



COMMUNICATE INNOVATE COLLABORATE FACILITATE NEGOTIATE MEDIATE EDUCATE

Manager, Small Business Ombudsman and Procurement Unit

Small Business, Competition and Consumer Policy Division

The Treasury

Langton Crescent

Parkes ACT, 2600

By email: small.business@treasury.gov.au

Dear Sir/Madam,

The Small Business and Family Enterprise Ombudsman Discussion Paper

I am a dispute resolution practitioner in private practice and a former member of the former NADRAC.

I appreciate the opportunity to provide comments in response to the Small Business and Family Enterprise Ombudsman Discussion Paper and hope that my comments are useful.

I have been arbitrating and mediating full time since 1999 and before that was a litigation lawyer in private practice. I have mediated in many small business programs including at the Retail Tenancy Unit and Small Business Commissioners Dispute Resolution Service, and under the Franchising Code of Conduct.

My CV is attached outlining more of my experience. I am happy to discuss any aspect of this submission with officers of the Department.

Chapter 2 - General comments

I support the Small Business and Family Enterprise Ombudsmen (“Ombudsmen”) having the function of a concierge for dispute resolution, provided the role involves skilled triage processes that assist small business owners finding the best dispute resolution process when they have a dispute. Small business owners are often unable to achieve access to justice as the cost and risk of court proceedings is beyond their resources.

I am not sure that there is a need for the Ombudsman’s role to include direct delivery of ADR services.

Negocio Resolutions

Steve Lancken 0418 272 449 mediator@negocio.com.au negocio.com.au

Sydney Office Suite 320/185 Elizabeth Street Sydney NSW 2000 **Phone 02 9036 0333**

Canberra Office Level 1 The Realm, 18 National Circuit Barton Canberra ACT 2600 **Phone 02 6198 3225**

Steve Lancken Conflict Management Pty Ltd - ABN 21 158 098 554 - trading as Negocio Resolutions

Care must be taken when creating any new dispute resolution service. There are many excellent services already available. It may be that existing services can deliver the DR processes without the need to create a new ADR service.

I therefore also support a review of existing dispute resolution services in the States and at the Commonwealth level to ensure that services are relevant, accessible, efficient and appropriate for the disputes that small businesses face. This may involve consideration of existing State based programs, such as the program that is administered by the NSW Small Business Commissioner, and programs administered under the Franchising Code, the Horticulture Code, the Oil Code and the Unit Pricing Code, as well as programs provided by Courts and Tribunals.

There are many successful models of dispute resolution programs in the above examples. A consistent approach to small business dispute resolution, even if specialist industry skills are sometimes applied will be of value to small business.

It is my view that the incentive for the creation of a dispute resolution program must be to support small businesses and stakeholders and not to save court time or costs. While there needs to be some incentive to the use such dispute resolution programs, and by definition, some disincentives to applications to the Courts, I do not support a dispute resolution program that would deny or prevent small businesses having easy access to Courts. In this regard I suggest that the Ombudsman have a power to place a short “stay” on a court application while the parties use the dispute resolution service.

Dispute resolution services are best provided by suitably qualified and *independent* dispute resolution practitioners, rather than government employed dispute resolution practitioners who are often seen as having a vested interest in settlement to “save costs”, or may not have practical experience in dispute resolution.

Dispute resolution practitioners to be engaged should be accredited under various accreditation schemes and have experience in dealing with small business disputes

If a concierge concept is adopted it is essential that those providing concierge (or triage) services must be well trained and resourced, not just in dispute resolution programs, but in negotiation and dispute resolution techniques. . In my experience, good early advice about dispute resolution options leads to early resolution in many cases, which results in lower costs to small businesses.

Education outreach and capacity building in small businesses is important to successful application of dispute resolution techniques. Small businesses need to be educated to understand that dispute resolution processes such as mediation are a chance to make decisions about whether or not litigation is appropriate for their dispute. Good concierge services are about assisting business owners make their own decisions, not making decisions for them.

