Conflict Management

A Practical Guide

5TH EDITION

Peter Condliffe

LexisNexis
Butterworths

Dedicated to women and men of strength and peace — Kathy, Emma, Zoe, John and Artie

Conflict Management
A Practical Guide
5th edition

Peter Condliffe
PhD

Barrister, Supreme Court of Victoria
Mediator and Facilitator

Nationally Accredited Mediator and Advanced Mediator at the
Victorian Bar and the Resolution Institute

Accredited Family Dispute Resolution Practitioner
Accredited Arbitrator

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Foreword

Whilst conflict management is as old as life itself, the academic study of conflict management is only a fairly recent phenomenon. One such example is taken from the Jewish Torah, involving dialogue (or negotiation) between Abraham and God regarding criteria for the destruction of Sodom and Gomorrah. Obviously, people realised the importance of resolving disputes long before State-organised litigation originated. Modern alternatives to litigation were heavily influenced by the United States National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, which took place in Minneapolis, Minnesota, 7–9 April 1976. At this conference, then United States Chief Justice Warren Burger encouraged the exploration and use of informal dispute resolution processes.

As Howard Raiffa (1982) points out, negotiation is both an art and a science. It uses aspects of law, psychology, economics and mathematics. For someone to fully understand the discipline, that person needs an excellent grounding in both practice and theory.

Dr Peter Condliffe has such skills. For example, he has worked in dangerous conditions, sorting out disputes and extrapolating from his experience for improvements in Cambodia's law and practice. He then worked as Chief Executive Officer of the Institute of Arbitrators and Mediators Australia (IAMA) — an independent, multidisciplinary body supplying and training skilled experts in alternative dispute resolution.

Peter is a very skilled mediator, with a great commitment to social justice. He was until recently the President (and founder) of the Victorian Association for Restorative Justice and is a highly-valued sessional lecturer on

Negotiation and Dispute Resolution and related subjects at many Victorian universities.

It was whilst he was at IAMA that I first met Peter. I had recently won an Australian Research Council grant to study the development of fair processes in alternative dispute resolution and online dispute resolution. I already had a postdoctoral fellow with expertise in information technology, but I desperately needed a PhD researcher with skills in dispute resolution.

Despite being in his mid-fifties, with wide experience as a barrister and mediator, Peter enthusiastically lived up to the challenge. In three short years he conducted superb empirical research comparing different forms of negotiation (arb-med, med-arb (same) and med-arb (different)) and found, amongst other things, that disputants were impacted by outcomes achieved in judging process fairness through mental shortcuts or heuristics.

This example illustrates that Dr Condliffe is a superb scholar, in addition to being a highly experienced and respected practitioner. He is thus the ideal person to write a book on conflict management.

All of you who read this book will be very fortunate to benefit from Dr Condliffe's many years of experience and wisdom. You are very fortunate to be able to learn from such a wise practitioner and researcher!

Professor John Zeleznikow

Laboratory for Decision Support and Dispute Management

Victoria University, Melbourne, Australia

7 August 2015

Foreword to the Second Edition

The Hon Justice Michael Kirby AC CMG

I worked closely with Peter Condliffe in one of the most interesting experiences of my life. We were engaged by the United Nations to help Cambodia restore the institutions of government and civil society that had effectively been destroyed by 20 years of revolution, invasion, genocide, war and foreign occupation.

My task, as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia, was to visit the country, report on progress and make recommendations consistent with United Nations Human Rights conventions. Peter Condliffe had a still more difficult task. He lived in the midst of the simmering conflicts of Khmer society. He worked on the front line, in dangerous conditions, sorting out disputes and extrapolating from his experience for improvements in Cambodia's law and practice. He gives an insight into those times in his description in this book of the difficulties of dealing with the Wretched Witch of Sisophon.

Much of my work with Peter Condliffe related to efforts to improve the conditions of prisoners in Cambodia. When so many other citizens were living on the edge of poverty, our efforts to uphold the human rights of prisoners were sometimes met with disbelief and resistance. This is where I saw Peter Condliffe at his best in the practical art of conflict management. He achieved much. It was not by techniques of demand and insistence. At the time, there were only two blue helmets of the United Nations Force left in Cambodia. Our sanctions were weak. We relied substantially on persuasion

and the provision of foreign aid by governments that supported our human rights endeavours.

This is not, therefore, a text written by a scholar who has simply examined all the literature, collected all the theories and repeated them with a few insights of his own. This book is written by someone who, in crucial years, had to turn theories of conflict management into practice. In my eyes, his success in those endeavours gives him a special credibility.

Between my missions to Cambodia, I performed duties as an Australian judge. Those duties continue to this day. In a sense, they represent the local application of a highly structured form of dispute resolution that is envisaged by the Australian Constitution and that we inherited from Britain. The British love games. Most of the sports that are played throughout the world were their invention. Global television networks show the way conflicting teams channel their contests into rituals played out on the sporting field. Political rituals take place between competing teams in Parliament and in the media. In courtrooms, the English never felt comfortable with the inquisitorial system of the Star Chamber. Instead, they refined the adversarial trial, as the public way of demonstrating how serious contests should be managed, and ultimately resolved, by an impartial decision maker.

Such judicial systems of conflict management work reasonably well if the combatants have plenty of money and can afford lawyers of roughly equal talents to represent them. Unfortunately, these Rolls Royce qualities are not possessed by the majority of citizens in Australia or anywhere else. Thus, in courts throughout Australia and other lands, increasing numbers of self-represented litigants attempt, as best they can, to put their cases forward. In the High Court of Australia, nearly a third of all applications for special leave to appeal are now argued by litigants without lawyers. This development appears to illustrate the limitations of the formal systems of dispute resolution and conflict management in our society. The frustrations inevitable in such circumstances often boil over into emotional outbursts, calumny against opponents and abuse towards the judge. By the time such

conflicts reach a nation's highest court, there is a huge investment of emotion and economics.

These considerations have led to calls for reform or elaboration of the formal system of dispute resolution in Australia and elsewhere. Some critics demand a root and branch overhaul. While this is unlikely to occur (and might, in any case, in Australia, require constitutional change, always difficult to procure), quiet efforts are proceeding to effect reforms in a more low key way. Those efforts necessitate a greater understanding of the nature and typical course of conflict, an analysis of its usual components and of the responses appropriate to particular disputes. Once one turns away from jousting, duelling and brute force, conflict is usually channelled by organised society into verbal contests. These can occur within a family, a society, a nation and the world. The importance of managing such conflicts successfully is obvious. Failure will all too frequently lead to a reversion to pent-up anger and infantile violence. In a nuclear world, this is perilous. But even at a more human level, it can often be dangerous and highly destructive.

Some of the best chapters of this book concern techniques of collaborative conflict management, negotiation and mediation. Lawyers have always required these skills. Ninety per cent of civil cases never get to a completed trial. They are settled between the parties. Court lists could not cope if it were otherwise. Courts and tribunals today send conflicts off for mediation. In trained hands, such procedures can be most beneficial. Whereas the formal institutions deliver an authoritative decision that must simply be accepted, mediation searches for the solution that the parties can tolerate and abide by. Whereas Australia's culture, in the past, preferred authoritative determinations, others always preferred the path of conciliation and mediation. In multicultural Australia we have, perhaps, to learn from other cultures in this regard. While our institutions have delivered a high measure of finality and certainty, they have sometimes done so at a price of brooding resentment, continuing frustration and endemic conflict.

This is not a book for lawyers only. Yet, as I read the text, I could see the

ways in which my own discipline constitutes a highly stylised system of conflict management. I am sure that this study, by a uniquely qualified author, will help many, as it did me, to understand better the theory and practice of conflict management. Resolution of conflict, if it can be attained, is highly desirable. But in today's world, management of conflict, as the author says, is a daily imperative.

Peter Condliffe is now the chief executive officer of the Institute of Arbitrators and Mediators Australia. This is an independent, multidisciplinary body supplying and training skilled experts in alternative dispute resolution. His book is aimed at a number of levels — to help people to learn about conflict, whether with family or friends, in a group, with colleagues or fellow workers or struggling with internal conflicts of their own. The lessons of the book are of universal importance. They are relevant to global conflicts and they are derived from the author's experience in conflict management over 25 years. I welcome this book as I respect its author for his practical achievements and techniques that he has now described and explained.

High Court of Australia

Canberra

1 October 2002

Preface: A Multidisciplinary Approach

If you read this book you will obtain a good overview of the key ideas and processes in alternative dispute resolution (ADR). Key practice areas such as negotiation, mediation and conferencing will be explained in detail. If an ADR practitioner, you will be able to add to your repertoire of knowledge and skills.

In the second edition of this book I compared the writing of a new edition to the experience of opening a time capsule. I am doing it again. In the preface to the second edition of 2002 I wrote:

> Much has happened since the first edition of this book. The world of alternative dispute resolution has undergone a dramatic transformation. Now there are many alternative sources of learning and knowledge, whereas in 1991 there were relatively few in this field. Some of these important changes are reflected in the content of this new edition. Some changes have come about because of my experience of conflict in a range of new settings and places as different as the killing fields of Cambodia, the busy-ness of Shanghai, the quietness of an Australian country hall, the strangeness of an old disused courtroom, and more. I have learnt about and tried to manage conflict sometimes in new and creative ways. I have tried to keep the book true to its original intent: to provide an easy read but useful guide to the conflict manager — in the end most of us end up needing some of these skills sooner or later. The book is intended for a wide audience.

Such sentiments still hold true. Much has happened and much has been experienced. The third edition was revised principally because I had returned to the Victorian Bar in 2003. The fourth edition further incorporated some of the knowledge and insights I had gained as a PhD student under the excellent supervision of Professor Zeleznikow, who has provided the Foreword to this edition. My thesis, completed in 2012, was titled ‘Conflict in the Compact

City: Preferences and the Search for Justice'. Many people say that one should write in an area one is passionate about. The focus of the thesis upon conflict and justice theory was certainly that for me. I studied the reactions of 252 participants in a simulated conflict, particularly focusing on their preferences and perceptions of fairness. Some of this work appears in this text in more depth.

Because of the inclusion of some of my recent research material there is probably more emphasis on theory in this edition. But the book remains essentially one for practitioners and students of ADR who need a practical guide they can refer to for ideas and inspiration in their work or study.

It is meant for a wide audience and is reflective of my disparate interests and multidisciplinary background. Many subjects and ideas are presented around various topics and are intended to allow the reader to reflect and hopefully be stimulated to explore further, but taking only that which is of interest or required. It is a book for the library shelf, not the bedside table. As Justice Michael Kirby in the Foreword to the second edition said:

> This is not a book for lawyers only. Yet, as I read the text, I could see the ways in which my own discipline constitutes a highly stylised system of conflict management. I am sure that this study, by a uniquely qualified author, will help many, as it did me, to understand better the theory and practice of conflict management. Resolution of conflict, if it can be attained, is highly desirable. But in today's world, management of conflict, as the author says, is a daily imperative.

Justice Kirby's Foreword is, in my view, so good an introduction that I have retained it in this edition.

The book has many layers built up over time, reflecting the passing parade that is ADR in Australia. As the Roman emperor and stoic Marcus Aurelius Antoninus said:

> Time is a sort of river of passing events, and strong is its current; no sooner is a thing brought to sight than it is swept by and another takes its place, and this too will be swept away.

So, with these things in mind, what are the changes reflected in the river that is this book?

The most significant change in ADR since the fourth edition has been the application and broad acceptance of a national scheme of accreditation for mediators. Some further comment on this subject is necessary. You will find this in Chapter 4, 'The Rise of ADR'.

You will also notice that the book keeps getting bigger. It has expanded to well over 350 pages. This perhaps reflects the fact that much that has gone before is still worth retaining. In some ways this book is a retuning of that which has gone before — like putting the old car in for a service. It still goes well but just needs a little bit of maintenance. However, there are some significant changes. The most important are:

- the addition of significant new sections on affect and conflict, gender issues, collaborative practice, persuasion and cognitive heuristics; and
- over 60 pages of new text, and 37 new exercises with approximately 120 new references.

As well, the material on negotiation and mediation has been tinkered with and updated. Because the material in these chapters continues to be the basis for a number of professional and academic courses in this country it would seem silly to alter them too much.

If you would like to comment on any section of the book, I can be contacted by email at pc@vicbar.com.au.

Peter Condliffe PhD

Melbourne

November 2015

Acknowledgments

Thanks are due to many people for their kind help in the writing of this book. Special thanks to an early mentor, sadly no longer with us, Professor Herb Bisno, for his time and generosity in allowing me to peruse the manuscript for his own book when I was preparing the first edition. His influence persists through to this fifth edition. Thanks to those many people who have read the book and offered suggestions about how to improve it. Professor John Zeleznikow of Victoria University in Melbourne continues to inspire me with his ideas and innovative approaches to conflict management and has written the Foreword to this edition.

Thanks to the many people who have contributed to this fifth edition, including the busy people at LexisNexis Butterworths who gave me the opportunity yet again. Special thanks to Commissioning Editor Jennifer Burrows, who has been terrific to work with. The brilliant and attentive text editor Georgia O'Neill has made many fine suggestions, picked up mistakes and improved the book considerably.

To the barristers on the ADR Committee of the Victorian Bar over the last few years, headed by Michael Keaton QC, and Tony Nolan QC, who provided me with so much support in developing a specialist accredited mediation course for those working in legal systems, many thanks. It has inspired me to continue to develop my ideas in different areas and different ways. My co-teachers in that course, Dr Elizabeth Brophy and Anthony Neal QC, have been a great support over a number of years and helped me in many little ways. Some of the results of this work are reflected in this edition.

Also, thanks again to my beautiful partner, Kathy Sue, and daughters Zoe

and Emma, who give me hope and keep me grounded; the many students over the years who keep teaching me so many things; and, again, to a man I worked with in Cambodia and a great Australian, the Honourable Justice Michael Kirby, who provided inspiration in so many different ways and contributed the Foreword to the second edition of this book.

Thanks are also due to the following for their kind permission to reproduce material contained in this book since their inclusion in the first edition: Addison-Wesley Publishing Company Inc for permission to adapt the graphs on pp 20 and 462, taken from L D Brown, *Managing Conflict at Organisational Interface*, 1983; Sage Publications Inc for the flowchart on p 225 taken from H Bisno, *Managing Conflict*, 1988, and for the figures on pp 37–9 and 354–5 from G Morgan, *Images of Organisation*, 2006; and the Victorian TAFE Board for the table 'Key competencies: Rank ordering of knowledge, skills and values' on pp 312–13, contained in its *Curriculum Document: Course in Conflict Resolution*.

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Chapter 1

Understanding Conflict

Summary

This chapter examines the nature and process of conflict. Conflict is defined as a perceived threat to our collective or individual goals, which are associated with our intrapersonal and interpersonal wants. Conflict can be ‘false’, ‘latent’ or ‘actual’ and its sources range from the biosocial to the structural and ideological. Conflict has three important components: interests, emotions and values. In this chapter, social change and conflict are also examined.

The process of conflict characteristically goes through stages of perception, realisation, avoidance, flashpoint, intervention, strategy and evaluation. Entrapment and conflict are examined in this chapter, and Rummel’s model illustrates the way in which social conflict continually transforms itself through a dynamic process from latent to manifest conflict.

Conflict is a necessary process that has both positive and negative aspects but is omnipresent in our society. The ways in which a society expresses and represses conflict plays a significant role in the type of society that evolves from these processes.

Introduction: The Aims of this Book

1.1 Over one-third of Australians are likely to experience a significant conflict within the next year. Most of these disputes will be resolved without assistance; however, help from a third party will most likely be sought in around 15 per cent of cases (Peacock, Bondjakov and Okerstrom, 2007). Conflict is not only inevitable for most of us; it also has some important functions, including providing the energy for much social and individual change. Generating ideas and developing skills for the constructive confrontation and management of conflict are the central tenets of the philosophy of this book.

The aims of this book are essentially fourfold. They are:

- to provide an outline of a number of essential conflict management approaches and an associated range of strategies, tactics and techniques;
- to provide an interesting and useful array of exercises and questions for the use of teachers, group leaders, students and participants in group situations and as tools for reflection by the individual reader;
- to provide a positive perspective on the nature of conflict as a powerful and potentially productive dimension of both our working and personal lives; and
- to enhance our understanding of conflict and conflict management.

It is intended that this book will be used as a resource for a wide range of people both in their working and personal lives. Hopefully, it will be a book for those who want to learn about conflict for themselves, whether in a group, with friends, with colleagues or workmates, or alone.

We often think of conflict as being a negative or destructive force in our lives. While this is sometimes the case, and we hear of and can see numerous examples where this is so, a constant theme of this book will be to demonstrate the positive aspects of conflict. If, for some readers, this sounds overly optimistic, then perhaps the book can be seen, at least, as an attempt to maximise the possible positive aspects or outcomes.

Why conflict management?

1.2 I have preferred to use the term 'conflict management' throughout the book, rather than 'conflict resolution', for the simple reason that many conflicts cannot be resolved, but most conflicts can be managed. Further, in many situations the generation or escalation of conflict is both an honourable and worthwhile objective if managed properly. Therefore, while the aim of much conflict management is the resolution of that conflict, it is more realistic and logical to accept that this will not always be achievable, or even desirable, in some circumstances. In other words, the term 'conflict management' is inclusive and avoids the limitation of assuming that to be successful conflict must be resolved.

A definition of conflict

1.3 Some years ago I was writing a chapter on conflict management in a book called *Communication That Works* (Valence and McWilliam, 1987), designed for undergraduate students, in which I defined conflict as (p 78):

> … a form of relating or interacting where we find ourselves (either as individuals or groups) under some sort of *perceived threat* to our personal or collective goals. These goals are usually to do with our *interpersonal wants*. These perceived threats may be either real or imagined.

This was a helpful definition that I often used in workshops and classes. In particular, it contained three elements that were helpful in explaining the nature of conflict. First, conflict is seen as involving a *perceived* threat. 'Perceived' is an important word here, as the basis of the conflict may be 'false' or indirect in the sense that there is no 'real' clash of interests or goals between the parties, but the parties nevertheless perceive, and therefore experience, conflict. It also raises the possibility that conflict is as much about people's perception about what is happening as about what is actually happening. In fact, the two may be interchangeable; that is, the perception creates the reality of the conflict. (Examples of this phenomenon are outlined below.) Second, conflict is experienced at the *interpersonal* level, which concerns our interactions with other people. Third, the dimension of conflict relating to our interpersonal wants is helpful in linking conflict to the idea of personal and social aspirations. All of these elements are useful starting points for the exploration of the nature of conflict.

However, this definition left out a fundamental area of conflict: the intrapersonal. This refers to the thoughts and feelings that people experience within themselves in certain situations, which often create inner conflict. This inner conflict often occurs simultaneously in relation to an interpersonal conflict. For example, when a friend confronts us about something important we may experience mixed feelings towards him or her such as affection mingled with feelings of anger and frustration. Intrapersonal conflicts are further explained in the conflict model developed by Dollard and Miller outlined at **1.9**. Because the interpersonal and intrapersonal aspects of conflict are interconnected it is important to understand the intrapersonal aspects of conflict as well as the interpersonal dimensions. These are both dealt with further in **Chapter 3**.

1.4 Lederach (1995, pp 8–10) brings these elements of perception — the interpersonal and the intrapersonal — neatly together in what he calls 'a social constructivist view of conflict' (p 8). He lists seven underlying

assumptions about conflict, which he intimately links with 'culture'. These are summarised as follows (p 10):

- Social conflict is a natural common experience.
- Conflicts do not 'just happen'; people are active participants in creating situations and interactions they perceive as conflict.
- Conflict emerges through an interactive process based on a search for, and the creation of, shared meaning.
- The interactive process is accomplished through, and rooted in, perceptions, interpretations, expressions and intentions which both grow from and go back to common sense knowledge.
- Meaning occurs as people locate themselves and social 'things' in their accumulated knowledge through a process of comparison.
- Culture is rooted in shared knowledge and schemes created by a set of people for perceiving, interpreting, expressing and responding to social realities around them.

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- Therefore, understanding the connection of social conflict and culture is not merely a question of sensitivity or awareness but of 'digging in the archaeology of accumulated shared knowledge common to a set of people'.

Mayer (2000, p 406) similarly, and in a more simple way, defines conflict as involving cognitive (perception), emotional (feelings) and behavioural (action) dimensions.

I will refer to John Paul Lederach, Professor of International Peacebuilding at the University of Notre Dame and a leader in the field of conflict management, further in this chapter. As we go on to look at various

conceptualisations of conflict it may be useful to examine your own assumptions about conflict.

Conflict and dispute

1.5 The terms 'conflict' and 'dispute' are often confused, or used interchangeably. Conflict can be viewed as a *process* of disagreement and grievance, whereas a dispute is an *outcome* of this process. Conflict is, in this view, a broader term than dispute (Boulle, 2005, p 83). For example, company X receives a complaint from a customer about the quality of services and products she has received. Here, the company is in conflict with its customer. If the issue with the customer results from problems arising, for example, between what salespeople have told the customer and what the service department can actually deliver, then there may also be an internal organisational conflict. In this way, conflict can be seen to be both potential and manifest. If the customer, in this hypothetical example, takes legal action and the company defends itself, then a dispute occurs. This is because one party is resisting what the other is seeking. If the service department makes a formal complaint against the salespeople and they in turn respond with a counterview, then this would also be a dispute. However, conflict can manifest itself in other ways than through disputes; for example, excessive competition, sabotage, inefficiency in the workplace and withholding information.

1.6 John Burton (1996), an Australian with an international reputation who pioneered research into conflict analysis with a particular emphasis on international conflict, also made a distinction between conflict and dispute. He made the distinction between those situations in which there could be compliance and those where accommodation is not possible. He states (p 21):

> For this reason a sharp distinction is made between disputes and conflicts. Conflicts are struggles between opposing forces, struggles with institutions, that involve inherent human needs in respect of which there can be limited or no compliance, there being no unlimited malleability to make this possible.

For Burton, the distinction is based on not only the ability to move to an accommodation or settlement but on the entrenched nature of the issues. This is because he identifies some conflicts where 'inherent human needs' are so ingrained there is little room to negotiate. When we look around the world and consider the many conflicts that seem beyond resolution, the strength of this argument is evident. We could, however, apply the same analysis to any long-term relationship whether in a family or a workplace. In such contexts, there are usually a number of areas of disagreement or conflict that are difficult to reconcile or resolve. These are often related to deep-seated value positions. In a successful relationship, these areas of conflict are

managed but not necessarily resolved; that is all that is often possible or expected. In other words, these deeply entrenched or 'inherent human needs' are present in many disputes. They can be managed in various ways but not reconciled. Burton's analysis sees 'resolution' as the aim, whereas in my view 'management' is the aim, as previously mentioned. Therefore, I prefer the distinction between the terms 'conflict' and 'dispute' to be based on the process or response rather than the possibility of resolution.

1.7 Another interesting example of the attempt to distinguish between conflict and dispute is David Moore's use of the terms in the context of restorative justice conferencing (2004; see **Chapter 8**). Moore sees conflict as necessarily involving strong negative feelings. In contrast, he defines a dispute as a situation where two or more people differ about a set of facts around which the dispute occurs. A dispute, in his view, may not involve conflict, but it may cause it. Likewise, conflict can occur in the absence of a dispute. In Moore's view, conflict can occur within one person or group as well as between persons or groups. In his analysis, Moore attempted to distinguish between the type of interventions needed when conflict (that is, negative

feelings) was involved as distinct from disputes between people or groups about factual differences. Disputes about the interpretation of factual circumstances are sometimes called 'cognitive disputes' (Husted and Folger, 2004). Moore makes an important point about the need to develop processes suitable for the type of issue that is being managed. This is a point that is made by many theorists in conflict theory and particularly in the development of models of conflict management often referred to as 'conflict systems design' (Ury, Fisher and Goldberg, 1988). Conflict systems design is examined at some length in **Chapter 9**.

Models of Conflict

1.8 Models provide us with useful shorthand ways in which to think about what conflict is and how it occurs. They cannot offer complete explanations, but they can give us the basis for some useful analysis and therefore better responses to conflict. As Bartoli, Nowak and Bui-Wrzosinska (2011, p 3) state:

> Mental models are different from concepts in that their central function is the prediction of properties rather than their description. They are also different from schemata. While schemata represent a class of objects, mental models represent concrete situations, processes, or phenomena. Although mental models may be represented in the form of images (e.g. mental models of electricity as a running crowd or flowing water …), they are fundamentally different from static illustrations by being dynamic. They can be manipulated and, thus, they represent the mental machinery that is able to predict both the likely course of action and the effects of various types of intervention.

The authors suggest that models of dispute resolution in fact affect the way people behave and make decisions in conflict situations. With respect to conflict, this suggests that the mental models of conflict adopted by experts and some mediators or negotiators, especially those directly involved in conflict intervention, will have the greatest impact on the course of action to be adopted (p 5). The danger here is that such models, when applied by 'experts' will become the dominant paradigm and entrap participants in their

particular mind-set of how a conflict should be managed. With this caveat in mind, let us proceed to consider some models which may be useful.

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The Dollard/Miller model

1.9 The Dollard/Miller model conceptualises three types of conflict: approach/approach, approach/avoidance and avoidance/avoidance. Each of these can create difficult intrapersonal conflicts and are briefly described below (adapted from Folberg and Taylor, 1986, p 20).

Approach/Approach	A conflict in which both options for resolving a situation are equally attractive but mutually exclusive — that is, only one option can be had despite our wanting both; for example, one party in an access dispute must decide between taking his or her children every second weekend or every school holiday.
Approach/Approach	A conflict in which both options for resolving a situation are equally attractive but mutually exclusive — that is, only one option can be had despite our wanting both; for example, one party in an access dispute must decide between taking his or her children every second weekend or every school holiday.
Avoidance/Avoidance	A type of conflict where all the available outcomes are disliked yet we have to choose one of them; for example, an employee is told he or she must accept either a pay cut or have a fringe benefit

	removed.

Rummel's structural model

1.10 Another way to look at conflict is that developed by Rummel (1976), who differentiates between conflict structure, conflict situations and manifest conflict. This can be represented as follows.

Conflict structure	Interests that have a tendency to oppose each other; for example, in a buying/selling situation, the failure of the seller to deliver goods to the buyer.
Conflict situation	Opposing interests, attitudes or powers are activated; for example, a threat by a buyer to withhold payment or start legal action.
Manifest conflict	Specific behavioural actions; for example, demands, aggression, or refusal to pay by the buyer, and legal action.

In this model, conflict is seen as either latent, that is, with an underlying potential for conflict, or actual. An existing potential for conflict or 'conflict structure' is followed by a demonstration of power by one or more of the parties, igniting a 'conflict situation'.

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The Deutsch model

1.11 Deutsch's (1973) model is similar to Rummel's conceptualisation in its division of conflict into underlying and overt or manifest conflict. The former is hidden, denied or implicit, while the latter is expressed and open.

Sometimes in conflict situations the manifest conflict represents a 'safe expression' of that which is hidden. For example, when a couple is in conflict because the wife wants to take a full-time job but the husband prefers her to stay home and look after the children, the manifest conflict may symbolise the potentially more explosive issue of dependence and power in the relationship. This model is therefore useful because it can help us to think more clearly about distinguishing between underlying issues and overt disputing behaviours. In a conflict situation it may be important to distinguish between these two elements; unless the former is addressed, any outcomes will probably not be effective, especially in the longer term.

Deutsch treats conflicting interests (that is, the motivations of parties) and incompatible behaviour as separate dimensions of conflict. Incompatible behaviour refers to actions by one party to a conflict that are intended to counter or frustrate the other party. When these two dimensions are compared we can see four possible positions as follows.

Incompatible behaviour	**Position 1: Conflict**	**Position 3: False conflict**
Compatible behaviour	**Position 2: Latent conflict**	**Position 4: Non conflict**
	Conflicting interests	Common interests

Position 1: Conflict	Occurs when both incompatible behaviour and conflicting interests are present.
Position 2: Latent conflict	Occurs when there is compatible behaviour but conflicting interests.
Position 3: False conflict	Occurs when there is incompatible behaviour but common interests.
Position 4: Non-conflict	Occurs when there are both compatible behaviour and common interests.

Any situation involving human interaction can bring together people who share common and incompatible interests and compatible or incompatible behaviours. It is usual that

the parties to any conflict will share a number of these. For example, if a person working for a committee or board wants to persuade its members to change organisational policy and this situation results in a certain amount of conflict, it is likely that this person will have different interests from the various people involved. For instance:

Position 1: Conflict	With the chairperson of the committee, several committee and fellow staff members who actively oppose the change because they have defined their interests differently.

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Position 2: Latent conflict	With several committee members and fellow staff members who are unsure about the proposed change and want to find out more about the change, or are unaware of the change.
Position 3: False conflict	Where potential beneficiaries of the change in policy actively oppose the change because they want to maintain the status quo through fear of change, or because they misperceive their interests.
Position 4: Non-conflict	The employee forms alliances with several committee members and staff members on this issue to pursue the change.

This model is useful when thinking about the various positions that people take as a part of a 'conflict context'. This model is historically interesting because it predates and anticipates aspects of the well-known 'Harvard Model', which is explored in **Chapter 6**. One way to examine these various positions, their underlying interests, and find some of the underlying issues, outlined earlier, is to look at the sources or origins of the conflict.

Types of false or indirect conflict

The following types of conflict often result in the emergence of bitter and emotional disputes.

Wrong parties	One party accuses the wrong party.
Wrong assumption as to cause	A person in a line or hierarchy of authority is blamed for something that was caused by another member in the chain of authority.
Stereotypes and ideological bias	Members of ethnic or minority groups are accused of being, for example, lazy or incompetent when in fact these types of problems may be structural and/or based on cultural bias.
Misperceptions and misunderstandings	Two people experience a communication breakdow n and assume disagreement, whereas in fact they may be in agreement.
False rumours	Instead of risking a conflict with a powerful authority figure, we blame somebody less powerful.
Induced conflict	A person stirs up a conflict to gain support from his or her supporters; politicians often do this.
Expressive conflict	One person expresses his or her hostility for cathartic or psychological reasons, by attacking another over a 'convenient' issue — sometimes referred to as 'letting off steam'.

Sources of conflict

1.12 There are almost as many sources of conflict as there are human

interactions. Bisno (1988) usefully lists five overlapping sources of conflict, which are summarised below.

Finding the source of conflict will assist you in planning and implementing the appropriate action or response. However, be careful — a list of causal factors such as Bisno's does not necessarily help explain a particular conflict, just as the models briefly described above do not give the complete picture. Conflicts are often too complex for such simplifications. Most conflicts have multiple causes (Moore, 2003, pp 61–6). Nevertheless, understanding the sources of conflict can help us begin to put the jigsaw that is conflict, together.

Sources of conflict	
1. **Biosocial sources**	Many theorists place frustration-aggression as the source of conflict. According to this approach, frustration often results in aggression that leads to conflict. Frustration also results from the tendency for expectations to increase more rapidly than improvement in circumstances. This is known as 'relative deprivation', and is the reason conflict is often intensified when concessions are made. This tendency can be observed in world conflicts.
2. **Personality and interactional sources**	These include: abrasive personalities; psychological disturbances; lack of, or poor, interpersonal skills; irritation between people; rivalry; differences in interactional styles; inequities (inequalities) in relationships.
3. **Structural sources**	Many conflicts are embedded in the structures of organisations and societies. Power, status and class inequities are the underlying forces in many forms of

	conflict. The civil rights, feminist and Aboriginal movements spring from structural sources of conflict.
4. **Cultural and ideological sources**	Intense conflicts often result from differences in political, social, religious and cultural beliefs. Conflict also arises between people with differing value systems.
5. **Convergence**	In many settings these various sources of conflict converge. In other words, they interact to produce a complex dispute. There may be many reasons, for example, why two workers within an agency are in conflict. There may be structural reasons such as differences in power; or different personalities and interactional styles; or the beliefs, cultural and ideological, may differ between the two workers and these may also be contributing to the complexity of the dispute.

(Bisno, 1988, pp 27–30)

Three vital ‘intangible’ components of conflict

1.13 To understand conflicts, and therefore manage them better, there are three vital components to engage: interests, emotions and values. These are the ‘intangibles’ of conflict; the things that are often hidden or hard to get at and understand. They are in contrast to the ‘tangibles’, which include the things people say they want (their positions) and their behaviour.

Interests are those things that ‘motivate people; they are the silent movers

behind the hubbub of positions' (Fisher and Ury, 1981, p 42). Interests are both subjective and objective. They are not only about our particular individual desires, but also about our roles and status; for example, managers are said to have different interests from workers. Marxist sociology is premised on these objective differences and the ensuing conflict. They may be substantive, psychological or procedural. Another way to think about interests is as the reasons why we want something relating to the conflict. Interests are different from 'positions'; positions are *what* you want, whereas interests are *why* you want them. Refer to **Exercise 4** at the end of this chapter for further exploration of interests and 'false consciousness'.

The emotional component of conflict is the feelings that accompany most human interactions. It includes feelings such as anger, resentment, fear, rejection, anxiety and loss. It is my view that if the emotional component of the conflict is causing distress or pronounced distraction, it should be dealt with first, followed by management of the values and interests components. This is dealt with further in **Chapter 3**.

The values component of conflict can be the most difficult to engage, because values are often part of an individual's or group's identity and sense of self worth. Values represent deeply rooted ideas and feelings about right and wrong, or correctness, which govern and maintain our behaviour. They are often embedded in longstanding cultural traditions, views and stereotypes.

These components are present in every conflict, but their individual importance can vary enormously. For example, in family disputes, emotion is often the predominant component. In debates on in vitro fertilisation, genetic manipulation and immigration programs, values are usually important. Interests are often hidden behind positions and will often need to be explored to ensure that the conflict is managed constructively. It can be useful to distinguish between, and actively manage, these various components in conflict situations. See **Exercise 5** at the end of this chapter to explore this idea further.

The robber's cave experiment

Muzafer Sherif and his colleagues from the University of Oklahoma conducted a classic experiment in 1954, which has been replicated many times. It demonstrates the ways in which conflict can be generated and manipulated. It also illustrates some of the differences between 'false conflicts', as previously mentioned, and 'real conflict' where there are actual opposed interests and values. The experiment involved two groups of boys in their early teens who were taken on a two-week experimental camp. The experiment progressed in three stages as follows:

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Stage 1: Development of togetherness and cohesiveness

Each group (which had arrived separately) was taken through a series of cooperative activities, for example, cooking, camping out.

Stage 2: Production of conflict

The groups were put into competitive situations with each other, for example, competitive games, such as baseball and tug-of-war, with prizes for the winner. Hostility, physical violence and threats increased. The groups even raided each other's cabins.

Stage 3: Reduction of conflict

Strategies for easing the conflict: Social events such as movie outings and joint dining did not work but in fact exacerbated conflict. What was much more effective was the introduction of superordinate goals (those that could not be achieved without the cooperative effort of both groups). These included fixing the common water supply to the camp, which had broken down, and pulling the broken-down camp truck back into the camp. These activities led to a gradual reduction in conflict and the groups started to have friendly interactions. Both groups even requested to travel home together in the same bus.

The situations in each stage were fabricated by the researchers.

(See Sherif et al, 1961)

Social change and conflict

1.14 Another aspect of conflict that we should not neglect is its relationship with society, and social change in particular. The American philosopher John Dewey (1930, p 30) once said:

> Conflict is the gadfly of thought. It stirs us to observation and memory. It instigates us to

invention. It shocks us out of sheep like passivity. Conflict is the sine qua non of reflection and ingenuity.

Conflict stimulates not only economic and scientific change but also the overthrow of old norms and institutions. It may therefore be better in many instances to stimulate conflict rather than suppress it or smooth it over. We live in a pluralistic and conflictual society that is constantly being transformed by science and technology. In fact, it may be argued that the success of science and the change that it brings about is interdependent with the existence of such a society; that is, scientific progress and change depend on a social context that enables the expression of differing views and that can accommodate the resultant conflict. In turn, this conflict spurs further scientific and social change.

Conflict can be seen to cause change either within the social system or of the whole system. The degree of conflict required to create major structural change in society is not known and therefore unpredictable. History can be seen as a process of constant change through conflict between competing interest groups, some of which have a vested interest in maintaining the system as it is and others that desire change. Change in turn leads to further conflict. As in Rummel's (1976) model, outlined above, there is a continuing spiral of conflict that both shapes and is shaped by the social context in which it occurs. Eventually, this leads to fundamental structural change. For example, if we compare the society that existed in mid-18th century Europe before the onslaught

of the industrial revolution with that which existed a century later, the magnitude and speed of such change can be readily appreciated.

The rigidity or flexibility of the social system in accommodating this change and conflict are also related to the type of conflict and further change

that will occur. Rigid, unbending systems may often experience violent and sudden uncontrollable change, whereas those systems that adapt to and encourage a plurality of views or interests will more likely experience gradual change. Further, it is the struggle for change through conflict that raises the consciousness of various societal groups to their predicament (Coser, 1974, p 458).

Culture and conflict

1.15 I have already referred to Lederach's work and the importance of culture in understanding and giving meaning to conflict (see also LeBaron and Pillay, 2006). However, many early, and some contemporary, advocates of alternative dispute resolution (ADR) tend to define the object of inquiry (that is, the dispute) separately from the issues related to the society in which it occurs. Theory and practice are thus derived from the nature of the dispute itself rather than from the interactive social processes that transform them (Condliffe, 1997; Abel, 1973; Sarat, 1988). These advocates follow what I term the 'dispute-focused approach'.

This approach leads to the problematic assumption that there is compatibility between disputes in different societies. However, there is strong empirical evidence to suggest that third party interventions, such as mediation, significantly differ from one social group to another and from one problem to another (Roberts, 1979). Early advocates of ADR processes often sought to present a simplified view of the alternatives in dispute management so as to rationalise their application and use. Fortunately, the advocates of these simplified views have not been without their critics (Sarat, 1988; Merry, 1987; Ingleby, 1991; Tomasic, 1982).

1.16 There are also a number of ADR advocates who promote what can be called the 'new ADR formalism'. They assume that there is a definite range of processes that exist in any society for settling disputes and that there is a fit between disputes and those processes that most effectively deal with them

(Sarat, 1988). This approach, as exemplified in the writings of Fuller (1978), Danzig (1974) and Goldberg, Green and Sander (1985), does not adequately put dispute processing in its socio-cultural and political contexts. I would rather see disputes as 'social constructs' whose meanings change with an audience that is constantly and actively redefining them.

Fortunately, there are a number of other models of disputing that may be more useful; for example, models that treat disputes not as discrete, isolated events but as representative of a continuous and cyclical movement. These include Rummel's and Deutsch's models of conflict briefly described above. The advantage of conceptualising conflict in this way is that it can be seen as being shaped by the social context in which it occurs.

While these conceptualisations have their limitations, they are a useful way to perceive conflict — as the constant playing out of structurally opposed forces. It may also be implied from these models that in some situations the participants may desire conflict. This is most clearly seen in industrial and environmental disputes. These cycles or 'rituals' of disputing may also be interpreted as important socio psychological

aspects of the process of conflict. This view of conflict draws heavily upon Lewis Coser's (1956) seminal concept of conflict as an instrument of social integration. To Coser, conflict is a group binding and preserving institution that maintains and establishes legitimate distributions of power.

1.17 Perhaps of more use is Richard Abel's (1973) attempt to point out and explain the presence of a constantly evolving and dynamic relationship between social institutions and culture on the one hand, and dispute processes and institutions on the other. Abel's work anticipates and parallels the research and writings of the anthropological and socio-legal 'schools' of

contemporary legal scholarship. (See, for example, Moore, 1978; Sarat, 1988; Nader and Todd, 1978; and Pederson, 2009.)

Abel (1973, p 244) provides a basis for comparison of different dispute processes in different societies. In particular, he attempts to isolate those elements that may explain why certain dispute processes are used in different societies. He concludes that certain structural properties of the dispute are highly significant. The most important of these is the role of the intervener in the dispute. This role revolves around three important aspects:

- *specialisation:* the degree to which the intervener's role requires special knowledge and skills;
- *differentiation:* how the intervener is kept apart, or assumes separation, from disputants; and
- *bureaucratisation:* the tendency to rationalise the role of the intervener to the needs of the organisation.

Further, according to Abel any given dispute institution represents only one possible way of handling a given dispute. This is understood if it is recognised that in any particular society there will be a range of disputing institutions to deal with any particular dispute. These can range from highly specialised, differentiated and bureaucratised institutions to those which are minimally so. Disputant choice will affect both the shape and existence of such institutions. This is related to the type of social relations within that society that will generate certain types of disputes and lead to certain preferred solutions. Therefore, to explain why certain dispute institutions occur in any society requires an understanding of broader social forces. In summary, we have to look at both social structures and disputant choice to understand the systemic preferences a society or group may have.

There is a constantly evolving and dynamic relationship between social institutions on the one hand and dispute processes and institutions on the other. Similarly, the well-known social scientist John Burton argued that

social conflict was centred within social structures and institutions, rather than just the individuals involved (Burton, 1990). More recently, LeBaron and Pillay have argued that we need to understand the connections between the 'material level' of a conflict (that is, the substance of the conflict itself) alongside the assumptions, world views and values of the people involved (the symbolic meaning and the way it is played out between people at the relational level) (LeBaron and Pillay, 2006). To explain the complexity of disputing behaviour we need to incorporate a composite of norms and social factors.

In addition, by treating dispute processes as part of their social context and culture we can see them as both cause and effect. Rather than simply thinking of dispute

processes as resulting from a particular type of society, as commonly suggested, it may be worth considering to what type of society or culture such processes will lead.

The process of conflict

1.18 So far in this chapter we have been concerned with the nature of conflict. Now we will consider the process of typical conflict situations. Note that the description that follows is an oversimplification of what usually happens but it will help to at least identify some of the common elements of a conflictual situation.

The beginning of the process is the perception of conflict. This is the stage of a conflict where one or both of the parties experience a sense of unease often characterised by intense feelings such as frustration, anger and anxiety. There may also be a sense of confusion and disorientation as the parties try to

comprehend what is happening, and the beginning of an awareness of the discrepancy between interests, values and emotions. The conflict is often latent during this phase and may remain so for a long time.

The second phase of the process — realisation — is entered when the discrepancy between what is felt and what is happening is confirmed in the minds of one or both of the parties. This phase can also be seen as the 'grievance phase', where one or both of the parties begins to express the frustration and other feelings that had become evident in the perception phase. If these feelings get out of control it can lead to the flashpoint phase.

The wretched witch of Sisophon

Sisophon is a small town in the northwest of Cambodia. In 1992 it was a wild, dusty place on the edge of disputed territory between government forces and the Khmer Rouge. When I was there in the dry season, in my role as a United Nations human rights officer, my clothes and body were constantly coated with a layer of dust. Every night, just after dusk, the shooting would begin. I was told it was the drunks letting off steam. Almost every household in Cambodia had a gun. One night, the firing was in the neighbouring house and my host warned me to be careful as I crept down to the bathroom at the back of the house.

It was in Sisophon where I heard the story of the witch. She practised her craft in a nearby village. Unfortunately, the village had experienced some unexpected bad luck, which resulted in several deaths and illnesses. The relatives of the victims blamed the witch. They decided that the best course of action was to kill her. They approached the headman of the village with their plan and he approved. The unfortunate witch was killed.

The police were called in. Rather than arresting the suspects, the police called a meeting of the witch's aggrieved relatives and the perpetrators. The meeting was held to discuss adequate compensation to the witch's relatives. This done, the matter was closed. Presumably, the police and the headman both received a share of the proceeds.

No attempt was made to bring the perpetrators of the crime to justice. No formal charges were laid. It was as if the State of Cambodia with its panoply of Western-style laws did not exist. The idea that the State may have an interest in these events was not contemplated or, if it were, it was an interest of very low priority. The very idea of 'crime' was different here.

This was only one of a large number of instances that came to my attention where Cambodian citizenry and officials reached their own solutions to problems and conflicts. The desire to engage in 'self help' or third-party interventions outside the formal legal

system was widespread. The murder of witches in Cambodia appeared to be common, as I came across a number of prisoners described in the official records as 'witch killers'. The response to the violence visited on the unfortunate witch of Sisophon was typical at that time.

Unlike our concept of public wrongs, which entitles the State to interfere in the lives of its citizens, the fate of the witch of Sisophon was determined by proto-State concepts of private and communal interests. The definition of crime was not the prerogative of the State but that of the people directly involved and according to their particular local customs. In Cambodia, even today there is often little understanding of, or perceived need for, a high-level justice system to protect citizens from often authoritarian or fearsome regimes. The rhythm of life beats to a different drum. Conflict and its various manifestations are perceived and dealt with differently in this society than they are in our own. (See **Chapter 2** for an outline of the ways in which we respond to conflict.)

The realisation phase is also characterised by a beginning analysis of the 'how, why and what' of the conflict. An important part of this is an assessment of what resources are available to engage in the conflict. These include power, status, information and skills, and such tangible factors as money, followers and productive capacities. Parties may also assess if the conflict is 'false' in the sense previously described.

At this stage, the conflict may go in a number of directions, as shown in the flowchart (see below). First, as already noted, it may go in the direction of flashpoint, where it degenerates into destructive conflict, or becomes distorted. However, the conflict may come back from this phase and move through the realisation phase again, or on to the avoidance or intervention phases. This is sometimes called 'the dispute'; where the parties engage in overt conflictual behaviour.

From realisation the conflict may go in another direction: to avoidance. This is one of the most common responses to conflict and is explored in more depth in **Chapter 2**. One of the most common manifestations of avoidance is the response to conflict known as 'lumping it', which in effect means that one or more of the parties in the conflict simply suffers the inconvenience or frustration that it may present. Avoidance responses are usually made because of a lack of resources (for example, power or skill) or a fear of the consequences of using other options. As in the flashpoint phase, the conflict

may go through, and then come back to, the realisation phase, usually because of a change in the situation or in the process used by one of the parties. It may then go into the intervention phase. Alternatively, it may bypass the realisation phase and go straight to intervention.

The intervention phase involves the decision to engage in one or more of the strategies to control or resolve conflict outlined in **Chapter 2**. This decision is often based on the perception of the resources at the disposal of each party.

This phase merges with the next one: strategy selection and implementation. The selection of a response to manage or control conflict is a complex one. The range of possible responses is wide and can include coercion, collaborative problem-solving and negotiation. Unfortunately, planning a strategy is often the most neglected part of this phase of the conflict process, contributing in large part to unsatisfactory outcomes. There is also a range of tactics that are deliberately covert so as to mislead or gain advantage over an adversary. These tactics are outlined in **Chapter 2**.

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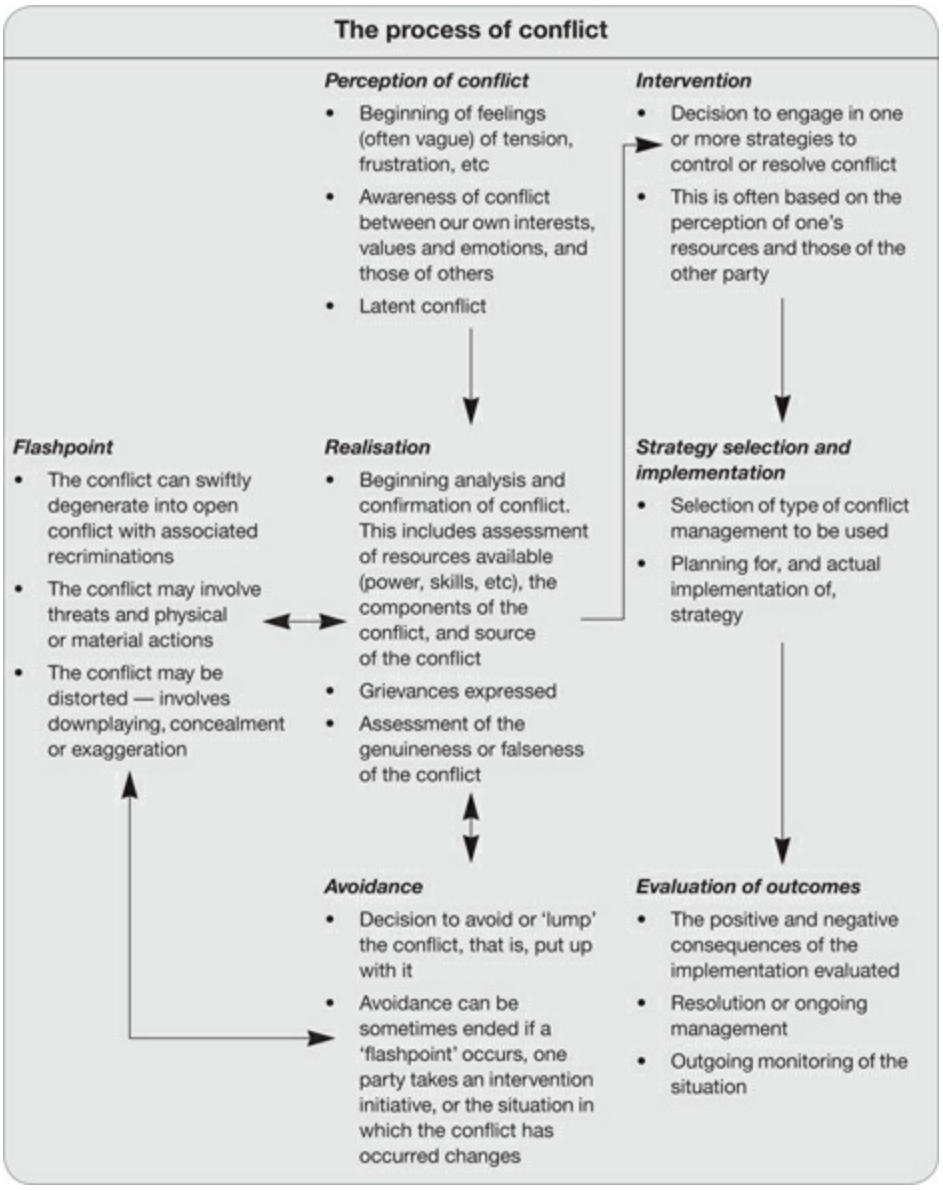
The final phase, evaluation of outcomes, involves the parties coming to terms with the many outcomes, good or bad, which may result from a conflict. Complete resolution cannot always be expected and ongoing management or monitoring of the situation may be required. Equilibrium may be restored to the conflicting parties but it may be only temporary.



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Conflict and storytelling

1.19 One of the more interesting trends in recent scholarly research has been an upsurge of interest in the use of storytelling, or 'narrative', as a means to both explain and research our social interactions. A leading early theorist in this area (Polkinghorne, 1988, p 11) has defined narrative as:

> … a scheme by means of which human beings give meaning to their experience of temporality and personal actions. Narrative meaning functions to give form to the understanding of a purpose to life and to join everyday actions and events into episodic units. It is the primary scheme by means of which human experience is rendered meaningful.

The relevance of this to our study of conflict is that it is the stories that people tell about themselves and others which join the particular aspects of their conflict to the larger social structures that they inhabit. In other words, storytelling is the way in which we give meaning to events in our lives within a larger social whole. For example, a young Aboriginal boy once told me, in a mediation, how he had done many wrong things against the larger (white) community in which he lived. He explained that it was because 'there was no meaning anymore'. All he saw around him were lost and forgotten people — his people. He was connecting his story to the sense of disadvantage and anomie (alienation) that indigenous people often feel in Australian society. As in all contexts, in a conflict, stories or narratives are told with particular purposes in mind. In a conflict situation, usually that purpose is convincing the listener of their validity and their inherent power. It may also be that some participants in a conflict are at a disadvantage when telling their stories, particularly women, children and those from certain ethnic groups.

It is the coming together of a number of different and competing stories that makes conflicts both fascinating and often frustrating. In addition, because stories are interactive rather than individual productions, they will change according to the context in which they occur. This has implications for the conflict manager and for the disputants themselves, because disputes, and the stories that define them, transform through a range of different contexts and processes. Narrative mediation, described in **Chapter 7**, and to a certain extent restorative justice conferencing, described in **Chapter 8**, are based on these ideas.

Entrapment and conflict

1.20 Have you ever been caught in a situation where you have been torn

between pushing on or going back and where the likelihood of success is uncertain? For example, you may have experienced waiting for a bus for 15 minutes, to take you to a place you could have walked to in less time; you may be in a long-term relationship that is now turning sour, leaving you wondering if you should stay in it any longer; there may be a labour dispute in which both the workers and employers have lost wages and profit; or a national government may be involved in a protracted and costly guerrilla war in a foreign country. These types of 'entrapment' conflicts are characterised by a number of dilemmas for the participants. First, is further commitment to the situation an investment or an irretrievable cost? Second, how do we choose between staying in the situation and withdrawing? (If you do not have a choice, it is not an entrapment situation.) Third, it is uncertain that your goals will be met. Finally, such situations

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invariably involve repeated investments. One short, one-off investment of time, money and so on does not constitute an entrapment.

The consequences of being caught in these types of situations can be summarised into three broad categories (Brockner and Rubin, 1985, pp 4–5):

- Conflict (either personal or social) escalates about whether to make the continued investment in, and commitment to, the situation.
- As the entrapment continues, the definition of why such involvement is necessary moves from clear and 'rational' justifications to a greater degree of emotional involvement; that is, as the entrapment proceeds a person may simply want to achieve the intended goal, to meet psychological needs, to save face or to justify their previous investment. Their motives shift from the *rational* to *rationalising*.
- Certain behavioural tendencies emerge, the most important of which are

self-perpetuating tendencies, which cause further commitment.

Brockner and Rubin (1985, pp 57–70) tentatively suggest that if the entrapment occurs in a social, rather than a non-social (individual), context it is likely to be more potentially entrapping, especially for males. Further, the degree of entrapment may be affected by participants' attitudes towards each other in the situation. For example, participants will invest more heavily in a situation where they are dissimilar to the others involved, where they are provoked by them, or where the other participants appear manipulative. Being a member of a group with a high level of internal cohesiveness may also lead to an enhanced degree of entrapment (pp 93–9).

Entrapment may have positive outcomes; for example, alcoholics who make public commitments to, and become involved in the programs offered by, Alcoholics Anonymous may be positively entrapped (pp 254–5). There are a number of ways that people can more readily entrap themselves (which can also provide clues about how to avoid entrapment) (pp 255–6):

- *Avoid limit-setting:* Avoid opportunities for stopping and reflection.
- *Avoid people who may weaken resolve:* Because people who are influential may weaken our resolve it is better to avoid them; for example, if you are trying to lose weight, avoid gourmet cooks!
- *Avoid information about the costs ahead:* Avoid information sources that remind you of the costs of such entrapment.
- *Show public displays of entrapment:* By making public our intentions and investment in a situation, we tend to lock ourselves more heavily into a stated course of action.

Perhaps the most significant lesson about being heavily entrapped in a course of action is a tendency for the participants to become heavy-handed in their responses. Further, there is a tendency for the issues to become more complex and the number of parties involved to increase. Participants' motivation to do well changes to one of aggression against the adversary (real

or imagined). In other words, there is a tendency for conflict to escalate in such situations. This comes about for three reasons. First, structural change occurs in the situation so that the participants cannot go back to the way they were before; for example, two people locked in a bitter argument may so undermine the basis of their relationship that even after the conflict is settled, a 'residue of resentment' remains. Second, participants locked in escalating conflict often suffer

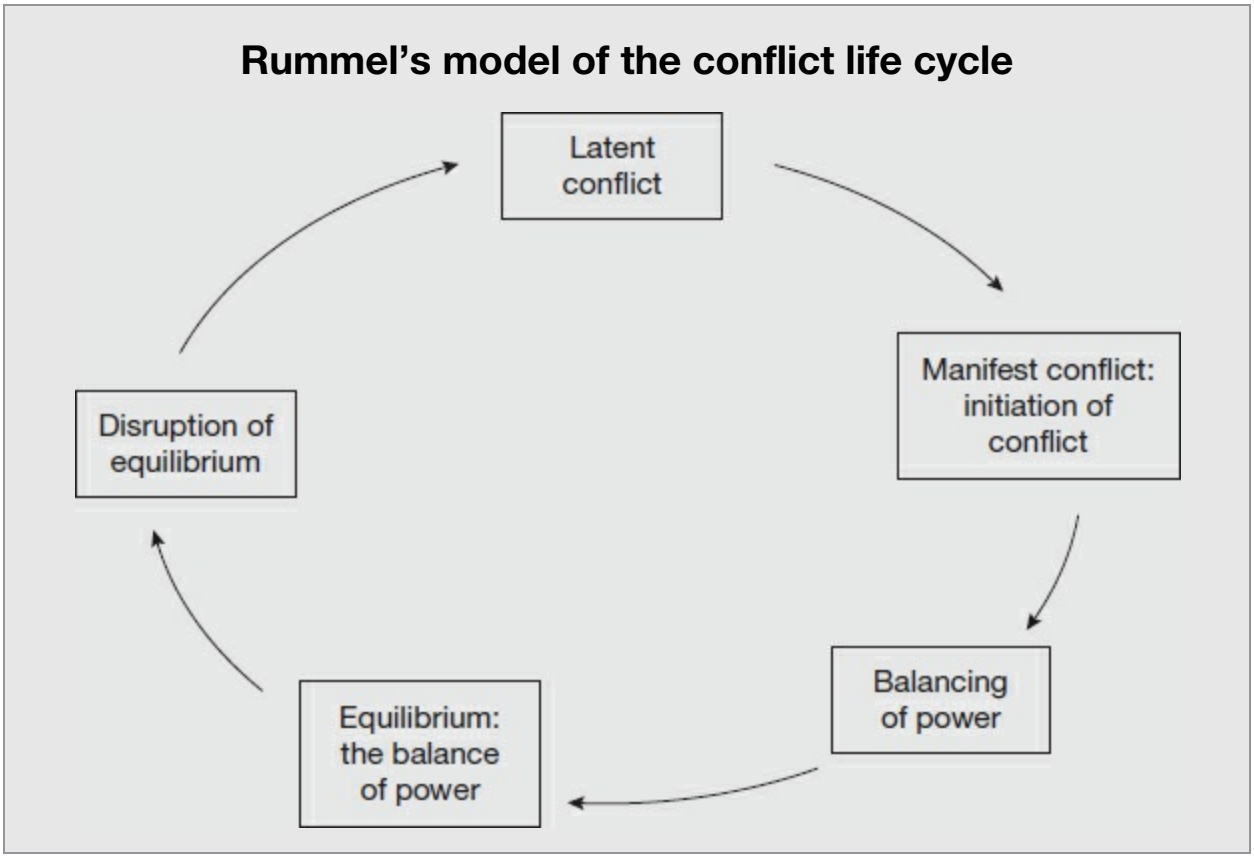
from 'selective perception'; that is, they often think the worst (or the best), distort information and hear only what they want to hear. Third, these tendencies lead to the phenomenon of the 'self-fulfilling prophecy'. In Brockner and Rubin's words (p 259):

> … if A expects B to be an angry, defensive person, and A therefore acts in angry defensive ways in order to ward off the expected attacks of B, B may be provoked into the angry behaviour which so serves to confirm A's initial perception.

The entrapment model of conflict presents some interesting possibilities, as explained by Bartoli, Nowak and Bui Wrzosinska (2011). Most models of conflict rely upon the idea of progression through the conflict on the idea of *escalation*. What if *de escalation* was just as important? De-escalation is another stage of conflict in which, as in entrapment, parties are limited in their movements and ideas. Bartoli, Nowak and Bui-Wrzosinska suggest that instead of looking like a classical bell curve, a model of conflict could look the reverse; that is, like a series of 'dips'. If you would like to follow this idea further you can access a free website and experiment with their model at <www.iccc.edu.pl/as/>.

Equilibrium in Conflict

1.21 Some writers, such as Rummel (1976), see the process of conflict as a balancing act that shifts between equilibrium and disequilibrium. The process can be seen in the following diagram of Rummel's model.



In Rummel's model, conflict is seen as a continuing spiral that is shaped by the social context or situation in which it occurs. Rummel maintains that once an important social issue goes through the five stages of the cycle the socio-cultural context will be affected and may in turn set off another round of latent or manifest conflict.

For example, environmentalists and miners have different interests, which are, for a large part of the time, not in open conflict. This latency period may last for

a long time until some triggering event, such as the revelation of environmental damage, or the unauthorised activity of mining officials in a national park, sparks off a conflict. Both sides then marshal their resources and go into open or manifest conflict. This is followed by a balancing period as the parties use the means at their disposal to protect their interests. These can include the mass media, legal systems and sometimes dispute resolution procedures like negotiation or mediation. Through such processes, the parties try to reach compromises or accommodations that will suit their interests and resolve the conflict. A balancing of power is then achieved which usually results in equilibrium being established. This may last for a very short or a very long time. However, as conditions change this new equilibrium may be upset; for example, the government may relax its policy on uranium mining, or environmental conservation movements may gather enough new resources through a massive inflow of citizen support to enable them to challenge the status quo. The whole process then starts again.

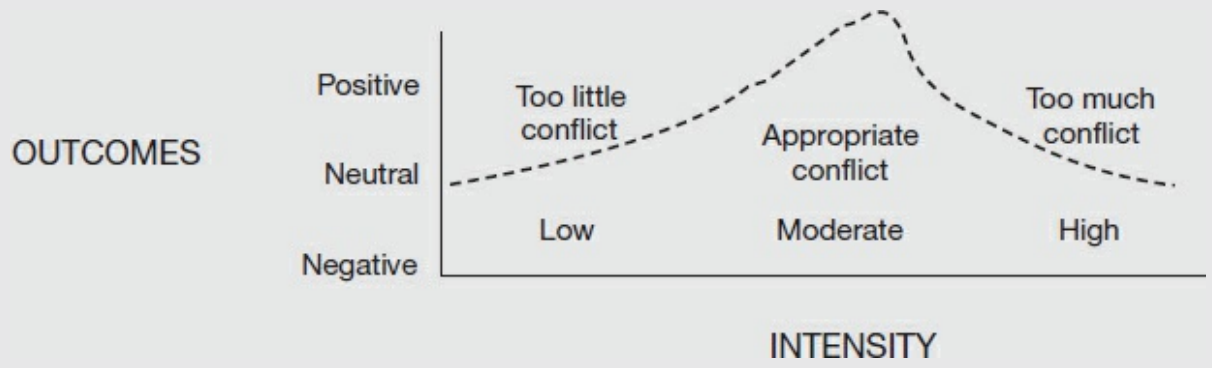
The 'Good' and 'Bad' Outcomes of Conflict

1.22 Brown (1983, pp 7–9) provides an interesting way to think about and analyse conflict by looking at the relationship between conflict outcomes and conflict intensity (behaviour). While this model, like all models, has its limitations and relies on the idea of escalation of intensity in the conflict, it does enable a useful examination of the possibilities. For an examination of similar and more current models, go to the Beyond Intractability website, which offers a range of resources for those interested in conflict analysis: <www.beyondintractability.org>.

'Outcomes' are the long-term consequences of a conflict. They can be either positive or negative. Positive outcomes improve understanding of issues, mobilise resources and energies, clarify competing solutions, stimulate creative searches for alternatives and enhance teamwork. Negative outcomes

cause increased antagonism and hostility. Too much conflict produces a lot of energy and antagonism, distorted communication flows, low quality decisions and one-sided commitments. Too little conflict leaves parties with little energy, prevents disagreement and sharing of controversial information, promotes decisions based on inadequate decision-making, generates unchallenged traditions and myths and tends to promote relationships that cannot face the rigour of changing circumstances. The relationship between these factors is shown in the following graph.

The relationship between conflict outcomes and conflict intensity



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The vertical line represents conflict intensity and indicates the range of too little conflict, appropriate conflict and too much conflict. The horizontal line indicates the shifting balance between positive and negative outcomes of a conflict in relation to conflict intensity. The point where conflict intensity becomes excessive will depend on the particular situation. Brown states that conflict management can require intervention to reduce conflict if there is too much, or intervention to promote conflict if there is too little (1983, p 9). The curved line represents the relationship between conflict intensity and outcomes.

There is no doubt that much conflict is counterproductive or destructive. However, there are many benefits that come from conflict, some of which are listed below:

- *Increased creativity and introspection:* When we are in conflict we are often forced to reassess and reorient our approach to particular issues or problems. Conflict often serves to shake us out of our lethargy. It can cause us to think more deeply and to thereby act more creatively.
- *Constructive social change:* Because our society is based on a number of interlocking but inherently conflicting groups, the expression of that conflict and its attempted resolution or management is important for the realisation of a more equitable (just) society.
- *Development of group and organisational cohesion:* Conflict, at appropriate levels, can assist group members by: helping them to define and articulate their interests; stimulating them to be innovative by exposing them to new ideas; re-energising the system; and increasing participants' sense of solidarity.
- *Enhancement of family functioning:* Families benefit from some expression of conflict, because it allows members to find their own individuality and also leads to greater intimacy.

Being part of a constructive process of conflict can be both a restorative and legitimising experience. Feelings are validated and the reality of our perception honoured. Good conflict managers allow the expression of conflict.

The negative consequences of conflict are many and include violence, the breakdown of relationships, the polarisation of views into static positions, the breakdown of collaborative ventures and anxiety-induced emotional impoverishment.

Conclusion

1.23 Conflict is a double-edged sword that we both can both gain and lose from. If we look at how our society, and indeed any society, functions, it is through the expression of certain levels of conflict. For example, our parliamentary and legal systems serve the purpose of funnelling conflict. They allow a level of institutionalised (that is, acceptable) conflict. Most conflict, however, happens at the informal level of our day-to-day interactions.

As we have seen in this chapter, there are many ways to describe and explain conflict. This is important because the way in which we identify conflict will have an impact on the way in which we manage this essential element of our lives. The way we think and talk about conflict will shape what it means to us. Because conflict is an ever-present element in our lives it can be crucial in both a professional and personal sense.

Conflict is all around us. The question is, 'How do we best deal with it?'.

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Exercises

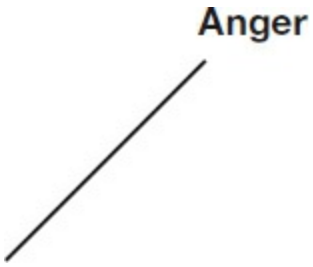
Exercise 1 Latent and manifest conflict

Most conflicts have a latent (hidden) as well as a manifest (open) element. There are several important aspects to this. First, many conflicts are latent before they become manifest; that is, the parties sense or feel the conflict before they are able to articulate it or demonstrate it to the other parties to the conflict. In some political and environmental campaigns, this latent period is deliberately maintained so that the respective parties can protect the status quo, to maintain or build their resources. Second, there are latent aspects to most conflicts; for example, work colleagues will often express their conflicts with each other in terms of work practices, while the underlying value or 'personality' conflict is concealed.

This exercise is designed to generate thought and discussion around these issues. It will also highlight the subtlety of the difference between manifest and latent aspects of conflict and demonstrate the levels of emotional involvement we may experience during a conflict.

(a) Draw a line as follows and call it the 'anger line'. Anger is defined here as the expression or

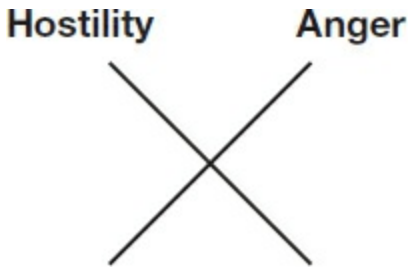
manifestation of feeling. Hostility is defined as the hidden or latent aspect of our feelings; that is, stored-up angry feelings not shown to other people.



(b) The anger line represents the level or intensity of anger that a person may experience in particular conflicts. As a person progresses up the line the intensity of angry feelings increases.

At right angles to the line, write different angry feelings, from low-intensity feelings at the bottom of the line to high-intensity feelings towards the top. This can be done in a group by brainstorming names for different angry feelings; for example, wrath or exasperation.

(c) After including as many angry feeling words as possible, draw a line across the angry line as follows:



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Call this line the 'hostility line'. Now list your hostility feelings. As for the angry line, the higher you go up the line the more intense the feeling. Some words that come to mind are resentment, displeasure and indifference.

(d) Think about and discuss the differences between angry emotions (often open or manifest) and hostile feelings (often hidden or latent) and give examples from your own experience.

Exercise 2 Intrapersonal conflict

The Dollard/Miller model briefly outlined in this chapter can provide a useful model to understand the intrapersonal dilemmas often experienced by parties to conflict. Try to think of examples from your own experience of these inner conflicts. How could the Dollard/Miller model be useful in conflict management strategies such as negotiation, collaborative problem-solving and mediation? What are the model's limitations?

Exercise 3 Sources of conflict

Do you think that the five sources of conflict identified by Bisno are accurate? To help you answer

this question, list examples of conflicts that you or your groups are involved in, using the following chart.

Source of conflict	Example
Blosocial	
Personality and interactional	
Structural	
Cultural and Ideological	
Convergence	

What source of conflict do you see as the most important? Is this judgment based on the ideological or value position you adopt? For example, if you were a psychologist, what particular source would you tend to emphasise? What if you were an Aboriginal activist or a feminist activist? What if you were the Prime Minister?

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Exercise 4 Interests and consciousness

The term 'interests' was defined in this chapter. As we saw, interests can be both subjective and objective. They are not only about our particular individual desires, but also about our roles and status. When an individual or group misperceives their 'true interests' and identifies with someone else's interests, this is often referred to as 'false consciousness'. This is an important concept in the analysis of conflict and can be observed in many situations or contexts. For example, feminists may suggest that many women identify with the dominant patriarchal interests in our society rather than with their own. Employees, when transferred from one section of their organisation to another, will often change their views about their fellow workers, clientele and management. 'Raising consciousness' is a term used to denote one of the ways in which people can begin to identify the relationship between their individual and collective interests and goals.

(a) How do you experience 'false consciousness'? Give examples of this phenomenon from your own experience.

(b) If you are in a common interest group (for example, family, work group or club) you will be able to identify many common interests. These are expressed and represented in certain ways to others outside the group. How are the group's interests different from and represented to those of other associated individuals or groups; for example, teachers, management or clientele? How can the group 'raise' its consciousness?

To work out how to identify interests as part of a conflict management process, see **Exercise 14** in **Chapter 6**.

Exercise 5 Emotions, values and interests

Emotions, values and interests are important components of all conflicts. Think about and write a short description of a work, family or social conflict, then try to identify the emotional, value and interests components. Use the following table.

Short description of conflict	Short description of conflict: other parties	Scores
Your perception	Their perception	
What are your interests?	What are your interests?	
How did you feel?	How do they feel?	
What values were important to you?	What values are important to them?	

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Weigh the importance of each of these components in the conflict by assuming you have ten points to distribute between all three components; for example, emotions, 2; values, 3; interests, 5. If you are working in a group, discuss your results. The following questions may help you:

(a) What relative importance did each component assume?

(b) Do you have a tendency to allow one compo nent to predominate?

(c) How do you balance all three components?

(d) Is it desirable to balance all three components?

(e) How useful is it to know the relative weighting for each component?

Exercise 6 Process in conflict

The process of conflict was outlined in this chapter. Does this process accord with your own experience?

Exercise 7 Imaging conflicts

This exercise is ideal for groups but you can also try doing it by yourself. I have called it 'imaging' because it enables people to create 'pictures' of what conflict means to them. It is particularly useful in the beginning phase of a group when you want to gently break down barriers between people and generate discussion. It is also helpful in enabling group members to appreciate each other's differences and in exploring the role of language in conflict.

(a) Divide participants into small groups. Ask each group to list common words and phrases they associate with conflict.

(b) Ask each group to discuss the dominant images they have of conflict, and the categories that they create, through language, for understanding it. You can help groups through this process by asking them to consider various criteria for categorising the words and phrases, such as intensity, when used, or internal versus external uses.

(c) A variation on the above is to ask people to explore the metaphors that the language used to desc ribe conflict creates.

(d) Bring the participants back together into the large group and discuss.

Exercise 8 Questions

(a) Is Rummel's model suitable to use in small-scale interpersonal or organisational disputes?

(b) What are the benefits and disadvantages experienced by your work organisation as a result of conflict? What purpose does conflict play in your work organisation?

(c) At what point does conflict become dysfunctional or destructive for you? Does this differ according to the particular context you are in?

(d) What does the 'robber's cave experiment' (see **1.13**) lead you to conclude about the nature, and resolution management, of conflict?

(e) What were the positive and negative consequences of the last major conflict you experienced?

(f) How is social conflict controlled and repressed in our society?

(g) In what ways does the concept of entrapment described in this chapter adequately explain or describe some of the conflicts you have been involved in?

Chapter 2

Responding to Conflict: Dispute Management Preferences

Summary

This chapter highlights the variety of ways in which people respond to conflict. These include 'lumping it', avoidance, coercion, negotiation, mediation, conciliation, arbitration and adjudication.

