

Latest Developments in Mediation in Australia

Topics

- Merger of LEADR and IAMA
- The spread of mandatory mediation
- The evidentiary “black hole” problem
- The move to evaluative mediation
- Hybrids

2015 Merger of LEADR and IAMA

- LEADR - predominantly mediators
- IAMA – predominantly arbitrators
- Now together as Resolution Institute

Mandatory mediation

Federal and State courts are empowered to order mediation with or without consent.

Settlement rates are about the same as for voluntary mediation.

Mandatory mediation by statute

- Retail lease disputes
- Enforcement of farm mortgages
- Native Title claims
- Workplace injury claims
- Small business disputes
- Rent for Govt leases over aboriginal land
- Access to land for mining exploration

Disputes which may be required to be mediated

- Deceased estates
- Apprehended personal violence
- Complaints against veterinarians, architects, lawyers
- Thoroughbred racing broadcasting arrangements
- Health & safety workplace inspections
- Dust diseases claims

Disputes commonly mediated by Federal Court Registrars

- Corporations Law
- Intellectual Property
- Industrial Law
- Consumer Law
- Human Rights
- Admiralty
- Tax
- Costs

The evidentiary “black hole” problem.

- Different regimes govern admissibility of mediation communications depending on whether the mediation is voluntary or court-ordered.
- 2011 National ADR Advisory Committee (NADRAC) recommendation.
- 2013 NADRAC abolished.

The move towards evaluative mediation

- Training remains focussed on facilitative mediation
- Today we see increasing use, without lawyers, of
 - Transformative mediation
 - Narrative mediation
 - Victim/offender mediation (restorative justice)

Response of lawyers

Early days -

- Mediation is a passing fancy.

Later

- It may be OK at the door of the court.

Today -

- It's all about settlement (not resolution).

Response of courts

- Courts must be “Just, quick and cheap”.
- Mediation is quick and cheap.
- Courts order and encourage mediation as a means of docket control.
- Courts worry about “ripeness”.

The result

- Mediation is mainstream but becoming more evaluative when lawyers are involved
- But there is still hope...

Hybrids

Combining mediation and arbitration with the same neutral

- Advantages
- Concerns

Statutory provision for hybrids

- 1904 Conciliation and Arbitration Act, Cth
- 1984 Commercial Arbitration Act, NSW
- 2010 Commercial Arbitration Act, NSW
- 2015 Mining & Petroleum Legislation Amendment (Land Access Arbitration) Act, NSW

How to make hybrids work?

- Training.
- Triage.
- Timing.
- Avoid surprise.

Thank you.