It is also important for lawyers to supportive or dispute resolution services for small business, which will involve education and capacity building. Whilst lawyers should not be excluded from dispute resolution programs, it should be possible for small business to engage in dispute resolution without lawyers if they chose.

Where small businesses cannot afford legal assistance, appropriate financial assistance or pro bono legal advice should be available to ensure that the party is not disempowered by the dispute resolution service.

Dispute resolution programs need to add to the value of the services of the Courts rather than detract, and should be designed in a way that does not add unnecessarily to the cost of disputing so that the least advantaged are unable to afford litigation because of the extra costs of dispute resolution programs.

The dispute resolution role of any Ombudsman needs to be coordinated with the other role. Data and information collection about small business needs and values should be obtained so that the value of the concierge and dispute resolution service can be measured. The dispute resolution program needs to be carefully designed, implemented, and monitored to ensure value to small business.

Education outreach and capacity building in small business is important to successful application of DR techniques. Small business needs to be educated to understand that DR processes such as mediation are a chance to make good decisions about whether or not litigation is appropriate for their dispute or whether a settlement that does not involve litigation is better for them. Good concierge services are about assisting clients make their own decisions, not making those decisions for them.

Focus Questions

Question 1

What should the scope of the Ombudsman's own mediation service include? For example, small business disputes with Australian Government agencies or disputes under industry codes of conduct?

As outlined above, there are many existing small business dispute resolution services. Use and rationalisation of existing services is needed before decisions are made that another Dispute Resolution services is appropriate.

The range of disputes that can be dealt with by the Ombudsman should not be limited.

Disputes with Australian Government agencies must be part of the Ombudsman service and the Government must commit to using dispute resolution services rather than the Courts, unless there is a compelling reason for engaging in litigation. If the government does not

embrace DR processes how it can be expected that small business will perceive the real value.

Question 2

What powers should be conferred to the Ombudsman to resolve small business disputes?

The Ombudsman should not exercise an administrative function to determine disputes. This is a matter for the Courts and Tribunals that already exist. A more appropriate power may be to offer the evaluation of disputes that may be binding on some parties (for instance Government agencies) but not on small business.

Question 3

Which types of dispute resolution services should the Ombudsman provide and what should be the model for providing these services? For example, should these services be outsourced or provided in-house?

See above. I support independent dispute resolution services offered by specialist dispute resolution practitioners with the appropriate skills, training and experience.

Thank you for the opportunity to comment. If you have any questions please feel free to contact me

Yours sincerely,

Steve Lancken

CURRICULUM VITAE

Stephen Lancken

Mediator/Arbitrator/Conflict Management Consultant

BA LLB

**Masters of Peace & Conflict Studies (Sydney University)
Accredited Specialist Commercial Litigation and Mediation**

0418 272 449

steve@negocio.com.au

Secondary Education

Newington College Stanmore, Higher School Certificate 1975

Tertiary Education

University of New South Wales

BA LLB1981

Sydney University

MPACS (Masters Degree in Peace and Conflict Studies) 2011

Admitted as a Solicitor

9 July 1982

Accreditation

Specialist Accreditation: Commercial Litigation. **Law Society of NSW**

Accredited Mediator. **NMAS**

Registered mediator **ACT Mediation Act**

Mediator Pursuant to rule 1177 of the Court Procedures Rules 2006 (ACT)

Accredited Mediator LEADR, ACICA and Australian Commercial Disputes Centre

1 Career Summary

Since 1999 I have specialised in mediation and negotiation and have engaged in advanced study in Peace and Conflict Studies at Sydney University. I am a highly experienced facilitator of processes such as conferences, mediation and group decision making with a special interest in people who have been or are in conflict situations. My practice and teaching focusses on effective communication and decision making, alternative justice and dispute resolution methods. I teach, consult and practice in all areas of conflict management and systems design. Over the last 2 years I have been teaching a course called Conflict in Organisations to postgraduate students at Sydney University.