As we discussed in **Chapter 1**, generating and confronting conflict are important strategies for obtaining useful goals. However, the management of that conflict is equally important. Conflict can be managed on three bases: one-to-one, representational or through third-party intervention. The presence or absence of a third party can be crucial in any conflict response.

Disputants typically use one or more of five styles when responding to conflict: avoidance, compromise, competition, accommodation and collaboration. The choice of style will usually depend on the situation. Each of these five styles will be outlined in this chapter.

An important aspect of responding to conflict is the disputant's preference for various types of processes available to them. Important elements such as control over the process, and the disputant's role and status, may be relevant to the preferences disputants have.

Introduction

2.1 The ways in which individuals, communities and whole societies respond to conflict has been, and continues to be, a rich source of study. Jerold Auerbach in his book *Justice Without Law?* (1984) states that the way societies settle disputes and their choice of socially acceptable responses to conflict ultimately reveal our most basic values and indicate whether people want to avoid, encourage, suppress or resolve conflict. These responses to conflict 'communicate the ideals people cherish in any culture, their perceptions of themselves, and the quality of their relationship with others' (Auerbach, 1983, pp 3–4).

This chapter will examine the broad range of alternatives available. **Chapter 3** will build on some of the ideas developed here and outline various strategies and tactics to respond to a range of potential and actual conflicts.

Alternative ways of responding to conflict

2.2 In any society there are alternatives when conflicts arise. Anthropology has provided many examples and a basis for comparing these. Nader and Todd in their book *The Disputing Process: Law in Ten Societies* (1978) identify eight procedures universally used to deal with conflict (p 79):

- *Lumping it:* This refers to the failure of one party in a conflict to press their complaint. In other words, the issue is simply ignored and the relationship with the offending party continues. Galanter (1974, p 124) states that this is done because 'claimants' lack information or access to the law and decide that the gain is too low or the cost too high to proceed.

- *Avoidance or exit:* This is defined by Hirschman (1970, p 10) as ending a relationship by leaving it. This is different to 'lumping it', where the relationship is maintained (at some level) and the conflict ignored. The decision to avoid conflict is usually based on the relative powerlessness of one of the parties or the social, economic or emotional (psychological) costs involved.
- *Coercion:* This involves the imposition of the outcome on one party by the other. Threats or use of force may be involved. Such processes are widespread across many societies.
- *Negotiation:* This involves the mutual settlement of the conflict by both parties without the aid of a third party. Parties 'seek not to reach a solution in terms of rules, but to create the rules by which they can organise their relationship with one another' (Gulliver, 1979, pp 2–3). This definition covers both collaborative problem-solving and negotiation.
- *Mediation:* This involves a neutral or impartial third party who intervenes in a dispute, to help the parties reach an agreement. The third party or mediator may be appointed by the parties or represent some outside authority. The parties in dispute agree to the mediator's intervention. This practice is widespread across most societies (Gulliver, 1973). The mediator has no advisory or determinative role in regard to the content, outcome or resolution of the dispute but, like the conciliator (see below), the mediator may advise on or determine the process of mediation whereby resolution is attempted (Gulliver, 1973).

- *Conciliation:* This is similar to mediation, but is often used in agencies such as tribunals and courts, where rights (usually granted by statute) are in issue. The conciliator will usually need to ensure that the terms of the

settlement are compatible with the legislation. Conciliation is often not a voluntary process for the respondent, who can be ordered to participate. The conciliator, who is an impartial or neutral third party, can offer options and advice to help the parties see alternatives to better manage the dispute, although the parties will make the final decision. Like the mediator, the conciliator has no determinative role.

- *Arbitration:* This involves both parties consenting to the intervention of a third party whose judgment they must agree to accept beforehand.
- *Adjudication:* This refers to the intervention of a third party that has authority to intervene in a dispute whether or not the parties wish it, to make a decision and to enforce that decision. The traditional court system is probably the best example of adjudication.

2.3 It is important to distinguish between these various procedures not simply for the purposes of definition and classification. That there exist numerous procedures within any society with which to manage disputes highlights the fact that different sorts of conflicts require different procedures. This was recognised by the now defunct National Alternative Dispute Resolution Advisory Committee (NADRAC), an advisory body to the Commonwealth Attorney-General. NADRAC produced a useful booklet of definitions of alternative dispute resolution (ADR) terms, to assist practitioners and consumers of such services (NADRAC, 1997). In 2003, following a series of consultations, NADRAC released a set of process descriptions, explaining that it was better to 'describe' rather than 'define' dispute resolution terms (NADRAC, 2003).

Soudin (2012, p 5) lists eight key factors that distinguish various dispute processes from one another, and which may be of assistance in determining which is better to use in any particular situation:

- length of the process and the formality that is present;
- whether the process incorporates 'different elements' of other processes;

- the role of the third party;
- the role of the parties to the dispute;
- the subject of the dispute;
- reporting and referral requirements;
- objectives of the process; and
- philosophical underpinnings.

Using a simpler typology, Lederach (1995, pp 92–100), in his quest to develop a relevant training tool with cross-cultural application, describes five 'facets' of any third-party process. These, he argues, apply across cultures:

- entry;
- gather perspectives;
- locate conflict;

- arrange/negotiate; and
- way out/agreement.

Each facet raises a number of key questions that need to be answered before it can be achieved or completed. The answers to these questions he terms 'functions'. Centring his model on the most basic of sociological premises, that form follows function, Lederach goes on to illustrate that the various forms that follow these functions can vary from culture to culture, and within cultures from place to place, as well as between social classes. Western-style mediation is included to illustrate the model. These facets are outlined in the table at **2.4** below.

Rights, Power and Interests

2.4 Conflict is usually managed around three phenomena: rights, power and interests.

Rights are concerned with entitlements, credibility, merits and position; for example, a consumer who enters into a contract for the supply of goods has certain rights by law. In litigation, judges will often decide a case on the question of rights.

Power is concerned with who is able to achieve an advantage or superiority of position. Power can be manifested in many ways, including control of resources and control of networks; for example, a company may close its offices using its superior financial resources, rather than bow to union pressure for better pay and conditions.

Interests are concerned with needs and desires. They are the 'why' of a conflict and are related to the needs and concerns of the parties; for example, a person who wants a job promotion would usually have a number of interests in doing this, including better pay, better security, status and more flexibility in working hours. Collaborative problem-solving and mediation intervention, described later in the book, are usually interest-based methods of managing disputes.

The ways in which any conflict is managed will reflect the relative emphasis given to each of these aspects of conflict; for example, an industrial dispute can involve interest-based negotiating, a power-based strike or a rights-based appeal to an outside tribunal. This movement across these varying approaches is typical and can even be strategic in many negotiations (Lytle, Brett and Shapiro, 1999).

Third party involvement in conflict

FACET	FUNCTION	FORM	FORMULA
1. Entry	Who? How?	Mediator/formal role	Contact
	• Locate acceptable	• Face-to-face meeting	• Introduction of

	third party • Seek help/remedy • Define process • Establish expectations	with disputants	process • Ground rules/roles/process • Sessions at office • Create trust/atmosphere of safety

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FACET	FUNCTION	FORM	FORMULA

2. Gather perspectives	**What happened?**
	• Create forum/process
	• Express conflict/vent
	• Acknowledge:
	  ◦ grievances
	  ◦ feelings
	  ◦ experiences
	  ◦ concerns
		• Storytelling by turn-taking	• Facilitate/monitor interaction
			• One speaker at a time/paraphrasing/open questions/encourage expressions of feelings

3. Locate conflict	**Where are we?** • Identify core concerns • Create common meaning • Create a framework for advancing on concerns	• Identify issues	• Create list/agenda of issues • Reframe issues
4. Arrange/negotiate	**How do we get out?** • Address nature of relationship • Seek solution to issues/concerns • Create paths toward resolution/reconciliation	• Problem-solving on issues • Healing/relational focus	• One issue at a time • Separate interests/positions • Generate options • Narrow to mutual solutions
5. Way out/agreement	**Who does what when?** • How will relationships continue? • Monitor/implementation	• Agreements	• Written • Concise/clear • Reality test • Follow-up contact

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The Role of the Third Party

2.5 Most conflicts are managed in one of three ways as shown in the chart below.

Conflict management bases

1. **One-to-one**	Where each party to the conflict acts on their own behalf.
2. **Representational**	Where the parties are represented by another person such as a lawyer, friend, colleague, employee or union official.
3. **Third party**	Where a third party intervenes on their own initiative, at the invitation of both parties, or as of right. The third party is not a participant in the conflict.

NB: Sometimes conflict management can involve a combination of these; for example, where one party is a representative and the other party is acting on its own behalf.

Often a conflict will involve all three of these bases over its lifetime; for example, a worker protesting to his or her supervisor about a work procedure may result in a one-to-one confrontation and conflict. This in turn may lead to a union official who represents the interests of the worker (and other workers) talking to the supervisor and management. If the conflict continues then a third party in the form of an arbitration tribunal may be involved to settle the matter. Family disputes provide another example of this progression as the parties move their dispute from the personal to the procedural (and impersonal) by seeking legal representation, and then, finally, the intervention of the Family Court of Australia.

Nils Christie (1977), a Danish criminologist, in a seminal, brilliant and very influential polemic, argued that conflicts are good for us — they strengthen us and we have much to learn from them. Further, he said that we think of conflicts as property and therefore guard them jealously. He argued that in many instances, in contemporary Western societies like Australia, conflicts have been taken away from the parties directly involved and, in the process, have either disappeared or become someone else's — usually taken on by lawyers or the State. He concludes that this is a problem because conflicts are potentially very valuable resources for us as individuals and as communities,

as they can provide us with useful feedback and help us create better outcomes in a range of situations.

Christie's argument, taken to its logical conclusion, would deny the legitimate role of governments and others to step in and assist or manage conflict for the individual and public good, and would alternatively place too much of a burden on individuals and local communities. Despite this, it is an idea that permeates the rise of the ADR movement in Australia and overseas.

The presence or absence of a third party is therefore a crucial variable in conflicts (Nader and Todd, 1978, p 9). Whether a party acts for itself, or another acts for it in a relatively objective capacity, affects the way in which the conflict is handled. Usually, the degree of formality increases as the conflict moves from the one-to-one basis, through the representational and on to third-party intervention. Issues in the conflict

are likely to become more objective and generalised as the conflict moves into the representational and third-party stages. A personal conflict becomes one of a class of such conflicts to which standardised procedures and resolutions can be applied. The court system, for example, relies on a system of precedent that in simple terms means that it compares the case before it with a number of previous important cases of the same type. Likewise, but in a much less formalised way, the professional arbitrator or mediator relies on a number of case experiences to guide his or her conduct.

The other phenomenon that occurs as third parties are involved is that the autonomy or power of the disputing parties is progressively lessened; that is, the parties are less able to define the conflict in their own terms, make their own decisions and control the type of outcomes possible.

The basis of the third party's intervention is also crucial (Nader and Todd,

1978, p 9). Does the third party have the authority and/or sanction of the parties to intervene? What status, power and resources does the third party have to bring an end to the conflict? These matters affect the way in which the parties to the conflict will respond. For instance, in the example above of the unhappy worker, it may be crucial to the course of the conflict whether management or unions first intervene in the dispute. The resolution of a dispute about a contract is obviously different if handled by a skilled mediator than if the parties had immediately taken the matter to court. For further consideration of these variables, see **Exercise 4** at the end of this chapter.

NADRAC has classified ADR processes as: facilitative, advisory, determinative or hybrid (NADRAC, 1997). In the absence of agreed definitions and agreed practice, this classification system provides a useful starting point for gaining an understanding of the characteristics of the various ADR processes.

The role of the third party in facilitative dispute resolution processes is to identify the disputed issues and possible options. According to NADRAC, facilitative dispute resolution processes are processes in which a dispute resolution practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole of the dispute. Mediation, facilitation and facilitated negotiation are examples of facilitative dispute resolution processes.

The role of the third party neutral in advisory dispute resolution processes is to provide advice about the facts and how desirable outcomes may be achieved. According to NADRAC, advisory dispute resolution processes are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Expert appraisal, case appraisal, case presentation, mini trial and early neutral intervention are examples of advisory dispute resolution processes.

The role of the third party neutral in determinative dispute resolution processes is to evaluate the dispute and make a final determination. According to NADRAC, determinative dispute resolution processes are processes in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Arbitration, expert determination and private judging are examples of determinative dispute resolution processes.

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In hybrid dispute resolution processes the third party neutral may play multiple roles. For example, in conciliation and conferencing, an ADR practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In hybrid processes, such as 'med-arb', the practitioner first uses one process (for example, mediation) and then a different one (for example, arbitration).

NADRAC has also recognised that descriptions of ADR processes may be based on objectives, strategies or types of dispute; for example, in transformative mediation (see **Chapter 7**) the mediator aims to enhance relationships and understanding between the parties, while in evaluative mediation the mediator may suggest solutions. Boulle (2001) has also recognised four different types of mediation based on objectives: settlement mediation, facilitative mediation, therapeutic mediation and evaluative mediation.

In its discussion paper *The Development of Standards for ADR*, NADRAC (2000b) suggests five core objectives for ADR:

- to resolves disputes;
- to use a process that is considered by the parties to be fair;
- to achieve acceptable outcomes;

- to achieve outcomes that are lasting; and
- to use resources effectively.

After extensive consultation, these objectives were revised by NADRAC in *A Framework for ADR Standards* (2001). This paper identified three core objectives of ADR:

- to resolve or limit disputes in an effective and efficient way;
- to provide fairness in procedure; and
- to achieve outcomes that are broadly consistent with public and party interests.

Generating and Confronting Conflict

2.6 Sometimes, conflict is actively generated. This was briefly mentioned in **Chapter 1** in relation to false conflict. Conflict may be induced by a person (for example, a politician) or an organisation to gain support for a cause, or as a cathartic expression of emotion ('acting out') to relieve anxiety. Generating conflict and/or confronting it may be useful in trying to achieve goals. For example, a local environment action group may be trying to ensure the protection of local parkland against encroaching commercial interests backed by a local council. It may arrange demonstrations, 'sit-ins' or other protests to both raise community awareness and resolve the issue constructively. Confidence is required when participating in these strategies. The ability to analyse the resources at your disposal before engaging in such strategies is often crucial; for example, if the environment group overestimates its support, this may be disastrous for achieving its objectives.

The environment movement is a good example of the way in which the generation of conflict has helped communities face problems, in this case the problems caused by

unfettered development. In Australia, the seminal moments of this ongoing conflict were the disputes over Lake Pedder and the Franklin River in Tasmania, the former being flooded to provide hydroelectricity and the latter saved. These disputes not only strengthened environment groups so that they became a mass movement, but also raised Australians' consciousness about the issues involved. If these conflicts had not occurred then it is doubtful whether these outcomes would have been achieved. The recent conflicts over the so-called 'carbon tax' and the 'renewable energy target' in Australia repeat many aspects of these earlier debates but with the outrage against the proposed changes being led and fed by business and industrial interests.

In fact, 'consciousness-raising' is a central feature of important social phenomena like the feminist and 'occupy' movements. The central idea behind consciousness-raising is to enable people to see that what they perceive as their interests may not in fact be the case. This involves challenging people's perception of the reality of a situation. This process has clearly occurred in the environment and feminist movements but it can also be seen in social action groups formed by consumers, the aged and the disabled. Consciousness-raising often involves turning latent conflict into manifest or actual conflict. If you want to explore the issue of consciousness-raising further, see **Exercise 4** in **Chapter 1**.

In groups and organisations it is often important to allow for and plan the expression of conflict so as to provide opportunities for positive outcomes. In many groups, the effort to avoid or suppress conflict often has disastrous results. These issues are examined in **Chapter 8**.

Guerrilla warfare: Conflict management by covert means

2.7 In some situations, usually where one party is much less powerful, or where the costs would be too high, parties may resort to covert or hidden ways to deal with conflict. Passive resistance, or some form of manipulation, are common covert means of dealing with conflict, particularly in groups or organisations. The following are some examples:

- Workers may 'work to rule' so as to reduce the range of services traditionally offered and which depend on the workers' flexibility and goodwill; in other cases, paperwork may go missing or be delayed, meetings postponed and telephone calls not returned.
- Gifts and other inducements may be made as a way to manipulate outcomes, or attempts may be made to single out individuals for 'special treatment' (good or bad).
- 'Divide and conquer' tactics may be used (Posner, Spier and Vermeulle, 2009), or 'emotional blackmail' employed: see examples in the box below.

Divide and conquer tactics

Divide and conquer tactics have been the subject of much study in sociology and military theory. The famous 'prisoner dilemma' exercise, described in **Exercise 2** of **Chapter 6**, is based upon the use of such tactics. The usual underlying premise of these types of tactics is to disrupt the cooperation or coordination between members of a negotiating team or

group. Such tactics can take many forms. For example, a manager confidentially informs one of his subordinates that a committee needs a shakeup because it is not working well. He wants her to 'stir up' the committee to improve its performance. This can place the subordinate in a particularly difficult position. Another example is from a dispute I mediated where several members of an owners corporation (also known as a body corporate) who were in dispute with other members tried to induce several members of the opposing side onto their side of the dispute by offering them potential concessions relating to parking rights if they would change sides.

While these responses are often unsavoury and unhelpful, they are very

common. It is therefore important to keep them in mind during any period of conflict and to develop strategies to deal with them. (For further exploration of these issues see **Exercise 8** at the end of this chapter.)

Emotional blackmail

According to Forward and Frazier, authors of *Emotional Blackmail* (1998), the victims of emotional blackmail are often unassertive types of people who do not realise that others are deliberately exploiting them, because they themselves do not regularly engage in such behaviour.

Forward and Frazier describes four different types of blackmailers:

- **The punishers:** Typical of the punisher are statements like: 'If you don't do what I want, I'll make you suffer'; 'I'll find another mate'; 'I'll sulk and fume'; 'I'll ruin your reputation'; 'I'll cut you out of my will'; 'I'll never speak to you again'; or 'I'll make sure that you never see your kids again'.
- **The self-punishers:** Typical of the self-punisher are statements like: 'If you don't do X, I'll hurt myself'; 'I'll get sick and depressed'; 'I'll have a stroke/heart attack'; 'I'll stop eating'; 'I'll run away from home'; 'I'll kill myself'; or 'I'll stop being fun'.
- **The sufferers:** Typical of the sufferer are statements like: 'I'm so depressed. I know you have a full time job and a family, but I need a place to stay for a few days. You're the only one who can help'.
- **The teasers:** Typical of the teaser are statements like: 'I know you don't want to do it, but it's all I ask. If you'd do it, I promise to turn over a new leaf and be nice to you'.

Five Ways of Responding: The Manager and Conflict

2.8 Gareth Morgan in his book *Images of Organisations* (2006), using a popular model adapted from Thomas (1979, p 90), states that managers in organisations are faced with a choice of five styles when confronted with conflict:

- avoidance;
- compromise;

- competition;

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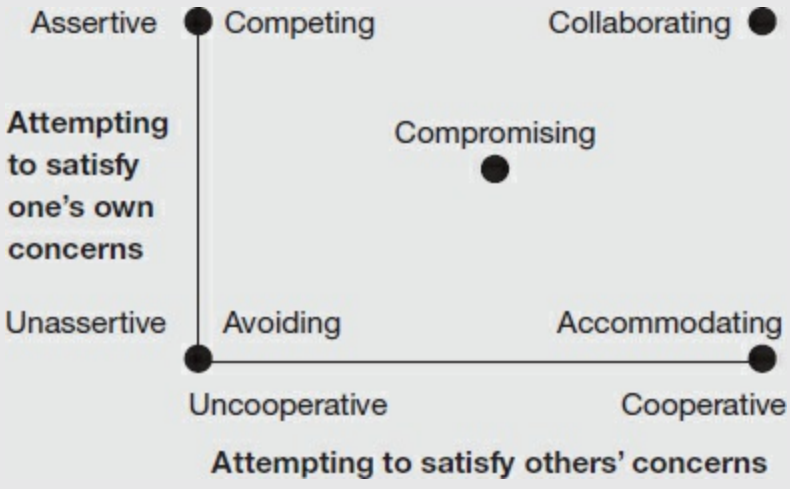
- accommodation; and
- collaboration.

Morgan maintains that while the manager may have a preferred style, any of the five may be appropriate at different times. The choice of style depends on the manager's ability to 'read' developing situations. In other words, the skilful manager will be able to use each of these styles as appropriate to the situation. These styles are described in **Chart 1** below. **Chart 2** describes situations appropriate to each style (mode) as reported by 28 chief executives. (The Thomas-Killman 'Conflict Mode Test' is a well-known test that can be used to study your own or a group's typical responses to conflict. It is available at <www.discoveryourpersonality.com/tki.html>.)

CHART 1

Conflict management: A question of style



The five styles can be characterised in terms of the following kinds of behaviour:

Avoidance

- Ignoring conflicts and hoping that they'll go

	away • Putting problems under consideration or on hold • Invoking slow procedures to stifle the conflict • Use of secrecy to avoid confrontation • Appeal to bureaucratic rules as a source of conflict management
Compromise	• Negotiation • Looking for deals and trade-offs • Finding satisfactory or acceptable solutions
Competition	• Creation of win–lose situations • Use of rivalry • Use of power plays to get your desired outcome • Forcing submission

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Accommodation	• Giving way • Submission and compliance
Collaboration	• Problem-solving stance • Confronting differences and sharing ideas and information • Search for integrative solutions • Finding situations where all can win • Seeing problems and conflicts as challenging

(*Source:* Morgan, 2006, p 192)

CHART 2

When to use the five conflict-handling styles

Situations in which to use the five conflict-handling modes, as reported by 28 chief executives:

Competing

1. When quick, decisive action is vital, for example, emergencies.
2. On important issues where unpopular actions need implementing, for example, cost-cutting, enforcing unpopular rules, discipline.
3. On issues vital to company welfare when you know you're right.
4. Against people who take advantage of non-competitive behaviour.

Avoiding

1. When an issue is trivial, or more important issues are pressing.
2. When you perceive no chance of satisfying your concerns.
3. When potential disruption outweighs the benefits of resolution.
4. To let people cool down and regain perspective.
5. When gathering information supersedes immediate decision.
6. When others can resolve the conflict more effectively.
7. When issues seem tangential or symptomatic of other issues.

Collaborating

1. To find an integrative solution when both sets of concerns are too important to be compromised.
2. When your objective is to learn.
3. To merge insights from people with different perspectives.
4. To gain commitment by incorporating concerns into a consensus.

Accommodating

1. When you find you are wrong, to allow a better position to be heard, to learn, and to show your reasonableness.
2. When issues are more important to others than to yourself — to satisfy others and maintain cooperation.
3. To build social credits for later issues.
4. To minimise loss when you

	are outmatched and losing.

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Collaborating 5. To work through feelings which have interfered with a relationship. **Compromising** 1. When goals are important, but not worth the effort or potential disruption of more assertive modes. 2. When opponents with equal power are committed to mutually exclusive goals. 3. To achieve temporary settlements to complex issues. 4. To arrive at expedient solutions under time pressure. 5. As a back-up when collaboration or competition is unsuccessful.	**Accommodating** 5. When harmony and stability are especially important. 6. To allow subordinates to develop by learning from mistakes.

(*Source:* Morgan, 2006, p 193)

Party Preferences

2.9 An often neglected aspect of how we respond to conflict is the way in which disputants themselves make choices or have a preference for one process over another (Condliffe and Zeleznikow, 2014). In Australia, governments have tried to actively influence these choices by offering

reasonable and legitimate alternatives to litigation; for example, the introduction in the State of Victoria of the Civil Procedure Act 2010 (Vic) aimed to facilitate the determination of disputes in a more timely and cost-effective manner before litigation. This is a good example of a government attempting to create a greater range of responses in the legal system to disputes. This followed several comprehensive consultations and reports by the Department of Justice in Victoria (Department of Justice, 2004 and 2008). Similarly, the Civil Dispute Resolution Act 2011 (Cth), enacted by the Commonwealth Parliament, provides for an even wider range of strictures on disputing behaviour once it reaches the legal sphere. The immediate precursor to the introduction of the latter Act was the report by NADRAC entitled *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (September 2009).

Courts and tribunals in Australia are currently experimenting and trialling various ADR processes in order to meet the policy directions of government or to improve their case management practices. They are also actively trying to be more responsive to the needs of disputants who use them. The trial of 'early neutral evaluation' in the Magistrates' Court of Victoria is a good example. Parties in this scheme are ordered,

at an 'early stage', to present arguments to a magistrate, who evaluates the key issues in the dispute and the most effective ways of resolving it without this having the effect of a binding determination (Lauritsen, 2010). Other experiments in the State of Victoria include the establishment of a Neighbourhood Justice Centre in an inner suburb of Melbourne that attempts to integrate court and community services; Koori courts, drug and alcohol courts and a special division of the Magistrates' Courts for the mentally ill (Department of Justice, 2004 and 2008).

Preferences and fairness

2.10 The preferences disputants have for ADR processes are intimately related to the perceived fairness or justice of the process (Colquitt et al, 2001; Conlon and Ross, 1992). The self-empowerment and recognition of the concerns, needs and values of disputants who use dispute management systems, including legal procedures, is progressively more recognised. Increasingly, disputant preferences will guide their management. In other words, the subjective judgment of disputants is relevant to the way in which disputes can be managed. It is incumbent on those who manage ADR systems to recognise and understand this, to ensure continued confidence in their use and governance. This idea is implicit in the National Mediator Accreditation Standards (July 2015), which guide the conduct of accredited mediators under the National Mediator Accreditation System (2015). Paragraph 2.2 of the National Mediator Accreditation Standards (Practice Standards) states:

> 2.2 Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:
>
> (a) communicate with each other, exchange information and seek understanding
>
> (b) identify, clarify and explore interests, issues and underlying needs
>
> (c) consider their alternatives
>
> (d) generate and evaluate options
>
> (e) negotiate with each other; and
>
> (f) reach and make their own decisions.
>
> A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes.

See the National Mediator Accreditation Standards (Practice Standards) on the Mediator Standards Board website: Australian National Mediator System, Approval Standards, July 2015, available at <www.msb.org.au/> (accessed 28 February 2015).

Control and fairness in making choices: The instrumental model of justice

2.11 The psychological perspective on procedural preferences builds on the research of Thibaut and Walker (1978). These researchers investigated the types of trial procedures that people wanted to use to settle their disputes. Their approach was based on the premise that people prefer those procedures that are most fair, while also generally taking a longer-term view. They argued that this was ascertained by the 'distribution' of control that the procedures offered; that is, disputants are motivated to seek control.

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Thibaut and Walker compared the procedural preference of individuals who were either in front of, or behind, a 'veil of ignorance' regarding their role in a physical assault case. Participants who were placed behind the veil were not informed as to their role (that is, they were not assigned the role of 'victim' or 'defendant'), whereas those in front of the veil were informed of their role. The weight of the evidence strongly favoured the victim over the defendant; the defendant was therefore 'disadvantaged' by the facts of the case, whereas the victim was relatively 'advantaged'. Participants were given descriptions of the following procedures: *inquisitorial* (an activist decision-maker who is also responsible for the investigation), *single investigator* (a moderately activist decision-maker assisted by a single investigator who is used for both disputants), *double investigator* (a less activist decision-maker assisted by several investigators), *adversary* (essentially adjudication — the decision-maker is relatively passive and the process is chiefly controlled by the disputants through advocates who represent them in an openly biased way), and *bargaining* (disputants meet in an attempt to resolve the dispute without the intervention of a third party).

Their research had three parties: two disputants and a third-party decision-maker (for example, a judge). In addition, the conflict resolution intervention progressed through two stages, the first of which was called the 'process

stage'. In this stage, information pertaining to the conflict was presented. Control over the delivery of information could be exerted by either of the two disputants (high process control) or by the third party (low process control). The second stage, the 'decision' stage, was when a judgment was delivered. Either the two disputants (high decision control) or the third party (low decision control) made the final decision.

The study found that participants in all roles — whether behind or in front of the veil of ignorance — preferred the adversarial procedure. Adversarial representation induced greater trust and satisfaction with the procedure and produced greater satisfaction with the judgment, independent of the favourableness of the judgment to the participant. Participants also deemed the adversarial procedure the most fair.

Conflict in the 'compact city' (high-density housing)

2.12 In an experiment I conducted in high-density housing, a simulated conflict in an owners corporation was used to empirically test 252 participants on three levels (Condliffe, 2011; Condliffe and Zeleznikow, 2014): their preferences; their perceptions of justice; and some elements of efficiency. Each of these levels was tested in relation to three processes: mediation followed by arbitration conducted by the same person; mediation followed by arbitration conducted by a different person; and arbitration followed by mediation conducted by the same person.

Participants clearly preferred a process that they judged gave them more control. In this research, mediation followed by arbitration by the same person was preferred. Participants did not rate any of the three processes more just than the others at post-mediation and post-arbitration stages of the experiment excepting those participants who received an adverse outcome at the end of the arbitration. These participants appeared to use the information

about the adverse outcome as a shortcut, or heuristic (mental shortcut), in deciding whether the process in a broader sense was fair.

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Thibaut and Walker's emphasis was on *decision and process control* and their approach is often referred to as the 'instrumental model of justice'. *Decision control* or, as it is sometimes known, *outcome control* refers to the ability of the parties to control final decisions and outcomes. *Process control* refers to the ability of the parties to control the type of information or evidence provided in the process. It remains the prevalent model of analysis. Until Shestowsky extended this analysis to include *rule control* in 2004, preference research was limited to these two control elements (2004, p 211). *Rule control* refers to the ability of the parties to make rules that govern the process.

2.13 Shestowsky suggests that some ADR procedures, such as mediation, are readily amenable to disputants choosing alternative rules and, accordingly, some parties may have a preference for such procedures. His research reports on three experiments that elaborate on previous research regarding preferences for ADR procedures for the resolution of legal disputes. He examined preferences for decision control, process control and control over the choice of substantive rules used in the dispute management process. Participants generally preferred the following: (a) control over outcome, such as a neutral third party helping the disputants reach a mutually satisfactory resolution; (b) control over process such that disputants would prefer to relay information on their own behalf without the help of a representative; and (c) either substantive rules that disputants would have agreed to before the resolution process, or the rules typically used in court. The results indicated that mediation was the most preferred procedure and facilitative mediation was generally preferred over evaluative mediation.

My own research into conflict in the high-density housing sector, discussed above, indicated that participants in a simulated conflict preferred a process that they judged gave them more control along the three dimensions noted above (Condliffe and Zeleznikow, 2014). In this research the participants evaluated each of three possible processes. A process of mediation followed by arbitration by the same person was preferred over mediation followed by arbitration by a different person and arbitration followed by mediation by a different person. These preferences were causally related to the degree of control that the disputants perceived they had in each of the processes.

2.14 The large number of studies on preferences has, however, delivered findings that have been deeply ambivalent. This appears to have two aspects. First, studies on the issue of control have generally been consistent with the research summarised above; that is, that high process control, or 'voice', increased perceptions of fairness even in the absence of decision control (Cropanzano, 2001). Disputants also appear to take a self-interested but longer-term approach to the issue of control. For example, they may want decision control when it will aid resolution but they will not want it if it will not be useful in this respect, while they may consider third-party process control desirable when the conflict is of high intensity (Deck et al, 2007; Wheeler, 1978) and involves face-saving (Bartunek et al, 1975). Second, studies in relation to the preferences for different types of procedures are conflicted.

A number of studies have supported the idea that people tend to prefer more adversarial procedures to less adversarial ones (Latour et al, 1976; Houlden et al, 1978; Lind et al, 1980). This has also been confirmed in several cross-cultural studies (Cukur and Ozbayrak, 2007). However, results from other studies sharply contrast

with this conclusion. In other research, participants tended to prefer less adversarial procedures (such as mediation or bargaining) to more adversarial ones such as trial or arbitration (see, for example, Peirce et al, 1993; Heuer and Penrod, 1986). The study by Peirce et al, which investigated procedural preferences in a landlord–tenant dispute, found that mediation was not only preferred to arbitration, but was the most preferred procedure involving a neutral third party. They found that the preferred sequence of procedural choices was: negotiation; mediation; advisory arbitration; arbitration and then 'struggle' (defined as 'pressure tactics'); and inaction (p 200). They also found that, compared with complainants, respondents preferred inaction and disliked arbitration. These findings are consistent with Thibaut and Walker's premise that disputants prefer to keep control over their decisions. Also, research in the anthropological disciplines, which has been going on for a considerably longer period of time, has generally found that negotiation is preferred (see, for example, Felstiner et al, 1980; Merry, 1989).

2.15 One of the favoured explanations of why the results of these studies have been so disparate is that the legal context of many of the early studies biased the results towards adversarial or adjudicative preferences; that is, the disputes studied have been those that are usually settled by legal procedures (Folger, 1986; Austin et al, 1981; Kaplow and Shavell, 2001). Much of the research into party preferences has examined how people evaluate two particular procedural models: adversarial and inquisitorial trial procedures. As defined by researchers, the adversarial model assigns responsibility for the presentation of evidence and arguments at the trial to the disputants, whereas the inquisitional model devolves responsibility onto the third party.

The problem with this argument is that the preferences expressed in non-legal disputes are themselves also ambivalent. Perhaps a more satisfactory explanation is that many of the studies where more adversarial procedures have been preferred were earlier in time than those where less adversarial processes have been preferred. The prevalence and awareness of mediation and like procedures has markedly increased in recent decades and such

procedures were not available or not raised as possible and viable alternatives at the time these earlier studies were conducted.

2.16 For example, a major study of the civil justice system by the Australian Law Reform Commission (ALRC) contended that clients depend on lawyers for information and advice on dispute management options, and they may not be informed of all the alternatives and may be unable to counter a lawyer's preference for litigation (ALRC, 1997). The ALRC found in 1997 that many lawyers had a limited familiarity with or understanding of other dispute management processes. Caputo more recently reported that there is now greater awareness of alternatives, but that some lawyers are still resistant to change or consider mediation and other ADR processes inferior to judicial dispute resolution (Caputo, 2007). Further, it is clear that some lawyers use mediation as a vehicle for making their client's case or for intimidating the other party as part of their negotiation strategies, rather than as a means to seek settlement (Robertson, 2006).

Role, Status and Timing as Predictors of Disputant Preference

2.17 Other relevant factors that have gained some prominence in explaining why certain preferences are made by parties include the role and status of the parties

(Delgrado et al, 1985; Lind and Tyler, 1988), conflict intensity (Penrod and Huer, 1986) and the time when the research was conducted; that is, pre- or post-process (Tyler et al, 1999).

The 'role' of the parties usually concerns their behaviour as complainants

and respondents. McGillicuddy et al (1999) found that complainants were found to be more aggrieved, to bring up more issues, and to expect more from a hearing than respondents. In contrast, respondents were more likely to acknowledge blame for the conflict and to engage in concession-making and problem-solving. They found that complainants achieved more in the final agreement, most likely because of the differences just mentioned. As they stated (p 202):

> Our hypotheses about complainant–respondent differences were based on the observation that complainants are usually trying to create change while respondents are trying to maintain the status quo. It follows that respondents should like inaction better than do complainants because inaction protects the status quo. Respondents should also like the consensual procedures (negotiation, mediation, and advisory arbitration) because these procedures allow them to refuse to change. Complainants should like arbitration and struggle because these procedures have the greatest potential for overturning the status quo by, respectively, providing a third party to enforce potential change and by defeating the other party.

Peirce and his colleagues supported these findings and found that arbitration and struggle were more popular with complainants than respondents, while inaction was more popular with respondents (Peirce et al, 1993, pp 199–222). Their rationale for this was explained in terms of the self-interest of the parties. This explanation is supported by the results of four studies by Tyler et al showing that people arrive at pre-experience preferences for decision-making procedures by choosing procedures that help them maximise their self-interest. Interestingly, these studies also showed that disputants base their post-experience evaluations on the quality of the treatment received during the course of the procedure (Tyler et al, 1999).

Heuer and Penrod found that people who perceived that they had a stronger case were more attracted to arbitration (1986, pp 700–10). In the Peirce research, noted above, concerning a landlord–tenant dispute, no effects were found for this element. Heuer and Penrod explain this discrepancy on the basis that their research task involved a court proceeding, which may have made their subjects sensitive to the strength of the evidence. Ross, Brantmeier and Ciriacks (2002) give the example of landlords who

prefer a process that maximises disputant control, while tenants prefer a third party to make the decision; that is, third-party procedures such as arbitration are generally perceived as favouring the weaker side, which in this context is usually the tenant.

Arnold and O'Connor's research into negotiators' choice of dispute-resolution procedures and responsiveness to third-party recommendations, after an impasse, shows that high self-efficacy negotiators were more likely to choose continued negotiation over mediation where they felt they were more in control (Arnold and O'Connor, 2006). In addition, they found that these negotiators were more likely to reject a mediator's recommendation for settlement, even when the recommendation was even-handed and met their interests. As predicted, however, the influence of self-efficacy on the acceptance of recommendations was moderated by mediator credibility. When disputants perceived that the mediator had low credibility, the pattern of effects remained unchanged.

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However, when disputants viewed the mediator as being highly credible, self-efficacy had no influence on the acceptance or rejection of the mediator's recommendations.

Shestowsky argues that the timing of the study of disputants' attitudes is crucial (Shestowsky, 2008). Most empirical studies of actual civil disputants have examined their perceptions of procedures almost exclusively after the disputes have ended. He states (p 2):

> Moreover, none of the published research has assessed their perceptions both before and after experiencing a dispute resolution procedure for the same dispute. The relevant research as a whole, then, appears to disregard important ways in which disputants' perceptions might be dynamic.

Shestowsky provides two main reasons for this. First, such perceptions can guide their procedural choices. Second, perceptions after the procedure has

ended may have some impact on the way in which disputants comply with the outcomes (p 4). This, he believes, can have important ramifications for the viability and confidence in the legal system.

Conclusion

2.18 There are many ways we can and do respond to the ever-present conflict in our lives. These responses are intimately related to the way our preferences are shaped by important elements such as the degree of control we believe we have. This complexity can be seen in a negative way, as a recipe for confusion, or we can see it as an opportunity for imaginative responses to conflict. The 'conflict map' (**Exercise 1**) and 'conflict chart' (**Exercise 2**) show how most conflict can be logically analysed and paths found through what may seem like an impenetrable jungle.

Exercises

Exercise 1 Conflict map

When confronted by conflict we are sometimes confused by the complexity of the issues and the number of elements involved. Conflict is like being caught in the middle of a maze, not knowing how to get out or, in some cases, not even knowing how we got there in the first place! As for an explorer, a map of the maze would be invaluable. Fortunately, in conflict situations you can often create a 'map'. To assist you in this exercise, refer to **Chapter 1** for an explanation of some of the terms used here, such as 'manifest conflict', 'latent conflict', 'emotions', 'values' and 'interests'. The outline of the map is as follows:

A. The conflict

(a) Short description:

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(b) Manifest issues:

(c) Latent issues:

B. Party perspectives

In this section, list the positions/interests, values and emotional state of each party to the conflict. These are the three crucial elements of any conflict. Use the box provided.

Key elements	Party A	Party B	Other parties
(a) Positions/interests (b) Values (c) Emotions			

C. Force field analysis (negative and positive factors)

A force field analysis is an analysis of the negative and positive factors in a situation. Such an analysis is useful in its own right and particularly so as part of a conflict

map. The positive and negative factors affecting a resolution of the conflict are listed. The former are those factors that restrain or hinder this process while the latter are those factors that are helpful in managing the conflict. Once these factors are written down they can be prioritised in order of importance or relevance.

(a) Negative factors:

(b) Positive factors:

Exercise 2 Conflict chart

The conflict chart is another useful way of analysing and evaluating the key elements of your conflict response. It also helps you to plan an intervention. While the conflict map was a brief way of beginning an analysis of conflict, a conflict chart provides a much more detailed analysis.

(a) Aims/objectives

What are my aims and objectives?

What are the other party's aims and objectives?

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What are the main differences between us?

(b) Positive aspects

What are the positive aspects of this conflict?

Does the other party share these?

(c) Negative aspects

What are the negative aspects?

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Does the other party share these?

(d) The other party's position and interests

What is the other party's position?

What interests support this position?

Do you know these well enough?

What would it be like to be in their shoes?

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(**NB:** There may be more than two parties to the conflict and it may be useful to list each separately and apply these questions to each party.)

(e) Your position and interests

What is your position?

What interests support your position?

Do you think the other party understands your position and interests?

(f) Emotional elements

What are your feelings in this conflict?

What are the other party's feelings?

Are these being dealt with appropriately?

(g) Value position/s

What values are involved (yours and the other party's)?

How can these be dealt with?

(h) Force field analysis

List the factors which restrain and those which help the resolution of this conflict.

Negative (restraining) factors	Positive (helpful) factors

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(i) Power

What are the elements of power involved?

How is power being used?

(j) Manifest and latent issues

List both manifest and latent issues.

Manifest issues	Latent issues

Should any of the latent issues be made manifest? If so, how?

(k) Brainstorming options

What are all the possible options?

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Which of these may be most useful and productive in this conflict?

Would it be useful to rank order or rate the options available? If so, use the space here.

(l) Mode of management

Which mode of conflict management may be most appropriate? Why? Is third-party intervention (mediator, arbitrator or conciliator) necessary/desirable?

(m) CAR analysis

The CAR (costs and resources) analysis is a way of weighing up the respective costs of strategies chosen and the resources needed to successfully implement them.

What personal or other resources are needed to successfully manage the conflict?

What costs may be involved in the strategies needed to manage the conflict?

(n) Short term vs long term

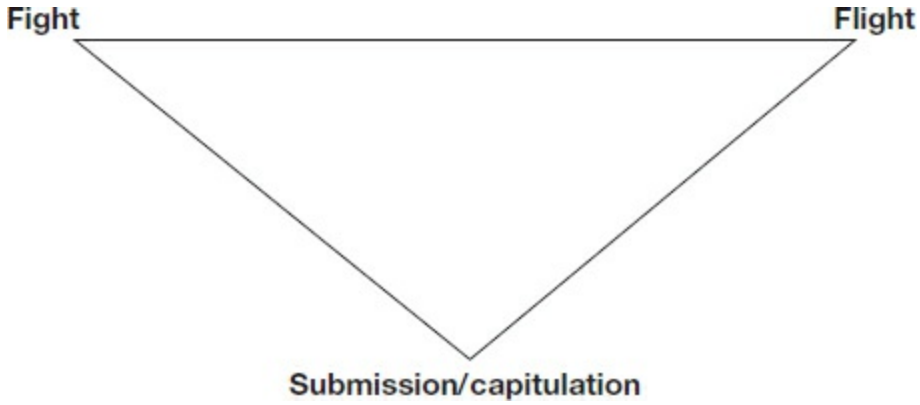
How should the situation look in the short term?

How should it look in the long term?

(o) Other comments

Exercise 3 Response triangle

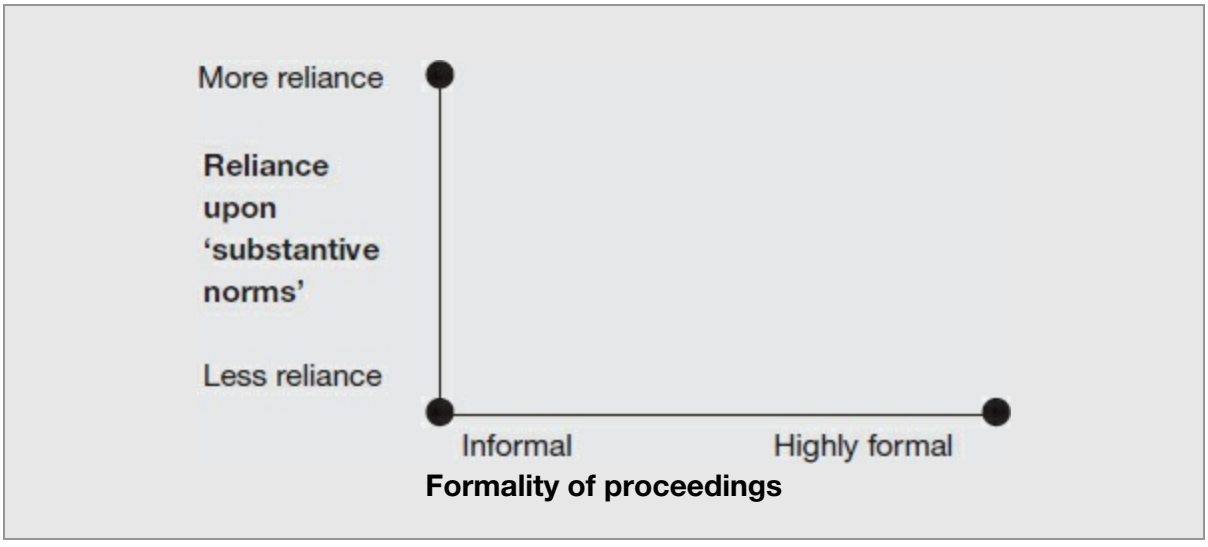
Many theorists have described the human response to threat as being either fight or flight. Some add a third element of submission or capitulation. The response triangle, shown below, can be a useful way of thinking about conflict.



What is your normal response to a threatening situation or one involving conflict? What elements would cause you to favour one or other of these responses?

Exercise 4 Party process

(a) Norms and formality: One-to-one, representational and third-party bases for conflict management have been described in this chapter. Each type has different effects on conflict management. Think of a conflict you have been involved in or know of which has gone through at least two of these stages. Chart the progress of the conflict along the following two axes with a series of Xs.



The vertical axis, 'Reliance on "substantive norms"', represents the amount of reliance on

knowledge and precedent to help manage the conflict. The horizontal axis, 'Formality of proceedings', represents the means by which the parties define and interpret each other's conduct and establish procedures to manage the conflict. As you move along each of these axes, the tendency to

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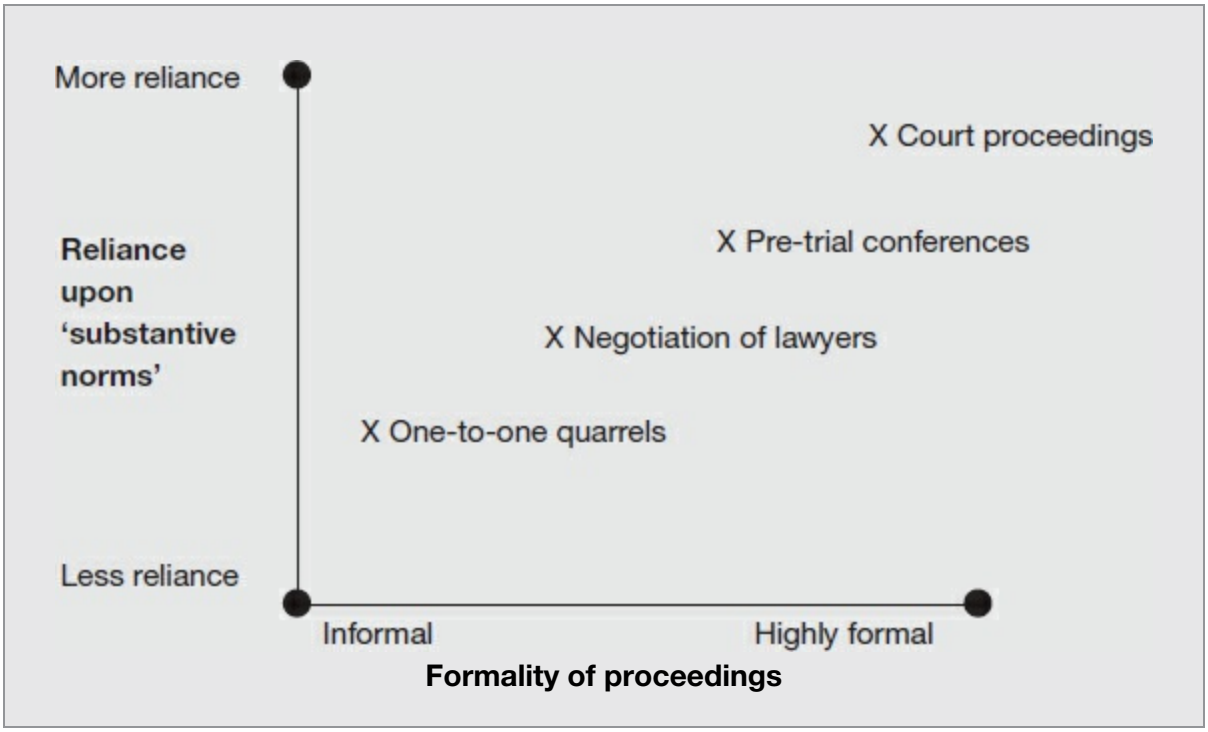
rely on each of these factors increases. To help you with this exercise, here is an example from a conflict that arose out of a marital separation.



This shows that as the separation conflict moved from the private to the public process of the Family Court (third-party intervention), both the formality of the proceedings and reliance on substantive norms increased. Also, as such a conflict progresses the autonomy or the power of the parties to make their own decisions tends to decrease. Why do you think this happens?

(b) Using the same two axes, chart with an X each of the conflict responses listed in the early part of this chapter; that is, lumping it, avoidance, coercion, negotiation, mediation, conciliation, arbitration and adjudication.

Exercise 5 Which response?

Think of conflicts where you have encountered or have used one of the responses listed in Exercise 4(b). Write these down and then list the advantages and disadvantages of each particular situation. If in a group, brainstorm around each of these examples.

Exercise 6 The CAR (costs and resources) analysis

Our management of any conflict often depends on the possible costs of pursuing a particular strategy, and the resources we *have* at our disposal; for example, when the costs are likely to be high and our resources are low, we might tend to 'lump it' or avoid the conflict.

(a) Consider any recent conflicts you have been involved in. Did you weigh up the possible costs and resources? If not, would such an analysis have helped you? For example, if you had decided that the costs were too high could you have set about trying to decrease them?

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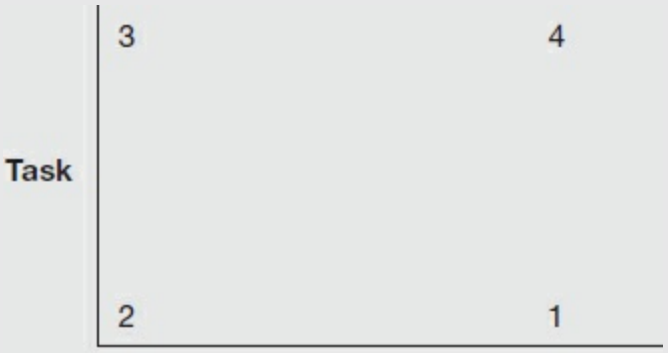
(b) Alternatively, did you decide you needed to increase the range of resources available to you?

(c) What sort of items could you include as costs and resources?

Exercise 7 Tasks and relationships

One way to consider why people respond to conflict the way they do is to look at the relative importance to them of tasks (getting things done) or relationships (getting on well with people). This can be done by using a graph like the following:



The relation between task and relationship

(a) A person at point 1 values relationships highly but places a low value on tasks. At point 2 neither relationships nor tasks are valued highly. Point 3 indicates that tasks are valued more highly than relationships. Point 4 is often said to be the best or optimum position. Why? Would it be the best position in all situations?

(b) Where would you place your colleagues and yourself on this graph?

Exercise 8 Guerrilla warfare and covert operations

Refer to the section of this chapter on guerrilla warfare and covert operations (see **2.7**). What examples can you give of guerrilla warfare and/or covert operations used at work, in your family, or

in your class? Why do you think they are used? What do you do when you encounter these tactics? What could you do?

Exercise 9 The power of an apology

In this chapter we consider how 'lumping it' or submission may be a way of responding to a conflict. This may be appropriate or not appropriate depending upon the particular merits of any fact situation. In some situations, however, giving way or submitting to another's demands may not be enough, especially if you have caused harm to that other person. An apology may be required to repair and manage the situation. We apologise for many small things in our lives; for example, when we step on someone's toes or bump into them in a crowded train or street. When we hurt or damage another person's interests an apology can also be a way of both managing and de-escalating a conflict. Take the situation

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where you are being criticised or chastised for behaviour which another person considers hurtful. An apology and/or acknowledgment of this hurt can be a way of decreasing the criticism and moving on to more productive interactions. If the other person persists in their criticism and chastisement, then they risk becoming the unreasonable party. Think of some instances where you may have better managed a situation; where you could have acknowledged your behaviour and then apologised. There are many examples in public life where politicians, business leaders or church leaders are called upon to apologise.

Can you think of any situations in which an apology has been effective?

Beverly Engle in her useful book *The Power of an Apology: Healing Steps to Transform All Your Relationships* (2009) argues that an apology, to be effective, requires three components. She calls these components the 'Three R's': regret, responsibility and remedy. Engle argues that as well as expressing regret a person seeking to give an apology also needs to take responsibility for their actions and then express a willingness to do something to redress the situation. Incomplete apologies can be seen as insincere and worse than saying nothing at all.

Can you recall a time when you may have needed to make an apology where you were not able to or where your apology did not work? Why do you think this happened?

Exercise 10 Case example: The wheelchair and the owners corporation

The claimant, Kate, is the mother of a profoundly disabled man, Steve, who is ambulatory only through the use of a large 150 kg-plus wheelchair. Kate and Steve live about one-third of the year in a Melbourne inner city apartment (administered by an owners corporation (OC), which is a committee made up of lot owners) and the rest of the year in their home town some 150 kilometres away. Kate bought the unit about 5 years ago and thought it would be perfect because Steve regularly needs to attend for treatment at inner city hospitals. Kate can also take him to sporting venues such as the MCG and the Rod Laver Arena; Steve has a passion for watching sports. Unfortunately, Steve's condition is slowly deteriorating and his ability to access the apartment

building directly from the street is heavily compromised. This is because the building, although refurbished some ten years ago, is a heritage listed site and was constructed over 100 years ago. To enter the building from the street requires Steve and his mother (or carer) to climb two steps, go through a heavy security door (opened with a pass key) and go through another heavy door to a small lobby where the lifts are located. Kate has received a quote for $70,000 for remedial work to install a ramp, better key positions and fittings. The alternative entry to the apartment building is from an adjacent carpark and through several long corridors, or through a downstairs bar that is also in the building.

Kate believes that the apartment is not compliant with anti-discrimination laws and current building standards as it does not allow disabled access. The OC believes that any work performed on the building's entry (which it is agreeable to) should be at Kate's expense and not that of the OC and the other 15 lot owners. In any case, the OC considers that the alternative access to the building is sufficient and that Kate was aware of what she was buying when she purchased her apartment. Also, it believes that the lobby is not a public, but a private, space and, accordingly, that it

should be treated like a private home, which is not subject to discrimination laws for public places. In addition, the front door needs to be locked because the homeless, drug addicts and inner city revellers frequent the lanes around the building and would use the premises for a variety of activities if it was left open.

The OC acknowledges that it is required to allow the installation of better access facilities if Kate pays for them, but says that it is not liable otherwise. The OC is afraid that to acknowledge otherwise would create a precedent that could be very costly, and is upset that it is being accused of discrimination. Kate is upset that the OC will not take responsibility and does not seem to understand that the improvements to the building's access would benefit everyone and make the building and its units more attractive as investments as well as better accessible to guests and to the lot owners themselves, some of whom are aging and infirm.

Instructions: Identify the advantages and disadvantages of various dispute management processes that may apply.

Process	Advantages	Disadvantages
One-on-one Representational; for example, lawyer, expert advisor, social worker Third party; for example, mediation, litigation		

You can see from an analysis of the issues in this scenario (based upon an actual case) that the type of third-party involvement in a conflict can be crucial and quite different in terms of party autonomy and eventual outcomes. The level of analysis must therefore consider not only the basis (one-on-one, representational or third-party) but the type of intervention that will be made within this framework. Consider how the outcomes, as well as the process, may be impacted by using different types of interventions. **Exercise 4** above may help you analyse this issue.

Exercise 11 Questions

(a) Why would you want to avoid conflict?

(b) When would you want to generate conflict?

(c) What may happen if one or more parties to a conflict deny its existence?

(d) Do you think that the way in which our society organises its dispute settlement procedures 'communicates our ideals', as Auerbach suggests?

(e) What are the three crucial elements of control studied by researchers when investigating disputant's perceptions?

(f) What are the relative advantages and disadvantages of one-on-one, representational and third-party forms of conflict management?

(g) Why do you think apologies (see **Exercise 9** above) need to be sincere and complete to be effective?

Chapter 3

Communication: Managing Emotions, Difficult Conversations and Complaints

Summary

This chapter emphasises the importance of mastering the skills of active listening, assertiveness and some tactical communication skills I call 'verbal jujitsu', when managing difficult conversations and complaints. Communication ideals (genuineness, congruence and unconditional positive regard) are the background against which these skills are used.

This chapter explores Kantor's 'structural dynamic theory' and outlines research into emotional intelligence and management. This includes summaries of the important contributions of theorists such as Ekman, Tomkins, Nathanson, Kahneman, Salovey and Mayer. The barriers to effective communication and questions — 'swords that cut both ways' — are examined. In addition, it outlines a five-step assertiveness process as well as seven ways to say 'no'. The chapter outlines the nature of complaints and provides some guidelines for managing them.

Related to this is a typology for understanding how we perceive and transact with each other differently — this will be used as the basis for managing difficult situations and 'difficult people'.

Introduction: Reading the Room

3.1 This chapter provides a brief introduction to the two major ingredients of good communication — active listening skills and assertiveness skills. They, along with the skills involved in conflict management, form a communication hierarchy as represented below. Combined with the techniques of 'verbal jujitsu' (which I will explain further below) they enable the conflict manager to more effectively manage complaints and other difficult encounters.

While these skills are often used simultaneously and are interdependent, it is sometimes helpful to view them as a hierarchy. For example, when learning about conflict management processes such as mediation or negotiation it is often difficult to understand the concepts, and apply the necessary skills, without first having at least a grasp of the skills outlined in this chapter. Similarly, being skilfully assertive depends on an understanding of the concepts and skills of active listening. In my view, you cannot ascend the hierarchy to arrive at the top without first mastering active listening skills and assertiveness skills. Recent developments in the field of communications theory and practice, particularly those of David Kantor (2012), who draws upon systems theory, give us some further insights into what is involved in

being a good communicator and have begun to have some impact in the field of conflict theory and management.

According to Kantor, every conversation is made up of individual acts of speech: statements and questions. The 'speech act' is his basic unit of analysis. He categorises every speech act into one of four types of action (being a mover, opposer, follower or bystander); one of three types of content (power, meaning or affect); and one of three types of paradigms, or rules for establishing paradigmatic legitimacy (open, closed or random). These categories combine into 36 kinds of speech acts, which to Kantor are the building blocks of human interaction. They can be deliberately sequenced to set the direction of a conversation. Intervening with the right speech act at the right moment can catalyse a shift in thinking or action for everyone involved. If this seems complicated, that's because it is!

In Kantor's model, everyone has speech acts that they use more frequently than others, but nobody is completely a mover, opposer, bystander or follower. These are descriptions of vocal actions. Change your vocal action, and you can change how people perceive you. Change what people perceive and you'll change how they respond with their own vocal acts. In this model, good communicators can move

easily and quickly between the different speech acts. The goal of Kantor's model is to increase communicative competency, which, in Kantor's terms, means being able to 'read the room'. This chapter is about 'reading the room' and Kantor's ideas on this are important, along with the ideas of others that we will touch on in this chapter.

The Kantorian crisis and the heroic modes

In the Kantor model, when people become involved in conflicts and difficult dynamics

where the 'stakes' become high they can go into a 'crisis' and enter into more urgent, less thoughtful forms of conversation. So a person prone to affect shifts to being an advocate, going from 'I feel' to 'we should' and arguing from a position of passion. A power-oriented person becomes a prosecutor, going from 'let's do' to 'you must do' and forcing others to perform. And a meaning-oriented person becomes an adjudicator, going from 'I think' to 'I decide' and imposing a framework of logic.

If the conflict further develops, these stances become even more pronounced; they become what Kantor calls 'heroic modes'. The advocate is now a protector, doing whatever must be done to shield others from harm. The power-oriented prosecutor becomes a fixer, out to conquer all enemies and win at all costs. And the adjudicator retreats into being a survivor, intent only on manifesting the cause and enduring the oppression and aggression.

According to Kantor, none of these modes is morally superior to the others. The problem is, however, that they lead people, especially leaders, in directions that are counterproductive. At the start of a crisis, people enter the heroic modes in a mild form, but people can gradually become more extreme: fixers become aggressive, protectors feel wronged, and survivors withdraw and endure. When left unchecked these tendencies towards extremism lead to the same basic attitude: the ends justify the means. And then the crisis accelerates. The fixers discover they cannot win, or cannot solve every problem; the survivors discover they cannot really withdraw; and the protectors find they cannot keep everyone from getting hurt. So they start to blame one another.

To help you utilise some of these useful ideas, go to **Exercise 11** at the end of this chapter, where you can analyse some of these aspects more closely. **Chapter 9** also features some of Kantor's ideas relating to group and organisational dynamics.

Communication Ideals

3.2 Since psychologist Carl Rogers (1951) popularised the basic concepts of modern communications theory in 1951, most humanist communication theorists have concluded that there are several main ingredients in good communication: genuineness or congruence, empathic understanding and unconditional positive regard. These are outlined in the box below.

Communication ideals	
Genuineness or congruence	This is the ability of the communicator to be himself or herself without putting up a facade. The communicator is 'real' in the sense that his or her words are congruent with what he or she does. The communicator is transparent to the other.
Empathic understanding	This is the ability of the communicator to put himself or herself in the other's shoes and communicate this understanding to the other.
Unconditional positive regard	This is the communicator's ability to unconditionally accept the other as he or she is and his or her potential for growth or change.

(See Corsini, 2010, Ch 5)

Unfortunately, these aspects of communication are sometimes treated as being absolute conditions for effective communication. I prefer to see them as 'ideals' in the sense that they are ways of being that we strive to reach without always being able to do so. It is not always easy or possible to achieve these ideals because of the many barriers that get in the way of effective communication.

Barriers to Effective Communication

3.3 The inability to communicate effectively can both create conflict and

impede its effective management. Our ability to communicate often degenerates into conflict. Robert Bolton (2009) in his book *People Skills* lists 12 barriers to communication. These can be divided into three major categories: judging, sending solutions, and avoiding the other's concerns. These are listed in the box below.

Twelve barriers to effective communication

1	Criticising	Judging
2	Name calling/labelling	
3	Diagnosing	
4	Praising evaluatively	
5	Ordering	Sending solutions
6	Threatening	
7	Moralising	
8	Excessive/inappropriate questioning	
9	Advising	
10	Diverting	Avoiding the other's concerns
11	Logical argument	
12	Reassuring	

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While the above are often barriers to communication, it does not mean that they should never be used. Each of the behaviours can be seen on a continuum, at one end of which is 'inappropriate use' and at the other 'appropriate use'. What is appropriate may depend on many different factors. For example, constant evaluative praise, or praise with an ulterior motive, is inappropriate, but praise itself is often a very productive response. Likewise, advising may be an appropriate response where advice is sought, but not

when it may be better to listen to and understand another's problems first, before providing what otherwise may be premature advice. To understand why these responses may become barriers to effective communication, look at the following brief reasons (adapted from Bolton, 2009, pp 15–16).

Responses that can stifle effective communication

Criticising — can be inappropriate and excessive, leading to defensive and/or aggressive responses. It is often justified as a way of getting another to improve or perform better. There are often better alternatives.

Name calling and labelling — tend to put barriers between people by creating a 'box' into which we place others. The result is often to distance others from us.

Diagnosing — a more sophisticated form of labelling practised often by professionals of various kinds. It can damage communication for the same reasons as labelling.

Praising evaluatively — unrestrained praise is often insincere and hollow. It can also be manipulative if the person using it has an ulterior motive. The result is often resentment.

Ordering — 'ordering' is a demand to do something. If ordering is used with coercion, it can create resistance and anger. Responses can range from sabotage to submission.

Threatening — has the same effects as ordering but they are often more pronounced.

Moralising — Bolton describes this behaviour as people putting 'a halo around their solutions for others' (2009, p 21). Moralising creates many problems, including resentment, increased anxiety and, often, pretence in the communication.

Excessive or inappropriate questioning — unavoidable and valuable tools of communication but when used to excess create boredom and unnecessary distance between people. There are often better, more direct, ways of communicating.

Advising — advice is sometimes valuable but when used inappropriately (which is often the case) it may damage the other's confidence or fail to enhance his or her own problem-solving abilities. It often prevents a full exploration of the issues.

Diverting — often used to avoid the unpleasant, unpalatable or the uncomfortable. It can create a lot of tension.

Logical argument — it is necessary, but using logical argument when emotions are running high may be inappropriate because it creates distance.

Reassuring — sometimes a way of avoiding the issues while having the appearance of providing comfort. It can, in some cases, be very frustrating for the person being reassured.

Active Listening: The Elemental Skill of the Conflict Manager

3.4 'Elemental' is a good word in the context of communication theory and practice, because it describes something that is fundamental or basic. The skill of listening is elemental. The Australian edition of the *Collins English Dictionary* defines 'listen' as:

1. To concentrate on hearing something. 2. To take heed; pay attention.

Many books have been written about this essential skill that seems so basic but that is constantly used inappropriately (or not used at all!). The term 'active listening' is useful because it implies that listening is not a passive exercise. Active listening involves a number of essential components, which can be divided into three broad categories: attending skills, following skills and reflecting skills. These are summarised in more detail below. It is not the intention of this chapter to go into the intricacies of each of these communication skills, but rather to flag them as essential elements in effective conflict management. There is a range of specialist books that provide further information on this subject.

Active listening skills

Skills:	**Demonstrated by:**
Attending skills	
• Appropriate non-verbal skills	• Open posture/inclining body forward/appropriate distance/effective eye contact
• Providing an appropriate environment	• Careful regard to seating/light/sound/no interruptions
Following skills	

• Appropriate cues to help the other to begin talking	• Non-advice giving/no false reassurances/open and honest invitation to talk/emphasis on exploring the problem/non-defensive/attending skills
• Appropriate cues to help the other continue talking	• Minimal encouragers (for example, 'hmm')/little questioning/open questioning/silence
Reflective listening	
• Clarification	• Requesting confirmation of what has been said
• Reflective responses	• Responses that summarise the feelings and factual content of the other's responses
• Paraphrasing	• Concise, specific and concrete responses that include essential elements of the other's position and interests
• Summarising	• A brief restatement or synthesis of the other's statement/s

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Questions: Swords that Cut Both Ways

3.5 As already mentioned, questioning can be both appropriate and inappropriate. It is appropriate when used constructively and economically

but inappropriate when used as a device to block active listening. Some people rely on questioning too much, which can make a conversation or negotiation seem more like an interrogation. It is often used in this way as a means of maintaining control. Questions are also used either to conceal a lack of knowledge or to delay proceedings. They can also be intrusive and confrontative. Used this way, questions can be quite discomfiting or inappropriate, especially at delicate stages of negotiations.

Questions can be closed or open. Open and closed questions are not mutually exclusive categories but, like most aspects of behaviour and communication, can be seen as part of a continuum. In a conversation it is usually better to start with open questions, so that rapport is built up and the other's anxiety eased. Closed questions can put the respondent on the defensive if used too early; that is, they are better saved for later in a conversation when more detailed information is required.

Open questions	**Closed questions**
These allow the respondent to answer in the way he or she wants to.	These do not allow the respondent a great deal of scope in answering but control or direct the answer in a certain way.
Example: 'What are your plans after finishing this job?'	**Example:** 'Do you intend to go on to the Smith job after this one?'

One variation of the closed question is the 'leading' question used extensively by lawyers when cross-examining witnesses. Examples of leading questions are: 'So you then went along in a westerly direction, didn't you?' or 'You are committed to this company, aren't you?'. They are useful in testing the respondent's facts but can be damaging to an interaction when not used correctly.

'Either/or' questions can also be also problematic. They have some of the difficulties already discussed, but also make it harder for the respondent to answer directly. For example, the question 'Do you love your children or your husband more?' presents the respondent with a difficult choice and can create obvious discomfort. A question like 'Are you going to leave her or put up with it?' is equally difficult. Change these into open questions and leave out the 'or'; for example, 'What do you feel about your children?' and 'What do you feel about your husband?'. The respondent can then come to his or her own conclusions in a more comfortable way.

Being directive

3.6 Conflict and negotiation situations sometimes require direct and directive responses. For example, Party A, in a negotiation about respective job roles and duties, says to Party B:

> I don't like how you behave in front of the Supervisor, hogging the limelight and showing off. Further, you are untidy and this affects me personally.

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> It's unreasonable and any ordinary person would not have put up with it for five minutes.

It may be helpful in these circumstances if Party B listens actively and then replies as follows:

> You have identified two important issues. One, how I behave in front of the Supervisor, and two, my untidiness. Could you be more specific about these two issues so that I can understand them better?

Party B's response is both a paraphrasing of Party A's assertion and a directive question about where to go next. This is often helpful in conflict when used skilfully and at the right time. Third parties such as mediators and arbitrators often need to be directive to enable the parties to break through

blocks in their communication. For example, you can use questions and statements such as:

- 'When will you be able to do that?'
- 'What do you need to do now?'
- 'I think you now need to stop and reflect before going on.' Or, put as a question, 'Can you now just pause and reflect before going on?'
- 'Let's now move on to what you said before about X because it ties in with what is being said now.' Or, put as a question, 'Could we go back to what you said about X as it would seem to relate to what is being said now?'

Managing Anger and Other Emotions in Conflict

3.7 In **Chapter 1** we discussed the three important intangible elements in conflict: emotions, values and interests. The word 'emotion' comes from a Latin word meaning 'to move'. Theorists often distinguish between primary emotions (innate emotions such as fear) and secondary emotions (feelings attached to objects such as dental drills) (Damasio, 1994). According to Johnson (2007), an emotion consists of a number of elements: a rapid general appraisal (good/bad; safe/threat); a body response (for example, heat in the hands when anger is cued or detected or in the feet when fear is cued); a slower meaning assignment or cognitive reappraisal (for example, 'Yes — it is a huge water snake'); and, finally, an action tendency (for example, to run away). Emotions are discrete, adaptive responses to a situation or the environment that contain both psychological and physiological components.

Many of our contemporary ideas about emotions come from the work of Paul Ekmann (2003), a psychologist who was a pioneer in the study of

emotions and facial expressions. His carefully conducted experiments were a model of elegance for other psychologists.

Contrary to the belief of some anthropologists at the time, including Margaret Mead, Ekmann found that facial expressions of emotion are not culturally determined, but universal to human culture and thus biological in origin, as Charles Darwin had once theorised. Ekmann's findings are now widely accepted by scientists. The expressions he found to be universal included anger, disgust, fear, joy, sadness and surprise. The findings on contempt were less clear, although there was some preliminary evidence for its being universally recognised. Ekmann also reported facial

'micro expressions' that he showed could be used to reliably detect lying. Later, in the 1990s, Ekman proposed an expanded list of basic emotions, including a range of positive and negative emotions that are not all encoded in facial muscles: amusement, contempt, contentment, embarrassment, excitement, guilt, pride in achievement, relief, satisfaction, sensory pleasure, and shame (Ekman, 1999).

Ekman and his colleague Wallace Friesen demonstrated that their findings extended to a remote preliterate tribe in Papua New Guinea, whose members could not have learned the meaning of expressions from exposure to media depictions of emotion (Ekman and Friesen, 1971). They then demonstrated that certain emotions were exhibited with highly specific display rules, culture-specific prescriptions about who can show which emotions to whom, and when. These display rules can explain how cultural differences may conceal the universal effect of expression.

