Current trends and models in dispute resolution, Part 2

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CURRENT TRENDS AND MODELS IN DISPUTE RESOLUTION: PART 11

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This article provides a helicopter view of some trends in dispute resolution in Australia, with random references to other jurisdictions. Thereby policy planners and practitioners who are dealing with conflict in the area of residential tenancies (or anywhere else) may be able to: locate their organisation and personal lives on the global map; feel normal; discover colleagues and fellow travellers who are attempting to manage conflict, proactively or reactively; anticipate future challenges; and develop options for responding to those future challenges. Part I of this article (published in Volume 9 No 1) highlighted the pressures on managers and practitioners to deliver effective services and examined not only the variety of dispute resolution services available, but also the practice computations within each service. Part II includes a diagnosis of the factors that service providers must consider, including accountability, legislative impact and how issues of cost, competition and practitioner-comfort might impact on quality, methods of practice and user satisfaction.

Diagnosis

A major or ongoing challenge for all service providers is how to diagnose with reasonable accuracy: Which conflict management process for which conflicts at which time? There is rarely enough money to send disputants sequentially to “counselling”, negotiation via lawyers, facilitative mediation, early neutral evaluation, evaluative mediation and finally a binding umpire. Moreover, multiple processing of a conflict usually escalates the original conflict, and spins off a galaxy of side-conflicts. (Conversely, multiple processing is, arguably, exactly what some disputants need in order to reach a stage of exhaustion by attrition, pain and expense.)

Taxpayer-funded Medicare cannot afford to send patients for sequential trial-and-error treatments. It relies upon clients lumping the problem, avoiding professional help or being diagnosed to the “right” treatment fairly promptly. Likewise dispute resolution services.

Some rudimentary check lists have emerged to assist with diagnostic guesses. Realistically, most disputants and conflict management services do not have either the resources or the expertise to interview clients at length and to discuss options. Whatever is available, respected and cheap is tried. Current random diagnostic methods include the following:

(1) There is a respected judge in San Francisco who “diagnostically” sends all the even numbered disputes in his list to mediation, and all the odd numbers to early neutral evaluation.
(2) During some settlement weeks, all those awaiting court are referred to mediation.

(3) Some Supreme Courts in Australia mandatorily send all awaiting court cases to mediation unless one or both of the parties can convince a judge that there is some “special reason” not to go.

(4) Most family mediation services have extensive written intake questionnaires which aim to screen out conflicts where there is extreme inequality of bargaining power, or a history of repeated violence. (Where do those excluded clients end up? Anecdotally, it appears that many clients who are excluded from a professional service by a benign screening process end up alone “in the wilderness”.)

(5) Some lawyers only send disputes to mediation when the conflict has escalated to vitriol; or there is “too much emotion”; or when the clients refuse to listen to legal advice; or when the lawyer on the other side is mad, bad or lazy. That is, perceived “disaster” cases are moved off the lawyer’s desk.

(6) Other lawyers have a stable of potential mediators and intuitively send disputants to mediators whose personality might “suit” the disputants.

“Success” and Statistics

Every dispute resolution service (court, tribunal, mediation, counselling centre) is wise to set aside a substantial yearly budget to: define the various meanings of “success” in their service; and collect ongoing statistics and customer surveys on various meanings of success. This expensive process is, first, a survival strategy in an era when government funds are quickly moved away from one service to a trendy new one; secondly, an essential reality check on quality of services; and thirdly, an essential marketing tool for the service.

In the 1980s, there was a tendency to require only “new kids on the block”, namely mediation services, to keep surveys of client satisfaction. The “old kids”, especially courts and tribunals, did not have to justify the status quo. Those services fried and basked in anecdotes, wonder and horror stories. Now, nearly every service (except perhaps the High Court of Australia, and various Courts of Appeal?) tries to record some measure of success in a systematic way. Even traditional monopolies must compete for cash and clients.

It is important to note that it is very difficult to compare “success” rates between different services (courts, lawyer negotiation, conciliation, self-help, etc). This is because comparison would require large random groups to go through different services, and outcomes to be measured over, say, a two- or three-year period. Such comparative studies are very expensive and logistically complex. Politicians want the comparative studies but usually not the delay and expense of accurate studies.

