

MAINTAINING STANDARDS IN ADR — A GROWING DILEMMA

At ADRAA's inaugural function Professor Paul Tractenberg, Professor of Law, Rutgers University (Newark, USA) addressed members on this topic, using the Statement of Standards of SPIDR (Society of Professionals in Dispute Resolution) as a springboard. He explored some new ADR directions in the USA tracing these to their logical conclusions. The implications for Australia are fascinating.

Whilst SPIDR acknowledges that members have "their own codes of professional conduct", the standards were developed as general guidelines of practice for "neutral disciplines represented by SPIDR membership."

Prof. Tractenberg said that the concept of the neutral intervenor raised a number of questions such as: What is the place of the arbitrator? Should the multi-professional (e.g. a legal or medical expert) also exercise ADR skills? In the USA "facilitation teams" embodying several skills have been used in complex multi-party disputes. Such issues are not addressed by the SPIDR standards. Questions of the disputants' imbalance of power are also not covered.

The standards do recognise that in some cases confidentiality will not be protected. In these cases they require the neutral to advise the parties of this where appropriate, during the process.

Professor Tractenberg also raised the problems of

- (i) Competing legislation governing the issues in dispute,
- (ii) Attorneys representing the parties being present during the ADR process itself, and
- (iii) Attorneys being indirectly involved.

Would all or any of these raise the spectre of malpractice actions? Would the SPIDR standards facilitate or dampen malpractice suits? These questions must be faced in the USA and in Australia.

He envisaged that new developments in ADR might include local neighbour-

hood practitioners; the entry of other professions into the field; an informal system of certification of practitioners; and the absorption of the ADR processes into the court system, either through the American Bar Association's "Multi-door Courthouse" project or other projects. He considered this absorption the most likely course for the U.S.A.

Finally, Professor Tractenberg drew an analogy between the ADR development in the USA and Australia. He likened the USA movement to a field of flowers with many developments, both public and private, and much variety. He likened the Australian approach to a hothouse with fewer carefully tended blooms. He said that examination might reveal weeds growing in the field; time might demonstrate the hothouse approach has much to recommend it.

Prof. Tractenberg, in his seminar for members of the N.S.W. Supreme Court bench, saw ADR as relevant to the courts in:

- (a) a voluntary or mandatory pre-trial procedure;
- (b) court referral to, say, (Australian Commercial Disputes Centre) or (Community Justice Centres);
- (c) court use of outside agencies as part of the litigation process;
- (d) court personnel trained in ADR techniques; and
- (e) judges trained in ADR techniques.

Janice Williams

Chinese Judge Visits Sydney

Mr. Pan Ge Huan, President of the Economic Court of the High People's Court of Guangdong Province, People's Republic of China, visited the Surry Hills Community Justice Centre in April this year, whilst on a study tour in Australia observing the judicial system and alternative dispute resolution processes.

Mr. Pan was well versed in mediation practices in China and noted that there were similarities between mediation in China and Australia. In both countries mediation is community based, mediators are expected to maintain high standards in the process that they administer, and disputing parties make their own agreement with the mediators acting as facilitators.

When asked about the mediation committees in China, Mr. Pan said, "mediation in China can be traced back to the Han Dynasty, over two thousand years ago, when an official in the Court was responsible for mediating between disputants. The present Constitution of the People's Republic of China stipulates that mediation be available and Neighbourhood Committees have been formed to select suitable mediators. They are voluntary workers who do it as a duty. A Committee usually has 9 to 10 people as mediators and no other people are involved. All are full time mediators elected for a given period of time."

Mr. Pan quoted some interesting statistics, namely, that China has 800,000 Mediation Committees with more than 6 million mediators. More than 8 million disputes are handled by the Committees each year, which is ten times more than the cases handled by the Local Peoples Court.

Mr. Pan commented that, "even in commercial matters the parties are encouraged to try mediation before going to arbitration. Judicial mediation can occur in the People's Court when large commercial disputes arise, rather than adjudication taking place. The People's Court has adopted the principles of mediation from the Mediation Committees and currently 70% of cases handled by the People's Court are settled by mediation."

Mr. Pan spoke about the differences that occur in the way that disputants present themselves for mediation. He said, "in China a pro-active approach is used whereby the mediators identify that

ADRAA ANNUAL GENERAL MEETING

is on 29th October, 1987 at
ACDC, Level 21, 175 Liverpool Street
Sydney at 5.30 p.m.

