

**REFLECTING THE MEDIATION LIGHT:
GOVERNMENT, GOVERNANCE AND THE GOVERNED**

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Introduction

Today I would like to ask the following question: to what extent can the mediation movement reflect its light onto aspects of contemporary governance. There are three sides to this coin, to add value to the metaphor, and they are connected. In light of these reflections, I will suggest a possible new outgrowth from the mediation movement.

In the past decade there have been extraordinary developments in the skills, practice and theory of mediation and other dispute resolution processes in Australia and abroad. As mediators we have come a long way in understanding our trade. I think in the future we shall make more systematic connections between mediation theory and practice and new understandings in the cognate disciplines of organisation behaviour, decision science, human resources, psychology, narrative theory and the like – including the theory of moves.

I wonder, however, about our inclination as mediators to relate our mediation world to broader societal pressures, and in particular the structural issues in today's uncertain modern society which not only give rise to conflict but are perpetuators of certain forms of conflict. It is these bigger structural issues I'd like to refer to today.

A common theme in these three areas is that conflict is not just a product of greed, ego, selfishness and the other seven deadly sins, it is often a function of structural features of society.

It is interesting that we find a similar quest in all of today's professions and occupations. At least that's what I believe, Philip Adams agrees with me. There are unprecedented pressures and stresses in today's professions. At the most basic they require a crisis-survival response from doctors, lawyers, preachers, social workers, just to get through the day. Another response is to say how can we perform our occupation better – reskill, do more with less, undertake continuing professional development, practice defensively, avoid disciplinary conduct, and increase our insurance. And finally there is a deeper structural query over why we seem to be in this spiral of intense pressures, increasing demands and exhausting emails. When there is this deep anxiety in professional life I think it is inevitable that we should examine the structural factors which impinge on us.

I will first reflect on some of the conventional social assumptions of the early 21st century, which have implications for the mediation movement. I will then deal with three aspects of mediation which relate to contemporary government, with particular reference to Australia.

- The first aspect will be the orthodox social policy of modern governments and the implications of this for dispute resolution generally and mediation in particular.
- Secondly, I will consider the way in which social policy is produced in legislative institutions and whether mediation might have an influence on those procedures.
- Thirdly, I will look at the use of mediation and other dispute resolution systems in inter-governmental disputes, with reference to some developments abroad.

The common theme will be whether there can be more mediatory influences in the governance of the governed, by the government.

There is of course another governance in the news these days, and that is governance of the modern corporation. While some comments may be relevant to that area of social activity, I shall not be commenting directly on corporate governance. I certainly think that ADR is relevant here and have recently looked at the possible use of mediation for disputes involving minority shareholders. As one my themes today is the government's competition policy it might be useful at some time to look at the increasing competition among shareholders, employees and customers, not to mention

directors and auditors. It seems logically impossible for everyone to do better at once, as if a law of perpetual motion operated in the balance sheet: Telstra employees down, share prices up, customer service down, directors fees up, Big Pond down, and so on.

Talking about hypothetical questions, would mediators make good CEOs or CFOs? Let's talk about that over dinner. We would be good at accepting the 'golden hellos' the 'golden cuff links' and the 'golden handshakes' which are very fashionable these days.

The Nature of the State

I think that any assessment of the role of mediation in government and government in mediation needs to take some account of the nature of the contemporary state. This is a complex issue. We know that the state has shifted its nature in the past fifty years, from the policing state, to the welfare state, and on to the corporatist state of today. In each stage it has changed its nature and functions quite profoundly.

There is of course a view that the nation-state is largely irrelevant in the face of the giant trans-national corporation. We have all seen the statistics: several corporations have larger budgets than all but the 20 or so wealthiest countries; the 70 poorest countries in the world are less wealthy than some individuals. None of the wealthy individuals is a mediator.

The increasing concentration of wealth in a few individuals or corporations is a defining feature of the world economic order. The privatisation of vast state resources around the globe, required by the structural adjustment programs of the World Bank or international agreements or imposed by dominant trading partners, has accentuated this phenomenon.

However I think that despite their immense power the trans-national corporations still require the nation-state and it will be a long time before they replace it. It is the function of the state which has changed. The state as entrepreneur, carer, service-provider, and so on has been pared back, but it still retains its functions of policing, regulation, enforcement and financial subsidiser.