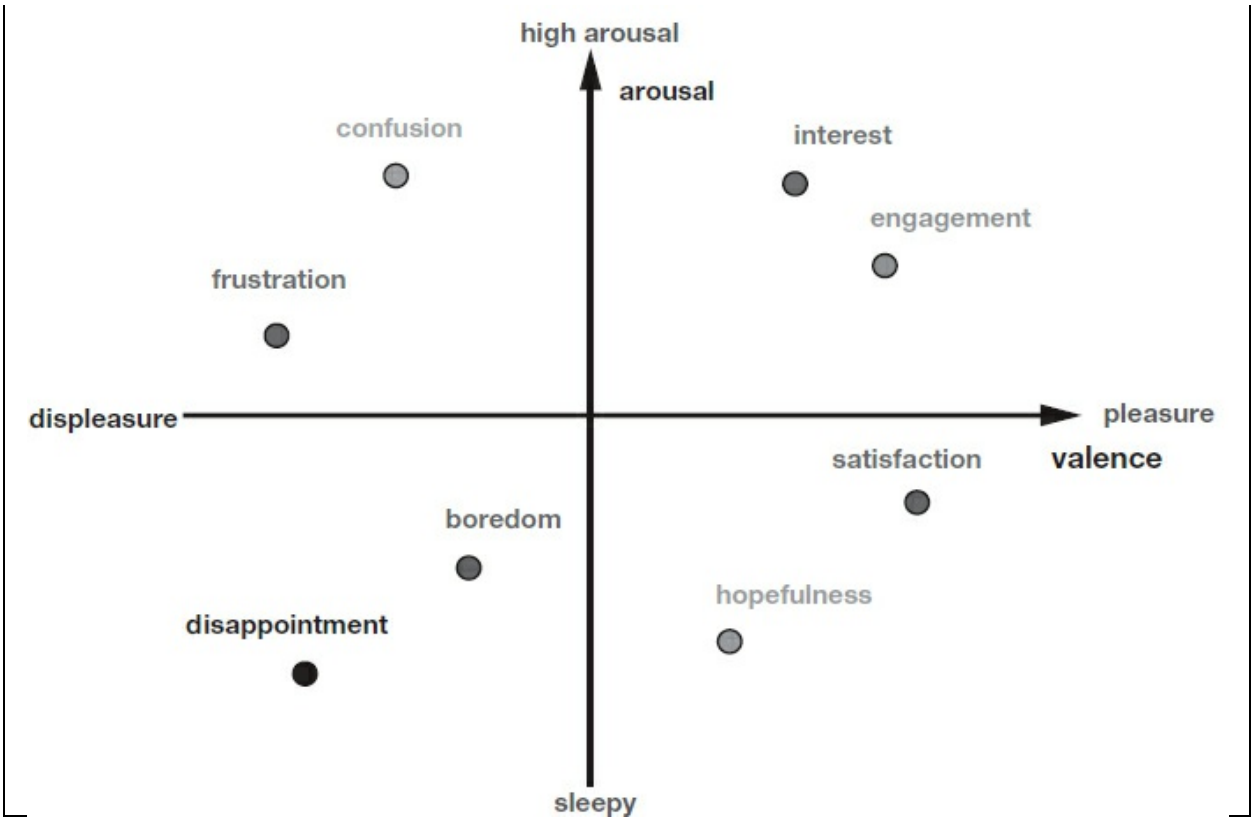
The affect heuristic

Available research tells us that affective preferences guide decision-making and can be

deeply entrenched. The reliance upon emotions to aid decision-making can also make people vulnerable to making bad decisions in certain circumstances. An 'affect heuristic' is a phenomenon in which people attach emotions (affects) to their mental representations of objects and actions. They are then able to make faster, more efficient decisions by referring to these affective tags rather than needing to work through the benefits and consequences of each decision every time they make a choice. However, this faster decision-making has the disadvantage of being more likely to be wrong or biased. See **Chapter 7** and the reference to Kahneman's (2011) interesting contrast between system 1 and system 2 thinking outlined therein; and **Exercise 40** in that chapter.

Of course, there are competing theories and models in the field of emotion theory as in others. Russel's circumplex model of emotion, for example, suggests that emotions are distributed in a two-dimensional circular space, containing arousal and valence dimensions (valence is a measure of the negative or positive aspects of an emotion) (Russel, 1980). Arousal represents the vertical axis and valence represents the horizontal axis, while the centre of the circle represents a neutral valence and a medium level of arousal. In this model, emotional states can be represented at any level of valence and arousal, or at a neutral level of one or both of these factors. Circumplex and similar models have been used extensively in psychological research (Posner, Russel and Peterson, 2005). The circumplex model proposes that all affective states arise from cognitive interpretations of core neural sensations that are the product of two independent neurophysiological systems. This model stands in contrast to theories of basic emotions such as Eckman's described above, which argue that a discrete and independent neural system subserves every emotion. This model, and others like it, critique basic emotion theories as no longer explaining adequately the vast number of empirical observations from studies in affective neuroscience.

Russel's circumplex model of emotion



Emotions are an essential element of relational systems and are a core element in communication (see Bowlby, 1969, 1973, 1980). Johnson (2007, p 18) summarises the functions of emotions as follows:

- offers us an internal compass to orient us to what matters and tell us what we want and need;
- primes key cognitions and guides the creation of meaning; colours the perception of the nature of self and the nature of key others;
- primes us for action in a rapid, compelling manner;
- communicates to others our inner states and solicits or 'pulls' specific responses from others in a visceral way. This is especially true in the context of attachment bonds; and
- is a primary signalling system that organises interactions. It is the music of the dance between intimates.

Furthering some of these ideas, Van Cleef (2008) provides a useful and

practical analysis through what he calls the 'EASI model'. He states:

> The premise of this perspective is that, just as mood provides information to the self emotional expressions provide information to observers, which may influence their behavior. The EASI model extends this notion by identifying two processes through which observers' behavior may be influenced: inferential processes and affective reactions. Imagine you are meeting a colleague in a bar, and you show up thirty minutes late. Your colleague expresses anger regarding your tardiness. On the one hand, your colleague's anger may lead you to realize that he or she is upset with you; that you are late; and that this is inappropriate (a sequence of inferences), which may motivate you to be punctual next time (behavior).

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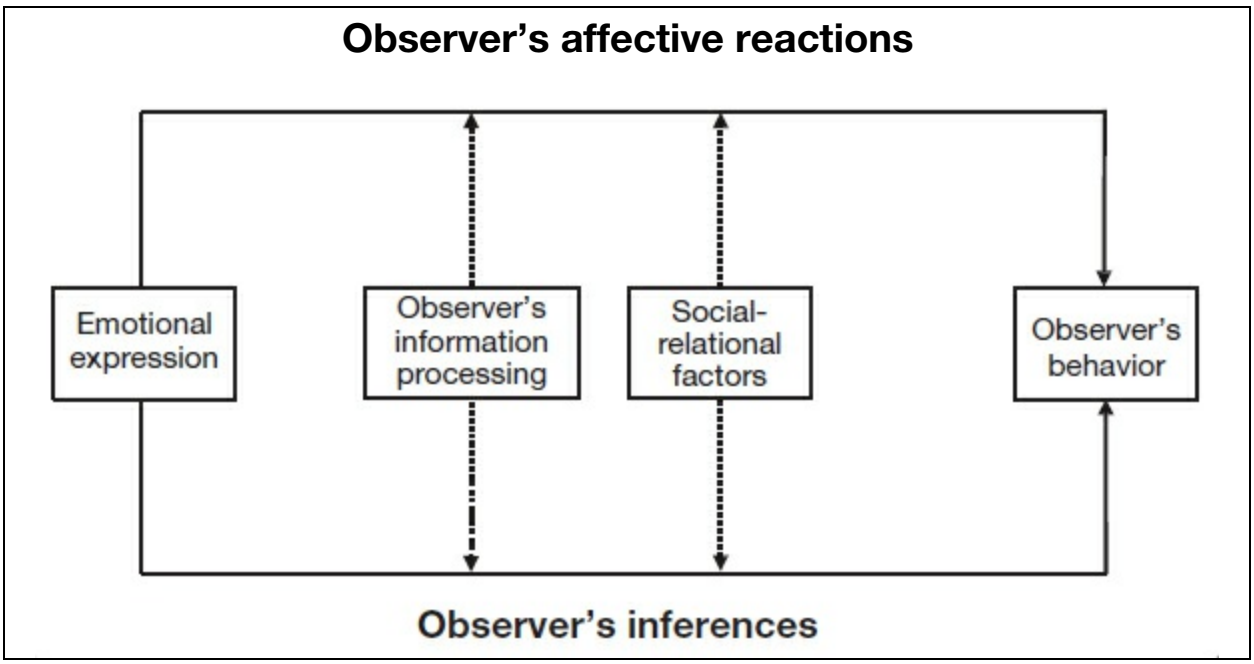
> On the other hand, the anger may upset you and make you dislike your colleague (affective reactions), and possibly cause you to decide not to meet anymore at all (behavior).

Van Cleef's model can be outlined as follows.



Van Cleef's model can be likened to and contrasted with the ladder of inferences outlined in **Exercise 8** at the end of this chapter.

Furthermore, emotions can be distinguished by particular cognitive antecedents, comprising such things as the blaming of opposing parties,

concerns over losses or judgements or blame (Luterbacher and Sandi, 2014). Therefore, it is important for the conflict manager to consider emotions as an important indicator of the intentions of the parties in conflict. In a useful summary, Olekalns and Druckman (2014) distinguish four broad themes in research into emotions and negotiation: moves and exchanges (the behavioural consequences), information processing (cognitive perspectives), social interaction, and context. The authors' review reveals that much of the research on this topic has focused on two key emotions: anger and happiness.

The role of anger

3.8 In behavioural studies, researchers often distinguish between *interpersonal* and *intrapersonal* anger (Van Cleef et al, 2008). Interpersonal anger refers to the effect of one person's display of anger on another individual. Intrapersonal anger, by contrast, refers to feeling angry; that is, felt anger. Both types of anger can have an impact on conflict management behaviour and outcomes. As Denson and Fabiansson (2011, p 140) state:

> Whether a negotiator simply expresses or experiences anger can result in very different negotiation outcomes. Anger can be examined from an intrapersonal perspective (i.e., felt anger) or an interpersonal perspective (i.e., the effects anger expression on others). Generally, intrapersonal anger in negotiations is thought to result in poorer negotiation outcomes than interpersonal anger. For example, intrapersonal anger can produce stalemates, conflict, and economically irrational behaviour. By contrast, expressing anger can result in financial gain by encouraging opponents to make concessions. For example, a salesperson may be likely to give in to an angry customer demanding a discount in order to avoid further escalation of conflict and minimize disruption to other customers.

> Despite these sometimes positive benefits, strategically using anger to obtain demands is a limited short-term strategy. For example, anger can negatively impact relationship quality and make people less willing to negotiate again in the future. Over time counterparts may habituate to anger expressions and they may no longer be effective. For example, an angry outburst may be effective the first time; however, the second time one tries this strategy, the other negotiator may resist their

demands. Furthermore, over time an angry negotiator may develop an argumentative reputation which could negatively influence subsequent negotiations. Therefore, expressing anger is doubtful as an effective long-term strategy and may only be effective in single instances of negotiation. However, even during one-time negotiations among strangers, research suggests that expressing anger requires very specific conditions to be effective. These variables include how, when, who, and where the anger is expressed. To quote Aristotle, 'Anyone can become angry. That is easy. But to be angry with the right person, to the right degree, at the right time, for the right purpose and in the right way — that is not easy'.

In an interesting experiment, Fabiansson and Denson (2012) examined bargaining behaviour within the context of 'the Ultimatum Game' (for a better understanding of this game, see **Exercise 9** at the end of this chapter). Utilising a complex research methodology that required provoking pre-arranged anger in some participants before entering into a variant of the Ultimatum Game, they found that the provoked participants punished their respondent in the game more than unprovoked participants. Angered participants were more likely to give money to a new unknown participant than to the person who provoked them. Angered participants also proposed less fair offers to their respondent than unprovoked participants; they were also less willing to accept offers from the respondent regardless of how fair the offer was. In sum, provoked participants had poorer financial outcomes than unprovoked participants when bargaining with the respondent. These findings suggest that intrapersonal anger adversely influences bargaining. The authors then took the experiment one stage further by setting up an experimental situation where some of those who were provoked were able to engage in 20 minutes of 'reappraisal' or 'distraction' using a guided writing task (for a description of these terms, see the box below). Subsequently, participants completed the Ultimatum Game. The authors expected that relative to the distraction condition, participants who reappraised would be less angry, propose fairer offers and accept more offers.

What they found was that reappraisal produced the most effective and temporally stable decrease in anger. Distraction was effective in reducing anger immediately following the provocation; however, during the negotiation task, anger increased again; that is, distraction did not have a

long-term effect. The authors noted that these findings converge with prior research. In fact, the influence of emotion regulation strategies on bargaining behaviour was shown to be somewhat complicated. Reappraisal did not increase fair treatment specifically towards the respondent. Instead, reappraisal increased the fairness of all offers proposed compared to the distraction condition.

Further, reappraisal did not affect punitive behaviour. When participants were given unfair offers they punished both respondents and others ('control respondents' who had not been involved in the provocation) involved in the experiment equally, by rejecting a similar number of offers. However, when the offers were fair, participants rejected more offers from the respondent than the control respondents, suggesting

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retaliation toward the provocateur. In other words, relative to distraction, reappraisal reduced anger during bargaining and improved fair behaviour but had no effect on punishment.

Emotional regulation: Cognitive reappraisal, distraction, rumination, faking it and suppression

Emotion regulation is the process by which we influence which emotions we have, when we have them, and how we experience and express these emotions.

- **Cognitive reappraisal** involves reinterpreting an anger-eliciting event in neutral, less emotional terms by considering the event from a non-personal, objective perspective. Reappraisal may also include consideration of any positive aspects of the event, such as lessons learned. For example, in the experiment by Fabiansson and Denton described above, the antecedent reappraisal was that the respondent was having a 'bad day'. Reappraisal works because instead of fixating on what went wrong in a negotiation reappraisal may involve focusing on future changes that can be made to improve subsequent negotiations. It generally works best when it is applied before the onset of the emotional response; that is, before a negotiation
- **Distraction** involves directing attention away from the anger-provoking event to unrelated neutral or positive stimuli. For example, in the experiment by Fabiansson and

Denton, the distraction was to ask participants to write for 20 minutes about a short list of pre-arranged topics. Relative to thinking about an anger-inducing event, distraction following anger provocation also reduces intrapersonal anger.

- **Rumination** involves focusing on your emotions and feelings without constructive problem-solving. In the Fabiansson and Denson experiment, this consisted of the participants writing about the feelings and thoughts they had towards others in the study. This manipulation did not have any significant effect, although the participants subject to it did express more positive words towards the other participants.
- **Faking and suppressing emotions** involve focusing on masking emotions rather than cognitive change. Although not as effective, these strategies can still have some impact on managing and preventing the escalation of aggressive or other negative tactics. These tactics are often used when the person does not have as much control in a potential conflict context.

For a good summary and further exploration of these strategies, see Denson and Fabiansson (2011).

Van Kleef (2009) and his colleagues summarised the conditions that influence the interpersonal effects of anger. In their view, anger helps achieve favourable outcomes for both parties when:

- it is directed at the task rather than the person;
- it is viewed by the other as being justified;
- the relationship between bargainers is interdependent;
- the expression has informational value;
- the bargainers take a strategic approach that encourages using the expression as information that can aid coordination, and;
- the target of anger has few opportunities to deceive.

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In a conflict, anger is also often related to and accompanied by threats (Sinaceur et al, 2011). Sinaceur and his colleagues showed that anger communication is effective in eliciting concessions, as it conveys an implied

threat. Their research demonstrated that direct threats were even more effective than anger in getting what we want. Along with that, calmly issuing a threat can also be effective instead of implying threat through anger. Apart from implying threat, anger can also pose a challenge to the participant (Van Beest and Scheepers, 2013). According to these latter researchers, the anger demonstrated can lose its effect when it does not lead to concession-making. In this sense, anger can be seen also as a sign of weakness.

Anger and how it is used can also be correlated with the respective power of individuals in a conflict (Overbeck et al, 2010). In negotiation, power is the ability to bring about desired consequences or to stop things from happening which you don't want to happen (Kim et al, 2005). Van Beest et al (2006) found that expressions of anger can lead to status conferral, indicating that individuals who display anger may be perceived as more powerful than individuals who do not. Participants with low power and status can be strongly affected by their opponent's emotions while those with high power are almost unaffected, and participants make larger concessions and lower demands when their counterpart displays anger rather than happiness: see **Exercise 10** at the end of this chapter for a comment on gender and power.

The other aspect that is important in relation to emotions is that they can influence the quality of argument and negotiation. Butt and Choi (2006), for example, describe *integrative and dominating behaviour* patterns through emotional display and responses. Integrative emotions such as gratitude can lead to reciprocation through feelings of obligation. Dominating behaviour such as competition and threats, often associated with anger, can be a way of getting your demands satisfied. In this way, anger can be seen as an efficient way to control the behaviour of the other party in negotiations. However, for the anger to be effective in this way it must be controlled and directed.

In addition, the experiments by Van Beest and Dreu (2010) show that apologising can alleviate the negative relational consequences of anger expression. According to them, participants whose partner apologised after expressing anger developed more favourable impressions and were more

willing to engage in future negotiations with the partner than those with non-apologetic partners. In fact, impressions were just as positive as those of non-angry partners, suggesting that apologies can eliminate the negative social consequences of anger altogether.

Positive emotions have received much less attention by researchers than negative emotions. But positive emotions can facilitate negotiation and conflict management. They can increase the likelihood of deal-making and, importantly, that participants will want to deal with each other again (Kopelman, Rosette and Thompson, 2006); that is, they strengthen ongoing relationships and the ability to make agreements. This theory suggests that viewing situations according to a distant time horizon ('taking the long view') is more likely to trigger cooperation and creativity than considering the situation according to a more limited time horizon (Henderson, Trope and Carnevale, 2006; Trope and Liberman, 2010). The impact of emotions can have a long-term social or interpersonal impact, particularly in what is termed the 'shame-rage cycle'.

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Scheff and Retzinger (1991) argue that many cases of social conflict are based on a destructive and often escalating, but stoppable and reversible, shame-rage cycle: when someone feels shamed by another, his or her social bond comes under stress. This can be cooperatively acknowledged, talked about and sometimes laughed at, so that the social bond may be restored. However, when shame is not acknowledged, but instead negated and repressed, it becomes rage, and rage may drive aggressive and shaming actions that feed back negatively on this self-destructive situation. Scheff and Retzinger postulate that the social management of emotions might underpin the fundamental dynamics of social cooperation and conflict.

Davide Pietroni and his colleagues (2008) found that when negotiators

display happiness in relation to high-priority issues and anger in relation to low-priority issues, integrative or value-creating behaviours increase, but when they display the reverse pattern (anger about high-priority issues and happiness about low priority-issues), integrative behaviours decrease. Moreover, Elise Kalokerinos and her colleagues (2013) found that negotiators who suppress happiness at winning are rated more positively and more likely to be viewed as potential friends, in part because the suppression of happiness following victory conveys a desire to protect a counterpart's feelings.

Affect theory and the role of shame

3.9 Relevant broadly to managing emotions in conflict, and particularly the study of shame, has been the theory of emotion developed by Silvan S Tomkins in a series of four volumes, entitled *Affect Theory*, published between 1962 and 1992. Affect theory has been particularly important in the development of restorative justice theory, victim–offender mediation and conferencing within criminal justice systems. Tomkins's concepts challenged the established theories about emotions, including the 'drive' theories of psychoanalysis and those of cognitive behaviour therapy. Affect theory contends that human infants are born with a finite set of innate affects. These affects provide the biological component of emotion. The affects are experienced throughout the body but they are most visible on the face. The actual experience of an affect state is quite brief, but affect states can be maintained by thoughts and memories which continue to stimulate the affect. This leads to the difference between affects and emotions. Emotions are composed of an assemblage of affect and cognition. Children are born with the ability to experience affects, but their emotions only develop over time as they develop memories associated with specific affect states. The result is that everyone has the same affects but each person's emotions are unique. This leads to considerable potential for misunderstanding in intimate relationships.

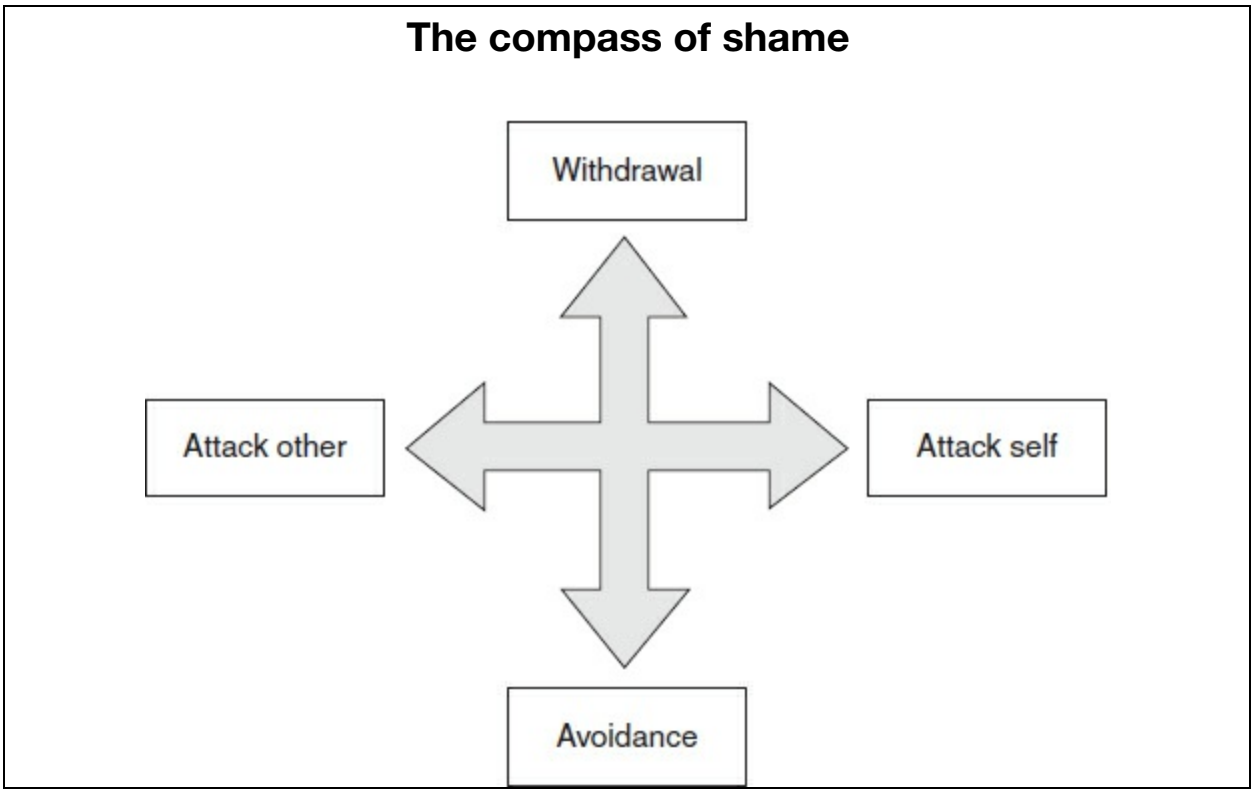
Tomkins's insight was that affects provide the vast majority of our motivation. Positive affects motivate us to seek or continue the events that activate them; negative affects motivate us to diminish or escape the events that activate them. It is not our cognitive understanding that motivates us to leap out of the way of an oncoming vehicle — it is our fear affect. Interest-excitement and enjoyment-joy, the two positive affects, are counterbalanced by six decidedly negative affects (fear-terror, distress-anguish, anger-rage, dismell-disgust (the word 'dismell' or 'dissmell' was invented by Tompkins to describe the reaction to a bad smell) and shame-humiliation), all of which may be

halted instantly by surprise-startle, an affect that is too brief to have either a positive or a negative flavour. The effect that these nine affects have on bodily structures that evolved for other reasons (for instance, heart rate, voice, facial musculature, or sweat) is quite different for each. Affect theory views the drives, or the things that motivate us, as simple biological needs. Thus, there is a drive to acquire sufficient water, a drive to reproduce and a drive to maintain a continuous supply of oxygen. The drives provide relatively weak motivation — a drive must recruit an affect to bring a sense of urgency to the need. So it is not simply the drive to have air that helps us find the strength to fight our way to the surface if we are stuck underwater — it is the affect or affects that have been recruited by the drive. Tomkins also noted that there are some affects that function only to moderate other affects. One of these is the shame affect; it functions to moderate the positive affects. If a person is experiencing the pull of a positive affect toward some goal, and then encounters an impediment to achieving that goal, the shame affect is activated. The shame affect is not the same as the emotion we know as shame, but it is an essential part of that emotion.

Tomkins's work was further developed by Daniel Nathanson, particularly in his study of the effects of shame (1998). Nathanson explains that shame is a critical regulator of human social behaviour. Tomkins defined shame as occurring any time that our experience of the positive affects is interrupted (Tomkins, 1991). So, an individual does not have to do something wrong to feel shame; he or she just has to experience something that interrupts interest-excitement or enjoyment-joy (Nathanson, 1997). Nathanson explains that shame is a critical regulator of human social behaviour.

3.10 These ideas have had significant influence on the development of restorative justice practices, which will be described in **Chapter 8**. The most critical function of restorative practices like victim–offender mediation and conferencing is restoring and building relationships. Because these processes promote the expression of affect or emotion, they also foster emotional bonds. Tomkins' writings about the psychology of affect (Tomkins, 1962, 1963, 1991) assert that human relationships are best and healthiest when there is free expression of affect (or emotion), minimising the negative and maximising the positive, but allowing for free expression. Nathanson adds that it is through the mutual exchange of expressed affect that we build community, creating the emotional bonds that tie us all together (Nathanson 1998). Restorative justice practices such as victim–offender mediation, conferences and circles provide a safe environment for people to express and exchange intense emotion.

3.11 The way in which a person copes with or defends against shame has important implications within the criminal justice system but also more generally in conflict management work. The *compass of shame* scale was developed to assess use of the four shame coping styles described by Nathanson (1992): attack self, withdrawal, attack other and avoidance, as shown in the diagram below.



The four poles of the compass of shame and behaviours associated with them are:

- withdrawal — isolating oneself, running and hiding;
- attack self — self put-down, masochism;
- avoidance — denial, abusing drugs, distraction through thrill-seeking;
- attack others — turning the tables, lashing out verbally or physically, blaming others.

This model illustrates the way we react to shame. When, for whatever reason, we oscillate towards one of the poles of the compass we need to create a new network of defences, but unfortunately at a cost. At the 'withdrawal' pole it costs us our social safety net — the sense of security we have, surrounded by friends and family. The 'attack self' pole places us in relationships with those who take pleasure in being unkind to us; we do not want to be alone so we reduce ourselves — it is a form of masochism. These relationships are usually unstable and often deeply unsatisfying. When we

operate from the 'attack other' compass pole, lashing out and seeking to dominate others may make us feel bigger and better, at least temporarily, but it does not make us feel good. Life at this pole of the compass is risky, dangerous, contentious and lonely. Nathanson says that the 'attack other' response to shame is responsible for the increase of violence in modern life. He states that people who live at the 'attack other' pole are in reality cowards who seek partners for their shame-borne sense of inferiority. This allows the attacker to cheat at the task of self-esteem. This is the bully, the scourge of the playground, the office and the classroom.

When we defend against shame using the 'avoidance' pole of the compass we can trick ourselves into believing that we are part of a group or connected to others. While most behaviour at this pole is relatively normal and is often characterised by escapes into consumerism and material possessions, to the extent that we are avoiding learning about our shame, it is counter-productive. This can manifest itself in drug-taking. However, those friends with whom we may be drinking or using drugs may also be escaping similar problems and are faking connection.

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Restorative practices, by their very nature, provide an opportunity for us to express our shame, along with other emotions, and in doing so reduce their intensity. In restorative conferences, for example, people regularly move from negative affects through the neutral affect to positive affects. The free expression of emotion inherent in restorative practices not only restores, but also proactively builds new relationships and social capital. Many schools in Australia now use restorative practices such as 'circles' (described in **Chapter 9**) to provide students with opportunities to share their feelings, ideas and experiences, in order to establish relationships and understand social norms. In a similar way, other organisations and workplaces can use

team-building circles or groups, in which employees are afforded opportunities to get to know each other better.

Emotional Intelligence

3.12 It can be seen from the preceding discussion that since the publication of the first edition of this book in 1991 the study of emotions has been a dynamic area of research in the psychological literature. Its usefulness for mediators and others involved in conflict management can be crucial. Besides Ekman, Tomkins and Nathanson, perhaps the catalyst for much of this research, at least in the application of it and in popular culture, was the conceptualisation of 'emotional intelligence' by Salovey and Mayer (1990, 1997). According to their model, emotional intelligence involves four main abilities:

- *using emotions:* harnessing our emotions to motivate ourselves to take appropriate action, commit, follow through, and work toward the achievement of our goals (motivation);
- *identifying emotions:* discerning the feelings of others, understanding their emotions, and utilising that understanding to relate to others more effectively (empathy);
- *understanding emotions in context:* building relationships, relating to others in social situations, leading, negotiating conflict, and working as part of a team (social skills); and
- *managing emotions:* managing, control, and adapting our emotions, mood, reactions, and responses (self-management).

Salovey and Mayer suggest that there are individual differences in emotional intelligence and that individuals higher in emotional intelligence might be more open to internal experiences and better able to label and communicate those experiences. Their model is arranged hierarchically from

the basic psychological processes to higher, more psychologically integrated, processes. The authors have suggested that individuals develop emotional intelligence in stages and that each of the abilities is related to one another and must be developed before the individual can progress to the next stage.

Underlying the emotional intelligence model is the idea that emotions are not just the feelings that an individual has; they are also a source of information and can be used to assist in decision-making (Damasio, 1994, 1999).

The importance of this model is that it suggests that the management of emotions begins with being open, and able, to regulate emotion in oneself (Mayer, 2001).

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In terms of managing the emotions of others, Mayer and Salovey (1997) suggest that this involves being able to realise how clear, usual and reasonable the emotions of others are. Critics of this model claim that its predictive validity is open to doubt and that there is a lack of definitional clarity about what the concept of emotional intelligence actually means (Matthews, Zeidner and Roberts, 2002).

Definitions and common terms in 'emotion theory'

Affect: Per Tomkins (1962), the innate physiological response pattern to a given set of external and internal stimuli.

Feeling: The conscious awareness of an affect.

Emotion: The affect plus the results of the memories of all of a person's previous experiences with that affect.

Mood: Emotion sustained over time.

Mood disorder: A problem with the overall system.

'Emotional contagion': When people are in a certain mood, whether elation or depression, that mood is often communicated to others. When we are talking to someone who is depressed, it may make us feel depressed, whereas if we talk to

someone who is feeling self-confident and buoyant we are likely to feel good about ourselves. This phenomenon is known as emotional contagion.

'Emotional flooding': A situation in which emotions are so strong that it becomes difficult to function. We can become overwhelmed with anger, fear, hurt, sadness or shame, and literally drown in the intensity of our own feelings, which may result in damage to our relationships.

'Emotional reappraisal': Refers to how individuals regulate their emotions. One common form is 'down-regulating' negative emotions; for example, construing a critical remark as helpful rather than hurtful or simply maintaining the appearance of having taken no offence. There are two principal ways people do this: antecedent-focused and response-focused reappraisal or regulation. Antecedent-focused reappraisal might take the form of construing a potentially emotional situation in a way that decreases its emotional relevance; for example, by thinking positively about an upcoming medical procedure. This is an attempt to pre-empt an emotional response. The second form, response-focused reappraisal, occurs as part of or later than the event itself. As Richards and Gross (2000, p 411) suggest, this can take the form of inhibiting the emotional response leading to 'expressive suppression' in selective instances. Richards and Gross suggest from experimentation that expressive suppression indicates lower memory retention.

Managing our own emotions

3.13 Whatever 'model of emotion' you favour, it is important to be proactive in understanding and managing the emotional component of any conflict. In conflict, our emotions are often hard to control and express appropriately.

In their important paper on the subject of emotions as it related to the role of the mediator, Jones and Bodkter (2001) identified three particular challenges: 'emotional flooding', 'emotional contagion' and 'emotional reappraisal' (see definitions above). According to these authors, the mediator must understand each of these to prevent and

manage the process of mediation. I would extend this to include anyone

involved in a conflictual situation. Below are some general guidelines for managing our emotions:

- If you are experiencing severe or intense emotional reactions to a situation, give yourself an opportunity to release these feelings; for example, take a tea or coffee break, go for a walk, take some deep breaths, listen to relaxing music and so on. The object here is not to stop or repress the flow of emotions, but rather to give yourself time to think of some strategies to deal with them. A severe emotional reaction can sometimes lead us to act rashly and against our own and other people's interests.
- Talk about the emotions released with friends, colleagues or family.
- Spend some time simply focusing on the feeling. This involves thinking about where the feelings come from and why they occur. Sometimes our present difficulties may be related to experiences that happened in the past.
- When communicating your feelings to the other people in the conflict do not use them as scapegoats for what you feel — avoid projecting your feelings and self-talk/cognition onto other people in order to punish them. Take positive responsibility and express the feelings as a way of improving the relationship. Use 'I' language; for example, you might say 'I feel hurt by the failure to include me and would like to talk about it'. These types of comments assume that it is preferable to talk about your feelings in conflict. In many conflicts, particularly one-to-one conflicts, this is appropriate and positive. See **Exercise 3** at the end of the chapter to explore this further.

A brief summary of these guidelines is provided below.

Managing your own emotions: Some guidelines

1. Obtain release	Give yourself time, if possible, to regain control and to think about strategies.
2. Seek assistance	Seek out other people to talk to about your emotional response.

3. Focus	Think about, and analyse, your feelings.
4. Take positive responsibility	Avoid scapegoating and projecting your feelings, and separate impact from intentions. See your emotions as an opportunity for improving the relationship.

Managing emotions in others

3.14 Matthews and colleagues suggest that there are two basic sub-skills to managing the emotions of another individual in the work environment:

- prevention strategies — by building consensus and support and winning people over; and
- effective communication — by dealing with difficult issues directly, listening well and sharing information (Matthews, Zeidner and Roberts, 2002).

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These are important elements of any relationship, especially those likely to be ongoing, such as in the workplace or neighbourhood. Unfortunately, we seem to be increasingly isolated in our places of study, workplaces and in our neighbourhoods. It often takes some effort to build consensus and support strategies to prepare for the possibility of conflict. Nevertheless, it is often worth the effort. Later in this chapter I will describe a number of techniques to assist you with these difficult encounters

When we encounter others' strongly expressed feelings, we are sometimes

thrown off balance and may respond unwisely. Below are some simple guidelines to deal with the *emotional* content of such encounters:

- Listen to the other person. Give them space to express and ventilate their feelings. (Refer to **3.4**, 'Active listening skills' for a short description of the skills involved.)
- Respect the other person. In most instances your respect will be conveyed in the first step. In conflict we often have a tendency to put the other person down and treat him or her with disrespect. Even if we try to hide this it will often be betrayed by our body language. In particular, we tend to label other people and talk *at* them rather than *to* them. These are forces we often find difficult to control. Extreme efforts are sometimes required to resist falling into the 'black hole' of angry outburst and recrimination. Respect also implies tolerance for the other person. In conflict, people often simply need to 'let off steam'. Do not discount emotions. They are a real and necessary part of any conflict.
- Do not retaliate, even if it seems the natural way to proceed. Retaliation may escalate the conflict. Further, if the other person is attempting to intimidate or manipulate you through an emotional outburst, then retaliation may be what he or she expects and wants. This is demonstrated below at **3.17**: 'Anger starvation: The case of the new floor'.
- When the other person has been able to express his or her feelings and they have been explored appropriately, state your own feelings and objectives. By talking about your own feelings you can 'balance' the exchange and legitimate the expression of emotion if this is required. After this, it may be appropriate to talk about what you would like to achieve in managing the conflict. This can be a useful way of reorienting the management of the conflict back towards the actual issues. A brief summary of these guidelines is provided below.

Managing emotions in others: Some guidelines

1. Listen	Give the other person 'space'.
2. Communicate respect	Try to communicate respect and tolerance to the other person.
3. Avoid retaliation	This may escalate the conflict.
4. State your own feelings and objectives	This balances and legitimates the expression of emotion and leads the conflict back to the actual issues.

The ABCs: Affect, Behaviour and Cognition

3.15 Folberg and Taylor, in their book about mediation, detail a useful way of analysing reactions of people in conflict (1986, pp 83–98). They maintain that every reaction has three components: affect, behaviour and cognition, or 'ABCs'. Affect is the emotional reaction, behaviour is the action taken, and cognition is the participants' thinking. All three are interrelated. These three components of people's reactions to conflict are helpful in formulating questions and other responses. By including all three, the tendency to concentrate on only one aspect of conflict responses is reduced and our ability to communicate effectively is enhanced. Folberg and Taylor also suggest that mediators relating the ABCs to past, present and future events can use this process creatively so as to help participants in conflict analyse and find options to explore (see **Exercise 5** at the end of this chapter).

Assertiveness Skills

3.16 Assertiveness is the ability to clearly communicate one's opinions,

needs, wants, interests and feelings to another person in a non-defensive and non-threatening way. In **Chapter 2**, **Exercise 3** was a description of a 'response triangle' which outlined how we have an instinctive tendency to deal with a threatening situation in one of three typical ways: fight, flight or submission. Sometimes we may try a combination of these responses. In different contexts we may adopt different responses. Assertiveness is a response that helps us break out of these typical ways of reacting. It enables us to create a 'fourth dimension' in the way we respond. Our response triangle then becomes a square!

The aim is to make the assertiveness part of the square larger and larger, so that it comes to represent our most typical way of responding. Virginia Satir in her important book *Peoplemaking* estimated that only 5 per cent of Americans practise assertiveness or, as she calls it, 'levelling' (Satir, 1990, p 78).

Some key assertiveness techniques and ideas

Broken record: Consists of simply repeating your requests or your refusals every time you are met with resistance. Sometimes this is necessary to ensure the other hears you and takes account of what you say. A disadvantage with this technique is that when resistance continues, the repetition may lose efficacy or power.

Reinforcement sandwich: The technique of 'surrounding' a claim or demand with positive messages (see example below at **3.25**).

Fogging: Consists of finding some part of the other's assertions that you can agree with; for example, one can agree in part or in principle.

Negative inquiry: Consists of asking for further information, including requesting further, more specific, criticism if necessary.

Negative assertion: Agreement with any assertion or criticism without letting up on demand. That is the ability to not be diverted, but to stay focused on the message.

'I' statements: The framing of one's feelings and wishes from a personal position without expressing a judgment about the other person or blaming one's feelings on them.

Characteristics of submissive, avoiding, aggressive and assertive responses

3.17 People who tend to be submissive find themselves taken advantage of, exploited and, in some situations, scapegoated. Often, people who are submissive tend not to respect themselves and are sometimes cruelly referred to as 'doormats'. Being a doormat is not without its payoffs however. Submissive people avoid conflict and responsibility. They also seek out others who can protect them but whom they nevertheless control. They are able to manipulate and control others through a style that is often praised for its selflessness.

People who tend to go into 'flight' mode by avoiding or running away from conflict situations suffer most of the disadvantages experienced by those who are submissive, but without many of the corresponding pay-offs. Flight is probably the worst response because it implies a total abrogation or denial of responsibility and control over a situation. While such people have relative peace and quiet, they have difficulty in asserting their rights or gaining any meaningful objectives for themselves.

Aggressive people tend not to respect the rights of others and, consequently, they often invoke in other people feelings of fear, helplessness and anger. Aggression often comes out of a sense of weakness, not strength. Aggressive people are often counter-attacked or lose control of a situation and may be left with a sense of guilt. However, aggression sometimes has pay-offs just as submission does. Aggressive people are often able to achieve their objectives and control those around them. It could be argued that as a culture we often reward the aggressive response.

Anger starvation: The case of the new floor

I once encountered a situation that has always reminded me of the importance of dealing with strong emotional outbursts in a thoughtful way. In particular, it reinforces the importance of actively listening and allowing the other person appropriate space to ventilate feelings.

Some years ago I lived in an old house that was in the process of being renovated. It was time to replace the existing original floorboards. This was a particularly difficult, time-consuming and dirty job. The man employed by the owner to do the job was an acquaintance who had a reputation as an unqualified but meticulous craftsperson. As he went about his business I came and went, occasionally stopping to chat with him.

One day I stopped to say 'hello' to him and was suddenly and unexpectedly confronted with a highly-emotional and angry outburst. This centred on my supposed 'superiority' as a professional person over a 'lowly' tradesperson like himself. I stood and simply listened, making short following signals with nods of my head and numerous 'ums' to let him know that I was paying close attention. He went on for some minutes and finally said, 'Well, aren't you going to say something and try to argue it out?'. I stated that I would like to understand his anger and what caused it and didn't mind if he kept talking about it. His outburst of anger had run its course and because I had not retaliated or tried to 'argue it out' there was effectively no way he could keep his outburst at the same emotional pitch. This is called 'anger starvation'.

After listening some more I was able to understand his frustration with the job, which was one he would not normally do. My comings and goings had angered him because of my seeming 'freedom'. I was able then to share my feelings of surprise and shock and discussed the matter with him at some length. This was enough to allow our relationship to proceed more productively and the new floor was beautifully made!

Assertive people tend to respect themselves and their own rights. They have better-balanced relationships with fewer bad feelings. They also tend to be less anxious and have a sense of control without the need to control others. However, as with most things, there are costs for being assertive. Others will often react negatively towards assertive people who confront conflict issues. Being assertive implies that conflict is dealt with more openly and this requires a good deal of energy, skill and patience.

We noted at the start of this chapter that assertiveness skills are part of the essential grounding for skilful application of conflict management strategies. We need to use assertiveness skills almost every day of our lives if we want to ensure our own rights and others' rights are respected and to effectively head-off potential conflictual situations. The examples below demonstrate this.

Should I be assertive?

- Your boss asks you to work back late on a project but you have already planned an important family celebration.
- Your teenage son or daughter asks you for money to buy a new pair of jeans, which would take you over the family budget.
- Your neighbour suggests that the best way to fix the fence between your respective properties is to pull the old one down and replace it with a new, blue, Colourbond fence. You would prefer to repair the existing timber fence because it would be cheaper and, in your view, more aesthetic.
- A fellow employee continues not to follow the roster and wash and dry the staffroom dishes as everyone else does.

If you think about these potential conflict situations you will probably be able to identify an appropriate assertive response. However, actually *being* assertive in the situation may be quite difficult. Assertiveness takes practice.

An assertiveness process

3.18 Below is a simple model of assertion which can be readily learned and used. It combines the communication skills already dealt with in the earlier part of this chapter. The process involves five steps:

- *Step 1:* Preparation.
- *Step 2:* Assertion message.
- *Step 3:* Listen.
- *Step 4:* Repeat steps 2 and 3 as necessary.
- *Step 5:* Strategies, options and solutions.

Step 1: Preparation

3.19 On occasions, you may not have time to prepare yourself when suddenly confronted with a situation demanding an assertive response.

Nevertheless, in many situations you will have time to prepare and, with practice, the necessary response will come very quickly to you.

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There are at least four things to keep in mind. First, think about your objectives. This may be helped by thinking about how your relationship with the other person will be affected by what you propose to say. Second, if you have time, write down what you want to say or rehearse it with somebody else. Third, check if what you want to say is appropriate given the nature of your relationship with the other person. Fourth, if possible, choose an appropriate time and place to be assertive. A quiet and non-public place is often best. Timing is important. It is not wise to be assertive when the other person or persons are likely to be rushed or distracted.

For further work on preparation refer to **Chapters 6** (on negotiation) and **7** (on mediation), in particular to the parts of the negotiation and mediation processes devoted to preparation.

Step 2: Assertion message

3.20 Step 2 is the central and most important part of the process. There are three parts to an assertion message:

(a) Precisely describe the behaviour or situation that is the subject of the discussion.

(b) Precisely describe your feelings in relation to or arising out of (a).

(c) Precisely describe the consequences of (a) for yourself.

For example, in the situation described in the box above where your boss asks you to work back late on a project but you have already planned an important family celebration, you could respond as follows:

(a) Behaviour/situation: 'I would prefer not to work on the project tonight,

although …'

(b) Feelings: 'I feel anxious about not meeting your request. I am torn …'

(c) Consequences: '… because I would miss an important family celebration'.

In the case in the box above of the fellow employee who does not clean up the dishes, the assertion message could go as follows:

(a) Behaviour/situation: 'When you do not wash and dry the dishes on your roster days …'

(b) Feelings: '… I become annoyed …'

(c) Consequences: '… because it means that I and other staff have to spend more time than necessary doing this job'.

Keep your assertion message short and to the point. Preferably, deliver it in one sentence. Be concrete — describe the behaviour or situation that you want to talk about in specific terms. Instead of saying 'Your non-cooperative attitude', say 'Your failure to wash the dishes on your rostered day'. Being concrete also means that you should limit yourself to what you have observed or know, rather than what you may infer from a situation. For example, if you say 'You are very inconsiderate when you …', there is an inference about the word 'inconsiderate'. Simply stick to what you observe or know. Do not try to read the other person's mind or interpret their behaviour for them. Do not attack or make fun of the other person because it will simply put him or her on the defensive. The purpose of the assertion message is not to evaluate but to give the other person a very clear and objective statement of your concerns.

Remember to keep feelings and consequences separate. One common problem when communicating an assertion message is that the asserter will

often list a number of feelings, rather than consequences. Try to think of the concrete consequences that are happening to you. Be sure that the consequences relate to the rest of the message and are not exaggerated. For example, in the case of the colleague who fails to do the dishes, it is probably an exaggeration to say that this behaviour cuts down the organisation's efficiency.

Assertion messages look easy but they are sometimes difficult to deliver; try writing them down as a way to practise.

In summary, assertion messages should be specific, concrete, non-interpretative, non-attacking, serious and objective. Assertion messages are essential building blocks in effective conflict management.

Step 3: Listen

3.21 After you have delivered your assertion message, stop and listen. Allow the other party time to respond to your message and then use those listening skills previously mentioned in this chapter: attending, following and reflection. This is crucial because it allows the other person to offer some options for a solution, and enables you to respond to defensive responses if necessary. Sometimes it is necessary to repeat your assertion message because the other person may not have listened to your first assertion message. Be sure to maintain your reflective listening — this will usually work with the most aggressive or defensive people. Try not to be side-tracked by questioning or debating. Reflective listening and turning questions into statements can usually overcome these tactics.

Step 4: Repeat steps 2 and 3 as necessary

3.22 When being assertive it is often necessary to oscillate between reflective listening and the assertion message. For example, Phillip is a university-educated engineer who wants to talk to Robyn about her

performance as a maintenance worker. Robyn's work has not been satisfactory over the past several months:

Phillip: *I would like to talk to you about your maintenance work over the past three months.*

Robyn: *Yes, what is it?*

Phillip: *The three breakdowns in the machines you have serviced and your failure to service the blue machines has annoyed me because they have seriously disrupted production and have resulted in some angry responses from other workers to me.*

Robyn: *What do you know? You're just a smart aleck university boffin who doesn't know what's really going on here.*

Phillip: *You think that I don't know about your work because of my educational background.*

Robyn: *Just because of your fancy education you think you can throw your weight around.*

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Phillip: *You think people with a fancy education throw their weight around.*

Robyn: *Yes. Why don't you just go back to your office and let us take care of the real business?*

Phillip: *You think I should stay in my office.*

Robyn: *Yes I do.*

Phillip: *I can understand that but the three breakdowns in the machines and your failure to service the blue machines have annoyed me because they have seriously disrupted production and have resulted in some angry responses from other workers to me.*

Phillip has made his assertion message twice in this exchange. In his other replies he has reflected back Robyn's aggressive responses. He has not been drawn into the angry exchange or treated Robyn with disrespect, or made judgmental remarks in reply. It is often necessary to repeat steps 2 and 3 before moving on to step 5. Remember that sometimes you will not succeed in the face of intractably angry, aggressive people.

Step 5: Strategies, options and solutions

3.23 On many occasions, respondents will not act defensively. They may suggest constructive strategies, options and solutions to manage or solve the issue. For instance, Robyn, in the example above, may have responded by saying something like, 'Yes, I know that I have been a little off lately. I think I need to figure out a few of the issues with you'. Assertion messages allow the other person to make positive, dignified responses. This gives the relationship a chance to become strengthened rather than undermined.

It has already been stated in an earlier part of this chapter that 'sending' solutions can be a problem. When being assertive it is generally a good policy to allow respondents to take the lead in this area so that they feel secure and have a stake in the outcomes. **Chapter 5** deals further with the process of reaching agreement.

Knowing your own objectives is the key to both being assertive and negotiating what strategies, options and solutions may apply in any situation. There are two types of objectives: process objectives and outcome objectives. Process objectives are concerned with how strategies, options and solutions are arrived at. They also often encompass the relationship aspects of the dispute; that is, what sort of relationship is required and expected for the management of the conflict to proceed; for example, is it sufficient and fair to toss a coin or is there some other process of decision-making which may be appropriate? Outcome objectives are concerned with what the end results of the process may be; for example, in the example given above about a conflict between neighbours over a new fence, what sort of fence the neighbours end

up with is obviously an important outcome for them. We often get ourselves into protracted and difficult conflicts because we forget about the process objectives and concentrate too hard upon the outcomes.

A good way of working out your objectives is to think about the concerns you have in the situation. These will indicate the sort of objectives you may then want to set for yourself. For example, in the neighbourhood fence example cited above, you may have a concern about the colour of the fence. This could lead you to have an objective of

wanting a green fence rather than a blue one as an alternative to discuss. After doing this you can then set your various objectives and, if required, you can then prioritise them according to your particular situation. After you have prioritised your objectives you can then go on to communicate your proposed strategies, options and solutions.

'Strategies' are broad plans to achieve certain objectives. 'Options' are a range of possibilities, one or more of which may be chosen to achieve your objectives. 'Solutions' are those actions that are expected to resolve the matter. The nature of the issue will decide which of these you need to focus on. Generally, strategies are necessary for issues that are more complex, while solutions can be suggested relatively quickly for simple issues. Options come somewhere in between.

We can place strategies, options and solutions on a continuum from 'complex' to 'simple'. For example, part of the skilled conflict manager's repertoire is the ability to break down complex issues into relatively simple 'bits'. This enables options and solutions to be more easily seen and adopted. When the other party is responding positively it is a good tactic to ask a question like, 'What strategy/options/solution would you propose?' This then enables you to negotiate. Remember that these proposed outcomes will not

necessarily work, so arrange a recheck at some future time of any agreement. Make sure that the strategies, options or solutions fit in with your requirements. Do not lose your assertiveness at this stage. The other person may suggest an option or solution that is not appropriate to your needs. If so, be prepared to go back to your reflective listening skills. You should also be prepared to suggest possible strategies, options and solutions yourself. When you have agreed on something make sure that you both understand what it means, and thank the respondent.

Conflict managers need to be aware not only of the content of the dispute but the process and relationships involved. By focusing equally on process and relationships the content of the conflict can be managed more successfully.

Expanded assertiveness

3.24 Assertiveness does not simply depend on enacting a five-part assertion process. In many situations this process may be too cumbersome. Nevertheless, the steps are useful to learn because they encapsulate the basic skills. After mastering these skills you can begin to experiment and elaborate on them. The earlier example of 'anger starvation' illustrates another way of dealing with an angry, emotional person.

Assertions do not have to follow a set process. This is particularly important with people we are in contact with on a regular basis, who may become bored by continued stereotypical replies. Being able to say 'no' in creative ways is very useful: see 'Different ways to say "no"', below.

If you are being abused or ridiculed (especially if this behaviour is repeated over a period of time) it is often good to respond with an assertive process. If this does not work you can refuse to acknowledge the remarks made; however, ensure that the other person knows that you are not responding because you find the remarks offensive.

The ‘reinforcement sandwich’

3.25 One way of giving people a message that may have a potentially threatening component is to give the respondent a ‘reinforcement sandwich’. The potentially threatening part of the message is ‘surrounded’ on each side by a positive and descriptive message. A reinforcement sandwich looks like this:

> I appreciated the way in which you were able to do the report on the Smith File, although I was not as happy with your concluding remarks on the Blue File, which could be reworded. I have confidence in your ability to do this.

Here, the message was given in a way that was helpful. It was not evaluative or judgmental; neither was it vacuous praise, which is equally dangerous for good communication. Instead, it was descriptive and concrete — two essential prerequisites when giving praise. This technique is useful with particularly sensitive people and, sometimes, complainants, which is the next topic in this chapter.

Different ways to say ‘no’

1.	**The ‘natural’ no**	This is your own idiosyncratic version.
2.	**Reflective listening, then no**	Reflect back the content and feeling of the request and then say no.
3.	**The ‘reasoned’ no**	Say no and give a succinct reason for it.
4.	**The ‘rain-check’ no**	Say no this time, but suggest that the other person asks again.
5.	**The broken record**	For use with very aggressive or manipulative people (for example, some salespeople). Simply use a one-sentence refusal and repeat it no

		matter what the other person says.
6.	**The ‘flat-out’ no**	Rarely used by assertive persons but simply saying ‘no’ is appropriate at times.
7.	**The ‘celebrative’ no**	This is a dramatic gesture to signify refusal (like Martin Luther pinning his thesis to the door of the Wittenberg Church).

(Adapted from Bolton, 1987, pp 196–9)

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Complaints Management

3.26 A complaint is an expression of dissatisfaction with being in part or wholly deprived of some perceived entitlement (SOCAP, 2003). Complaints are usually associated with the provision of goods and services. This can involve a perceived inadequacy of not only the goods or services but the process (‘Was I dealt with fairly?’) or psychological (‘Was I dealt with respectfully?’) issues associated with the provision of such goods or services (Sourdin, 2012, p 134). In Australia, various consumer affairs departments of state and federal governments keep detailed statistics of such expressions of dissatisfaction, which run into the millions; see, for example, the website of Consumer Affairs Victoria: <www.consumer.vic.gov.au>. In many respects, complaints overlap the whole field of conflict management. Many complaints, if not handled well, can escalate into disputes. In fact, often the two terms are used interchangeably. Those parts of **Chapter 9** dealing with dispute system design can be usefully applied to complaints management.

Good complaints management is not only about preventing dispute escalation but can lead to product and service improvement (Standards

Australia, 2003). It is now generally considered to be a key area of organisation-wide quality improvement (SAI, 2007). It can:

- provide a resource as a low-cost source of information;
- help to restore the complainant's trust and confidence in the service or product;
- lead to service improvement, including safety and quality;
- lead to organisational improvement and protect the organisation's reputation;
- help to identify and manage risk;
- promote a culture of reporting and accountability; and
- help to monitor prevention strategies.

Describing complainants

3.27 There are various ways of describing complainants; for example, salespeople are likely to call them 'intimidators', 'clams', 'indecisives' or 'know-it-alls'; people in human services are more likely to call them 'abusive', 'unreasonable', 'persistent/serial', 'vexatious' or 'organised' (Australian Parliamentary Ombudsman, 2007).

For the purposes of this book I will simply call them 'complainants'. Complainants can be categorised under three broad headings: normal complainants, difficult complainants and persistent complainants (Lester, 2004).

Difficult conversations

In their useful book titled *Difficult Conversations*, Stone, Patton and Heen (2000) of the Harvard Negotiation Project explore the three 'conversations' one needs to have to better manage difficult conversations. They are the 'What happened', the 'Feelings' and the 'Identity' conversations. I prefer to think of four conversations or critical elements to any difficult encounter. They are the conversations about perceptions, feelings, behaviour and self-talk.

Perceptions: Do you remember the definition of conflict outlined in **Chapter 1**? Underlining it was the idea that interactive processes are accomplished through and rooted in perceptions, interpretations, expressions and intentions. They are not based on absolute truths, although we often think they are. Therefore, it is useful to talk to the other person in a conflict about their perceptions of what has happened and what is happening. The advantage of doing this is that is easier to change perceptions than it is to change 'the truth'. One useful technique for doing this is to use 'reported speech'. Reported speech is achieved by prefacing a question or statement you make by words such as, 'You said …', 'Your view was …', 'In your view …' and 'You say …'. By doing this there is a subtle emphasis on the other person's story as exactly that — a story. Another way is to use the technique of 'externalising'. Externalising is treating or talking about the issue or complaint as something 'out there' or separate from the people who are experiencing it. Rather than talk about an issue as 'your issue' or 'my issue', you can talk about it as 'the issue' or 'the issue between us'.

Feelings and affect: We have already looked at emotions earlier in this chapter. Identifying the other person's feelings and allowing the person to express them can help better manage difficult encounters.

Behaviour: Rather than focusing on labelling a person's behaviour, for example, by judging them or concluding that he or she must be thinking this or that (mind reading), focus on what the person has done, heard or seen. Explore this aspect with them, allowing the person to draw conclusions about what it may mean and tell you what they are thinking. The 'ladder of inferences' that you will see outlined in **Exercise 8** at the end of this chapter will help you to do this.

Self-talk: One of the hardest things to do in a difficult encounter with another person is to be aware of and control our own inner thoughts or cognition. There are always two or more conversations going on in our hundreds of interactions in any one day — one with the outside world and one with ourselves. In fact, many of us seem to be unaware of our inner thoughts. What we are telling ourselves or thinking is crucially important in managing our interactions. Often, especially in difficult encounters, we are telling ourselves negative things; for example, 'He does not like me' or 'She thinks I am an idiot!'. Often these thoughts have little or no foundation in reality. To manage this, we need to be constantly reality testing ourselves by asking 'counter contentions' such as, 'What is that idea based on?' or 'What is the evidence for that?'. By doing this we can cut off the potentially damaging reactions we can experience to other people in difficult encounters. Again, by using the ladder of inferences you can help control your reactions and focus upon the actual words and language of the other person.

Keep these ideas in mind when you read the sections on verbal jujitsu and STAR below.

3.28 'Normal complainants' make up the vast majority of those who complain. They complain for a wide range of reasons, including to: get attention; receive an explanation or an apology; seek vindication for their

position; protect other people; receive compensation; or obtain justice or protect a 'principle'. In many cases they also want some emotional engagement and are seeking retribution as well. In most cases the normal complainant will, on receiving an explanation or apology, go back to being a non-complainant. They are able to maintain a balance between the cost and the possible benefits of making the complaint. However, a proportion of complainants will become difficult complainants where this balance becomes less important.

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3.29 'Difficult complainants' are likely to make up between 5 per cent and 10 per cent of complainants. A number of factors cause normal complainants to become difficult complainants, chief of which is delay. However, lack of recognition, emotional engagement and, in some cases, cognitive engagement can be relevant. In addition, the inappropriate attitude of people managing the complaint can be significant. The difficult complainant is more likely to appeal to principle and employ third parties such as lawyers, Members of Parliament or others to assist them. They become more indignant and begin to feel victimised. Some complainants may have a psychiatric condition that predisposes them to difficult behaviour; others may have an egocentric personality that makes it difficult for them to see any other perspective but their own.

Research by the Victorian Institute of Forensic Mental Health in six Ombudsman's offices around Australia found that about one-half of the complainants had not been dealt with as well as they might have been (Lester, 2004). In 25–30 per cent of cases there was unreasonable delay in responding to a complainant. There was overt hostility shown by agency staff in about 5 per cent of cases and in about 20 per cent of cases the organisation or agency denied any responsibility. A report by the Telecommunications Industry

Ombudsman found that the initial response to a consumer was the most significant cause of complaints; see <www.tio.com.au> (TIO, 2011).

Typical difficult behaviours

When a complainant becomes 'difficult' they tend to increasingly engage in the following typical types of behaviour:

'Ratwheeling': The complainant continually focuses upon the past and 'what has happened' rather than on 'what to do'.

'Tape playing': Repetition of the complainant's story so that it becomes increasingly difficult for them to entertain different perspectives.

'Ping pong': Difficult complainants become increasingly focused on responding rather than creating options to move on.

Mutual monologues: The complainant takes the view that if he or she can talk long enough to the exclusion of others he or she will win the issue.

Monosyllables: Usually due to a lack of trust, the complainant will not engage in conversation.

Blaming: The complainant increasingly becomes focused on 'who is to blame'.

Helplessness: Some complainants take a position of helplessness so that others will come to their rescue.

'Looking for a friend': Some complainants attempt to cross normal professional or business boundaries to seek a resolution.

3.30 The 'persistent complainant' or, as psychiatrists term them, the 'querulous paranoid', is one of the most difficult types of personalities and interpersonal communication situations likely to be encountered (Levy, 2014). Lawyers call them 'vexatious litigants'. A draft report of the Australian Parliamentary Ombudsman prefers to focus on the behaviour rather than the nature of the personality. It uses

the term 'unreasonable conduct', which is in line with legislative provisions which allow Ombudsman offices to respond to conduct that is unreasonable (Australian Parliamentary Ombudsman 2007, para 1.3). This report defines

unreasonableness as '… conduct that goes beyond the norm of situational stress that many complainants experience' (para 1.3). The report divides unreasonable conduct into five categories (para 3.1). For each of these categories the report details a broad strategy as follows:

- unreasonable persistence — strategies are about 'saying no';
- unreasonable demands — strategies are about 'setting limits';
- unreasonable lack of cooperation — strategies are about 'setting conditions';
- unreasonable arguments — strategies are about declining or discontinuing if the complaint is groundless; and
- unreasonable behaviour — strategies are about having risk management protocols in place; setting limits and conditions.

The persistent complainant may have a pre-existing psychological condition that predisposes him or her to be difficult to manage. Research indicates that these complainants constitute between 1 and 3 per cent of a typical client base (Craigforth, 2003, p 13). Their management requires specialised thinking and policy beyond the scope of this book, but typically there are a number of indicators of the persistent complainant, including that:

- they have egocentric tendencies;
- they are initially ingratiating but will quickly become angry and turn on people when they do not get their way;
- they feel particularly victimised; and
- they attribute all or most issues to external causes.

As Lester (2005, p 18) states:

> Despite 150 years of psychiatric research into querulous paranoia, there is no consensus as to the underlying pathology. Theories range from an underlying organic disease process, similar to schizophrenia, through to psychogenic processes; that certain vulnerable characters are sensitised by certain life experiences and are then struck by a key event which triggers their complaining.

Persistent complainants are generally middle-aged and male. They are highly energised and often emotionally labile. They seem motivated not to manage or resolve a dispute, but to seek further avenues of complaint. The persistent complainant may derive some satisfaction from being involved in the complaint process, rather than the management or resolution of it. They can often be identified by the style of their written communications; not only will these written communications be copious, they will often be crowded with different coloured highlighting, underlining, capitalisations of various sections of text, extravagant use of punctuation and writing in the margins. Persistent complainants tend to keep detailed diaries and collect a range of materials that may be only marginally relevant to their case. They often demonstrate what Lester calls 'hypercompetency', but this is in reality only superficial (Lester, 2005, p 18).

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Characteristics of the persistent or unreasonable complainant (known as the querulous paranoid by psychiatrists, and vexatious litigants by lawyers)

- 72 per cent are male, and most are middle-aged.
- Make multiple 'approaches' to various people and organisations who may be involved or potentially become involved.
- Have a tendency to make unannounced appearances.
- Written records and texts tend to overuse underlining, capitalisation, punctuation and extravagant expressions.
- More likely to ask for change of caseworker or person responsible for their case.
- Initially overly ingratiating, but can change rapidly.
- Often suffer pressure of speech, so that they do not seem to have enough time to say all they want to and are emotionally labile.
- Will more often ask for apologies.
- Seek acknowledgment of the wider social implications of their case.
- More likely to make overt and veiled threats.

(See Lester, 2004; see also Skilling et al, 2011; Levy, 2014)

The legal system attempts to manage persistent complainants by a special process of labelling — they are known as 'vexatious litigants'. Various limitations can then be placed on a litigant including preventing him or her from instituting litigation without the leave of the court; limiting submissions to writing; and striking out proceedings which show no reasonable cause of action. In Victoria, legislation has been introduced to better manage the problem. The Vexatious Proceedings Act 2014 (Vic), commenced on 31 October 2014, repeals the previous single-tier system for dealing with vexatious litigants in (the then) s 21 of the Supreme Court Act 1986 (Vic). The Act empowers all courts and the Victorian Civil and Administrative Tribunal to make a form of litigation restraint order. Altogether there are three types of litigation restraint order of increasing breadth and severity. There are also associated orders, including an acting in concert order that seeks to prevent a person from acting in concert with a person the subject of a litigation restraint order and an appeal restriction order restricting the right to appeal a decision to refuse leave to proceed.

An extract from the legislative guide to the Act published by the Civil Law Policy division of the Department of Justice notes that a 2008 Victorian Parliamentary Law Reform Committee conducted an inquiry into vexatious litigants, and found that:

> … although small in number, vexatious litigants consume a disproportionate amount of court and tribunal time and resources, which creates delays in the courts and reduces access to justice for other members of the community with meritorious claims. The Committee also found that vexatious litigants can have a significant financial and emotional impact on the people they sue.
>
> For example, one vexatious litigant brought 77 separate civil and criminal proceedings over an 11-year period. Many of these proceedings were private prosecutions attempting to summon grand juries to hear treason charges against judicial officers, government ministers and other public officials. Despite the fact that these allegations

were completely lacking in substance, considerable court time was required to hear and ultimately dismiss the claims. This not only caused embarrassment, inconvenience and expense to those involved in the proceedings (who were required to spend time and money in contesting the baseless allegations), but it also created delays in the court system for other litigants with genuine claims.

Understanding complaints: Two examples

In my workshops on training people to better manage difficult customers and persistent complainers, I like to give the example of a large regional English airport. Several years ago this airport reported that it had 2072 complaints. This seems like a large number of complaints, but when one considers the number of people who use the airport, perhaps not so. What was interesting on further analysis of the airport's figures was that the 2072 complaints were made by only 594 people. What was even more interesting was that 41 per cent of these complaints (almost 1000) came from just three people!

Another example I like to give is the 'Telstra Man', who was instrumental in forming a group called 'The Victims of Telstra'. In part because of the way in which his initial complaint was reportedly dealt with, over a period of a decade he cost Telstra about $5 million dollars.

These cases illustrate very clearly why it is important to know about and carefully manage your complainants.

Unfortunately, the role of the psychiatric system in these cases is very limited. Although it would appear that antipsychotic medication and psychotherapy may be helpful, vexatious litigants rarely seek treatment and may become quite agitated if it is suggested (Lester, 2005, p 19). Some management options for this group are included below.

Policy guidelines for dealing with persistent complainants

- **Identification of the problem:** Ensure that the policy settings adequately define a 'persistent' or vexatious complainant.
- **Early resolution:** Try to ensure that the response is not delayed.
- **Speedy escalation:** Persistent complainants may often benefit from being moved 'up' through the normal process.
- **Clarity and flexibility:** Ensure that all dealings are logged and appropriately recorded.
- **Confirm agreements and undertakings:** Confirm these in writing if possible.
- **Allocate difficult/persistent complainants to a particular person or team:** Have a person (or persons) appointed who is experienced and senior enough to manage this group.

- **Provide support for staff**.
- **Focus on behaviour:** Do not label the person but concentrate on the behaviour that has occurred. Most staff who manage complainants are unlikely to be psychiatrists or psychologists and most complaints are not made as part of a counselling session. Focusing on behaviour and training staff to do this enables the broad range of staff members to feel confident in managing complainants. A focus on behaviour also lessens the chance of unnecessary and possibly damaging or unproductive stereotyping.

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Having briefly defined the nature of complainants, the next question is how one best responds to the issues presented. This has to occur at two levels: the organisational and the interpersonal.

Is there a gender basis to many difficult conversations?

This question is there a gender basis to many difficult conversations was answered in the affirmative by American sociolinguist Deborah Tannen (2001), Professor of Linguistics at Georgetown University in Washington DC, who writes that different conversational styles derive from gender-specific divisions ingrained in family and social cultures. In the struggle to balance intimacy and autonomy, Tannen argues that women tend to focus on the former while men focus on the latter. Men tend to approach the world as a hierarchical social order, in which independence is valued and failure shunned. Conversations, in this context, can be competitive, and based on a one-up/one-down model of relating. Women tend to approach the world as a network of connections. Conversations are negotiations for closeness that give confidence and provide support; they also protect against isolation.

If this is so, there is no shortage of opportunity for misunderstanding. A man may buy something without consulting his wife because, in his hierarchical outlook, consulting her may feel like asking permission, which then feels like a return to childhood or an encroachment on his freedom of action. A woman may ask her partner for advice about a problem and become annoyed when he takes the problem away from her to solve himself, or won't talk about it because he has no answer. An invitation to become involved is converted into a potentially competitive challenge. In other words, women are speaking and hearing a language of connection and intimacy, while men are speaking and hearing a language of status and independence.

For further information see <www9.georgetown.edu/faculty/tannend/>; see also **Exercise 10** at the end of this chapter and **Chapter 6**.

Managing complainants in groups and organisations

3.31 The process of effectively handling a complaint can vary from organisation to organisation but includes the following:

- risk management recording and assessment;
- referral and reporting as necessary;
- complaints management through a variety of processes as described in this book, including:
  - the provision of information;
  - negotiation;
  - assisted negotiation through processes such as mediation and conciliation; and
  - decision-making by someone outside the dispute (for example, independent arbitrator, investigation and recommendations, senior staff, panel or trial); and
- gathering information and monitoring, including:
  - the number and seriousness of complaints;
  - the level of persons in the organisation who deal with complainants;

  - issues raised;
  - timeliness;
  - type of management/resolution;
  - complaints trends;
  - how changes have been implemented and what impact these have had;

- satisfaction with the process;
- policy sufficiency and review;
- criteria for success; and
- management involvement.

The first thing that can be said about managing complaints is that complaints are inevitable. If not handled appropriately, complaints have the capacity to severely disrupt an organisation, create chaos, increase the potential for threats and violence, consume disproportionate amounts of time and energy and severely impact on staff morale. Every organisation, whether in the public or private sphere, needs to have in place a process for managing complaints.

Many Australian organisations either do not have a complaints and conflict management strategy for their clients and their staff or, if they do have one in place, it is inadequate. Any organisation that is receiving or is likely to receive a significant number of complaints needs to start thinking about some policy and procedures to help manage them. By policy I mean the set of guiding principles and objectives which outline the direction the organisation wants to go in terms of managing complaints and conflict. Procedures describe the steps involved in achieving the purposes of the policy. The policy and procedures should allow some flexibility and not be overly complex or cumbersome to use. They are relatively easy to draft and set up; however, difficulties can be experienced in implementing and applying the policy. There are several possible reasons for this, including:

- Various individuals or parts of the organisation may benefit from the status quo. Any changes to 'the way things are done' may be resisted.
- The 'routinisation of the behaviour' — a fear of change based on the idea that things have being done a certain way in the past and that is how they will continue to be done.
- Most importantly, the organisational culture may militate against the

adoption of ideas and processes which might ease the internal or external conflict the organisation is facing. There are some agencies that assume that conflicts and complaints will not occur, or, if they do, they are somebody else's problem.

Overcoming these particular issues is sometimes difficult and demands leadership, often from the top echelons of the particular organisation.

3.32 Successful organisations see complaints as a resource; that is, they see complaints as part of their feedback mechanism from clients or customers and build this into their research and analysis of the products and services they deliver. Any policy or set of procedures should align with other agency or organisational goals. Many agencies have business plans, performance policies, risk management

strategies and codes of conduct. A complaints and conflict management policy (and its accompanying procedures) should mesh with these other organisational documents.

Any set of policy and procedures in this area needs to have five principal objects. These are, in broad terms, to:

- ensure fairness and consistency;
- support staff;
- effectively manage resources;
- set clear boundaries for the complainant; and
- ensure graduated responses; that is, from low-level, low-resource interventions to high-level, high-resource interventions.

Organisations that want to deal better with persistent or difficult

complainants will often need to make some significant shifts in their approach and culture (Australian Parliamentary Ombudsman, 2007, para 1.2). According to the Australian Parliamentary Ombudsman this requires an agency to recognise that:

- complaints are an unavoidable and integral part of its core work;
- they require priority and adequate resources; and
- staff should be given support, encouragement and appropriate supervision.

Best practice

The Australian Parliamentary Ombudsman has developed an acronym called 'Best Practice' to help manage unreasonable complainant conduct. The key messages conveyed by the letters making up the term are summarised below.

B — Boundaries are clear and set.

E — Expectations are managed and kept realistic.

S — Support from management is adequate.

T — Training is provided that is comprehensive and ongoing.

P — Practices are maintained in a normal manner so that in abnormal situations complaints handlers do not act as 'saviours' or 'persecutors'.

R — Responsibilities are clear and mutual.

A — Authority is exercised so that staff can manage the case.

C — Communication is effective, timely and firm.

T — Time is sufficient.

I — Impartiality is maintained and valued.

C — Consistency through organisational commitment and supervision is maintained.

E — Equanimity or calmness, through self-control and good communication skills, is maintained.

(Australian Parliamentary Ombudsman, 2007, para 2.2)

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3.33 The Standards Australia Committee has established a standard on

complaints handling (AS 4269-1995) which is compatible with the international standard (AS ISO 10002-2006). The Australian Standard recommends a consideration of 13 essential elements of an effective complaints-handling process: commitment, fairness, resources, visibility, success, assistance, responsiveness, charges, remedies, data collection, systematic and recurring problems, accountability and review. The questionnaire in **Exercise 7** at the end of this chapter ('Complaints: A simple checklist to audit your organisational preparedness') is based on these elements. You might find it useful to have a look at this and answer the questions, to determine if you think your complaint handling process has considered these elements. The next section of this chapter on 'verbal jujitsu' may also be useful when considering the interpersonal aspects of complaints management.