1982 to 1999

Lawyer then Partner Owen Hodge Lawyers

Specialising in injury and insurance for plaintiffs and then acted for corporate defendants in insurance and banking and finance litigation

Clients included insurers, banks and insolvency practitioners

Senior partner 1995 to 1999

Retired from partnership to pursue career in ADR

1994 to present

Costs Assessor Supreme Court of NSW

1998 to 2002

Board Member St George Community Housing Co-Op Limited

1998 to 2002, Chair 2002

1993 to 1998

Member Hurstville Board of Governors

1993 to 1998

1999 to present

Consultant Mediator and Arbitrator

2002 to 2012

Australian Principal, The Trillium Group

This organisation offers conflict consulting and skills training in mediation and other ADR processes. The company operates throughout the world

2002

Councillor Law Society of NSW

2002 to present

Arbitrator and Mediator Workers Compensation Commission

2003 to present

Adjunct lecturer Conflict Management, AGSM and University of NSW and
Program Director Executive Programs

2005 to 2008

Board Member Cumberland Housing Co-Operative Limited

2008 to 2013

Councillor National ADR Advisory Council

Appointed by the Attorney General of Australia

2011 to present

Lecturer, MPACS, Sydney University

ADR and Conflict in Organisations

2011 to present

Volunteer Indigenous Community Volunteers

2012

Managing Director Negocio Resolutions

2 Qualifications, Accreditations, Appointments, Associations

Qualifications

Bachelor of Laws and Bachelor of Arts *University of NSW 1981*

Master Peace and Conflict Studies *University of Sydney 2011*

Accredited Specialist: Mediation & Commercial Litigation *Law Society of NSW*

Accreditations

Arbitrator and Accredited Mediator *NMAS*

Accredited Mediator *ACDC/LEADR/Retail Tenancy Unit/
Workers Compensation Commission*

Accredited Farm Debt Mediator

Accredited Mediator *Hong Kong International Arbitration Centre*

Mediator *Law Society of New South Wales*

Appointments

Arbitrator *District Court of NSW & Local Court of NSW 1984 - 2005*

Mediator *Supreme Court, Land and Environment Court, District Court and Local Court (NSW)*

Costs Assessor *Supreme Court of NSW 1994 - present*

Arbitrator and Mediator Workers Compensation Commission of NSW

Mediator *Retail Tenancy Unit (NSW)*

Chair Settlement Week Steering Committee, *Law Society of NSW*

Adjunct Lecturer *Australian Graduate School of Management*

Conciliator *Health Care Complaints Commission NSW*

Chair Independent Property Impact Assessment Panel *Cross City Tunnel and Lane Cove Tunnel*

Member Experts Working Group Commercial Arbitration Act

Councillor *NADRAC 2008 -2013*

ACDC Panel of Mediators *2013*

ACICA Panel of Mediators *2013*

Associations Past & Present

Member *Law Society of NSW and St George and Sutherland Law Society*

Fellow *Australian Institute of Company Directors*

Associate Member *Institute of Arbitrators and Mediators Australia*

Associate Member *Chartered Institute of Arbitrators*

Member *LEADR (Lawyers Engaged in Alternative Dispute Resolution)*

Member Dispute Resolution Committee *Law Society of NSW 2000 to 2005*

Member Litigation Law and Practice Committee *Law Society of NSW*

Member *Corporate Lawyers Association*

Member *Australian and New Zealand Sports Law Association (ANZSLA)*

Member *Insolvency Practitioners Association of Australia*

Member Mediation Group *Hong Kong International Arbitration Centre*

3 Professional Education & Development

Specialist Accreditation Mediation and Commercial Litigation *1994*

Mediation Workshop *Harvard University Law School 1994*

Advanced Arbitration Course *Institute of Arbitrators Australia 1994*

Intensive Mediation Course *Australian Commercial Disputes Centre 1990*

ADR Workshops Levels 1 & 2 *The Trillium Group, Sydney 2000*

Australian Institute of Company Directors Course *1997*

4 Specific Experience & Practice Areas

- Mediation and arbitration of numerous disputes over work grievances, discrimination, wrongful dismissal and workplace abuse (in corporate, school, hospital, club & government agency environments).
- Mediated and investigated numerous disputes relating to workplace bullying and harassment in the private and public sector.