The contemporary state has a much reduced impact on economic behaviours and performances, these are a function of larger global forces. Nor can they much control the movement of capital, rates of exchange, interest rates, information flow, and the like. They can, however, control the movement of people, as has been apparent in this country. Moreover they are a source of welfare to the corporation and this is an increasing function of the modern state, a shift from welfare to the individual to welfare to the corporation, through tax incentives, grants, bail-outs, levies, subsidies, private public partnerships, and the like.

Of course states themselves differ in their capacities. At present the super power has over 30% of world GDP and can act in a unilateral way in relation to trade tariffs, criminal law, arms control and so has an enormous amount of structural power. Other states have a much small capacity and so little power that they cannot even resist the foreign incursion of Big Brother.

However in overall terms when it comes to structure and power government is still an important factor. I think this is all relevant because much dispute resolution has to do with power and power is often a function of structural arrangements.¹

¹ We could look, for example, at the different models of mediation and see how, or the extent to which, they address issues of power. In *problem-solving* mediation the even-handedness of the process, the impartiality of the mediator and the various mediator interventions, are all designed to redress power imbalances, at least to some extent. In *transformative* mediation one of the very goals of the process is empowerment of self, balanced with recognition of the other. These are of course very individualistic models of mediation, with their assumptions of party autonomy, freedom

These are, of course, of a mere academic, in an ivory tower, unfamiliar with the real world, a sipper of Chardonnay, member of the chattering classes, unversed in the bottom line, confused over the bulls and the bears. Perhaps it would be better to ask the markets, the modern day oracles and fonts of wisdom, some of the questions I am posing today.

Government Policy and Mediation

When talking about government policy I am really talking less about the policy of the government of the day and more about the orthodox, social policy, not only in this country but in many others as well. This involves a combination of free market, economic rationalism, privatisation, deregulation, competition, globalisation and their friends and relations.

One of the features of modern social policy is that it takes on a strong ideological shape. By ideology I mean a purported explanation and justification of reality, but not reality itself. Mediation has its own ideology, that it is collaborative, empowering, and so forth. The problem with ideology is that it often presents us not with reality but with a world of illusion. Iris Murdoch said that everything is illusion, though she did not blame it on other Murdoch. It is not always easy to scrape away the illusion to better see reality, and not a competing illusion.

Competition Policy

Let's take one aspect of social policy, that of competition. In 1995 all governments in Australia reached agreement on a National Competition Policy (NCP) for the country. The policy is underpinned by three complementary agreements: the Competition Principles Agreement, the Conduct Code Agreement and the Agreement to Implement the National Competition Policy and Related Reforms Agreement. 'Related' reforms in the electricity, gas, water and road transport industries form part of the NCP package.

Now the goals of the NCP are a competitive, dynamic and innovative economy as the source of the country's social objectives. It is designed to remove anti-competitive protections and privileges, including those of governments in the social services. It has been driven by the economic policy agendas of successive governments during the 1980s and 1990s. Corporatisation, deregulation, harmonisation and the creation of competitive markets are part of this trend.

The NCP targets the public sector in particular, with government businesses now required to apply competitive neutrality principles, though other sectors, such as the professions, have also felt its sting. The competitive neutrality principles are also relevant to local government.

The National Competition Council oversees and evaluates the operation of the NCP. Competitive neutrality policy aims to promote efficient competition between public and private business. The Commonwealth Competitive Neutrality Complaints Office is a unit within the Productivity Commission which administers the competitive neutrality complaints mechanism.

of choice and assumptions of mediator neutrality. Much of their efforts are aimed at overcoming the arational behavioural problems which arise in dispute resolution so that rational decisions can be made. The *narrative* theory of mediation comes closest to abandoning individualistic assumptions and acknowledging the societal and structural nature of conflict. Here the mediation is not assumed to be neutral towards societal features, such as discrimination and disadvantage, and strives to assist the parties to understand the contexts in which the dispute has arisen.

Safeguards

There have of course been a number of safeguards designed to mitigate the effects of competition. Changes to the *Trade Practices Act* and the extension of price surveillance are designed to deal with shortcomings in the competitive market place. There are new regulatory bodies, anti-corruption institutions and industry codes of conduct. There is a public interest test to be taken into account in assessing the merits of reforms, and adjustment assistance is available in some situations for people or communities adversely affected by reforms. And of course there is, as a last resort, the criminal justice system. But here the irony is that the same principles of competition apply to regulators, auditors, lawyers, prosecutors and other institutions designed to keep the playing field level. Recently I was asked to mediate in a delicate problem within a local branch of one of the national regulators.

Consequences

Nevertheless the NCP is a structure with deep foundations. There are reporting obligations by all governments and the Commonwealth government makes payments to the States and territories where they progress satisfactorily in terms of their NCP duties.

