputes Committee.

If a problem is unresolved despite the above procedures (if they are available) then the Residential Tenancies Tribunal can hear and determine the matter if the dispute materially affects a party, or it is in the public interest.

The Tribunal must hear all termination by management cases and can also hear disputes about residence rules or the transfer, or proposed transfer, of a resident to other accommodation within a village.

An underlying principle of the retirement village package is that parties to a dispute should take all reasonable steps whenever possible to resolve their differences themselves. The establishment of Village Dispute Committees supports this notion. The principle is developed further through the concept of the Industry Appeals Panel.

It is thought that any decision-making body with the capacity to develop specialist expertise and resolve disputes quickly, in an informal manner without the expense or technicalities associated with our formal court system, will benefit those who use it. The Village Disputes Committee and Industry Appeals Panel represent mechanisms by which retirement village residents and management can seek to have their various problems resolved without unnecessary government interference. By

restricting access to the Residential Tenancies Tribunal to instances where a party is materially affected or the matter is in the public interest, it is hoped that the Tribunal will not be called upon to deal with disputes which would be more properly dealt with by the parties themselves.
The Industry Appeals Panel is to be an industry body answerable to the industry and consumer organisations represented on the Retirement Village Consultative Committee. It is yet to commence operation so in the meantime the opportunity for dispute resolution remains with the Village Disputes Committee and Residential Tenancies Tribunal, with both management and residents able to access the process.

Community Land Management Act

The Community Land Management Act also requires disputes to be resolved "in house" so to speak, before any final arbitration is possible. The steps to be taken are :

1. Attempt to resolve dispute in own Association
2. Community Titles Commissioner mediates
3. Commissioner makes order
4. Can appeal to Board
5. Appeal to Supreme Court on point of law.

Essentially, the nineties will see Tribunals and Courts not only costing, but featuring more as a last resort, with the government emphasising the parties' attempts to resolve their own disputes through mechanisms such as disputes committees or through government assistance by way of information and mediation services.

The Anti-Discrimination Board

Leigh Baker, Senior Conciliation Officer

What types of disputes do we handle, and how do we handle them?

The Anti-Discrimination Board is set up under the New South Wales Anti-Discrimination Act, 1977.

The goal of the Anti-Discrimination Board as set out in the Act, is to eliminate discrimination generally in New South Wales.

The Board attempts to do this in three ways, through:

- Education
- Legal Reform
- A Legal Complaint Mechanism

Therefore, the complaint process is but one of the ways in which the Board attempts to achieve its goal.

The Anti-Discrimination Board also administers the federal Racial Discrimination Act, 1975 and the federal Sex Discrimination Act, 1984 as agent for the Human Rights and Equal Opportunity Commission in New South Wales.

The three Acts mentioned define the types of disputes the Anti-Discrimination Board can deal with. These complaints must fall within one of the following grounds and areas :

GROUNDS	AREAS
Race	Employment
Racial Vilification	Education
Sex	Accommodation
Pregnancy	Goods and Services
Marital status	Registered Clubs
Sexual harassment	Trade Unions
Physical impairment	Access to places & vehicles
Intellectual impairment	
Homosexuality & Lesbianism	
Harassment on any of above grounds	

It is only where a person has a complaint that they have been treated less favourably on the basis of one of the above grounds, in one of the above areas of their public life, that the Board can receive a complaint, and attempt to resolve the dispute.

All Acts briefly set out the procedure to be followed in the complaint handling process. The steps in this procedure are :

1. Written complaint
2. **Must** investigate
3. **May** conciliate
4. **Outcome -** Settlement
   Not proceeded with
   Referral to Equal Opportunity Tribunal
   or the Human Rights and Equal Opportunity
   Commission for a legal determination.

Therefore, the Acts proscribe certain types of behaviour as unlawful, and set out a compulsory pre-court hearing procedure which encourages the parties to the dispute to resolve the problem at an early stage.