Notice and nomination form enclosed.

a dispute exists in a family or a community, then they have a duty to listen to both sides and try to effect a resolution of the dispute. The way of conducting the mediation work is quite flexible. If an agreement is reached between the parties it is not legally binding."

"The People's Mediation Committees handle cases including many types of family disputes. They also handle neighbour disputes, which can involve some production and labour problems, children of one another, and also some minor threat and minor debt problems if someone buys something and does not give the money. Some minor property disputes are also mediated by the Committees. Some minor criminal cases, where police charges are made, could be handled by mediation to settle the matter out of Court."

When Mr. Pan was quizzed about specific types of disputes in China, his answers reflected the different tolerance levels between urban dwellers in Sydney and similar Chinese cities. He explained that when children are noisy in China it is of no consequence, as children are expected to behave in a less restrained way than adults. However, he emphasised that parents have a duty to teach children respect for adults.

Animals are also tolerated in China and Mr. Pan explained that if someone keeps a noisy rooster in the flat, and it disturbs the neighbours, they will understand because a rooster must crow.

Hopefully it will not take two thousand years before all Australian can proudly proclaim, as Mr. Pan does, that, "it is an accepted way of life to resolve disputes by mediation first, and only when that fails, to have recourse to the judicial system."

Maureen Carter
Co-ordinator.

Bankstown Community Justice Centre

Social Workers and Alternative Dispute Resolution

The University of New South Wales, School of Social Work, in 1988 will be offering an elective on Alternative Dispute Resolution to its fourth year social work students.

This elective will be taught by Dr. Sandra Regan, who recently presented a workshop on *Alternative Dispute Resolution in Social Work Education* as part of the Australian Association for Social Work Education, Workshop Program, 12-13, 1987, in Perth. The workshop focused on conciliation/mediation, teaching strategies and how alternative dispute resolution can become more visible in social work education.

Dr. Regan also presented a paper on *Conflict Resolution Skills for Social Workers* as part of the Australian Association of Social Workers Ltd., 20th Biennial National Conference, 13-18 September, 1987, in Perth. The theme of the Conference "Social Work in a Changing Society" provided a fitting arena to look at conflict in general and the need for social workers to develop skills in conflict resolution in particular

FAMILY MEDIATION/ADR

There have been a number of meetings between November 1986 and July 1987 of people interested in Family Mediation/ADR. They were organised through the efforts of the Pearl Watson Foundation Ltd., and a working party established to look into the feasibility of an organisation with a focus on Family Mediation/ADR.

At a meeting on 28 July 1987, it was agreed that rather than forming a separate organisation, it would be more appropriate at this stage to become members of ADRAA and form a subcommittee with a focus on Family Mediation/ADR.

I am therefore organising a meeting for all interested members of ADRAA to formally establish this subcommittee.

The meeting will be held on *Tuesday, 27 October, 1987, 5.30-7.30p.m.* at the School of Social Work, University of New South Wales, Western Campus, Room 68 (Conference Room).

If you are interested in being a part of the subcommittee, but can't attend this meeting, please contact me at 697 4751, x4752 messages.

Dr. Sandra Regan
School of Social Work
University of New South Wales

N.S.W. Law Society Dispute Resolution Committee

The President of The N.S.W. Law Society has created a committee to consider the role of solicitors in providing alternative dispute resolution (ADR) services to clients. The Committee will concentrate on a number of techniques for resolving disputes without litigation. These techniques involve negotiation; mediation and conciliation; mini-trials; and arbitration.

It is contemplated that the ADR Committee will play an active role in educating solicitors about ADR and providing a liaison between solicitors, the judiciary, the bar, academics and providers of dispute resolution services.

The Committee is undertaking a review of ethics for lawyers involved in ADR processes, concentrating on mediation at first. An Issues Paper is being prepared.

The members of the Committee are David Fairlie of Mallesons Stephen Jaques (Chairman); Jennifer David, lecturer at Sydney University Law School; Alan Limbury, of Minter Ellison; Fred Herron of Lismore; David Newton, the Secretary General of the Australian Commercial Dispute Centre Limited; Robert Angyal of Allen Allen & Hemsley; and Catherine Macadie of the Law Society.

ADRAA Membership

As at August, 1987 the range of members has expanded enormously to include:

- grievance resolution officers
- psychologists
- interpreters
- social planners
- probation and parole officers
- librarians
- social planners
- probation and parole officers
- librarians
- community relations officers
- tradesmen
- chartered accountants
- court counsellors

Community Justice Centres — N.S.W.