Various governments around Australia have established principles or criteria for assisting businesses and organisations in establishing conflict management systems. For example, the Victorian Government's eight principles for a conflict management system (Department of Justice, 2004, p 35) are:

- *Fairness:* Dispute resolution processes must be fair and seen to be fair by the disputants and the broader community. Principles of natural justice must be applied that provide the opportunity for each disputant to make their case and to have a 'voice' in the process. Where third parties are used in the process, such as mediators or judges, they must be impartial and free from bias.
- *Timeliness:* In general, disputes should be settled as early as possible. While some disputes must be given time, either for issues to crystallise or where the parties' positions are materially changing, most disputants wish to resolve them at the earliest opportunity. Dispute processes should minimise the opportunities for delay and focus on identifying the issues at stake and agreeing on the process to resolve them.

- *Proportionality:* The cost and complexity of the process should be proportionate to the subject matter of the dispute. Matters involving significant public interest, difficult points of law or large sums of money will require more elaborate processes, while more routine or minor disputes should be resolvable using relatively informal and inexpensive processes. The government will encourage policies that minimise the cost and complexity of dispute resolution that is appropriate to the nature of the dispute.
- *Choice:* Different dispute resolution pathways should be available to reflect disputants' needs and expectations. However, not all pathways need to be provided by the government, and many industry dispute resolution schemes have been established that have no government involvement. Dispute resolution processes should also be sufficiently flexible to allow further choices to be made during the course of a matter as the issues are developed.
- *Transparency:* The processes should be clear and simple to allow users to navigate their way through the process as easily as possible. In the courts stream, rules of civil procedure should be consistent between the different jurisdictions.
- *Quality:* Disputants should be confident that no matter which pathway they choose it will provide a level of quality of service appropriate to the nature of the dispute.

- *Efficiency:* Dispute resolution procedures should aim to maximise the efficient use of available resources to resolve disputes.
- *Accountability:* Information about disputes and outcomes, including resolution times and associated costs, should be published. This facilitates

evaluation of the relative efficiency of various dispute processes and their associated outcomes.

The nine-dot problem

I would like to introduce you to the nine-dot problem. Jot down the nine dots on a pad in three rows of three, one above the other. Now join each of the nine dots with four continuous straight lines.

Unless you have done this before, it is not easy.

This exercise demonstrates the fact that we have certain patterns of responding to problems. However, our established ways of doing and thinking will not always work. In particular, they will not often work in those situations where 'difficult people' confront us. 'Verbal jujitsu' is designed to get you 'outside the square' and help you manage these situations more creatively and with less mental anguish. (Note, the answer to the nine-dot problem is provided later in this chapter.)

Verbal Jujitsu: Managing Difficult People

3.34 Like assertiveness skills, 'verbal jujitsu' is simply a way of managing difficult situations better. It expands and develops those principles and techniques we have already covered in this chapter. The essential premise of the verbal jujitsu approach is not to 'react' to a situation but to 'respond'. In many situations this will initially mean that you sidestep the difficulty rather than resist it. It also means that the energy of the other should not be resisted, but joined and used to your mutual advantage. Therefore, rather than seeing conflict as a contest with winners and losers, it is reframed as a collaboration where mutual gains can be made. This view of conflict is not necessarily one that comes naturally to us in Western societies. The metaphor of the name — verbal jujitsu — is meant to convey an idea of respect for the other and for their needs and energies. 'Jujitsu' is a corruption of a Japanese word which described how an unarmed person could defend themselves against an armed

person. Just as the judo or aikido expert will 'go with a punch' and then turn it to his or her advantage, so can you in difficult situations if you use the techniques described below.

The three levels of conflict

3.35 There are three levels of conflict that concern us when applying verbal jujitsu techniques. Level 1 conflict arises from differing personality and interpersonal styles. Level 2 conflict is related to the resistance that we meet when we try to get somebody

else to do something that they do not, for whatever reason, want to do. This level of conflict is usually harder to deal with than Level 1 conflict and requires some considered strategies. Level 3 conflict is concerned with deliberate deception and the playing out of 'dirty tricks'. These level 3 conflicts can create extremely volatile situations.

Principles

3.36 Before going on to describe and look at ways to manage these various levels of conflict it may be useful to consider a number of broad principles to apply in our everyday, professional and family lives. The first principle is to try and create reciprocity or harmony in our relationships with others. The second is that while you cannot always resolve conflicts perfectly, you can manage them so that you can get on with your life more productively. The third principle is not to aim to defeat or exact revenge against another person. If you cause loss of face or create enemies of other people then in the longer term life becomes more difficult for you. And remember that the stronger the

attack, the easier it is to handle, for the simple reason that people who are moving in strongly in attack mode more easily get out of balance.

Level 1 conflicts: Personality and interpersonal factors

3.37 I have classified personality and interpersonal factors as Level 1 conflicts because they are constantly, and often unconsciously, with us. They lead us into difficulties even in situations where the expectation is that cooperation to achieve common goals is understood by all those involved. We often move into conflict for reasons that are not the result of a deliberate confrontation, negotiation, competition or fight, simply because the personalities and resultant styles of the participants are different. The ways in which this happens will be explored briefly below.

The past two centuries have seen enormous advances in the way we understand the general interrelatedness between our internal and external lives. Jung, along with Freud, has been the most influential theorist and practitioner in this area. He suggested that people tend to process information about the world in terms of sense or intuition, and to make judgments in terms of thought or feeling. According to this analysis, the dominance of a particular set of functions will give a good indication of how any particular person will manage the world. This idea has had widespread application by psychologists and, most popularly, by Myers and Briggs, whose model is outlined in the following box.

The Myers-Briggs Model

The well-known Myers-Briggs Type Indicator (MBTI) has been used extensively as a way of understanding how individuals respond to conflict and change. The MBTI measures individual preferences in four areas mainly concerned with information-giving and decision-making. It does this through measurements obtained on four scales as follows:

- **Extroversion (E) or Introversion (I)** — indicates whether individuals prefer to derive energy from the outer world (E) or the inner world (I).

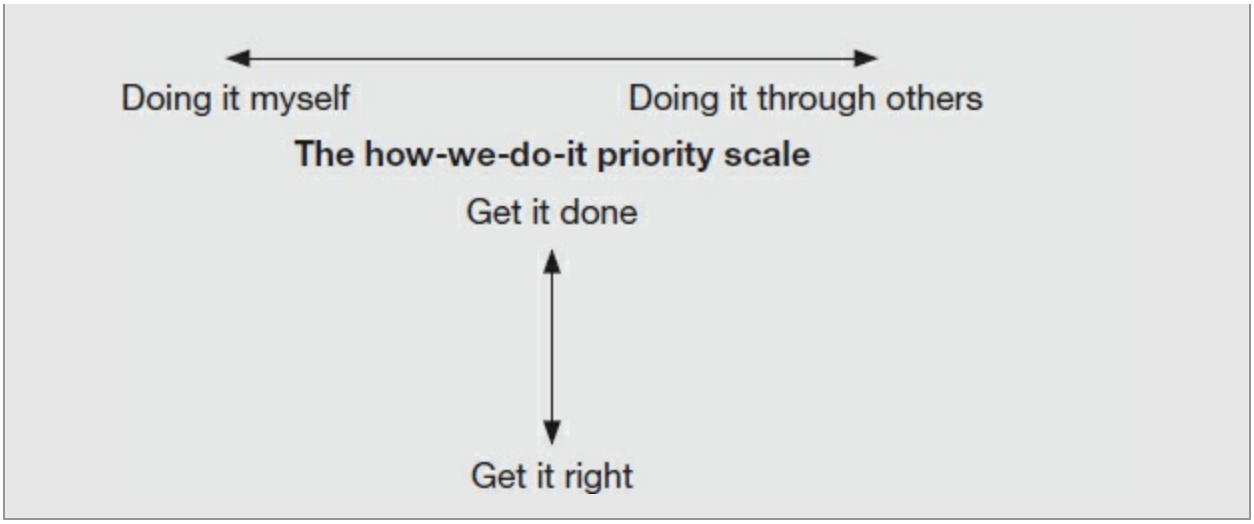
- **Sensing (S) or Intuitive (N)** — indicates how individuals perceive or gather information. Some people prefer to rely on their senses (S) while others prefer to rely on their perception of relationships, meanings, concepts and possibilities beyond what is immediately apparent (N).
- **Judging (J) or Perception (P)** — indicates the attitude individuals adopt when dealing with the world. The J person seeks to command and control events in a decisive way, while the P person lives in a more spontaneous way, seeking to adapt to life.
- **Thinking (T) or Feeling (F)** — indicates what one relies on when making a decision. T people like to rely on analysis, logic and objectivity. F people rely on more subjective, personal and social values.

Each preference on each scale is independent of the other three. This results in 16 possible combinations denoted by four letters (for example, ENFJ, ENTJ, ISTP and so on). Each of these types has different preferences, weaknesses and strengths. The way in which they deal with conflict is likely to be different. The MBTI can be useful in indicating the complexity of responses to conflict. It is less useful in designing system-wide responses.

In verbal jujitsu, however, we use a system adapted from author Brandon Toropov (1997). (I find the Myers-Briggs and other models too unwieldy and complex to be of much use in my own practice.) The Toropov model is a simple one that I have found useful in better analysing and responding to conflict situations. In this model there are four initial frames of reference or styles that people bring to bear in their relationships with each other. These four personality types have different ways of getting things done. They are based on two priority scales.

The first scale is balanced between the two extremes of doing things by ourselves or doing things through others. The second scale is a balance between a preference for getting things right and checking the detail regardless of time and getting things done within time constraints. Most of us have a preference along one of these scales. These scales can be represented as follows.

The who-does-it priority scale



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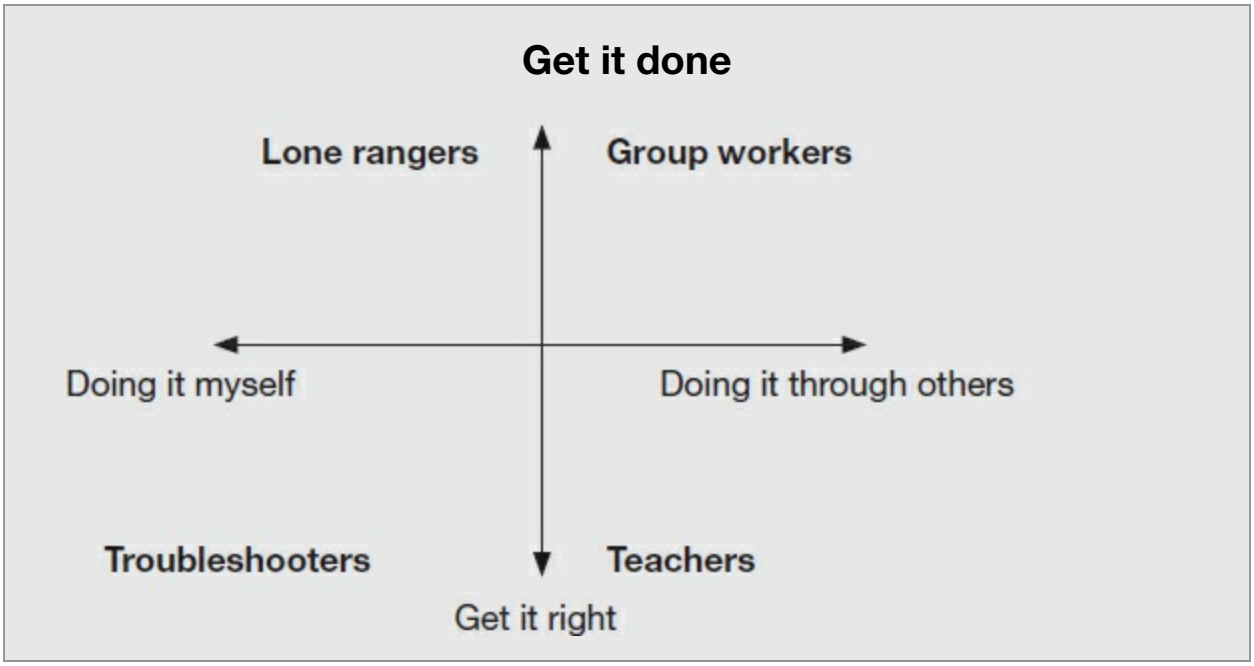
By putting these two scales together, Toropov developed a quadrant model which, with adaptations, I have found extremely useful in the Australian context. The four sets illustrated below match the priorities of most people.



Most people can identify with one or more of these four groups of people almost immediately. Some take a little longer to work it out. I have provided a

checklist of characteristics of each group below which you can use to analyse your own and others' styles. Each type can be summarised as follows:

1. *Lone rangers* are self-directed, goal-oriented and persistent. They like to keep to deadlines but have a tendency to overcommit themselves. They generally have great confidence in their abilities.
2. *Troubleshooters* are also self-directed and persistent. They prioritise their technical knowledge and finding the problems or issues to be fixed.
3. *Teachers* like technical detail but focus on developing policies, procedures and systems that keep the whole group focused.
4. *Group workers* like to work through the group, as with teachers. They are generally optimistic and gregarious and tend to be time-sensitive and goal-oriented.

Using these four types can be very helpful in understanding why you are having conflict or misunderstandings with particular people; it also gives you some clues as to how to talk and respond to them. However, be warned! They are not prescriptions for dealing with others. People are adaptable and act differently in different contexts. These descriptions can enable you to respond to each type in the most appropriate way. The examples of conversational styles in **Exercise 6** at the end of this chapter (adapted from Toropov, 1997, pp 46–7) illustrate this. They can be contrasted with the conversations models described in **Exercise 11**.

Understanding the conversational style of the person you are dealing with means you are more likely to head off any misunderstandings and conflict. The basic way of doing this is to mirror the conversation (and non-verbal communication) of your conversational partner. This helps you to connect with the other, and helps both of you to meet your respective interests and needs. To do this you send your messages in the language of the other. In this way you get into their 'mindset' and maximise

your chance of harmony. You put yourself in the other person's shoes and present the concerns and issues in a way that they will best understand and respond to.

Toropov (pp 49–51) provides some general guidelines for dealing with each personality type. You can use these guidelines in most situations to improve your communication with people and to prevent conflict from occurring. Framing your conversation in the way the other party best relates can be rewarding for both of you. Try to think of people around you whom you can safely practise this on — perhaps a friend or partner. Discuss with them the four styles and, while you are doing it, try to establish the other's style and mirror (but do not parrot) elements of their style.

A checklist of the four personality types

Lone rangers	Group workers
• Self-directed	• Group-directed
• Goal-oriented	• Gregarious/optimistic
• Persistent	• Enjoy working with others/talk
• Enjoy developing projects/new ideas	• Enjoy 'adventures'
• Take deadlines seriously	• Reluctant to alienate others
• Find doing it easier than explaining	• Generally concentrate on particular projects and goals, systems
• Handle pressure	• Credit and trust the team
• Can over-concentrate on one project	• Assume the best in others
• Can over-commit	• Have difficulty disciplining/replacing others
• Often expect/assume similar of others	• Often intuitive
• Often assume others understand	• Can over-compensate in management

• Often highly intuitive	
Troubleshooters	**Teachers**
• Self-directed • Persistent • Enjoy finding mistakes/issues • Enjoy details • Everything is a search for quality • Find discrepancies/inconsistencies • Like to be technically proficient • Sometimes can be seen as harsh/tactless • Can be indirect (to avoid conflict) • Like to write things down • Assume others will pick up errors like them • Can go in the 'wrong direction' because of the need to find the problem	• Group-directed • Enjoy detail • Enjoy problem-solving/measuring/quantifying runs • Team workers • Systems and procedures maintenance are important to others • Reluctant to alienate others • Concerned with problems, bu as to make the system work r smoothly • Can be conservative/risk-aver • Can concentrate too much on generating data and not 'doin

Level 2 conflicts: Resistance

3.38 When people are fearful or feeling threatened they tend to go into resistance mode, which can sometimes manifest itself in difficult behaviours. The Duke of Wellington was credited as saying that the next greatest misfortune to losing a battle is to win a victory such as Waterloo. This is because, after years of conflict, Europe was ill-prepared for peace. Likewise,

individuals and groups who have been in intense conflict for considerable periods of time also experience this difficulty — victory and peace may be almost as fearful a prospect as defeat. If you create an environment where ongoing destructive conflict is the norm, then it may be difficult to break the pattern. Conflicting parties may, because of their past conflicts or experiences, resist initiatives to do something differently.

It is therefore necessary to take account of the reactions and resistance that any management intervention may create. In his scientific treatise, *Principia*, published in 1687, Isaac Newton conjectured that every action in nature provokes an equal and opposite 'reaction'. From there this term entered the vocabulary of the social services (hence, the term *reactionary*). Reaction to attempted change or to doing things differently is inevitable. It should therefore be planned for and met. When the reaction is such as to impede or stop the process of change or positive movement, it is usually termed 'resistance'.

Resistance

Resistance is defined in the *Australian Concise Oxford Dictionary* in three different ways (biological, physics and electrical) as follows:

> resistance n. **1**. (Power of) resisting (*showed resistance to complying, to wear and tear*); (Biol.) ability to resist adverse conditions; Passive *resistance*; ~ (**movement**), secret organisation resisting authority, esp. in a conquered country. **2.** Hindrance, impeding or stopping effect, exerted by material thing on another (*overcome the resistance of the air*); **line of** ~, direction in which this acts; **take line of least** ~, (fig.) adopt easiest method or course. **3**. (Phys.) Property of failing to conduct (electricity, heat, etc.); amount of this property in a body; (Electr.) resistor.

All three variations are worth considering when thinking about managing people's reactions to your activities.

The tables entitled 'Deliberate deception', 'Psychological Warfare' and 'Positional pressure tactics' reproduced below at **3.39** outline some typical types of resistance that you will encounter and offers suggestions for handling them, to minimise the escalation of the conflict. It is by no means exhaustive.

There may be other types of resistance that you have to deal with in your particular situation.

Keep in mind that resistance will occur often in your work and personal life. When you want to go in a certain direction, others will not necessarily want to go along for the ride, whether it is your children who do not want to go to school, your dog who does not want to play or your boss who is reluctant to consider your training needs.

Level 3 conflicts: Dirty tricks and deception

3.39 Resistance can sometimes escalate into 'dirty tricks'. People often engage in dirty tricks and deceptive behaviour when they can least afford to. In truth, none of

us are necessarily at our best when confronted with intense conflictual situations; for example, if you ask yourself the following questions, the answer is probably, 'No':

- Are you always honest?
- Are you always thinking of the longer term?
- Are you always cooperative?

If you ask yourself the further question, 'Why not?', you will probably come up with quite a few reasons why you engage in this level 3 behaviour from time to time.

There are three main forms of dirty tricks and deception:

- deliberate deception;
- psychological warfare; and

- positional pressure tactics.

The typical response to dirty tricks is to respond in kind, or let the other get away with it. Instead, try these approaches:

- Recognise the tactic and raise the issue explicitly (but not in an attacking way). Often this will be sufficient to stop the behaviour.
- If necessary, negotiate first over process rules/objectives.
- Stay objective — remember you've always got your 'best alternative to a negotiated agreement', or BATNA. This is the outcome you could get if you were not engaging or negotiating with the other person/s.
- Turn to a third party for help.

Deliberate deception

Examples	Suggestions for handling them
• Phoney facts	Check the other side's facts.
• Ambiguous authority	Ask about their authority; that is, 'How much authority do you have in this negotiation to make a decision?'.
• Dubious intentions	Make the problem explicit — explain that you are worried and obtain a guarantee clause.

Psychological warfare

Examples	Suggestions for handling them
• Stressful physical environment	If the situation is stressful, say so and ask for a change.
• Personal attacks	Don't respond. Use silence. Name the game; for example, 'I feel like you are attacking me personally rather than attacking the problem'.

• Good guy/bad guy routine	Recast the attack on you as an attack on the problem. Recognise the tactic and respond the same way to both people employing the tactic. Name the game. Ask for the objective criteria they are using. Suggest that the good guy and bad guy come to their own agreement before returning to negotiation.
• Threats	Ignore them. Return the discussion to objective criteria.

Positional pressure tactics

Examples	**Suggestions for handling them**
• Refusal to negotiate	Recognise the tactic as a possible negotiating ploy. Talk about their refusal to negotiate and find out their interests in not negotiating. Suggest options; for example, negotiating through a third party or sending letters. Insist on principles; for example, what principles apply to their refusal to negotiate? Present negotiation as something they can gain from; for example, not giving

	up power. Name the game. Ask for principles justifying their position.
• Extreme demands	Name the game. Ask for the principles underlying their position. Take a break from negotiating.
• Lock-in tactics	Do not take the lock-in tactics seriously/make a joke. Refer to it as an 'ideal' position. De-emphasise it so the other side can back down gracefully. State 'My practice is never to yield to pressure' and return to interests.
• Hard-hearted partner	Recognise the tactic. Ask to speak directly with the hard-hearted partner. Name the game. Look for objective criteria that can be used to establish deadlines.
• Calculated delays	Begin exploring your BATNA or WATNA (worst alternative to a negotiated agreement). Ignore the tactic/keep talking as if you didn't hear it. Look for a face-saving way, such as a change in circumstances, for them to withdraw the threat.

• Take it or leave it/commitment strategies	Look for a face-saving way out, such as a possible change in circumstances or varying options which might make

their decision different.

(Adapted from Fisher and Ury, 1981)

Common reaction to these tactics

3.40 Our common reaction to the three levels of conflict, especially dirty tricks and deception, is to retaliate or respond in kind; for example, if somebody is nasty to us we are nasty back — that is, we react rather than respond. Reaction is an unthinking, off-the-top-of-the-head response to a difficult situation, whereas responding is pausing, even if momentarily, and thinking about what the other person's intent is before making a response. This is the essential element of most of the suggested responses outlined above.

The second thing we normally tend to do in these situations is to avoid them; that is, we ignore the conflicts and hope they will go away. This is the most common response to conflict in our society. Sometimes this is an appropriate response to difficult situations, but often what happens is the problem re-emerges somewhere else at another time, and often when that happens it is more difficult to deal with than it originally would have been.

Many of us react and/or avoid almost automatically. To break these patterns when they are not working for us requires practising and using some new tactics across the three levels of difficulty. These are outlined below and form the core of the verbal jujitsu approach. The start of the process is the STAR approach.

The 'Stop-Attend-Reframe' (STAR) Approach

3.41 When I was working in the Alternative Dispute Resolution Branch of

the Queensland Department of Justice and Attorney-General some years ago, I came up with a simple process — the STAR technique — to help teachers manage conflict at school. What I have discovered since then is that it works in almost all situations. The technique is based on three simple steps and is particularly useful if you are in a difficult situation or conversation.

Using this technique, you first stop, scan, listen and do not suggest a solution. Second, attend and take an impartial stance. Provide some positive verbal cues, ask questions and explore the other's perceptions, then summarise what they have said. Only then move onto the third step: try to demonstrate respect and reframe the issue or problem in a more positive way. At this time you can present your own feelings, intentions and self-talk. Options or possibilities can be listed to manage the issue(s) and these can be reality tested and negotiated. If you employ this process you are more likely to maintain control and maximise your opportunities for a productive outcome. Alternatively, you will often discover that the person did not intend to engage in such activity or that you have misunderstood them, or you may discover that the process of thinking it through has calmed you and defused the situation.

The STAR approach emphasises the need to stop or pause when confronted with a difficult encounter. By doing this, you give yourself a reasonable chance of making a good response. Others prefer verbal jujitsu.

Using Verbal Jujitsu

3.42 Similar to the STAR technique, verbal jujitsu involves the processes of joining, focusing and collaborating. It is more specifically designed to help

you when you are under attack. The way you use these processes will, of course, depend on the situation. In this section we will consider different situations you may find yourself in, including direct attacks, circular attacks, multiple attacks, silence, procrastination, negativity, expert overkill and the 'nice pill'. As you read this, think about the three levels of difficulty we have outlined above and tailor your responses accordingly.

Verbal jujitsu: The basic steps

1. **Join:** Put yourself with the other person. Operationalise by focusing on the person's issues and their perceptions of what is happening.
2. **Focus:** Focus on the other's interests. Operationalise by asking about their needs, motivations and concerns, and go back as necessary to steps 1 and 2.
3. **Collaborate or negotiate:** Start to bring in your own interests, but remember to take turns. Operationalise by suggesting options, possibilities and future concerns, and reality test as necessary.

The direct attack: Crocodiles and land mines

3.43 The direct attack is a straightforward attack on you; for example, 'Jill, you're an idiot!'. There are seven basic responses to this sort of attack: fight back, withdraw, negotiate, avoid, do nothing, use deception or use verbal jujitsu. There are advantages and disadvantages to each response. People who combine these aggressive tactics with displays of physical intimidation and who want to overpower as well as defeat you, I call 'crocodiles'. Verbal jujitsu can provide you with a response that gives you a reasonable chance of maximising the possibility of remaining positive and reaching a reasonable outcome. If you use the processes outlined above, these attacks are relatively simple to deal with. Some other pointers for these situations are:

- Use the other person's name.
- Self-referent terms such as 'I want' and 'I need' are useful.
- Use questions rather than statements.

- Use direct eye contact.
- Use the 'broken record' technique; that is, repeat your essential message.

Crocodiles are not normally sensitive to others' needs and often do not listen well, so be patient with them. Even though they are scary, crocodiles tend to come straight at you and therefore are relatively easy to manage.

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This is not quite the case with 'land mines'. Land mines are people who, for whatever reason, are under such pressure that they 'explode' and seem to lose control. With these people, remember the following extra points:

- At a pause or convenient moment let them know they are taken seriously.
- Clarify the facts of the situation.
- Try to clarify the perceived threat that they are experiencing.
- Offer some concrete and realistic help.
- Most importantly, use the anger starvation technique; that is, simply listen and do not respond until you sense that they are 'running out of steam'.

Circular attack: Magpies

3.44 Circular attacks are those that don't come straight at you. Instead, the attacker will often use sneak tactics, such as gossiping, and often they are meant to unsettle or confuse you. Sometimes, magpies, as I call these types of people, appear outwardly friendly. They are often extremely skilful and they will also 'cover up' by turning an attack into a joke or imply that you are too sensitive. They will often appear in a group setting. Magpies are more difficult to manage than crocodiles and land mines. There are two basic strategies for dealing with circular attacks. The first is to pause and work out what is

happening. Use the STAR strategy; that is, stop momentarily to gather yourself so that you can become centred and balanced. The second strategy is to confront the other person with what you think they are doing, in order to get them to attack you or at least be direct with you, in which case you can use the techniques outlined above. By using these strategies you can gain control of the situation.

Some other pointers that will help you in mastering situations with magpies are:

- Talk to them one-on-one if possible.
- Ask questions that reveal their intention; for example, 'You said … Is that what you meant?'.
- If in a group, try to involve them.

Some thoughts on listening

1. Rather than judging something the other person is saying as wrong, stupid or incorrect, ask for clarification.
2. Ask open-ended questions.
3. When you are experiencing a difficult situation avoid pointed questions, and make statements.
4. Keep eye contact.
5. Take notes, but only where this will not interfere with your listening.
6. Provide feedback and paraphrase what the other person is saying to you.

Multiple attacks

3.45 In groups there are variations of the direct and circular attacks. This is where more than one person simultaneously attacks you. It often happens in committee or

group meetings. There are different sorts of multiple attacks. Below are some pointers to help you when such situations arise.

The sandwich
First, there is the sandwich, which is where two people attack you from different sides. The basic way to deal with these sorts of situations is to step out of the way and join one of the attackers. You do this by not just agreeing with one of the parties but by listening, empathising and asking questions. In other words, you try and put yourself in one of the parties' shoes. This will take you out of the centre of the attack and put you beside (or behind) one of the parties. It is usually best to join with the stronger party. This will often lead the other parties to clash. When you have extricated yourself from the sandwich, you can go into verbal jujitsu mode as before.

The tug of war
Another type of multiple attack is the tug of war. This is the situation in which two people are pulling you in opposite directions. In this situation, wait until one side becomes stronger and then join that side. This doesn't mean that you agree with that side, but that you empathise with that side. When you and the person you are empathising with have the momentum, and the other party is trying to shift around, you can then change the focus to discuss what is really going on between them. Finally, you join and harmonise with both sides.

The group attack
The other type of multiple attack is the group attack. This is where three or more people have you surrounded and are attacking you. Again, your response should be similar to 'the sandwich'. Join with the strongest attacker and so remove yourself from the centre of the issue. Remember, you are not necessarily agreeing with the strongest attacker, but you are trying to take the heat off yourself so you can ultimately negotiate the issue in a clearer and more balanced way. By removing yourself from the centre of the action and joining with one party, you make it easier for the group to move to negotiation. Usually in this situation the group members will begin to attack each other once you are not the centre of attack. When this happens, you can more easily have your say and direct what the group will do.

Silence: The submarine

3.46 Another variation of the attack is the silent treatment. I call these people 'submarines' because one never knows where they are! Submarines can represent a multitude of different possibilities. Being with them is characterised by long periods of silence and/or withdrawal. You need to try to

find out what is going on, but do not expect to always succeed. In dealing with submarines it can be difficult to use the techniques described above because there is very little energy in the interaction to use productively. Try the following approaches:

- state the issue and then ask open-ended questions;
- look expectant;
- do not fill the silences — this is what they expect; and
- if the above does not work, state what you have to do and get an acknowledgment.

Another variation in this situation is 'autistic hostility'. These are situations where other people are openly avoiding you. Depending on the circumstances, it is best to

remain friendly and cooperative and often these situations will pass. If they do not, you may need to confront the person(s). Often doing this on an individual level is better. When you have done this, use your basic verbal jujitsu techniques.

The procrastinator

3.47 The procrastinator is a person who is constantly putting things off. They may look busy but not a lot is getting done. Underlying this is usually a marked level of anxiety. Procrastinators can lead you into a serious and unproductive state of conflict if you are not careful. With these people, non-verbal signals are often very important. Here are some useful pointers for you to consider:

- Find out what they are thinking — this may be difficult for them, so do not

press it.

- Ask them what is the issue, problem or difficulty for them.
- Use some option-setting for them, being as clear and concrete as possible.

Negativity: Complainants and 'black holes'

3.48 Negativists generally are those who do not see anything but the potential for disaster and discord. They come in two varieties — complainants and 'black holes'. Keep in mind that people with different interpersonal styles from your own may come across as negative; however, complainants and black holes tend to be on a different level of difficulty, and represent extreme examples of the pessimistic personality. The primary reason for this is that they feel powerless and want to shift responsibility away from themselves. Black holes are differentiated from complainants because they also have a very low level of trust. Complainants tend to be more opinionated, broadcasting and trying to enlist support for their concerns, whereas black holes tend to be relatively insular. Below are some useful guidelines for dealing with these sometimes difficult people.

For complainants:

- Do not apologise.
- Do not argue.
- Emphasise active listening skills and paraphrase back to them what they are saying.
- Ask clarifying questions and try to get them into a collaborative mode (which could be difficult).
- Involve them in outcomes.
- Help them set deadlines and aim for definite outcomes.
- Do not set complex or difficult tasks.

For black holes:

- Do not argue.
- Suggest positives but not solutions — deal with the issues as they present.
- Develop scenarios about what they fear may happen.
- Suggest how you can provide help.

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Expert overkill: The know-it-all

3.49 Every so often you meet somebody who always has the right answer for everything and takes personal slight to a different point of view. This characteristic can be very trying and lead to endless conflict. Again, keep in mind that some people may appear to us to be in this category because of a different style of communicating or because that is the assumed position they have been given in the group.

When confronted by this situation, carefully analyse your position. Below are some pointers for dealing with these situations:

- Concentrate on summarising and paraphrasing what they say.
- Ask clarifying questions in which you point out issues of concern to you.
- Ask questions that get them to expand on their ideas.

The nice pill: Marshmallows

3.50 Some people want to be liked whatever the cost to themselves or others. These people tend to be agreeable to the point where the counterbalancing need to get a task performed is sacrificed. This can cause real problems, particularly in work groups. In situations calling for the use of

judgment and problem-solving, such people, or 'marshmallows', can even be dangerous. The problem is that they spend so much time wanting to be liked that they succeed, to the point where it can be quite difficult to confront them with the issues that this may be creating.

When they are confronted, they tend to want to please you so quickly that the real issues are often sidestepped. What do you do? Below are some guidelines:

- Help them clarify what they are thinking.
- Try to focus on a concrete issue.
- Give positive feedback (marshmallows are often anxious).
- Try to look for compromises and incremental progress rather than going for big advances or goals.

Self-attack

3.51 We probably attack ourselves more often than other people attack us. If we are constantly attacking ourselves it makes it much more difficult for us to deal with outside attackers. Again, you can take one of the seven positions I have talked about previously and manage yourself!

Conclusion

3.52 In a conflict situation, prevention is always better than a cure. Therefore, it is important to think about your family, social and workplace environments as investments. If you do not invest in the relationships around you, including those with clients and the public, you will get little in return. So, we cannot constantly be thinking only of what the task at hand is; we also have to think about how we maintain those relationships around which our

tasks are achieved or performed. Hopefully, some of the ideas outlined above will enable you to get more out of your conflicts.

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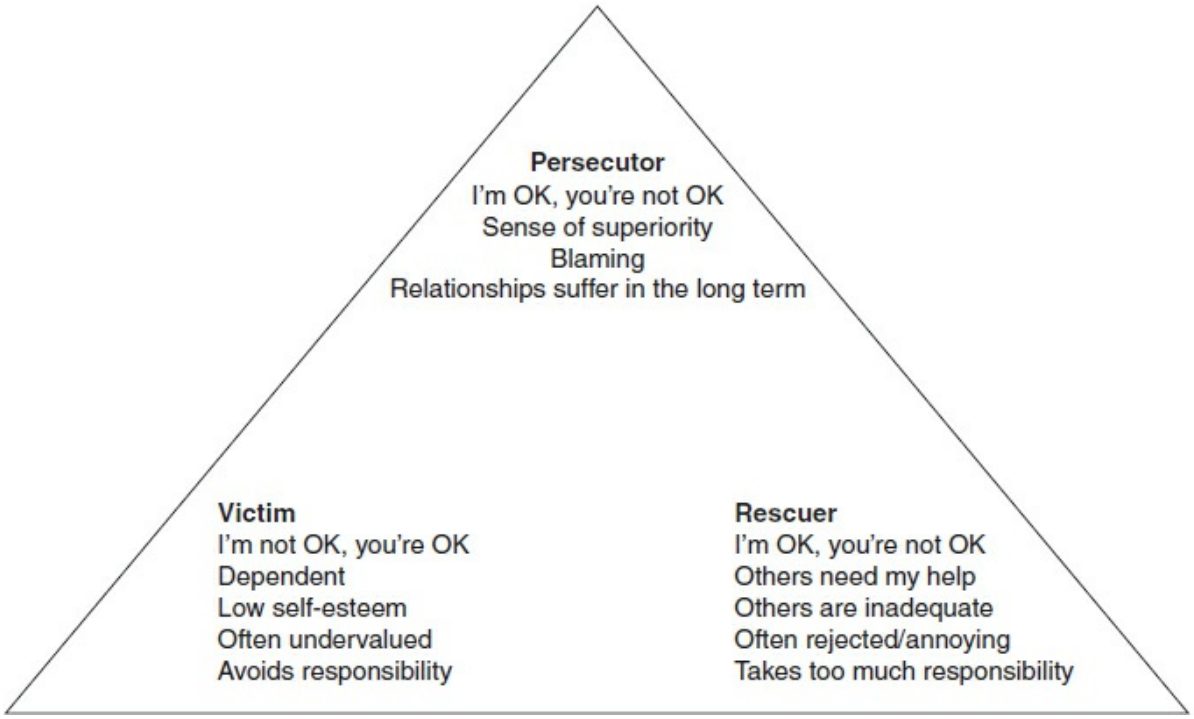
Exercises

Exercise 1 The communication triangle

According to the theory of Transactional Analysis, people often use three maladaptive roles: persecutor, rescuer and victim. These roles are usually learnt from past experiences. Each is based on certain assumptions that we have about ourselves and other people that in turn affect our communication patterns. Each is coercive or manipulative. The model can be represented as follows:



Many relationships, especially in family groups, reflect these maladaptive dynamics. Ask yourself which of these roles you play and when. By exploring this communication triangle you can uncover some of the issues and problems in your own communication style and patterns. Ask yourself, 'How can I change this behaviour?'. (See Berne, 1964; James and Jongeward, 1971.) Contrast this model with the Kantor model in **Exercise 11** below.

Exercise 2 The communication onion

Sometimes it is useful to think of our communication as a process which reveals layers of our own

personality and which penetrates the layers of personality of the people we communicate with. Usually, one of these elements — our behaviour, thoughts or feelings — is more accessible than the others. This idea can be illustrated with a 'communication onion' as follows:

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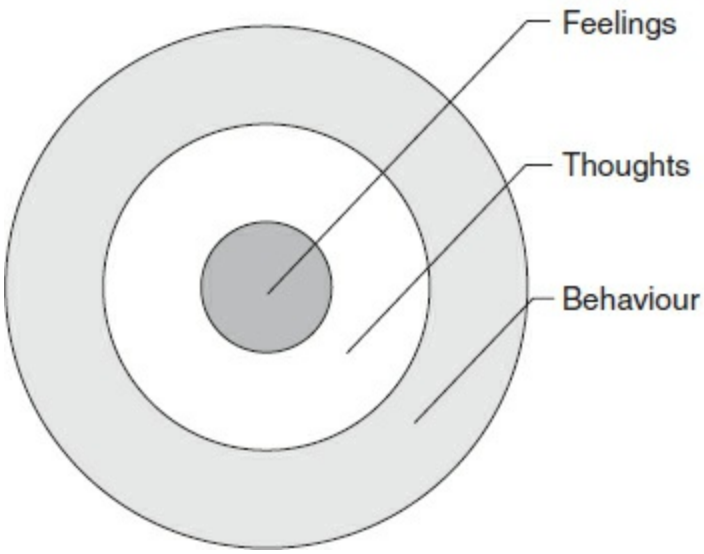
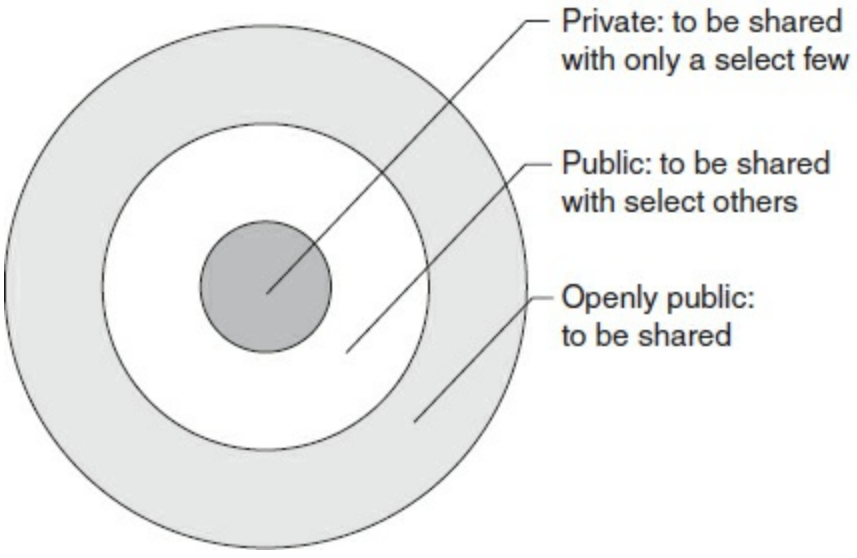


For many people, behaviour is the aspect of personality most readily communicated and observed. Thoughts and feelings are progressively hidden. The barriers we put around these aspects of our personality vary between individuals, groups and cultures. People in Western cultures, especially men, often find it difficult to communicate their feelings directly. The result may be that this expressive part of their personality becomes both undervalued and difficult to relate to:



If you drew an 'onion' of yourself would it look like the one above? How thick would the lines (barriers) be around each part? Another way to think of communication onions is as illustrations of your public and private aspects. For example, if you drew an onion like the one above, what would you include in each of the layers of the onion? Include in your consideration of 'onions' the way in which these divisions of the various layers or parts of your life influence your communication style.

Exercise 3 Expressing emotions

Emotions are an integral part of our communication style. They show in our body language and voice. They are always present and sometimes take us over. Often we need to control or even repress our emotions. Think of some situations where you

have had to forcibly repress your feelings. Do you think the other person detected how you felt? Was there any way in which you could have expressed your feelings without fear that this may have been in some way damaging, embarrassing or disrespectful to the other? Do you agree that it is always better to express your feelings?

Exercise 4 Communication barriers

(a) Look again at each of the communication barriers listed at **3.3** above. Rank them in order from those that cause you least trouble to those that cause you most trouble as both perpetrator and respondent. List three reasons why each of these cause you trouble.

(b) Which barriers do you use most in your significant relationships? Why do you use them? How could you change your behaviour?

Exercise 5 The ABCs

Folberg and Taylor (1986, pp 83–7) in their book on mediation describe a method for helping the mediator structure his or her intervention so as not to miss the three vital aspects of communication: **A** affect (feelings), **B** behaviour, and **C** cognition (thoughts). They combine this with a consideration of how each of these elements occurred in the past, how they occur in the present and how they will occur in the future. This analysis of the past, present and possible future of a conflict by the mediator can help the disputing parties thoroughly analyse the ABC of their dispute. Think of a conflict in which you are currently involved either at a personal level or in your role as a mediator or negotiator. How could you use these various elements to analyse the dispute?

Exercise 6 Conversational styles

In this chapter we considered that it was possible to deal with a range of interpersonal disputes by understanding and being able to mirror the conversational styles of others. For the sake of simplicity, we divided people into four types: lone ranger, trouble shooter, teacher and group worker. These differing styles are outlined below.

(a) Where do you think you belong?

(b) Which type are you least like?

(c) Do you change your conversational style in different contexts?

(d) How can you use this knowledge to help you manage conflict more constructively?

Bill Eddy, President and founder of The High Conflict Institute, has described a number of personality types who may be difficult to communicate with and has used this model to train lawyers and judges, among others, to better manage them. For further information see <www.highconflictinstitute.com>.

Conversational style of lone ranger

'I can finish it by this Friday if I can just block out the time to work on it undisturbed.'

'It will take me longer to explain it than it will for me to do it.'

'She's my kind of employee: a real self-starter, and she can move mountains for you, if you just get out of her way.'

'You know what they say: if you want something done right, you've got to do it yourself.'

'I've almost finished it. I think I'm going to stay late tonight.'

'I can't talk now. It's crunch time here.'

'The phone won't stop ringing while I'm on deadline!'

'I need to head to the library to finish this off. It's too noisy around here.'

'I don't know why he's having so much trouble wrapping that up. It's a morning's work, tops.'

'When do you need it by?'

Conversational style of troubleshooter

'I found a problem.'

'You're going to need to redesign something for us here.'

'What happens if someone uses it like this?'

'This is all distorted. Something's wrong with the manufacturing process.'

'There's a typo right here.'

'It's off centre.'

'That clause doesn't cover us if (dire unforeseen event of person's choice) happens.'

'The figures don't add up.'

'I think there may be a problem with the formula we put in the spreadsheet.'

'These don't match.'

Conversational style of teacher

'I've set up a form that will help us keep track of everything.'

'If we just do this for an hour every Tuesday, we won't fall behind.'

'Interesting idea. Did the people in accounting get to take a look at this?'

'Have you logged this in yet?'

'Let's pump all these numbers into the spreadsheet and see what it looks like a year or two out.'

'The problem is, we didn't get the right people talking to one another.'

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'Let me put that on my list.'

'We need to have a meeting with (departments or individuals of person's choice) to address this.'

'You know, we had a problem just like that on my last job. We ended up going with an X-14 widget-sorting system.'

'Can I see another analysis that takes (factor of person's choice) into account?'

Conversational style of group worker

'We can do it.'

'My people can work miracles with something like this. You watch.'

'Listen, they're exhausted. They're only human.'

'You're going to accomplish some great things in this department.'

'We've taken on tougher jobs.'

'Big project coming up, guys!'

'I know you can pull this off.'

'Let's show them where to find the sharpest department in the company.'

'I can't tell them that. It will ruin morale in the office.'

'It was my fault. I should have told him to watch out for that.'

Exercise 7 Complaints: A simple checklist to audit your organisational preparedness

The checklist below is based upon the document titled 'Essential Elements of Effective Complainants Handling' as identified in the Australian Standard Complaints Handling (AS 4269–

1995). By completing it, you will obtain a good sense of the various organisation-wide core elements of a complaints management system.

	Essential elements	Response/what do you need to do?
1.	***Commitment:*** **Demonstrated organisation-wide commitment to complaints policies and procedures**.	
1.1	Are management and staff aware of any legal or other requirements to create and maintain a complaints policy?	
1.2	Is there a 'complaints-friendly' environment?	

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	Essential elements	Response/what do you need to do?
2.	***Fairness:*** **Fairness to both the complainant and the organisation is recognised**.	
2.1	Are complainants' concerns genuinely addressed?	
2.2	Are there sufficient resources to properly investigate complaints	

	and communicate reasons for decisions as required?	
3.	***Resources:* Adequate resources with sufficient levels of delegated authority**.	
3.1	Have staff been sufficiently trained in communication, problem-solving and complaint management?	
3.2	Is there sufficient investment in information systems to track individual cases and manage aggregate data?	
4.	***Visibility and access:* The provision of information about and access to the complaint management system and processes of referral from it**.	
4.1	Is there sufficient information provided to staff and potential complainants?	
4.2	Can potential complainants readily access information and assistance or find out where to lodge a	

	complaint against your agency?	
4.3	Are complainants able to obtain advice as to the progress of their complaint?	
4.4	Are impaired or disadvantaged persons catered for?	
5.	***Assistance:* The availability of sufficient explanatory material and other assistance to enable complainants to manage the system that is set up**.	

	Essential elements	**Response/what do you need to do?**
5.1	Is there an explanatory brochure that the public and client can access explaining the complaints handling procedure?	
5.2	Is there a way of helping people complete forms and deal with language difficulties?	
6.	***Responsiveness:* The complaints handling**	

	system should set time limits and enable feedback to complainants at various stages of the process.	
6.1	Are there established timelines for each step in the complaint handling process?	
6.2	Are there triggers to alert staff of the need to inform complainants of the progress of their complaints?	
7.	***Charges:*** **The complaints handling process should be provided free of charge subject to statutory requirements**.	
7.1	Are there any hidden costs in making a complaint about your agency?	
8.	***Remedies:*** **Policies on the provision of remedies which reflect what is fair and reasonable in the circumstances, legal obligations and good industry practice**.	
8.1	Does your agency indicate what remedies	

	may be available in given situations?	
8.2	Does your complaint handling process indicate who may decide a particular remedy and what sort of process can be used?	
9.	***Data collection:*** **Systematic recording of complaints and their outcomes**.	
9.1	Does your agency have any legal or other reporting requirement regarding complaints?	

	Essential elements	**Response/what do you need to do?**
9.2	Have you evaluated your complaint management process?	
10.	***Systemic and recurring problems:*** **Classification and analysis of systemic and recurring problems**.	
10.1	Are you able to identify complaints trends?	
10.2	Does your agency deal	

	with complaints from persistent complainants?	
10.3	Does your agency publish effectiveness criteria about your complaints handling processes?	
11.	***Accountability:* Appropriate reporting on the operation of the complaints-handling process**.	
11.1	Is it clear in your agency who has responsibility for analysing the complaint-handling data?	
11.2	Is senior management involved in analysis of the data?	
11.3	Is there follow up of action taken to manage complaints?	
12.	***Accountability and review:* Appropriate reporting on the operation of the complaints handling process**.	
12.1	Are outcomes of the complaints handling process monitored?	
12.2	Are the results of the complaints handling	

	system reported across the agency or elsewhere?	

Exercise 8 The ladder of inferences

The ladder of inferences is a useful way of helping explore another person's perceptions of or interpretations of what is happening (see Peter Senge's *The Fifth Discipline: The Art and Practice of the Learning Organization*, 1990). It is a representation of different ways that individuals make sense of and deal with everyday events.

Individuals select and process certain aspects of events, and introduce elements from this processing into their thinking, feeling and interactions. These elements include inferences, attributions and evaluations that may have substantial errors

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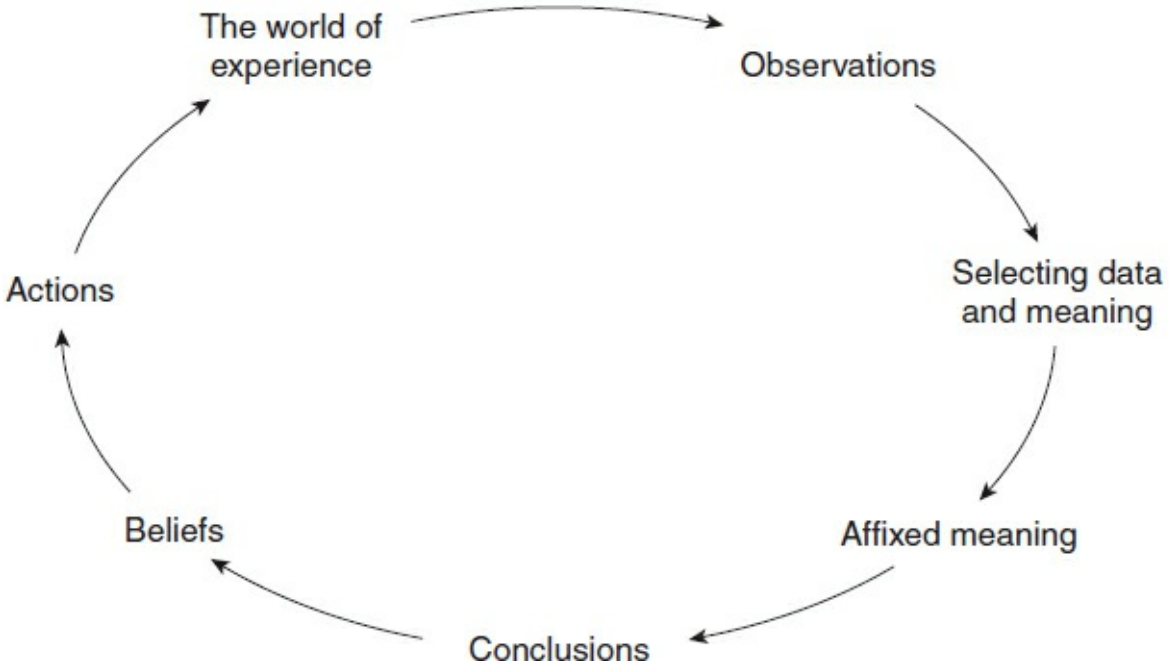
relative to objective observations of the same events. The further an individual moves or extrapolates from the actual, original data, the greater the potential error. This model can be useful in helping individuals reduce such errors and the resulting interpersonal problems.

As we know, we all have different ways of seeing things based on our culture, life experiences, training and so on. There are many ways to explain the same phenomenon. By using this technique, you can tie this idea to a person's actual behaviour and experiences. At the top of the 'ladder' are the conclusions on which we base our belief systems and actions or behaviour. These are the 'end points' of our thinking. At the bottom are our observations of what is happening. In between are our thinking processes, including the assumptions we make about the observations. You will notice that people often talk at one or other of these levels; that is, at the level of observations ('what happened') or at the level of conclusion ('this is what it means'). By moving people between these two levels you not only explore what they are observing, you can help them examine the assumptions and belief systems that lead them to their conclusions. For example, you can ask questions like: 'What have you observed to come to that conclusion?' or 'What have you seen that leads you to this conclusion?'. By taking the other person up and down the ladder, you can assist in understanding and gently confronting the other with their own thinking processes.

This mode can be illustrated by placing one element on top of the other, which makes it look like a ladder. I prefer to use a circular diagram because this demonstrates how the way in which we observe and then process information in our environment is a self-perpetuating system. Often we are unaware of these processes.



Asking individuals how they describe and name things and what this is based on may help them work through their thinking processes and can reduce misunderstandings. For example, if someone has concluded that another person is unreliable (a 'conclusion'), you can ask them what they base this on (their

'observations'). You can help them to work through the various levels, assisting them to understand and question ('reality testing') their own cognitive processes. Next time you are involved in a conversation, note how people move between these various 'levels' and think about how you could move them from one to the other.

Exercise 9 The Ultimatum Game

Imagine you are in a class with fellow students and the teacher says to you, 'I have $10 in coins and they are yours subject to one condition: you have to offer me back some of it to keep the rest otherwise you cannot keep any of it and it will be thrown out the window'. What would you do and what do you think would be a fair share?

This is a variation of the Ultimatum Game, first developed in 1982 by Güth, Schmittberger and Schwarze as a stylised representation of negotiation. I have tried this small experiment on a number of occasions and in a number of different ways. It replicates, in a simplified form, what sometimes happens in the negotiation process, usually towards the end. The results can be interesting and lead to some interesting discussions.

The game involves two roles: the proposer and the responder. The proposer divides the money. Typically, the proposer chooses how to divide a monetary amount (usually $10/$20) between

themselves and another player, the responder. The responder chooses whether to accept or reject the offer. If the offer is accepted, the money is divided between the two participants. However, if the proposal is rejected then both participants receive nothing. Therefore, the responder has the possibility of punishing the proposer for choosing to divide the money unfairly but, at the same time, suffers a cost. This type of behaviour is known as altruistic punishment because one chooses to punish at a personal cost (Fehr and Gächter, 2002). In the context of the Ultimatum Game, it is more economically rational to accept an offer regardless of how low the offer is. This is because accepting a small amount is objectively better than rejecting the offer and receiving nothing. Accepting what are perceived to be unfair offers can involve the activation of negative emotions, including anger.

The Ultimatum Game is important from a sociological perspective, because it illustrates the human unwillingness to accept injustice. The extent to which people are willing to tolerate different distributions of the reward from 'cooperative' ventures results in inequality that is measurably exponential across the strata of management within large groups and corporations.

For an interesting example of an academic experiment using this technique, go to the *PLOS One Open Journal* website and see the article by Fabiansson and Denson, 2012: <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0051595> (accessed 4 June 2015).

Exercise 10 Gender and anger

Consider these two recent statements concerning emotions and gender:

a) Olekalns and Druckman state (2014, p 467):

> Like culture, gender could also determine which emotional expressions are seen as appropriate and consequently affect the impact of those emotions. In general,

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> women are expected to both experience and express a greater range of emotions than men. The two exceptions to this general expectation relate to expressions of anger and pride, both of which are seen as more typical of men than women (Plant et al. 2000). Consistent with this view, men who express anger are more likely to obtain positive organizational outcomes than women who express anger (Gibson et al. 2009). Acting against expectation in general can have consequences: negotiators who switch strategies and thereby violate the expectations of the other negotiator influence that party's mood (Barry and Oliver 1996; Olekalns and Smith 2005).

b) Denson and Fabiansson (2012, p 143) in their research relating to the Ultimatum Game (see **Exercise 9** above) note that:

> Expressing anger can also be used to exert the illusion of power and competence. In a series of experiments, Tiedens (2001) illustrated that anger expressions influence whether people confer or bestow status to others. In study 3 co-workers who rated their colleagues as highly likely to

display anger tended to also be conferred more status including higher salaries and likelihood of a promotion. However, additional research reveals that the association between anger and status is different for men and women (Brescoll & Uhlmann, 2008). In contrast to an angry professional man, professional women who expressed anger were conferred lower status regardless of their actual status (CEO or assistant trainee). Women were allocated lower wages, status, and perceived as less competent than unemotional women or angry men. The extent to which women were conferred a lower status depended on whether the anger was attributed as due to internal characteristics (e.g. personality) or external characteristics (e.g. the situation). When external attributions were provided for expressions of anger in professional women they were awarded higher status than women without an external attribution but not higher status than non-emotional women. Therefore, the advantages associated with expressing anger do not extend to everyone and the effectiveness of expressing anger is constrained by variables including gender.

Do you agree with these statements and what can be done to manage such outcomes?

Exercise 11 Kantor's reading of the room

The speech act is Kantor's unit of analysis (2012). Every speech act can be categorised as having one of four types of action stances (mover, opposer, follower or bystander); one of three types of content (power, meaning or affect); and one of three types of paradigms, or rules for establishing paradigmatic legitimacy (open, closed or random). Examples of the action stances are:

- Mover: 'We need to spend less time in these meetings'.
- Follower: 'Yes, I've been concerned about the same thing'.
- Opposer: 'I don't think that's right. We need time to cover every topic on the agenda'.
- Bystander: 'Ian wants shorter meetings, Ralph wants to keep them the same length. What does everybody else think?'.

According to Kantor, skilled communicators and leaders are aware of these categories, and know how to respond in sequence. For example, you do not want to

oppose an opposer but you might try bystanding, to pause the sequence a bit, then follow by acknowledging that the person's concerns are legitimate. Finally, move by establishing your own point of view or a way to better discuss the problem.

The content dimensions emphasise the language itself: do you make a point based on feelings associated with nurturing and intimacy (affect), based on specific actions to increase competency and efficacy (power) or an argument based on reasoning, policy or philosophy (meaning)? We tend to gravitate strongly towards one method and discount people who use the others. In other words, we misread each other and can talk at cross-purposes.

The paradigmatic dimension is organisational. In an open system, everything is relatively

unregulated until specific action points, where a designated leader or authority takes over. In a closed system, the higher you are on the power hierarchy, the more authority you have. In a random system, authority belongs to those who take and use it.

The most effective communicators and leaders, according to Kantor, combine all these attributes based on how they see people responding. Everything you say can be framed as a combination of these elements. Imagine you are in a hot room. You could say, 'Turn the air conditioner on'. This is a closed-system move in power. However, you could change this to an open-system statement by saying, 'It occurs to me that people are sweating. Will somebody near the air conditioner turn it on?'. Your statement is still in power, but now it is open; that is, people have a choice.

The framework depends upon keen observation and learning from the people you interact with, and some experimentation to see what they respond to best. But once you have a sense of what works, it can become much easier to move conversations along, persuade people, and avoid roadblocks.

Key components of the Kantor model

Speech actions or action stances			
Mover	Follower	Opposer	Bystander
Communication domains			
Affect	Power	Meaning	
Organisational paradigm/operating systems			
Closed	Open	Random	

A good communicator and leader, according to Kantor, understands the interactions between these various dynamics and can help balance them, especially in work teams. A crisis (see **3.1** above) is often a manifestation of what Kantor calls the 'shadows' (dysfunctional communication patterns), which can be very interactively damaging. Good communicators and leaders can transcend these difficulties by understanding and acknowledging these problems and steer the interaction away from the shadow side in a more beneficial direction. For example, a group hits

a crisis point and its key members are antagonising each other. One is a fixer: 'We have to move fast and cut 40 per cent, with no nonsense about the damage to morale'. The other is a protector: 'My God, do you really believe that? We'll lose our best people, and the larger culture is going to suffer'. And then the survivor chimes in: 'I'm going to keep our morale up, even if I have to do it all myself. I'll work twice as hard, all week if necessary'. It is worth asking:

- How could a leader respond to this situation?
- How could this model, or aspects of it, be used in verbal jujitsu?

Exercise 12 Questions

(a) When does it pay to be angry?

(b) Are emotions innate or culturally determined?

(c) What are the two broad theoretical models in emotion theory?

(d) Why is it important to distinguish between intrapersonal and interpersonal emotions?

(e) In simulations like the Ultimatum and prisoner dilemma games is disappointment and/or guilt a key part of the reason/s why participants react as they do and does it lead to higher levels of cooperation?

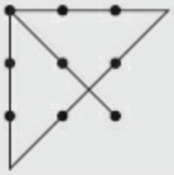
(f) Can positive emotions facilitate conflict management and negotiation (see Carnevale, 2008)?

(g) Why do displays of emotion by high status or powerful participants in a conflict often have different impacts to those of participants with relatively lower status or power?

(h) Kantor's model depends upon there being four 'action stances.' Do you think there could be others?

Solution to the nine-dot problem

Did you solve it? It should look something like this:



Sometimes you have to think outside the square!

Chapter 4

The Rise of Alternative Dispute Resolution

Summary

Over the past 30 years, Australians have had an increasing array of new and innovative alternative dispute resolution (ADR) processes to manage their conflicts. This has been the case not only in the legal sphere, but also in such disparate areas as industrial relations, family therapy, business disputes, public issue disputes (especially in environmental and planning matters) and the management of disciplinary and consumer complaints among professional groups. The ADR movement, as it is sometimes called, has progressively, almost stealthily, played an increasingly important role in the move away from authoritarian and top-down social and institutional structures to more open, accountable and inclusive arrangements. Understanding how and why this has happened enables us to better use and come to terms with the changes that have occurred in our broader society.

ADR usually describes systems that are an alternative to adjudication by traditional court processes. Many commentators suggest that the alternatives are now so popular that the word 'alternative' has become a misnomer.

This chapter looks at the key developments in the ADR field over the past 100 years and the way in which dispute resolution clauses are drafted and interpreted in contracts. The impact of these new

developments on the practise of arbitration are used in this chapter as case studies, to illustrate some of the issues that have developed.

Introduction

4.1 Since British settlement Australian history has been infused with notions of individualism and battling the harsh climate and landscape of the frontier. We revel in the imagery of competitive sports and of a nation bonded through war. Yet we also have a strong and rich tradition of communal sharing and fellowship that has lent itself to the adoption of ADR processes, not only during the past three decades of development of ADR in Australia, but earlier as well. Our Indigenous people also have a rich history that encompasses a range of processes we now identify as ADR innovations. As Astor and Chinkin (1992) point out, indigenous communities in Australia have for thousands of years used a range of methods to deal with conflict, including shaming, exclusion, compensation, initiation and training centred on a system of kinship-based law.

The ADR movement draws heavily on our history of collective dispute management, especially in the industrial relations system. A study of Australian history since European settlement reveals that non-litigious forms of dispute management have been practised in Australia since colonial times through arbitration provisions inherited from English law and the establishment of informal tribunal and ombudsman systems. In addition, the Federal Government, at a very early stage, developed a conciliation and arbitration system to manage the labour market, although this progressively developed into a formal litigious system.

These early developments were piecemeal and it was not until the late 1960s and 1970s that significant interest began to focus on informal dispute resolution, although the early focus was on tribunal systems and arbitration. In the late 1970s interest in mediation-based approaches began. Most

arbitration, ombudsman and tribunal systems provide alternatives to traditional litigation, but do not necessarily provide for the self-determination of the disputant parties, which is central to mediation programs. It was this emphasis which tied mediation to the rise of communitarian and consumer rights ideals and projects of the time, and which marked the beginning of the modern ADR movement.

The Modern ADR Movement

4.2 The beginning of the government-funded Community Justice Centres pilot in New South Wales in 1980 provided the initial impetus for the development of a new movement that we now recognise as ADR. This pilot was followed by similar establishments in Victoria in 1987 and Queensland in 1990. The centres were modelled on community-based mediation services which had sprung up in great profusion in the United States. These services, institutionalised within government bureaucracies, aimed at providing services to a long-neglected and ill-used sector of conflict — community disputes. They also pioneered the use of mediation in public issue disputes, victim–offender mediation (sometimes called 'conferencing') and family mediation.

The legal profession quickly followed these developments and established a specially constituted forum, Lawyers Engaged in ADR (LEADR, which became known as Leading Edge Alternative Dispute Resolution and which in 2015 merged with the Institute of Arbitrators and Mediators (IAMA) to form Australia's largest ADR organisation), to develop and lobby for the use of mediation within the legal system. Many universities

and law schools now offer ADR or mediation courses. Other professions have been slower to embrace these new approaches, but this is rapidly changing, especially in the environmental planning and human service fields.

Key developments in Australian ADR

1892	Courts of Conciliation Act 1892 (Qld) is proclaimed.
1904	Arbitration and Conciliation Court (Cth) provides for informal conferences.
1929	Conciliation Act 1929 (SA) provides for pre-trial interviews.
1931	Courts of Conciliation Act 1892 (Qld) is amended to streamline procedures.
1974	Consumer Claims Tribunal adopts neutral third-party referees.
1975	Family Law Act 1975 (Cth) provides for counselling and conferences.
1975	Institute of Arbitrators and Mediators Australia (IAMA) is established.
1977	Anti-discrimination Act provides for conciliation.
1979	Land and Environment Court (NSW) provides for conferences.
1980	Community Justice Centres (NSW Pilot Project) Act is proclaimed.
1983	Community Justice Centres Act (NSW) provides for community-based services.
1983	Victorian County Court Building Cases List makes provision for referral to mediation.
1984	Norwood (SA) Community Mediation Service is established.
1985	Noble Park (Vic) Family Mediation Centre is established.
1985	Australian Commercial Disputes Centre (ACDC) is established.
1987	Neighbourhood Mediation Centres are established by

	Legal Aid Dept (Vic).
1987	Formation of the Australian Dispute Resolution Association (ADRA), the first state-based ADR association, based in Sydney.
1987	Federal Court pilot ADR program begins in the NSW District Registry.
1988	ACT Conflict Resolution Service is established.
1989	Establishment of LEADR, now known as Leading Edge ADR — a not-for-profit lobby, professional and service organisation.
1990	Dispute Resolution Centres Act 1990 (Qld) is proclaimed, establishing the Community Justice Program, now known as Dispute Resolution Centres.
1991	Courts (Mediation and Arbitration) Act 1991 (Cth) introduces voluntary (since 1997, mandatory) mediation to the Federal Court.
1991	Canberra Mediation Service is established.
1992	'Spring Offensive' is initiated by the Supreme Court of Victoria with review of waiting cases, many of which were referred to mediation. Equivalent 'Settlement Week' occurs in NSW.
1993	Administrative Appeals Tribunal introduces mediation conferences.
1994	Farm Debt Mediation Act 1994 (NSW) is proclaimed.

1995	Establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC) by the Commonwealth Attorney-General to monitor and promote the use of ADR.
1995	Family Law Reform Act 1995 (Cth) establishes the centrality of 'Primary Dispute Resolution'.
1996	Native Title Act 1993 (Cth) amendments give increased

	emphasis to mediation before the Native Title Tribunal.
1996	Workplace Relations Act 1996 (Cth) is referred to mediation for the first time in industrial disputes.
2000	NADRAC discussion paper, *The Development of Standards for ADR.*
2004	NADRAC discussion paper, *Who Says You're a Mediator? Towards a National System for Accrediting Mediators*, outlines the need for mediator accreditation and standards.
2005	National Mediation Conference appoints sub-committee to consider accreditation and standards for mediators.
2006	Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) is implemented, mandating mediation in cases seeking parenting orders.
2007	Introduction of a new accreditation scheme for family mediators under the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).
2008	Implementation (1 January 2008) of National Mediation Accreditation Standards through a committee convened by NADRAC.
2010	Civil Dispute Resolution Act 2010 (Cth) is enacted, providing a leading example of a statutory attempt to improve timeliness and party responsibility to settle disputes before litigation commences. (Similar legislation is replicated in some states.)
2010	Introduction of the Model Commercial Arbitration Bill (MCAB) to replace state commercial arbitration legislation.
2013	NADRAC is abolished by the Federal Government.
2015	Merger of two leading ADR organisations (LEADR and IAMA) into the Resolution Institute.
2015	National Mediation Accreditation Standards are updated.

Courts, the banking and insurance industries and other large

institutionalised systems have now embraced mediation, in varying degrees, as part of their conflict management strategies. One significant indicator of this growth has been the proliferation of ADR-related legislation that has emerged to deal with the increasing array of services. Statutes referring to mediation have grown prolifically since 1990 when there were only a handful of such statutes. There are now over 100 statutes nationally. This figure does not include legislation that refers to other processes like conciliation, arbitration and case appraisal.

Like many broad-based social movements, ADR has not had many 'Napoleons' to lead the way forward, but it has had many 'champions' who, through their dogged

persistence and patience, have achieved remarkable things. Their efforts have been mostly unheralded or known only in their own state or locality. Often, the advances have necessarily been incremental and therefore without the drama of 'the big announcement' so beloved of our politicians. However, even a cursory review of the above list of key developments, which includes only the salient points, provides an insight into the remarkable range and depth of the services now provided.

One of the largest, fastest growing and innovative areas of ADR practice is in family law. While the Family Law Act 1975 (Cth) has always emphasised the management of disputes by ADR processes, the Family Law Reform Act 1995 (Cth) reaffirmed the centrality of these alternative processes by designating them 'Primary Dispute Resolution'. The related Family Law Regulations contain comprehensive statutory mediation protocols dealing with such issues as accreditation, standards, duties and obligations. The funding of outsourced community-based services by the Commonwealth grounded on these regulations (mainly to Relationships Australia and

Centacare) has provided the impetus for the development of new and innovative processes, supervision and research.

Significant reforms to the family law system were introduced in 2006. These require parties before the Family Court to attend a family dispute resolution service if they are seeking a parenting order. The parties can then obtain a certificate that they have attempted dispute resolution and then may apply to the court for an order. In addition, a less adversarial hearing model in children's matters was also introduced. Section 13C of the Family Law Act 1975 (Cth) empowers the Family Court, at any stage of the proceedings, to order that parties attend a conciliation, family counselling or family dispute resolution procedure.

The Accreditation of Mediators

4.3 After much debate in the mediation industry there has been progress relating to the implementation of accreditation and standards for mediators. Two approaches to accreditation were formulated. The first was a voluntary base-level accreditation scheme known as the National Mediation Accreditation System (National Mediation Conference 2005). The second approach was a legislated mandatory accreditation scheme provided for in the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), which outlines an accreditation scheme for family dispute resolution professionals, including mediators (Condliffe and Douglas, 2007).

Between 1995 and 2013 the National Alternative Dispute Resolution Advisory Council (NADRAC) had a role advising the Federal Government in relation to ADR. In 2000 it began providing discussion papers and reports regarding the accreditation of mediators (NADRAC, 2000b, 2001). Issues arising from the debate in regard to mediation have resonance in any discussion of the need for accreditation of conference convenors. The work of NADRAC culminated in the 2004 report, *Who Says You're a Mediator:*

Towards a National System for Accrediting Mediators (NADRAC, 2004). The report followed extensive consultation in relation to an earlier discussion paper, including a forum in each capital city. It contains 21 recommendations for government and non-government agencies involved in ADR, and provides a framework for the ongoing development of ADR standards. In particular, the report calls for ADR

service providers to adopt and comply with self-regulated codes of practice, and for the inclusion of such codes in any agreement for the provision of ADR services. It also usefully outlines a range of knowledge, skills and ethical standards that may be adapted into a code of conduct.

After release of its discussion papers and reports, NADRAC found support from the mediation industry for the development of standards to (NADRAC, 2006, p 57):

- maintain and improve the quality and status of ADR;
- protect consumers;
- facilitate consumer education about ADR;
- build consumer confidence in ADR services;
- improve the credibility of ADR;
- build the capacity and coherence of the ADR field; and
- promote Australia's international dispute resolution profile.

It became clear that there was sufficient support for the introduction of some forms of accreditation in the mediation industry. This is not to say that there were no reservations about the adoption of such standards. Douglas, for example, made the point that there could be a danger that the new system

may constrain mediation practice to certain privileged models because of the NADRAC definition of that process (Douglas, 2006, p 2).

A proposal for a National Scheme of Mediator Accreditation was released in 2005 and consultations with the mediation community were then undertaken. The proposal for accreditation was accepted at the 8th National Mediation Conference in Hobart in 2006, where it was decided that the role of accrediting individual mediators would rest with Recognised Mediator Accreditation Bodies (RMABs). An implementation committee was also established to set up the new system. This has been modified somewhat with more recent consultations to give the RMABs responsibility for training and ongoing professional development, with accreditation being the responsibility of individual mediators to initiate. Indeed, this was how the system had emerged, with the management of these aspects by the RMABs, cementing their place as the necessary conduit through which such accreditation can be sought. The new scheme was initially opposed by some representative professional bodies, mainly in the legal profession, but was overwhelmingly supported by ADR providers, including state and federal courts. The new scheme was finally introduced on 1 January 2008. Such diverse bodies as the Federal Court of Australia, the Industrial Relations Commission, the various state-based legal representative bodies, the Australian Medical Association and numerous ADR groups, have joined the new scheme as RMABs. The initial set-up of the new arrangements was the responsibility of a National Mediator Accreditation Committee, made up of representatives from the RMABs and a number of interested parties. The committee finally agreed on a governance structure in 2010. The Mediator Standards Board (MSB) now has oversight of the arrangements. Funding, representation and management of these new structures continue to present challenges as the ADR field expands, and more changes can be expected. The abolition of NADRAC by the Abbott Federal Government in November 2013 has not helped the ADR movement in advancing ongoing coordination and research activities (Bactogal, 2013).

The new scheme provides both a process for ongoing accreditation called the National Mediator Approval Standards, and the National Mediator Practice Standards. For further information go to the MSB's website at <www.msb.org.au/>.