Nevertheless, anecdotes abound that structured “mediation” is better, cheaper, faster, fairer and more durable than “court”. These anecdotes must be treated with caution, at least because courts may be handling more entrenched and conflicted disputants (that is, they are “treating” different samples).

Despite the above reservation, there are now many surveys in Australia and various states of the United States of America which consistently show that highly trained, debriefed, problem-solving mediation services (especially in family and workers compensation disputes), staffed by well-paid mediators, who use an intake process, are
consistently successful in that they have moderate to very high
(a) levels of settlement;
(b) durability of settlements (the “stickability” factor);
(c) customer satisfaction in that the customers would use the service again, and would refer friends;
(d) customer satisfaction in that the customers say: “I was listened to”, “I had a sense of control”. (In the United States, these are sometimes referred to as the “dignity factors”.)
(e) numbers of settlements which were in the range of objective outcomes as advised by the parties’ lawyers; and
(f) preservation (and even restoration) of the disputants’ ability to talk to one another in the future.

These are consistently impressive “success” results, and are daunting for other service providers (for example, lawyers, courts and tribunals) to emulate. Conversely, there are many anecdotes that untrained lawyer mediators, with a few notable exceptions, who use a settlement or evaluative model of mediation have low levels of customer satisfaction. These people are quickly unemployable as mediators - gossip is powerful.

Customer Complaints and Horror Stories

Even when managed well, every dispute resolution service (court, tribunal, mediation) should expect a parade of disgruntled customers (conflict managers should predict and prepare for normal patterns of conflict!). First, this is because, as a wild estimate, a well-run mediation or conciliation service should expect every 20th customer to be seriously disgruntled; and a well-run decision-making service should expect every sixth customer to be seriously disgruntled. For every kind of service, say every 50th customer will be a conflict junkie with some major psychological dysfunction who will transfer his or her hostility from one “helper” to another (until his or her death occurs).

Of course, these guesstimates will escalate in number if any service is managed or run poorly, particularly if the service lacks excellent communication skills, respect for customers and “due process”. “Due process” is often considered by bean-counters to be a dispensable bunch of legal rules which increase lawyers’ wealth. No doubt “process” will always enrich someone. However, to omit a substantial dose of historic “due process” in any conflict-management or decision-making process is to invite raging grievances in many cultures, including “Australian” culture.

Secondly, all dispute resolution services (including outstanding services) walk between the devil and the deep blue sea. They are usually required by legislation, Australian Standard 4269 of 1995, TQM and/or internal management policy, to do the impossible - namely, be “fair, just, economical, informal and quick”. Emphasise one of these attributes and the others diminish. Also, disputants often change as the process goes along they want “cheap and quick” to begin with, until the outcome emerges when they want “fair and just” (on their personal criteria).

Moreover, each of these words can be rephrased by a critic - “quick” translates to “superficial” or “lacking due process”; “informal” translates to “disorganised”; “economical” translates to “low quality”; “just and fair” translates to “just” only on your standards, not mine or the- average Australian’s.
Thirdly, coupled with a steady stream of aggrieved customers looking for someone to blame for life’s problems (or for poor-quality services), is a voracious media looking for a moment of anguish to fill an approaching screen, sound or page deadline. Apparently the media’s interest is often not to investigate “the truth” or a balanced view of the complaint, as collecting perceived truth or balance is ponderous, expensive, boring, confidential and post-deadline.

Fourthly, few dispute resolution services (court, tribunal, mediation service, etc) are in a position to defend themselves openly in relation to complaints from a particular client. A defence would usually involve:

- breaching confidences about a client’s statements and behaviour;
- potentially compounding the psychological distress or illness which affects some clients;
- conducting an inevitably inaccurate and sensationalised trial by media; and
- failing to observe important concepts of due process.

Therefore every dispute resolution service should be prepared for critical assaults yearly or even monthly, via the media or via politicians in the service of, or used by, disgruntled customers. The assaults will be accompanied by horror stories about bias, ignorance, failure to listen, undue pressure, failure to communicate and inequality of power.

