

## LINKING ADR PRACTITIONERS PRESIDENT'S WELCOME

**Mediation, arbitration, conciliation and adjudication are words often used in the media when describing actions being used to resolve disputes. The newsworthy disputes are more likely to be industrial or international disputes, than commercial family or interpersonal disputes. Terms are often used interchangeably, with little thought given to the role of the third party neutral involved.**

There has been little research in Australia on the levels of disputing, the methods of resolution (in terms of the role of the third party) or the cost to the community of unresolved, or unproductively resolved disputes.

The contemporary discussion on the merits of ADR began in Australia in 1979, with the NSW proposal to use mediation for the resolution of minor civil and criminal disputes. Although the Community Justice Centres demonstrated their effectiveness and low cost, other States have been slow to establish similar programmes.

Interest in ADR for the resolution of commercial disputes, and for family disputes has been demonstrated by the establishment of the Australian Commercial Disputes Centre, and the Family Conciliation Centres. More recently, courses offered in family mediation, and general conflict resolution have had an enthusiastic response.

People involved in the Peace Movement, and Peace Studies began to recognise that peace at a local or individual level was one way of promoting a peaceful world. Academics, and students of law, criminology, sociology and behavioural sciences have maintained and further developed their interest in ADR, and its implications for social change and individual growth.

The last two years have seen an increasing recognition by people operating as third party neutrals that they could be part of the field broadly described as alternative dispute resolution. These included Human Rights and Consumer Affairs Conciliators, EEO grievance personnel, and members of trade or professional tribunals.

Some police (e.g. aboriginal liaison unit), counsellors and court officials have also recognised the value of ADR methods in their work.

The Alternative Dispute Resolution Association of Australia is the first attempt to link these diverse practitioners. It will provide an opportunity to exchange views and ideas. We can learn

from one another and share our information and skills. The Association will be able to promote effective use of ADR processes and, ultimately, promote standards of practice, teaching and research.

The modern development of ADR may appear slow and reluctant, but those of us responding to requests for assistance or advice are convinced that ADR is poised for expansion, development and wide acceptance. We have an opportunity to demonstrate that the Australian community is ready and able to tackle its disputes with a spirit of common sense and co-operation.

WENDY FAULKES  
PRESIDENT

### Introducing ADRAA Committee

#### Wendy Faulkes (President)

Director of Community Justice Centres of NSW. Prior involvement in local government in Tasmania. Foundation Director of one of the first ADR pilot programmes in Australia. As a Churchill Fellow in 1982, reviewed overseas developments in ADR and produced the first published reports in Australia on Community Mediation. Wendy more than any other person, has been responsible for the growth of mediation in Australia.

#### David Newton (Vice-President)

Secretary General, Australian Commercial Disputes Centre. Lawyer and conciliator. Has worked as an in-house lawyer for a large commercial company and head lawyer for a national industry association. David has pioneered ADR for commercial disputes in Australia. Member of N.S.W. Law Society ADR Committee.

#### Linda Fisher (Secretary)

Sydney Technical College teacher of communications. Community Justice Centre mediator since 1980. TAFE trainer of mediators in NSW since 1982. Presently working to establish mediation for EEO complaints at S.R.A.

#### Basil Evangelidinis (Treasurer)

Background experience in Economic and Business Management working for industrial companies. Involved in community justice mediation since 1985.

#### Jenny David (Committee Member and Editor of Newsletter)

Lecturer, University of Sydney, in Criminal Law, Criminology and Dispute Resolution. Formerly worked as a litigation solicitor. Researched dispute resolution since 1984. Pioneering the teaching of ADR to law undergraduates and graduates. Member, NSW Law Society ADR Committee.

#### Ruth Charlton (Committee Member)

Background experience as a litigation solicitor. One of NSW's most experienced mediators, she has mediated in over 120 disputes for the Community Justice Centre since accreditation in 1983.