Changes in the family law jurisdiction have also been significant in the move towards greater formalisation of ADR practice. Family law accreditation is an important part of the significant changes to family law passed by the Federal Government. 'Family dispute resolution' is the term now applied to processes used to resolve disputes in family law. Under s 10F of the Family Law Act 1975 (Cth) (as amended by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)), the term 'family dispute resolution' is left remarkably open, specifying only that the third party be independent and assist in helping to resolve the dispute. However, one of the most used processes is mediation. Under s 10A(1) and (2) of the legislation an accreditation scheme for dispute resolution professionals was introduced in 2007. This is backed up by the development of competency-based learning programs delivered via a vocational graduate diploma in family dispute resolution (Community Services and Health Industry Skills Council, 2006).

Another area of rapid development is the use of ADR processes based on legislative schemes (Altobelli, 2000, p 23). These have included retail and residential leases, aged care services and farming relating to lender practices. Other industries have enacted management systems that attempt to regulate their internal and external disputing; for example, the Telecommunications Industry Ombudsman, the Life Insurance Complaints Scheme, the General Insurance Enquiries and Complaints Scheme, the Australian Banking Industry Ombudsman, the Franchising Industry Code, the Oil Code, the National Electricity Code and the Credit Unions Dispute Resolution Service.

For a list of such schemes see the 'Complaint Line' at <www.complaintline.com.au/>. The Department of Industry, Science and Tourism (1997) and the Australian Competition and Consumer Commission (1997) have provided a set of benchmarks for such schemes.

An analysis of these developments indicates four pivotal developments around which the modern ADR movement has grown:

- The establishment of the Family Law Court in 1975 with its intended emphasis on informality, disputant empowerment and pre-trial processes such as counselling and conferences. Although criticised as not fulfilling its potential in these areas, the court was an early and powerful symbol that contributed significantly to the rise of the ADR movement.
- The establishment of Community Justice Centres in New South Wales pioneered the use of specially trained panels of community mediators to settle the largest areas of conflict in our community — household and neighbourhood disputes. This service was backed by legislative protections and administrative resources that enabled the centres to provide coordinated services across large sections of the community. This development was a catalyst for other states and interest groups, principally the legal profession. The real heroes of these services are the several thousand community mediators who have provided excellent cost-effective mediation services and, just as importantly, spread the idea throughout their communities.

- In 1986 the Australian Commercial Disputes Centre was established to manage major commercial disputes and divert them from courts. It was established as a company with government assistance (progressively phased out) and provided a model that the legal and business communities could relate to and foster as an approach to these types of conflict. It showed the

potential of mediation in particular as a useful conflict management mechanism and could be readily adapted and understood by lawyers. This development, coupled with the foundation of such bodies as the Institute of Arbitrators and Mediators Australia (IAMA) in 1975 and LEADR in 1989 (amalgamated in 2015), has provided a focal point on which the legal profession has developed a creditable response to the emerging ADR movement and kept it at the forefront of developments, at least until recently.

- In 2000 the process of serious consultation around the issue of accreditation and standards for mediators began, led by a diverse group of mediators from around the country meeting in bi-annual national conferences and supported crucially by NADRAC, culminating in the introduction of a national accreditation scheme in 2008.

Why ADR?

4.4 The development of these new initiatives, during the last three decades, has occurred against a backdrop of widespread concern, both in the community and in the legal profession, about the Australian justice system. There has been a plethora of reports relating to this issue over many years. See, for example, the reports of the Senate Standing Committee (1993), Access to Justice Advisory Committee (1994), Australian Law Reform Commission (ALRC) (1995, 1997) and Victorian Law Reform Commission (2007).

Even such an august figure as the then Chief Justice of the High Court of Australia, Sir Gerard Brennan (1997), has spoken of his concerns about the justice system:

> Consider the present position. The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally-aided litigant;

governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis.

In the same vein, Davies J (1997) of the Queensland Supreme Court, a frequent critic of the existing system, complained that it is not only costly and slow but unfair because only certain privileged interests can regularly access it. More recently, Murray Gleeson J (Australian Legal Convention, 2007) noted that:

Both within and outside the court system, there is increased emphasis on various forms of alternative dispute resolution. Arbitration has long been an important alternative to litigation, and has certain advantages, especially as a form of resolution of commercial disputes. Other procedures, such as mediation, conciliation, and early neutral evaluation, are also widely used. The courts have never had the capacity to resolve by judicial decision all, or even most, of the civil cases that are brought to them. Most legal disputes never come before courts; and most court cases are resolved by agreement between the parties rather than judicial decision. The formal and informal procedures that facilitate such agreements are an essential part of the system.

These perceived issues and problems within the justice system have been exacerbated by the complexity and sheer number of cases coming before the courts, which is linked to increasing government regulation designed to control business activity, protect consumer rights and citizens' rights and to better manage the environment. The types of cases the courts have been called on to adjudicate over the last half-century have moved from being predominantly business, property and criminal matters to a broad range including motor car and industrial accidents, product liability, family and a range of government regulatory actions. Many question the capacity of lawyers and court procedures to adapt to the new 'social rights' of consumers, tenants and the poor. Courts are expensive and often very slow, and these features are aggravated by formal procedures. There was and is growing concern about the proliferation of laws and their complexity. 'Legality' often seems to obscure and override basic justice.

Ironically, adjudication, as a procedure designed to resolve conflict, is itself inherently conflictual. David (1989, p 31) states:

> It emphasises conflict since our system of adjudication is like a contest between opposing parties played according to definite rules with an umpire (the judge or judge with jury) deciding in favour of the 'winner'. Each party is like a side in a game or contest, the winner taking all. Hence the saying 'fight it out in court'.

Dissatisfaction with certain aspects of the court system has been a major factor in people seeking alternative ways to resolve disputes. Although the court system, through the process of adjudication, provides the most publicly visible means of resolving disputes, it processes only a very small proportion of them. David suggests that only 5 per cent of initiated legal cases are actually resolved in court (David, 1989, p 26). The remainder of these cases are settled or abandoned. Most disputes do not result in the initiation of legal proceedings at all and are instead addressed by other means of conflict management. A report by the Productivity Commission after a 15-month inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law, states (2014, p 10):

> Interactions with the civil justice system often occur at times of personal stress — a family break up, as a defendant in a claim, following a traumatic injury or the financial failure of a business. Understandably, many turn to family and friends or other trusted parties such as doctors for advice. But for a great many, this is the only advice they seek. As a consequence, some parties are poorly informed about their legal rights and have little guidance about the practical steps they can take to resolve their disputes.

According to the commission's survey of legal need, close to half of respondents experienced one or more civil legal problems in a 12-month period. The most prevalent civil problems related to consumer matters, housing disputes and dealing with different levels of government. Many disputes experienced by individuals were substantial in nature. More than half of respondents who experienced at least one civil legal problem, considered the problem had a 'severe' or 'moderate' impact on their everyday life. Family disputes, including disputes relating to child custody and

maintenance, were more likely to be considered substantial. The commission found that many people have difficulty identifying whether their problem has a legal dimension and what action to take, indicating a lack of access to information.

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4.5 The way in which these issues have been and are being addressed is central to understanding the rise of ADR as a significant social movement. There are four broad trends. First, the last three decades have seen the development of a number of specialised courts and tribunals to provide inexpensive mechanisms for dispute resolution (including adjudication) as well as to deal with an increasing volume of litigation in the community. These bodies generally use more flexible responses to dispute management. Second, a number of courts, including the High Court and the Federal courts, have been made self-governing, rendering them responsible for their own workloads and resources. This has sensitised these bodies to the cost pressures not only on themselves as organisations but to the clientele who must use them. Third, case management has been embraced in varying degrees and forms by Australian courts, often as a response to a crisis in their lists, but also to deal with the apparent and perceived inadequacies in their processes. The progression of cases through the system is no longer, in most respects, only the preserve of the parties. Most of these developments have occurred in the civil sphere but there has also been interest within the criminal justice system. Finally, there has been the development of court and institutional related ADR processes aimed at making their processes more client centred and accountable. This can be seen in the development of conferencing and restorative justice processes, especially in juvenile jurisdictions and in educational systems, which have emerged after some years of experimentation by practitioners. The further expansion of these processes throughout the criminal justice system (including pre-trial and

corrections) can be anticipated. (See **Chapter 8** for a fuller exploration of these developments.) ADR has emerged as a powerful idea not only because of the perceived inadequacies of existing systems. It provides a range of procedural advantages in its own right. These include:

- greater user choice;
- flexibility;
- the potential for fairer outcomes;
- a non-confrontational process;
- cost advantages;
- the ability of participants to be 'heard' and to participate in developing outcomes; and
- user ownership and control of the process.

Greater disputant choice, control and participation within the framework of a more flexible process empower many disputants, particularly members of minority groups. Process flexibility can also lead to accommodation of non-legal principles and is often categorised as a distinct advantage of ADR. For example, issues that are considered legally or commercially irrelevant, but which are nevertheless very important to the persons concerned, may be swept aside by professionals engaged to manage a matter. Flexibility of the process allows its adaptation to the needs and culture of the disputants. Participants can agree to apply their own values to the dispute. For minority groups this flexibility has the potential to lead to greater freedom from any substantive systemic bias of the dominant culture.

The ability to match processes to user needs is central to the ADR approach. Rather than simply applying the same process template over a range of disputes, ADR practitioners have been innovative in developing a range of processes that meet the

particular needs of disputants. The non-confrontational nature of the ADR process also leads to an important benefit: the maintenance of ongoing relationships between the parties.

The ALRC (1997) reported a survey of company directors in Australia that found that they perceived that ownership and control of the conflict management process was lost during litigation and there was wide agreement that conflict could be better resolved using a mechanism other than litigation. They felt that the important issues in disputes are often lost to procedural complexities, delay and cost. Also, the chance to keep intact pre-existing relationships and customers is considerably lessened in the traditional processes.

While these process factors may create the conditions for more durable outcomes, this still depends on one party not defaulting on the agreement. However, there is now some persuasive research that has concluded that mediation has a comparatively high rate of compliance (ALRC, 1998).

There are substantive cost savings to parties who use ADR processes. In an evaluation of a mediation trial in the Adelaide Civil Registry, lawyer interviewees contended that while in small claims there were no significant cost savings, clients saved substantial costs where settlement had been achieved through mediation in general claims (Cannon, 1997). An evaluation of the ADR Centre of the Ontario Court (General Division), in which 70 per cent of lawyers whose cases settled at the centre responded, found that cases would otherwise have terminated at a greater cost to the client. A smaller number, but still a majority of lawyers whose cases did not settle at the centre, responded that the referral nonetheless resulted in a saving on final costs (MacFarlane, 1995). One of the major benefits of the new processes is the legal system's increased capacity to deal with the cases of the many clients

who appear to have reasonable claims but who are unable to afford legal proceedings and who do not qualify for legal aid (ALRC, 1998; Black, 1995).

NADRAC (1997) pointed out that ADR is only cheaper and quicker (within the court context) if it is 'successful'. However, even if ADR is not successful in resolving the dispute completely, it may narrow the issues, reduce the need for interlocutory hearings or pre-trial processes and contribute to shorter hearings, thus indirectly reducing costs. For example, Black (1995) reports that 54 per cent of ADR users thought that mediation brought settlement forward even though they indicated that the matter would probably have settled anyway.

Efficiency, Proportionality and Dispute System Design

4.6 Much of the impetus for change in courts and other organisational systems has been premised on a need for greater efficiency. In 1997 the Australian Competition and Consumer Commission (ACCC) established benchmarks for industry practice for complaints and dispute systems and listed efficiency as one of their key ingredients (ACCC, 1997); most Australian dispute system standards have included it since. In 2001, NADRAC recommended that efficiency should be a 'common objective' for most parties, practitioners, service providers, government and the community at large. NADRAC described efficiency as one of the three core objectives of ADR (2001, p 12). Sourdin, in a study of consumer credit processes, points out the inherent

relationship between perceptions of fairness and the time it takes to manage

cases through a dispute system (Sourdin, 2007). Efficiency has therefore been widely used and is clearly established as a key ingredient for the design and assessment of dispute systems. This has been given some emphasis in reforms to the Australian legal system (see Senate Standing Committee, 1994; ALRC, 1995, 1997, 1999; Victorian Law Reform Commission, 2007, 2008; Productivity Commission, 2014).

In an evaluation of court processes in Victoria, Sourdin notes the complexity of the concept of efficiency, but advocates a broad interpretation which can encompass such elements as long-term gains, rates of compliance and the broader costs of unresolved conflict (Sourdin, 2008, p 128). She concludes that:

> Using these broader notions of efficiency, many ADR processes may arguably meet efficiency objectives more readily than conventional litigation or non-integrative processes.

The ALRC (1998, p 27) commented that when considering dispute resolution processes and their objectives, efficiency can be viewed from a number of perspectives, including:

- the need to ensure appropriate public funding of courts and dispute resolution processes that avoid waste;
- the need to reduce litigation costs and avoid repetitive or unnecessary activities in case preparation and presentation; and
- the need to consider the interests of other parties waiting to make use of the court or other dispute resolution process.

Underpinning much of the debate about court efficiency is the concept of 'proportionality' (Hanycz, 2008); that is, the costs incurred by the parties and by the public in the provision of court resources should be 'proportional' to the matter in dispute. This principle was central to the most significant recent reforms in the English system of civil procedure enacted following the *Woolf Reports* (Woolf, 2008). According to Lord Woolf's Final Report, 'the achievement of the right result needs to be balanced against the expenditure

of time and money needed to achieve that result' (Woolf, 2008, p 17). The Victorian Government's Justice Department has identified proportionality as one of its eight principles for dispute management systems (Department of Justice, 2004). However, as the Victorian Law Reform Commission noted, there are 'numerous dimensions to the civil justice debate about proportionality', including the way in which attempts to limit parties to proportionate expenditures may impact on the quality of justice (2008, pp 91–2). The commission noted the problem not only of 'low-value' disputes receiving a disproportionate amount of public funding, but that of purely commercial disputes between well-resourced litigants (who can afford private ADR processes) also receiving such assistance. Hanycz, in her review of the Canadian drive towards more efficient court processes, articulates this concern about the increasing demands to be efficient and the effect this has on the delivery of just outcomes, noting (Hayncz, 2004, p 106) that:

> Assumptions underlying the principle of proportionality hold that high costs and delays in the litigation process discourage disputants from accessing the courts as a means to resolving disputes. By achieving proportionality, it is assumed that [in] the

> interests of justice, accurate outcomes are balanced with efficient cost-effectiveness, thereby enhancing meaningful access to justice.

She believes that these assumptions may be misplaced and often come from narrow conceptions of efficiency based on reductionist and utilitarian approaches in legal and economic theory (2004, pp 102–3). Moreover, she takes the view, from a review of the literature, that most commentators have not taken into account what effect the focus on efficiency will have on justice. In other words, she is sceptical that increased efficiency can be balanced with more just outcomes. Further, she indicates this is not necessarily balanced by empirical studies showing increased satisfaction among users of the court system.

4.7 A 2007 survey of those using courts in Australia reported that 78 per cent did not have confidence that the process would be completed within a reasonable time, while there was almost an even split between those who thought the courts would deal with them fairly (Anleu and Mack, 2010). As Anleu and Mack conclude (p 8):

> These findings might stem from different views about what constitutes fairness, such as differences in emphasis on procedural fairness, the equitable application of law, and just substantive outcomes.

Courts also face an increasing number of self-represented litigants, whose perceptions of fairness can conflict with that of the judiciary (Moorhead, 2007).

Those seeking to introduce ADR into existing dispute, complaint and adjudication systems have realised that such processes may require a relatively substantial investment of time on the part of the parties and mediators. They are not necessarily cheaper and may, if not implemented correctly, exacerbate existing power imbalances between the parties. This is particularly so for small claims, neighbourhood and workplace disputes where the existing systems may be quite efficient in terms of time and process as well as delivering binding outcomes (Sourdin and Matruglio, 2004). In addition, there are considerable contextual differences across the various programs that have implemented mediation-focused reforms (Waters and Sweikar, 2006). As Baron and colleagues (2014) point out, ADR processes may themselves be corrupted by their proximity to adversarial processes and this may lead to role confusion and related problems. Further, the type of dispute has a bearing on the way in which disputing systems reach settlement. As Colbran et al conclude (Colbran, 2005, pp 902–3):

> Nonetheless, the figures highlight the importance of formal and informal pre-trial procedures as the basis for the disposition of cases. The vast majority of cases are 'settled' by some means or other — possibly by agreement, possibly by unilateral default. Settlements are, however, more likely in some kinds of cases than others. While the overall settlement rate is in the 90–95 per cent range, possession and debt cases seem far more likely to settle than damages cases.

4.8 The 2014 Productivity Commission report, *Access to Justice Arrangements*, mentioned earlier, found that parties in legal disputes have at their disposal an increasing number of low-cost and timely informal mechanisms to help resolve disputes. It found that directing disputants to ombudsmen and other informal dispute resolution bodies could significantly reduce the level of unmet legal need, but these bodies need to be more visible to those who might require their services. It also

concluded that some ADR techniques have proven an efficient and effective way to resolve disputes. In addition, it found that there appears to be greater scope for the use of ADR in court and tribunal processes, government disputes and private disputes but that litigation should remain an option if settlement cannot be reached.

The commission further found that when disputes cannot be resolved independently and disputants opt to seek formal legal advice, they find it hard to compare practitioners, different billing arrangements and service offerings. In addition, the complicated nature of many legal services means that disputants find it difficult to judge the quality of the services both before and after they utilise them. Avenues to allow disputants to make more informed choices and enhanced regulatory oversight of the legal profession have the potential to improve outcomes.

The commission argued that governments, in granting courts and tribunals exclusive jurisdiction over some activities, have a responsibility to ensure that these institutions operate as efficiently and effectively as possible. Further, the adversarial behaviour of parties can run counter to these objectives, hindering the resolution of disputes or even exacerbating them. It found that such behaviour can be addressed by subjecting parties and their lawyers to requirements that facilitate the swift, proportionate and just resolution of

disputes. Greater use of targeted pre-action protocols — the rules that govern legal manoeuvrings that occur before a trial — accompanied by strong judicial oversight can help resolve disputes early or narrow the range of issues in dispute. While it concluded that much had been achieved, further reform, especially in the structure of costs, discovery processes and better case management, would improve efficiency. The progress made has been uneven across jurisdictions, according to the commission.

4.9 Many factors are relevant in terms of how to measure 'success' in dispute management systems. Barendrecht provides a very useful summary of the various elements involved in dispute management systems and maintains that these can be divided into five elements that constantly interact with each other: to meet, talk, share, decide and stabilise (Barendrecht, 2009). Unfortunately, the available research has not yet provided a clear picture of how ADR programs impact on court processes, and vice versa.

For example, Sourdin comments on the lack of adequate data on the mediation of disputes in the County and Supreme Courts of Victoria (Sourdin, 2008). Colbran et al, in a review of Australian superior court reports over the past 20 years, has found that while there is a low percentage of cases that end in trial, ascertaining the way in which they were disposed of is problematic (Colbran, 2005, pp 201–3). This is because of the way in which they are reported across the various jurisdictions. As Bingham states: '[W]e need more and better research data to examine how design variables affect disposition time, trial rates, and substantive outcomes' (Bingham, 2008–2009, p 261). She indicates that we need a more systematic and standardised set of protocols for evaluating court-based ADR programs, and provides an extract of the American Bar Association's 'Top Ten Data Fields for Court Programs' as an example that could be used (pp 261–2). These are reproduced in the box below.

Ten indicators of court performance

The American Bar Association Section of Dispute Resolution has proposed 10 indicators or 'data fields' for courts to collect so that researchers and policy-makers can systematically assess differences in the impact of ADR programs nationally. These include:

1. Was ADR used for this case (yes/no)?
2. What ADR process was used in this case? (Mediation, early neutral assessment, non-binding arbitration, fact-finding, mini-trial, summary jury trial or other.)
3. Timing information (date the claim was docketed; date of referral to ADR; date of first ADR session; date of close of ADR referral period; at what point in the docket duration did ADR occur (before suit, after filing suit, before discovery or just before trial); final disposition date of the case; and date of post-trial motions).
4. Whether the case settled because of ADR. If settled, whether the case settled in full or settled in part.
5. What precipitated the use of ADR? (Court order *sua sponte*; party consent to the process; party motion with one or more parties opposed and a court order for ADR following; or automatic referral per court rule due to kind of case.)
6. Was there a settlement without ADR (yes/no)? If so, how was the case terminated; for example, dispositive motion, settlement in ADR, settlement by some other process, during or after trial, removal to another court, etc.
7. Case type (general civil, criminal, domestic, housing, traffic or small claims).
8. The cost of the ADR process to the participants.
9. Did the disputants use more than one form of ADR? If so, which form?
10. Satisfaction data: How satisfied are the participants with the process, the outcome, and the neutral [sic].

See 'Memorandum from American Bar Association Section of Dispute Resolution Task Force on Research and Statistics' (11 October 2005), available at <http://apps.americanbar.org/dch/committee.cfm?com=DR014500>, follow 'Top Ten Data Fields for Court Programs' hyperlink under 'Related Resources'.

As the reliance on ADR grows, the ability of courts and tribunals to control outcomes is correspondingly lessened. Whereas legal systems have as their principal goal the delivery of just outcomes, no such guarantee can be given for other dispute management systems. Proponents of ADR, such as Galanter and Cahill, provide a persuasive and often-cited argument why settlement between the parties is preferable and fair, even if their emphasis is on party self-determination allied with efficiency, rather than 'justice' (Galanter and

Cahill, 1994: see the table below for a summary of their arguments). This analysis clearly signposts the inherent tension between traditional legal systems, with their emphasis on objective rights, and the approach of modern reform movements, informed by the social sciences and a concomitant emphasis on self-determination.

Bingham suggests that the way to manage this tension is to ensure transparency in ADR processes and a level of ongoing oversight by the court system (Bingham, 2008, p 29). This is similar to Waters' call for appellate courts to have more control over ADR processes to ensure they work efficiently (Waters and Sweikar, 2006). How this could be put into practice is difficult to imagine, especially given the confidentiality provisions

and privacy concerns which have invigorated debates and caused concern within the Australian legal and mediation communities. These concerns have been focused on the possible implications of the uniform evidence amendments to the Evidence Act 1995 (Cth) and their impact on the confidentiality of mediation processes: see Evidence Act 1995 (Cth) s 131 (Dewdney, 2009; Nolan and O'Brien, 2010).

Why settlements are preferable

1. The party preference arguments

a. Party pursuit: Settlement (rather than adjudication) is what the parties seek. In other words, they 'vote with their feet'.

b. Party satisfaction: Settlement leads to greater party satisfaction.

c. Party needs: Settlement is more responsive to the needs or underlying preferences of parties.

2. The cost reduction arguments

a. Party savings: Settlement saves the parties time and resources, and spares them unwanted risk and aggravation.

b. Court efficiency: Settlement saves the courts time and resources, conserving their

scarce resources (especially judicial attention); it makes courts less congested and better able to serve other cases.

3. The superior outcome arguments

a. Golden mean: Settlement is superior because it results in a compromise outcome between the original positions of the parties.

b. Superior knowledge: Settlement is based on superior knowledge of the facts and the parties' preferences.

c. Normative richness: Settlement is more principled, infused with a wider range of norms, permitting the actors to use a wider range of normative concerns.

d. Inventiveness: Settlement permits a wider range of outcomes, greater flexibility in solutions, and admits more inventiveness in devising remedies.

e. More compliance: Parties are more likely to comply with dispositions reached by settlement.

f. Personal transformation: The process of settlement qualitatively changes the participants.

4. The superior general effects arguments

a. Deterrence: Information provided by settlements prevents undesirable behaviour by affecting future actors' calculations of the costs and benefits of conduct.

b. Moral education: Settlements may influence estimations of the rightness or feasibility of various sorts of behaviour.

c. Mobilisation and demobilisation: By defining the possibilities of remedial action, settlements may encourage or discourage future legal actors to make (or resist) other claims.

d. Precedent and patterning: Settlements broadcast signals to various audiences about legal standards, practices and expectations.

[page 143]

The push to more effective ADR programs and court efficiency may lead to unexpected outcomes and points to the complexity of the relationship between these two elements. Colbran et al give the example that if settlement rates suddenly increased, so that cases were more efficiently disposed of, some litigants might opt for trial rather than settlement (2005, p 903). Echoing some of the concerns expressed by Galanter and Cahill in 1994 they suggest that there may also be 'social costs' associated with high settlement rates, particularly concerning a lack of information about 'going rates' where '…

decision makers lack external cues and where decisions are basically unreviewable' (p 903). They indicate the complicated nature of the path to settlement by illustrating the difficulties parties have in assigning value to their cases, stating (p 904):

> To begin with, note that at any given time, a party's case will have a value: Vp (for plaintiffs) and Vd (for defendants). The value will reflect both the value attached to possible outcomes, and their likelihood. If litigants were rational economic decision-makers, the value of their cases would equal their 'expected value,' Ex, where Ex = ∑pi × Vix where pi is the subjective probability of an outcome with value Vix to party X. ∑pi always = 1. Thus if a party considered there was an 0.4 chance of total failure, and a 0.6 change of winning $100,000, the 'expected value' of its case would be $60,000 ((0.4 × $0) + (0.6 × $100,000)). An offer to settle it for $70,000 would therefore be very attractive. An offer to settle for $50,000 would not. While Vx will bear a rough relationship to Ex, the two will not necessarily coincide; litigants and lawyers are not always particularly good at handling probabilities.

As the authors state, these types of econometric calculations are rarely ever satisfied because parties: make different assessments for their own case as against the other sides; are overly optimistic; attach different values to different outcomes; have different levels of risk aversion; have different levels of emotional involvement; have different views about the impact of the case on reputation and its precedent value; have different resources; and may be represented by lawyers with different interests (pp 904–8). In other words, parties and their lawyers are not always rational so as to apply these calculations objectively.

4.10 Focusing too much on efficiency can also be misleading. Apart from an assumption of disputant rationality, as indicated above, another issue is readily apparent (Kiser, Asher and McShane, 2008). ADR processes may not be favoured simply because they produce the more efficient 'surplus'. Even in zero-sum or ultimatum games research, where one party can offer the other party as much as they like but the other party only has the option of accepting or refusing, the results show that disputants will put a value on the fairness of such offers. Disputants will reject an offer they do not consider fair, even if this means they get nothing. The person making the offer knows this and, accordingly, is more inclined to make a fairer offer than their self-interest

would presuppose (Carraro, Marchiori and Sgobbi, 2005). As Carraro, Marchiori and Sgobbi argue (p 2):

> Traditional models of negotiation have focused almost exclusively on the efficiency properties of both the process and the outcomes. Yet, as every day experience indicates, considerations other than efficiency play a crucial role in selecting which agreement will be reached — if any at all — and through which path. The theory of fair division focuses on processes and strategies that respond not only to Pareto efficiency, but also to equity, envy-freeness, and invulnerability to strategic manipulation.

Disputants may therefore choose a process in a rational manner for reasons other than efficiency. Taking a limited purview centred on elements of efficiency can therefore be useful for research purposes but misleading in other contexts. Boulle suggests that in the practice of mediation, demands of efficiency may place pressure on what he calls 'the process/substance distinction' (Boulle, 2000). He argues that overemphasising short-term quantitative factors (such as time and cost) may not accommodate other more qualitative factors which assist to determine effectiveness, such as client satisfaction, and impact on behaviour and compliance.

There is some recognition therefore that the usefulness or appeal of ADR programs goes beyond simple measures of efficiency. As Levy states in relation to the court system in New York (2005, p 343):

> [T]he purpose of ADR is not simply to ease congestion. Quite to the contrary, its primary goal is to offer litigants fair, inexpensive, and efficient means of settling a dispute that they were unable to solve on their own.

Combining justice with efficiency

4.11 For simple one-off or transitional relationships, Barendrecht argues that market transactions backed up by threats of enforcement and a mechanism for establishing the extent of rights or obligations are the most

efficient ways of managing disputes (Barendrecht, 2009, p 12). These rights and obligations have usually been demarcated by contracts or default rules of private law. In his view, most disputes can be resolved by applying these rules to the case. In practice, dispute management in this area is mostly a matter of fair complaint-handling, resolving quality disputes efficiently and ensuring payment. He calls this bundle of processes 'enforcement rights'. However, in more complex and longer-term relational systems there may be a need for a more nuanced approach which takes account of the complexities of the relationships involved. Barendrecht suggests that 'trilateral governance', which he defines as a 'neutral arbitration mechanism', is needed (2009, p 7). The parties in these more complex relationships are therefore, in this view, likely to negotiate in the shadow of 'hierarchy', or as Mnookin and Kornhauser termed it, the 'shadow of the law', and are accordingly relatively more difficult to make efficient (1984). As well as recognising the different contexts of disputes, some justice theorists are also attempting to integrate economic theory with their own theories.

In an analysis which attempted to integrate institutional economic theory with the justice literature, Husted and Folger argued that governance forms should not only allow for participation of the parties but that perceptions of justice would affect the transaction costs (2004, pp 719–29). They suggested that '… governance design will fail if it does not take into account the relationship between informal norms like justice and formal structures'. Not only should a system be designed as fair, it should also be perceived as being fair throughout its implementation. They state (p 723):

> Justice theorists, however, recognize that being fair is not enough. A transaction or procedure must be perceived as fair. Justice theory is thus more concerned with the acceptance of a particular mechanism by the transactors. Simply designing the mechanism does not suffice because the perceptions of fairness are influenced not only by design, but also by its implementation.

Husted and Folger build on earlier work by Ouchi, who connected justice theory and the institutional economics literature (1980). Ouchi argues that the attempt to achieve the perception of equity or distributive justice (fairness in exchange outcomes) creates transactional costs. Husted and Folger critique that approach based on an analysis of the transactional costs and give three reasons why this type of analysis may be unduly limiting (p 340). First, transactional costs analysis often fails to distinguish between different sorts of conflicts, and for this reason may implement the wrong process. They make the distinction between 'cognitive conflicts' (conflicts which depend on disputes of fact) and 'interest-based conflicts' (conflicts which depend on a search for different goals or outcomes), which are not recognised in economic analysis. ADR and justice theorists generally recommend an adjudicative process for the former and a process with more decision control in the parties for the latter, to maximise the perception of fairness. Second, because economists do not take fairness into account they may recommend the right process but for the wrong reason; that is, while a process that ensures efficient low-cost processes may seem the best solution in certain situations, it may not in fact meet the needs of the parties involved. Third, because economic analysis is derived from an 'equilibrium orientation' it tends to discount the dynamics inherent in the nature of disputing systems where the perceptions of fairness can change over time. This contrasts with the socio-psychological approach that dominates the ADR literature and which is comfortable with a more dynamic approach where perceptions of fairness can be quite unstable.

4.12 From their analysis, Husted and Folger believe there is a 'fairness-response' transactional cost based mainly on interactional justice (that is, how people are treated and what information they receive about the process), elements which can enhance transactional cost analysis. These elements are trust, truthfulness, respect, propriety of questions and sufficiency of justifications (p 725). In other words, if these conditions are not met then the likelihood of parties engaging in maladaptive behaviour increases and so do the costs.

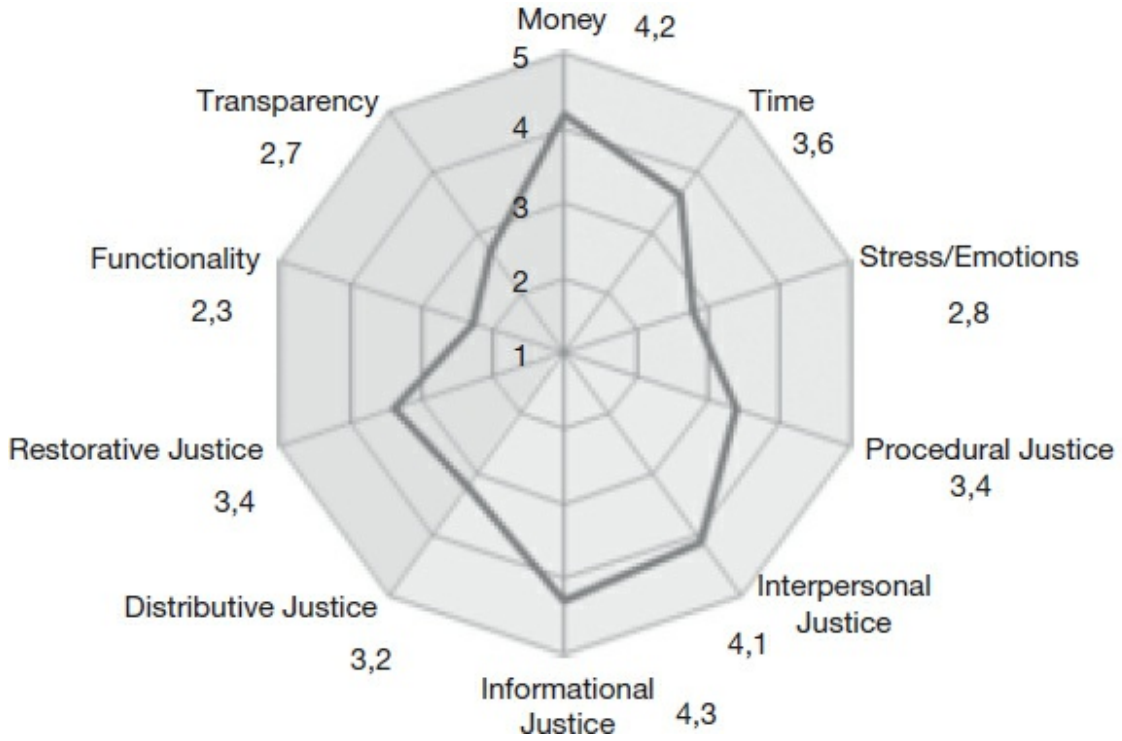
A further development in the cost-factors analysis of justice systems is provided by the Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO, 2009). The TISCO analysis is based on a review of attempts, across various disciplinary perspectives, to measure the components important to the access of justice (Barendrecht, 2006). The Institute uses Genn's well-known metaphor, that access to justice can be seen as a 'path' that is travelled by a person who experiences a problem in relation to another individual (Genn, 1999).

The TISCO team developed and used a range of research instruments to collate what they term 'the basic indicators' — costs, quality of the procedure and quality of the outcome (see diagram below) (2009, p 20). They developed a five-point measure for the component parts of each of the three indicators based on the perspectives of the users of the justice system under study. They then use this to diagrammatically indicate the 'paths to justice' of parties. This technique enables them to quickly compare results from different studies. See the TISCO handbook *A Handbook for Measuring the Costs and Quality of Access to Justice*, a tool for academics, practitioners and other people and organisations who are measuring users' perceptions of paths to justice: available at <www.equalbeforethelaw.org/library/handbook-measuring-costs-and-quality-access-justice>.

The costs in the TISCO model include actual out-of–pocket costs, intangible costs and opportunity costs. The quality of the procedures refers to procedural, interpersonal, informational and restorative justice. The outcomes measures they use have three dimensions — distribution, functionality and transparency. At the next level, the authors aggregate the information on costs, the quality of the procedure and quality of the outcome into one composite figure. This single value, which they call the 'Access to

Justice Index', can, in their view, provide focused and better integrated information about the measured paths to justice across different systems and jurisdictions (Gramatikov and Laxminarayan, p 7). For further analysis and examples of the application of these ideas see **Chapter 9**.

The TISCO evaluation of the paths to justice — aggregated indicators*



* *The black line indicates the score of each aggregated factor*

Continuing and Future Issues

4.13 The ADR movement has a major impact on the way in which individuals, organisations and communities perceive and manage conflict. Despite the fact that many of its core processes have been practised by communities since time immemorial, the formal ADR movement in Australia and in other Western countries is now just emerging from its beginning stages. Theory and practice, in many instances, are still being trialled and

advanced in incremental and ad hoc ways as the field expands and embraces new approaches and techniques. A number of issues, outlined below, provide interesting further debate.

Critics sometimes argue that the new ADR processes fail to provide the necessary safeguards. They argue that the closed and confidential nature of many facilitative dispute resolution processes is contrary to the notions of transparency and fairness (ALRC, 1998). Others worry that disputants could waive their legal rights simply to end the fighting. Therefore, it is important that people are made aware of their legal

rights before they come to mediation, and that they are encouraged to seek legal advice before entering an agreement (Rogers, 1994). Some argue that ADR itself risks being contaminated, particularly in relation to the premise of voluntary participation implicit in ADR processes, and undermined by its proximity to the legal system and the power of large institutional systems (Baron et al, 2014). Indeed, Baron and his colleagues argue that the adversarial system itself may be under some threat by the intrusion of ADR.

Mediation is still not many disputants first choice, which suggests that by the time a conflict is serious enough to warrant outside intervention the parties want vindication and/or a third party who will uncover the 'truth' and impose a decision upon them. A survey by the Victorian Department of Justice found that only 15 per cent of disputants turn to a third party to try and resolve a dispute (Peacock, Bondjakov and Okerstrom, 2007).

The ALRC contends that clients depend on lawyers for information and advice on dispute management options, and that they may not be informed of all the alternatives and may be unable to counter a lawyer's preference for litigation (ALRC, 1997). Unfortunately, many lawyers have a limited familiarity with or understanding of dispute management processes. Until

quite recently, courts were seen as the premier forum for hearing and determining disputes. While there is now greater awareness of alternatives, some lawyers are resistant to change or consider mediation and other ADR processes as inferior to judicial dispute resolution (Caputo, 2007). This scepticism may also extend to the judiciary. For example, Zariski (2000) contends that 'some judges remain ambivalent to what they see as risky and unproved alternatives to traditional litigation'. Many lawyers may distrust or lack respect for resolution methods which they see as informal, unfettered by legal norms and which lack coercive power. They may consider ADR to be 'second class justice'. Lurking behind these attitudes may be lawyers' fear of loss of power, prestige and income to other organised practitioners (Zariski, 2000, pp 2–3). Further, it appears that some lawyers use mediation as a means to intimidate the other party or to enhance their client's case as part of their overall negotiation strategy, rather than as a genuine means to seek settlement (Robertson, 2006). The introduction and consolidation of a national mediation accreditation scheme, noted above, with accompanying standards, may go some way to ameliorating some of these attitudes to ADR.

On the positive side, NADRAC reports that increasingly, particularly in the commercial area, ADR is seen as part of an overall dispute management process in which disputes are regarded as constructive events (2009).

A related source of tension is whether user satisfaction should be a concern. As Sourdin and Davies (1997) note, the litigation system is not about satisfying disputants, in contrast to ADR processes where the interests and satisfaction of the parties are central. With the trend from rights-based to interest-based dispute resolution, there is a dilemma created at a number of levels when the interests of the individual are not necessarily the interests of the community. Underlying this concern is that if important legal principles and practical issues are not brought to a court to be tested, judges will be deprived of the opportunity to keep up to date with the needs of society. In turn, the ongoing development of legal precedent and principles will be potentially impaired.

Many of the critics of ADR argue that despite the problems with traditional processes we need to rely on these relatively formal systems because they reflect our present societal

values. The traditional mediatory roles which ADR advocates extol and which were centred in church, family and high-status individuals have persisted in only a few close-knit homogenous communities. In Australia, with its huge urban sprawl where people value spatial and workplace mobility, these informal processes have largely broken down. As a society we therefore have and continue to face the dilemma of a remote and creaking legal system, which few of us can afford to use, but where the traditional alternatives have largely disappeared. Increasingly we have had to rely on the age-old tactic of 'lumping it'; that is, putting up with, or walking away from, the problem.

A number of authors note the need for more research and evaluation of ADR and its processes, as well as comparative evaluation of the outcomes of ADR with those of traditional litigation. The limited data evaluating either litigation or ADR processes is undoubtedly due to the difficulty of measuring many of the benefits of ADR and litigation (Colbran, 2005).

There are significant methodological difficulties in comparing ADR with traditional litigation. One problem, difficult but not impossible to overcome, in comparing costs is that any comparison with the cost of cases that go to trial will be flawed because many civil cases settle out of court anyway. A conceptual problem is that some of the other possible benefits of ADR, such as community development, are difficult to measure (Lewis and Condliffe, 1999).

There are a number of other questions that will increasingly concern those involved in ADR processes. The first is concerned with the continued level of support to be provided by government to ADR services. While community-

based services have provided much of the inspiration and drive for the development of ADR services, there is increasing evidence that they are low on the priority list for adequate funding. The ability to maintain ADR services at the level at which they have been operating is in doubt in the face of continued increases in demand. The likely impact this will have is hard to determine.

Another issue is the confusion that exists, both within the field of ADR and outside it, about the definition and quality of various services provided (Douglas, 2006). NADRAC was providing leadership in this area, with the publication and dissemination of various guides and discussion papers. Its demise, for unknown reasons, by a decision of the Federal Government in 2013 will not help this tendency. There is anecdotal evidence that, for example, mediation practised in one sphere may be quite dissimilar to mediation practised in another. This, in itself, is not necessarily bad, but it can lead to confusion for consumers of such services and also to possible abuse. This is part of the rationale for the national mediation accreditation scheme previously discussed.

An outline of the way in which ADR organisations and professionals have moved to deal with issues relating to accreditation and standards has already been given in this chapter (see **4.2**). Some of this pressure has been driven by governments eager to ensure that the ADR services they are funding are of the requisite standard. These issues are also linked to the inability of the ADR field to develop a key industry body able to represent the various professional elements. Indeed, there are some who would argue, with some justification, that the field does not require this and is better off without such leadership or regulation. The merger of the two leading ADR organisations (LEADR and IAMA) in 2015 into a new organisation called Resolution Institute may go some way to meeting these expectations and fill the void left by the demise of NADRAC.

Bringing mediation into the criminal justice system

Victim–offender mediation and conferencing programs have emerged over the past 25 years as a dynamic alternative to criminal justice practice. Often referred to as 'restorative justice', it is a systematic response to wrongdoing that emphasises healing the wounds of victims, offenders and communities that have been caused or revealed by criminal behaviour.

Victim–offender mediation programs began in Ontario, Canada in 1974. Such programs have been operating in the United States and in the United Kingdom for over 30 years (Marshall, 1996). Since this time, victim–offender mediation programs have been widely introduced around the world. There are now more than 300 victim–offender reconciliation projects in Europe and North America, with 175 programs in the United States and Canada.

In these programs, victims and offenders are brought together to negotiate reparation. Conferencing has built on the victim–offender mediation programs by attempting to bring together not just the individuals involved in the particular criminal offence but the wider 'communities of care' which may be affected. The conference is essentially a process through which the communities affected by a criminal act can come together to discuss and respond to what has happened; for example, the family of an offender can provide support for the offender, but they can also describe their own 'secondary victimisation'. In a conference the focus is not on a dispute but on the offence, its consequences, and those affected and what they can do to repair the damage and minimise further harm.

Conferencing originally developed in New Zealand. The process finds its roots in traditional M ori practices and is commonly called 'family group conferencing' (Brown and McAlrea, 1993). In Australia and the Pacific region, restorative justice programs based on the conferencing process have been widely adopted (Maxwell and Hayes, 2006). Each Australian state's and territory's jurisdiction has seemingly followed its own particular needs and predilections. There is consequently little conformity and we are left with a confusing jigsaw of legislation, models and practice (Condliffe, 2005).

Conferencing is a staged process in which the convenor or coordinator gives participants the opportunity to tell their story of the experience of a crime or a conflict. It is closely aligned with victim–offender mediation but differs from that process due to the inclusion of a wider group of people in the meeting (Moore, 2004). Conferencing in the criminal justice context generally includes family members, police, youth workers, victims and victim support workers and, possibly, lawyers.

The Victorian Association for Restorative Justice website provides a useful summary of the use of restorative justice principles in the community, education and justice systems: see <www.varj.asn.au/>. See **Chapter 8** for a detailed outline of restorative justice and conferencing.

ADR Clauses in Contracts: A Short Legal History

4.14 The use of ADR clauses in contracts has increased significantly over the past 30 years and mirrors developments in the wider society. They provide a useful metaphor for the development and acceptance of ADR in the Australian community. These clauses are meant to be used when a contract breaks down or to assist the parties in the management of differences that may emerge. There are several significant reasons and advantages for the use of such clauses, including that they:

- help the parties prepare for the possible eventuality of conflict and disputes;

- allow the parties to design their own flexible procedures, including selecting the type of process, the third party intervener and the service organisation that may provide ADR services;
- assist the parties to avoid a secondary dispute over the methods of dealing with the primary dispute and may motivate them to negotiate;
- help avoid (although not entirely) the ploy to 'play tough' and not to appear weak that parties and their legal advisers use when confronted with disputes (Robertson, 2006); and
- may be perceived as assisting the professional profile and obligations of legal advisers, although there have, as yet, been no cases involving professional negligence for a failure to include such a clause.

Professional associations and service providers such as the Resolution Institute have standard dispute resolution clauses. These clauses, copies of which can be seen in the Exercises at the end of this chapter, provide that if a

dispute arises, the parties will use one or more of the dispute resolution processes provided by the particular association. These clauses are usually drafted in a general way and are not designed for particular circumstances. Therefore, there is often the need to design and draft particular dispute clauses to suit the needs of the parties. It should also be remembered that dispute resolution clauses of various sorts have been incorporated into contracts for many years, but legal challenges to them are relatively new. Most of the earlier forms of dispute resolution clauses provided for a referral to arbitration. The dispute clauses traditionally used under the Uniform Commercial Arbitration Acts were generally quite uncertain at the time of their creation. However, they were mostly upheld because of certain characteristics of that process, which will be explored later in this chapter (see **4.18**). ADR clauses that include processes other than arbitration have become much more prevalent in the past 20 years and have been subjected to extra scrutiny. The design and drafting of such clauses has thus become more of an issue for lawyers and will be dealt with below (see **4.18**).

Courts have on many occasions entertained applications for a stay of proceedings on the basis that the dispute which is the subject of the litigation is one to which the parties have contracted to manage through a dispute resolution process before going to a court for relief. The purpose of such a stay is to require the parties to adhere to their contractual agreement to delay going to court until after the agreed dispute resolution process has been exhausted. In dealing with the particular case of an arbitration agreement, Dixon J said in *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502; [1950] ALR 918 at CLR 503:

> But the Courts begin with the fact that there is a special contract between the parties to refer, and therefore in the language of Lord Moulton in *Bristol Corporation v John Aird & Co* (1913) AC 241, at p 259, consider the circumstances of a case with a strong bias in favour of maintaining the special bargain or as Scrutton LJ said in *Metropolitan Tunnel and Public Works Ltd v London Electric Railway Co* (1926) Ch 371, at p 389, 'A guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it'. At the same time, as is shown by the two cases cited, the Court's discretion has not been restricted by any exclusive definition of the circumstances which will warrant a refusal of a stay: see per Lord Parker in *Aird's*

Case (1913) AC 241, at p 260, and per Scrutton LJ in the *Metropolitan Tunnel Case* (1926) Ch 371, at pp 389, 390.

While this and other similar statements refer to an agreement to submit to arbitration, there is no reason why the same principles should not and do not apply where the agreement of the parties is to follow some other non-curial process for seeking to resolve their dispute. In *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188, Gillard J held that the principle in *Mill Hill* applied to an application for a stay where the parties had agreed to a dispute resolution involving an expert; and in other cases mentioned below, the same approach has been taken in relation to contractual provisions involving other forms of dispute resolution: see also *Morrow v Chinadotcom Corp* [2001] NSWSC 209.

Possible conditions precedent to maintain a viable dispute resolution clause

4.15 For litigation to be stayed there are at least five possible conditions to be satisfied:

1. In order to avoid being void as an unlawful attempt to oust the jurisdiction of the court, the provision must operate as a pre-condition to the parties' freedom to litigate rather than a purported denial of that freedom: *Scott v Avery* (1855) 5 HL 811.
2. It will be void for uncertainty and unenforceable if it constitutes an 'agreement to agree'.
3. It is self-evident that the disputes which are the subject of the proceedings sought to be stayed must be within the scope of the contractual provision.

4. The agreed contractual process must possess such a degree of definition and certainty as to enable it to be meaningfully undertaken and enforced.

5. At least in New South Wales, there should be careful reference to such terms as 'good faith'.

The first condition, relating to the case of *Scott v Avery*, is designed to ensure that the jurisdiction of the courts is not ousted. Therefore, while a dispute clause can require parties to proceed through a series of steps before litigating, it cannot exclude the latter.

The second condition, that a contract clause is unenforceable if it is merely an 'agreement to agree', is also usually clear from a reading of a typical clause. You cannot enforce an ADR clause which is dependent on the wishes of one or more of the parties; for example, 'A and B will mediate if they agree …'. This is too uncertain and would be both void and unenforceable: *Minister for Main Roads for Tasmania v Leighton Contractor Pty Ltd* (1985) 1 BCL 381. A relevant matter to determine is whether the parties reached a point of agreement on all essential matters or if there were matters still subject to negotiation, In *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1, Kirby J held that a contract to negotiate in good faith could be enforceable in some circumstances — this a good example of the way in which Australian courts, compared with English courts, have been ready to be flexible in applying this principle. Warren J in *Computershare Ltd v Perpetual Registrars Ltd* [2000] VSC 223 held that agreements to negotiate a dispute are capable of being enforced.

The third condition, that the scope of the dispute resolution clause be sufficient to comprehend the subject matter of the proceedings, raises two possible issues. What if, for example, the litigation contemplates or is not confined to claims based on a breach

of the original contract? Also, what if one or more of the parties is not a party to the contract?

To answer these questions we must consider the wording of the particular clause. In the New South Wales Court of Appeal in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165, Gleeson CJ (Meagher and Sheller JJA concurring) stated:

> When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument.

The question in the *Francis Travel* case was whether a particular dispute was properly described as one 'arising out of' an agency agreement. The dispute involved a claim that a purported termination of the agreement had been wrongful. This was allegedly because of representations made in contravention of the then Trade Practices Act 1974 (Cth) (now the Competition and Consumer Act 2010 (Cth)) during the course of the agreement giving rise to a claim for estoppel and misleading conduct. The court held that the claim was one 'arising out of' the agreement and it was in that connection that the Chief Justice's warning against construing such agreements narrowly was made.

Whether one thing may be said to exist or arise 'in relation to' another is, as Lehane J observed in *Australian Securities Commission v Bank Leumi Le-Israel* (1996) 69 FCR 531, very much a matter of impression to be gathered from the whole of the context. Barrett J in *Morrow v Chinadotcom Corp* [2001] NSWSC 209 at [17] held that similar words in a contract:

> … extend to all controversies about the transactions and processes provided for in the agreement or which flow from it. It is not, in my judgment, confined, as the Founders [the plaintiffs in that case] contend, to claims for breach of the agreement.

What about the issue of the joinder of a party to the proceedings who is not

a party to the original contract in which the dispute resolution clause appears? Can the clause operate to include this party? This depends on the role and attitude of that third party and is not necessarily fatal to the operation of the dispute resolution clause: see *Morrow v Chinadotcom Corp* at [18].

The fourth condition concerns whether a dispute resolution clause has the necessary degree of certainty of operation. There has been considerable case law on this point, mainly in New South Wales, where three decisions of the Supreme Court have had a particular bearing on the matter: *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 and *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709, both of which were decisions of Giles J, and the decision of Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236. In Victoria, the decision of Warren J of the Supreme Court of Victoria in *Computershare Ltd v Perpetual Registrars Ltd* [2000] VSC 223 is of most relevance. In *Hooper Bailie* and *Computershare*, the particular dispute resolution clause was found to have the degree of certain operation necessary to justify a stay, while in *Elizabeth Bay* and *Aiton* it was not.

In brief, *Hooper Bailie* upheld a conciliation agreement because it prescribed the conduct of the parties for participation in the ADR process with sufficient certainty. In *Elizabeth Bay*, the court found that the clause failed for uncertainty because it provided for 'mediation administered by the Australian Commercial Disputes Centre (ACDC)' but the parties had not purported to contract by reference to those guidelines and the guidelines did not identify any applicable form of mediation agreement; that is, the terms of the agreement were left to be agreed, and it was not possible to identify that which the parties would have been required to follow. In *Aiton*, the court also

struck down a clause because it was silent about the remuneration to be paid to the mediator and the effect of a declined appointment.

In *Computershare*, Warren J emphasised, in holding the particular clause to be sufficiently certain, that there was 'a framework to which the parties [had] agreed including subjecting themselves to an obligation to establish a detailed framework within which a solution may be achieved between them'. The situation in Victoria, because of this case, would seem to constitute an exception to the uncertainty rule and runs counter to the trend of the New South Wales cases which apply a narrow interpretation.

Warren J seems to suggest that the essence of the dispute resolution clause is the lack of certainty regarding the procedures and processes to be used; but, as Spencer (2001, 2003a) speculates, should such clauses be an exception to the uncertainty rule? He suggests that the answer is probably 'yes'. Having complex sets of procedures that take away from the parties' autonomy seems contrary to the basic premises underlying ADR. The benefits of such processes (such as simplicity, cost efficiencies and timeliness), which are meant to relieve the burden on overburdened courts, would otherwise be lost. Such procedures could then be reduced to just another rung along the ladder of various processes which only suit the well-heeled litigant not particularly interested in a timely response to the dispute.

Warren J clearly appreciated the central part that party control plays in the attractiveness of ADR to participants. To intervene in this aspect of the process only militates against the chance for successful outcomes. In fact, the attitude of the New South Wales courts to these matters appears to indicate the way processes such as ADR can be impeded in their development. In this regard, the importance of the decision by Warren J cannot be understated. I hope it will be followed in further cases as they emerge in the future. It represents a marked departure from the legal formalism of the New South Wales courts, linked to an understanding of the informality of ADR processes. The matter is not entirely settled, however, and it therefore would be wise for dispute resolution clause drafters to formulate clauses in such a

way as to minimise the scope of their opponents or the courts to contemplate a challenge on the basis of uncertainty.

The final condition precedent relates to providing for negotiation in 'good faith'. Good faith provisions, whether implied, inferred or express, have been increasingly used in recent years. Carter and Harland (2002, para 213) regard the obligation to act in good faith as being more onerous than the obligation to cooperate, but less onerous than the obligations of a fiduciary. Good faith provisions regularly occur in legislation. See, for example, the UNCITRAL Model Law on International Commercial

Arbitration (2002); Native Title Act 1993 (Cth) ss 170QK(2), 170MP; and Competition and Consumer Act 2010 (Cth).

Giles J had some difficulties with the concept of good faith in the *Elizabeth Bay* case because of the tension between self-interest and the interests of the other party in negotiation. He held that the parties could not commit in advance to negotiate in good faith because this might change by the time they got to the dispute. Such commitment would be too uncertain to be enforceable. Subsequent decisions have been less formalistic and more realistic in this regard. Einstein J in *Aiton* disagreed with the analysis of Giles J. In this case, part of the dispute resolution clause provided that the parties use '… all reasonable endeavours in good faith to expeditiously resolve the dispute …', as well as similar terms in certain other parts of the clause. While Einstein J found the clause to be uncertain, as indicated above, this was based on a lack of certainty about the mediator's remuneration. However, he disagreed with Giles J's distinction between self-interest and other interest, because one party does not have to represent the other party's interests. He stated that '… maintenance of good faith in a negotiation process is not inconsistent with having regard to self-interest'. The comments of Warren J

above also indicate this view, which has been supported by a number of other courts: see *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; *ACCC v Leelee Pty Ltd* [1999] FCA 1121; *Demagogue Pty Ltd v Ramesnsky* (1992) 39 FCR 31.

Severability, compliance and remedies

4.16 There are other issues that can impact upon the ability of one of the parties to enforce a dispute resolution clause. These relate to severability, compliance and remedies for breach of the contract.

Where a dispute resolution clause is held to be void or invalid it is severable from the rest of the agreement in which it is contained. This means it does not affect the rest of the contract. What if only part of the clause is held to be invalid or unenforceable? The answer would seem to be that the whole clause fails: see *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1997) 14 BCL 277; *NSW v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503 at [70]. For example, in *Banabelle* the failure of one of five process stages of the dispute resolution clause precluded the legal enforceability of the whole process.

Another issue is determining how a court will determine whether parties are complying with a dispute resolution clause. Compliance with a dispute resolution clause is a matter of evidence in every case. For example, in *Computershare Ltd v Perpetual Registrars Ltd (No 2)* [2002] FSC 233 the plaintiff was held to have improperly terminated the dispute resolution process on the evidence. There may be objective criteria, express or implied, which may be relatively easy to determine, but requirements of good faith and reasonableness can muddy the waters, as can the essentially private and confidential nature of many of the processes.

The remedies for breach are essentially centred on breach of contract. There are three possibilities. First, there can be a stay of the proceedings, and most Supreme Courts and the Federal Court have an inherent jurisdiction to

do this. Stays are only granted where the proceedings amount to an abuse of process or are vexatious or

frivolous. The Uniform Arbitration Acts specifically provide for a stay of proceedings: s 53. The New South Wales courts in the cases mentioned above, and Warren J in *Computershare*, have accepted the appropriateness of ordering a stay to enable an ADR process to be pursued. There is a balance between participation in a process which can expedite a resolution and the possibility that the process will not work.

The other remedy is specific performance so as to order a party to carry out its undertakings. Although this has not yet been ordered in an Australian court in relation to a dispute resolution clause, it may not be long in coming. The problem with this remedy is that such an order would be difficult to supervise and may be an exercise in futility.

Damages would also appear to be a limited remedy. In *Simon Richard Lane v The Commonwealth Bank of Australia* [2000] NSWIRC Comm 274 a dispute resolution clause had not been complied with in an employment contract and the plaintiff maintained that this was unfair conduct directed towards him. It was held that the failure to conduct the mediation deprived the plaintiff of an opportunity to put forward his view that he should not be dismissed. Consequently, the plaintiff was awarded costs including those relating to his attempt at mediation. It is also interesting to note that the United Kingdom courts are beginning to consider the use of cost orders to ensure compliance with ADR clauses: see, for example, the decision of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. For an excellent review of the applicable principles see *WTE Co Generation v RCR Energy* [2013] VSC 314 at [39].

The power to order mediation

4.17 What if an applicant who is trying to enforce a dispute resolution clause instead seeks an order for compulsory mediation under the provisions of the relevant local courts legislation? This jurisdiction is a discretionary one. If all parties were to agree to such a referral then it is probable that in most instances so would the court. There is little precedent to guide the courts here, although it seems clear that the intent of the power is to enable the court to order compulsory mediation against the wishes of one of the parties. However, as Perry J in the South Australian Supreme Court in *Hopcroft v Olson* [1998] SASC 7009 stated:

> Be that as it may, it does not appear to me that precedent is of much assistance in determining the present application. Every case involves different circumstances. What might be an appropriate procedure in one case may clearly be inappropriate in another.

See also the case of *Baulderstone Hornibrook Engineering Pty Ltd v Dare Sutton Clarke Pty Ltd* [2000] SASC 159 where similar issues were considered.

As Barrett J in *Morrow v Chinadotcom Corp* [2001] NSWSC 209 stated, the fact that the parties had included an ADR clause in their contract was of marginal significance. The opposition of one of the parties to pursuing mediation would have to be very carefully considered by the court (at [43]–[44]). His Honour goes on to argue that because the parties and their advisers are engaged in a commercial exchange and can be assumed to understand the pros and cons of mediation, a court would have to think carefully before compelling them to take part in such a process. Although we could question the rationale of these arguments, he states that, in any case, '[a]ccess to mediation or any other form of dispute resolution may be obtained at any time through

a simple agreement among the parties to pursue such a course'. Robertson (2006, pp 51–3) makes the point that more recent case law demonstrates that the judiciary are becoming more open to the possibility of ordering mediation, even if the parties object before a court: see, for example, *Azmin Firoz Days v CAN Reinsurance Co Ltd* [2004] NSWSC 705. This is, in part, because the parties, through their legal representatives, are likely to adopt stances in an open adversarial court that are predisposed to overstating the merits of their own case and downplay the possibility of settlement. An interesting side issue was revealed in the Supreme Court of South Australia where Bleby J was prepared to confer wide powers on a mediator to enable him to obtain disclosure of the contents of certain documents when the court ordered a mediation to be conducted: *Addstead Pty Ltd (in liq) v Simmons (No 2)* [2005] SASC 25.

Mega-litigation: The limitations of mediation and the call for mandatory arbitration

The possible limitations of mediation after litigation has commenced were amply demonstrated in *Seven Network Ltd v News Ltd* [2007] FCA 1062, a case involving costs estimated to be up to $200 million. Sackville J stated:

> [19] Mega-litigation creates formidable challenges for any court required to manage the case and to decide it within a reasonable time frame. The presiding judge can make efforts — perhaps strenuous efforts — to confine the scope of the litigation and thereby limit its cost, both to the parties and to the community. For example, the parties can be encouraged or even directed to undertake mediation or other forms of dispute resolution with a view to resolving their differences or at least narrowing the areas of dispute. They can also be directed to take measures designed to identify and record matters not genuinely in dispute. But there is a limit to what the judge can do without compromising his or her role as an independent and impartial judicial officer.
>
> [20] In the present case, I repeatedly encouraged the parties to enter mediation, if not to settle the proceedings, then at least to narrow the issues. In fact the parties did undertake mediation on more than one occasion, but apparently with only limited (but by no means negligible) success. Later in the proceedings, I directed the parties to prepare an agreed chronology and encouraged them to agree on a template for written submissions. However, the responses illustrate that parties to mega-litigation are often able effectively to ignore (albeit politely) directions made by the court, if they consider that their forensic interests will be advanced by doing so.

The wide publicity this case received, including the fact that costs for the parties were estimated to be over $200 million, fuelled calls, most notably from the Commonwealth Attorney-General, for the introduction of compulsory arbitration. The Victorian Law Reform Commissioner Peter Cashman said that he planned to recommend that judges of the Victorian Supreme Court be given this power: see the *Weekend Australian*, 'Ruddock Backs Calls to Force Firms to Mediate', 28–29 July 2007, p 3. Nothing has come of this.

In any case compulsory arbitration is a power that many courts already enjoy. For example, the County Court of Victoria can order arbitration whether or not the parties consent: the power derives from the County Court Act 1958 (Vic) s 47A and the County Court Civil Procedure Rules 2008 (Vic) r 50.08. In the Victorian Supreme Court, arbitration can only be ordered when the parties consent: Supreme Court Rules 2005 r 50.08. The Victorian

Magistrates Court has power to compulsorily order parties to mediation (Magistrates Court General Civil Procedure Rules 2010 O 50.04) and in civil matters of less than $10,000 can also conduct the matter as an arbitration: Magistrates Court (Miscellaneous Proceedings) Rules O 2.

Compulsory arbitration exists in some United States jurisdictions. Probably the most well known is the Philadelphia Civil Rules, which require all civil claims under a limited amount to be arbitrated before a three-member panel.

Part of the concern in *Seven Network Ltd* seemed to be that a large part of the costs were to be borne by taxpayers through both the provision of the court system itself and tax subsidies available to the parties for their costs.

How to Draft a Dispute Resolution Clause

4.18 There is little point in including dispute resolution clauses in contracts if they are struck down by a court. In 2009 NADRAC released an issues paper noting that dispute resolution clauses that are not clearly drafted can create barriers to the effective use of dispute resolution (NADRAC, 2009a). The subsequent final report to the issues paper included a draft dispute resolution clause based on a precedent developed by the Law Society of New South Wales. However, it was noted that relying on one clause in all cases could be problematic because there are many factors to be taken into account in any contractual arrangement (NADRAC, 2009).

In the age of desktop computers, lawyers are tempted to cut and paste clauses from one document to another. In some instances it may be advisable to adopt one of the standard dispute clauses available from one of the major dispute resolution providers for incorporation into contracts. However, standard dispute clauses may prove inadequate, in which case the lawyer will need to draft his or her own terms. As Boulle (2005, p 419) suggests, a dispute resolution clause is like a 'mini system of conflict management for the future use of the parties'. The fact that there are numerous procedures to handle disputes implies that there is no one particular procedure that is necessarily best for a particular situation. When considering the range of possible dispute resolution options and strategies for a particular situation, there are at least six categories: preventative, collaborative, facilitative, fact-finding, advisory and mandatory. These are described in some detail in **Chapter 8**.

The ADR literature has long set out the principles for choosing a process to suit the circumstances where there is potential for conflict. These include (Boulle, 2005, p 231):

- Set clear and achievable objectives for the conflict response(s).
- Build in data collection and evaluation from the start.
- Early intervention is usually indicated, although remember that where people have experienced serious conflict or loss the ability to respond cooperatively may take some time.
- Move from least intervention to more, that is, a graduated approach.
- Any system should be seen as non-linear, that is, there is ability to go back to less interventionist processes.

- Disseminate information, education and training relevant to the system so

as to make it accessible.

- Each part of the system should be time limited.
- Privacy and other rights are to be respected.
- Rather than simply prescribing processes, a system should, if possible, provide a 'road map', that is, several possible ways to proceed.

Due to the increasing number of lawyers trained in ADR procedures cognisant of the above principles, the drafting of dispute resolution clauses has improved over recent times and they have become both more complex and sophisticated.

A number of drafting propositions need to be kept in mind (Spencer, 2003a, p 160):

- *Avoid an 'agreement to agree'*: Consider carefully before leaving any part of the future agreement to the parties; that is, avoid an 'agreement to agree'. There is an essential contradiction here — the more certainty the clause has the less autonomy the parties have, for example, in selecting the type of procedure to be followed. However, in trying to prevent or pre-figure challenges by another party, the risk of an adverse ruling by a court has to be seriously contemplated. Parties may want to leave open for future agreement various aspects of an ADR process, such as the procedures to be followed and timing. This will not be fatal if they also provide for default arrangements to provide certainty where they cannot agree on an important element. In summary, there should be no part of the process requiring the parties to agree on a course of action before the ADR procedure can proceed.
- *Selecting a third party:* It is probably best to avoid allowing the parties to select a third party themselves because often they are unable to do so. However, if the parties prefer to retain such a choice, it is best to have a provision that allows them to break any impasse that may develop between them in making such an appointment; for example, list the chairperson or

president of the Law Institute, Bar Association or state chair of IAMA or LEADR.

- *Incorporating other documents:* When using other documents or powers, annex them to the contract or recite that the parties agree to the terms in a named document/s and ensure that all parties have a copy of them. This avoids the problems that occurred in the *Elizabeth Bay* case. In that case, the documents in question had not been seen at the time of the execution of the contract and the parties were therefore agreeing to something that neither had seen nor agreed to. Further, ensure that the documents being incorporated into the contract do not contain terms that are not consistent with it. In this way, certainty can be derived from the external standard.
- *Language:* Use precise language to identify the parameters of the procedural rights and obligations between the parties (Boulle, 2005, p 160). The dispute resolution clause should be relatively complete and comprehensive.

Arbitration: The Forgotten Process?

4.19 The formation in 1975 of the IAMA (amalgamated with LEADR into the Resolution Institute in 2015) occurred against a background of significant reform and

development of arbitration legislation. New English arbitration legislation in 1979 was the catalyst for Australia's Uniform Commercial Arbitration Acts in 1984.

Despite changes from the late 1980s, mediation and other forms of ADR have continued to gain popularity at the expense of arbitration, apparently because they are seen as less formal processes which offer substantial savings

in time and legal costs (Condliffe, 2004). More importantly, it may be because mediation and related forms of dispute resolution give the parties greater control and self-determination over both process and outcomes.

An interesting question is why, despite many criticisms of traditional court litigation processes, has arbitration not maintained the same level of popularity that it has in Europe or North America? For example, the American Arbitration Association reported in its 2002 Annual Report that it had administered 230,255 cases for the year. This represented a 5.6 per cent increase on the previous year. Most of these were arbitrations. Of these, 3298 were for sums in excess of US$250,000. In my time as chief executive officer of IAMA (2000–03) there were no more than 150 cases administered by the institute in any one year. This declined further in the years since.

Arbitration is generally cheaper and faster than litigation, ensures privacy, is more likely to contain the excesses of interlocutory processes like discovery, is readily enforceable, is relatively flexible and ensures finality. In some ways arbitration has become the 'forgotten element' in dispute management, especially when it comes to drafting dispute resolution clauses.

There are three principal reasons why this may be occurring in Australia: greater disputant choice, the increasing use of tribunals and adverse publicity.

First, across all sectors of the economy and community, disputants now have more choices and the range of alternatives continues to broaden, as the history of ADR in this chapter has shown. In any society there are alternatives when conflicts arise. The fact that there are numerous procedures within any society to handle the same dispute implies that one particular procedure is not necessarily the best for every situation.

During the past three decades dissatisfaction with certain aspects of the court system has been a major factor in people seeking alternative ways to resolve disputes. In response the courts have increasingly turned to case management techniques, including referencing-out (used extensively in New South Wales) and new administrative systems. Arbitration has suffered in this

process of change because it is often associated with the old style, resolution-focused (determinative) and evaluative procedures rather than the management-focused, facilitative processes that have developed. Indeed, arbitration has often been lumped with litigation as a disputing system. This has not always been helpful to those who would want to encourage its greater use. For example, Donaldson J in *Bremer Vulkan Shiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909 stated:

> Courts and arbitrators are in the same business, namely, the administration of justice. The only difference is that the courts are in the public and arbitrators are in the private sector of the industry.

With respect to the learned judge I believe there may be differences other than a simple public/private divide, and I consider that many arbitrators do not see themselves as being involved in the 'administration of justice'. Although it is true to

say arbitration is essentially the outcome of an agreement between the parties, and hence their relationship is one based on private rather than public law, this is not to say that there are no other fundamental differences, including matters of procedure, use of prescribed rules and precedent including evidentiary rules. More importantly, in litigation the role of the third party (the judge) is directly backed by the power of the State and the parties attempt to resort to it. This establishes an aura of authority around the judge, and perhaps the parties also, which transcends such a simple division as the learned judge may seek to establish.

The second reason why Australians have moved away from arbitration as a conflict management process is because we have developed a marked preference for relatively informal tribunals over private arrangements for settling disputes. Tribunals of various sorts have proliferated and been

strengthened with the promise of further relieving the case burdens of courts. There is also the added bonus of bringing to bear special technical expertise. The 'new' facilitative processes of mediation and conciliation have become compulsory precursors in the establishment of the tribunals. The Victorian Civil and Administrative Appeals Tribunal is a good, if somewhat contradictory, example. It brings together the proliferation of tribunals and jurisdictions in Victoria into a body that in some ways is now paradoxically assuming the proportions and appearance of a court of law. In this process, legislatures can actively discriminate against the use of arbitration. For example, s 14 of the Domestic Building Contracts Act 1995 (Vic) prohibits arbitration clauses. The case of *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2002] VCAT 1489 clearly points out some of these procedural and jurisdictional issues. Here, deputy president Professor Damien Cremean held that an expert determination clause was invalid because it breached the provisions of the Domestic Building Contracts Act, which prohibited arbitration clauses. This decision of the tribunal has been overruled on appeal to the Supreme Court in Victoria, which has sought to clarify the distinction between the two processes: see *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307. The court also found that on its proper construction, s 14 was not intended to apply to current disputes; that is, parties can enter into an arbitration agreement once a dispute is underway.

The third reason is that arbitration is often only cited in the media or comes to notice when a case appears to go wrong. Because, unlike litigation, it is not a process that goes on public record, the triumphs and successes of arbitration lie mute while the disasters sometimes go down with a fanfare akin to the *Titanic*.

Arbitration: Two cases that made the headlines

The case for cancellation

Sea Containers Ltd v ICT Pty Ltd [2002] NSWCA 84 is a case in point. Early in the preliminary negotiations in an arbitration the parties were asked by the arbitrators to place $250,000 in a trust account as security for fees, costs and expenses. A dispute

then arose between the parties over the arbitrators' request for cancellation fees which would be paid in the event the hearing settled early or did not proceed for the full period set aside. ICT argued that the arbitrators had misconducted themselves by pressing repeatedly for the agreement of the parties to pay cancellation fees. It further argued that in view of that, it could not get a fair hearing. The arbitrators would not withdraw.

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Before the New South Wales Supreme Court, Gzell J ordered the arbitrators to be removed, saying they acted to 'the detriment of their duty to maintain the appearance of acting in the interests of bringing down a just award'. When his Honour's findings were appealed, Meagher J went even further:

> [5] … There was, of course, no legal obligation, no agreement to pay even having been reached; just how there could be a moral obligation to pay for work which might never be done, I quite fail to see. It is, in my opinion, that at this point the conduct of the arbitrators passed beyond the realms of unseemliness into misconduct — and misconduct of a very high order. …
>
> [8] … They, apparently, brushed to one side any consideration that a litigant might feel more than a little uncomfortable if he went to court knowing that the judge was plaintiff in an action against him arising out of the very matter the judge was supposed to adjudicate.
>
> [9] At this point the arbitrators' conduct became disgraceful.