- Advising Government on dispute resolution systems.
- Conciliation of doctor/patient disputes for the Health Care Complaints Commission of NSW.
- Mediation of land issues between Native Title claimants, pastoral lease holders and a state government.
- Facilitated dialogue and community consultation for local and state government agencies (including dispute resolution with community and special interest groups).
- Conciliation and arbitration for a large number of Workers Compensation matters.
- Mediation and arbitration in numerous commercial, professional, partnership, lease and property disputes (including a multi-million dollar dispute in family businesses).
- Conduct of a wide variety of commercial litigation including such cases as *Amann Aviation v Commonwealth* to the High Court, lengthy and complex commercial litigation in all jurisdictions including District, Supreme and Federal Court.
- Appeared as an advocate in the Local, District and Supreme Court and the Court of Appeal.
- Conduct of litigation for such clients as St George Bank, GIO, Catholic Church Insurance and Primary Industry Bank of Australia.
- Conduct as a mediator and arbitrator of numerous matters for claimants and defendants in personal injury and insurance law (including multi-million dollar personal injury disputes, medical negligence, Lawcover, product liability and occupier's liability cases).
- Advocacy, mediation and arbitration in building, construction and general commercial matters (including a multi-million dollar building claim heard over 15 days and a major power station construction).
- Negotiation of Enterprise Bargaining Agreements.

- Sports Law (including Tribunal Chair, hearing an appeal against a failed Olympic Games selection; mediation of a dispute between a national sports body and a sponsorship partner; and mediation of a dispute concerning the trainer's fee for a thoroughbred racehorse).
- Chair of the Independent Property Impact Assessment Panel (IPIAP) for the CrossCity Tunnel and Lane Cove Tunnel Projects in Sydney.
- Mediation between a state owned resource corporation and a contractor alleged to have negligently caused \$6.5 million damage to corporation assets.
- Mediation of a dispute between a telecommunications supplier and a third party vendor
- Mediation of many debt and insolvency disputes, acting for a number of Sydney insolvency practitioners in a variety of case types (including significant bank debt recovery actions arising from rural and general commercial lending).
- Many mediations involving issues of property estates and retail leases (for example, a dispute over a will involving significant assets including real estate, bloodstock and a share portfolio).
- Panel Member in the Retail Lease mediation scheme.
- Construction disputes including \$50 million dispute relating to construction of a power station.

5 Teaching, Training and University Courses Conducted

Conflict in Organisations *Centre for Peace & Conflict Studies, Sydney University.*

Conflict Management (Master of Business Administration).

Australian Graduate School of Management.

Five-day Personal Injury Mediation Course *Hong Kong Law Society.*

Coaching and Assessing of Mediators *Construction Industry, Development Board of Malaysia; Hong Kong International Arbitration Centre (Mediation Group).*

Training and Assessing of Mediators *The Accord Group; Law Society of NSW; Institute of Mediators and Arbitrators; Global Mediation Services, The Trillium Group.*

Representing Clients in Mediation *College of Law; Coudert Bros Lawyers*
ADR, Advanced ADR, Applied Negotiation and Difficult Conversations
Workshops; *The Trillium Group (Toronto, Vancouver, Canada, Hong Kong, Sydney, Perth,
Brisbane, Canberra, Townsville & Melbourne).*

6 Publications & Seminars

Publications

AS 4608: Standard for the Prevention, Management and Resolution of
Disputes *Australasian Dispute Resolution Journal Dec 2001*

ADR for Insolvency Practitioners *The Insolvency Bulletin Dec 2000*

The Preliminary Conference: Option or Necessity? *Australasian Dispute Resolution
Journal Aug 2000*

The Benefits of Mandatory Mediation *Lawyers Weekly Aug 2001*

Compulsory Mediation in Asia *Asian Dispute Review Sept 2001*

Litigation: Is refusing to mediate worth the risk? *Law Society Journal Apr 2004*