In 1980 Community Justice Centres were established in N.S.W. Since then the three centres have conducted continuing business culminating in 1225 matters "resolved to the satisfaction of the disputants" either by mediation or conciliation as outlined in the 1985/1986 Annual Report of the Community Justice Centres Council. An analysis of the parties' relationships reveals the following:

family disputes 18.1%, neighbours 64.6%, multi party 0.4%, and other including customer/trader, landlord/tenant, individual/organization 10.2%

Examining the nature of disputes, it is evident why neighbour problems represent a majority. Children's behaviour is specifically cited with great regularity, but other behaviours in the form of harassment, rumour, gossip, threats of damage or violence, obscene gestures, telephone harassment, exposure, actual damage or violence or the entry of objects are also outlined in the Report. Consider the pollution of garbage, odours, incinerators, eyesores or noise. Water is another area of dispute as exemplified by drainage, run-offs, swimming pools and hosing problems. Boundaries are also potential areas of dissension, with fences, retaining walls, trees, strata living and rights of way listed. Motor vehicles, parking rights and building developments are also included. Many disputes often encompass several issues, reinforcing the fact that today's lifestyle is one of increasing complexity.

In 82.2% of instances where a mediation was held, the Report notes that an agreement was reached. This undoubtedly makes Community Justice Centres an extremely important resource in alternative dispute resolution in N.S.W.

Janice Williams

NB Members: Limited copies of *Alternative Dispute Resolutions Proceedings* are available to members at the reduced price of \$7.50 (normal price \$12.00).

THE 1987 HARVARD LAW SCHOOL NEGOTIATION COURSE

Having read "Getting to Yes" (Fisher & Ury — Hutchinson Press, 1981) as part of the required reading before attending the Harvard Summer School Programme on Negotiation in June this year, I found it somewhat arresting that its principal author, Professor Roger Fisher, tore up a copy of his own book and threw the bits on the floor in order to demonstrate that since it was written, thinking in this field has advanced and that one should not regard any writing as having permanent validity.

The week-long session was, for me, the most rewarding learning experience I have ever had. The 120 participants from various countries heard a series of formal lectures on the negotiation process, punctuated by smaller working group sessions to analyse proposed strategies for particular negotiation exercises. Participants then negotiated one-on-one with each other and subsequently resumed their working groups for debriefing. There were opportunities to see oneself in action on video and to witness and analyse the techniques of others.

Whether an agreement was reached and, if so, what its terms were, turned out to be far less important than how the parties went about the process of negotiation and what particular approaches worked or did not work.

Fisher's approach has the advantage of doing away with all the gimmicks commonly associated with the "how to" approach to negotiation, and the stereotypes of the "hard" and "soft" negotiations: Instead Fisher advocates not going into a negotiation with a fixed position or preconceived idea of what the "right" answer is. Rather, he says, it is best to prepare thoroughly what is our best alternative to a negotiated agreement (BATNA), both on our side and on theirs and exploring how ours may be legitimately improved and theirs legitimately worsened. Negotiation should then proceed to examine ways by which the pie can be enlarged before it is distributed, thus finding creative options to satisfy the interests of both parties.

One further defect of the "positional bargaining" approach is that, whether one is "hard" or "soft", one tends to accept the first acceptable solution proposed, without taking the time to explore other ways by which the proposal might be improved for oneself, without becoming unacceptable for one's opposite number.

Having clarified each side's interests, communicated them and collaborated in generating options, one can then apply a test of legitimacy in choosing between the various options to ensure that, so far as possible, objective criteria are being used by which to judge whether or not a particular option is fair.

The invocation of objective criteria enables one to proceed irrespective of trust, while being open to persuasion (by reference to other possibly more appropriate criteria) that one should view things differently.

To buy a house because the vendor dropped \$50,000 off the asking price is not necessarily to pay fair market value, whereas to offer \$50,000 less than the

asking price because this figure reflects comparable recent sales in the area is to cling to an objective criterion by which to compel the seller to do likewise.

The one weakness in the Fisher approach appears to be that, once the parties have entered what one might call a "zone of agreement", in which any particular result would satisfy the interests of both parties (and that of society in allowing agreements of this kind to be made), there appears to be little short of positional bargaining or "salami tactics" by which one can arrive at the ultimate agreement. Once the best possible agreement has been worked out, it should be compared with one's BATNA and if it is better than one's BATNA, accepted. It should be remembered that one's BATNA might change during the course of negotiations. For example, one might find the conduct of one's opposite number to be so repulsive that what previously appeared to be an unacceptable alternative away from the negotiating table would now be regarded as preferable to any dealings with that person at all).