On the rocks

The other notable case was a contractual dispute between the owner of a tourist business at Phillip Island and the Victorian Government. In November 2003 the Victorian Auditor-General revealed that the dispute cost the government $55.9 million. A total of $42.9 million was the amount required to be paid to the business owner by the government. Of this sum, $37.3 million was awarded by an arbitrator appointed to settle the dispute and a further $5.6 million was paid in costs. Legal fees of $9.3 million were paid out during the dispute, which continued in the Victorian Supreme Court when the government appealed against the arbitrators' award: see *Seal Rocks Victoria (Australia) Pty Ltd v Victoria* [2003] VSC 85. The government was left with an empty building and the community with significant disquiet about the cost-effectiveness of the process. Subsequently, the site was redeveloped by a new investor.

Despite the difficulties mentioned above, there are circumstances where arbitration may offer certain advantages. Dispute resolution clauses referring parties to arbitration have faced fewer difficulties than those referring parties to mediation or other processes. The reasons for this are that (Boulle, 2005, p 422):

- Commercial arbitration is regulated by statute including provision for the enforcement of such clauses.
- Arbitration is a mandated adjudicatory process similar to litigation itself and is therefore more likely to be understood by the courts.
- The arbitration results in an award which the parties can rely upon whereas mediation and like processes have no such guarantee.
- Because arbitration is so regulated it is much easier to ascertain if there has been compliance whereas in mediation and like processes it is much more difficult.

It is worth noting that arbitration clauses have long been held to be severable from the contract in which they occur; that is, the clause survives after termination of the contract or where one party claims it is void. In other words, it is a collateral agreement. This principle is being increasingly applied generally to dispute resolution clauses: see *Heyman v Darwins Ltd* [1942] AC 365; *Codelfa Construction Pty Ltd v State*

Rail Authority of NSW (1982) 149 CLR 337; 41 ALR 367. This is a matter still to be definitively decided.

Reform of Australian arbitration law

4.20 To address the issues developing around arbitration and, in particular, the perception that its statutory framework was out of date and overly complex, in November 2009 the Commonwealth Attorney-General announced that the legislation governing domestic arbitration in Australia — the state Commercial Arbitration Acts — would be overhauled. On 7 May 2010, after a period of consultation, Australia's Standing Council of Attorneys

General (SCAG), a body composed of each of the state and territory Attorneys-General, the Commonwealth Attorney-General and the Minister for Home Affairs, agreed to introduce to each state and territory legislature a Model Commercial Arbitration Bill (MCAB) to replace the state Commercial Arbitration Acts.

The need for new legislation to govern domestic arbitration has its origins in Australia's status as a federated commonwealth, with both Commonwealth and state governments. Australian arbitration law is 'dualist' — there is one law for international arbitration and another for domestic. The international arbitration regime is governed by a federal statute, the International Arbitration Act 1974 (Cth) (IAA); the domestic arbitration regime, on the other hand, is governed by the CAAs, which were passed individually by the legislature of each state and territory to oversee arbitrations within those jurisdictions. In an attempt to achieve consistency between the states in this regard, the CAAs are based on largely the same core text, though the courts of each of the states are at liberty to interpret the provisions of their CAA differently.

The primary purpose of the MCAB is to update the current CAAs. However, in the context of reforms to the IAA, and against the dualist backdrop of Australian arbitration law, the MCAB also attempts to narrow the gap between the laws applicable to international and domestic arbitration. It attempts to make arbitration more attractive to disputants for the resolution of domestic commercial disputes by:

- giving parties more control over the arbitration procedure;
- reducing unnecessary delay and expense; and
- enhancing the finality of the arbitration process, principally by limiting the grounds for appeal.

When the MCAB is promulgated in each state there will still be separate statutes for domestic and international arbitration, and Australia will still be a

dualist arbitral jurisdiction; however, there will be much greater general consistency.

The MCAB is based on the provisions of the 2006 United Nations Commission on International Trade Law (UNCITRAL) Model Law, the current international benchmark for arbitral laws.

Conclusion

4.21 A review of the history of ADR in Australia shows that Australians have for a long time been both enthusiastic and innovative in their embrace of procedures other than traditional litigation. They have been world leaders in fields as diverse as arbitration

of labour disputes and restorative practices. As the new ADR processes become more established, their ability to remain innovative and develop further will be a key issue. For example, as mediation and like processes become more institutionalised and the courts become more familiar with their processes, it has become more difficult for the courts to attack dispute resolution clauses on the grounds of uncertainty.

The increasing use of mediation and similar processes by the courts under various statutes or rules will continue to change both the role of the courts and the participants in these processes (McFarlane, 2008). Tension between the need for flexibility in ADR processes and the courts' need for certainty will continue and perhaps increase. There is currently no definite boundary between these two elements and perhaps there never will be. As Warren J said in *Computershare*, the parties '… are required to establish a protocol or framework within which the matters between them are to be negotiated'

([2002] at [14]). As her Honour indicated, the courts should not require the parties to set rules in advance but should only require them to attempt in good faith to achieve the path they have chosen.

Processes like arbitration, which offers a good alternative to litigation in certain circumstances, have suffered a decline in popularity as new processes have developed. Recent reforms to arbitration legislation across Australia provide some optimism for improvements in this area. As community awareness grows that there are other ways of resolving disputes that can facilitate more satisfactory outcomes and processes, which are less costly both financially and non-financially, the demand for ADR services will continue to increase. As the Hon Michael Kirby (2009) has stated:

> Getting the relationship between courts and ADR right is itself an important challenge for us all. It is neither feasible nor desirable for ADR to take over all the functions of courts any more than it is for ADR to imitate slavishly the procedures that courts observe. The great challenge that lies ahead is ensuring a correct and evolving relationship between ADR and the curial process. This is unlikely to be static. The success of ADR practices, like the success of the courts, will necessarily depend upon the integrity, skills and training of the personnel involved.

It seems clear that not all conflicts and the resulting disputes can or should be resolved through such processes as negotiation and compromise-encouraging mediation and other ADR processes. Litigation and the public trial of matters have important social functions. Courts are able to articulate, apply and expand principals of law necessary to provide order to social and economic life. Negotiations take place in 'the shadow of the law' and precedents created by the legal process have long provided a way in which to manage disputant expectations. Over 500 years of development, court processes have developed concepts of natural justice and due process which inform our concepts of procedural justice. Courts have developed coercive powers that require disclosure of information that one side may want to keep from the other. They provide a bulwark of powers that can protect the vulnerable and the disempowered. These benefits can be missing when settlements are privatised and confidential (Fiss, 1984)

The overall goal for social policy should not be to eliminate adjudication through the courts. I believe the aim should be to develop responsible alternatives to supplement litigation, so that parties have multiple options for dispute management. If we can give disputants greater choice or more options so that they can weigh up the costs of litigation as against its benefits then this may be for the overall betterment of our society.

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In many ways the ADR movement reflects both the rise of consumer and rights consciousness as well as the questioning of traditional competitive forums for managing conflict. Paradoxically, the ADR movement carries on the traditions of community folkways, which we recognise in the school meeting, the church hall and the local neighbourhood. The emerging question is how to balance these various elements.

Exercises

Exercise 1 A problematic dispute resolution clause

Read the dispute resolution clause below.

Assume that one of the parties to the contract in which this clause appears believes that there has been a breach of contract and issues proceedings. The other party, in turn, objects and says that the dispute resolution clause has not been properly drafted and adhered to and applies to the court for a stay of proceedings. Do you think a court would uphold this clause or strike it down?

A possible dispute resolution clause

(a) The parties must attempt to settle by negotiation any dispute in relation to this Agreement in accordance with this clause before resorting to external dispute resolution mechanisms.

(b) A party claiming that a dispute has arisen under this Agreement must immediately notify the other parties' Nominees.

(c) If the dispute is not resolved by the Nominees within seven business days of it being referred to them then the dispute must be immediately referred by the Nominees to their respective Chief Executive Officers.

(d) If the dispute referred to in the case of a referral to the Chief Executive Officers under clause (c) hereof is not resolved within seven business days of referral, the

matter must be referred by the Nominees for dispute resolution to the Resolution Institute or its successors and the parties shall enter into that process in good faith.

(e) If a dispute is not resolved within two months after referral to clause (d) hereof, or such longer period as agreed between the parties, then either party may institute legal proceedings without further notice.

(f) Notwithstanding the existence of a dispute each party must continue to perform its obligations under this Agreement, including payment.

To answer this question, refer to **4.14**, 'ADR Clauses in Contracts: A Short Legal History'. The following comments will provide you with some initial thoughts.

For the litigation to be stayed there are at least five possible conditions to be satisfied. First, in order to avoid being void as an unlawful attempt to oust the jurisdiction of the court, the provision must operate as a pre-condition to the parties' freedom to litigate rather than a purported denial of that freedom: *Scott v Avery* (1855) 5 HL 811. Second, it will be void for uncertainty and unenforceable if it constitutes an 'agreement to agree'. Third, it is self-evident that the disputes which are the subject of the proceedings sought to be stayed must be within the scope of the

contractual provision. Fourth, the agreed contractual process must possess such a degree of definition and certainty as to enable it to be meaningfully undertaken and enforced. Finally, at least in New South Wales, there should be careful reference to such terms as 'good faith'.

The *Scott v Avery* nature of the sample clause above is apparent. Paragraph (e) makes explicit the ability of the parties to access a court at a reasonable stage in the process. In the present case, the first and second of these conditions appear to present no difficulty. The clause seems to go beyond being simply an agreement to agree as the parties have laid out the terms of their agreement in specific enough terms in so far as it relates to the procedures to be followed. The other conditions are more difficult and require some further analysis.

The clause provides for a series of steps and it is necessary to trace those steps to see how the clause works. The clause provides for the general principle that the parties 'must attempt to settle by negotiation any dispute in relation to this Agreement in accordance with this clause before resorting to external dispute resolution mechanisms' (paragraph (a)). It then says that a party claiming that a dispute has arisen under this agreement 'must immediately notify the other parties' Nominees' (paragraph (b)). The clause thus provides a means whereby the party claiming there is a dispute notifies the other parties of that dispute. Paragraph (c) begins with the words, 'If the dispute is not resolved by the Nominees within seven business days of it being referred to them' — thus implying (but not explicitly saying) that the first step after that referral is for the Nominees to make some attempt among themselves to resolve the notified dispute. Failing that, the remainder of paragraph (c) requires that the dispute be referred by the Nominees '… to their respective Chief Executive

Officers'. The final stage in the process is that 'the matter must be referred by the Nominees for dispute resolution to the Resolution Institute (paragraph (d)). Finally, and failing successful resolution by any of these means, paragraph (e) provides that either party 'may institute legal proceedings without further notice', provided that at least two months (or any longer period the parties have agreed) have passed since referral to the Resolution Institute.

The clause clearly leaves it to the parties, their Nominees and Chief Executive Officers, to manage the dispute or disputes. Only then does it require that the parties, as per paragraph (d), refer any unresolved matter to the Resolution Institute. But what does this mean? If we look at the Resolution Institute website there are a number of possible processes that this organisation operates to assist parties in dispute. It is a member-driven dispute resolution organisation whose principal objects are to promote various kinds of dispute resolution, principally arbitration and mediation but also including expert determination and conciliation. There are guidelines for the various processes that may be used. Except for expedited matters, there are no set fees required — these are dependent on the experience of the arbitrator, mediator, expert or conciliator to be used. There are extensive guidelines for the use of these various processes. The Resolution Institute acts as a referral agent to those of its members who may be appropriate to act in any particular matter. It does not determine what process the parties will use. It is not one of those cases where

the parties have referred matters in the contract to a third party for management of a particular process and which the courts have found to be sufficiently certain; for example, see *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600; 43 ALR 68. But this line of authority is probably not relevant to the matters now under consideration. This clause does not refer to dispute resolution to be managed by the Resolution Institute or cast the institute in the role of a decision-maker, by the parties' agreement, to fill a gap they have consciously left. Rather, the clause speaks of a dispute being referred 'for dispute resolution to' the Resolution Institute without seeking to define its role.

In New South Wales, at least, it seems that this clause may fail for want of certainty. There the authorities require certainty as to procedure and process as an essential element before there can be an exercise of the court's power to order a stay of proceedings. In Victoria, the situation would be somewhat different. The clause would most likely be held to be certain enough to be enforced.

Alternatively, what if the applicant sought an order for compulsory mediation under the provisions of the local Supreme Court Act providing for such orders to be made? If the parties had used a dispute resolution clause similar to the one above, that would at least show some predisposition towards ADR. It could be argued, however, that if the clause fails for uncertainty, there has been no agreement at all.

Exercise 2 The NADRAC model dispute resolution clause

The following dispute resolution clause was developed by NADRAC (disbanded by the Federal

Government in 2013) to promote the use of ADR procedures. It was based on a Law Society of New South Wales precedent and is available at the society's website: <www.lawsociety.com.au>.

Could you use this clause in all situations or would it need to be modified?

1. If a dispute arises from or in connection with this contract, a party to the contract must not commence court or arbitration proceedings relating to the dispute unless that party has participated in a mediation in accordance with paragraphs 2, 3 and 4 of this clause. This paragraph does not apply to an application for urgent interlocutory relief.
2. A party to this contract claiming that a dispute has arisen from the contract ('*the Dispute*') must give a written notice specifying the nature of the Dispute ('*the Notice*') to the other party or parties to the contract. The parties must then participate in mediation in accordance with this clause.
3. If the parties do not agree, within seven days of receipt of the Notice (or within a longer period agreed in writing by them) on:
    a. the procedures to be adopted in a mediation of the Dispute; and
    b. the timetable for all the steps in those procedures; and
    c. the identity and fees of the mediator; then,
    d. the [independent appointment body or person] will appoint a mediator accredited under the National Mediator Accreditation System, determine the mediator's fees and the parties will pay those fees equally.

4. If the mediator is appointed by [independent appointment body or person] in accordance with paragraph 3, the parties must assist the mediator to mediate the Dispute in accordance with the Practice Standards articulated in the National Mediator Accreditation System.
5. If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief, that party must consent to orders by the Court in which the proceedings are commenced that:
    a. the proceedings relating to the Dispute be referred to mediation by a mediator; and
    b. if the parties do not agree on a mediator within seven days of the order referred to in paragraph 5(a), the mediator appointed by the [independent appointment body or person] will be deemed to have been appointed by the Court.
6. If a party:
    a. refuses to participate in a mediation of the Dispute to which it earlier agreed; or
    b. refuses to comply with paragraph 5 of this clause, a notice having been

served in accordance with paragraph 2; then,

i. that party shall not take any steps to recover its costs whether by way of obtaining or enforcing any order for costs, and,

ii. that party shall consent to an order of a Court of competent jurisdiction that it will specifically perform and carry into execution paragraph 3 and 4 of this clause.

Exercise 3 When to use dispute resolution clauses

This is a simplified example that comes out of case I was involved in. John and Betty are setting up a barbering/hair salon business. They need to rent premises, lease and buy equipment and split the costs and income from the business as equal partners. John knows that Betty can sometimes be temperamental and Betty knows that John can be stubborn but that they both get on together. They think they need a proper partnership agreement drawn up but are unsure what dispute resolution provision to include in it. What sort of questions would you ask John and Betty to assist them to decide what provisions to include in their partnership agreement?

Dispute resolution clauses can be relatively simple. The important thing to keep in mind is to ensure you have an appropriate process in place to manage any conflict that may emerge in a contractual or other type of relationship. Most of the time we do not need these clauses but it is better to prepared and to treat this aspect as an important part of any ongoing business or professional relationship. When you look at the clauses make sure you tailor and edit them to your particular requirements. Go back to **4.18** for a guide to such clauses. Are there any particular arrangements in your own life where you think you could benefit from the presence of such a clause?

Below are several standard ADR clauses in commercial contracts adapted from those that were previously provided by LEADR and IAMA (now amalgamated into the Resolution Institute: see <www.resolution.institute>).

1.1 Mediation

The parties must endeavour to settle any dispute in connection with the contract by mediation. Such mediation is to be conducted by a mediator who is independent of the parties and appointed by agreement of the parties or, failing agreement within 7 days of receiving any party's notice of dispute, by a person appointed by the Chair of LEADR … or the Chair's designated representative.

1.2 Rules

The LEADR Mediation Rules shall apply to the mediation.

1.3 Arbitration or litigation

It is a condition precedent to the right of either party to commence arbitration or

litigation other than for interlocutory relief that it has first offered to submit the dispute to mediation.

Dispute resolution

1.1 Before court or arbitration proceedings other than for urgent interlocutory relief may be commenced, the following steps must be taken to attempt to resolve any dispute that arises out of or in connection with this contract (including any dispute as to the validity, breach or termination of the contract, or as to any claim in tort, in equity or pursuant to any statute).

1.2 Notice (the notice of dispute) must be given in writing by the party claiming that a dispute has arisen to the other party (or parties) to this contract specifying the nature of the dispute.

1.3 Upon receipt of the notice of dispute, the parties must attempt to agree upon an appropriate procedure for resolving the dispute.

1.4 If within 10 business days of receipt of the notice of dispute the dispute is not resolved or an appropriate alternative dispute resolution process is not agreed, then the parties shall refer the dispute to LEADR, … for facilitation of a mediation in accordance with LEADR's Mediation Rules. LEADR shall act in accordance with its Facilitation Rules.

1.5 The parties must co-operate with LEADR as facilitator.

1.6 If within 10 business days after referral of the dispute to LEADR the parties have not agreed upon the mediator or other relevant particular the mediator and any other relevant particular will be determined in accordance with LEADR's Facilitation Rules.

1.7 This clause will remain operative after the contract has been performed and notwithstanding its termination.

Arbitration

The standard clause which is recommended for insertion in agreements where arbitration is the desired method of resolving a dispute is:

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to,

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The Institute of Arbitrators & Mediators Australia Rules for the Conduct of Commercial Arbitrations'.

Unless the parties agree upon an arbitrator, either party may request a nomination from either the President OR the Chapter Chairman of the Chapter where the dispute arises.

Expedited arbitration

(In small disputes and/or where quantum is limited or restricted.)

To limit the potential cost of small disputes an additional phrase may be added to the

arbitration clause which restricts the right of a formal hearing to when the quantum in dispute is above a certain, agreed amount. For example:

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to arbitration in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Expedited Commercial Arbitration Rules. For disputes in which the quantum is less than $ (include amount here — usually $50,000 or under) arbitration shall take place using the submission of documents alone unless both parties agree otherwise.'

Meditation-arbitration

Where mediation is the desired method of resolving a dispute and where, if the dispute is not settled by mediation and you require this further option, the dispute is referred to arbitration is:

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to mediation in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Mediation and Conciliation Rules.'

Add the following if you require the matter to go onto arbitration if not settled:

'If the dispute or difference is not settled within 30 days of the submission to mediation (unless such period is extended by agreement of the parties), it shall be and is hereby submitted to arbitration in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Rules for the Conduct of Commercial Arbitrations. Notwithstanding the existence of a dispute or difference each party shall continue to perform the Contract'.

International arbitration

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with, and subject to, the UNCITRAL Arbitration Rules. The appointing and administering body shall be The Institute of Arbitrators & Mediators Australia (IAMA). There shall be one arbitrator, the language of the arbitration shall be English, the place of the arbitration shall be (nominate city in Australia).'

Please note:

- *The parties may designate different rules to the UNCITRAL Arbitration Rules.*
- *The parties may provide for 3 arbitrators.*
- *The parties may designate a language other than English.*

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Industry/consumer contracts

This clause can be modified as appropriate to the particular scheme.

'Any dispute under, or arising out of, this contract shall be referred to the Institute of Arbitrators & Mediators Australia, for resolution under the Rules of the (Trade Body or Association) Consumer/Industry Dispute Resolution Scheme. Each case will first be

referred to a Conciliator appointed by the Institute unless either party wishes to proceed directly to arbitration. If the conciliation is not satisfactorily concluded within six weeks or if the parties want to proceed directly to arbitration, the Institute will appoint an Arbitrator who will make a final and binding award'.

Expert determination

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to an expert in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Expert Determination Rules'.

Mediation

'Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to mediation in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Mediation and Conciliation Rules.'

Exercise 4 Questions

(a) In your view what are the key moments in the development of ADR in Australia?

(b) Why is arbitration, as a disputing process, struggling?

(c) The MCAB could be a model for reform of the jigsaw that is the Australian federated legal system, with its various state and federal jurisdictions. Do you agree?

(d) What are the conditions precedent to drafting a dispute resolution clause?

(e) Conferencing in the context of the criminal justice system is perhaps symptomatic of how ADR is permeating our major social institutions. Do you agree?

(f) Why would it be important to include efficiency in the analysis of dispute resolution systems?

Chapter 5

Collaborative Practice

Summary

This chapter contrasts the collaborative and coercive approaches to conflict management and outlines a five-phase interpersonal process for collaborative conflict management.

It also describes two techniques of collaborative conflict management (the use of creative metaphor through 'root-cause analysis', and persuasion) and includes an overview of the developing field of collaborative legal practice, including a draft collaborative law agreement.

Introduction

5.1 In conflicts, we experience and observe the inability of parties to be open and cooperative. Often, the parties to a conflict treat each other like nations at war. Sometimes, however, they are able to engage in open and well-regulated approaches. The issues and problems arising out of the conflict are dealt with in a collaborative way so as to best serve the interests of all parties. In this chapter we look how this might be achieved.

The Collaborative vs the Coercive Approach

5.2 Fisher and Brown in their book *Getting Together* (1989, pp 132–48) provide a useful seven-point summary contrasting a collaborative approach with what they term a 'coercive approach'. This is summarised in the box below. The principles underlying this approach were originally outlined in the seminal work by Fisher and Ury, *Getting to Yes* (1981), and became known as the 'principled, win-win or integrative negotiation approach' or, more lately, the 'Harvard approach'. This approach has had a significant impact on the practice of conflict management, and particularly negotiation. (See **Chapter 6** for a fuller explanation of this approach.)

In simple terms, a collaborative approach means that the conflict is not treated as a case of who's right and who's wrong, but rather as a problem to be mutually solved. There is an emphasis on the exchange of information and exchanges between the parties about their underlying needs and motivations. This approach requires a party to carefully prepare the information they are willing to disclose to ensure cooperation, and will depend on the other party

demonstrating good faith in the exchange. Because the interests of each party are creatively explored it is usual to find a much broader range of options being generated in this style of negotiation than in a more adversarial approach. Also, because the stumbling blocks in negotiation are often emotional rather than substantive, this approach is probably more likely to be successful because these issues will usually be addressed (Spegel, Roger and Buckley, 1998, p 34).

Traditional 'hard bargaining' over rigid positions focuses on power or rights. It is generally concerned with the outcomes to be achieved. Goal-setting is therefore given some importance, and concession-making, although often part of the process, is resisted. In cooperative conflict management the objective is to creatively reconcile interests. How people negotiate is, therefore, as important as what they are negotiating about.

Refer back to the robber's cave experiment at **1.13** for a further example of the collaborative versus the competitive approach.

The collaborative vs the coercive approach

1.	**Attacking the individual vs attacking the problem**	Instead of criticizing the other person, concentrate on the problem. It is better to be hard on the problem and soft on the people. A simple technique to help this happen is to sit side-by-side rather than directly face each other.

2.	**Winning a contest vs solving a problem**	Making an assumption that we are in a contest immediately leads us to conclude that someone is going to win and someone is going to lose. It is better to treat negotiation as a joint problem-solving effort.

3.	**Making an early commitment vs remaining open**	The often-used tactic of locking yourself into a particular solution to try to force the other person to negotiate on your terms sometimes works but may be disadvantageous in the long term. People often resent such tactics. It is usually better to remain open to persuasion and alternative solutions.
4.	**Focus on positions vs exploring interest**	Instead of trying to settle the matter too early by stating a position it is better to try to understand the issues. Instead of trying to find a solution by bargaining over respective positions, concentrating on interests can bring the parties closer together.
5.	**Either/or vs multiple options**	Instead of trying to explore multiple options there is a tendency to try to over-simplify the situation and narrow the available options.
6.	**'Break their will' vs persuasion towards a fair outcome**	Instead of trying to break the other person down, the collaborative conflict manager looks for external, objective criteria rather than maintaining arbitrary positions.
7.	**Worsening their outcomes vs improving our own**	Instead of concentrating on threatening, hurtful or 'either/or' outcomes, it is better to think about the 'best alternative to a negotiated agreement' (BATNA), which is what one could achieve if the negotiation fails. You can also think of your 'worst alternative to a negotiated agreement' (WATNA) to help focus your thoughts.

(Adapted from Fisher and Brown, 1989, pp 132–48)

Five-phase Structure for Collaborative Conflict Management

5.3 Collaborative conflict management depends on both parties being willing to work cooperatively. This necessarily depends on the nature of the relationship between the parties and the context in which the conflict occurs. One of the aims of the competent conflict manager is to develop relationships within important contexts (for example, workplace, neighbourhood or family) where this can happen. There are a number of different ways of structuring collaborative conflict management. The process below may be useful in a wide variety of contexts where collaboration is possible. The different phases are:

- *Phase 1:* Define the issues/problems.
- *Phase 2:* Concentrate on interests, not outcomes.
- *Phase 3:* Generate options.
- *Phase 4:* Select an option or options, and implement.
- *Phase 5:* Evaluate.

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Phase 1: Define the issues/problems

5.4 The logical, but often overlooked, starting point of any collaborative effort is the development of a clear 'picture' of the issues or problems. This means allowing each party to state what they think are the issues or problems. This demands all the listening and assertiveness skills discussed in **Chapter 3** and, in particular, it requires at least one of the parties to open the exchange

by establishing a rapport in which these opinions can be expressed. Statements can achieve this rapport, as can questions such as the following:

'Can we get together and discuss the issues that concern us?'

'What ideas can we share together about these problems?'

'I would appreciate your input into this.'

'I'm worried about this and would like your contribution.'

By concentrating on defining the issues it is easier to avoid the common problems of looking for premature solutions or giving advice. It also heads off the tendency to want to dominate or control the other. By beginning this way, the chance of generating constructive options is enhanced and the input of all parties is considered.

Sometimes it is useful to list all the issues in writing or do a 'force-field analysis', as described in **Chapter 2, Exercise 1**.

Different voices: Female and male

Carol Gilligan's early research indicated that women's experiences revolve around social interaction and personal relationships (Gilligan, 1982). This contrasts with male individualism. Traditional 'girls' games' such as hopscotch or skipping are turn-taking and cooperative, with few rules and minimal adjudication. Traditional 'boys' games' are competitive, rule-bound and have definite processes for dispute resolution. Gilligan's research indicated that girls place greater emphasis on the continuity of relationships as being more important than the game, whereas boys are more concerned about competing. It suggested that girls tend to respond to issues in more complex ways than boys and are more concerned about the individuals involved in any problem. Girls are also less willing to create abstractions like legal rules to resolve them. Gilligan's research suggested that boys accept the conceptual framework of abstraction and hierarchy that are typical in Western cultures. In other words, while men and women have much in common there are different ways (or, in Gilligan's terms, 'voices') of seeing the world — 'female' and 'male'. These are important considerations in any conflict management strategy but particularly in the area of collaborative conflict management where it would seem that the female voice is of central importance. Gilligan's research has sparked considerable controversy and debate in the feminist movement and in academic literature. Since Gilligan, there has been a plethora of books and articles written about male and female difference. John Gray's *Men are From Mars, Women Are From Venus* (1992) is probably the most popularly known, if not academic, variant. In **Chapter 3** we also touched on research into emotions and gender (see **Exercise 10**) and there will be further, more detailed consideration of this dynamic in **Chapter 6**.

Phase 2: Concentrate on interests, not on outcomes

5.5 One of the most basic mistakes made in conflict management is to try to reach an outcome or solution prematurely before adequately exploring the issues (Phase 1). Interests are the 'why' and the 'what' behind positions.

The example often given is of two people both wanting the one orange (the *what*). This can result in needless conflict until they define the conflict, not in terms of the outcome (wanting the orange), but in terms of interests (*why* they want it). If, in this instance, one person wants the orange for its peel to make a cake, and the other wants it for its juice, then a ready solution is apparent.

In conflicts over scarce resources (one of the most common forms of conflict), such as financial allocations in a budget, availability of overtime or use of cars or office space, spending time focusing on interests will facilitate a collaborative effort. The major advantage of this approach is that it often broadens the parties' perception of the conflict and enhances their ability to develop options for a possible solution. The way to concentrate on interests is not to simply ask 'why?' but also to explore the objectives of the other party. For example, if there is a dispute over the use of a car, asking for what purposes the car is to be used moves the discussion towards interests and away from premature solutions.

Phase 3: Generate options

5.6 The next thing to do is develop a number of options. (This aspect, important in most forms of conflict management, is discussed in more detail

in **Chapters 6** and **7**.) Brainstorming is probably the best known way of developing options. It is a simple technique that involves the quick generation of possible options for a solution without trying to clarify or evaluate them. The important thing is not to discount any idea expressed but to include them all, even if they appear unrealistic. The clear intention is not to be stuck on one solution, but to be flexible enough to consider a range of options.

Phase 4: Select an option or options, and implement

5.7 It is now possible to select the option or options with which to manage or resolve the matter. Each party can state which options they prefer. If phases 1–3, and especially respective interests, have been worked through well, then there will often be an overlapping between the options chosen. It is necessary to arrive at agreement on which options are appropriate and how they will be implemented. This will involve determining who will do what, and time lines. Sometimes it is a good idea to write down the agreement, including details of the implementation.

Phase 5: Evaluate

5.8 It is usually a good idea to evaluate both the collaborative conflict management session and the consequent implementation. The latter can involve a follow-up session to check on how things are going. It is also a good idea to set aside some time alone to consider different aspects of the exchange and the likely longer term consequences, especially those which may affect your relationship with those involved.

Other Collaborative Techniques

5.9 The process described above can be used in a wide variety of situations and by third-party interveners such as supervisors and mediators. It can be modified and adapted to the particular context. There are many ways to be collaborative in resolving actual or potential conflicts. A variety of collaborative techniques useful in group and organisational contexts are described in **Chapter 7** and include search conferencing, nominal group and Delphic techniques. Another technique, using creative metaphor, useful for both individuals and groups, is outlined below.

Using creative metaphor — a root-cause analysis

5.10 The technique of using creative metaphor is particularly useful for groups that are experiencing rapid or traumatic change which is creating internal confusion and anxiety. It provides an innovative and creative way of reviewing the issues presented by these changes.

The issue in question is divided by the group leader or third-party intervener such as a mediator into three parts: presenting problems, support problems and root-cause problems. The presenting problems are those that are visible or readily apparent to members of the group, and are identified as the issues that must be dealt with. Support problems are also referred to as 'systemic' problems because they reflect underlying (latent) problems which arise out of the system or systems the group members belong to. Root-cause problems are those that are related to the structures which underpin both presenting and support problems. For example, if a group wants to discuss sexual discrimination in the workplace it may describe a presenting problem as sexist language, a related support problem as the disproportionate number of supervisor positions held by men in the organisation, and a root-cause problem as the relative social disadvantage of women in society.

Creative metaphor involves four steps, summarised below.

Creative metaphor	
Step 1: **Brainstorm**	The group brainstorms as many problems as can be thought of under each of the three categories of problems: presenting, support and root-cause.
Step 2: **Create a metaphor**	The group as a whole or in smaller subgroups creates an image or metaphor which can be used to describe each of the three types of problems. They are then asked to draw this on butcher's paper (or equivalent) and discuss its meaning for them. A tree or plant of some description is often the easiest image to use.
Step 3: **Relating metaphor and problems**	The group or subgroups relate each of the brainstormed problems to the different parts of the image; for example, petals of the flower are likened to the presenting problems. They are asked to discuss the interconnections between each type of problem in terms appropriate to the image.

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Step 4: **Discussion**	The group then discusses how the process of creating a metaphor has been helpful and in what ways it could lead to useful strategies for dealing collaboratively with the problems raised.

Persuasion and audience

5.11 The ability to influence others through persuasion is an important aspect of many conflict management strategies, particularly those involving

collaboration (for more on this important topic go to **Exercise 8** at the end of this chapter and **Chapter 6**). Persuasion relies on the ability to influence without threatening or pressuring. There are many factors that make a person a good persuader. These include skilled communication, a positive reputation, personal attractiveness, understanding of self and others, self-discipline, versatility in behavioural styles and social context. (To consider this last aspect further see **Exercise 5** at the end of this chapter.)

Michael Platow (2007, p 188), a social psychologist at the Australian National University, performed several interesting experiments to measure the importance of group context on a person's view of something. In the first experiment, students were shown a videotape of a stand-up comedian. One group of students listened to a comedian with a background of canned (simulated) laughter and one group without any laughter at all. The researchers then added another element. One-half of the group was told that the comedian's audience was a disliked political party (termed an 'out-group'). The other half were told the audience was from their university (termed an 'in-group'). Interestingly, the group which thought the audience was the out-group did not laugh any more than if there was no canned laughter at all. The participants who thought the audience was the in-group laughed a lot more. This difference in the perceived audience also had a similar direct correlation with the participants' view of the quality of the material and the comedian's potential. The experiment shows that participants in the study may have been intentionally suppressing their laughter so as not to be associated with the disliked out-group.

In a second experiment (Platow, 2007, p 191), participants were twice exposed to a painful stimulus. When reassurance about the pain came from somebody from an in-group (that is, somebody they identified with) the participant became calmer than when reassurance came from somebody from an out-group (that is, somebody they did not identify with). It would seem that the social context is therefore important in how people will respond to various situations. In Platow's view, our behaviour 'is … determined by an

interaction between our personal identities (who we are as unique individuals), our social identities (who we are as group members), and the context in which we find ourselves' (p 190). These findings are important in terms of how responses to various stimuli are dependent on contextual issues. To seek change in a collaborative way therefore requires some consideration of the interrelationships between people.

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Collaborative Legal Practice

5.12 The continued development of the ADR movement can be seen in the emergence of 'collaborative legal practice'. This is a cooperative, voluntary process to resolve issues such as divorce and other family law matters without the need to go to court. With the help of professionals in various disciplines, the parties work together to create shared solutions for all aspects of the case — financial, emotional and legal. It is based on developing constructive communication and requires the active participation of the parties focused on the needs and interests of the clients; that is, an interest-based negotiation process. It requires that the client and all of the professionals involved agree not to go to court. In the event that the matter does not resolve in the collaborative process, the professionals are disqualified from representing the parties in any subsequent court proceedings. The process moves forward via structured and managed meetings with the overall goal being to reach a mutually agreeable settlement. Collaborative legal practice has been practised in the United States and Canada since the early 1990s and more recently in the United Kingdom, Ireland and Europe. Most Australian states and territories now have associations for collaborative practice (see Lopich, 2007).

The Law Council of Australia has published 'Australian Collaborative Practice Guidelines for Lawyers' (March 2011), available at

<www.lawcouncil.asn.au>. As well as providing a detailed description of the collaborative process, it also includes standards for training and trainers. These guidelines define collaborative legal practice as:

> … a process in which the clients, with the support of collaborative practitioners, identify interests and issues, develop options, consider alternatives and make decisions about future actions and outcomes. The collaborative practitioner acts to assist clients to reach their decision and provides advice where required in a manner that supports the collaborative process.

The collaborative approach is team-oriented to assist disputants to reach settlement. For this reason the various, usually state and territory based, organisations have developed protocols to attend meetings and programs to foster a team approach. For example, the Law Institute of Australia has a group listing on its website for collaborative practitioners and those listed are required to attend a minimum number of meetings of the practice group: see <www.liv.asn.au>. In 2007 the Federal Attorney-General launched a website called 'Collaborative Law in Australia', which provides links to state and territory based organisations working in this area: see <www.collaborativelaw.asn.au>.

A collaborative case study

Jessica and Paul had been married for 12 years and had three children aged 13, 11 and 9. Jessica had been a physiotherapist before their marriage. She had been a virtually full-time mother and homemaker during their marriage, with some intermittent locum work. Paul had not spent much time with the children and seemed to Jessica to be a distant, traditional 'male-type' parent. The relationship ended after Jessica discovered that Paul had been seeing another woman, and Jessica retaliated by ordering Paul out of the house and making plans to renew a relationship with a former boyfriend she had known before

the marriage. Jessica was very bitter and extremely fearful about becoming a single parent without income support.

Looking at the options

The couple decided that collaborative practice would be the best way for them to work

through the seemingly insurmountable decisions ahead — arrangements for the children and the way they would organise their money and property.

A child psychologist was brought in to help them work through various issues regarding the children and it was agreed that it was especially important for the children to stay at their current school, as it had specialist programs and because one child had trouble coping with change.

Money worries

Jessica knew that any formal child support assessment would not reflect the living standard the family had maintained in the past. She had no real knowledge of their finances, whether she could afford the mortgage or if they would have to sell the house, or where and how she and the children would live if that happened. She did not know how she could become re-employed after so long out of the workforce. She also did not know if the relationship with her former boyfriend would come to anything.

Jessica and Paul worked out budgets as part of the collaborative process and it became clear that the house would have to be sold if Jessica could not raise some money to pay to Paul. Paul agreed to take part of the payment by way of a superannuation split, and to wait for Jessica to return to work so that she had the ability to borrow, before receiving the balance of the payment.

Understanding each other's point of view

As far as child support was concerned, the couple was able to come to an agreement based on the real costs of maintaining the children, rather than on the amount assessed by the child support agency. As Jessica was returning to a higher workload, Paul knew that he would not be responsible for all of the costs of the children indefinitely, and that he would be able to buy another home soon enough, which had been his greatest worry.

Jessica had assumed that Paul was moving in with his new partner, and until she understood his concerns about buying his own home, she had not understood why the subject of money had caused Paul to become so angry in the past. All of this information emerged in the joint meetings, which focused on joint long-term interests.

The way forward

Collaborative lawyers drew up a financial agreement and a child support agreement for Paul and Jessica. The child psychologist helped them to write a parenting plan.

(Based upon a case study on the Collaborative Professionals website at <www.collabvic.com.au/> (accessed 19 June 2015).)

Of interest in this practice area is the multi-disciplinary nature of the teams who are engaged in cases. As well as lawyers there are psychologists, financial planners, accountants and other experts. There is a number of complex, unresolved issues related to the effort to merge the expertise of different professionals working on a

collaborative case (see Macfarlane, 2005, pp 51–7). Macfarlane posits that the most pressing issue in this regard is the possible encroachment by lawyers on the therapeutic role of coaches. Some therapists have indicated they are uncomfortable with the blurring of the boundaries between their role and that of some lawyers who assume a more therapeutic relationship with the client.

The other interesting aspect is the requirement that collaborative practitioners discontinue their involvement in a case if the process fails to reach settlement. This leaves it open to the parties to litigate the matter. Gutterman suggests that the need to engage new lawyers to litigate the matter and the expense involved acts as a disincentive to terminate the collaborative process (Gutterman, 2004).

5.13 The International Academy of Collaborative Professionals (IACP) conducted a survey between 2007 and 2010 which studied clients' experiences with collaborative divorce and collaborative family law in general (Wray, 2012). These survey results and other useful information on collaborative practice can be accessed via <www.collaborativepractice.com>. Ninety-eight participants of the collaborative process responded with an almost equal gender split. The majority of respondents were between the ages of 40 and 59, were married for 16 years or more and had used the process in dissolving their first marriage. The majority of respondents had children. Most respondents had unsuccessfully attempted marital or couples' counselling prior to engaging in the collaborative process. Ninety per cent of those surveyed settled their case using the collaborative process.

Clients were asked about their level of satisfaction on a variety of issues surrounding the outcome of their cases, including issues relating to their relationship with their children, their relationship with their former spouse, co-parenting matters, development of post-divorce communication and

parenting skills, and the terms of their settlement. About three-quarters of clients were extremely or somewhat satisfied with the general outcome of their case, compared to one per cent who were extremely or somewhat dissatisfied. Respondents were most satisfied with the outcome of the collaborative process on issues dealing with their children. Respondents felt that the interests and emotional well-being of their children were well served in the process. Respondents were also satisfied with their improved co-parenting skills. They were somewhat satisfied to extremely satisfied with the following features of their collaborative process:

- that meetings were scheduled to accommodate respondents' schedules (as opposed to hearings accommodating the court's schedule);
- the respectfulness of the collaborative process;
- how free respondents felt to express themselves in their case; and
- that they had the opportunity to address concerns directly with the other participant (as opposed to communicating solely through attorneys, mediators or court motions).

Respondents were neutral to somewhat satisfied on the following features:

- how well the process focused on concerns important to the client;
- the restructuring of their family in a constructive way;

- the degree of control the client had over the process;
- maintaining a constructive/healthy relationship with their spouse;
- the minimisation of stress; and
- the efficiency with which the respondent's case was handled.

Almost three-quarters of respondents stated that they would definitely or probably refer a person to the collaborative process, as opposed to 10 per cent of respondents who reported that they definitely would not, or were unlikely to, refer.

The United States Uniform Law

In the United States, the Uniform Collaborative Law Act was adopted in 2009 by the Uniform Law Commission, and thereby became available to the individual states to enact as law. The Act proposed to regulate the use of collaborative law and has been used extensively as a precedent by various United States state legislatures. The map below shows the progress of the adoption of this Act as at the date of printing, and further adoption was pending in a number of states.

See **Exercise 7** at the end of this chapter for further information about the United States legislation.

(Source: Uniform Law Commission at <http://uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act> (accessed 20 June 2015).)

Collaborative family lawyering

5.14 Julia Macfarlane's study of collaborative family lawyering (CFL) for the Canadian Department of Justice sees its growth as one of the most significant developments in the provision of family legal services in the past 25 years (Macfarlane, 2005). This three-year study examined CFL in both Canada and the United States. Sixty-six initial interviews were conducted with lawyers, clients and other collaborative professionals. From these interviews 16 case studies were developed, involving another 150 interviews. The objective of the research was to explore the differences that CFL has made to the process and outcome of divorce disputes and, in particular, to assess its impact on the clients of family legal services.

The study found that the primary motivator for lawyers embracing CFL was finding a way to practise law that was a better fit with their beliefs and values than the traditional litigation model. Further significant motivations included the desire to provide better client service and to offer a better alternative to family mediation. For many clients, the principal goals in the collaborative process were reduced expense and faster results. Secondary motivations mentioned by a smaller number of clients were the importance of taking personal responsibility for role modelling, especially for children of the marriage, and the opportunity for personal growth offered by a face-to-face collaborative process (Macfarlane, 2005, p viii).

Macfarlane makes the interesting point that clients generally take a far more pragmatic approach to CFL than lawyers. She notes that this contrast raises two concerns. The first is that clients who choose CFL largely because of the 'promise' of fast and inexpensive dispute resolution are sometimes bitterly disappointed with their final bill, and disillusioned by how long it has taken for them to reach a resolution. She concludes that the CFL movement should be cautious in making such claims, especially when using them as a

basis for obtaining clients' consent to participate. Second, the apparent mismatch in expectations and objectives between some clients and their lawyers may raise the risk that CFL lawyers may assume an ideological commitment on the part of their client that is not actually there, perhaps imposing their own motivations onto clients who are simply trying to get their divorce completed quickly and inexpensively. CFL lawyers should take care to be transparent with their clients about their values and goals and ensure that they do not paint an unrealistic picture of CFL in their eagerness to promote the approach (Macfarlane, 2005, pp 25–9).

Macfarlane concludes that there is as yet no clear evidence that CFL cases are less expensive than traditional litigation or negotiated divorces, although common sense suggests that they often will be. Some clients are disappointed at the eventual cost of the process, especially if negotiations proceed slowly (2005, p 62). Further, she has concerns that there is a widespread view among CFL lawyers that, while mediation is a constructive process for some clients, CFL is appropriate for a much wider range of clients and levels of conflict. One commonly expressed view is that 'the mediation process is not a complete process', a reference to the lack of direct advocate participation. Some CFL lawyers appeared to have little appreciation of the mediation process itself (2005, pp 71–3).

Macfarlane concludes that there are four key values for excellence in collaborative practice (2005, p xiv):

- commitment (carefully balancing commitment to the process, to your client and to your colleagues);
- transparency (being frank with your clients regarding core values and what might go wrong);

- flexibility and responsiveness (developing different styles of CFL practice and adjusting your practice to client needs); and
- recognition of the limitations of the CFL model and practice (realising that not every case is suitable for CFL and not every lawyer has the necessary skills for every potential CFL case).

Contrasting mediation with collaborative law

5.15 It is clear that both mediation and collaborative law are valuable conflict management processes which share common characteristics but which also have differences that could be relevant to the parties' preferences. They both provide a forum for private and confidential negotiations, the promise of cost reduction and the potential for better ongoing relationships. Both processes are based on voluntary disclosure and collaborative practitioners put some emphasis on fair outcomes to both. However, there is no independent 'neutral' during collaborative law process negotiation sessions as in mediation, unless agreed to by the parties. The presence of lawyers is usually required in collaborative law processes, which can lead to some assurance of standards and accountability, but to extra cost. The parties in a collaborative law process therefore may have the advantage of immediate professional advice that may be missing in mediation. As was stated in a recent preparatory guide to the Uniform Collaborative Law Act and Rules drafted by the National Conference of Commissioners (2014):

> Collaborative law is an attractive dispute resolution option for many parties, especially those who wish to maintain post dispute relationships with each other and minimize the costs of dispute management. Parties may prefer it to traditional full service representation by lawyers, which includes both settlement negotiations and representation in court, because of its reduced costs and incentives for lawyers to work hard to produce acceptable compromise while still providing the party with the support of an advocate.

Collaborative lawyers emphasise that no threats of litigation should be made during a collaborative law process and the need to maintain respectful and courteous dialogue. Usually, in order to promote negotiations,

collaborative law participation agreements provide that communications during the process are confidential and cannot be introduced as evidence in court. Also, the formal and sometimes time-consuming and expensive discovery process is done away with and the parties voluntarily agree to exchange of relevant information. Many models of collaborative law require parties to engage jointly retained mental health and financial professionals in advisory and impartial roles. Sometimes, collaborative law participation agreements require that negotiations take place in meetings in which parties are the primary negotiators and their lawyers can then encourage a focus on integrative interest-based sharing of information, and brainstorming of options to manage the dispute.

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In a review of the literature relating to the evaluation of collaborative practice in Australia, Kha (2015) points out three major issues relating to the practice. In summary, he says, first, it is limited in relation to the clients it attracts being confined chiefly to wealthier clients and excludes the disadvantaged or disabled. Second, the disqualification clause in collaborative contracts, which excludes practitioners involved in being involved in subsequent litigation, if it is included is contentious and adds to the expense of the process. Third, the negotiation process could disadvantage weaker parties because of its informality. These are all valid criticisms and will no doubt be played out in future debates. Kha notes that there may be a need for further regulation and certainly better training for participants in the process (pp 183–4).

Conclusion

5.16 Collaborative approaches are a key strategy in the prevention and

management of conflict. Their success usually relies on the development and maintenance of a relatively harmonious and trusting set of relationships. They are often of crucial importance in workplace and family environments. Their increasing use in legal practice, particularly in family law, has been of particular note. As yet still in its infancy, the impact of collaborative ideals on the practice of law, and other disciplines, will be interesting to observe.

Exercises

Exercise 1 Collaborative modes

Try to identify the ways in which people work collaboratively in your workplace. Are there certain people who act as catalysts for this process or is collaboration part of the group or organisational culture? What could be done to improve the use of collaborative conflict management strategies? How do you think different people in your workplace would 'rate' if you applied to them Fisher and Brown's seven criteria (see 5.2)?

Exercise 2 Collaborative conflict management process

The five-phase process set out in this chapter is a simple but useful framework in which to develop collaborative conflict management skills. The chart below can be used as a basis to help you become more familiar with the process. It can be used as a part of your preparation for a collaborative effort or it can be used in a group setting as an overhead transparency or on butcher's paper.

Collaborative conflict management chart

Phase 1: Issues

What are the issues for each party?

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Phase 2: Position and interests

What are each party's positions and interests?

Phase 3: Options

How many options are there?

Phase 4: Selection

Which option or options will work?

Phase 5: Evaluation

How can the process and outcomes be evaluated?

Exercise 3 Different voices

Carol Gilligan's analysis (p 140) (see **5.4**) provides a useful starting point for group discussion and debate. Below are some useful starters. This exercise can be combined with **Exercise 10** in **Chapter 3** (see further on gender at **6.27**):

- If Gilligan's analysis is essentially correct, how do we balance the 'male' and the 'female' ways of relating? Can males develop their 'female voice'?
- How can we address these issues in a wider sense (group/organisation/society)?

Exercise 4 Group collaboration

This exercise can be used in groups that want to discuss common issues. It does not matter if members do not know each other.

Ask members of the group to list two or three issues they think can be resolved collaboratively. If the group is large, divide it into smaller groups and ask them to work through the following steps:

(a) List all the issues of group members. Select one of the issues for discussion.

(b) Analyse why this issue would be amenable to collaborative conflict management.

(c) If it is not amenable, what other conflict management strategy could be used?

(d) If it is amenable, discuss the strategies to deal with the issue collaboratively.

Repeat this process for other issues as time allows, then bring the group back together and discuss.

Exercise 5 The persuader

In a group ask each person to think about someone he or she knows and thinks of as very persuasive. Each person then lists three essential characteristics of this person as a persuader. List all these characteristics on a whiteboard or butcher's paper. This should provide some useful data for discussion, especially the overlap between characteristics. Ask if there are any listed characteristics that would not normally be associated with persuasiveness. This can lead on to a discussion about why certain characteristics may be considered to enhance persuasiveness in particular contexts.

Then in pairs, in small groups or as one group (depending on the nature of the group), members list and discuss three aspects of themselves which they consider enhance their ability to be persuasive and three which may inhibit it. (See **Exercise 9** below, which can be combined with this exercise to assist the analysis.)

Exercise 6 Australian Collaborative Practice Guidelines for Lawyers

The Australian Law Council has published the Australian Collaborative Practice Guidelines for Lawyers, to assist the development of collaborative practice: see <www.lawcouncil.asn.au>.

The first seven sections of these guidelines are reproduced below. What do you think are some of the key requirements for practitioners who may want to practise in this area?

1. A collaborative process is a process in which the clients, with the support of collaborative practitioners, identify interests and issues, develop options, consider alternatives and make decisions about future actions and outcomes. The collaborative practitioner acts to assist clients to reach their decision and provides advice where required in a manner that supports the collaborative process.

2. In a collaborative process, the clients and their lawyers contract in writing to attempt to resolve a dispute without recourse to litigation and agree in writing that the lawyers will not act for the clients if they cannot resolve their matter by collaboration and decide to litigate the dispute.

3. The collaborative process supports interest based negotiation. Competitive negotiation strategies and tactics are antithetical to the collaborative process.

4. The goal of a collaborative process is agreed upon by the clients with the assistance of the collaborative practitioners. Examples of goals may include assisting the participants to make a wise decision, to clarify the terms of a workable agreement and/or future patterns of communication that meet the participants' needs and interests, as well as the needs and interests of others who are affected by the dispute.

5. The collaborative process: (a) assists the participants to define and clarify the issues under consideration; (b) is conducted through a series of face to face discussions with the participants and, where appropriate, other professionals; (c) assists participants to communicate and exchange relevant information; (d) invites the clarification of issues in dispute to increase the range of options to assist resolution; (e) provides opportunities for understanding of the perspectives brought to the table; (f) facilitates an awareness of mutual and individual interests; (g) helps the participants generate and evaluate various options; and (h) promotes a focus on the interests and needs of those who may be subject to, or affected by, the situation and proposed options.

6. Collaborative practitioners can provide legal advice to the participants. They also assist in managing the process of dispute and conflict resolution whereby the participants through an interest based negotiation process agree upon the outcomes, when appropriate. Collaborative practitioners continue to provide legal advice to their clients whilst working cooperatively with the other legal practitioner and professional in a cooperative and non-tactical way to manage the collaborative process and assist the parties to reach a mutually beneficial outcome.

7. Collaborative practitioners will be alert to and assess the need for the involvement of other professionals in the collaborative process (such as child specialists, financial planners and coaches). Where appropriate, collaborative practitioners will work together with other collaborative professionals in the collaborative process in such ways as best suit the needs of the participants.

Exercise 7 Developing model legislation

In the United States, considerable progress has been made in developing model collaborative law legislation (Uniform Collaborative Law Act 2009), which has been adopted in a number of states. Several interesting provisions of this model legislation and rules are reproduced below. Rule 5 is

concerned with how such a process may begin and how it may be terminated. This is important to ensure certainty in the process and to ensure parties' rights, at law, are not compromised.

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Rule 6 is concerned with the issue of pre-existing proceedings before courts and what happens to these pending a collaborative process, while the remaining Rules deal with the disqualification of a collaborative lawyer from appearing before a court in the same proceeding and other related matters, including adjournment. The attitude of Australian courts to such matters has not as yet been tested.

Do you think there is scope for such model legislation in Australia?

Rule 5 Beginning and Concluding Collaborative Law Process

(a) A collaborative law process begins when the parties sign a collaborative law participation agreement.

(b) A tribunal may not order a party to participate in a collaborative law process over that party's objection.

(c) A collaborative law process is concluded by a:

  (1) resolution of a collaborative matter as evidenced by a signed record;

  (2) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

  (3) termination of the process.

(d) A collaborative law process terminates:

  (1) when a party gives notice to other parties in a record that the process is ended;

  (2) when a party:

    (A) begins a proceeding related to a collaborative matter without the agreement of all parties; or

    (B) in a pending proceeding related to the matter:

      (i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

      (ii) requests that the proceeding be put on the [tribunal's active calendar]; or

      (iii) takes similar action requiring notice to be sent to the parties; or

  (3) except as otherwise provided by subsection (g), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(e) A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(f) A party may terminate a collaborative law process with or without cause.

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e) is sent to the parties:

(1) the unrepresented party engages a successor collaborative lawyer; and

(2) in a signed record:

(A) the parties consent to continue the process by reaffirming the collaborative law participation agreement;

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(B) the agreement is amended to identify the successor collaborative lawyer; and

(C) the successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.

(h) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.

(i) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

Rule 6 Proceedings Pending Before Tribunal; Status Report

(a) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection (c) and Rules 7 and 8, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding under subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(d) A tribunal may not consider a communication made in violation of subsection (c).

(e) A tribunal shall provide parties notice and an opportunity to be heard before

dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

Legislative Note: In enacting this Rule, states should review existing provisions concerning stays of pending proceedings when the parties agree to engage in alternative dispute resolution. As noted in the comment to Rule 6, some states treat party entry into an alternative dispute resolution procedure such as collaborative law or mediation as an application for a stay, which the court has discretion to grant or deny, while other states make the stay mandatory. Enacting states may wish to duplicate the practice currently applicable to collaborative law, mediation, or other forms of alternative dispute resolution.

Rule 7 Emergency Order

During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].

Rule 8 Approval of Agreement by Tribunal

A tribunal may approve an agreement resulting from a collaborative law process.

Rule 9 Disqualification of Collaborative Lawyer and Lawyers in Associated Law Firm

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Rules 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

  (1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or

  (2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person.

(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

Exercise 8 Making a collaborative law agreement

The ground rules for collaborative law procedures are set forth in a written agreement in which the parties designate who the collaborative lawyers will be and agree not to seek judicial resolution of a dispute during the collaborative law process. The agreement usually provides that if a party seeks judicial intervention, or otherwise terminates the collaborative law process, the disqualification requirement takes effect. Parties agree that they have a mutual right to terminate the collaborative law process at any time without giving a reason. The precedent family law-oriented agreement that follows is not meant to be comprehensive or complete for any particular case but does give you a good idea of what is involved in the process.

If you were considering the case outlined at **5.12** above, would you add anything further to the agreement?

Precedent Collaborative Law Participation Agreement

1 Purpose

[insert name] and his/her lawyer, [insert name] and [insert name] and his/her lawyer, [insert name], have chosen to use the principles of collaborative law to resolve their family law matters. Collaborative law is the shared belief that it is in the best interests of the parties and their family to resolve their differences with minimal conflict and through consensual processes which maximise our involvement as parties in the dispute management process. We agree to seek a better management of the family law matters with each other rather than by litigation or interventions by a court. The process relies on cooperation, integrity and professionalism.

2 Communication during the process

(a) The parties shall communicate with each other to efficiently and directly settle their issues. Written and verbal communications by the parties and their lawyers will be respectful and constructive. It is agreed that communication during settlement meetings will be focused on the economic and parenting issues and the constructive resolution of those issues.

(b) To maintain an objective and constructive settlement process, the parties agree to discuss settlement of their issues only in the settlement conference setting. Discussions outside of the conference setting must be agreed to in advance by the parties and their attorneys.

(c) The parties authorise their lawyers and any allied professional expert retained in the collaborative process to share information, opinions or communications regarding this matter with each other. However, professional privileged communication that a party specifically instructs his or her collaborative professional not to reveal will be kept confidential.

3 Children's issues

The parties shall make every effort to reach amicable solutions that promote the best interests of the children. Inappropriate communications regarding issues can be harmful to the children. Settlement issues will not be discussed in the presence or hearing of the children and communication with the children regarding these issues will occur only if it is appropriate and done by mutual agreement or with the advice of a child specialist.

4 Participation with integrity

Each participant shall uphold a high standard of integrity, and specifically shall not take advantage of mistakes, errors of fact or law, miscalculations or inconsistencies, but shall disclose them and have them corrected. Integrity includes keeping commitments and agreements made during the collaborative process.

5 Negotiation in good faith

(a) The parties and their lawyers shall deal with each other in good faith and shall promptly provide all relevant and reasonable information. The parties shall provide sworn statements of net worth and supporting documentation making full and fair disclosure of their income, assets and debts.

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(b) By using an informal exchange of information and signed authorisation forms, the parties are setting aside certain procedures for the duration of the collaborative process including, but not limited to, formal discovery proceedings, restraining orders, and formal court hearings.

(c) The parties may seek an opinion from a lawyer outside this process; however, the party doing so shall disclose to the participants only that an outside opinion has been sought.

6 Allied professional experts

When appropriate, the parties shall employ an accountant, valuator, mediator, facilitator, child specialist, mental health professional and/or other professional specialist for the purposes of improving communication, evaluation, cash flow analysis, parenting issues and any other issue for which expert assistance may be helpful. The parties will agree in advance as to how the allied professional will be paid. Further, the parties shall enlist the aid of an allied professional on the recommendation of the collaborative lawyers.

7 Lawyers in the collaborative process

While the lawyers in the collaborative process share a commitment to the process as described in this agreement, each has a professional duty to represent his or her own client diligently, and is not the lawyer for the other party.

(a) Disqualification by court intervention: The lawyers are prohibited from representing either party against the other, now or in the future. The lawyers

may, upon mutual agreement, submit documents comprising a final settlement to a court for final consent orders.

(b) Withdrawal of a lawyer from the collaborative process: If either lawyer withdraws from the collaborative case for any reason except those set out in paragraph VIII herein, the lawyer shall do so promptly by a written notice to all. This may be done without terminating the status of the case as a collaborative case. The party whose lawyer has withdrawn may elect to continue in the collaborative process with a new collaborative lawyer and shall give prompt written notice of this intention as well to all.

(c) Lawyers' fees and costs: The parties understand that their lawyers are entitled to be paid for their services, and that one of the tasks in a collaborative law matter is to ensure timely payment to each of them. The parties agree to make funds available for this purpose. The lawyers shall enter a cost agreement with their respective parties according to law.

8 Termination of the collaborative process

(a) Party's termination: If a party decides to terminate the collaborative process, prompt written notice will be given to the other party through his or her attorney. There will be a 30-day period before any court hearing unless there is an emergency. All temporary written agreements will remain in full force and effect during this period. The intent of this provision is to permit the other party to retain another lawyer, make an orderly transition and to avoid surprise and prejudice to the rights of the other party. Either party may bring this provision to the attention of the court in requesting a postponement of a hearing.

(b) Lawyer's termination: A collaborative lawyer must terminate the collaborative process in the event the lawyer learns that his or her client has withheld or misrepresented relevant information and continues to do so, or otherwise has acted so as to undermine or take unfair advantage of the collaborative process. The lawyer terminating the case shall advise the other participants that the collaborative process is terminated.

9 Confidentiality

Except as heretofore provided and set forth below, all communication exchanged within the collaborative process shall be confidential and without prejudice according to law. If subsequent litigation occurs between the parties:

(a) neither party shall be permitted to introduce as evidence in court information disclosed or documents prepared (including notes, minutes, records, etc.) during the collaborative process, except any sworn statements of net worth and supporting financial documentation;

(b) neither party shall be permitted to introduce as evidence in court information with respect to either party's behaviour or legal position; and

(c) neither party shall be permitted to request, subpoena or bring an application for discovery of any document or request testimony in any court proceeding from a lawyer or allied professional with regard to disclosure made during the collaborative process.

10 Rights and obligations pending settlement

During the collaborative process, except in the usual course of business consistent with their past practice or for payment of usual and customary household expenses, or upon mutual agreement:

(a) neither party shall sell, transfer, or in any way dispose of any property, individually or jointly held by them;

(b) neither party shall incur debts after the signing of this agreement, including but not limited to: further borrowing against any credit lines, using credit cards or cash advances against credit cards; and

(c) the health, automobile, life, superannuation, property and other insurance shall be maintained in its present form and there shall be no changes to beneficiaries of insurance policies or pensions.

This agreement shall remain in full force and effect during these negotiations, unless terminated, modified or amended by written agreement of the parties or upon order of a court.

11 Enforceability of agreements

Any interim agreement signed by the parties during the collaborative process survives the termination of the process and may be presented to the court as a basis for an order. Once a final agreement is signed, it is legally enforceable.

Signed by:

Wife	Husband
Lawyer for Wife	Lawyer for Husband
Allied Professionals	
Dated:	

Exercise 9 The ACE model of persuasion

The ACE model of persuasion holds that people are influenced by three types of appeals: appropriateness, consistency and effectiveness (Reardon, 2001). Using the appropriateness appeal, we can point out how and why others should do what we are suggesting or the objectives we seek, indicating that they are the best and most logical choice. The consistency appeal uses our history or track record to our advantage. It can help us by pointing out to others the successful history of our past suggestions or agreements. Finally, underlining the effectiveness of following our suggestions or objectives can further strengthen our credibility, allowing us to be more persuasive. I use the

ACE model in mediation and facilitation to point out to parties the increased likelihood of success if they can follow and participate in the process being suggested. Below is an example from the mediation context, with some typical responses of parties:

> **Mediator:** I have now outlined the process that I'd like you to follow. I have learnt from experience in over 1000 mediations/facilitations that it improves the chances of success (consistency appeal).
>
> **Parties:** That's good, but this is a very difficult/complex/emotional etc dispute.
>
> **Mediator:** Yes, I agree it's complex. However, if you can use this process and clear some of the obstacles you're experiencing the outcomes for you, and the other party, will be considerably better (effectiveness appeal).
>
> **Parties:** But there's an intensity/irrational element/etc that may make this very difficult.
>
> **Mediator:** I've followed this process with many parties that have similar problems and who felt similar to you and have found that they can reach good outcomes (appropriateness appeal).

The next time you are formulating a persuasive message, consider whether appropriateness, consistency or effectiveness is likely to be most useful — it just might cut down on a lot of guesswork.

Like most social skills, being more persuasive can be learnt and practiced. Look around your workplace or a community group you belong to and using Reardon's criteria list those people you find persuasive. Depending on how well you know them you will probably notice that they may be more persuasive in some roles or context than in others. (This applies to yourself as well.) Then ask yourself, 'Why is that?'. Next time you are collaborating or negotiating how could you use this model?

Exercise 10 Questions

(a) What prevents you being a collaborative conflict manager in different contexts?

(b) Refer back to 'the robber's cave experiment' at **1.13**. What lessons does this experiment provide for the would-be collaborator?

(c) What distinguishes your collaborative efforts from your competitive efforts?

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(d) Divorce and family law disputes are generally acknowledged to be the best example of collaborative legal processes. This is because separating couples have ongoing and often long-term obligations based upon children, extended families, friends, and property and other assets. They need to find ways to manage these ongoing involvements. But collaborative law agreements similar to that in **Exercise 7** above can be entered into to attempt to manage a range of other civil disputes, especially in workplace, contract and statutory-based claims of various sorts.

How would the agreement in **Exercise 7** need to be changed for a workplace dispute, for

example?

(e) Persuading another to your point of view on points of process or substance is often necessary in collaborative approaches, as noted at **5.11** above. Can you think of times where you have been persuaded to adopt or decide something against your better judgement, either by the person you are dealing with or by a group of people? What has been, in your view, the main cause of this?

Chapter 6

Negotiation: Models, Strategies and Tactics

Summary

Being a good negotiator can allow you not only to make better deals both in a personal and business sense but also to manage the world around you more confidently. It provides a set of skills that can be utilised across a wide range of situations. Being a good negotiator can help you build and sustain relationships and manage difficult social interactions. In the context of conflict management it is a key skill set.

In the first part of this chapter we consider two major 'types' of negotiation: distributive and integrative. The central contradiction of negotiation — the tendency to want to both cooperate and compete — is also addressed.

Important tactics in both types of negotiation are detailed. In distributive negotiation these include commitment tactics, threats and promises, bargaining, power arguments, normative (value) arguments, and bluffs. In integrative negotiation these include separating people from the problem, focusing on interests, not positions, inventing options for mutual gain, using objective criteria, knowing your BATNA (best alternative to a negotiated agreement), and using 'negotiation jujitsu'. Fisher and Ury's model of 'principled negotiation' is examined in detail. This model is the precursor to the so-called 'Harvard model' which is also outlined.

The ways in which persuasion works and how gender may effect negotiation is explored and key references to these important topics are noted.

Throughout the chapter, particular attention is given to the issue of power as it relates to negotiation, and other aspects of the negotiation process such as ‘negotiation tightropes’ (cooperation versus competition; honesty versus misrepresentation; short-term versus long-term gain), threats and the ‘tit-for-tat’ strategy are described. Managing impasse and resistance are also addressed. We look at some key texts in considering the practical application of some of these ideas in varying cultural contexts.

In the last part of the chapter a detailed five-phase process of negotiation is presented. This covers preparation, process and agenda construction, exploring needs and interests, intensive negotiation and making agreements. The description of the process includes important issues likely to be encountered in each phase.

Finally, the chapter presents an extensive range of exercises, role-plays and questions to help you further explore the enormous amount of information and number of issues that this topic presents.

This chapter should be read in conjunction with **Chapter 7**, which addresses mediation, as many of the ideas, processes and issues discussed overlap.

Introduction

6.1 Negotiation is one of the most common forms of conflict management. We use it every day: we negotiate with our work colleagues over where to go for lunch, with our ex-partners about who will look after the children next weekend and with our neighbour about the overhanging tree. We even negotiate with ourselves about how to keep certain commitments like sticking to a diet or stopping smoking. Oliver (1996) described negotiation as 'negotiators jointly searching a multidimensional space and then agreeing to a single point in the space'. It is the process of two or more individuals or groups reaching joint agreement about differing needs or ideas. Lewicki et al (2003) describe the process of negotiation as being essentially the same at the personal, diplomatic or corporate level. They maintain that negotiation is good for value creation as well as for managing conflict. The former is where there is a synergy between the parties so that 'the whole is greater than the sum of its parts' (p 16).

Negotiation is a process of two (or more) parties combining their conflicting perceptions into a single decision. It is a 'positive-sum exercise', since, by definition, both parties prefer the agreed outcome to the status quo (in comparison to no agreement) or to any other mutually agreeable outcome (Zartman, 1977). Both sides should, in most cases, come out better in the agreement than in the absence of the agreement, or else they would not agree. A decision is usually made by changing the parties' evaluation of their positions and interests in such a way as to be able to combine them into a mutual package — by persuasion, coercion or force. In the process, the parties essentially exercise one of four choices (yes, no, maybe and/or keep on talking). Both sides have some power over each other and are consequently

interdependent. Such was the observation of Thomas Schelling, a noted international economist, who was one of the first to comment on this phenomenon during the height of the Cold War (1960). Since this time, the field of negotiation has developed considerably. This common interest in a shared agreement is the starting point for the 'common interest and mutual dependence that can exist between participants' in a conflict (Schelling, 1960).

Pruitt's four negotiation strategies

Dean Pruitt, a leading negotiation theorist, argues that there are four basic negotiation strategies (1991, p 27): problem-solving, contending, yielding and inaction. Below is a brief summary of each:

- **Problem-solving** seeks to reconcile the parties' aspirations. Problem-solving tactics include increasing available resources, compensation, exchanging concessions on low-priority issues, minimising the costs of concessions and creating new mutually beneficial options. This has been called 'integrative negotiation'. The advantage of problem-solving strategies is that they yield the best outcomes. Mutually beneficial outcomes are more likely to last, to improve the parties' relationship and to benefit the wider society. Problem-solving outcomes are likely to benefit both parties when the conflict situation has high integrative potential and both parties have reasonably high aspirations. In addition, parties must be firm about their aspirations or goals but flexible regarding the means used to reach those goals. The risk of problem-solving strategies is that they may backfire if the other side pursues a contentious strategy.

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- **Contention** seeks to persuade the other party to agree to a solution that favours one's own interests. This strategy has also been called 'positional' or 'distributive' bargaining. Contentious tactics include inflated demands, irrevocable commitments, persuasion and threats. Contentious strategies alone tend to yield poor outcomes. Contending strategies may escalate a conflict. When outcomes are finally reached they may be low-level compromises. Contention is often used as an opening strategy, to be replaced by problem-solving at a later stage. In such cases, the early use of contention may still yield beneficial outcomes.
- **Yielding** is when parties reduce their aspirations. It is an effective way to close negotiations when issues are unimportant and time pressures are high. Yielding can also contribute to a successful problem-solving approach. However, outcomes tend to be depressed when both parties use a yielding strategy.
- **Inaction** is a strategy usually used to increase time pressure on the other party.

(See **Exercise 20** at the end of this chapter for more on Pruitt's model.)

Capable negotiators have not only good communication skills but they also understand the role of persuasion, as well as the process, the subject matter and the dynamics between the parties. Incentives play an important part in negotiation, especially in sales contexts such as buying cars or whitegoods. The key point is that we all have different incentives and it is not safe to assume that others will have the same values and priorities as we do. To understand the other party in a negotiation you need to spend some time getting to know that party and be able to put yourself in their shoes.

For many workers, negotiation is an integral part of their duties. Most legal disputes are settled by negotiation, usually by lawyers, but sometimes by other professional workers attached to or allied with a legal process. For example, child protection workers may spend many hours of their time negotiating with the family of an abused child, other agencies and their own agency about such things as the provision of services, resource or funding allocations and access and custodial arrangements for children. Accountants, as part of debt recovery or company wind-ups, may be involved in negotiating the best form of recovery on behalf of their creditor client. As DeMarr and De Janasz (2014) suggest, negotiation is an appropriate form of dispute resolution when the following four factors exist: (1) two or more parties have a conflict of interest; (2) the parties believe that negotiation will result in a better outcome; (3) the parties would prefer mutual agreement; and (4) the parties are willing to compromise their tangible and intangible needs.

The literature on negotiation generally divides it into two types: distributive and integrative. Some commentators suggest that these two styles of negotiation are distinct. Deutsch (1973) also makes the distinction between competitive and cooperative approaches. According to Deutsch, the most important factors that determine whether an individual will approach a conflict cooperatively or competitively are the nature of the dispute and the goals each side seeks to achieve. Often the two sides' goals are linked or interdependent. The parties' interaction will be shaped by whether this interdependence is positive or negative. Therefore, if one party's chance of

obtaining its goals is increased by the other side obtaining its goals, then this will lead to cooperation (p 20), a scenario which Deutsch termed 'positive interdependence'. This is contrasted with 'negative interdependence', where the chance of one side attaining its

goal is decreased by the other's success (pp 20–2). This creates a competitive situation, because the only way for one side to achieve its goals and 'win' is for the other side to 'lose'. Carnevale and Pruitt (1992) similarly view the move towards or away from contentious negotiation tactics as dependent on an interplay between the parties' relative 'concern' for each other's needs. (See **Exercise 20** at the end of this chapter.)

As a practitioner, in my view the distributive and integrative and the cooperative and non-cooperative all merge. Negotiators typically move back and forth between the various styles based on the situation. Thus, understanding the various approaches is important for negotiators because elements of each will come into play in most interactions. Although some advocates argue that most disputes can be resolved with interest-based cooperative negotiation, others believe the various approaches should be used together. Lax and Sebenius (1991, p 161), for example, argue that negotiations typically involve 'creating' and 'claiming' value. First, the negotiators work cooperatively to create value (that is, 'enlarge the pie'), but then they must use competitive processes to claim value (that is, 'divide up the pie'). As a mediator of countless conflicts, I can confirm that this is a pattern I have observed many times.