This is not the time and place to evaluate the NCP and its consequences in any detail. As mediators we know that reality is a complex thing and for a group of mediators even deciding where to go for dinner can be complicated by 'issue proliferation' and 'depositioning through interests'. Nor can NCP be seen in isolation from other current developments such as globalisation, information technology, changes in commodity prices, and so on.

Nevertheless we are told conflicting things. On one hand we are told that NCP has brought increased productivity, improvements in exports, new efficiencies, more variety and individual choices, greater economies of scale, better value for money, and a greater number of jobs. On the other we are told that it has contributed to unemployment, cut backs in public services, to shortages in social welfare, lower incomes, to greater disparities in wealth, to detriments to small business, to environmental damage, to losses in equity, to greater rural and bush dislocation, to an uneven spread of costs of the benefits, to more social anxiety and insecurity than ever before, and to less satisfying jobs.

Mediation Responses

In discussing how as mediators we might respond to as major a structural issue as the NCP the medical profession provides a good analogy.

- On one hand we might be the dispensers of mediation morphine to individual sufferers.

Certainly my own mediation practice and training has turned increasingly to the workplace. Restructuring, right-sizing, realignment, change management, outsourcing, quality controls, mission statements, these are difficult things to contend with at the same time as the new job description, the new performance criteria, and all the emails.

We know from practice that places of employment compete with one another through competitive tendering, employees compete with one other, they compete against abstract standards such as benchmarks and productivity statements, and they even compete with themselves in terms of needing to increase productivity over time.

In my last workplace mediation it was difficult to organise a suitable time as of the five individuals involved, four were on stress leave, three indefinitely. And when librarians say that theirs is the most stressful of contemporary careers we have to ask where the workplace is heading. Nevertheless I think mediators are performing a worthwhile service, even if providing the Prozac for the pain of competition. Mediators, counsellors and masseurs, they are the professional beneficiaries of the NCP.

- On the other hand we might consider the approach of the epidemiologist who does not provide injections to individual sufferers but examines the systemic issues that affect public health. Here the search is for the contagion, and not just perfecting the art of giving the injection.

This requires an observation of reality, an analysis and diagnosis, and the application of professional skills. Again, while reality is complicated our methodology is helpful.

We have shifted to an individualistic and contractarian model of society in which we are consumers not citizens, customers not airline passengers. Contracts imply the negotiation of social relationships, and negotiation involves positional bargaining and the LBT factors – lies, bluffs and tricks. Like many machines of our age, competition makes us move very fast. And it generates too many emails.

Clearly competition does not necessarily equate with conflict. We know that conflict, well managed, has some social advantages. We also know that a system which avoids disputes, in the sense of sweeping them beneath the carpet in the short term, is asking for trouble in the long term. It is the singular pursuit of competition policy by opinion-makers from different backgrounds which is worrying – one wonders whether it also applies at the ministerial family breakfast table. What of the countervailing values to be factored into the social equation – fairness, equity, safety, and so on.

We also know from Conflict Management 101 that structural factors can be conflict inducing. What is it about competition which is conflict inducing: it involves individualistic choices of self-interest, contestation over scarce resources, some degree of adversarial rivalry, withholding of information, positional bargaining, winners and losers, the defensiveness born out of insecurity, anxiety and disappointment.

So, to take the workplace example referred to earlier, we might diagnose the causes of personal stress, anxiety and insecurity as deriving in part from the structural competitive factors. When we factor in the demands of home and personal life it is not surprising that many people feel that they are engaged in a giant 24/7 version of prisoner's dilemma exercise. And the Productivity Commission is investigating ways of going beyond 24/7.

I think not only mediation methodology, but also its value assumptions, is significant here. While many of the advantages of NCP can be measured in quantitative terms, many of the disadvantages have to be measured in qualitative terms. As we all know we live in an age more impressed by quantitative indicators, particularly numbers of dollars, and less by qualitative indicators, such as satisfaction and security. However as mediators we are accustomed to probe beneath monetary claims to personal and commercial needs and interests.

Even within mediation circles it is not only ego, envy and turf which have caused competition and tensions over the years, but structural factors as well. In fact the NCC is about to look more closely at the professions, which might include mediators, so we had perhaps better look at them first before they tell us to be more competitive in tendering for the provision of non-competitive services.