Waiting for these inevitable attacks to occur and only then reacting is a recipe for trouble. Services must be prepared in advance with complaint handling systems, as well as extensive client evaluations and statistics measuring multiple criteria of “success”.

**Commissions, Investigations and Inquiries**

Given the inevitable incidence of client complaint mentioned above, coupled with constant pressure on politicians to invent new solutions to social conflict, every major dispute resolution service should expect to be “investigated” regularly by a committee of inquiry. (Once again, all of these predictable dynamics require anticipatory action by dispute resolution services.)

“Inquiry” dynamics include:

- hasty assembly of the committee of inquiry;
- with members who are busy;
- with members who do not represent the diversity of views in the field;
- an agenda driven by either a politician’s cost-cutting predetermination or a zealous lobby group;
- the committee’s failure to understand or observe due process;
- secrecy and paranoia about what process or agenda is “really” being pushed during the inquiry;
- a lengthy and delayed report which is either misinterpreted or not read;
- a political decision to abolish, reconstitute, amalgamate or reduce the dispute resolution service which may or may not be supported by the inquiry report;
the service may be changed to contain fewer or more lawyers; more or less of a particular lobby group; more substantive experts or more process experts; more speed and less procedural justice; more speed and less due process for poor people and “small claims”, etc.

Managers of large dispute resolution services appear to be profoundly aware of these predictable and dangerous dynamics of investigative committees or inquiries.

**Process, Substantive and Interest-group Experts**

Dispute resolution services will be challenged continually by *who* to appoint and *how* to minimise each appointee’s weaknesses and maximise their strengths. Appointees can be competent/expert in:

- process (for example, adjudication, or problem-solving mediation);
- “substance” (domestic housing rentals; taxation; commercial building; personal injuries, etc); and/or
- understanding a particular interest group (for example, men, women, Vietnamese, builders, manufacturers, etc).
- emotion and the grieving process

Dispute resolution services will presumably experiment with the four different kinds of appointees by: mixing strengths by use of tribunal panels or co-mediation; attempting diagnosis and matching needs of a particular conflict with a particular service provider; constant education and multiskilling of service providers (for example, judges, mediators, arbitrators); and periods of apprenticeship and debriefing with mentors. One irony is that almost all conflict management services are subject to appeal, review or supervision by a traditional court or magistrate. The expertise of this supervisory culture usually is in “fair” process or “due process” rather than substantive knowledge, or the interests of competing groups. There is a historic tension over whether to increase or reduce the supervisory shadow of those who are experts in (expensive) due process.

**Second Wave of Mediation Research**

The “first wave” of mediation research over the last 20 years in the United States, Canada and Australia has established that well-trained mediators using problem-solving models of mediation consistently have reasonable to high rates of “success”, on a range of meanings of “success”.

Joan Kelly\(^1\) has suggested that there is a second wave of mediation research now to be done. Ironically, courts, arbitrators and tribunals have scarcely begun the first wave of research, although all are now under considerable funding and marketing pressure to do so.

The second wave of mediation research questions can apply equally to all dispute resolution services. Kelly’s seven suggested important future research questions are:

\(^1\) See Joan Kelly, “A Decade of Divorce Mediation Research - Some Answers and Questions” (1996) 34 Family and Conciliator Courts Review 373 on a range of meanings of “success”.
(1) Taxonomy: What categories of mediation exist?
(2) Diagnosis: Which conflict types should be referred at what time to what kind of mediation?
(3) Diagnosis: What adaptations should be made to each mediation process to provide for cultural and language differences?
(4) What micro-skills does a successful mediator use?
(5) Can systematic comparisons be made of costs, user satisfaction, settlement rates and durability of: different models of mediation; different models of negotiation; negotiations conducted by clients or by (legal) agents; different models of counselling; door of the court settlements; imposed (judicial) decisions; and imposed (arbitrated) decisions.
(6) What are the referral practices and values of gatekeepers to various dispute resolution services?
(7) How can mediation (or other dispute resolution services) be marketed more effectively?