Before we consider these two types of negotiation in some detail, we will look at three key elements or 'tightropes' in the negotiation process.

Negotiation 'tightropes' and the cost–benefit

relationship

6.2 There are three crucial variables (summarised below) where negotiators are pulled in a number of directions. This has been likened to walking a tightrope (Rubin, 1983, p 135). All of the variables relate to a 'cost–benefit analysis' where negotiators compare the costs and benefits of no agreement with the costs and benefits of agreement; that is, negotiators tend to constantly ask themselves questions like, 'What can I gain from this negotiation that I cannot gain from simply avoiding the situation or by doing something else?'.

Negotiation tightropes

Competition vs cooperation	This is a central paradox or contradiction that seems to be apparent in almost all negotiations. The parties to a negotiation have some incentive to reach agreement and, therefore, cooperate with each other. They also have an incentive to push for an agreement consistent with their own interests, which may be inconsistent with the interests of the other party. In other words, negotiators tend to want to both cooperate (otherwise they would not negotiate in the first place) and compete (if there was no incentive to do so they would also have no need to negotiate). The pull is between being tough and demanding, which runs the risk of alienating the other party or driving them away, and being entirely cooperative and accommodating, which runs the risk of settling for less than you want. Parties in negotiation are interdependent in the sense that they both need each other. However, this interdependence has its limits beyond which the parties will not negotiate. (See **Exercise 2** at the end of this chapter, 'The prisoner's dilemma:

	Managing interdependence'.)

Honesty and openness vs misrepresentation	To be completely open and honest is to run the risk of being exploited by the other party; but, if you are completely withholding in your approach, you run the risk of creating so much distrust that the other party may be unwilling to negotiate at all.
Short-term versus long-term gain	If a negotiator pushes hard enough it is possible to come up with a quick 'killing' in negotiation, but at the other's expense. Such short-term gain is often at the expense of longer-term mutual gain, especially in on-going relationships. Sometimes short-term sacrifice may be the best option.

These variables are important because they often determine the behaviour of the parties and any final agreement they may reach. They are sometimes seen in dichotomous terms but in fact each of the three variables represents a continuum between both of the elements they each contain; for example, there are degrees of honesty or failure to disclose information. In **Chapter 3** we analysed complaining behaviour and difficult encounters, including dirty tricks. When parties to a negotiation 'fall off' these tightropes they are most likely to engage in such difficult behaviours and tend to engage in more extreme forms of competition, dishonesty or short-term opportunism.

It is also clear that there is a small percentage of people who, because they have been dealt with badly in the past or have a pre-existing psychological condition, do not follow the rational cost–benefit analysis. They are more likely to appeal to principle and wider rationalisations, including their own victimhood, to explain the dilemma or impasse they are experiencing. They

are also more likely to use third parties such as parliamentarians, lawyers and industry advocates to assist them in their negotiations. Various ways of managing these behaviours are described in **Chapter 3**.

In any negotiation, the parties must decide whether to be competitive, cooperative or a mixture of both. Lax and Sebenius call this the 'negotiator's dilemma'. This is similar to the 'prisoner's dilemma' in game theory, because the best outcome for one person is not necessarily the best for both, but if both pursue their own best option they will often both get the worst outcome. Another way to understand it is to consider it as a tension between the need to cooperate with the need to compete in a situation where the available information to participants is incomplete or inadequate.

Stabilising reference points for negotiators: Managing interdependency

6.3 To help manage these negotiation tightropes, negotiators typically use reference points such as the reservation price or standard, market information and aspirations (Buelens, 2004). These reference points act as anchors. According to Buelens, who surveyed 596 managers, information about the alternatives available to negotiators will heavily influence how they regard these reference points. He states (2004, p 24):

> Fisher and Ury introduced the notion of Best Alternative to a Negotiated Agreement. When I want to sell my car to a neighbour, and a work colleague made the highest offer

> I have previously obtained, that offer is my BATNA. It would be economically irrational to sell my car cheaper to my neighbour than to my colleague.

Therefore, understanding one's own and the other party's BATNA can be very helpful in determining what Buelen calls the 'reservation price' — the

point below which they would not find the negotiation attractive. 'Market price' or the standard is information negotiators gather about the appropriate cost that their own past behaviour or that of wider marker actors would indicate is fair. 'Aspirations' refers to the internal motivations that parties have about negotiation outcomes. Generally, it is agreed that higher aspirations can lead to better outcomes, but at the increased risk of impasse (2004, pp 25–6).

Buelens concludes that negotiators are very aware that negotiation is the management of interdependency between themselves and the other party (2004, pp 33–4). Not only do they consider the bargaining zone, but when they know the other party's alternative, they understand 'the rules of the game' and they start negotiating in the neighbourhood of that alternative. When negotiators do not know that alternative they look at other reference points such as market value. When there is almost no relevant information negotiators tend to turn inward and focus on their own situation. Knowing the other party's alternatives is therefore a good way of taking a larger view of the bargaining zone, to be ambitious and to set high goals. Criteria of fairness, as reflected in an estimated market price, are therefore also important. However, an awareness of the dependency of the other party has no direct effect on the initial offer. Apparently, according to Buelens' research, negotiators define negotiation as the management of interdependency, but in an extremely egocentric way, basing their opening offers largely on cues regarding their power positions.

The Zone of Possible Agreement

6.4 There are several key concepts used in both distributive and integrative approaches to negotiations. In any negotiation, each side has a reservation or resistance point, usually referred to as a 'bottom line'. It is a point beyond which a person will not want to go, and instead breaks off negotiations

(Raiffa, 1982). It is also a point that is not generally known by opposing parties and a value that, Raiffa and others argue, should be kept secret. The reservation points of negotiating parties help to frame the likelihood and possible scope of an agreement and form a 'zone of agreement' (Raiffa, 1982) or, as it was termed by Fisher, Ury and Patton, the 'Zone of Possible Agreement' (ZOPA) (1991). The ZOPA constitutes the overlap range between reservation points. If the negotiators are successful, they will come to an agreement somewhere within this range, and thus both are likely to come out of the negotiation better than if they had not negotiated, or been subject to some other process. If, however, there is no overlap between reservation points, then no ZOPA exists. An agreement in such cases is highly unlikely and the parties may do better in some other arrangement.

Calculating the ZOPA can be a difficult task given possible deficiencies in information, uncertainty about the true value of the objects being negotiated and the need for estimations. It is, however, an important step if the negotiator is to have a clear view of the situation. **Exercise 19** at the end of this chapter provides a case study and a potential analysis that will help you with this concept.

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The Role of Persuasion

6.5 I have briefly described the importance of persuasion in **Chapter 5**: see **5.11** and in particular **Exercises 5** and **8** in that chapter. Because persuasion is such an important element of the negotiation process, I want to examine some further points here. The first thing to note is that persuasion is the way we influence others and to be effective it should not rely on deceit, coercion or manipulative tactics. It is not something we do *to* others but something we do *with* others. It is a collaborative strategy which works best

when it is aimed not only at getting what *you* want but at helping others involved in the negotiation to get what they want as well. For example, when you are negotiating with your partner about where to purchase or rent your next home it is likely that you will be more persuasive if you first listen to your partner's preferences and the reasons for them before moving onto your own. Many of us start important negotiations by simply stating or making a demand such as: 'I want to live in Knoxville because it suits my work–life balance'. This can put the other person on the defensive and makes the negotiation more difficult than it needs to be. If you start the negotiation with a question such as, 'Where do you think the best location would be?', then you can follow up with more questions to clarify such as, 'Before I indicate where I want to go can we discuss what considerations we need to apply in making that selection?'. Taking this type of approach is difficult and, indeed, counterintuitive, but it is more likely to be effective in persuading the other person about your views than simply approaching the negotiation as an argument to be won. Combining this approach with the ACE model outlined in **Exercise 9** in **Chapter 5** can be a powerful way of moving through a negotiation and increasing, although not guaranteeing, your chances of success. Let us now look at some of the key ingredients to being persuasive as revealed by research.

Robert Cialdini, one of the leading scholars in the fields of negotiation and persuasion, has proposed in his 1984 book *Influence: The Psychology of Persuasion* that there are six important principles or 'triggers' that persuade people. He arrived at these by studying closely those he called 'compliance professionals' — salespeople, fund raisers, recruiters, advertisers, marketers and so on. These are people skilled in the art of persuading and influencing others. Cialdini argues that the six principles, listed below, act as shortcuts to enable people to understand information they are being presented with:

- *Reciprocity:* We generally aim to return favours, pay back debts and treat others as they treat us. This can lead us to feel obliged to offer concessions or discounts to others if those same concessions and discounts have been

offered to us. This is because we are uncomfortable feeling indebted to others.

- *Commitment (consistency):* Cialdini argues that we have a deep desire to be, and appear to be, consistent. For this reason, once we have committed to something we are more inclined to go through with it than if we had not committed.
- *Social proof:* We like to appear to be doing things which others, especially high-status individuals or people like us, are already doing. It is similar to a herd instinct: we are constantly scanning to see what others are doing. That is why there is always money in the busker's hat or donation tin and why we favour cafés where

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other people are sitting (and why café proprietors like to put their patrons towards the front of the cafe where others will see them). Cialdini gives the example of an experiment where a sign relating to re-use of hotel bedroom towels suggested that most customers re-use their towels at least once. This increased the actual re-use rate by 28%.

- *Liking:* Cialdini says that we are more likely to be influenced by people we like. This liking can come in many forms — people might be similar or familiar to us, they might give us compliments or we may simply trust them. Pyramid selling or selling through local community members, as pioneered by the Tupperware company with its emphasis on local Tupperware parties, is a good example of this. People are more likely to buy from people like themselves, from friends, and from people they know and respect.
- *Authority:* Have you ever wondered why television commercials so often feature people in white coats selling all sorts of things from toothpaste to

hair transplants? It is because we generally feel a sense of duty or obligation to people in positions of authority. Job titles, uniforms and even accessories like cars or fancy computers can lend an air of authority, and can persuade us to accept what people say.

- *Scarcity:* Things may appear more attractive when their availability is limited or when we stand to lose the opportunity to acquire them on favourable terms. This is why sales are often described as the 'last chance to get a bargain'.

The use, misuse and defence against these principles is explored further in **Exercise 18** at the end of this chapter. Cialdini likens the misuse of these principles to the difference between being a 'smuggler' and being a 'detective.' The smuggler will fabricate information to influence people but his or her gain will generally be short–lived. The detective, on the other hand, will legitimately use these principles to improve his or her influence. For example, in an experiment, physiotherapists who displayed their qualifications on the wall of their consulting room (the authority principle) markedly improved the compliance rates of their clients (Cialdini, 1987). By being aware of these principles, negotiators can not only be aware of the legitimacy of persuasion as a natural human tendency but also guard against being manipulated by those who would unfairly manipulate using these techniques. Keeping Cialdini's principles in mind, let us consider several other related elements that may also be of importance when considering how we may be persuaded.

It is important in this discussion on persuasion to go back to some of the issues that were outlined in **Chapter 3** relating to communication skills and, in particular, the important baseline skill of active listening. This is the first skill to engage in to help you be persuasive and manage how you are persuaded. Active listening requires not only that you listen to what is being said but that you try and put yourself in the other's shoes, to understand the issues from their viewpoint. In addition to focusing on what is said you can focus on feelings and non-verbal communications such as tone and gestures.

Active listening also requires you ensure that people understand each other overtly. Checking for understanding and verbalising through such techniques as summarising or paraphrasing what the other has said can be important in this regard. Also, you need to be able to be active in understanding others. For example, by asking

open questions and observing the ways in which people behave and speak about themselves can be crucial indicators to ensure successful interpersonal encounters. Finally, you can use data and information to back up your argument. Ask yourself what information will be helpful in persuading your audience. This involves preparation and trying to anticipate your audience's needs for information. You can also help a person think through the logic of their position. Return to **Exercise 8** in **Chapter 3** ('The ladder of inferences') for a way of using logic to help people deconstruct or unpack their own arguments. You can help others understand how you got to your own preferences by presenting them with your observations and the factual context on which you base your conclusions. Another technique to assist you in persuasion is to use what has been termed 'inoculation theory' (McGuire, 1961), which involves anticipating the objections that may be made to your proposals and addressing them before they arise.

Below is a summary of my own 'shortcuts' or essential principles of being persuasive:

- *Actively listening:* Really listen, and come to an understanding of the other by paying close attention and communicating your understanding of both what is said and what is unsaid.
- *Communicate understanding:* Check that your understanding is shared by using feedback such as paraphrasing and summarising key points, preferably in the language of the other.

- *Stay active:* Listening is good but it can be supplemented with intelligent, usually open questions, and observations.
- *Use logic and reasoning to help you:* While emotional appeals can be persuasive, logic or the use of facts and information can also be crucial in persuading people about what to do and in addressing possible objections.

Following these initial four shortcuts will provide you with the basis for developing credibility and trustworthiness with others and hence help you to be more persuasive.

Cognitive bias and heuristics: System 1 and system 2 thinking

Nobel Laureate economist Daniel Kahneman, in his book entitled *Thinking Fast and Slow* (2011), divides thinking into two types or subsystems: system 1 and system 2. System 1 thinking is fast, intuitive, unconscious thought. Most everyday activities (driving, talking, cleaning etc) make use of system 1 thinking. Kahneman uses the concept of heuristics (thinking shortcuts) to assert that system 1 thinking involves associating new information with existing patterns or thoughts, rather than creating new patterns for each new experience. System 2 thinking is slow, calculating and focused upon conscious thought such as when you are doing a difficult statistical problem or thinking carefully about a moral or philosophical problem. From Kahneman's perspective the main difference between system 1 and system 2 thinking is that system 1 is fast and easy but susceptible to bias, whereas system 2 is slow and requires conscious effort but is more resistant to cognitive biases. (For further information about these biases see **Exercise 40** in **Chapter 7**.)

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Models of Negotiation

6.6 There are many different ways to describe negotiation, and researchers have not been in agreement about the theoretical frameworks that may apply. For example, Druckman (1997) describes the main schools of thought in negotiation theory as corresponding to four approaches to negotiation:

negotiation as puzzle-solving; negotiation as a bargaining game; negotiation as organisational management; and negotiation as diplomatic politics. Alternatively, Raiffa (1982) puts forward a typology of 'approaches' developed around the dimensions of symmetry–asymmetry and prescription–description (Adamson and Cunga, 2009). Zartman (1978 and 1988) describes five models of negotiation (structural, strategic, behavioural, concessional exchange and integrative), which are described below, based on an outline developed by Adamson and Cunga (2009).

Structural approach

6.7 The structural approach emphasises the structural features of a negotiation such as the number and relative power of the parties, and maintains that outcomes are a function of these structures. In this approach, negotiation is treated as a competition between incompatible positions or goals. Power is a central factor and the relative power of the parties affects how parties can obtain their positions (Bacharach and Lawler, 1981). One of the issues with this approach is that even when a powerful party is pitted against a weaker party the range of outcomes can be very wide and do not always favour the powerful. Other factors such as negotiating skill can play a significant role (Zartman and Alfredson, 2006). The other weakness of this approach is that it emphasises position-taking, which can undermine a party's ability to identify and flexibly respond to changes in the negotiation so that its own interests are protected and enhanced. The emphasis on 'winning' a negotiation can have unsatisfactory long-term impacts on relationships.

Strategic approach

6.8 The emphasis of the strategic approach is on outcomes and goals. It has its roots in mathematics, decision theory and economics, among others. Negotiators are viewed as rational decision-makers with known alternatives, who make choices guided by their calculation of which option will maximise

their ends. In this sense negotiators respond to incentives and make a cost–benefit analysis of what is happening. They are looking for the best solutions. This approach underlies game theory and critical risk theory. Ellsberg's Critical Risk Theory of crisis bargaining argues that negotiators use probability estimates when making rational calculations of whether to concede or stand firm in a crisis negotiation (Ellsberg, 1961). These probabilities are derived from each player's calculation of his or her own critical risk, or the maximum risk of a breakdown in negotiations that a player is willing to tolerate in order to stand firm.

The Ellsberg paradox: Why rational utility theory does not always work

Suppose you have a glass jar containing 30 red balls and 60 other balls that are either black or yellow. You don't know how many black or how many yellow balls there are, but that the total number of black balls plus the total number of yellow equals 60. The balls are well

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mixed so that each individual ball is as likely to be drawn as any other. You are now given a choice between two gambles:

- Gamble A: You receive $100 if you draw a red ball
- Gamble B: You receive $100 if you draw a black ball

Also you are given the choice between these two gambles (about a different draw from the same jar):

- Gamble C: You receive $100 if you draw a red or yellow ball
- Gamble D: You receive $100 if you draw a black or yellow ball

This situation poses some uncertainty — how many of the non-red balls are yellow and how many are black, which is not quantified — and probability — whether the ball is red or non-red, which is 1/3 vs 2/3. Utility theory models, used in many negotiation models, assume that in choosing between these gambles, people construct a probability that the non-red balls are yellow versus black, and then compute the expected utility of the two gambles; that is, that people will prefer something based upon a rational choice related to such things as cost and supposed benefits. Since the prizes are exactly the same, it follows that you will prefer Gamble A to Gamble B if and only if you believe that drawing a red ball is more likely than drawing a black ball (according to utility theory). Also, there would be no clear preference between the choices if you thought that a red ball was as

likely as a black ball. Similarly it follows that you will prefer Gamble C to Gamble D if, and only if, you believe that drawing a red or yellow ball is more likely than drawing a black or yellow ball. It might seem intuitive that, if drawing a red ball is more likely than drawing a black ball, then drawing a red or yellow ball is also more likely than drawing a black or yellow ball. So, supposing you prefer Gamble A to Gamble B, it follows that you will also prefer Gamble C to Gamble D.

When surveyed, however, most people strictly prefer Gamble A to Gamble B and Gamble D to Gamble C. Therefore, some assumptions of utility theory are not met. Note that there are only two outcomes: you receive a specific amount of money, or you receive nothing. Therefore it is sufficient to assume that you prefer receiving some money to receiving nothing.

The result holds regardless of your risk aversion (see box below at **6.12**). All the gambles involve risk. By choosing Gamble D you have a 1 in 3 chance of receiving nothing, and by choosing Gamble A you have a 2 in 3 chance of receiving nothing. If Gamble A was less risky than Gamble B it would follow that Gamble C was less risky than Gamble D (and vice versa), so risk is not averted in this way. However, because the exact chances of winning are known for Gambles A and D, and not known for Gambles B and C, this can be taken as evidence for some sort of ambiguity aversion which cannot be accounted for in utility theory generally.

There may be different ways of explaining this paradox. Since the information available to the decision-maker is incomplete. They are told precise probabilities of some outcomes, though the practical meaning of the probability numbers is not entirely clear. According to Ellsberg, decision-makers have an ‘ambiguity aversion’; that is, decision-makers will predominantly prefer taking on risk in situations where they know specific odds rather than an alternative risk scenario in which the odds are completely ambiguous — they will always choose a known probability of winning over an unknown probability of winning even if the known probability is low and the unknown probability could be a guarantee of winning. Given a choice of risks to take (such as bets), decision-makers prefer what they know rather than assuming a risk where odds are difficult or impossible to calculate.

Another possible explanation is that this type of game triggers a ‘deceit aversion mechanism’. Many decision-makers naturally assume in real-world situations that if they are not told the probability of a certain event, it is to deceive them. When faced with the choice between a red ball and a black ball, the probability of 30/90 is compared to the lower part of the 0/90–60/90 range (the probability of getting a black ball). The average decision-maker expects there to be fewer black balls than yellow balls because in most real-world situations, it would be to the advantage of the experimenter to put fewer black balls in the jar when offering such a gamble. On the other hand, when offered a choice between red and yellow balls and black and yellow balls, the decision-maker assumes that there must be fewer than 30 yellow balls as would be necessary to deceive them. When making the decision, it is quite possible that people simply fail to consider that the experimenter does not have a chance to modify the contents of the jar in between the

draws. In real-life situations, even if the jar is not to be modified, the decision-maker would be afraid of being deceived in any case.

Ellsberg's research has been very influential in the field of economics and particularly prospect theory. For a general analysis of these ideas, see Ellsberg, 1961 and Craig and Tversky, 1995.

Behavioural approach

6.9 The behavioural approach emphasises the personalities of the negotiators. Negotiators are described as 'hard' or 'soft'. The different styles between these two extremes are described below at **6.24** as 'The Negotiator's Dilemma' (Lax and Sebenius, 1986). As Adamson and Cunga note (2009, p 14):

> The behavioral approach derives from psychological and experimental traditions but also from centuries-old diplomatic treaties. These traditions share the perspective that negotiations whether between nations, employers and unions, or neighbours are ultimately about the individuals involved. Where game theory relies on the assumption that players to a negotiation 'game' are featureless, uniformly rational, pay-off maximizing entities, the behavioral approach highlights human tendencies, emotions and skills. They may emphasize the role played by 'arts' of persuasion, attitudes, trust, perception (or misperception), individual motivation and personality in negotiated outcomes. Other researchers from the behavioral school have emphasized factors such as relationships, culture, norms, skill, attitudes, expectations and trust.

Thomas' model, as described in **Chapter 2** as the 'Five Ways of Responding to Conflict' (1979, p 90), is an example of the behavioural approach where the motivational intentions of the parties are important elements in a negotiation or conflict. The section in **Chapter 3** on verbal jujitsu (see **3.34–3.40** and **3.42–3.51**) is another example of this approach, as is the 'Negotiation Tightrope' described earlier in this chapter.

Concessional exchange theory

6.10 The concessional exchange model of negotiation process, in which the parties learn from each other, usually comes about through the concessional behaviour of the parties. These concessions structure the

negotiation through a series of stages and serve as signals to each side to encourage movements in their opponent's positions.

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This model overlaps with the structural approach in which power is an important element. In the concession exchange approach the concession-making is a way of expressing power through the negotiation. The limitation of this approach (as with the structural approach) is that those engaged in this concession exchange will miss the broader mutual options — the creative problem-solving of the parties — which may be more beneficial to both sides.

Integrative models

6.11 Integrative models, in sharp contrast to distributive approaches, frame negotiations as interactions with 'win–win' potential. Whereas a zero-sum view sees the goal of negotiations as an effort to claim a share of a 'fixed amount of pie', integrative theories and strategies look for ways of creating value, or 'expanding the pie'. It is an approach that emphasises problem-solving, cooperation, joint decision-making and mutual gains. These are integrative strategies which call for participants to work together to create win–win solutions. They involve uncovering *interests*, generating *options* and searching for *commonalities* between parties. Negotiators may look for ways to create value, and develop shared principles as a basis for decision-making about how outputs should be claimed (and who should claim them). **Chapter 5** was based on this approach.

Integrative models helped popularise the idea of phases or stages of negotiation in which the negotiation was viewed as a series of steps. This is the approach taken later in this chapter where the process of negotiation is broken down into five stages (see **6.41**ff). Principled negotiation, described

below at **6.20**, is another example of this approach, emphasising the importance of preparation and planning in improving negotiated outcomes.

6.12 The essential characteristics of these various models are often simplified into two broader streams: the distributive and the integrative. The distributive stream largely incorporates the structural, strategic, behavioural and concession exchange models. The integrative model is usually regarded as being distinct from these but, as outlined below, it may be possible to see the overlaps between the two broad approaches and the way they can be applied together.

Framing the negotiation: Prospect theory, loss aversion and negotiation

Prospect theory, also known as loss aversion theory, is a behavioural economic theory that describes decisions between alternatives that involve risk, where the probabilities of outcomes are known. According to the theory, people make decisions based on the potential value of losses and gains rather than the final outcome, and people evaluate these losses and gains using cognitive heuristics (that is, cognitive shortcuts), which points to a non-rational basis for some decision-making. The key beginning of this theory is the D Kahneman and A Tversky article, 'Prospect Theory: An Analysis of Decision under Risk' (1979) XLVII *Econometrica* 263, available at <www.princeton.edu/~kahneman/docs/Publications/prospect_theory.pdf>. It has had a considerable impact on negotiation theory and practice, as well as other fields. This theory holds that people value gains and losses differently and, as such, base decisions on perceived gains rather than perceived losses.

Thus, if a person was given two equal choices, one expressed in terms of possible gains and the other in possible losses, he or she would choose the former.

For example, consider the situation of an investor being presented with advice about the same investment fund by two different financial advisers. The first adviser tells the investor that the mutual fund has had an average return of 10 per cent over the past three years. The second adviser tells the investor that the mutual fund has seen above-average returns in the past five years but has been declining in recent years. According to prospect theory, even though the investor is presented with information about the same investment fund, he or she is more likely to buy the mutual fund from the first adviser, who expressed the rate of return as an overall 10 per cent gain, rather a combination of both high returns and losses.

This example demonstrates the importance of 'framing' in interpersonal behaviour. Each

negotiator enters the negotiation with different frames of reference, which helps them define and apply meaning to what is happening. Negotiators with a positive frame are more likely to take risks, compromise and settle compared to those who may have a negative frame. See further **Exercise 17** at the end of this chapter, 'Aspirations, anchoring, Pareto points and negotiation results: Managing the "first offer" trap'.

Distributive Negotiation

6.13 Distributive negotiation (sometimes referred to as 'zero-sum negotiation') is often characterised as being 'one-issue' negotiation in which the parties have opposing positions; that is, every gain by one party is the loss of the other party. The underlying assumptions of this approach are that the winnings of one party will equal the losses of the other, and that their interests are fundamentally opposed. Redistribution within a conflictual framework is the other assumption. This orients the parties towards an adversarial stance and may inhibit creative problem-solving (Leventhal, 2006). It often involves a pattern of rotating demands and concessions between the parties. A common example of this is when a buyer and seller come together to negotiate a price. The buyer generally wants to minimise the price whereas the seller wants to maximise it. This is, of course, a narrow and simplistic view of the negotiation process, but for the purposes of analysis it is quite useful. Other examples of one-issue negotiations are the date on which partners want to hold a meeting, the amount of time an employee wants to work on a particular job, or an employee's conditions of work.

Distributive negotiation usually centres on a 'zone of possible agreement' as outlined above. The outer limits of this zone represent the minimum demands each party will expect the agreement to satisfy. For example, a buyer knows that he or she can only afford to pay $500,000 for a house because of credit limitations. The seller will settle for $450,000. The zone of agreement in this case is $50,000.

It is important to note that while the parties in this example may have the

potential to settle their agreement they may not do so because of the negotiating tactics employed. For example, the seller may make an opening bid (or advertise) to sell the property at $515,000. The buyer may think this is so far over his or her limit as to be beyond the point of any negotiated settlement.

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The zone of possible agreement may also change during the course of a negotiation. For example, the buyer's limit may stretch to $510,000 because the seller is willing to provide generous terms (time for payment) on settlement, or the mortgage interest rates charged by the banks take a sudden dive.

Skilled negotiators are conscious of this zone and are constantly on the lookout to stretch it in ways that are still compatible with their own interests. The aim is to try to obtain concessions from the other side to bring the negotiation within the zone. The outer limits of the zone are often called 'resistance points', beyond which the parties are loath to go. Nash (1950) suggests that the limits of these concessions are determined by the propensity to risk and conditions of transfer. Negotiators within this framework tend to give away less information while trying to acquire more. They also tend to ask more questions, create strategies to get information, act firm, offer less generous opening offers, are slower to give concessions, use confident body language and conceal their feelings. They are more interested in the bargaining position and bottom line of the other negotiating party, and they prepare for negotiations by developing strategies and planning responses to the other side's arguments, especially to cover weak points.

The relative power of the parties is a central concern in any analysis of distributive bargaining; that is, the eventual outcome of any negotiation is likely to turn on the respective power of the opposing parties. Power in this

context can include a wide variety of elements particular to that negotiation; for example, the skill of the negotiator, the market conditions for a house sale, or the positions of the parties in a particular work hierarchy.

Power is a central element in each of the tactics described at **6.14**ff and which are typical of this type of negotiation (see in particular those tactics described as 'power arguments' (see **6.17**)). Later in this chapter we will also consider power in relation to integrative negotiation.

Before looking at the tactics employed in distributive negotiation it is a good idea to keep in mind that power does not, by itself, give one party an advantage over the other in all situations. Schelling (1960, p 27) gives an interesting example of the paradoxical situation where the seemingly weaker person is really in a position of strength:

> The sophisticated negotiator may find it difficult to seem as obstinate as a truly obstinate man. If a man knocks at a door and says that he will stab himself on the porch unless given $10, he is more likely to get the $10 if his eyes are bloodshot. The threat of mutual destruction cannot be used to deter an adversary who is too unintelligent to comprehend it or too weak to enforce his will on those he represents.

Another interesting example is provided by Alfredson and Cunga (2009, p 11) from a well-known international conflict known as the 'Cod Wars':

> The first 'Cod war' took place in 1958, when Iceland extended its coastal fishing limit, from 4 miles to 12 miles, provoking the British to contest the action. In 1972, a second Cod War started when Iceland extended its coastal non-fishing limit to 50 miles. Despite Britain's overwhelmingly superior military and economic power, in both instances negotiations over Iceland's right to assert its sovereignty over its coastal waters concluded in Iceland's favor, and resulted in significant economic losses for the British fishing industry. In examining the case of the Cod Wars, Habeeb (1988) writes that

> weak actors may sometimes triumph in asymmetric negotiations because they have greater commitment to the issue area, when they possess a resource that is not easily found elsewhere, or when they are seen as defending highly regarded principles, such as sovereignty or defending

against an injustice committed by a strong state. The near exclusive dependence of the Icelandic population on fishing as a means of livelihood meant that the extent of the Icelandic government's commitment to the issue of fishing rights far exceeded the commitment felt among the British populace.

Some important tactics in distributive negotiation

Commitment tactics

6.14 Commitment tactics are employed when one party makes an irreversible sacrifice of bargaining power which commits them to a position that seemingly cannot be changed, thus putting the other negotiator under great pressure to accept the demand or give up the whole negotiation. An example is the truck driver who is so determined to force an oncoming truck off a road only wide enough for one of them that the driver conspicuously throws away his steering wheel as the trucks get nearer to each other!

Schelling (1960, p 35) makes the important point that, to be convincing, commitments usually have to be qualitative rather than quantitative and to rest on some rationale. He gives as an example the difference between making a commitment to principles such as 'profit-sharing' or 'cost of living' (qualitative) as compared to a particular price like '$2.07' (quantitative). An example that comes to my mind is when a colleague in an intragroup negotiation stated that the negotiation had to proceed on the principle of 'sexual equality' or not at all.

Threats and promises

6.15 Threats and promises, frequent in the negotiating landscape, often cause considerable heartache. Threats run the risk of dangerously escalating the conflict and leading to revenge tactics, while promises often place the ability to trust the other side under considerable strain (trust is one of the common ingredients of successful negotiation).

Promises, to be successful, must be tactfully put in such a way that they do not appear as false or overblown rhetoric, or as a bribe. The promisor should also be able to demonstrate that he or she can make good such an offer.

There are only very few occasions when a threat should be incorporated into a negotiation, perhaps one being when the other side is not acting honestly or in good faith. If a threat is considered necessary it should be aimed at the problem, not at the other person, and it should be accompanied by conciliatory gestures to lessen the likelihood of escalation and retaliation.

Bargaining

6.16 Bargaining includes several of the elements we have already mentioned. It incorporates the notion of being able to make and demand concessions, offers and counter-offers, while maintaining a position of relative strength, and without threatening the other party or their interests in such a way as to escalate the conflict. Bargaining is an integral part of the give-and-take process that often goes on during

distributive negotiations. In this book, the term 'bargaining' is used in a way that is not synonymous with the word 'negotiation', but represents a particular tactic used in negotiation. Some of the essential elements of the bargaining process are:

- Concessions are often hard to match. For example, is a higher wage adequate compensation for working on a public holiday? And how can we compare one with the other? How do you compensate workers in a nuclear power plant where the risk of contamination is always present?
- Your opinion of the other bargainer's behaviour in relation to concessions will necessarily influence your actions. For example, if you think the other

negotiator is going to make a large concession you will either take a tougher stand yourself, or be gentler. The course you take will depend on the circumstances.

- The bargainer who is most eager, or more desperate, to reach an agreement is generally more likely to make concessions.
- Bargainers often want to give the impression that any risk to them of the negotiation failing is low, or that they are willing to accept the risk; that is, they will not make concessions easily. However, if this is a bluff, it may be called!
- Making concessions is not necessarily a sign of weakness. It may be a gesture of goodwill or a realistic appraisal of the situation. Sometimes it may be used to 'test the waters'.
- Bargainers usually move through a process of concession convergence; that is, concessions are made which gradually inch the parties towards agreement (Bisno, 1988, p 134).

There are four techniques from the literature that typify bargaining (Bisno, 1988, pp 134–5):

- Starting with a competitive approach then switching to a cooperative approach. The rationale is that if you are always cooperative another cooperative gesture may have limited impact.
- Offering compensation for a loss experienced by the other side.
- Making an offer designed to be a concession, to allow the other party to reciprocate. If the other party does so, then a further concession can be offered and so on. This technique is called 'graduated reciprocity'.
- Showing your opponent in some way that you will not or cannot give way; for example, stating that you are under binding instructions from your constituency or that you only have a limited time to negotiate the issue. Bisno calls this group of techniques 'hanging tough'.

Power arguments

6.17 Bacharach and Lawler in their book *Bargaining* (1981) describe in some detail a range of tactics that they call 'power arguments'. These types of argument are primarily aimed at manipulating the other party's perception of the power relationship. There are four dimensions to these tactics:

- they manipulate the opponent's commitment;
- they manipulate the opponent's perception of its alternatives;

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- they manipulate the opponent's perception of its own commitment; and
- they manipulate the opponent's perception of its own alternatives. The following are examples of this type of argument.

Examples of power arguments

Coalition arguments	One or both parties may attempt to communicate the impression that they can form alliances with other interested parties.
Threat-to-leave arguments	One or both parties may indicate that they can leave the negotiation and take some other course of action.
Self-enhancement arguments	One or both parties may argue that their behaviour or position warrants some concession by the other.
Priority arguments	One or both parties may try to manipulate the other's impression of its priorities.

(Bacharach and Lawler, 1981, p 170)

Normative or value arguments

6.18 Bacharach and Lawler also describe a range of arguments they call 'normative arguments', which refer to the appeal by one or more of the parties to arguments centring on equality, equity (fairness or justice) or responsibility, and place these within the context of relative power and the issues at stake. They put forward three propositions concerning this group of tactics (Bacharach and Lawler, 1981, p 176):

> Proposition 1. The greater the difference in bargaining power, the greater the tendency of the higher-power party to use equity appeals and the greater the tendency of the lower-power party to use equality or responsibility appeals.
>
> Proposition 2. If the difference in bargaining power is not large, the lower-power party will use responsibility appeals; and the higher-power party will use equality appeals.
>
> Proposition 3. If the total bargaining power in the relationship is very high, both parties will use equality appeals.

Equality, equity and responsibility are important considerations, especially for workers in the human services field who may often be in a position of great power vis-à-vis their client group or, conversely, may be advocating on behalf of a low-power group. In fact, these considerations are important in those contexts where a power imbalance is present (which is often). Bacharach and Lawler suggest that normative arguments are likely to be most successful when the issues are couched in broad terms — when trade-offs are of prime concern, and when negotiators 'are prepared to exaggerate the cooperative part of their relation' (Bacharach and Lawler, p 176).

Bluffs or creating illusions

6.19 A bluff may mislead the other party about your intention to do or not do something, or it may mislead the other party (create an illusion) about the real power or capacity you have. A bluff can centre on the resources you have at your disposal,

the other party's dependence or reliance on you or your resources, or the possible sanctions or repercussions that would follow from certain actions (Bacharach and Lawler, 1981, pp 171–4). The success of bluffing depends on the amount of information each party has about the other, so it is essential to ensure that you prepare for a negotiation with as much fact-gathering as possible. Bluffing is quite risky and, in nearly all cases, unethical.

The tactics described above are generalisations of the many variations and patterns that will occur during a negotiation. As such, you should treat descriptions with caution and regard them as approximate guides to the tactics you will use and often encounter.

Fisher and Ury (1991) referred to distributive negotiation as 'positional bargaining'. They were critical of the process of bargaining, based on three major propositions: first, that the distributive process is damaging to the relationship of the parties; second, that it leads to agreements that are not the best available; and third, that the process is inefficient — it complicates the negotiation and takes longer than other processes because parties tend to start at the extreme position and slowly work their way in. Fisher and Ury are the chief proponents of the integrative approach, described below.

Integrative Negotiation

6.20 Integrative negotiation (win–win negotiation) emphasises the interests of the parties rather than their relative positions. The most widely read and influential piece of writing on integrative negotiation is *Getting to Yes* by Fisher and Ury (1981). They describe three main ways to negotiate: soft, hard and, their preferred method, principled negotiation. More recently, the Fisher and Ury model has become associated with seminars and workshops in the Law School at Harvard University and has become known to a broad audience as the 'Harvard model'. However, their work builds on a considerable body of prior research. For example, Walton and McKersie

published a theoretical framework for understanding the negotiation process, which they applied to negotiations in international relations and to civil rights disputes. They described integrative bargaining as bargaining in which negotiators employ problem-solving behaviour (Walton and McKersie, 1965). Perhaps the most important of such earlier research was the work of Parker Follett (1918, 1924) who forged a philosophical ideology of peace wherein she described four ways of resolving conflict:

- voluntary submission of one side;
- victory of one side over the other;
- compromise; or
- integration.

The first two options rely on the use of force or power, which is a distributive process. The third option involves an avoidance of issues common in conflict but not helpful in managing issues productively. The fourth option is Follett's significant contribution to the theory of negotiation. She described it as a technique involving conferencing, discussion and cooperation. For Follett, integration involved moving beyond compromise and domination.

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Building on and popularising these ideas, Fisher and Ury describe three ways to negotiate, outlined below. Their preferred method they called the 'principled approach'.

Three ways to negotiate	
Soft negotiation	Involves avoiding personal conflict and making many concessions. The soft negotiator may

	therefore end up feeling exploited.
Hard negotiation	Involves treating negotiation as a contest between stronger and weaker, where 'hanging tough' and 'holding out' are treated as virtues. Winning is all-important, but often at the cost of a good relationship.
Principled negotiation	Involves deciding issues on their merits rather than through a 'haggling' process. Mutual gains are emphasised and, where interests conflict, fair objective standards should be relied upon. It is said to be hard on the issues, but soft on people.

(Adapted from Fisher and Ury, 1981, p XII)

Fisher and Ury's central message is summed up in the following passage (Fisher and Ury, 1981, p 43):

> Behind opposed positions lie shared and compatible interests, as well as conflicting ones. We tend to assume that because the other side's positions are opposed to ours, their interests must also be opposed. If we have an interest in defending ourselves, then they must want to attack us. If we have an interest in minimising the rent, then their interest must be to maximise it. In many negotiations, however, a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed.

The basic principle of this approach is to find the underlying needs and objectives of the parties, and to reach a resolution that does not cause loss to either party. The needs and objectives of both parties can be complementary and therefore be the basis of mutually satisfactory agreements. This focus leads to a problem-solving approach to negotiation. It seeks creative solutions to conflict, whereas the emphasis on compromise, so prominent in the distributive approach, does not. The integrative process emphasises option creation to move away from the focus on loss and gains. This is an attempt to create value and expand resources from the party's differences.

Essential elements of the principled approach

6.21 The essential elements of the principled approach are set out below (Fisher and Ury, 1981):

- *Separate the people from the problem:* Do not attack the other negotiator, but the problems or issues that have arisen out of the conflict. Allow for feelings to be expressed; speak about yourself using 'I' language; do not blame; aim towards building a good working relationship.

- *Focus on interests, not positions:* Positions are *what* you want; interests are *why* you want them. Focus on shared interests by asking 'why' questions. These may uncover mutual or complementary interests that will increase the likelihood of agreement.
- *Invent options for mutual gain:* Even if the parties' interests differ, there may be bargaining outcomes that will advance the interests of both. Fisher and Ury cite four main obstacles to this outcome: (a) premature judgment; (b) searching for the single answer; (c) the assumption of a 'fixed pie' (see **6.57**); and (d) thinking that solving the issue is 'their problem'.

  To illustrate this point Fisher and Ury quote the example already mentioned of two people who are trying to decide which of them should get the only orange in the house. Once they both realise that one wants it for the juice and the other for the rind, a suitable agreement that furthers the interests of both becomes apparent.
- *Agree on objective criteria:* Fisher and Ury recognise that some negotiations are not as susceptible to a 'win–win' outcome; for example, haggling over the price of a used car — each dollar I give you is a dollar less for me. To minimise the risk of inefficient haggling or failure to reach agreement, Fisher and Ury suggest that the parties first try to agree on objective criteria to govern the outcome. Thus, instead of unnecessarily haggling over the

price of a used car, both parties might agree instead that the 'official industry price book' should govern the price.

- *Know your BATNA:* As already mentioned, one of the reasons to negotiate is to produce more productive results than would be possible without negotiating. This is your BATNA and if you are unaware of it you are in danger of entering into an agreement that you would be better off without. For example, if you are buying a house it would be unwise to enter negotiations until you know the prices of similar properties. The availability of other houses in your range will then be your BATNA.
- *Negotiation jujitsu:* If the other side is in an attacking mode, either attacking you or your proposal, or if it announces a firm position, Fisher and Ury maintain that it should not be reacted to but side-stepped. They maintain that rather than resisting the force of the tactics you should channel your energies into exploring interests, inventing options for mutual gain and seeking objective standards. This is achieved by not attacking the other's position, but looking behind it; not defending your ideas, but inviting criticism and advice; and recasting personal attacks as an attack on the problem. **Chapter 3** presents a range of tactics using this principle (see **3.34**).
- *Dirty tricks:* Fisher and Ury suggest three steps in handling dirty tricks: recognise the tactic, raise the issue explicitly, and question the tactic's legitimacy or desirability. They list the following as common dirty tricks: deliberate deception; phony facts; ambiguous authority; dubious authority; dubious intentions; stressful situations; personal attacks; 'good guy'/'bad guy' routine; threats; refusal to negotiate; extreme demands; escalating demands; lock-in tactics; calculated delay; and 'take it or leave it' ploys.

Fisher and Ury maintain that people have more power than they think, and that principled methods are the most effective means of achieving a result that maintains relationships. *Getting to Yes* emphasises the importance of finding compatible interests rather than simply assuming differences. Alternative solutions, imagination and cooperation are essential elements of this approach. *Getting to Yes* and its sequel *Getting Together* (Fisher and Brown, 1989) are inexpensive and worthwhile reading for every would-be negotiator.

Harvard University's law lecturers, applying the Fisher and Ury model in their teaching, describe 'Seven Elements' for a successful negotiation process (see, for example, Mnookin, Peppet and Tulumello, 2004):

- interests — parties' needs/motivations/concerns;
- alternatives (BATNA) — what the parties can do if there is no alternative;
- options — possible alternatives/solutions;
- standards — objective criteria for choosing between options;
- relationship/people — establish a good working relationship; separate the people from the content;
- commitment — ensure that the agreement is workable, measurable, certain; and
- communication — ensure that the agreement is as clear and complete as possible.

The university advocates these elements as the basis for preparation for a negotiation, for analysis during the negotiation and at the end of a negotiation to assess the terms agreed.

The characteristics of a successful negotiation outcome using the Harvard Seven Elements are:

- the outcomes are at least as good as any alternative solution available (BATNA);

- it satisfies the needs or interests of all parties as much as possible;
- it is the best available option;
- no party feels taken advantage of (standards);
- the procedure or process of agreement leaves the parties, and their representatives, if any, prepared to negotiate together again (relationship and communication); and
- the agreement is clarified, written down and signed (commitment).

Criticisms and limitations of the *Getting to Yes* model

6.22 One aspect of the *Getting to Yes* model which is often criticised is its lack of consideration of an important aspect of distributive negotiation: where the benefits for one party come at considerable cost to the other. In my view, many negotiations involve both integrative and distributive aspects. Often, negotiation moves through a process of cooperation where the parties each gain some benefit without any loss of significance. However, eventually the negotiation may get to a stage where any added benefit to one party may involve considerable costs to the other. The crucial question for the negotiator then becomes: 'Can the negotiation continue as cooperative

problem-solving in the Fisher and Ury way?'. Sometimes it can, but on other occasions it may not. This is particularly so where one of the parties is more powerful.

We have already seen that the distributive aspect of the negotiation may turn on the exercise of power. For example, two buyers may value differently a house for sale in the $1 million to $1.5 million range. Buyer A might be

willing to purchase it for $1.1 million, whereas buyer B may only be willing or able to purchase it for $1.2 million. Consequent negotiations do not rest on principle but on the relative needs of the seller to sell and the two buyers to buy.

The various elements that establish these relative needs and, in turn, the relative power of the parties in negotiation, may be the most crucial aspect of the negotiation. Further, the ability to find objective criteria may be very difficult and, instead, the negotiation may rest on persuasive rationalisations. Negotiators seldom simply assert a position and stubbornly insist on it; there will be a rationalisation for every position (White, 1984, p 115).

In answering his critics, Fisher acknowledged that in *Getting to Yes* he may have paid insufficient attention to the issue of power (Fisher, 1983, p 149). He argues, however, that making negative commitments (an irrevocable offer or demand or a 'take it or leave it' position) or threats often undercuts other elements of negotiating power. Further, he maintains that while power does depend on another's perception of your strength, this is a fragile basis on which to found a negotiation. He gives the analogy of the general who commands a real tank battalion being in a much stronger position than one in charge of a row of cardboard tanks. While the power of both generals may at first instance appear to be the same, the real differences instantly become apparent if they have to go into action. Fisher describes six kinds of power, described briefly in the box below, which would potentially be undermined by any premature negative commitment or threat.

Integrative power

1. The power of skill and knowledge	The longer the negotiation goes on, the more likely it is that you will come to decide on the best proposition.
2. The power of a good relationship	Good working relationships take time, while presenting rigid positions may undermine them.

3.	**The power of a good alternative to negotiation (the BATNA)**	This is a useful ‘warning’ to the other side without being a rigid position or threat.
4.	**The power of an elegant solution**	Putting forward premature solutions may damage the prospect of an agreement, which will more adequately meet most of the interests of both sides.
5.	**The power of legitimacy**	According ‘natural justice’ to the other side by hearing their views and establishing what they think is fair helps to legitimate and make more persuasive your own decisions.

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6.	**The power of an affirmative commitment**	Making a clear offer to do something that will have positive consequences for the other side increases the likelihood of a settlement. (Fisher gives the example of the United States inability to offer the Vietnamese a clear proposition vis-à-vis ceasing hostilities as a reason for the prolonging of the Vietnam War.)

In conclusion, Fisher states (1983, p 164):

This analysis also suggests that when as a last resort threats or other negative commitments are used, they should be so formulated as to complement and reinforce other elements of negotiating power, not undercut them. In particular, any statement to the effect that we have finally reached a take-it-or-leave-it position should be made in a way that is consistent with maintaining a good working relationship, and consistent with the concepts of legitimacy with which we are trying to persuade the other side.

Advantages of the integrative approach

6.23 The claimed advantages of the integrative approach can be summed up as follows. It:

- provides a basis for a better relationship between the parties;
- provides more satisfying results for the parties;
- establishes agreements which are more likely to be adhered to;
- lessens the emotional costs;
- is potentially more creative; and
- reduces the likelihood of a stalemate.

Integrative negotiation is particularly useful between parties where there is an ongoing relationship. Therefore it has significant utility in family, workplace, neighbourhood and long-term business contexts. The major disadvantage of integrative negotiation is that it does not fit all situations. The interests and issues of the parties may not lend themselves to this approach. Further, one or more of the negotiators can quite easily subvert it. The skilled negotiator should be able to both recognise these circumstances and respond accordingly.

In summary, both integrative and distributive approaches to negotiation may be appropriate at different times, and both may be used in the same negotiation. In all cases the good negotiator should retain a certain flexibility to suit the particular social, political and normative contexts in which the negotiation takes place. However, in terms of maintaining long-term relationships it is probable that the integrative approach is to be preferred because it is less likely to set in train aggressive competitive behaviour.

Combining the Two Models: Creating and

Claiming Value

6.24 Negotiation theorists have often viewed the distributive and integrative models as distinct (Lewicki et al, 2003; Fisher and Ury, 1981); however, the two models

can be used together. There are periods in a negotiation when one approach is more useful than the other. Countless times in mediations and negotiations I have witnessed parties move into a more robust process of bargaining with each other as they negotiate over the various options they have developed. Walton et al (1994) describe this switching between the two models as 'forcing or fostering' strategies. The former reflects the distributive approach and the latter the integrative. As Leventhal (2006, p 77), in summarising Lax and Sebenius's (1986) useful work, *The Manager as Negotiator*, succinctly states:

> The more value that is created through joint problem solving, the more value there is to be claimed distributively by both parties. In other words, cooperative moves create value and competitive moves claim it. Indeed, it seems sensible to assume that sometimes parties to negotiations would find it difficult to maintain a distance from trying to achieve personal gain. One of the main criticisms of the integrative negotiation model is that adversarial parties can use cooperative techniques to achieve more than they could have through competing.

Lax and Sebenius (1986) argue that the integrative (they call this 'creating value') and distributive (they call this 'claiming value') tactics are connected activities. In their view, creating new value improves both parties' outcomes. Regrettably, the cooperative strategies needed to create value tend to undermine the competitive strategies used to claim value (and vice versa). The exaggeration and concealment needed for effective competition is directly opposed to the open sharing of information needed to find mutual benefits. However, taking an open cooperative approach makes one

vulnerable to the hard bargaining tactics of a competitive negotiator (1986, p 30). Consequently, if both parties cooperate, the result is usually productive, while if one cooperates and the other competes, the competitor usually does better. However, if both compete they usually come out worse than if both cooperated, which is the issue explored in the prisoner's dilemma game (see **Exercise 2** at the end of this chapter). The assumption is that claiming value in integrative situations is more likely to be balanced, because the parties are expected to develop cooperative relationships and communicate freely, which is not allowed in the prisoner's dilemma game.

Olekalns and Smith (2005), two researchers from the University of Melbourne, using a bilateral role-player negotiation, examined the relationship between motivational orientation, mental maps and negotiators' outcomes. Sixty-four undergraduate students were placed in a role-play negotiation with different incentives for competition and cooperation. Some dyads (groups) were given instructions that emphasised either competition or cooperation. The results provide a different perspective on how distributive and integrative styles combine. In their experiment, cooperative and competitive negotiators bargained with a counterpart who held either the same or a different orientation. Predictably, compared to negotiators in mixed dyads, those in same-orientation dyads placed greater emphasis on cooperation, flexibility and trust; and less emphasis on competition. Flexibility was more critical to joint gain when at least one negotiator held competitive goals, but detrimental when both negotiators held cooperative goals. Negotiators in same-orientation dyads reported a more positive experience than negotiators in mixed-orientation dyads.

In other words, when at least one negotiator has a competitive goal, the

tone of the negotiation changes. In these circumstances, negotiators placed increased emphasis on competition (Olekalns and Smith, 2005, p 72):

> A greater emphasis on competition increases the risk that negotiators will not only select competitive strategies but will initiate a cycle of escalating contentiousness (e.g. Pruitt 1981). This in turn increases the risk that negotiators will be unable to settle.

Olekalns and Smith suggest that negotiators in the planning stage of the negotiation tend to give too much emphasis to the competitive elements of the negotiation when their substantive goal is to maximise personal outcomes. To counter this they suggest that negotiators with competitive goals should, in the planning process, pay particular attention to including problem-solving strategies in their behavioural repertoire.

Other findings from their research indicate that the following:

- Negotiators with competitive goals can be a threat to a negotiated outcome and can be countered by emphasising flexibility, because increasing contentiousness leads to 'strategic rigidity'. When at least one of the parties is competitive it is usually better to broaden the settlement options. This can be assisted by developing problem-solving strategies so as to move away from an individualistic, competitive stance.
- When both negotiators are cooperative, flexibility does not have the same benefit and, in fact, it lowers the potential for gains. In such a case it may be better to focus on restricting the options and more rigorously reality-testing them.

Olekalns and Smith conclude that (2005, p 73):

> Our results show that dyad composition is critical to the structure of individuals' mental maps as well as their experience of negotiation. Similarity and predictability resulted in a greater emphasis on cooperation, greater perceived fairness and an increased willingness to interact with the other party in the future. Our results suggest that while a shared frame is not necessarily a prerequisite for settlement, it does shape the negotiating experience far more than does individual orientation. We conclude that time spent in developing a shared perspective at the outset of a negotiation will benefit negotiators, at least in terms of intangible outcomes.

By emphasising problem-solving planning for the competitive negotiator and developing rapport (by identifying and highlighting similarities between the parties), the negotiator can override the impact of excessive focus on goals and build a better relationship as well as maximise outcomes (2005, p 73).

This research can be compared with the earlier work of Lax and Sebenius (1986, p 161), who talk about the tension that exists between creating and claiming value. The competitive strategies used to claim value tend to undermine cooperation, while a cooperative approach makes you vulnerable to competitive bargaining tactics. The tension that exists between cooperation and competition in negotiation is known as the 'negotiator's dilemma', similar to the 'prisoner's dilemma' described in **Exercise 2** at the end of this chapter.

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The negotiator's dilemma

1. If both sides cooperate, they will both have good outcomes.
2. If one cooperates and the other competes, the cooperator will get a less desirable outcome and the competitor will get a better outcome.
3. If both compete, they will both have middling outcomes.
4. In the face of uncertainty about what strategy the other side will adopt, each side's best choice is to compete.
5. However, if they both compete, both sides end up worse off.

(From Lax and Sebenius, 1986)

Therefore, it would seem that most negotiations have both cooperative and competitive components which move them potentially through integrative and distributive modes, which creates a kind of tension. The following chart contrasts the different elements of the two approaches.

The left-hand side of the chart summarises steps in the distributive option

and the right-hand side the integrative option. The central column indicates the important elements common to both types of negotiation. This summary of the two major types of negotiation illustrates the continuing paradoxical pull on negotiators between the need to be cooperative and at the same time competitive. It also illustrates that there is an overlap between both types of negotiation and a sequential process through which they proceed. However, keep in mind that there is often a change in direction or, as Bisno (1988, p 109) calls it, a 'feedback reversal' in the course of a negotiation that can alter the sequence of steps. This means that the negotiator should be flexible in his or her approach.

The terms 'face maintenance', 'face-saving' and 'face restoration' are important concepts in the chart and are important elements in any negotiation. Face maintenance is the desire of a participant in negotiations to convey an impression of capability and strength. Face-saving is preventative; that is, trying to forestall actions that would tend to make someone appear to be incompetent, weak or inadequate. Face restoration refers to attempts to restore the damage done by prior actions; such reactive efforts may be anything from seeking redress (for example, apology) to retaliating (for example, engaging in counter face-attacking actions) (Bisno, 1988, p 118).

Negotiating: combining the distributive and integrative options

The distributive option	Important elements in both types	The integrative option
Establishing the issues and constructing an agenda	Existence of a genuine conflict of interest	Establishing the issues and constructing an agenda
Stating positions and advancing demands	Pre-negotiations and preparatory arrangements	Focusing on interests rather than positions: • discovering interests behind position and issues • communicating and
Identifying areas of positional	Building trust and credibility	

agreements and disagreements and common and divergent interests | | Debate and bargaining: • persuasion • carrots, sticks and bluffs • give and take — exchange of concessions • development of new options Concluding the negotiations — working out agreements by: (a) emergence of mutually prominent solution based upon compromise OR (b) accepting 'something is better than nothing' result or partial solution OR (c) finding a creative solution more desirable than compromise OR (d) a non-binding agreement using reopener proviso	| | Decoupling the person from the issue | | Face maintenance Face saving Face restoration | | | | | | Ritual affirmation at conclusion of negotiations OR If negotiation is unsuccessful, continue with other conflict management modes or accept BATNA	understanding interests by both parties • identifying communalities and differences in interests | Determining objective criteria to be used in negotiation | Identifying areas of agreement and disagreement emerging from the negotiating process | Considering range of possibilities and developing new, mutually beneficial solutions — brainstorm options that encompass both sets of interests | Give and take in relation to alternative solutions | Concluding the negotiations — working out agreements by: (a) dovetailing interests into 'yesable' propositions OR (b) reconsidering interests in relation to possible solutions, and (c) redefining areas of disagreement in respect of prospects for a constructive negotiated agreement (d) accepting new solutions

Rubin (1983, p 136) has some good advice about the importance of preserving face for the other party:

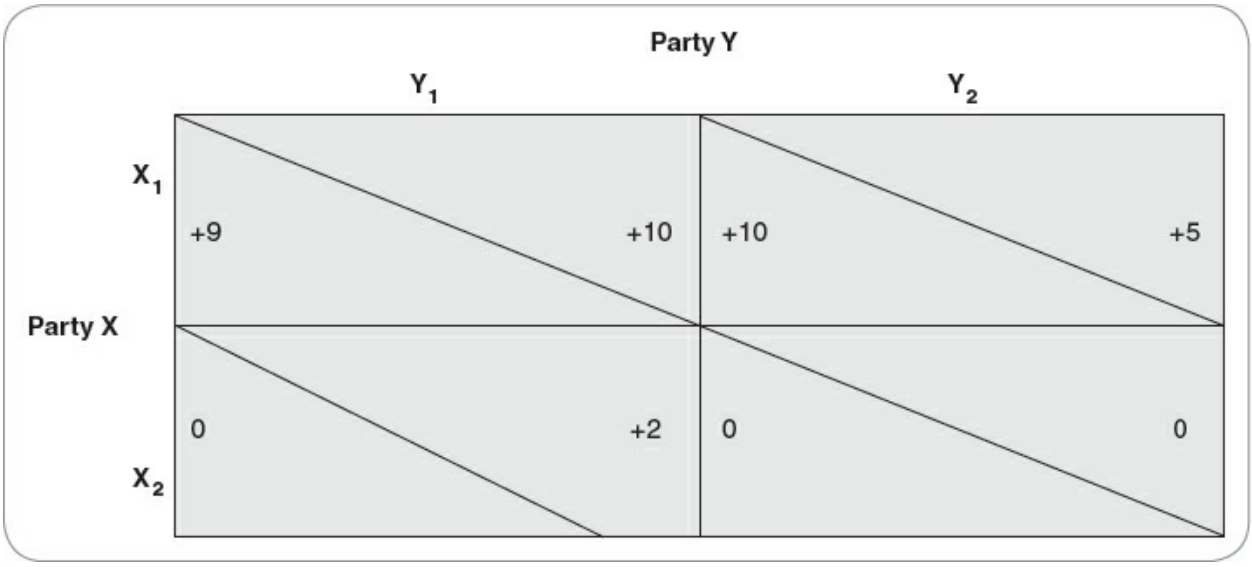
> Negotiators are reluctant to make concessions when they believe these moves imply loss of face. Negotiators want to believe that their concessions will be construed not as weakness but as a sign of their willingness to deal from a position of strength. I have made a conciliatory move not

because you forced me to do so but because my competence as a negotiator has led to the development of a mutually satisfactory quid pro quo. If this line of reasoning is correct, then, paradoxically, the key to inducing conciliatory behaviour is not coercion and intimidation but a set of moves that encourage the other negotiator to feel competent and effective.

We will examine the negotiation process in some detail later in this chapter. Before discussing this process, however, other important factors that influence the negotiation process are worth considering. These are threats, the tit-for-tat strategy, gender, and the cultural factor.

Threats

6.25 Threats are one of the most difficult behaviours to deal with. A good way to respond to them is to use the verbal jujitsu skills described at **3.42**ff. Schelling, in his book *The Strategy of Conflict* (1960), uses a complex series of matrices to describe and analyse the character of threats. The following matrix reduces these down to their essentials.



Both parties have two choices. If both parties can move simultaneously, and without prior communication, Y wins by choosing Y1, since, assuming that X is rational, X would choose X1. If, however, the parties can communicate with each other and move successively, the likely scenario

changes quite dramatically. X could announce that he or she will choose X2 unless Y chooses Y2, so that if successful he or she will achieve the outcome XI, Y2 giving the better payoff. To do this, X would have to announce something additional, to convince Y that he or she will revert to the unattractive choice of X2 unless Y complies. This is the essence of a threat. It is the demand for a certain response which, if not forthcoming, will incur a penalty.

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To be successful, a threat usually has to meet three conditions:

- it must he convincing and believable;
- it must be communicated to the other party; and
- the other party must be capable of complying with it.

These conditions also give some idea of strategies that may be used to counter them. There are at least seven 'counter coercion measures' to a threat. In summary these are:

- refuse to 'accept' or 'hear' the threat. The most famous example of this occurred during the Cuban missile crisis when President Kennedy ignored a threat from the Russians and instead acted on an earlier conciliatory move;
- build up your retaliatory capabilities and strengthen the perception that they may be used in appropriate circumstances;
- get assistance or form an alliance;
- demonstrate less 'need' for whatever is being sought by the threatener;
- generate moral commitments in the threatener by indicating hurt or a sense of betrayal;
- reduce or deflect the threat by persuading the threatener that the

responsibility for the circumstances of any frustration leading to the threats does not rest with you; or

- bring in a third party such as a mediator or arbitrator in whose presence such threats are less likely to be made.

Tit-for-Tat

6.26 'Tit-for-tat' is a strategy based on the idea of reciprocity, where I do whatever you did to me the last time (Axelrod, 1984). This, in effect, means that I will be cooperative until you become competitive, at which time I will then become competitive until you become cooperative again. Axelrod used computer simulations of a repeated prisoner's dilemma game to show that, even when met with an uncooperative opponent, a player can maximise his or her gains by using the tit-for-tat strategy. Axelrod demonstrated that cooperation may then arise as an equilibrium outcome.

It is to be expected that a negotiator is more conciliatory when opposed by another who is consistently cooperative rather than competitive. However, it is suggested that the most cooperation is gained when the other party adopts a tit-for-tat strategy. To illustrate this, consider the following example. If negotiator A is always cooperative or competitive then there is no incentive for negotiator B to change his or her behaviour; negotiator B knows that it will not make any difference. However, if negotiator A adopts a tit-for-tat strategy, negotiator B will begin to realise that his or her own behaviour is interdependent with A's; that is, if B cooperates (or competes), so will A (Rubin, 1983, pp 136–7).

This is a strategy that also seems to work in the well-known game model the 'prisoner's dilemma' (see **Exercise 2** at the end of this chapter). The essence of the game is that two parties are placed in a situation where they cannot communicate with

each other but need to reach a joint decision. Each party needs to trust that the other will arrive at a decision advantageous to both.

In an addendum to their book *Getting Together*, Fisher and Brown (1989, pp 197–202) strongly argue that the tit-for-tat strategy is not of much use in relationship building, whether it be in foreign relations or personal relations. They argue that it is better to try to understand the other person and pursue a better relationship, regardless of whether that person follows suit. They also suggest that games like the prisoner's dilemma do not relate to the real world, because the number of choices one has are much more varied. Adopting the tit-for-tat strategy, in their view, would likely lead to 'malignant spirals', because we see the world in terms of our particular biases and we are therefore likely to interpret any competitive actions as worse than our own and respond accordingly. In other words, if somebody does some 'wrong' by us we are more likely to view this more seriously than if we did the same thing to the other.

Gender and Negotiation

6.27 Gender issues reflect a widespread and ongoing social movement that permeates all aspects of society. As Kristoff and WuDunn (2009) eloquently comment:

> In the nineteenth century, the central moral challenge was slavery. In the twentieth century, it was the battle against totalitarianism. We believe that in this century the paramount moral challenge will be the struggle for gender equality around the world.

Gender has, in recent years, become the subject of intense research interest in respect of how we negotiate. As Benoliel and colleagues state: '[E]vidence has accumulated to illustrate the nuanced ways gender impacts negotiations'

(Benoliel, 2011, p 230). Women now comprise almost 46 per cent of the total (part-time and full-time) workforce in Australia and in several occupational groups (professionals, clerical and administrative, community and personal services and sales) women are in the majority (ABS, 2015). Women are taking a more prominent role in work-related and public negotiations, and it has become increasingly important to understand gender dynamics in the negotiation context.

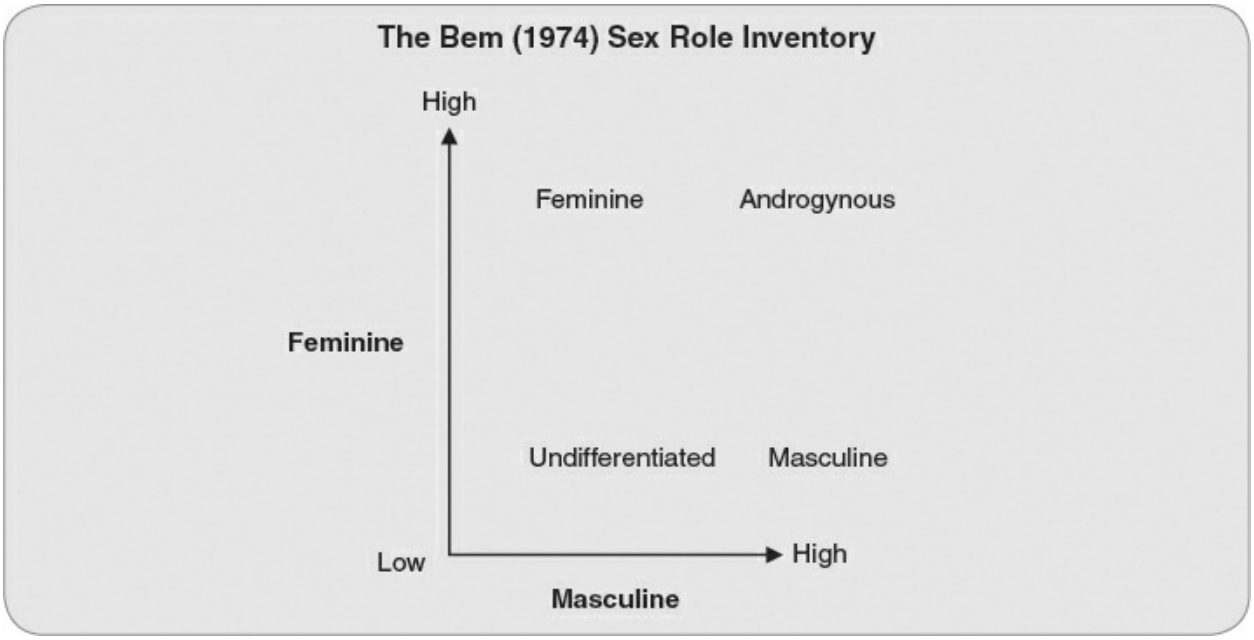
Further, the nature of gender inequality and discrimination in the workplace has become a key issue of public debate. The Workplace Gender Equality Agency (WGEA) reports that women hold fewer senior positions in Australian workplaces, earn lower wages on average and retire with lower savings than men (WGEA, 2014, p 2). Although women make up 48 per cent of the workforce they hold only '16.4% of board roles in the top 200 organisations listed on the Australian Securities Exchange and only 3.5% of CEO roles' (p 2). The full-time average weekly earnings of women are currently 17.5 per cent less than those of men, and this gap has not shifted meaningfully in the past 20 years (WGEA, 2014). Could this gender gap be contributed to by differences in the way in which men and women negotiate?

A leading researcher in this area, Sandra Bem, does not distinguish gender by male and female but by feminine and masculine *traits*, which are stereotypically associated with females and males respectively. Examples of feminine traits are affection, cooperativeness, emotion, gentleness, mildness and sensitivity (Bem, 1976). Examples of masculine traits are aggressiveness, competitiveness, decisiveness, individualism, opportunism and tough mindedness (Bem, 1976). It is these traits that differentiate

each gender's behaviour. These masculine and feminine traits are not,

according to Bem, synonymous with male and female. However, they are generally associated with men and women.

Bem developed a Sex Role Inventory (BSRI), which was developed as a means of identifying gender schematic and gender aschematic individuals. Composed of 60 words (which are divided into 20 stereotypically masculine traits, 20 stereotypically feminine traits and 20 neutral traits), the test asks participants how strongly they identify with a given characteristic. The BSRI does not dichotomise masculinity and femininity; a person does not have to be characterised as one or the other in inventory results. The BSRI ranks masculinity and femininity on a continuum; scores may include evidence of high levels of masculinity and femininity (androgynous) or low levels of both (undifferentiated) as indicated in the figure below. **Exercise 21** at the end of this chapter has a link to this inventory if you would like to do it.



The way these differences play out in the process of negotiation is most clearly indicated through studies of how men and women communicate in the process of negotiating. Craver (2013) concludes that men and women employ different language styles during the negotiation process. According to this research, men use 'highly intensive language' (Craver, 2013, p 349) which includes utilising the power of persuasion, speaking more directly and putting

forward a fact-based argument. As Schau and Meierding (2007) state: '[W]omen tend to use conversation as a tool to build relationships, establish connections and to share experiences', whereas men tend to rely upon 'report talk', the purpose of which is to share information. This coincides with the masculine traits Bem (1976) listed. On the other hand, women employ 'less intensive language' and tended to 'use language containing more disclaimers (such as, "I think" and "you know")' (Craver, 2013, p 350), and 'generally use non-assertive communication' (Smeltzer and Watson, 1986, p 75). In addition, women ask more open-ended questions than men in negotiation, for the purpose of eliciting more information and establishing a connection or relationship with the other party.

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Men use open-ended questions in negotiation, to exchange information for the purpose of solving a problem.

In addition, men and women may display different non-verbal traits. Wyatt (1999) reports that men tend to improve their power or authority by 'stand[ing] with their feet apart, expanding their space, or lean[ing] forward in their chairs' (p 23), exhibiting behaviours that are interpreted as aggressive, whereas women 'often hold their arms closer to their bodies than men' (Zhou and Zhang, 2008, p 93) and 'stand with their feet close together' in negotiation, 'denoting submissiveness' (Wyatt, 1999, p 23). Carli, La Fleur and Loeber (1995) found that women who used more of a 'social style' when negotiating were perceived as 'persuasive', 'influential' and 'likeable' (quoted in Haselhuhn and Kray, 2012, p 309). Social style includes eye contact and friendly expressions. However, women who used a task-focused style, that is, 'firm tone of voice, upright body posture' were perceived as not having 'good intentions' (p 309). Walter, Stuhlmacher and Meyer's (1998) meta-analysis of gender differences found that gender stereotypical differences in behaviour

were larger in face-to-face communication than computer-mediated communication, even if parties knew each other.

In an interesting study, Barron found a significant difference in starting salaries negotiated among MBA graduates based on gender. Male MBA students negotiated a salary $4000 (7.6 per cent) higher on average than those of female MBAs from the same programme, because female MBAs tended to accept the initial offer. In fact, 7 per cent of female MBAs negotiated the first offer while 57 per cent of male MBAs (eight times as many men as women) asked for more (Barron, 2003). In another study, this time conducted in a laboratory setting, participants were told that they would be observed playing a word game. After playing the word game, participants were advised that they were going to be paid in the '$3 to $10' range. An experimenter then thanked each participant and said, 'Here's $3. Is $3 OK?'. The men requested more money than the women at a ratio of nine to one (Babcock, Laschever, Gelfand and Small, 2003). Bowles, Babcock and Lai (2007) suggest that women are less likely to use negotiations as a way to upwardly influence. They are more likely to have greater anxiety than men about negotiating and are less likely to perceive situations as negotiable. This ability to initiate negotiations, rather than avoid them and simply accept the first offer made, is a key to negotiation success. Amanatullah and Morris (2010) found that the difference in negotiating assertiveness between self-advocating female negotiators and self-advocating male negotiators was significant. They stated (p 263):

> [W]omen negotiating economic outcomes in the workplace are simultaneously 'negotiating' social approval whilst conceding on material issues in contexts in which their assertiveness would be seen as running foul of gender expectations.

Medvec (2013) lists four reasons that act as barriers for women negotiating for what they want: women do not think a given situation is negotiable; they think they will be given 'things' when they 'deserve' them; they do not want to establish aggressive goals; and they do not want to damage the relationship.

However, in the context of representation and advocacy for others, these

suggested feminine attributes may be lessened. Research by Paddock and Kray (2011) shows that when negotiating for others, as opposed to playing the role of principal (that is, self-advocating), women achieved better and more lucrative results. Interestingly, no such

difference emerged for male participants, who, on average, performed equally well across the principal and agent roles. Crucially, Paddock and Kray showed that these differences did not emerge because of divergent expectations, nor because women were more or less competent, but rather because women felt more 'energised' when they discerned 'a sense of responsibility to represent another person's interests' (Paddock and Kray, 2011, pp 232–5). It would seem that while men do well in ambiguous, competitive environments, women are very good negotiators when the beneficiary is someone other than themselves.