#### Micheline Dewdney (Committee Member)

Senior Lecturer in Law and Welfare, Criminal Justice and Social Administration at Macarthur CAE. Background experience in correctional administration. Sabbatical leave spent on reviewing ADR programs in Australia, the U.S.A. and the U.K. in 1986-7.

#### Gerald Raffesath (Committee Member)

Senior partner in Malleson, Stephen, Jacques. Active involvement in developing ADR in commercial law. Assisted in the production of a video on ADR for the College of Law.

#### Janice Williams (Committee Member)

Lawyer. Formerly taught in secondary schools and to children in State care. Worked as an interviewer for the Australian Bureau of Statistics. Community Justice Centre mediator since 1980.

# Alternative Dispute Resolution — An Initiative in the Workplace

Employers have always been acutely aware of conflicts between employees which do not arise directly out of their employment. They know that some employees, whilst competent in the performance of their duties, just do not "get on", they have a "clash of personalities", or for some other reason are not able to work together effectively.

For many employers these conflicts have proved too difficult to resolve. Managers, unable to find more fault on one side than the other have resorted to transferring or dismissing one or both employees involved on an arbitrary basis. Most organisations have not had the skills to resolve the conflict and until recently most have not fully accepted that they have a legitimate role in resolving conflicts between employees which arise out of their personal interactions and which are not directly connected with performing tasks.

In recent years, legislation has placed a legal requirement on employers to ensure that workplaces are free of discrimination and harassment based on sex, race, marital status, sexual preference, physical disability and intellectual impairment. This has involved organisations, particularly those in the public sector, in extensive research and analysis of their own behaviour, performance and practices. This activity particularly through EEO Surveys, has shown that interpersonal conflict can be a serious problem for organisations and that discriminatory behaviour is a major source of such conflict. Organisations have been faced with the possibility of embarrassing, costly and disruptive proceedings by the Anti-Discrimination Board or Equal Opportunity Tribunal.

The direct response of public authorities in NSW to this problem has been to establish internal grievance mechanisms, a strategy suggested by the Office of the Director of Equal Opportunity in Public Employment. The State Rail Authority initiative creating an Employee Complaints Service to resolve all complaints of unfair treatment and discrimination goes further by recognising the existence of a broad range of conflict in the workplace which has no other means of resolution.

State Rail and the Urban Transit Authority recognise that the best solution to conflict problems is not simply to create a system of impartial third party intervention. The key to effective conflict resolution is good management and the development of skills at the local level."

There has been a substantial increase in resources devoted to developing conflict resolution related skills, particularly in the ranks of management. Technical, professional and trade-related vocational training courses have been supplemented by courses and seminars in communication, negotiation skills, counselling, assertiveness and EEO awareness for managers and super-

The impact of poor interpersonal conflict resolution has gained wider recognition as a mainstream management issue concerned with workforce cohesion and productivity.

The objectives of the service reflect this broader view. The service is expected to provide an additional means of improving communication and exchanging information between different levels of the organisation. It will provide a means of identifying problem areas between management and employees and areas where remedial action is required.

The resolution processes devised for the Employee Complaints Service (ECS) follow a conciliation - mediation - arbitration model. There are four levels of resolution:

Level I is Information and Referral. At this stage potential complainants consult with Complaints Officers on their rights and responsibilities, the strategies they have adopted to negotiate their own solution to the conflict and their alternatives for resolution. They may be counselled on their negotiation techniques and assisted in improving communication in their future efforts to achieve a resolution. Complaints Officers check that other viable means of resolving the problem have been considered or used.

The screening process ensures that the ECS does not exasperate or provoke conflict by acting on vexatious or malicious complaints; by reactivating old matters which have previously reached decision; by duplicating the work of other resolution mechanisms or by investigating complaints where there is no evidence of unfairness or discrimination.

Level II Procedures, Conciliation and Mediation begin when a complaint is accepted and put in writing.

The mediation process closely follows the structure developed by Community Justice Centres. The main differences are that mediation is conducted by one mediator, complainants and respondents have the right to be accompanied by a representative and an account of agreements on unresolved issues may be disclosed to management on a "need to know" basis.