**Legislative Avalanche: Mandatory Changes to Negotiation Practices**

It seems clear that, at this time of rapid social change, most legislators know little about mediation, let alone its multiple forms. This ignorance is not surprising as few have attended mediations in the manner we all may have used other professional services such as doctors or dentists.

Nevertheless, legislators are all under pressure to cut conflict costs, and to provide some dispute resolution service (whether diagnostically appropriate or not). Thus mandatory mediation clauses are routine in new legislation. Table 2 contains an extract from a newsletter of the ADR branch of the Queensland Department of Justice summarising some Queensland legislation which contains “alternative” dispute resolution clauses.

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Process</th>
<th>Short Description</th>
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<tbody>
<tr>
<td><em>Dispute Resolution Centres Act 1990 (as amended)</em></td>
<td>Mediation</td>
<td>Established dispute resolution centres and the operation of the service provided by them.</td>
</tr>
</tbody>
</table>

*There are several Acts of limited application, eg, the *Casino Acts*, where provision is made for arbitration in the event that dispute arises between the parties to the relevant agreement. The list does not include federal acts, eg, *Family Law Act 1975*, *Federal Court of Australia Act 1976*. 

| Act and Legislation | Mediation and case appraisal | Court-ordered mediation/case appraisal in civil cases: see
| | | Supreme Court of Queensland Act 1991, ss 90116;
| | | Supreme Court Rules, 0 99 rr 1-38;
| | | District Courts Act 1967, ss 89-110;
| | | District Courts Rules, rr 384-421;
| | | District Court Practice Direction No 2 of 1997;
| | | Magistrates Courts Act 1921, ss 21-42;
| | | Magistrates Courts Rules, ss 344-372.
| Supreme Court of Queensland Act 1995 | Arbitration | Section 52 - actions involving taking of account may be referred to arbitration/court officer (0 97)
| District Courts Act 1967 | Arbitration | Section 71 - judge may order an action or matter ... to be referred to arbitration (rr 276-280).
| Magistrates Court Act 1921 | Arbitration | Rule 223 of the Magistrates Court Rules permits the court to refer to arbitration any action or matter, or any question arising therein.
| Justices Act 1886(as amended) | Mediation | Section 53(4) - Justice may with consent of complainant refer complaint for mediation.
| | | Section 88(1B) - Justice may adjourn hearing of simple offence or breach of duty to be the subject of a mediation session.
| Criminal Offence Victims Act 1995 | Supply of information | Section 17(2) - “A victim should have access to information about victim offender conferencing services.”
<table>
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<tr>
<th>Act</th>
<th>Mediation</th>
<th>See new s 48(3) added by Justice And Other Legislation (Miscellaneous Provisions) Act 1997 - complaint of adverse conduct may be referred, with complainant’s consent, to mediation.</th>
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<tbody>
<tr>
<td>Peaceful Assembly Act 1992</td>
<td>Consultation/ mediation</td>
<td>Section 11 provides for consultations with interested persons as condition of approval. Section 15 provides for a mediation process with the relevant (local) authority.</td>
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<tr>
<td>Residential Tenancies Act 1994</td>
<td>Mediation</td>
<td>Sections 231-247 provides for mediation of tenancy disputes as part of scheme of resolution of tenancy issues.</td>
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<tr>
<td>Retail Shop Leases Act 1994</td>
<td>Mediation</td>
<td>Sections 55-64 deal with mediation of certain retail tenancy disputes (defined in s 97).</td>
</tr>
<tr>
<td>Queensland Building Services Act 1991</td>
<td>Mediation</td>
<td>Section 96 empowers the Tribunal to appoint a mediator or mediators to endeavour to achieve a negotiated settlement of a domestic building dispute.</td>
</tr>
<tr>
<td>Body Corporate and Community Management Act 1997</td>
<td>Mediation</td>
<td>Section 205 - The Commissioner for Body Corporate and Community Management may, in making initial recommendation for case management of dispute, recommend that the application be the subject of DRC mediation. He may also refer a matter for “specialist mediation” (ss 207-213). There is also a process of “specialist adjudication”.</td>
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<tr>
<td>Retirement Villages [Bill]</td>
<td>Mediation</td>
<td></td>
</tr>
<tr>
<td>Freedom of Information Act 1980</td>
<td>Mediation</td>
<td>Section 80 - “The [Information] Commissioner may, at any time during a review [of a decision by an agency/Minister] try to effect settlement between the participants”. (Section heading is “mediation”.)</td>
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</tbody>
</table>
Parliamentary Commissioner Act 1974 (Ombudsman) | Section 13(5)(g) (added by DRC Act 1990) provides that the Ombudsman cannot investigate mediations.
---|---
Legal Aid Queensland Act 1997 | ADR/ conferencing | Sections 23-27 allows Legal Aid to refer matters to ADR and to Carry out conferencing - provisions as to immunity included.
Maintenance Act 1965 | Conciliation | Section 130 – the court may on the hearing of an application take such steps as may effect a settlement of the dispute by conciliation.