While it is possible to *fast-track* complaints through this process to the Equal Opportunity Tribunal or the Human Rights Commission, conciliation is attempted in most complaints.

The legal parameters within which the complaint-handling process is located, lend it some important characteristics which influence how the Board attempts to resolve complaints.
These include :

1 The types of complaints or disputes that the Board can handle are defined by the Acts it administers; that is, all disputes have a legislative base.
2. Each *dispute* is an allegation of unlawful behaviour by one party against the other.
3. The complaint-handling process is a compulsory step in the process of proceeding with a legal action.
4. "Conciliation" is but one step in the overall complaint-handling process.
5. "Conciliation" is not defined by the Acts, therefore enabling the Board to keep the process as informal and non-legalistic as possible, whilst remaining part of a potential on-going legal action.

While the legislation refers to "conciliation" as the means to be used to attempt to settle these potential disputes before they reach a formal hearing stage, the legislation does not define conciliation. This can, and has, raised issues on the nature of the process and how it works.

It is arguable that the lack of a definition of conciliation or the complaint-handling process generally, together with the fact that the process is confidential, can lead to a lack of clarity, consistency and a lack of accountability, leaving the process difficult to analyse.

Whilst these concerns are legitimate ones, the advantages of the lack of definition is that the process can remain versatile, with conciliation not confined to any accepted definition of dispute resolution.

Whilst there are definitions of conciliation available and Margaret Thornton in her article on conciliation in the **Modern Law Review** (Volume 52, No. 6) refers to Silbey and Merry's definition as a

> "process of settling conflict in which a third party oversees the negotiation between two parties but does not impose an agreement",

there is no requirement in the legislation that this or any other definition of conciliation be adhered to. However, if conciliation is seen as one form of dispute resolution on a spectrum from mediation through to arbitration, it is the process most likely to be used in discrimination disputes. If mediation means that the mediator allows the parties to determine the parameters of the debate, the type of discourse and the nature of the outcome, and arbitration means that the third party can impose a settlement on the parties if they cannot themselves reach agreement, then certainly conciliation is the more usual way in which an attempt is made to settle discrimination complaints.

The conciliator first investigates the complaint with both parties, informs the parties of each side's point of view, informs both parties of the law in the area and therefore puts both parties in a position where they can judge for themselves or get legal advice on what might happen if the matter were to proceed to a formal hearing. This role puts the conciliator in a position to oversee and contribute to the negotiations between the parties, without representing either party or imposing an agreement upon them.

The lack of strict guidelines in the Acts, however, allows for some versatility in the way in which "conciliation" can proceed. The range of complaints under the Acts is very broad, and the skills and strategies appropriate to resolving one type of complaint may not be as appropriate to use in resolving another type.

This means that in some cases, a model of mediation may be considered more appropriate, while at the other end of the spectrum something akin to arbitration may be more appropriate in attempting to settle a complaint.

The particular process adopted is largely determined by the nature of the complaint and the result the complainant wishes to achieve. While the conciliator does not act on behalf of the complainant but exercises an "independent" role in the process, the reality is that the process is complaint-driven, and the fact that it is the complainant who retains the right to have the complaint referred to a court if it **cannot** be settled, means that a settlement must satisfy the complainant, whilst also being "acceptable" to the respondent.

A useful way of explaining how these factors determine which model of dispute resolution may be appropriate in different circumstances, is to look at cases of alleged discrimination, but in conditions where the complainant's present location and desired outcomes differ.

1. **A complaint from a woman currently employed who wishes to have sex-based harassment stopped in her workplace**

The complainant states she does not want to go to court and obtain damages for the behaviour to date, but wants the Board's intervention to both educate the employer on his responsibility and to establish a better working environment for herself. Her overriding concern is maintaining her employment status.

This complaint would demand the conciliator play more of a mediation role in order to achieve the complainant's goals. We may advise the complainant to attempt to *conciliate* the matter herself with our advice and assistance. If this were not possible however, we would certainly take a less interventionist role than in other complaints in attempting to have this situation resolved, not only to the satisfaction of the complainant, but also in a way that the education aspect would be maximised. A mediation approach may be more appropriate where the goal is to maintain an existing work relationship.