Level III Procedures, Investigation and Resolution may be activated if there is no resolution at Level II.

The Manager, ECS has powers of investigation which include carrying out field inspections and inquiries, obtaining documents from branches and interviewing employees. The processes of this stage display the characteristics of non-binding arbitration.

The final process is Level IV — Complaints Review Committee. It will make a binding decision when the Branch Head disagrees with the ECS Manager's report or recommendations.

It is expected that over 90% of complaints will be resolved at Level I or II of the process. The success of the scheme will heavily rely on conflict counselling, conciliation and mediation which is in step with other management developments.

The State Rail and UTA workforces are apprehensive about the introduction of the new system. Will it undermine the authority of Managers? Will it cut across

the role of unions? The coming months will test whether this new form of alternative dispute resolution can survive and flourish.

Barry Douse

(Barry is interested in your comments. Please forward them to him:

C/- State Rail Authority,  
Transport House,  
York Street,  
Sydney.

Telephone No. 290 4144)

## Book Review

The Australian Institute of Criminology organised a seminar on Alternative Dispute Resolution which was held in Canberra in July 1986. The principal goal of the seminar was to share information about the range of alternative dispute resolution mechanisms used in Australia and the programs using ADR.

"Alternative Dispute Resolution Proceedings 22-24 July 1986" edited by Jane Mugford and published by the Australian Institute of Criminology, shows how successful the seminar was in achieving that goal. This is the first comprehensive publication on ADR in Australia and deserves a wide readership.

The seminar chose to look at three alternative dispute resolution mechanisms, conciliation, arbitration and mediation, with the main focus being on mediation. The majority of papers focussed on the range of ADR mechanisms and programs and were presented by ADR practitioners. The empirical approach was complemented by conceptual and critical approaches to ADR.

A concluding overview on the current status of ADR in Australia by Jan Cameron provides a fitting finale to the seminar papers and a salutary warning against the dangers of complacency and cargo cult thinking. She stressed, inter alia,

- \* the considerable uncertainty about who should practice ADR and the need to establish nationally recognised systems of training and legislative protection for all practitioners.
- \* the problems of establishing comparative cost effectiveness criteria for ADR programs
- \* the need for proper evaluation of ADR mechanisms

The publication is a must for all who wish to gain a critical understanding of current ADR developments in Australia.

Micheline Dewdney

NB Members: Limited copies of Alternative Dispute Resolutions Proceedings are available to members at the reduced price of \$7.50 (normal price \$12.00). Order through Secretary, ADRAA 17 Randle Street, Surry Hills, N.S.W. 2010

# Dispute Resolution Service Available

The Australian Commercial Disputes Centre in conjunction with Australian Chamber of Manufactures is currently offering a comprehensive dispute resolution service to members.

ACDC provides an administration service to help companies and businesses resolve their commercial disputes quickly and inexpensively. The aim is to be able to maintain goodwill in business relationships that can often be destroyed through prolonged disputes. Also, ACDC processes are aimed at achieving a satisfactory and imaginative solution for both sides.

ACDC is the first body in Australia with an emphasis on the resolution of commercial disputes by assisted negotiation and settlement methods. By these methods parties are assisted with the help of an independent third person to reach their own agreement, an agreement by which both parties are more likely to be able to happily continue their business relationship into the future.

Experience overseas indicates that ACDC's processes, such as negotiation, conciliation, independent expert appraisal and mediation are likely to be the most increasingly used methods of dispute resolution in the future.

ACDC provides a new third option for resolving commercial disputes. Litigation and arbitration have become expensive and are most often associated with significant delay before a conclusion is reached. ACDC offers a new first option before litigation or arbitration is undertaken.

ACDC focuses only on commercial disputes and not on consumer or industrial relations disputes. The users of ACDC services are most likely to be companies, businesses, industry groups or government departments which are seeking to resolve a dispute of a commercial nature. Lawyers may also engage ACDC to help them resolve their clients' disputes.