Mediation: What cases will a court refer to mediation over the objection of
one of the parties? *Law Society Journal Sept 2002*

The responsibility of the neutral party in respect of mediation confidentiality
ADR Bulletin July 2004

Reasonable, Cheaper Way to Avoid Filing *The Australian Apr 2004*

Common Ground on Access to Justice Reforms *Law Society Journal Dec 2009*

Courts Require Clarity from Lawyers Engaged in ADR *Law Society Journal Sept 2009*

Lawyers as Conservationists *Law Society Journal Sept 2008*

Courts Apply Old Principles to New Situations *Law Society Journal Apr 2009*

Reflections on ‘tactics’ in negotiation and conflict management *ADR Bulletin Dec
2007*

Pre-litigation dispute resolution – What new requirements will mean in
practice *Law Society Journal Feb 2011*

Let’s be Reasonable *Lawyers Weekly Oct 2011*

Litigation – Court finds reasonable steps vacuum *Law Society Journal Dec 2011*

Good faith bargaining – how “good” is it really? *Law Society Journal 2012*

Make me an offer I can’t refuse *Lawyers Weekly Apr 2012*

Lawyers & Mediation: What’s the right direction for resolution? *Lawyers Weekly
Aug 2012*

Fair Work Act Negotiations - Failure to Bargain may jeopardise your interests
Law Society Journal Sept 2012
Mediation: Talking about a resolution *Lawyers Weekly Sept 2012*
Judging Mediation *Lawyers Weekly Dec 2012*

Seminars Conducted

Part 7B, Supreme Court Act 1970, Reference to Mediation *College of Law*
Innovative Dispute Resolution for Corporations *Australian Corporate Lawyers Association*
'Compulsory' Alternative Dispute Resolution Young Lawyers, *Law Society of NSW*
ADR and Medical Negligence *NSW Legal Conference*
Representing a Client in ADR *College of Law*
ADR Processes for Personal Injury Cases *College of Law*
ADR Processes in Commercial Litigation *College of Law*
Winning the War without the Battle *Sparke Helmore*
What You Should Know About Mediation *Master Builders Association of Malaysia*
Is Litigation the Answer? Law Society Specialist Accreditation Program
Personal Injury Revisited *College of Law*
Preparation and Management of a Civil Trial: ADR Issues *College of Law*
ADR for Medical Negligence Disputes *NSW Legal Conference*
Environmental ADR *Law Society of NSW*
Mediation Demonstration and Panel Discussion *Young Lawyers*
The Art of Settlement *College of Law*
Mediation Demonstration and Update *Lighthouse Club of Kuala Lumpur*
Improving Your Practice with ADR *NSW Legal Conference*
Court Ordered ADR: Does it Work? *Hong Kong Mediation Council*
Workers Compensation *State Legal Conference (NSW) 2001 to date*
Negotiation for Lawyers *State Legal Conference & College of Law 2005 to date*
Negotiation/Collaborative Problem Solving *Various Law Firms*
Finding the answers to effective mediation *Tonkins Workers Compensation Conference 2012*
Effective Contract Drafting and Negotiation *Marcus Evans 2008 to date*
In-House Counsel Day - 'Conflict Resolution within an organisation' *Legalwise 2013*
'Ethics in relation to negotiation and mediation' *Corrs 2013*
The unique role of the insurer in mediation, ADR and settlement conferences
NSW Claims 2013

Negotiation Business and “legal” outcomes, without giving in...Breaking down positions and creating value *State Legal 2013*

The Bullying Session *State Legal 2013*

A New Approach to Winning Negotiation Skills *College of Law 2013*

Negotiation Tips & Traps (Rule 42.1.6.3) Professional Skills *College of Law 2013*

Negotiating through Conflict *The Law Society 2013*

“Dealing with difficult parties at mediation” *CAS Conference 2013*

Solicitors as Executors *The Law Society 2013*

Negotiation Skills Seminar *Clinch Long Barrow 2013*

Innovation, Influence or Inhibition *Kongress LEADR 2013*