2. **A complaint from a woman of sex-based harassment where the complainant has been dismissed or has resigned**

In this instance, a process more closely described as *conciliation* as generally understood would be more appropriate. If the complainant wanted to be compensated for the effects of having lost her position due to discrimination, the usual steps of investigation, information sharing, information on the law to both parties and formal conciliation conferences would be more likely followed, in order to achieve that outcome. If this was not successful, the matter could be referred for a legal hearing.

3. **A complaint from a woman of sex-based harassment in a large government department, where the complainant remains employed**

In this instance, it is possible that the respondent would agree that the Board carry out an internal investigation and make some recommendations about what the Board could do to prevent a repetition of the incident/s. If this was what the complainant wanted, and if **both** parties agreed that this process was the preferred outcome, it could be seen as a form of arbitration by agreement, where the Board investigates and then makes recommendations for possible settlement. Only in cases where **both** parties agreed that the Board should play such a role, would this model be used.

In Summary ...

The lack of clear guidelines about what conciliation is allows the Board some versatility in choosing the most appropriate model and strategies to address an individual complaint. This takes account of the current circumstances of the complainant and what the complainant considers would be an acceptable outcome, presuming investigation of the complaint has shown that the complaint has potential substance and therefore if not resolved, may be taken to the Tribunal or Commission for a hearing.

However, conciliation as previously defined is the most common "model" used in the resolution of discrimination complaints. This is because the conciliator always maintains the position of independent third party and never imposes an agreement, but does play an active role in assisting the parties to negotiate a settlement.

The only compulsory powers given conciliators in the complaint handling process are those in the federal Acts requiring that documents be furnished and the power in both the federal and state Acts requiring parties to attend compulsory conciliation conferences. The use of these powers also depends on the nature of the complaint, the model of dispute resolution considered appropriate and the relationship between the conciliator and the parties to the complaint.

The level of legal formality depends, too, on the same factors. The decision whether to allow parties to a complaint to have lawyers present at a conciliation conference is a matter for the conciliator. Whether this is allowed depends upon the consideration of such factors as :

* the power imbalance between the parties
* the involvement of lawyers during the investigation process
* the lawyers' attitudes to conciliation and whether they see it as a positive method of dispute handling.

It is very unlikely that a lawyer would be allowed to participate at the conciliation conference stage on behalf of a respondent if a complainant does not have representation. Once more, an assessment of the complaint and what the complainant wishes to achieve would usually influence such a decision.

The complaint-handling process, and particularly the formal conciliation proceedings, are confidential, and information from compulsory conciliation conferences cannot be used in any future legal proceedings. However,but information on the investigation is forwarded to the Tribunal or the Human Rights and Equal Opportunity Commission as a President's Report if the matter does proceed to a legal hearing.

While the *guarantee* of confidentiality often influences in a positive way the willingness of both complainants and respondents to proceed with and settle complaints, it of course has the effect of keeping specific details of conciliated settlements out of the public arena. The fact that at the very least settlements must be anonomised, has the disadvantage that settlements cannot be fully utilised as educational and empowering examples for persons with similar complaints or as educational examples for respondents in avoiding future breaches of the Act. It also adds to the difficulty of assessing the success of the conciliation process in any consistent and meaningful way

However, the Board considers that the positive role that the confidentiality of the process plays in encouraging both parties to resolve complaints, and the versatility of the process due to the lack of definitions and guidelines within the legislation, far outweigh the disadvantages or the difficulties experienced in assessing the process. A large percentage of complaints continue to be conciliated (35-50% being satisfactorily conciliated in 1989/90).

Where to from here?

How the ADB is developing to meet the needs of the 1990's

The new decade provides us all with an opportunity to assess the success of dispute resolution processes in areas such as Anti-Discrimination Law.