Conclusion

Whatever the social reality, this vision of a competitive society has become part of the prevailing ideology, and it is hard to argue against it. However the late futurist Robert Theobald made some interesting discoveries when interviewing Australian captains of industry a few years ago. In relation to their own lives they virtually universally wanted a society which was competitive, market driven, economically efficient, individualistic and driven by the bottom line. But when questioned about the society they would want for their children they almost universally wanted one which was collaborative, effective, communitarian and sustainable.

If it is true that competition can induce negative forms of conflict then mediators in their diagnostic capacities might do is to call for CIAs, conflict impact audits, for policies, to sit alongside environmental or social impact audits. After all social policy is like the web of a spider and where there is strong tug from one direction there are implications for other areas of social life.

Mediation in Legislative Procedures

Secondly, I would like to refer to the source of social policy, the legislative institutions, and consider the extent to which mediation might be incorporated into the processes of these institutions to modify their adversarial procedures.² If mediation-type processes can be used in many areas of commercial, judicial and administrative business, can there be some use for them in legislative business?

Adversarial Legal System

Here it is worth noting that if we go back to the ‘access to justice’ movement in the 1990s we note that much of the energy of the movement was devoted to modifying the so-called *adversarial* nature of the legal system. Now there is still much to reform in civil litigation and in the legal system more generally. However my own view is that much of the shift from adversarialism has been quite successful. Judges, barristers, solicitors, corporate lawyers and the like have, in a modest way, felt the earth move beneath their feet and have adapted their positions accordingly.

So in the court system a number of barriers to effective dispute resolution have been identified, most of which are associated with the ‘adversarial’ nature of litigation. These include the exclusive party control over the conduct of proceedings, the technical rules of procedure and evidence, the limited role of the ‘umpire’ judge, the necessity for the litigants to make extreme claims to support their case, the focus on past events and legal entitlements, and the limited nature of the outcomes which can ensue.

ADR procedures, together with case management practices, have produced strategies to overcome some of these barriers and lead to the modification of common law litigation. It is now something of a pejorative and misleading caricature to refer to court-based litigation as ‘adversarial’.

What of Legislatures?

Now of course there are many factors responsible for the shift in culture, including self-interest and competition, there it is again, in other professions. But much of it is a product of legislative activity. Australian parliaments have made profound changes in rules of procedure, principles of personal injury, workers compensation schemes, administrative tribunals, native title claims, and other decision-making situations. In the process both the court process and the legal system have been modified from their so-called adversarial character to more appropriate forms of decision-making.

² See Laurence Boulle ‘ADR in Australian legislatures: are there prospects?’ 2002 4 *ADR Bulletin* 117.

So parliaments have shone the mediation light on the activities of courts and lawyers but I am not sure of the extent to which it has reflected back on them.

Adversarialism in Politics

Most political systems inherited from Westminster also operate on an 'adversarial' basis. This entails that the political party attaining a fifty percent plus one majority in the dominant house can give effect to its policies through control of the decision-making process in the legislature. This is buttressed by a single-member constituency electoral system which allows a single party or coalition of parties to obtain a clear majority of seats and thereby control the legislature. These structural arrangements constitute essentially a winner-takes-all-system allowing for domination of the organs of state by the electorally successful political grouping, with no necessary collaboration in policy development and decision-making. In this context of executive control parliaments can have a very limited role in affecting the policy of the government.

The adversarial nature of parliamentary politics is reinforced by the fact that much of it is conducted through the popular news media. Conflict, by definition, constitutes news. No conflict is no news. There is a tendency for the media to present politics in simplistic terms, for differences to be exaggerated and for the parties to be depicted in polarised terms. In the fourth estate a premium is placed on consistency, and where a politician changes their mind, compromises or collaborates this is presented sensationally as a sign of vacillation or weakness or back flip. We don't see headlines such as, 'MP changes position subtly after careful weighing up of all the options.'

Of course, some political parties seem to have their own domestic competition policy, involving public stoushes, positional bargaining, resignations and periodic rotation of leaders. Some weeks ago a Democratic Senator suggested the involvement of a mediator to facilitate decision-making in the parliamentary caucus of the party – this was a caucus in which there had already been too much caucusing. Interestingly the normally sensible Gerrard Henderson criticised this suggestion as being unfit for a political party; to me it sounded like a positive³ awareness of mediation's potential. Although one could not resist Backberner's sting: when interviewing a new leader of the DP the leader, when asked how he had come to attain the position, indicated that he had been the mediator and was asked to stay on. My phone was yet to ring

Functions of Parliament

Now parliaments are not only policy-making institutions. They are forums, to varying degrees, of accountability, scrutiny and control of government and they are also national assemblies in which events of the day can be 'debated'. And their procedures differ according to their function and the issues at hand.