It is possible to pre-empt a potential dispute by inserting in a contract a particular dispute resolution clause. The two most currently favoured are conciliation clauses and conciliation/arbitration clauses.

These are:

(1) For use where negotiated settlement is sought with the help of an independent expert third person who does not have power to hand down a binding decision: It is the intention of the parties, without creating any legal obligation, that any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof shall be the subject of conciliation, administered by the Australian Commercial Disputes Centre Limited ("the Centre"), conducted at Sydney (or any other specified place) and held in accordance with the Conciliation Rules of the Centre in force at the date of this contract.

(2) Initially Conciliation, then failing resolution — Arbitration:

Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof shall first be the subject of conciliation, administered by the Australian Commercial Disputes Centre Limited ("the Centre") conducted and held in accordance with the Conciliation Rules of the Centre in force at the date of this contract. In the event that the dispute, controversy or claim has not been resolved within twenty-eight (28) days (or

such other period as agreed in writing between the parties hereto) after the appointment of the conciliator by the parties hereto the dispute controversy or claim shall be submitted to arbitration administered by the Australian Commercial Disputes Centre Limited, conducted and held in accordance with and subject to the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitrations provided that the parties hereto shall agree as to the identity of the arbitrator and in the event that the parties fail to so agree within ten (10) days after submission of the dispute, controversy or claim to arbitration the Secretary General of the Australian Commercial Disputes Centre Limited shall appoint the arbitrator. Notwithstanding anything elsewhere contained in this Agreement the Commercial Arbitration 1984 (NSW) shall apply to any arbitration referred to in this clause.

The advantage to members is that a dispute settlement may occur in the Chamber's premises, which include full support services including facsimile and telex.

ACDC is the only body in Australia providing an overall dispute resolution service throughout Australia, so that disputes between companies in different states may be assisted and resolved.

Any enquiries as to any matter concerning the Centre may be directed to: Mr. David A. Newton, Secretary General, Australian Commercial Disputes Centre Limited, Level 21, 175 Liverpool Street, Sydney, NSW 2000 or call Mr Ken Crompton at ACM on (03) 698 4257.

## Mediation Seminar in Law Week, N.S.W.

As part of their yearly Law Week activities, the Young Lawyers' Section of the Law Society of NSW organised a seminar on resolving disputes by mediation on 29 April last. The seminar was chaired by the Chief Justice of NSW, Sir Laurence Street, who is a continuing enthusiastic supporter of ADR.

The seminar covered the present use of mediation in commercial, neighbourhood and family disputes in NSW and then explored future possibilities for its use. The seminar demonstrated the dramatic growth of use of ADR processes in NSW.

David Newton, Secretary-General of the Australian Commercial Disputes Centre (ACDC), detailed the growth of that Centre which aims to assist companies and businesses resolve commercial disputes quickly and inexpensively using structured negotiation, conciliation, independent expert appraisal, mediation and arbitration

Over 120 companies have signed the Centre's Declaration of Support for first exploring ADR processes prior to litigating disputes. These companies include AMP Society, IBM Australia, Volvo Australia, Qantas Airways and Transfield. ACDC also has developed a Declaration of Professional Support for law and accounting firms, industry associations and other professional firms to sign.

Wendy Faulkes, Director of the NSW Community Justice Centres, said the case load of the 3 Centres in 1985-86 year was 2837. Approximately 70% of the cases are neighbourhood disputes, 17-20% are family and the remainder are a "mixture of business and social relationships". Apparently, the type of relationship has little effect of the likely outcome of CJC intervention. Approximately 83% of all disputes result in agreement. The more coercive referrals from courts are more likely to result in a mediation session and "contrary to general expectation, the resulting sessions are only slightly less likely to result in agreement."

The CJs have observed that the "most effective matching" of mediators to disputants is by "age — or at least by generation". Cultural matching is advantageous but not as important.

John McDowell, Family Court Counsellor, described the conciliation service of that court, which is available to families even if no application is made to the court. John described the function of the Family court counsellors as "conciliation counselling" which he identified as being closer to counselling that negotiation and family mediation.