As Margaret Thornton has pointed out in her article (cf. p.19), for all its faults in relation to its role as part of the formal legal system, the conciliation process in the area can still have positive and practical benefits for both individuals and some classes of persons. Some of the benefits she lists are:

1. Access to and participation in a procedure which would otherwise be denied the traditionally disempowered persons covered by the Acts.
2. Access to a variety of strategies and techniques which are denied in the formal legal system.
3. Allowance, in very personal and individual situations, for the scrutiny of certain types of behaviour that will be judged unacceptable, particularly cases that may be difficult to prove within the formal rules of evidence.
4. Is a comparatively inexpensive, non-threatening and quick way of dealing with cases of discrimination, particularly **direct** discrimination.
5. **May** be able to address some of the concerns of power imbalance between the parties (compared to a formal legal hearing).

However, Margaret Thornton also points out that some of its most serious shortcomings, when assessed in relation to the overall goal of changing the social environment so that discrimination no longer occurs, are its concentration on and applicability to individual complaints of **direct** discrimination which fail to address and review widespread practices which are at the base of structural discrimination.

The Anti-Discrimination Board is seeking, in the 1990's, to further develop its role of educating and assisting potential respondents to identify stereotypical belief patterns within their organisations and to deal with them in order to comply with the Acts. This will hopefully have the effect of actually decreasing the incidence of discriminatory behaviour and hence the need for individuals to lodge complaints. It is recognised that increasing resources in one area will not automatically lead to a decrease in complaints; in fact, the effect could be quite the opposite. The goal of the Board is however to maximise its impact and efficiency by utilising all its resources as efficiently as possible in all areas in which it attempts to eradicate discrimination in NSW.

The complaint-handling process, with all its problems of labour-intensiveness and limited efficacy, will nonetheless continue to play a very important role in meeting the Board's major goal. It will do so by providing not only a very real legal remedy to those who have been discriminated against but also a limited but continuing threat to those respondents who fear public exposure or payment of damages if they do not implement the preventative measures being recommended.

The complaint-handling process itself is under constant review within the Board and continual attempts are made to streamline the process, to make it more efficient not only in achieving results for disenfranchised complainants but also in finding more broadly-based remedies to increase to a maximum the number of persons benefiting by the process.

Further, the trends and collective knowledge of what has happened in complaints and how they have been solved can contribute to the development of appropriate programs and projects for the Board, which will hopefully have a more far-reaching effect on the overall problem of discrimination in the New South Wales community.

We enter the 1990's with a sense of achievement and excitement about what will be achieved in the area of creative dispute resolution in the future.

PANEL B

Report	Kate McCormack

Presentations

Human Rights & Equal Opportunity Commission	Kim Rosser
State Rail Authority	Murray McWilliam
Office of the Ombudsman	Albertje Gurley

Panel B : Report

Both the Ombudsman's Office and the Human Rights and Equal Opportunity Commission are created by and operate under legislative Acts which define their area of responsibility and lay down guidelines for resolution of disputes. The State Rail Authority, on the other hand, while being a State body is run as a profit-making concern. Its area of responsibility and method of solving business-related and staff-related disputes is of necessity different to the first two mentioned.

The State Rail Authority uses dispute resolution processes in two main areas of concern - dealing with commercial customers and disputes arising from freight and other contracts, and employee complaints.

The main objectives of the Human Rights and Equal Opportunity Commission are to promote acceptance and observance of human rights and to develop public awareness. The main areas of operation of the Commission are in reviewing Federal Government legislation, holding public inquiries, conducting research and education programs and resolving disputes arising from complaints.

The Office of the Ombudsman has a more limited sphere of influence in that it investigates complaints regarding State Governments or local authorities.

What was notable in these presentations was the fact that although dispute resolution processes are used by all three, the methods are very different. The Human Rights and Equal Opportunity Commission uses conciliation, State Rail uses mediation and the Ombudsman very largely uses correspondence.