Sometimes their affairs are conducted in a collaborative and courteous fashion.

But in their public form capacity it is question time which elicits the most robust and adversarial behaviour.

This quiet pasture of parliament debate can pose challenges for the Speaker, particularly one not trained in mediation.

It is these latter functions, combined with the media complicity, which cause parliaments to provide what Mike Steketee referred in the Weekend Australia 16-17 Feb 2002 as 'the front-bar brawling that passes for parliamentary debate, feeding Australians' disenchantment with politics.' It's a game of I'm right and you're wrong', 'oh but yer but', played by one and all. When the Queensland parliament met in Townsville recently it gathered in a basketball arena called the Swamp. The opposition's offices were in the men's toilets.

In fact if we analyse the nature of parliamentary debate, interventions and questioning it has all the features of bad conflict management: ambit claims, positional demands, point scoring, subjectivity, arguments and hominem, non sequiturs, point scoring, opinionated views, lies, bluffs and tricks, self-serving statements, evasiveness, selective, positional and moralistic claims, wild extrapolations about future consequences, utilitarian, short term expediency, and more point scoring. These are the things we were taught not to do at play school. Effectively these are the punchy, pugnacious preliminaries to a predictable power content, which is always won by the government with its superior numbers.

One might legitimately enquire whether ADR principles and processes have a place to play in at least some parliamentary affairs. After all these are the same policy-makers urging lawyers to adopt the gentler arts of conciliation. Mediation's civilising force has mitigated some of these features of the legal culture, might it yet affect the political culture?

Mitigating Structural Features

There are already structural features of parliamentary politics which mitigate some of the adversarial excesses and promote some degree of collaborative decision-making. They do this by curbing the role of the majority government.

- One such feature is the bicameral nature of most Australian legislatures which requires negotiation over policy between governments and upper houses over which they have no control – a celebrated example of this was the GST deal in the Commonwealth parliament.
- A second is the committee system which in most legislatures introduces a degree of negotiation give and take and compromise into the legislative process, and in fact sometimes committees become a graveyard for government policy.
- A third occurs in those parliaments in which independents hold the balance of power, forcing minority governments to consult, negotiate and compromise with them.
- A fourth is the informal, back-room politics which brings some give and take into the policy-making process, regardless of public posturing.
- A fifth is found in the advisory role of the Senate through its inquiry system.
- Finally parliaments sometimes delegate policy-making and administration to outside bodies often in a collaborative venture with other parliaments, for example in form of the Murray River Ministerial Council and other examples of cooperative federalism.

And of course, ultimately even majority governments, like military generals, know that they have a vested interest in the continued survival of the opposition.

The fact that at present a lot of deal-making is done in, nowadays, smoke-free back-rooms is an interesting one. It undercuts the veneer of adversarial posturing. However these practices are largely unaccountable, despite the fact that they may involve major social issues, not sports carnivals. Formalising them would make them more transparent – this would involve what David Syme calls 'undercutting the undercutting'.

Future Changes

There is, however, some change in the air. In the Commonwealth Parliament there is currently discussion over structural ways to increase the independence of the speaker so that this person

becomes more of an ‘outside neutral’ in parliamentary deliberations. In South Australia there are currently efforts to institute a program of parliamentary reform, with some effort to reform ‘question time’ and turn it into ‘answer time’.

The question remains as to whether mediation principles and procedures might be further deployed to shift parliamentary procedures out of the adversarial paradigm, as they have with court-based litigation.

Here are some of the institutions which in other jurisdictions mitigate adversarialism and facilitate dispute resolution within legislatures.³