Improved negotiation techniques are relevant to ADRAA because in all forms of non-adjudicated dispute resolution negotiation is an essential element, whether between the parties, or through the intervention of a neutral person such as a mediator, negotiating separately and collectively with the disputants.

For this reason, we should encourage the teaching and improvement of negotiation skills wherever possible.

Alan L. Limbury
Minter Ellison

A.D.R. in Australia

Juvenile Offender/Victim Mediation in N.S.W.

Following an announcement by the N.S.W. Premier in January, 1987, funds have now been allocated for the establishment of a Juvenile Mediation/Reparation Programme. This will be administered jointly by the Community Justice Centres and the Department of Youth and Community Services. The Community Justice Centres will provide mediation and pre-mediation contact. It is expected that mediation of these matters will begin before the end of 1987.

Victorian Neighbourhood Mediation Centres.

The initiative of legal aid solicitors who promoted mediation in Victoria over the last five years, has resulted in the establishment of four neighbourhood mediation centres on a pilot basis from September 1987 to 31 March 1990 and funded by the Legal Aid Commission of Victoria. The four centres are located in Heidelberg/Preston, Outer Eastern Suburbs, Geelong and Bendigo. David Bryson, Project Manager of the Neighbourhood Mediation Centre Project at the Legal Aid Commission of Victoria, stated that the project represented "a major reform of the justice system in Victoria and a further legitimisation of alternative dispute resolution in Australia."

Legal Service Bulletin, Vol. 12, No. 3 June 1987, p. 108.

A.D.R. in the U.S.A.

Criminal mediation.

In February 1986, the Harvard Mediation Program, a student organisation at the Harvard Law School, became involved in training in criminal mediation. The training focussed on distinctive features of criminal mediation where cases often involved alcoholism or substance abuse. Typical criminal mediation cases include property damage, excessive noise, threats and vandalism. The Harvard Mediation Program President, Jack Schwartzman, highlighted the advantages of criminal mediation as being more challenging and more advanced.

(The Alternative) Vol. No.1 February 1986, p. 1)

Growth in dispute resolution

Whereas in 1976 there were only a handful of mediation programs and an estimated 2,500 community mediators, today there are more than 350 programs and more than 20,000 mediators in the U.S.A. A decade ago not a single state had a specific dispute resolution statute compared with 20 states today. In 1986 more than 120 Bar Associations had a committee on dispute resolution compared with none in 1976. More than half the law schools now offer courses in dispute resolution whereas no such courses were available in 1976.

(Dispute Resolution), A.B.A. Summer 1986, Special Commemorative Issue)

Mediation and the needs of adolescents.

The Adolescent Mediation Program has been set up in Suffolk County, New York State, in recognition of the needs of adolescents under the age of 18. The program aims to prevent escalation of situations such as school bus stop harassments, ethnic or racial incidents, parent-child conflicts, adolescent-adult conflicts and adolescent-adolescent conflicts. The program has claimed an 88% resolution rate.

(The New York Mediator Newsletter) Vol. 6 No. 1 Spring-Summer 1987, p.9)

Micheline Dewdney

Forthcoming Events

1. ADRAA Breakfast Seminar

Speakers will be Louis Chang, (Corporate General Partner, Kuniyuki and Chang, Hawaii) and Chuck Cooper, (Vice President, American Arbitration Association, San Francisco). Both are very experienced mediators who have had extensive experience training mediators.

They will talk on Mediator Training.

October 23 at ACDC, Level 21,
175 Liverpool Street
Sydney.

From: 8.00 a.m. to 9.30 a.m.
\$5 members, \$7.50 non-members.

Book direct with ACDC.

2. ADRAA "End of Year Get-Together" will be held on Tuesday, 1 December. Do keep that evening free. Details will be sent to members.

3. ADRAA Family Mediation Sub-Committee Meeting:

on 27th October, 1987
in Room 68 School of Social Work,
University of N.S.W., Western Campus

Contact: Dr. Sandra Regan
Telephone: 697 4751, (697 4752 messages)

ADRAA NEWSLETTER

EDITOR: Jenny David
EDITORIAL COMMITTEE:
Ruth Charlton
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University of Sydney Faculty of Law

Continuing Legal Education

Last of series of three Seminars on ADR as follows:

October 20

Mini-Trials and Discussion of the ADRA Movements Impact on the legal system and the Legal Profession.