The question of the tendency for Australians to rely fairly heavily on the State to resolve disputes was raised during question time. In respect of the Human Rights and Equal Opportunity Commission, participants wanted to know what were the most difficult complaints to resolve and which the most damaging. In all cases, the possibility of neutrality in resolving disputes in all three areas was questioned.

Kate McCormack, Community Justice Program, Brisbane

Human Rights and Equal Opportunity Commission

Presented by Kim Rosser

The Human Rights and Equal Opportunity Commission was constituted by the Act of the same name, promulgated in 1986.

The Commission is responsible for administering four pieces of legislation

Racial Discrimination Act 1975
Sex Discrimination Act 1986
Human Rights & Equal Opportunity Commission Act 1986
Privacy Act 1988

The **Human Rights and Equal Opportunity Commission Act of 1986** deals with many aspects of discrimination :

International Covenant on Civil & Political Rights
Declaration on the Rights of the Child
Declaration on the Rights of Mentally Retarded Persons and
Declaration on the Rights of the Disabled
International Labour Organisation Convention on Discrimination in Employment & Occupation.

The Commission has the power to investigate complaints of discrimination over a wide range of issues, which can be conveniently divided into 4 categories. Each area falls under the direction of a Commissioner.

1. Human Rights : Brian Burdekin
2. Sex Discrimination : Quentin Bryce
3. Race Discrimination : Irene Moss
4. Infringements of Privacy : Kevin O'Connor

In all areas, the main objectives are to promote the acceptance and observance of Human Rights, and to constantly strive to increase public awareness of the provisions of Human Rights legislation in all its applications.

The following are the main areas of work of the Commission :-

1. Receiving and investigating complaints and attempting to bring parties to a mutually satisfactory agreement.
2. Reviewing Federal Government legislation applicable to Human Rights and Equal Opportunities.
3. Public Inquiries, for example that on Homeless Children.
4. Consultation with various bodies, e.g. Trade Unions, Employer Associations, on matters relating to any aspect of discrimination.
5. Research and Education programs.

Statistics for the year 1988/89
The Commission dealt with 1977 written complaints. Of these:

48.5% were resolved by Conciliation
3.0% were referred to Public Hearing.

Conciliation
Although this is not defined nor laid down in the Acts, the Commission uses the process of conciliation, by which the parties are brought together with a third party, the conciliator, in an attempt to reach a mutually satisfactory agreement.
The conciliator should attempt to ensure that any resolution is consistent with the spirit of the legislation.

Process of concillation

1. The initial inquiry is received.
2. A written complaint is requested.
3. A Conciliator interviews the complainant to discuss the complaint in detail. (It has been found that most complaints are related to employment.
4. The respondent is notified in writing.
5. The respondent is interviewed and his/her point of view is discussed in detail.
6. Witnesses may also be interviewed.

In cases where the complaint cannot be substantiated, it may be declined.

If considered a valid complaint, the matter will go forward to conciliation, the conference being conducted by a conciliator. If settlement is reached, the case in closed. If it is not settled, it may be referred for a public hearing by the Commission.

Some of the points raised for discussion :-
(NOTE : The discussion was wide-ranging, and the answers not as simple as would appear from what follows).

Q1. Are complainants expected to try to resolve the issue before submitting a complaint to the HREOC?
A. This was not necessary.

Q2. Which are considered the most difficult complaints to resolve?
A. Racial discrimination cases.

Q3. Which issue is the most damaging (to the complainant)?
A. Sexual harassment issues.

There was some discussion of the requirement of neutrality on the part of the conciliator.

Report compiled by Terry Nixon

State Rail Authority

J.M. McWilliam, Commercial Manager, Freight Rail

The organisation known today as State Rail is more than 130 years old. It was designed to operate through individuals performing their jobs by rote. The majority of its staff joined the service at 15 or 16 years of age, having reached Intermediate or School Certificate level. They nevertheless ran efficiently possibly the most complex organisation in Australia.

Obsolete practices
State Rail's culture was set in a tradition which failed to move with the times.