1. Having a proportional electoral system which allows small parties more easily to gain representation. This leads to the need for more coalition-building and compromise in order to get policy approved. Proportional representation, grand coalitions and mutual vetos are found in many of the world’s constitutions and they make politics more mediatory by necessity. New Zealand has lived comfortably with this arrangement for a few years and it did not, after all, prevent them from winning the Tri-Nations competition in 2002.
2. The requirement of unanimity, or near-unanimity, for the making of some legislative decisions. Where this principle applies to important legislation, collaborative negotiation is required for any decision-making. It is found in many of the world’s constitutions, and operates to some extent in Australian constitutions in relation to constitutional amendments and legislative deadlocks. It clearly has draw-backs in terms of the potential for gridlock and according to minority groups a veto power out of proportion to their size.
3. Isolating more of the legislative process from the ‘political’ process and allowing more structured negotiation in private. This has the advantage of allowing leaders to make concessions, to engage in negotiation trade-offs and compromise, without being called to account for the public positions. It has an obvious draw-back in terms of lack of accountability and public transparency in the legislative process.
4. The intervention of ‘neutral’ politicians or other parties in the decision-making process, particularly in legislative committees. Here the third party can have a ‘mediating’ function by facilitating communications, acting as an agent of reality, promoting trade-offs and encouraging the parties to hang in with their discussions. Though this would involve less a change of culture and more a facilitative dimension in the adversarial culture.
5. The use of joint fact-finding protocols to deal with complex issues of fact or projections about future eventualities, to avoid the ‘we’ll all be rooned’ syndrome.
6. Revision of meeting procedures to make the process more informed, impartial, focussed, and collaborative, and the availability of more conscience votes, as occurred in the recent stem-cell debate which produced some refreshing candour and changing of views. If these are conscience votes, are the others non-conscience votes?
7. Rotation of the office of speaker, or use of a speaker independent of political parties.
8. Greater community involvement in policy and decision-making roles, as occurs in many local government contexts.
9. Investigation of more interest-based procedures. As Rooney comments, if the highly conflictual building and construction industry can move away from adversarial approaches to more interest-based ones to achieve better results, so might our parliamentarians.⁴ This would require a dispute system design effort with some encouragement of the use of mediation, perhaps initially

³ Tom Melling “Dispute Resolution Within Legislative Institutions” 46 (1994) *Stanford Law Review* 1677.

⁴ Greg Rooney, ‘Mediation and its place within the parliamentary system’ 2002 5 *ADR Bulletin* 4.

over personal clashes, conflicts over standing orders or misconduct. At a later stage more political-type conflicts might be trialed.

10. Greater structural incentives for bipartisanship, which is mediatory in part.

This is not a very extensive list. Nor does it follow that all policy-making should be subject to bargaining, collaboration and compromise – if that were the case real reforms in terms of civil rights, access to information, and so on, would probably never have materialised. But ADR principles and processes need not be restricted to dispute resolution settings – after all they are used in the private sphere on the transactional side in facilitating mergers, joint ventures and wage negotiations.

Legislative processes have in common with other fields in which ADR is practiced the fact that a number of parties are involved in decision-making for the future. Should the governed who fund the decision-makers not enquire as to whether the governors are using best-case decision-making processes?

Depoliticising Politics

Of course it will be argued that some of these innovations would take the politics out of politics, and the fun out of parties. But is an eighteenth century debating ethos, without performance reviews, appropriate for the highest organs of state? As mediators our slogan has always been that ‘better process ensures better outcomes’. And just as judges will soon go to the National Judicial College for further education, so might MP’s go to a National Members College. We mediators could, as they say, learn them good, and lets not forget how even the highest courts have enhanced ADR.

Dealing with Inter-Governmental Disputes

Recently I had the experience of working with a country which, while it has its own version of competition policy, also has principles of cooperation built into its constitutional foundations.

Some of the world’s constitutions make provision for the management of disputes between governments. The Indian Constitution has specific dispute resolution mechanism for example on inter-state rivers or valleys. Section 263(a) charges the President to establish an Inter-State Council with the duty of facilitating co-operative government, including ‘inquiring into and advising upon disputes which may have arisen between the States.

In Switzerland informal negotiations are the order of the day and popular dispute resolution is used in Switzerland where 50 000 citizens or eight cantons can initiate the submission of federal legislation to the people for approval or rejection.

In Germany the constitution court performs the function of de facto mediator in federation-state and state-state conflicts, mostly notably in the public revenue area. The court produces results similar to the political process. The German constitution provides for many intergovernmental forums designed to contribute to conflict management and the use of the Bundesrat Mediation Committee for resolving legislative deadlocks between the chambers.

In Hong Kong the Basic Law has formal requirements of consultation as preventative mechanism before the National People’s Congress acts as the final arbiter of disputes. Some countries now give advisory jurisdiction to their highest court so that at least the legal framework can be clarified within which the dispute will be politically resolved. In 1976 Papua New Guinea Organic Law requires mediation and arbitration before the parties can resort to the courts. In Canada there are

moves to use ADR techniques for conflict management in relation to interprovincial trade. An agreement among the federal, provincial and territory governments is aimed at enhancing mobility throughout Canada by providing uniform access to education, training, social and health programs.⁵ The agreement commits the governments to ‘work collaboratively to avoid intergovernmental disputes’ and there is a chapter on dispute avoidance and resolution involving the use of outside experts where necessary. And there are well-known mechanisms at the international level, from the 1899 Hague Convention for the Pacific Settlement of International Disputes, the 1948 United Nations Charter, to the 1995 World Trade Organisation’s Dispute Resolution Understanding, designed to manage disputes.