Enroll through Faculty Office:
Telephone: (02) 232 5944.

Fees: \$40.00 or \$20.00 for papers only.

Chips Off a Very Old Block

While not wishing to enter into the old hereditary vs. environment argument regarding which of these shapes our character and destiny, with some folk it's indubitably in the genes.

ADRAA President, Wendy Faulkes, recently came across some interesting data on her family tree relating to the Vagg family on her father's maternal side. The Vaggs were natives of Chilcompton in the English county of Somerset. A book called "Meandering through Chilcompton" relates that Robert Vagg married Martha Gates in Chilcompton Parish Church on 16th March, 1857 and that the newlyweds arrived in Melbourne in the "Essex" on 1st July that same year. Their daughter was Wendy's grandmother.

There were Vaggs living in Chilcompton during the 11th Century and at least one went on the Crusades in the 12th. However, for Wendy, who pioneered mediation in Australia, the most pertinent information was that when the Civil War was drawing to its close in 1645 "the Vaggs and the Stockers of Chilcompton met the Cavaliers and Roundheads at Shepton Mallet to act as mediators"!!

These 17th century ADR exponents were themselves merely carrying on a family tradition practiced by an earlier ancestor of Wendy, Marmaduke Vagg. Marmaduke, it is recorded, "died abroad in the 14th Century whilst negotiating the Treaty of Bretigny with the French during the Hundred Years War".

Marmaduke & Co. may rest easily knowing that this 600 year family mediation tradition does not stop with Wendy. Marmaduke's descendant, social worker Katrina Faulkes, younger daughter of Wendy, without doubt held the title of "Australia's Youngest Mediator" when she was accredited at the age of 17 several years ago.

Whilst the Vagg genes have passed on the mediation tradition intact, it is not sure whether this is so in regard to the process. Until further historical research confirms this point it might be precipitous to refer to the CJC mediation process as "The Vagg Technique". However, it is understood there is a patent pending.

Ruth Charlton

ADRAA

The Alternative Dispute Resolution Association of Australia is a non-profit organisation established to promote alternative dispute resolution throughout Australia through the dissemination of information, ideas and experience. The Association will support education and research in the area and will help develop and maintain standards. All correspondence, unless for the Newsletter, should be addressed to the Honorary Secretary, ADRAA
17 Randle Street, Surrey Hills,
N.S.W. 2010, Australia

Membership fees: \$25 Aust. per annum
Newsletter only: \$15 Aust. per annum
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ALTERNATIVE DISPUTE RESOLUTION ASSOCIATION OF AUSTRALIA INC

ANNUAL GENERAL MEETING

DATE Thursday 29 October 1987

TIME 5.30 pm

PLACE The offices of -
Australian Commercial Disputes Centre Limited
Level 21
175 Liverpool Street
SYDNEY

- AGENDA
- 1 Welcome and Introduction
 - 2 Apologies
 - 3 Minutes of Inaugural Meeting
 - 4 Committee of Management Report
 - 5 Statement of Accounts
 - 6 Election of Committee of Management
 - 7 Other Business

LINDA FISHER
Hon Secretary

ALTERNATIVE DISPUTE RESOLUTION ASSOCIATION OF AUSTRALIA INC

NOTICE OF MEETING

BUSINESS MEDIATION

8.00 - 9.30 am Friday 23 October 1987
Australian Commercial Disputes Centre
at Level 21, 175 Liverpool St Sydney

Speakers: Mr Louis Chang, Attorney and International Business Mediator from Honolulu, and

Mr Charles Cooper, Vice President, American Arbitration Association, San Francisco

This will be an excellent opportunity for members to hear first-hand the experiences of Mr Chang as an international business mediator and also to hear the perspectives of Mr Cooper who is an experienced mediator trainer.

The meeting will take the form of an informal discussion meeting during which a light breakfast will be served.

Cost: \$5 (members)
\$7.50 (non-members)

Please return the completed registration form below with your cheque made payable to Alternative Dispute Resolution Association of Australia to: Treasurer, ADRAA, C/- Community Justice Centres, 17 Randle Street, Surry Hills, NSW 2010

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REGISTRATION FORM

BUSINESS MEDIATION - BREAKFAST MEETING

NAME

PHONE NUMBER

GUEST

CHEQUE ENCLOSED FOR