Imagine a section of 32 staff where each had a specific job: one processed claims involving passengers' luggage; another processed claims for lost goods; yet another processed claims for damaged goods, and so forth. Each knew his job extremely well; each was bored out of his mind, and all without exception had nowhere to go in the system because nowhere else in an organisation of nearly
40 000 at that time was their expertise of any value. When the luggage clerk finished his work he had nothing to do. He couldn't help others because he hadn't learned their jobs. So he read his paper.

This was the atmosphere in State Rail as recently as two years ago. It is to some degree still with us. It is in this atmosphere that an attempt is being made to encourage the adoption of mediation. Many we are trying to encourage believe only the "big stick" is effective because that is the way it has always been done.

Hurdles to overcome
This attitude is possibly the greatest hurdle we have to overcome. Much has already been achieved in this regard, however, by the present executive.

State Rail's Responsibilities
Now let me give some idea of what State Rail is and how it operates.

The organisation is responsible for moving goods and passengers by rail within and through New South Wales. To perform this task, it requires :

649 locomotives
9213 freight cars
2095 passenger cars
43 road coaches
11436 kilometres of track

In the last financial year the State Rail Authority carried 58 million tonnes of freight and conveyed 251 million passengers, of whom 2.7 million were travelling on country lines.

To keep the system on the move we have 28 000 employees although this is being reduced through natural attrition and voluntary redundancy.
The organisation is at present in transition, with initiatives being introduced which will radically change the railway as we have known it in the past.

State Rail Structure
However, we are more concerned with the present structure, which consists of two operating groups. These are CityRail and Freight and Country Passenger, or as it is now known, Freight Rail and CountryLink.

Freight Rail and CountryLink provides a support facility which includes :
1. Drafting and assistance in the negotiation of freight agreements
2. Drafting and processing subordinate legislation
3. Risk management and negotiation of larger claims' settlements

4. Provision of legal advice and management of litigation files with private solicitors
5. Regulation of dangerous goods.

Promoting the principle
This responsibility has given an opportunity to promote in State Rail the use of alternative methods of resolving disputes. While the advantages of ADR are obvious to some of us, others have failed to appreciate them, and as a result it has been necessary to proceed by stages.

First, we have educated those in positions where the need to use ADR may occur.

Secondly, in the drafting of freight and other agreements we have promoted the inclusion of provisions that disputes be resolved outside the courtroom.

Thirdly, legal practitioners acting for the group will be encouraged to facilitate matters, where appropriate, by ADR.

The Freight Rail and CountryLink group is divided into divisions, each semi-autonomous and under the control of a general manager.

These divisions may be responsible for
(a) Marketing
(b) Operations or
(c) Engineering
or in the case of regional general managers, all three functions to varying degrees.

Establishing awareness of ADR
Accordingly, there has been some difficulty in establishing awareness through training. However, a two-day mediation course was arranged and attended by 15 staff. It was well received, but we still have a long way to go.

The Commercial Unit organises seminars for senior management staff through the State, mainly in litigation and contract law. These are also being used as promotion mediums for ADR.

In drafting freight agreements it has been possible to educate our customers to incorporate dispute resolution clauses.

Regrettably there has been some opposition from certain customers on advice from their legal advisers. But even here it has been possible to include a provision that litigation will only follow if dispute resolution fails within a specified period, generally 28 days.

Future of ADR in State Rail
I believe at some time in the future all State Rail freight agreements will contain dispute resolution clauses which would, on past experience, result in a substantial saving in funds and more amicable relations.

The organisation's Legal Branch is to be dissolved at the end of this month, so while the Commercial Unit is currently processing selected legal matters for our own group and for CityRail, we will in future be responsible for all such matters for Freight Rail and CountryLink. The majority of these will be processed by private practitioners. I would like to think those solicitors will have some regard for ADR as a practical option.

I am happy to say that State Rail has used the services of ACDC and the Executive has been reasonably happy with the results. So while I cannot say State Rail is committed to the principle of ADR, I can see a strengthening of its use wherever possible.