Nevertheless in overall terms constitutional systems do not regularly provide formal institutions or mechanisms for the non-judicial resolution of inter-governmental disputes.

This is why the 1993 independence constitution of the Republic of South Africa is of interest. While this constitution was a long time in coming, it had the benefit of drawing on the successes and failures of the world’s constitutional systems during the previous centuries.

While there is the normal three level division of power with relatively strong provincial governments, the constitution quite explicitly does not establish a system of federal government, partly because of the dispute potential of competitive federalism. Nevertheless because the system is new and has a somewhat complicated division of authority among the levels of government disputes are bound to arise over powers, resources and jurisdiction.

Section 41(1)(h) has a dispute avoidance goal: all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest;(iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another.’ While these might seem like idealistic aspirations, s 42(2) is directed at the national legislature and is more down to earth. It provides,

An Act of Parliament must –

1. establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
2. provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

Section 42(3) provides:

An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

Section 41(4) provides:

If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organ of state involved.

⁵ A Framework to Improve the Social Union for Canadians. See Nico Steytler ‘The Settlement of Inter-governmental Disputes’ in Norman Levy and Chris Tapscott *Intergovernmental Relations in South Africa*, School of Government, University of Western Cape (2001) 175 at 190.

Now the national legislature has yet to enact legislation providing the ‘mechanisms and procedures’ required by the constitution . So in a recent decision the Constitutional Court referred to it as an urgent need and transmitted these views to the Minister for Justice and Constitutional Affairs.⁶ This was a highly public case, involving the breathtaking social issue of electronic monitoring of pokie machines. Such are the rewards for abolishing apartheid. The court held that the governments had made no effort to discuss their differences of opinion and far from co-operating had proceeded on a collision course. The constitutional judges refused to grant direct access to the court.

What is interesting about these constitutional provisions is that they are not designed to operate in private or contractual relations between different organs of state. They are designed to deal with public law disputes, with policy differences relating to allocation of powers and duties, the very matters which are at the heart of the constitutional and political system. What the provisions in effect are doing is bringing a mediatory dimension into the political process, rather than allowing the too-easy packaging of essential policy issues as legal ones for court determination.

Reverting to Australia, federalism does imply some measure of cooperation between governments, as a matter of necessity if not policy.⁷ Section 101 of the Australian constitution established the Inter-State commission to determine constitutional disputes relating to trade and commerce. However the combined efforts of the High Court and the federal parliament have deprived the section of its practical significance.⁸

The High Court for its part has recognised that it is constitutional for the Commonwealth and States to co-operate where a project is beyond the capacity of either on its own.⁹ In fact Justice Deane in 1999 proclaimed that Commonwealth-State legislative co-operation was a positive objective of the Constitution¹⁰ although some would argue that he was looking too closely to find something that was not really there.

However to this day it is very seldom that explicit provision is made for the management and resolution of disputes between the Commonwealth and State governments, despite the prevalence of dispute resolution clauses in much private sector contracting and within industry bodies and codes of conduct.

In 1999 the *Intergovernmental Agreement on the Reform of Commonwealth-State Relations* was annexed to a Commonwealth statute regulating key aspects of federal, state and territory financial relations arising out of the Goods and Services Tax. There is the usual reference to ‘best endeavours’, but no dispute resolution provision whatsoever. Moreover if a determination is made under the Act by the Commonwealth Treasurer it is, according to the legislation, ‘presumed to be correct.’ Not a mediatory type of arrangement this one.

In Canberra itself there are many disputes between the Commonwealth and Territory governments. However these are played out in the Canberra Times, with plenty of politics but without any seeming sense of structure, process and professionalism. Many of these relate to planning issues where the Commonwealth’s planning goals do not dovetail with the ACT’s own plan. Some Commonwealth-State agreements do provide explicitly for the resolution of disputes, though commentators suggest that these are generally not satisfactory to the States. The best example is probably to be found in the *Australian Health Care Agreement for 1998-2003*. It provides for disputes to be referred to an arbitrator, independent of the parties, although even here the

⁶ National Gambling Board v Premier of KwaZulu-Natal and others 2002 (2) BCLR 156 (CC).

⁷ Winterton.