Other emerging “standard” features of legislation (apart from mandatory mediation) are routine attempts to change what is perceived to be a dysfunctional culture of negotiation. (See, for example, the Workcover Queensland Act 1996 (Qld).)

<table>
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<tr>
<th>Table 3 Legislative Attempts to Change Negotiation Culture</th>
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<tr>
<td><strong>Perceived Problem in Culture of Negotiation</strong></td>
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<tr>
<td>1. Opening negotiations with a positional or ambit offer.</td>
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<td>2. Employing “duelling experts” who inevitably are paid to give opposite conclusions.</td>
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<td>3. Client ignorance of transaction costs of continued conflict or of a “court” hearing.</td>
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<tr>
<td>4. Filing formal claims as a routine and inflammatory method to open negotiations.</td>
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<tr>
<td>5. A junior person attends formal negotiations.</td>
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<tr>
<td>6. Lawyer or skilled helper unnecessarily escalating conflict due to ambit claims, emotional entanglement, jargon, “no-stone unturned” discovery and cross-examination or sloppiness.</td>
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<tr>
<td>7. Chaotic data.</td>
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<tr>
<td>8. Withholding of key information and</td>
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witnesses in order to “ambush” later. | exchange of witness statements; exclusion of all undisclosed evidence
---|---
9. Strategic stalling and inaction in order to avoid facing a problem, or to cause inconvenience, expense or attrition. | 9. Mandatory time limits.
10. Unwillingness to focus and make or respond to a “reasonable offer”. | 10. Vigorous awarding of costs in favour of reasonable offers; against ambit offers; mandatory single, filed, early written offers.

**Data Chaos**

A recurring feature of conflict is “data chaos”. This is particularly apparent where disputants are acting without expert assistance known as the “pro se” movement in the United States and the “LIPS” movement in Australia (“litigants-in-person”). These disputants arrive in court or at a mediation with a suitcase full of chaotic paper, or with no paper at all.

Even when “lawyers” are acting for disputants, data chaos is a common feature of the early stage of conflict as:

- A lawyer may be unwilling initially to spend a client’s money to collect and summarise data - rather, “we will go along and see what happens”.
- Sanctions are rarely imposed on a lawyer for having initially chaotic data.
- Lawyers may have an office management system which allegedly cuts costs by collecting and summarising data later, rather than earlier.
- If a dispute does not settle immediately, the costs of early preparation may cause a client to be disgruntled (one aspect of “principal/agent interest divergence”).
- Young lawyers may too quickly translate conflict into legal categories and jargon. (Young specialist helpers tend to define problems and remedies in the terms of their own expertise.)
- Negotiation culture favour ambit claims first and then lets the facts and rules evolve with the passage of time.
- There is a difficult risk management question of whether to negotiate early with “incomplete” factual probabilities, or negotiate later after spending research time and money locating more pieces in the data jigsaw (knowing that “all” information will never be available or accurate, and at best can be summarised in the form of probable/possible range, risk and transaction cost).