Volume of disputes

For such a large organisation carrying large quantities of goods and numbers of passengers over such an extensive area, the disputes in which State Rail may be involved in a year are relatively few. For example :

11142 lost or damaged goods

502 lost or damaged passenger luggage.

In that period we would have carried 1.7 million consignments representing 5 million items in Trackfast alone, and 2.5 million country passengers.

Employee Complaints' Service

I was interested to learn that while with my colleagues I was attempting to develop the use of mediation to resolve difficulties in the legal and commercial fields, we had within the State Rail Authority a relevant going concern.

As I mentioned, State Rail employs 28 000, many of whom, for one reason or another, become dissatisfied with their employment. Concerns may include alleged victimisation, promotion or failing to gain it, discrimination, or enmity arising from personality clashes. We have all come across them all from time to time.

Three years ago an Employee Complaints' Service was created and staffed by a Manager and a Complaints Officer, both of whom are here today - Louise Rosemann and Danny O'Brien. Their presence here as members of ADRA indicates their commitment to its principles, and their application on a regular basis in helping employees to resolve their complaints to the benefit of employee and employer.

Louise has provided literature on the valuable service her small staff provides in helping to keep management in line as well as providing a mediation process for the complaint, based on practices of the Community Justice Centres.

The objectives of the service, adopted as policy by State Rail, are to :

* Assist employees to resolve complaints
* Provide an additional chance of communication between management and employee
* Identify related problem areas within State Rail.

The procedures are :

* Screen frivolous, vexatious and malicious complaints
* Offer advice and comment on the consequences
* Arrange referrals
* Conciliate and mediate

I believe the process of alternate resolution of disputes begins in the negotiated framing of freight agreements, and in litigation the moment a potential claim is reported; thus I have no doubt that the Employee Complaints' Service resolves many an industrial dispute before it occurs.

The Ombudsman's Office

Presented by Albertje Gurley, Investigation Officer

In her presentation, Ms. Gurley made the following chief points to explain the nature and scope of the Ombudsman's Office in New South Wales.

The Ombudsman investigates complaints about New South Wales government departments and authorities, local councils and members of the police force. His job is to make sure that they act fairly and reasonably.

1. The Office operates under the New South Wales Ombudsman's Act of 1974 (as amended).

2. The Ombudsman is an Office of last resort. Cases will only be submitted to the Ombudsman after other avenues of settlement of disputes have been explored. For instance, the complainant should have written to the Authority concerned, seeking a solution.

3. The Ombudsman has wide powers to investigate complaints. He can demand to see the authority's records, enter and inspect its premises and question its employees. He can also make use of other non-coercive powers.

The process usually adopted
A complaint must be in writing and it may be in the complainant's own language. Assistance in formulating the compliant can be provided by the Office.

The authority involved will be asked for an explanation of what has happened. If a mistake has been made, the matter can often be settled at this stage.

If the Ombudsman decides that a wrong act has occurred he can recommend, for example, that action be taken to alter procedures to prevent it happening again. If he is not satisfied that the authority has solved the problem, he can make a report to Parliament about it.

Complaints are usually handled by mail. Initial interviews can be face to face but parties to the complaint never meet in discussion.

Complaints against the police
Complaints about the conduct of members of the New South Wales Police Force may be made, in writing, to the Ombudsman, to police headquarters or to any police station, police officer or local court. Whatever the procedure, all complaints are referred to the Ombudsman.

The Police Regulation (Allegations of Misconduct) Act 1978 (as amended) sets out the procedures that will be followed upon receipt of a complaint and the rights of the complainant.

A senior police office or member of the Ombudsman's staff may consider that informal resolution or conciliation of the complaint may be possible. If so, a police officer will attempt conciliation, but only if the complainant agrees.

If this is not possible, arrangements are made for an investigation to be carried out, often by the Police Internal Affairs Branch, but not always. The Ombudsman's Office will monitor the investigation and provide the complainant with a progress report, indicating what action is proposed by the Commissioner of Police.