⁸ Crommelin.

⁹ *R v Duncan, ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.

¹⁰ *Ibid* at 589.

Commonwealth has refused to comply with an arbitrator's decision where it argued that it was erroneously based.

The Council of Australian Governments, comprising all nine heads of government, has some potential for dispute avoidance through management of policy development in areas such as tax and competition. There is also an abundance of ministerial councils, for example that of the nine Australian treasurers which replaced the old Premiers' Conference, and there are also numerous other councils on topics such as education, drugs and the river basins. There are also such bodies for public servants from all governments, such as the Commonwealth-State Standing Committee on Treaties (SCOT).

All these bodies have the potential for preventing, managing and resolving disputes, but there is no evidence of their embracing the wisdom of the mediation movement. Moreover they often deal with inter-governmental agreements in respect of which the courts have not been prone to regard as justiciable. And certainly where a constitutional issue of the federal balance of power is at stake there is a long tradition of resorting to litigation.

To return to the provision from Africa, it is of course true that a constitutional prescription does not alone create a culture of collaborative dispute resolution. However currently a dispute system design undertaking is underway to flesh out the constitutional provisions. It would have the following elements:

1. All organs of state would be required to appoint a Dispute Systems Manager, along the lines that Australian agencies are required to have Freedom of Information Officers.
2. The DRMs would have prime responsibility for processing disputes between their respective organs of state, as facilitators and not as judges or umpires.
3. The DRMs would be subject to a protocol requiring them to liaise with one another in using early low-cost interventions and to follow a systematic plan thereafter.
4. External intervenors would be used where the DRMs were unable to facilitate a resolution themselves.
5. The external intervenors would be appointed from a panel of trained and accredited mediators, arbitrators and so on and could be DRMs from other organs of state.
6. DRMs would have to certify compliance with the DR protocol and report to their political supervisors and relevant courts.

This is, of course, classic dispute systems design with a strong emphasis on prevention and mediation (I thought of premediation but my spell-checker would not allow it). What stands out is the extent to which it is designed to reinforce the political process and prevent, manage and resolve disputes in a structured and systematic fashion. It certainly shows the light of mediation being reflected onto inter-government processes.

ADM Coming From the South

If the mediation light is to shine in this area it may well come from the south. In the year 2000, the *Tasmania Together* program was established as an ambitious and long term vision to involve the community in having a say about every aspect of society in that State. *Tasmania Together* includes a vision statement, so mediational, and broad goals underpinned by benchmarks that can be monitored. A Community Leaders Group drove the process for two years and more than 60 public meetings have been held in cities and towns across the State. The vision uses three C-words, co-operation, community participation and collaborative decision-making, with no mention of the other one, competition.

Earlier, in December 1997, the Municipal Association of Victoria and the Victorian Local Governance Association developed a Code of Good Governance, which, besides emphasising the expected principles of community participation and accountability, encourages co-operation among local governments through mutual respect, co-operative attitudes and adherence to The Code. Appendix 1 of The Code comprises dispute resolution processes involving independent conciliation and mediation, and where this fails, resolution through representative Good Governance Panels. This dispute resolution system is designed in part to remove the let down feeling of councils being sacked by another sphere of government. All but one of the 78 local councils have agreed to adhere to The Code. A report is due shortly on the operation of The Code and it is expected to be incorporated into proposed changes to the Local Government Act 1989 of Victoria. The Final report of the Good Governance Panel to the Municipal Association of Victoria and the Victorian Local Governance Association in 1999 also recommends an effective complaints handling process for residents or councillors.

There are of course other examples of collaborative decision-making in setting rules and standards, though these tend not to be facilitated by outsiders. Perhaps these initiatives herald the beginning of a new outgrowth from ADR, namely ADM or Alternative Decision Making. Like so much else today, government has to be reinvented. It has learned lessons from the business sector, for good and for bad. And it might do well to emulate the mediation experience as well. Especially the good. (Cuomo)

Conclusions

What I have done in this presentation is pose three questions for the mediation movement.

- First, to what extent do the social policies of the day create the conditions of conflicts and disputes, in a sense promote problems which require attention? And how might the mediation movement react to those realities?
- Secondly, to what extent is the crucible of social policy-making, parliamentary processes, taking on a more mediatory and less adversarial complexion?
- Thirdly, to what extent are governments modelling appropriate dispute resolution behaviour in relation to disputes among themselves? And should principles of collaborative government lie alongside other policies in the bed of constitutional politics?

Hopefully the development of ADM will provide some of the answers.