

Fizzing and buzzing at the National Mediation Conference Perth 9-12 September 2008

Reflections by Robin Tapper (and others).

The creative possibilities of mediation fizzed and buzzed around the potted-palm dotted foyer and in the meeting rooms of the Hyatt Hotel in Perth during the National Mediation Conference. All that fizzing and buzzing now goes home with delegates as they return to their own tribes – to borrow a concept from John Wade. What will they take with them? Will the landscapes of their homes be transformed?

The first thing that they will take, by all accounts, is a bursting sense of appreciation for a wonderful, and magnificently organised, conference. What a sense of fun and creative variety – along with great speakers, and the basics like good food and the courtesy of well-enforced timekeeping! Just two highlights: yoga stretches to improve physical flexibility while thinking about flexibility in mediation; and, during the conference dinner, a mind-stretching entertainment of magic and sleight of hand.

Federal Attorney General, Robert McClelland set a tone of optimism for the Conference in his opening address: “The Australian Government believes it is incumbent upon us all to nurture a ‘resolution culture’... I want it to be clear that mediation and other ADR processes can provide efficient and enduring outcomes. We need to encourage Australians to be alive to the benefits of these processes when disputes first arise.

Ultimately, I want mediation and other ADR processes to be seen as indispensable and practical ways for Australians to resolve conflicts.”

From here there was a convergent theme, in the fizzing and buzzing, of this being a pivotal time in the history of mediation in Australia.



*Judge
Christopher
Stevenson,
Co-convenor
of the 2008
NMC,
opening the
conference*

Michelle Le Baron spoke of the move from the magic of mediation to a mature understanding - with the dangers of developing orthodoxies and reducing flexibility. She skillfully evoked in us all some awareness of our impulses to orthodoxy and challenged us to recognise what we do when we intervene: how do we amplify or mute an issue or concern? “Whose common sense and ways of seeing are being used when trust is damaged and approaches to mediation are contested?”

In her presentation Julie McFarlane gave us a glimpse of how the legal landscape is being transformed: “New lawyers’ who

are serious about offering conflict resolution advocacy rather than traditional adversarial litigation are developing and promoting a spectrum of consensus seeking processes ... that reflect a new recognition of the need to market themselves as conflict resolvers, not just as conflict warriors”.

Hilary Astor amusingly and movingly shared stories of the ‘elders’ of mediation who have taught her “the importance of repairing relationships, not just resolving disputes” and “if we are to communicate effectively across cultures, we need to know ourselves as well as knowing the ‘other’ with whom we negotiate”. Her own dreams for mediation into the future include that “mediators will have a lively and thriving dialogue across disciplines. They will draw on the best of their various disciplines to nourish the growth of excellence in mediation, theory, policy and practice.”



The buzzing conversations made clear that this pivotal point has space for different views. One question is about just how much space there might be in the concept of mediation?

Bill Eddy challenged us to think about those he identified as high conflict people. These people tend to:

- Be rigid and uncompromising
- Have difficulty in accepting and healing loss
- Have their emotions dominate their thinking
- Work against their own self interest

- Be unable to reflect on their own behaviour

How do we make space for such people in mediation?

Bill suggested four key strategies:

- Connecting with statements that emphasize empathy, attention and respect
- Analysing realistic options to reinforce focusing on problem solving more than overwhelming emotions
- Responding to the misinformation and unconscious distortions of information
- Setting limits on predictable self defeating behaviour during the mediation as well as in the client’s future relationships.

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Here are some other questions:

How do accreditation and a code of conduct fit together?

- Accreditation is part of the coming-of-age of mediation. Accreditation of mediators is part of the reality that mediation has now arrived in the mainstream. Is mandated accreditation the next step for mediation in Australia? As part of accreditation, do we as mediators need a code of ethics, and what sort of code of ethics?
- The experience of a mandated accreditation system and codes of

ethics is that the room for variety and trying new things becomes limited. As a result the wonderful flexibility of mediation may be lost and the practice of mediation may atrophy.

- As mediation proceeds through this stage of consolidating its place, there needs to be increased awareness of the predispositions to stagnation, paying attention to whether we as mediators – individually and together – are aware of our limitations, open to difference, flexible in practice, courageous in trying new ways and, in everything we do, congruent with principles of mediator impartiality and parties’ self-determination.

How aware are we of our own collusion with illusion?

- Mediators are always giving advice, even when we say we are not.
 - Some mediators practising within work places or Tribunals are very knowledgeable about the likely outcomes in the disputes coming before them as mediators, and find it difficult to accept what they see as an ‘unfair’ outcome for one party or the other. They may send that party off for legal advice. Is this a covert way of ‘giving advice’.
 - Mediators with knowledge, as we all become about some areas at some time or other, need to be aware of how we might be giving advice without using words.
- Mediations are full of lies and illusions. As mediators we supervise rooms full of lies and illusions, and many of them are in ourselves. John Wade in his very entertaining and instructive presentation explained “Psychological studies give many helpful insights into the process of

human decision-making, and how we are all prone to error. These tendencies to err are sometimes collected under the label of ... decision traps. Most of these decision traps profoundly influence negotiation decisions. In other words, all the parties to the decision making of negotiation, including a mediator are prone to delusion and self-deception. “How do we remain ethical mediators in these circumstances?”

“...the importance of repairing relationships, not just resolving disputes...”

Is ‘neutrality’ a helpful concept?

- What does ‘neutrality’ mean? Can anyone truly be ‘neutral’ or ‘impartial’? We need to be clear about the ways in which we are not capable of being neutral and impartial. We need to work out practical ways of dealing with that reality.

What is the impact of lawyers in mediation?

- There is a common model of ‘mediation’, particularly in some court-mandated mediations, that can be called the lawyer-in-charge model. In this model the clients only speak when the lawyers allow them to do so, and when they are operating this way lawyers are often very reluctant to allow their clients to speak.
- In the lawyer-in-charge model of mediation it sometimes even happens that only the lawyers are present in joint sessions and the clients are kept

in another room, to be consulted only by the mediator in private session

...it is incumbent upon us all to nurture a 'resolution culture...'

- What room is there in the lawyer-in-charge model for the fundamental mediation principle of the self-determination of parties? Is the lawyer-in-charge model of dispute resolution properly called mediation?

- Lawyers have a crucial role in mediation but we need to be clearer about what that role is. Rights talk is an important part of reality-checking, and there are lots of other kinds of discussions that need to occur.

The fizzing and buzzing continued throughout the conference. Effervescent discussions, unsettling notions, challenges to our practice of mediation, animated dialogue, friendships renewed, collegiate relationships sparked – perhaps these too are some of the keys to “Transforming the Landscape”.

Robin Tapper is Family Law ADR practitioner and active member of the LEADR WA Chapter Executive.