Following receipt of the final police investigation report, the Ombudsman may order further investigation and/or a hearing at which he will make a final decision on whether the complaint has or has not been sustained.

Complaints from people in institutions
The Ombudsman's staff makes regular visits to all prisons and juvenile institutions in New South Wales. Complaints about treatment by the authority should be directed firstly to a senior staff

member of the Superintendent. Prisoners can also complain to the Official Visitor. If the problem in still not resolved a complaint can then be made to the Ombudsman.

Confidentiality is guaranteed: neither the letter of complaint nor the reply being delivered can be opened or read by the custodial authority.

What the Ombudsman cannot do

1. He cannot investigate conduct related to the employment of a person.

2. He cannot investigate the conduct of a court, the Governor, a Minister of the Crown or a Member of Parliament.

Ms. Gurley said, in reply to a question, that in her opinion Australians were more reliant on "the State" when it came to resolving disputes. But, she felt that the Australian Government had more interaction with the community than, for example, the United States and that Australia is better served by support systems such as the Health system. Because of this interaction, it is possible that more complaints are voiced.

She also noted that some other departments, e.g. the Department of Health, now have their own grievance guidelines. More grievances can be resolved without recourse to the Ombudsman.

Report compiled by Terry Nixon

PANEL C

Report	Matthew Naylor

Presentations

Dispute Resolution and AIDS-related questions	Greg Tillett
Dispute Resolution in the Building Construction Arena	John Tyrril
Dispute Resolution in the 1990's : Further Alternatives	Linda Fisher

Panel C : Report

AIDS-related disputes

Ignorance and irrational fears about Acquired Immune Deficiency Syndrome (AIDS) and the Human Immunodeficiency Virus (HIV) which causes it have led to a social climate in which AIDS-related problems, disputes and conflicts are widespread and frequent.

The resolution of AIDS-related conflict usually involves many aspects :-

1. Deeply-rooted personal fears
2. Concern about transmission of HIV
3. Value conflict relating to personal rights
4. Religious conflict
5. Popular perceptions of AIDS conflicting with reality
6. Conflict occurs in crisis setting
7. Disparity between personal power of disputants
8. Time factor - urgent need for resolution

The basic principles of dispute resolution, particularly relating to the resolution of values disputes, remain valid. Most importantly, the following steps are vital :

1. Competence to approach the conflict; sound scientific, social, psychological and legal knowledge of many, varied and complex issues.
2. Analysis of the surface and deep elements of the conflict. It may be necessary to separate the dispute from the conflict.
3. Need to establish common ground of fact from which to work.
4. Recognition of the fact that AIDS-related dispute resolution can be uncomfortable for both parties.
5. Acceptance that resolution of underlying value conflict is remote. More likely to settle dispute without resolving the conflict. Understanding of the difference can facilitate the settlement.
6. Short-term "first-aid" may be the best action available.
7. Recognition that issue involved is one of social justice and that "private justice behind closed doors" is inappropriate. This can be the cause of personal dilemma for the mediator.

Conflict and dispute resolution in this area will continue to pose a major challenge to mediators in the years ahead.

Dispute Resolution in the Building Construction Industry

Introduction

The Building Construction Industry is, of its nature, a major source of dispute. Disputes relate chiefly, but not only, to the design/documentation and construction phases. The incidence of claims and disputes has increased significantly over the last decade. The main method used for resolving disputes has traditionally been arbitration, but alternative procedures are increasingly being investigated and used by the industry.

The following **main sections** are expanded upon in the paper :

I **Looking at disputes** and the need for negotiation skills.

II **Use of Arbitration** in resolving disputes
- (a) Arbitration
- (b) Expedited Arbitration
- (c) Difficulties related to consolidation of Arbitration proceedings
- (d) Arbitration survey

III **Alternatives to Arbitration**
- (a) Conciliation & mediation
- (b) Rights-based mediation
- (c) Expert Appraisal