In considering the future possibilities for mediation, Jenny David, lecturer in law at University of Sydney, looked at its use in schools, environmental and public interest disputes, and in victim-offender disputes. She stated that mediation is being used successfully in some schools in the USA with one program in 5 New York high schools reporting that suspensions for fighting decreased by 70% in one of the schools in the first year of the program. This decrease continued in one school over a 3 year period.

Jenny then looked at the effect ADR will have on legal education. ADR emphasises consensual resolutions yet the method of teaching laws used in most Australian Universities is from appellate court cases which emphasise for students the adversarial and conflict increasing method of resolution used in adjudication. She argued for ADR to be integrated into the law curriculum and for continuing legal education in ADR processes for practising lawyers.

Sydney University is to introduce the first ADR course in a law school in Australia as an optional final year course in 1988 and is planning continuing legal education courses for 1987 and 1988.

The seminar illustrated an exciting time of growth for mediation and ADR processes in NSW at present. On a cautious note, Jenny David called for a thorough evaluation of all programs set up. As she said, "We need to be constantly aware of the need for quality and excellence in the field and for the need to be critical of our efforts to that that excellence can be attained and sustained."

## **Forthcoming Events — here and overseas**

### **ADDRAA Breakfast Seminar**

Speakers will be: Robert Banks, Vice President and General Counsel for Zerox Corp. and Chairman of the Board of Directors of the Centre for Public Resources, New York, and David Newton, Secretary General, ACDC.

Venue: ACDC  
Level 21, Remington Building,  
175 Liverpool Street  
Sydney.

On: 15 September, 1987  
From: 8.00 a.m. to 9.30 a.m.  
\$5.00 members  
\$7.50 non-members

### **SPIDR 15th Annual Conference**

October 22-25 1987, Grand Hyatt Hotel,  
New York City.

“Dispute Resolution Practice —  
Implication for Society”  
Contact: SPIDR National Office,  
1730 Rhode Island Avenue, N.W.  
Suite 909, Washington D.C. 25036  
(Telephone: 202 833 2188)

#### **ADRAA NEWSLETTER**

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## **University of Sydney Faculty of Law**

### **Continuing Legal Education**

Series of Three Seminars on ADR as follows:

October 6  
Introduction to Concept of ADR.

October 13  
Mediation and Conciliation in NSW

October 20  
Mini-Trials and Discussion of the  
ADR Movements Infact.  
Enroll through Faculty Office:  
Telephone: (02) 232 5944.  
Fees will be charged.

### **Next Issue**

Last day to receive articles — Sept. 15.

(1) There will be a report on the recent visit of Professor Paul Tractenberg of Rutgers University, New Jersey, U.S.A. to Sydney and Canberra. Prof. Tractenberg teaches negotiation to law undergraduates, practitioners and to judges in the U.S.A. Whilst in Sydney he gave an evening seminar for ADRAA on “Maintaining Standards”, two seminars on teaching ADR. At the University of Sydney Law School, an informal seminar to some of the N.S.W. judiciary and took part in many informal meetings and discussions on ADR. All who met him were enthused.

(2) A report on a meeting in N.S.W. at the Conflict Resolution Network in Chatswood on teaching conflict resolution in schools and on implementing a mediation program in schools on a pilot basis.

(3) A report on the experiences of legal practitioners who are establishing ADR sections in the large law firms.

(4) If anyone has other news they would like to see published or covered in future issues, do please contact the Editor, Jenny David, at address at bottom of front page or telephone (02) 232 5944.

## **ADRAA Membership**

ADRAA now has members in all mainland states and the A.C.T. The membership includes

Mediators  
Conciliators  
Corporate Lawyers  
Litigation Solicitors  
Academics and  
Judges

ADRAA Newsletters will be sent overseas to U.S.A., U.K. and Canadian contacts. We are entering into reciprocal arrangements with journals and newsletters from those countries. Future newsletters will contain more overseas news as a result.

## **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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