**In the writer’s opinion, a** well-trained and exacting intake process is vital to confront the dynamics which lead to data chaos. Without this, subsequent dispute resolution meetings will be dogged by frustration, adjournments and client dissatisfaction. This raises again the tension between “quick and cheap” (“Let’s get together quickly”; “Let’s go along and see what happens”; “This will settle if we are both reasonable”) and “fair and just” (“There’s no point meeting until we’ve collected more facts”; “A meeting will just be a pooling of ignorance unless we both have expert advice on likely outcomes and cost”).
**Importance of Intake and Preparation**

The old adage states that only three things matter in negotiation, mediation and advocacy -- preparation, preparation and preparation. “Successful” dispute resolution services whether courts or conciliations require intake or preparatory meetings. These will include education nights, seminars, videos and interviews. Intake meetings cover a variety of predictable issues with a disputant: What information do I still need? Who should be present/not present? What is my BATNA, WATNA and PATNA? What process will be followed at a formal joint meeting? What third parties or outsiders will be influencing the process and outcomes? What is the range of possible/probable outcomes? What range of emotional, time and financial costs attach to each stage of the formal process?

There is an inexorable cost-cutting pressure to reduce or eliminate intake procedures as either “too expensive”, or “unnecessary”. In the writer’s opinion, this is a false economy which almost guarantees the eventual failure and demoralisation of the formal dispute resolution process. Even the most brutal, abbreviated cost-cutting legal aid mediation conferences should begin with a ten-minute intake in the corridor or over the telephone with each of the disputants.

One repetitive feature of well-trained intake procedures is that disputants do not feel threatened by “mere” friendly education. Many conflicts accidentally appear to settle during intake when parties ask the intake officer to make a “few” “quick” shuttle telephone calls on their behalf. This dynamic requires the intake officers to be multiskilled and well-resourced. It is also a pleasant surprise for the cost-cutting manager of the dispute resolution service.

**The “Quality Creep”: The Tensions between Quality and Quantity of Services**

In an era of “more for less”, there is a difficult balance to be struck between the quality and quantity of any service. There is a strong tendency for the quality of many dispute resolution services to slide downwards, in order to process people more quickly. For example, mediation projects (such as Queensland Legal Aid and Family Court), clearly evaluated as “successful” on multiple criteria, have had intake shortened, co-mediation changed to sole mediation or session times shortened.

Court-annexed mediations appear to be conducted often by barristers or former judges some of whom are unskilled and uncomfortable with a model of problem-solving mediation; slide too readily into a lawyer-comfortable shuttle settlement or evaluative model of mediation; schedule the mediation sessions without any intake, and for short single sessions; run mediations without clients being present; and seem to encourage the view among disputants that the mediation is just another procedural hurdle before settlement at the door of the court. This “lawyer-comfortable” model of mediation appears anecdotally to be producing steadily decreasing rates of “success” except for personal injury disputes. Apart from the decreasing rates of durable settlements, this lawyer-comfortable model misses the two key measures of mediation quality for clients, namely “I was listened to” and “I had a sense of control” (as compared to losing control to professionals).
**Predictable Cost-cutting Measures**

There is an array of predictable measures which are taking place in dispute resolution services with a primary aim of reducing costs. These measures are particularly occurring for conflicts over “small” amounts of money, though they are also climbing into conflicts over “large” amounts of money. Set out below are examples:

- User-pays or steadily climbing filing fees.
- Repeat “corporate” users (for example, insurance companies; banks; government agencies) pay substantial “filing” fees.
- If a government or corporate disputant appeals and loses, the loser must pay all the other person’s appeal costs (the citizen or “small” disputant does not pay costs upon loss).
- Multiple specialist tribunals or services are amalgamated into one generalist tribunal.
- The dispute resolution services are staffed by cheap, part-time workers.
- The services have no special accommodation.
- The workers are paid fixed sums for each case completed; no salaries.
- No lawyers or professional advocates are permitted in the meeting or hearing.
- Written forms are reduced to simple English with a variety of tick-a-box categories.
- Educational evenings and -seminars are held to help do-it-yourself disputants understand alternative processes, and fill in forms. Fixed meeting/hearing dates; no adjournment permitted.
- Vigorous case management to ensure disputants are “ready” for the meeting/hearing.
- Guaranteed times between the date of filing and when a decision is issued.
- Mandatory disclosure within short time frames; all evidence of witnesses to be written and exchanged; no “new” evidence or facts can be produced unless already disclosed; heavy costs penalties for non-disclosure.
- Meetings/mediation/hearings in shifts into the night.
- Written reasons for decisions or written reports not provided other than in exceptional circumstances.
- Mandatory written, single and filed offers to be made within a short time of making a formal claim.
- All argument and evidence reduced to writing at the disputant’s own expense.
- Oral presentations restricted to a short time period. Oral presentations by telephone or video.
- No cross-examination permitted.
- No appearances at all; decisions reached on papers.
- Total “hearings” or “meetings” reduced to a specified hour limit.
• No appeal or supervision by courts except in dramatic and specified circumstances.
• No duelling experts permitted initially (for example, doctors, builders, valuers, accountants, lawyers); rather a court appointed or jointly appointed sole expert gives a report.
• Umpires or mediators have multiple roles (for example, data collector; data summariser; investigator; cross-examiner; adviser; mediator first - then umpire).
• No rules of evidence.
• No reporting system; or system of written precedents.
• Limited intake; or intake with lowly paid workers.
• Mandatory early neutral evaluation on the papers.
• Mandatory mediation with poorly paid, time-limited mediation.
• Short judgments or reports guaranteed within X days of a hearing/meeting.

As already mentioned, combinations of the above cost-cutting measures will tend to increase to the extent that either the taxpayer is paying for the service or the dispute is labelled as about “small” amounts of money or resources.

Quality Control

Straining with the move for less expenditure on (certain) dispute resolution processes is the cry for more quality. A variety of quality control measures are being debated and implemented. Some services already have traditions of very high quality control. These measures include:
• written definitions of minimal aspirational service standards and competencies;
• peer or mentor supervision;
• mandatory debriefing; mandatory client surveys;
• clear published records of various measures of success, including client satisfaction levels;
• complaint procedure for clients;
• mandatory continuing education for service providers;
• initial competency and knowledge-based “accreditation” established at several levels of expertise;
• eventual connection to the study of theory, systematised practice and critiques at universities;
• extensive ethical codes and training in ethics;
• disciplinary procedures and tribunals for accredited members;
• liability for professional negligence;
• mandatory professional insurance for accredited members;
• gradual exclusion of non-accredited members from the ability to practise;
regular collegial support and meetings.

Obviously, all these measures of quality control and “professionalisation” have dark sides similar to other service monopolies. The blossoming of “alternative” dispute resolution services in the 1970s was partly in reaction to the diagnostic myopia, inefficiency and high cost of traditional monopolies (for example, legal services). And so the vision-to-institution-to-vision cycle will continue.

**Turf Wars**

Conflict management services have not always handled our own conflicts astutely. There has been a history of lawyers, counsellors, mediation services, tribunals and courts competing for control of limited funds and customers. Within each of these groups there is also competition to create submonopolies so that only “self-accredited” or “specialist” groups receive a guaranteed stream of interesting and well-paying customers (and other providers do not!) Accordingly, arbitrators and mediator groups constantly attempt to lobby for legislative monopoly for “their own” organisation; or standard form contractual clauses which give a monopoly for “their own” members.

The mediation/conciliation movements in the Western world in particular have many more would-be providers than customers. With mediation, this is partly because the majority of disputants will not readily use an unfamiliar service despite systematic reports of high customer satisfaction from structured mediation services. Potential customers are also discouraged from using even skilled mediation because of the traditional risks of problem solving negotiation - namely position, data and image loss and the need to learn new communication skills.

Because of these and other factors, turf wars are likely to continue between multiple service providers in the dispute resolution industry. To repeat, this raises two further important research questions: Who are the gatekeepers or brokers referring clients to the multiple dispute resolution services? What values and practices are and should be exhibited by such gatekeepers or brokers?

**Conclusion**

This article has given a helicopter glimpse of some of the grand themes and issues in the dispute resolution industry in Australia and elsewhere. No doubt there are more. Whether these themes apply to a particular dispute resolution service, and what problem-solving options exist to each theme, are vital tasks for each organisation to address and record.