Kulik and Olekalns (2012) suggest that female negotiators obtain poorer individual outcomes than male negotiators because of the tendency 'to engage in more accommodating behaviours than men' (p 1390) and having a 'greater concern for relationships' (p 1390). According to Gelfand et al (2006), women seem to have an awareness that competitive behaviours will harm their 'social outcomes'. Women prefer to protect their social outcomes such as preserving relationships at the expense of economic outcomes, '[w]hereas men weight economic outcomes more heavily than social outcomes' (Kulik and Olekalns, 2011, p 1390), which coincides with the distributive approach of negotiation.

These studies suggest the existence of gender stereotypes in negotiation, where men see negotiation as a means of improving their own positions and interests (a more distributive approach), whereas women are more intent on protecting their relationship and social position or reputation (a more integrative approach.) Kolb and Coolidge (1991) suggest that women have

qualities that fit well with the integrative approach. This is a view also supported by Babcock and Laschever (2003) and Mazei et al (2015). In a meta-analysis of the available research on negotiation outcomes, Mazei et al (2015) concluded that the integrative approach is 'more congruent with the female gender role' (p 88). Men, on the other hand, would tend to be less effective or 'reduced in integrative as compared to distributive negotiations' (p 88). On the whole, according to these researchers men are 'credited with being more effective [negotiators] than women' in distributive negotiation contexts.

Women and men possess certain traits and behaviours (stereotypically or not) that provide them with different strengths and weaknesses in negotiation. As a result, in negotiation these traits can be an important element in how both the process itself and outcomes achieved come about. (Ways in which these issues can be addressed which draw on recent research in this field can be found in **Exercise 11** at the end of this chapter.)

The Cultural Factor

6.28 Another related and important psycho-social element of negotiation is culture. In his well-known book on conflict management, *The Mediation Process: Practical Strategies for Resolving Conflict*, Moore (1989) identified eight major variables that he believes influence problem solving and negotiation work:

- attitudes towards cooperation, competition and conflict;
- cultural views of problem solving and negotiation processes;
- cultural views of relationships;
- cultural impacts of language and communication;

- cultural views of time;
- cultural views of venues and space;
- cultural views of third parties in negotiation; and
- cultural impacts of larger social structures.

O'Donnell and Noble (1994), from their experience of working with Aboriginal and Torres Strait Islander people, use the cultural variables identified by Moore and usefully describe some of the key variables that may apply in these social contexts. The following is a summary of their experiences.

Conflict management in Aboriginal and Torres Strait Islander communities

Attitudes towards cooperation, competition and conflict

6.29 Attitudes towards cooperation, competition and conflict may differ, as:

- a high degree of visible competition and conflict among Aboriginal people is tolerated and, indeed, on many occasions required. This may be exhibited in meetings;
- there is a degree of ritual and servicing of process needs involved in conflict gestures at meetings;
- face-saving behaviour towards mediators or negotiators (especially from non-Aboriginal groups) may be in part a test of both their robustness and sensitivity;
- cooperation within family and between clan groups is required to fulfil

kinship obligations; this may become important in meetings.

Views of problem-solving or negotiation processes

6.30 Problem-solving and negotiation processes differ, as:

- parties are expected to develop a holistic relationship, and agreement or resolution should include an element of emotional reconciliation;
- beginnings of processes may require rituals, opening ceremonies, hand-shaking, story-telling, lengthy introductions and vision statements;
- endings of processes may require ceremonies, food, music, embraces, public statements and closing gestures. These confirm relationships and commitments;
- there should be recognition by all parties that relationships are important and that crises will come and go, moving from active to passive phases in predictable cycles;
- Aboriginal people strive to make decisions according to an ideal of consensus rather than by means of adversarial procedures accepted within non-Aboriginal associations.

Views of relationships

6.31 Relationships are crucial, as:

- how, or the way in which, connections and relationships are established in Aboriginal and Islander communities is very important;

- the building of relationships and preparation for negotiation and consultation takes time;

- other influences, including age, gender and perceived power of the parties and the mediators or negotiators, are important social indicators;
- the exercise of power and influence in relationships is very subtle; those with most to say and with the most up-front response may not be the most influential;
- significant emphasis is placed on establishing dominant and subordinate relationships; there are strong cultural norms regarding appropriate deferential behaviour;
- exclusion from, or part-inclusion in, a process may leave that process and its results open to repudiation by aggrieved parties;
- mediators, facilitators and negotiators from outside a community will need to identify local power brokers and gain their support for whatever process is planned.

Impacts of language and communication

6.32 The cultural impacts of language and communication are important because:

- the nature of relationships between people affects the use of language and the type and quality of communication in Aboriginal and Islander groups.

Views of time, venues and space

6.33 Aboriginal and Torres Strait Islander people view time in a different manner from those in Western societies:

- aboriginal people have a cyclical, not linear, approach to time;
- time is not a scarce commodity, nor can it be 'lost'; things will get done eventually;
- meetings can deal with several matters together, moving from general to the specific in discussions or back and forth from item to item;

- elders in a community may have competing agenda items which can be discussed simultaneously with some degree of acceptance and comfort by those present.

Regarding venues and space:

- outdoor meetings may be favoured; they allow for freedom of movement, people may come and go, observers may attend, and caucusing may occur freely during meetings.

Views of third parties in negotiations

6.34 Third parties in negotiations may be viewed differently:

- the neutrality of mediator or facilitator is important, but so is credibility and robustness;
- good references from prior dealings with Aboriginal and Torres Strait Islander people or good introductions are vitally important;
- establishing trust and respect with key stakeholders before negotiations and consultations is important.

Impacts of larger social structures

6.35 Larger social structures may impact the community, as:

- issues may be seen and considered in the context of wider social issues, such as native title legislation, state alcohol policy, and finance and budgeting issues;
- internal group or community issues and external issues may be discussed simultaneously.

Other analyses of the cultural factor

6.36 As the Australian economy has become more open to the international community, the need to negotiate with people from different cultures and backgrounds has become more evident. Not only do negotiators need good process skills, they also need a greater understanding of the ways in which different cultures, practices and customs influence the process. Lederach argues that understanding conflict requires an understanding of the culture of a group. He interprets culture to mean the shared knowledge schemes created by a set of people for perceiving, interpreting, expressing and responding to social realities around them (Lederach, 1995, pp 92–100). For example, Lederach identifies two third-party roles that exist in the United States and Somali, respectively: the formal mediator and the traditional elder (p 94).

6.37 The formal mediator, termed the 'outsider neutral', is generally not known to those involved, and he or she tries to act impartially. Traditional elders, whom he refers to as 'insider partials', are revered for their local knowledge and relationships, and are relied on for direction and advice, as well as for their skills in helping parties communicate with each other. Both these roles appear in a range of cultures. Societies can be described as 'high context' (such as traditional aboriginal groups) or 'low context' (such as modern European society) (Hall, 1976). As a rule, insider partials tend to be preferred in traditional, high-context settings, while outside neutrals are more familiar in low context settings. The following table highlights some of the differences between these two types of societies.

High context societies	Low context societies
• High level of assumed or commonly understood information; people have common experiences,	• Low levels of assumed information; people have diverse experiences,

backgrounds and cultural assumptions. • Need for words to explain oneself is low; language is generalised, implicit, nuanced, focus on agreements that build relationships, have more general outcomes.	backgrounds and cultural assumptions. • Need for words is high; language is detailed, explicit and direct. • High concentration on task; focus on specifics; explicit wording of agreements.

6.38 Much of the basis for research in this area is derived from Hofstede's pioneering work in this field (Hofstede, 1991). Although Hofstede's analysis has been extensively

criticised it is the most widely-used model of cross-cultural analysis (Ailon, 2008). Using data collected from IBM employees in 50 countries between 1963 and 1973, Hofstede identified a number of different dimensions of culture that vary between countries. Starting with four dimensions, these have now been expanded to six. These differences have an impact on negotiating and communication practices, and are described below:

- *Power distance index (PDI):* Power distance is the extent to which the less powerful members of organisations and institutions (like the family) accept and expect that power is distributed unequally. Individuals in a society that exhibit a high degree of power distance accept hierarchies in which everyone has a place without the need for justification. Societies with low power distance seek to have equal distribution of power. Cultures that endorse low power distance expect and accept power relations that are more consultative or democratic.

- *Individualism (IDV) vs collectivism:* This describes the degree to which individuals are integrated into groups. In individualistic societies, the stress is put on personal achievements and individual rights. People are expected to stand up for themselves and their immediate family, and to choose their own affiliations. In contrast, in collectivist societies, individuals act predominantly as members of a lifelong and cohesive group or organisation. People have large extended families, which are used as a protection in exchange for unquestioning loyalty.
- *Uncertainty avoidance index (UAI):* This describes a society's tolerance for uncertainty and ambiguity. It reflects the extent to which members of a society attempt to cope with anxiety by minimising uncertainty. People in cultures with high uncertainty avoidance tend to be more emotional. They try to minimise the occurrence of unknown and unusual circumstances and to proceed with careful changes, step-by-step planning and by implementing rules, laws and regulations. In contrast, low uncertainty avoidance cultures accept and feel comfortable in unstructured situations or changeable environments and try to have as few rules as possible. People in these cultures tend to be more pragmatic and they are more tolerant of change.
- *Masculinity (MAS) vs femininity:* This describes the distribution of emotional roles between genders. The values of masculine cultures are competitiveness, assertiveness, materialism, ambition and power, whereas feminine cultures place more value on relationships and quality of life. In masculine cultures, the differences between gender roles are more dramatic and less fluid than in feminine cultures where men and women have the same values emphasising modesty and caring. As a result of sexual taboos in many cultures, particularly masculine ones, and because of the obvious gender generalisations implied by Hofstede's terminology, this dimension is often renamed by users of Hofstede's work, for example, to 'Quantity of Life vs Quality of Life'.

- *Long-term orientation (LTO) vs short-term orientation:* Initially called 'Confucian dynamism', this describes societies' 'time horizon'. Long-term oriented societies attach more importance to the future. They foster pragmatic values oriented towards rewards, including persistence, saving and capacity for adaptation. In short-

term oriented societies, values promoted are related to the past and the present, including steadiness, respect for tradition, preservation of face, reciprocation and fulfilling social obligations.

- *Indulgence versus restraint (IVR):* This describes the extent to which members of a society try to control their desires and impulses. Whereas indulgent societies have a tendency to allow relatively free gratification of basic and natural human desires related to enjoying life and having fun, restrained societies have a conviction that such gratification needs to be curbed and regulated by strict norms.

The dimensions can have a variety of impacts on the way in which negotiations are conducted. For example, negotiators from individualistic cultures tend to have considerable autonomy, whereas those from collectivist cultures will often need to defer decisions until all concerned team or group members are informed and consulted. Negotiators from low-context cultures like to keep the tone and language of negotiation informal, whereas those from high-context cultures prefer more formality and would regard too much informality as disrespectful. What these dimensions indicate is the need to prepare thoroughly when negotiating in a different cultural context or with people from another culture. See further at **6.41**ff, 'The Process of Negotiation' and **Exercise 22** at the end of this chapter to explore this model further.

6.39 Robert March, an Australian, lived for 15 years in Japan, where he was a management consultant and Professor of International Business at a university in Tokyo. His book *The Japanese Negotiator: Subtlety and Strategy beyond Western Logic* (1988) provides a fascinating and instructive account of the role of culture and group norms in negotiation in Japan. He describes a range of strategies used by the Japanese which Western negotiators should understand in order to negotiate successfully in Japan. These are summarised in the box below. According to March, the negotiator dealing with the Japanese needs to understand these strategies and prepare for them. When conflict or complications occur, Westerners and Japanese will differ in their responses. As a general rule, March suggests that the Japanese:

- are less concerned with the pressure of deadlines;
- retreat into vague statements or silence;
- require frequent referrals to superiors;
- slow down as complications develop; and
- quickly feel threatened or victimised by aggressive tactics or stressful situations.

Polly Walker (1999), part Cherokee and an expert in intercultural conflict, maintains that the concept of the 'self' is crucial in managing negotiation and conflict. She maintains that Western culture, which underlies most academic research and professional practice in Australia and the United States, defines the individual as self-contained, a unit that can be legitimately analysed apart from other people. By contrast, many indigenous cultures define the individual as 'self-in-relation', consisting of a network of relationships, including extended family, community and ancestors, set in a time framework that includes past, present and future, and able to be analysed appropriately only by considering this network. These differences, according to Walker, have a significant impact on conflict resolution.

In particular, when the individual is defined as a distinct entity, only the presence of those individuals directly involved in a dispute are considered essential, as is often the case in Western models of dispute resolution. However, if an individual is defined as part of a particular set of interconnections, then those relationships will need to be addressed or included in the proceedings. Individuals from Western cultures might express the core question for conflict resolution as, 'How can I resolve this dispute in a way that meets my needs?', whereas individuals from indigenous cultures might consider the primary question to be, 'How can we resolve this dispute in a way that maintains or improves the interrelationships that sustain us?' (p 17). In addition, the meaning attached to 'knowledge' and the role of intra-group conflict may be quite different. Walker (p 18) states:

> The concept of a self-contained individual supports ways of knowing that are individualised and which seek to develop the most accurate version of the truth. In contrast, the concept of self-in-relation supports ways of knowing in which knowledge is a shared resource, knowledge is partial and negotiable and different people have particular knowledge to share, with competing versions of the truth being accepted. In many indigenous cultures, all individuals have their story and their truth, which is not negated by a group consensus. In indigenous conflict methodology, members of a dispute may be more interested in the way in which the dispute is handled so that harmony and stronger relationships can be restored, than they are in reaching an agreement.

These questions of identity not only shape the content and context of conflict dialogue, they also shape the location in which dispute resolution may take place. Whereas Western dispute resolution most often takes place in a room within a building, indigenous peoples often hold their conflict resolution proceedings in a natural setting, to maintain connection and relationship with the land. Indigenous practitioners have explained to me that when it is not possible to hold the proceedings in a natural setting, they seek other ways of maintaining connection with the land.

In many forms of indigenous dispute resolution, spirituality is also an integral part of the proceedings, which may include prayers and ritual.

The numbers game

Numbers can be crucial in cross-cultural negotiation. Bee Chen Goh (1999, p 19), an academic with an interest in Chinese negotiation strategies, gives some examples of the importance of numbers. In Chinese culture some numbers are considered taboo; for example, the number 13 is almost always regarded in a negative light. The number four is easily the most shunned number by the Chinese. This probably has nothing to do with the number itself — what is considered taboo is the fact that 'four', when pronounced in Mandarin, Cantonese or Hokkien, is homophonic with 'death'. The Chinese go to great lengths to dissociate themselves from virtually anything that has 'death' connotations. The number four is, therefore, regarded as highly inauspicious and unlucky. In commercial transactions, this cultural influence is illustrated by the following examples:

- Some years ago, Alfa Romeo launched its new model 164 in Taiwan. The company was shocked by the lack of buyer interest, which it discovered was due to the presence of 'four' in the model series number. It changed the model number to '168' and relaunched it. The car sold like hot cakes, not only in Taiwan but in Hong Kong as well.

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- A banker from the National Australia Bank recently pointed out that her Chinese clients declined term deposits at the bank when the account numbers had the number four in them. The bank avoided a potential conflict by responding in a culturally-sensitive way with new account numbers.
- Real estate agents have reported that it is a waste of time to show houses with a street number of four to potential Chinese buyers. To accommodate this, the Brisbane City Council announced in 1994 that new streets would not carry house numbers ending in 'four'.
- When entertaining Chinese clients at business meals, try not to seat them at a table number with a four in it, as they may feel uncomfortable. Such a negative mood is likely to make them psychologically more prone to conflicts.

  Conversely, the number eight is regarded as a very auspicious number. The real estate industry has found that houses with an eight in their street numbers appeal to Asian purchasers.

The foregoing examples illustrate how cultural beliefs can shape and influence our negotiations in subtle but real ways. It is prudent to be culturally literate in our globalised environment, and even more so in building business relationships and minimising disputes. After all, numbers do count.

Putting it 'on the table'

In America, putting something 'on the table' usually means to put it aside to be reviewed at another time. In Australia this usually means to enable the topic to be discussed now.

The pregnant pause

Some cultures, such as the Japanese, are very comfortable with long pauses in conversation, whereas Australians tend to feel uncomfortable with this, hence the description 'pregnant pause'. Silences can be misinterpreted as rejection or rudeness.

6.40 The implications of these differences in world view are of significance for cross-cultural dispute resolution. A structured, clearly-defined model of cross-cultural conflict resolution would not be flexible enough to respond to the complexity of inter-cultural differences, nor to intra-cultural differences related to gender, socioeconomic status, religion and education.

Cross-cultural issues are complex, multi-faceted and constantly changing, depending on the context and the individuals involved. An awareness of the parameters of difference, the themes and areas that need to be addressed in developing culturally-sensitive dispute resolution practices can be of assistance in planning the methodology of a particular cross-cultural dispute resolution.

In developing cross-cultural dispute resolution proceedings for conflicts between indigenous and non-indigenous people, the following questions, according to Walker (1998, p 18), would elicit information needed to develop culturally sensitive procedures:

- Who will be involved in the proceedings and what arrangements can be made for extended family or community?
- What settings will respect the world view of those involved?

- What opportunities can be included for individuals to express their spirituality within the process (for example, prayer, calling on the ancestors, or recognising land and traditional owners)?
- What ways of 'knowing' are people bringing to the process?

Bird, Mendenhall and colleagues (2010) suggest that there are three interrelated key ingredients of cross-cultural competence, sometimes referred to as the 'three-bucket model': perception management; relationship management; and self-management. They are summarised as follows:

- *Perception management* refers to an ability to deal with cultural differences and how you manage your own perceptions when confronted with differences. This aspect is mainly concerned with your cognitions.
- *Relationship management* refers to how the impact of cultural difference has on how relationships are conducted. This aspect is concerned mainly with your behaviour.
- *Self-management* refers to how your sense of self-identity and self-worth is impacted by confronting and uncomfortable contexts and how this impacts on your own feelings and attitudes. This aspect is mainly concerned with your feelings.

Being able to adjust to the practices of another culture is one of the most important attributes of those who may be engaged in cross-cultural activities or who are required to work in another country. When you are in another country or negotiating with people from another culture, careful observation, active listening and being appropriately inquisitive are key ingredients to being both culturally sensitive and cross-culturally competent.

The Process of Negotiation

6.41 The process of negotiation can be described in a variety of ways. Acuff (1997) describes six stages: orientation and fact-finding; resistance; reformulation of strategies; hard bargaining and decision-making; agreement; and follow-up. Raiffa (1982) describes four stages: preparation; opening gambits; the negotiation dance around offers and concessions; and 'end play', which revolves around agreement-making or the intervention of a third

party. The following is my approach to the process of negotiation. It takes into account many factors described as part of the distributive and integrative modes, and other elements relating to power and negotiation covered in this chapter.

The process of negotiation is like dancing. It takes practice, effort, skill, passable music and a reasonable dance floor to come together in one graceful flowing motion that is pleasing to the eye, the heart, the mind and the soul. When the dancers engage, the spectacle can be one of awkwardness with room for improvement, or one of sheer beauty and grace. The latter results from both partners knowing the steps, the beat of the music and the condition of the dance floor. The good thing about dancing is that one partner can usually teach the other. This depends, of course, on the other's willingness to learn and the realisation that he or she is dancing in the first place!

I have broken down the negotiation process into five discrete phases as shown below. This division into phases is, in a sense, somewhat arbitrary as there is usually

much overlap between the various phases and you cannot guarantee that each phase will happen in the sequence shown, if at all. However, dividing the process like this helps to conceptualise and understand the various components.

	Phases of the negotiation process
Phase 1	*Preparation* — choosing the dance floor and the music
Phase 2	*Process and agenda construction* — choosing the dance

Phase 3	*Exploring needs and discovering interests* — dancing
Phase 4	*Intensive negotiation* — the tango beat
Phase 5	*Agreement-making* — the curtsy and the music break

Phase 1: Preparation — choosing the dance floor and the music

6.42 Preparation is the beginning point of a negotiation, and if you are not properly prepared you are entering a blind alley. Even in the simplest of negotiations you may run into difficulties if you do not prepare. For example, buying a ticket on a bus can sometimes be a difficult experience if you have not checked beforehand that you have enough money to pay for the fare. If in a negotiation you find yourself unprepared exercise caution. You could suggest a break or simply state that you have not had time to think about the issues or gather all the facts, and would like to suggest a time to meet again (within a reasonable period of time). Research suggests that successful or effective negotiation depends on preparation (Fells, 1996; Rich, 2011). Rich claims that 'effective negotiation is 80 percent preparation. Fail to prepare and you prepare to fail (p 4). Fells takes the idea a step further and describes negotiation as 'a contest of preparation' (p 50). Thorough preparation enables the parties to establish target outcomes, understand the alternatives they have and predict the same for the opposing party (Peterson and Shepherd, 2011).

There is some tentative research indicating that women and men approach negotiation preparation differently. According to Craver (2002), men and women adopt different means of preparing for negotiation. This research indicated that in relative terms men tend to 'minimally prepare' and 'wing it' (p 6), while women are more likely to make more effort to be prepared. Craver (2002) concludes that this is because 'males tend to exude more confidence than women in performance-oriented settings' while women on the other hand 'continue to express doubts about their own capabilities' (p 6).

According to Murray (2014), women are more concerned with self-image and dedicate extra time to preparing because they do not want to look 'foolish'. Further, according to this research males generally view the negotiation process as 'freewheeling' and prefer to take a more spontaneous approach. See further the commentary at **3.27** on gender issues in negotiation.

The table below outlines Peterson and Lucas' (2001) 'Four-Phase Pre-Negotiation Framework' to facilitate the negotiation process. Refer to **Exercise 23** at the end of this chapter to see how this model may apply in practice.

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Phase 1	*Intelligence gathering*	Collecting, processing, analysing and evaluating available data concerning the other party and relevant environmental factors.
Phase 2	*Formulation*	Developing goals and specific objectives, and setting the parameters for each issue to be negotiated.
Phase 3	*Strategy development*	Integrating a party's goals and action sequences into a cohesive whole.
Phase 4	*Preparation*	Rehearsing verbal communication, arranging/creating support materials, and attending to logistical concerns.

(Adapted from Peterson and Lucas, 2001.)

There are at least seven other important and related aspects to preparation that may be helpful to keep in mind.

Making assumptions, developing frames and setting goals

6.43 It cannot be assumed that the other party will share your enthusiasm for negotiation as a strategy. Negotiation is only one of a number of possible strategies by which people manage conflict. Further, another person may agree to an offer to negotiate but then be willing only to listen to the complaint or enter into a fact-finding exercise or discussion, without actually wanting to go further. Alternatively, a person who makes the offer to negotiate may have something quite different in mind, simply because he or she does not understand what negotiation means or because of an ulterior motive. Also, avoidance and 'lumping it' or putting up with conflict can be powerfully attractive to many participants in conflict, as we noted in **Chapter 1**. To complicate matters further, your own reservations about the other person's desire to negotiate may itself impede negotiations.

It is preferable at the initial stages of any conflict management strategy to be open to the range of possibilities, of which negotiation may be one. A refusal to negotiate may sometimes be overturned by a simple reframing of the issue in dispute. Framing the issues in a way that identifies potential common ground can be useful. At this point it is also important how the problem is framed. A 'frame' is the conception of the problem to be managed. The degree to which each party's frame overlaps or corresponds with the other party's will indicate the level of understanding and ability to cooperate on common goals. If this overlap does not occur then it is unlikely that a successful outcome will be achieved. By understanding what frame each party is operating from, negotiators may be able to shift the conversation and develop common definitions. The way in which parties define the problem can shape the rest of the preparation. By framing the negotiation in a positive way, to explore common ground, a party can set a collaborative tone, which will facilitate ongoing negotiation (Bazerman, 1992). Parties can do this by broadening their perspective so as to encourage the exchange of options. For example, a party may say something like, 'I have some ideas about what may

work that would be good to talk about. I'm keen to hear what your ideas may be so that we can move forward.' Also, a good frame can allow the other party to 'buy in' to the process, to minimise the resistance that may be encountered. For instance,

a proposal to set up a new workplace rostering system may be introduced as being a more equitable arrangement to enable others to spend more quality time on their key tasks. This framing of the dispute also becomes important in agenda construction: see Phase 2 below. To examine how important this aspect of the negotiation can be go to **Exercise 17** at the end of this chapter.

It is also useful at this time to plan some general goals you want to achieve through negotiation — if necessary enlist the aid of outside experts, consultants or sources.

Positions and interests and developing targets

6.44 Without pre-empting Phase 2 of the negotiating process (issues and agenda-setting), it is nevertheless a good idea to think about your position in the conflict and your underlying interests. Do the same for the other party to the negotiation. Listing your positions and interests and those of the other party ensures that you go into the conflict well prepared

Another important part of preparation is to have your BATNA ready. As discussed previously, your BATNA enables you to keep clearly in mind what you can achieve as an alternative to the negotiation. The strength of your BATNA will influence the way in which you negotiate. It is also reasonable to have both a bottom line (your 'reservation point') and a level set somewhere above it (your 'target level') for negotiation. Note, these may shift during negotiation, especially your target level. For example, if you are negotiating to sell a house, your bottom line might be a sale price of $750,000, even though

you have advertised it for $800,000. Your 'target level' may be $775,000 which, if offered, you would consider quickly and reasonably. Of course, whether you go to your bottom line and/or your target level may change during the negotiation, for example, if you are provided with more information during the negotiation that enables a reassessment of the situation. You may, for example, find out that equivalent properties are selling for $900,000 only two blocks away.

It is useful for negotiators to define targets with respect to the key issues on the agenda. Parties should try to figure out the optimum outcome they can expect, what counts as a fair deal, and what is a minimally acceptable deal. They should also be aware of the strongest points in their position and in the other side's position. This enables parties to become aware of the range of possible outcomes — their Zone of Possible Agreement (ZOPA) — and to be flexible in what they will accept. It also improves the likelihood that parties will arrive at a mutually satisfactory outcome.

In workshops on conflict I have sometimes used a simple device to encourage the participants to evaluate a recent or current conflict: paricipants list on a piece of paper the 'good' and 'bad' things about the conflict and what needs to be done, including changes to their own behaviour, to improve the situation.

Edward de Bono, in his book *Conflicts: A Better Way to Resolve Them* (1986, pp 27–35), suggests a similar exercise which he terms 'PMI' (plus, minus and interesting). This exercise asks the negotiator (De Bono uses the term 'thinker') to look at the positive (the good points), the negative (the bad points) and the interesting (points that may be either good or bad) aspects of the situation and write them down. These types of exercises can be useful in your preparation and during negotiation as well. See also the exercises at the end of the chapter.

Designing a way through conflict

6.45 De Bono (1986, pp 86–91) suggests a number of ways to creatively 'design' a way through conflict:

- *Sub-elements:* By breaking down the ingredients of conflict into its sub-elements (values, objectives, positions, personalities etc), a design for an agreement can be formulated. The sub-elements act as building blocks for any agreement.
- *Central conflict point:* In De Bono's view, the conflict often focuses on a 'convenient perceptual crystallisation of the conflict', which has become the central conflict point, and not the basic cause. Sometimes, therefore, it is better to work around this central point so that eventually it loses its relevance or potency.
- *Working backwards:* Using this tactic the negotiators start at the end point and see what alternative circumstances might get them there, then do the same for each of these circumstances. The problem with this approach is knowing what the end point is. If we are being creative, then the end point is logically not known. If the end point is known, then the solution may be merely routine. This paradox relates to the next approach.
- *Dream solution:* This can provide the end point for the 'working backwards' approach. By creating a 'dream solution' or ideal we can be creatively illogical, which helps us create agreements now! The dream solution, like most planning schemes, does not have to be specific. In some situations it may be preferable to be vague. For example, in the region where I live the local planning authority has begun a process of planning to prepare local authorities and communities for the future. Unfortunately, the documents produced so far have been disappointing in the sense that they provide a mass of facts from which certain predictions are made. Otherwise, they do not provide much enlightenment about what our region may be like in 30 years' time (the projected time under consideration). In this situation it

would be worthwhile to include a 'vision' of what our region will be like at that time and then to think about what we need to do to achieve it.

- '*If' clauses:* Questions concerned with speculative change, such as 'If x and y were to happen …' or 'What if this were the position …' can enhance clarification of the conflict and solution design.
- *Blocks, taboos and assumptions:* In De Bono's view, tactics that indicate that certain things are 'not negotiable' are not acceptable, because accepting such limitations makes design impossible. However, this view may ignore certain variables in the negotiating arena, such as power, and I would not be as dogmatic in my response to such attempts to limit the negotiation.
- *Up or down design:* Using the example of a sculptor creating a figure, De Bono suggests that we can work 'down' from a broad concept, filling in detail as we go. Alternatively, we can work 'up', adding bits and pieces to make a whole. Either way is okay.
- *The core principle:* The negotiator fashions a 'core' principle around which the design is built. For example, in our consideration of my local region's future, the core principle might be: 'Our 30-year plan must include economic growth which has as

little negative impact as possible on the environment'. I have used core principles often in public issue disputes where those parts of the opposing positions that overlap and agree can be put into a broad 'synoptic' or 'mission' statement. This enables the parties to see the commonalities between them.

Timing

6.46 Choosing the time for negotiation may be crucial. This does not

necessarily mean that only those instances when there is an ample amount of time available are the right time. Sometimes it may be preferable to choose a time when there is not much time available. This may enhance the prospects of a negotiated agreement. Zartman and Berman (1982) have argued that parties are unlikely to enter talks before a situation is 'ripe for a solution', a condition that occurs when the parties realise that the status quo 'is a lose–lose situation, not a win–lose situation'. However, the authors maintain that ripeness, while necessary, is not a sufficient condition for successful negotiations. For this, the presence of what Zartman and Berman call a 'Mutually Hurting Stalemate' is also required, a condition of intolerable 'hurting' or mutual loss (Zartman and Berman, 1982).

During the negotiation, timing can be crucial in terms of making the 'right move' at the appropriate moment. A sense of timing may also lead you to judiciously call a break in proceedings to allow yourself or the other side time to evaluate what is happening or to think of new strategies.

Another consideration is the stage at which the conflict is. This may affect the strategy you adopt. As previously mentioned, for negotiation to commence, both parties must perceive the possibility that an agreement can be reached and that this is preferable to no agreement at all. However, you need to be aware of any reluctance of the other party to negotiate, and not try to force a negotiation prematurely. Your initial work on the conflict, in fact, may be directed to creating a context or atmosphere where negotiation becomes a realistic option.

The environment

6.47 The location and physical characteristics of the negotiation session should always be considered. Ask yourself the following questions:

- What will facilitate good communication in this situation?
- What sort of facilities do I need?
- On whose 'home ground' will the conflict be and is this likely to be

important?

- Would ‘neutral ground’ be better?

Sometimes you might be more comfortable and/or assertive on your home ground, or you may find that it is diplomatic to remove yourself to the other’s territory. Whatever decision you make, environment is an important aspect of negotiation preparation.

The presence of an audience can have a number of different effects although these vary from situation to situation. An audience at a negotiation session, just as at a football match, can improve the performance or, alternatively, upset the concentration of the participants. Audience members can pressure their particular negotiator to act in their

perceived interests and heighten the negotiator’s sense of accountability. They can also affect the way in which a negotiator acts because of his or her necessity to maintain face. This may increase the negotiator’s militancy, aggressiveness or propensity to retaliate. Given these considerations, it is prudent to consider the likely or intended presence of an audience and the effect it may have on the negotiating process.

The negotiating conventions and preparing a list of issues in advance

6.48 The negotiating conventions govern the formality of proceedings and the way in which ‘rules’ are formulated to guide the negotiators. These conventions depend on the nature of the issue and the parties involved; for example, a negotiation between a husband and wife would usually be quite different from that between a union and employer over an industrial award.

Rules of conduct may develop spontaneously as the parties negotiate or they may constitute an elaborate printed set of protocols established before the negotiation begins. Whatever the degree of formality required, it is a good idea to consider the issue of rules before you enter the negotiation. The clarification of rules beforehand can be reassuring for the other party, especially if there is a level of distrust. It also allows the parties to feel confident in negotiating the issues without needing to go off on tangents concerning the process to be adopted.

If you or the other party represent a constituency, as is the case with union negotiators or the head of a work group, then it is likely that the proceedings will be more formal and rule-bound which, in many instances, symbolises or represents the negotiator's accountability.

It may be useful for the parties to exchange and negotiate a list of issues to be discussed in advance. Sometimes the parties can exchange a list of issues that they agree upon, and this can be important in both identifying common ground and ensuring that there is a further basis for collaborative effort. This prior consultation can assist parties to prepare, and to agree on the agenda of issues to be discussed, as well as the location of the negotiations, the time and duration of the sessions, the parties to be involved in the negotiations, and techniques to pursue if negotiation fails. Negotiators can also agree on principles that will guide the drafting of a settlement and the procedures to be used in negotiations (Saunders, 1991). Discussions about these procedural issues can be crucial to the success of substantive negotiations.

Practice and role-playing

6.49 Role-playing and practising your negotiation skills with another person in the other party's role may be helpful before a negotiation, as may discussing the issues and the likely tactics of your opponent. In particular, you can focus on tone and non-verbal behaviours that you may want to adopt and respond to as part of your preparations.

The characteristics of the participants

6.50 There are a number of personal and group characteristics that may be important variables in negotiation preparation (Bisno, 1988, pp 107–8). These are summarised below.

Important dynamics in negotiation preparation

- Personality factors are often most important in the early part of a negotiation.
- Negotiators are more likely to be 'themselves' if their constituencies are not too dominant.
- Power-oriented, concrete-minded negotiators are more likely to be competitive and interpret concessions as a sign of weakness.
- Competitive people tend to be insensitive to interpersonal cues.
- Persons in low-status or low-power positions tend to be more responsive to interpersonal cues.
- Persons who are flexible in their ethical judgments tend to be more cooperative than those with rigid views.
- Men may tend to orient themselves to 'impersonal' tasks based on optimising gains while women may be more reactive to interpersonal cues.
- Persons who show marked deference towards higher-status persons can often behave exploitatively towards persons of lower status.

Phase 2: Process and agenda construction — choosing the dance

6.51 Establishing the ground rules for the negotiation and framing the issues have already been noted as part of the preparation process. It is often important, even in relatively informal settings, to lay out some process guidelines; for example, 'Mary, I wanted to meet with you to discuss the issues related to the new stock rollout. To do this I would like to hear your

views about what the issues may be and then share some of my own, before going on to a discussion of them together so we can get a better understanding before coming to some agreement/s about ways to proceed'. You can also discuss the time that may be necessary to do this and other matters relating to process.

6.52 The listing and discussion of a list of issues may be useful to guide or structure the interchange. In simple and informal negotiations this is not necessary; however, in many situations setting an agenda is useful and naturally overlaps with and flows from the preparation you have already undertaken in Phase 1. The skills of questioning, reflecting and summarising are very important in this phase.

There are a number of key objectives in agenda construction. These include:

- providing a visible structure to the session;
- reframing and mutualising the dispute, its content and its context into less divisive and provocative terms;
- giving legitimacy and validity to each party's topics and concerns;
- objectifying the dispute, to enable the parties to 'separate' or distance themselves from the issues; and
- reducing the dispute to manageable proportions.

If there is a group involved in the negotiation, the brainstorming technique may also be useful. Brainstorming usually consists of the participants telling a 'note-taker' of the issues as they see them. This is done as spontaneously as possible and without

initial regard for the priority of the issues. After the participants have

exhausted the number of issues they put them in order of importance or priority. Some issues may be discarded as unimportant or deferred to another time.

Phase 2 is the time when the underlying interests of the parties can be explored, although in the distributive mode of negotiation positions would normally be stressed.

Agenda construction is sometimes a difficult process. Not only will divergent interests be revealed, but there may be real concern about including some issues on the agenda, or about defining them. Priority on the agenda may be another thorny point.

Do not assume that once an issue is on the agenda it has been adequately defined. It may require further elaboration and clarification as the negotiation proceeds. The actual definition of the issues can be of crucial importance to a negotiation. Your aim should be not only to have your definition accepted; it is important to 'vet' each issue as to its meaning and, where possible, redefine the issues as appropriate. The more powerful party or, often, the better negotiator is the one likely to define the issues, so this is an area where disadvantaged or weaker parties can start to assert their own interests and power. This also applies to the ordering of issues.

Divide 'big' issues into a number of sequential parts that can then be dealt with separately. I have been involved in complex negotiations that have gone on for many days. The agenda for these types of negotiations can be complex and lengthy, amounting to many items. I have always found it useful to break up the list of issues under five or six separate headings, with each item listed as a sub-heading underneath. In this way, the parties can get a much clearer picture of the negotiation parameters and not be overwhelmed by the sheer weight of the number of issues. This also ensures that issues do not get left out or forgotten.

Once the parties have determined the relative importance of the issues, they need to decide the order in which issues should be discussed. Many

sequencing options are possible: going from easy to hard, hard to easy, or tackling everything together. Different situations suggest different answers to that question, and different negotiators and mediators prefer one approach to the others (Weiss and Rosenberg, 2003). Sometimes it is preferable to start with a less important issue or one that is easier for the participants to handle. Early success in the negotiation may then go into the more difficult issues. Sometimes it is an advantage to break from concentrating on the one big issue, divide it into sub-issues or add a number of other relevant issues. If there is a group of people negotiating an issue, it may be useful to break up into small groups to work on particular issues.

Remember to be flexible in this phase, as in any other. Be prepared to 'move' issues around or even drop then as negotiation proceeds, if this will ultimately help. Negotiators must be aware of their goals and positions and must identify the concerns, desires and fears that underlie their substantive goals. They must determine which issues are most important, as well as whether the various issues are linked or separate. In addition, negotiators should be aware of the underlying interests and goals of the other side. Because the linkages between parties' goals often define the issue to be settled, these goals must be determined carefully. If one party wants more than the other party is capable or willing to give, the disputants must either change their goals or end the negotiation.

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Sequencing tactics

There are a number of tactics associated with sequencing including:

- **Fractionation (or factionalisation)** — dividing difficult issues into smaller parts in order to keep a situation from escalating.
- **Holisticism** — addressing issues in their entirety without breaking them into smaller elements. This can be done particularly with issues that do not lend themselves to being broken down easily.

- **Irrevocable commitments** — the process of making a concession that is virtually impossible to rescind. This is used to try to positively entrap the parties in the process, making it very difficult for them to leave the table; for example, 'I will only do this if you give me that'.
- **Linking** — the process of conjoining one issue with another for the purposes of settling two or more issues, sometimes also called 'log-rolling'.
- **Nothing is agreed until everything is agreed** — a philosophical approach that encourages parties to feel free to generate all sorts of ideas, and not be bound by any one of them until all the issues in question are agreed to.
- **Packaging** — the process of negotiating and linking multiple issues together for the purposes of reaching a comprehensive agreement.
- **Salami slicing** — the process of taking the whole conflict or a single issue in the conflict, viewing it as a 'salami', and slicing off pieces until one has dealt with the entire problem; this is usually accomplished by focusing on the easier elements of a specific problem first.

(Adapted from Weiss and Rosenberg, 2003)

Phase 3: Exploring needs and discovering interests — dancing

Discovering interests

6.53 In integrative negotiation the usual emphasis is on discovering the interests of the parties. In 1981 Fisher and Ury maintained that interests define the problem, not the positions that parties adopt. This reframing of an old idea marked a fundamental shift in the way in which negotiation was viewed in the public imagination and in public discourse. As we saw earlier, Fisher and Ury define interests as those things that motivate people (the 'why'). Positions are the 'what' — the concrete expressions of their motivations (Fisher and Ury, 1981, p 42). An important part of their analysis is the assertion that 'behind opposed positions lie shared and compatible interests, as well as conflicting ones' (p 43). In their view, the assumption that opposed positions means opposed interests does not follow. They illustrate this point by pointing out the shared interests that a landlord and tenant may have.

A central element of this approach is that the most powerful interests, and therefore those that tend to motivate people, are those that involve basic human needs (pp 49–50). Fisher and Ury list these as: security, economic wellbeing, a sense of belonging, recognition and control over one's life. Recognising and identifying these basic human needs as part of the 'interests' in negotiation are often overlooked but may be rewarding.

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How to identify interests

6.54 Identifying interests is one of the essential skills of the integrative approach. There are several basic ways of going about this. First, put yourself in the shoes of the other party and try to imagine what the issues look or feel like from their point of view. You can do this by saying things like, 'So from your point of view, you think that …'. Or you can ask questions, which demonstrate that you want to understand, to visualise or even feel the other party's experience. Second, ask 'why' questions about each position that is put forward. Third, consider the reasons why the other side has not made a decision on the lines you would like. Fourth, analyse the short-term and long-term consequences of agreeing to the type of decision that you would want made.

Concentrating on interests in the negotiation process

Make your interests come alive	Be concrete in describing your issues and invite the other party to respond to them in a critical way. Ask the other party to stand in your shoes and look at the problem from your point of view.
Acknowledge the other party's	If you want the other side to appreciate your interests begin by appreciating theirs and by including their interests as part of the problem.

interests	
Put the problem before the answer	Make sure you put forward your interests, and your reasoning behind them, before the answer that you may already have in mind, or run the risk of not being listened to.
Look forward, not back	Direct the negotiation towards where you are going rather than where you have been; that is, what can be done rather than what has happened.
Be concrete but flexible	Ask yourself the question: 'What would I like the other person to go along with?'. This will convert your interests into concrete options and avoid the use of a positional statement. Illustrate the interests and think in terms of a number of differing options rather than just one. For example, make a statement like: 'Three hundred thousand dollars a year would be the kind of figure that would satisfy my client's interest in receiving the salary she feels she is worth. Something in the order of a five-year contract should meet her need for job security'.
Be hard on the problem, soft on the people	Negotiate hard for your interests, but do not attack the other party. Show them that you are attacking the problem, not them. Give the other party positive support while attacking the problem.

(Adapted from Fisher and Ury, 1981, pp 51–7)

Managing the 'first offer' trap: Creating positive frames

6.55 In both distributive and integrative negotiation, but more so in distributive negotiation, opening demands or offers are often exaggerated, to

allow a party 'leverage'. This can be the point where the negotiation quickly breaks down because the demand is so high that it acts as a disincentive.

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The initial demands and offers are important for another two reasons. First, they create an initial impression of your sincerity and the reality of your position. Tone of voice and body language are important variables. Second, the party who makes an initial demand or offer can often 'anchor' the negotiations by altering the other party's perception of the issue. In other words, the initial demand can be the starting or central point around which the negotiation will proceed. (For an appreciation of how powerful this part of the process can be go to **Exercise 17** at the end of this chapter, 'Aspirations, anchoring, Pareto points and negotiation results: Managing the "first offer" trap'.) However, this may be a disadvantage if the demand or offer is too low or too high. If caught in a situation where the opening demand or offer from the other side seems too high, end the negotiations until a more reasonable offer is made or make a counter-offer that will focus the negotiation upon a midpoint.

Those using an integrative style of negotiation would, of course, 'look behind' the positions advanced to ascertain the interests of the other side. They would reframe the demands so as to invite an exploration of the issues and the respective interests of the parties.

Phase 4: Intensive negotiation — the tango beat

6.56 Phase 4 is a continuation of Phase 3 but is significantly more intense. It demands the utmost of negotiators in stamina and patience. However, it is

also the time when negotiators can be most creative in their approach, especially if using the integrative approach.

Managing resistance and moving through impasse: Further exploring interests

6.57 Sensitive questioning, paraphrasing and summarising can achieve further exploration of the parties' interests. In following an integrative approach it is important to continue to be firm but positive, and flexible, with an emphasis on reconciling interests rather than positions. You should continually examine the areas in which disagreement exists, but note the areas of agreement. Some areas of discussion may be 'discarded' as irrelevant.

Use objective criteria to emphasise a standard of fairness and the merits of the arguments. Invent new options using the brainstorming technique. The following inhibit the generation of options (Fisher and Ury, 1981, pp 59–62):

- premature judgment of the issues, interests, etc;
- seeking single answers to issues which may be much more complex;
- 'fixed pie' assumptions that assume there are only so many options to go around; and
- the type of thinking that is best summarised in the phrase, 'solving their problem is the problem'; that is, not sharing or taking responsibility for the problem.

'Broadening procedures' may be particularly useful in this phase. These involve moving from specific assertions, queries, demands and so on to a more generalised view of the situation. For example, a response to a suggestion, 'I think we should do X', could be, 'X is a positive suggestion and is one I would describe as being innovative. Are there any other innovative strategies we could use?'. This is both a positive reply and one that broadens the discussion to include innovative strategies.

The distributive mode usually goes through an oscillating round of offers, demands, compromises and concessions. There may be a process of increasing concessions; that is, the gap between the respective offers becomes progressively smaller, indicating to the parties that the limit is being approached. This process is characterised by those elements of the distributive process already noted: commitment tactics; threats and promises; bargaining; power arguments; normative or value arguments; and bluffs or creating illusions.

It is in Phase 4 that the possibility of emotions rising and 'boiling over' increases. The negotiator thus needs to be not only firm but flexible, and to listen to the other party. It is also during this phase that the overlap between the two major modes of negotiation — distributive and integrative — becomes most apparent.

In any negotiation you must plan for resistance. Both parties will have reservations about the other's ideas and will usually take some time to either accept or accommodate them. Sometimes, however, this initial resistance will develop into something more usually termed impasse or 'getting stuck'. Impasse will sometimes occur when both or one of the parties refuse/s to negotiate at all or on certain points in the negotiation. Impasse can lead to an acute sense of frustration as well as threaten the viability of the negotiation itself. Impasse occurs for a number of reasons, including (Wade, 1994):

- *As a negotiating tactic:* Impasse can be a method of signalling to the other side the seriousness of their position. It can be seen as providing a credible signal that a party's position is genuine and not merely an ambit claim.
- *Self-serving bias:* Impasse may also arise if parties suffer from continuing self-serving bias. As we have seen, many disputes arise in situations where facts are able to be interpreted in multiple ways. In conflicts, parties tend to interpret the facts to their own benefit and may be unable to accept the

opposing party's claim as reasonable. They may believe the other side is either bluffing or acting unfairly and deserves to be 'punished'. This can rapidly lead to a point of impasse.

- *Suicidal embrace:* This can take two forms. First, parties can sometimes be so enmeshed in their conflict that they lose perspective on having a relationship without it. They therefore heavily resist any attempts to move them away from this position. I see this time and again in family and workplace conflicts. Alternatively, they take the attitude that, 'If I'm going down I'm taking her with me!'. This is a self-destructive tactic of revenge and vindication.
- *The last straw:* Sometimes negotiations have gone on for so long that one or both parties feel that they have given so much already that they will not embrace any more changes or compromises. They refuse to give anything more.
- *Lack of trust:* Parties can continue to feel a sense of distrust and guardedness even when a negotiation is going well. They can also feel 'tricked' at times by the other side or by the process of the negotiation itself, which can increase the sense of distrust. This will result in some resistance and in some cases cause an impasse.
- *Unfinished emotional business:* The psychological literature is full of material about how to deal with unfinished emotional business. In negotiation, the parties can still

feel, among other things, anger, frustration and fear of the other for a long time leading up to the negotiation. When these feelings are strong they can block the move towards compromise, understanding and change.

- *Keeping something up our sleeve:* Parties will often reserve their final

position or offers during a negotiation. If the negotiation goes well then the 'reserve position' will often reveal itself. Often, however, the preferred tactic is to keep this reserve as something to reassure oneself that one will have something to 'fall back on'. This tactic can unfortunately lead to an impasse.

- *Symbolic:* Parties often enjoy the symbolism of appearing steadfast or resilient in the face of demands and suggestions from the other side they see as threatening or hostile. This attitude can lead to a form of resistance that leads to impasse. This type of resistance can be important in conflicts that take place in intense social environments. Lawyers often both embody and employ this tactic.

Managing impasse: Some ideas

Impasse is a common element in the progression of a conflict. During negotiation the parties will often get 'jammed' or 'stuck' and feel a sense of frustration about what is occurring. The following strategies are often used and may be useful at these times:

- **Verbal appeals:** One party appeals to the other, usually based on equity or fairness, to arrive at some resolution.
- **Split the difference:** One party makes an offer and the other party makes an offer; then one offers to 'split the difference' — to agree on a price or thing that is somewhere between what each party wants. Splitting the difference — agreeing to an option that is half-way between two positions — appears to be fair, and hence can be difficult to refuse.
- **Take a break:** Many conflicts are settled because parties have 'slept on it' or paused to allow the parties to remove themselves from the intensity of the encounter. On returning, there is sometimes new energy and new perspectives that are applied to move the negotiation on.
- **Third party:** It is often open for the parties to consider employing a mediator, conciliator, expert appraiser, investigator or arbitrator to help them settle differences. In fact, these types of third parties are usually brought in when negotiation has reached an impasse. Sometimes, of course, the third party can be a lawyer who will raise the potential costs of not settling considerably.
- **Fractionating or sub-division:** Like de Bono's sub-elements mentioned above, this tactic consists of breaking an issue into smaller parts so that each can be dealt with in turn. If possible, start with an easier issue that is also a shared concern. The issue probably feels overwhelming in its current form but by breaking it into more manageable parts, a sense of confidence can be built.
- **Add-on offer:** Sometimes it may be useful to add an incentive for the other party to allow them to consider or accept an offer or term of an agreement. For example, a staff

member may be unwilling to take on a new position, but a new office or tax incentive may be enough for them to agree.

- **Transfer benefit to third party:** Sometimes, rather than haggling over an amount of money, for instance, the parties can agree to pass this on to the third parties present. For example, the parties may be in a difficult negotiation assisted by their lawyers and

others. Imagine that the parties have narrowed their differences in money terms to $50,000 but are having difficulty in narrowing this gap. A party may, in this instance, propose that this amount be used to pay the parties' respective legal representatives or at least a proportion of their fees. This can sometimes be enough to refocus the parties and move them past this point of resistance.

- **Games of chance:** Many differences are settled by 'tossing a coin'. It is quite possible to do this in formal as well as informal negotiations, including mediation. I have personally used it in questions of property division in family disputes. It has an inherent element of fairness as well as chance.
- **The fear of being entrapped by the first offer:** Sometimes known as the 'incremental fear offer', this occurs where one or both parties feel that if they make the first offer the other party will then use this as the basis for a further offer. For example, a party may say, 'I will give you $1 million dollars for the property', to which the other party may reply, 'I will take $1.1 million'. This is common in many negotiations and can be moderated, although not overcome, by one party naming the issue. For example, 'Both of us may feel hesitant in making an offer because we may think that this will lock us into a position which we cannot retreat from and which will be used to then leverage a better position. My view is that we can deal with this if we talk about a zone of agreement. Let's say $900,000 to $1.4 million? Does this make sense to you?'. As previously mentioned (see **6.5**), these strategies have been termed 'inoculation theory' (McGuire, 1961); that is, they anticipate the objections that may be made and attempt to defuse them before they arise.
- **Auction:** In some situations it may be possible and useful to hold an auction for an object or thing that both people want. There are variations, including that the auction can have open or secret bids, or it can be a 'Dutch auction' in which an initially high price is lowered until the first bid, which secures the deal. A normal auction is one in which bidders offer increasing prices until nobody else makes an offer.
- **Select a list:** This is often useful in family property matters. I have used it a number of times in estate disputes where there is a large number of property items in dispute. By first making a list of all items and then arranging for each party to select those things they may want and exchanging this information they may be able to jointly negotiate their way through an impasse.
- **One-text procedure:** This can be useful in both mediations and negotiations. The 'one text' starts as a rough draft of an agreement which each party is asked to critique. The text is then repeatedly updated and revised in light of the parties' criticisms.

- **Blind offers:** Often used in online dispute resolution. Many disputes are reduced to a claim by one party of liability for damage, and/or an acceptance, or attribution, of some responsibility by the party against whom a claim is made. This will usually lead to an iterative process of demand and offers between the parties. In this situation the use of blind offers can be very useful. The process works when the parties agree to formalise the process by each putting in offers to the other, usually in writing, without knowing the contents of them. The demands and offers are therefore 'blind' because each party is unaware of them, and a third party neutral is usually therefore engaged to manage the process. Generally, the process is automatically ended, when conducted through an online process, if the differences between offer and demand become small, typically 10 per cent. The parties are made aware of the 'settlement rules' beforehand, and due to the 'blind' nature of the offer/demand structure no bargaining power or positions are

  lost in this process; that is, if unsatisfied, participants can try another avenue without having shown their hand to the opposing side.
- **Treat the threat as an option:** If a party threatens to walk out or makes a commitment threat as a result of the impasse, treat it as an option. Say something like, 'That is an option you have … what other options do you have at this time?'
- **Reframe the issue:** Sometimes, shifting from substantive issues to procedural or psychological concerns may help. This may generate new energy to revisit the substantive issue, or put it into proper perspective.
- **Stay flexible:** Generate new options. Affirm the value of continuing to explore better responses when people feel trapped by their thinking and their responses.
- **Validate and affirm areas of agreement:** Go back to any agreements that may have been made. These are frequently overlooked, as parties often focus only on areas of disagreement.
- **Clarify criteria:** On what basis are we evaluating the various options before us? Can we agree on criteria or principles that are 'mutually acceptable' to all parties, even if not fully shared by all?
- **Reaffirm ground rules:** Again, these are frequently overlooked at times of impasse, to our collective detriment.
- **Explore alternatives:** Going back to our BATNA and WATNA (worst alternative to a negotiated agreement) may allow for an important reality check before determining not to negotiate further.

For further exploration on the topic of managing resistance and moving through impasse, see **Chapter 7**.

Phase 5: Agreement-making — the curtsy and the music break

6.58 Agreement-making is concluded between the parties to a negotiation because of:

- the recognition of a satisfactory result;
- the end of the process of generating options;
- external pressures such as time, third-party pressure; and
- exhaustion/mental fatigue.

Whatever the factors leading to agreement, it is desirable to formalise it in some way, particularly in complex and very formal negotiations such as in court or tribunal-referred matters. The parties to the agreement will then have a written document to refer back to for clarification and reference. They will feel more 'honour-bound' to stick to it, especially if each party or a third party has a copy. Also, the agreement can be produced in evidence to a court to prove its existence and of the terms therein.

Sometimes, putting the agreement down in writing may not be prudent, or in your interests, and you may prefer a verbal agreement. It is usually beneficial to formalise the agreement with a handshake or similar gesture and to make closing statements which both summarise the terms and reconfirm your acceptance of them. In informal situations, an in-between point may be an exchange of letters or emails outlining the

agreements made, or simply jotting points agreed to on a piece of paper and giving each side a copy.

If agreement on the issues cannot be reached, both parties may agree to

come back to further negotiations at a future time. Many negotiations take a number of meetings to conclude. The areas of disagreement and agreement could be listed as agenda items for the next meeting. Both parties may agree to do some 'homework' in the interim, to clarify their positions and interests. In some circumstances only a partial agreement may be reached, in which case the above suggestions apply.

If a final agreement cannot be reached it may be possible to reach a tentative agreement pending further negotiations or contingencies. In this situation try to build in further negotiation or consultation so as to keep alive the possibility of a more permanent arrangement. If an agreement is contingent on the occurrence or non-occurrence of an event be sure that you have worked out all subsequent ramifications of this with the other party to avoid possible misunderstandings.

BATNA and WATNA

6.59 Be sure to keep your BATNA in mind during this final phase. It will help you to be mindful of the consequences of not reaching an agreement. Your WATNA (worst alternative to a negotiated agreement) may also helpful. It may be useful to think about the worst thing that could happen to you; for example, in a family dispute the worst thing might be the initiation of court proceedings by the other party. I find it particularly useful to refer to the worst-case scenario in mediations or where I am advising participants in a negotiation, as a way to focus the parties on the context and the potential risks they face or opportunities that other alternatives may present.

Reviewing the agreement

6.60 Finally, it is important to remember that a bad agreement is often worse than no agreement, so be sure of the terms and that both you and the other party share a common understanding. Build a monitoring or feedback provision into your agreement. This may help clear up future difficulties as they arise and help both parties evaluate the effectiveness of the agreement.

A summary of the negotiation process

6.61 The process of negotiation described represents only an abstraction of what is a very complex interactive process and, as in all aspects of conflict management, flexibility in approach and interpretation is required. The following is a summary of the negotiating process described in this section.

Summary of the negotiation process

Phase 1: Preparation — choosing the dance floor and the music

- Assumptions
- Practice and role-playing
- Positions and interests

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- Timing
- The characteristics of the participants
- The environment
- The negotiating conventions

Phase 2: Process and agenda construction — choosing the dance

- Questioning, reflecting, summarising
- Brainstorming
- Agenda items — inclusion, definition, order

Phase 3: Exploring needs and discovering interests — dancing

- Discovering and identifying interests
- Opening demands and offers

Phase 4: Intensive negotiation — the tango beat

- Designing a way through conflict — sub-elements, central conflict point, working backwards, dream solution, 'If' clauses, blocks, taboos and assumptions, up or down design
- Managing impasse and resistance
- Further exploration of interests — objective interests, generating options, broadening procedures

- Distributive process — commitment tactics, threats and promises, bargaining, power agreements, normative or value arguments, bluffs/creating illusions

Phase 5: Making agreements — curtsy and the music break

- Formalising the agreement
- Tentative/partial agreement
- Reviewing the agreement
- BATNA/WATNA
- Failure to reach agreement

Conclusion

6.62 Negotiation is a set of knowledge and skills essential to most of us in our working and personal lives. It involves a complex matrix of behaviours which, if understood, can be better used and transacted. This understanding can mean the difference between success and failure. It can lead you to not only making better deals but being able to manage the world around you more confidently; that is, it provides a set of skills that can be generalised across a wide range of situations. Being a good negotiator can help build and sustain relationships and manage difficult social interactions. In the context of conflict management, it is the key skills set. The exercises that follow are designed to build further upon your insights and abilities in this important area of practice.

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Exercises

Exercise 1 Negotiation questionnaire

The questionnaire below will help you focus on some important issues in negotiation. It can also be a catalyst for group discussion and for analysis of participants' negotiation styles.

Instructions: Read each statement and mark whether you agree (A) or disagree (D) with each. Take

three to four minutes to do this. Then, if in a group, try to reach unanimous agreement on each statement. Discuss any reasons for disagreement. If you cannot come to agreement, see if you can change the wording so that unanimous agreement can be achieved.

Questionnaire

1. The distributive (win/lose) style of negotiation, often characterised by bargaining tactics, should only be used in extreme cases.
2. Competition is present in nearly all negotiations.
3. Power is the single most important element in negotiation.
4. Threats are always counter-productive.
5. It is a useful tactic to try to manipulate the other party's perception of your power as part of a negotiation.
6. The greater the difference in negotiating power, the greater the tendency of the higher-power party to use equity appeals and the greater the tendency of the lower-power party to use equality or responsibility appeals.
7. Bluffs are a legitimate strategy in negotiation.
8. Focusing on interests ('why' you want something) is more important than focusing on positions ('what' you want).
9. Gender can be an important element in the way in which the negotiation is conducted.
10. Persuasion is, in effect, about manipulating the other party's perceptions of what is happening.

Exercise 2 The prisoner's dilemma: Managing interdependence

The prisoner's dilemma is an exercise that has for many years provided a rich source of discussion and debate around the issues of trust, interdependence and reciprocity. It provides a framework for understanding how to strike a balance between cooperation and competition, and is a very useful tool for strategic decision-making. It is presented in a variety of versions but is usually based on the following scenario:

> A police detective is holding two people (A and B) who were both found in possession of illegal firearms and who are suspected of an armed robbery. As yet, she does not have enough evidence to charge them with the offence. The detective tells the suspects that in order to charge and convict them she needs a confession; without one, she can only charge them with illegal possession of

> firearms, which carries a penalty of three months in gaol. She promises them that if they both confess, they will receive the minimum sentence for armed robbery which is two years. If,

however, only one confesses, that person will be considered a state witness and only sentenced to one year while the other will get 10 years, the maximum sentence. She then locks them in separate cells before they have any time to collaborate with each other.

Under these conditions, what should the prisoners do? The answer seems simple enough: since three months in gaol is the best outcome, it makes sense not to confess. But in the solitude of the cells doubts may begin to arise:

'What if my companion decides to confess? Am I safer to confess?'

'If she confesses and I do not, she gets 1 year and I get 10 years or vice versa.'

'Can I trust her?'

'Will she trust me?'

This is a dilemma that has no ready or easy solution. Even if the prisoners could communicate with each other there would still need to be a degree of trust involved — each would have to trust that the other will stick to his or her decision. Yet the dilemma does have a rational solution, which will not necessarily be the optimal one. The safest outcome for each party may not be the one that may give them the best individual result. Can you see why?

It would seem logical that both prisoners would deny, and therefore receive only 3 months imprisonment. This is called the 'global optimism state'. However, it is inherently unstable because if one prisoner denies and the other confesses, then the one that denies in this instance will receive 10 years and the denier only one year. It is therefore more likely that each will choose to confess, which is called the 'Nash equilibrium state' which although not optimal in terms of results is more stable given the overall choices each of the prisoners faces. Can you see why?

The reason is that regardless of whether the other confesses or denies, it is better for each prisoner to confess, especially if there is a low level of trust. In this situation each parties' rational incentive is to choose the less optimal but more stable choice of a confession.

What the prisoner's dilemma shows is that when each individual pursues his or her own self-interest, the outcome is worse than if they had both cooperated. In the above example, cooperation — A and B stay silent and do not confess — would get the two suspects a total prison sentence of two years (the global optimum state). This is obviously the preferred choice but not as stable or predictable as the party may like. All other outcomes would result in worse outcomes, although the most rational choice would be to choose to confess (the Nash equilibrium).

Of course, in real life we often can talk to and exchange information with other parties to a greater or lesser extent and this may impact on what the Nash equilibrium would be. Therefore, in a general sense this equilibrium is a set of strategies where no player can do better by unilaterally changing their strategy. For example, imagine that each player is told the strategies of the others. Suppose then that each player asks themselves, 'Knowing the strategies of the other players,

and treating the strategies of the other players as set, can I benefit by changing my strategy?'. If any player could answer 'yes', then that set of strategies is not a Nash equilibrium. But if every player prefers not to switch strategies (or is indifferent between switching and not), then the set of strategies is a Nash equilibrium. So, in this instance each strategy in a Nash equilibrium is a best response to all other strategies in that equilibrium (von Ahn, 2008).

As part of this exercise, consider how these principles may apply in negotiation.

Exercise 3 Threats

Shapiro and Bies (1994) found in an experimental setting that while negotiators who used threats were perceived as more powerful, they were also perceived as less cooperative and achieved less integrative agreements than those who did not use threats. In addition, when information (allegedly from a constituent) identified the threat as a bluff, they found that the disclaimer lessened the negativity of re-evaluations of the negotiation partner. Their findings suggest that the effect of threats and bluffs in negotiation needs to be qualified by how these tactics are stated in the negotiation itself. Sinaceur and colleagues (2011) found that a calmly stated threat may be more effective than a threat accompanied by anger.

Discuss the use of threats in your practice or work and the strategies that may be used to deal with them. The matrix provided in the text at **6.25** can be used as the focus of discussion.

Exercise 4 Quarrelling in a lifeboat

The distributional (or win/lose) problem in negotiation has been compared to the situation where two people are in a lifeboat quarrelling over their limited rations (Fisher, 1984, p 120). One approach to resolve the problem is hard bargaining. A can insist that she will sink the boat unless she gets 60 per cent of the rations. B can insist that he will sink the boat unless he gets 80 per cent. But is A and B's shared problem simply to do with the rations? Isn't it also to do with keeping the boat afloat and being found? Isn't it therefore better to treat the distributional issue as a shared problem to be solved? For example:

'How about dividing the rations in proportion to our respective weights?'

or

'How about a fixed portion of the ration for each hour we row?'

What do you think?

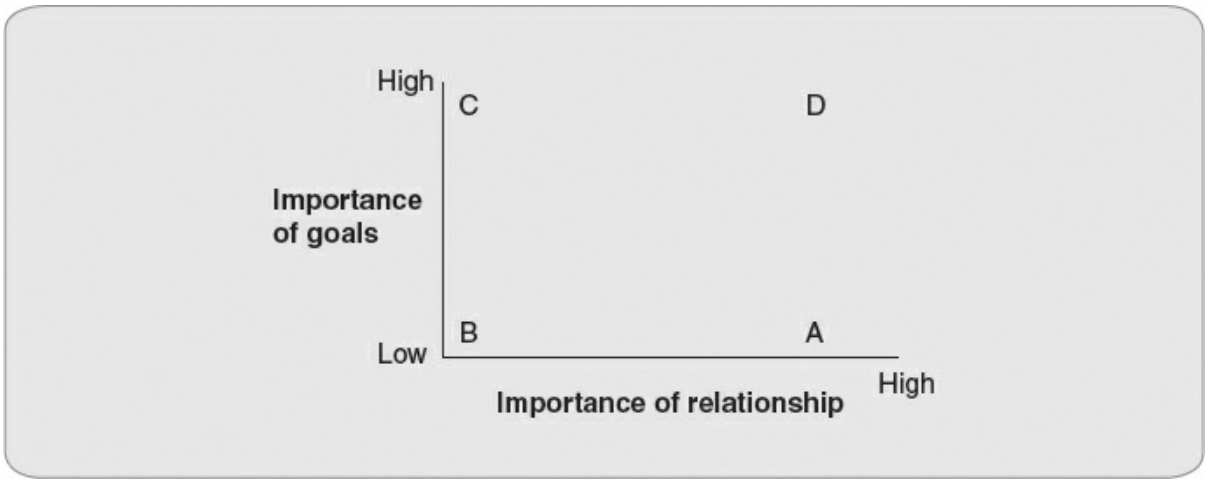
Exercise 5 Relationships and goals: The dual concern and feasibility models

One of the great attractions of the integrative mode of negotiating is its emphasis on building and maintaining relationships between the negotiators. One of the chief ways it does this is by emphasising interests over positions, so that the negotiators are more able to find 'common ground'.

Consider the graph below. It is based upon Pruitt's (1991) dual concern model, which predicts that

strategy choice in negotiation is based on four factors. He states: 'Concern about both one's own and the other party's outcomes encourages a problem-solving strategy; concern about only one's own outcomes encourages contending; concern about only the other party's outcomes encourages yielding; concern about neither party's outcomes encourages inaction.'(p 30). (See also **Exercise 20** below.)

The vertical axis represents the importance of goals and the horizontal axis the importance of relationships. Negotiation can be simplified down to these two essentials: we often want to achieve certain goals but they will also depend on the type of relationship we want with the other.



If, in a conflict, the goal (or outcome) is not important but the relationship is (point A on the graph), how do you think this would affect your negotiating style? What if points B, C or D represented your attitude? Some people tend to always treat the goals or outcomes as more important than the relationship, and vice versa. Where do you stand in this regard?

Pruitt (1991) contends that since joint problem-solving yields the most beneficial outcomes, it is in a party's interests to encourage the other party to adopt a problem-solving approach (similar to the integrative model described in this chapter). One way to do this could be to encourage the other party to develop concern for your own outcomes. This can be done in a number of ways, including offering favours or incentives and cultivating the other party's interdependence, by pointing out a common identity or even by putting them in a good mood.

Another way is to explicitly adopt a problem-solving approach coupled with firmness about your interests and aspirations, and flexibility about the means or process of satisfying those aspirations. Pruitt states that 'the firm part of this strategy should convince the other that contentious behavior is infeasible, that one will never give under pressure. The conciliatory and flexible parts should produce enough perceived common ground and trust that the other will see problem solving as thoroughly feasible'. (p 42). Firmness in your aspirations may be conveyed by strong statements and verbal defences. Contentious tactics may be used to underscore your commitment. What do you think the drawbacks to this approach may be?

Be aware that too much 'firmness' could undermine the problem-solving approach. Pruitt stresses flexibility in the means of reaching an outcome and the form of the outcome that may be conveyed by showing concern for the other party's interests and a willingness to try to satisfy them.

The dual concern model also relates to what Pruitt calls the 'feasibility model'. Even though the dual concern model may predict what sort of tactics may be used, those tactics will not be used unless considered feasible in the circumstances. Can you think of examples of this and why this may be so?

Pruitt suggests that the feasibility of a technique to be adopted depends upon the *perceived common ground* the parties have with each other. This common ground is in turn dependent upon four key factors:

- a party's confidence in their own problem solving skills;
- the presence of problem-solving momentum from previous successful negotiations;
- the presence of a mediator. Mediators facilitate the parties' problem-solving and communication activities, and actively search for common ground. (**Chapter 7** will deal with this dynamic in detail.); and
- the presence of trust on the part of the parties. When the trusted party also has firm aspirations, the other party will generally adopt a problem-solving strategy. When the trusted party's aspirations seem weak, the other party will adopt a contentious strategy, expecting the trusted party to yield.

Exercise 6 Moving the negotiation from distributive to integrative mode

Taking into account the content of **Exercise 5** above and assuming that in many situations the integrative mode of negotiation is preferable to the distributive mode, how can one move a negotiation towards this? Here are a few pointers:

- Seek out and discuss the principles underlying the other party's position (that is, look for objective criteria).
- Ask how their position addresses your mutual interests.
- Treat any position stated as one option among several/many possibilities.
- Do not defend your own ideas but invite criticism and advice.
- Listen, ask, listen, ask, listen …
- Meet any attack or unreasonable request with quiet listening.
- Adjourn the negotiations and retreat to your BATNA.
- Try a different type of conflict management; for example, mediation.

Practise these tactics in a role-play. Divide group members into two parties. One party uses distributive negotiation tactics while the other uses integrative tactics.

Exercise 7 Role-playing as practice

Imagine you are an employee about to negotiate a difficult issue with your boss/supervisor: your terms and conditions of employment. To prepare yourself you

have asked a colleague to play the part of the boss/supervisor in a simulated role-play. It may be useful as part of the simulation to 'swap' roles, so that you become the boss and the colleague becomes you, the employee.

After the role-play discuss the usefulness of the exercise.

You may use this sort of exercise to help you with current situations or situations likely to arise.

Exercise 8 A structured role-play — who's the boss?

What do you think are the key positions and interests in the following scenario? If you were one of the parties, how could you frame the issues to ensure a good a chance of success?

Background

Judy and David both work for a research organisation. David was employed to work in a special community services project, which was originally headed by the director of the organisation. At the time David was employed, Judy took part in his job interview and had strong reservations about David being employed. In particular, Judy thought that David was not competent to do the work involved. Three months after David was employed, the director decided to take herself off the community Services project and proposed that Judy and David conduct it jointly. Judy reluctantly agreed but stipulated that it be made clear that she was not under the direction of David. The director agreed to this and arranged that they have joint directorship of the project.

After several weeks of co-directorship Judy was angry because David was acting towards others as if he were the director of the project and she was working for him. Judy and David are meeting to see if the conflict between them can be resolved.

David's role

As David, you think Judy is preoccupied with power and titles. Just because you are the project director, or sign yourself that way, does not mean that she is working for you. You do not see this as an issue of any importance. Judy is too sensitive. When meetings are called she immediately assumes you are running things. In your view, Judy has other projects to run and does not pay too much attention to this one. When you take the initiative, however, she assumes you are trying to make her work for you.

Judy's role

As Judy, you are busy with several projects. The joint project with David is not your top priority but takes up much of your energy because of the tension you feel around him. You believe him to be pushy and arrogant although you think that he is probably doing the work well despite your earlier position on his employment. However, you think that he is probably not a good person to be in the job because of the effects his 'manner' will have on the organisation.

Exercise 9 Role-playing the 'process of negotiations'

The 'process of negotiation' model described in this chapter (see **6.41**) can be used to practise or role-play negotiation situations in small groups. It may be most beneficial to work on only one or two segments of the negotiation process at a time. After each such role-play the group could come back together to discuss progress before pressing on through the process. How formal you make the process will depend upon the situation. For example, negotiations involved in inter-country trade deals can take years and involve large teams of negotiators. Negotiating a pay rise or change in work conditions in your workplace may still be complex but at a different level of formality. What, in your view, are the advantages and disadvantages of developing a process to use in negotiations?

Exercise 10 What type of negotiator are you?

Using the Fisher and Ury (1981) typology (soft, hard and principled negotiating styles), how would you characterise your own negotiating style? If you are not the type of negotiator you want to be, what can you do about it?

Exercise 11 Gender stereotypes

Are there special issues or problems when negotiators are of different sexes? For instance, do women tend to respond more to relational and caring issues and men to logical and analytical issues, as has been suggested? Are women less comfortable with conflict? Are men more aggressive?

Exercise 12 Throwing down the gauntlet

How would you deal with this opening approach by an opposing negotiator: 'I think we should be fair and open about this matter. We don't have to mess around with a lot of debate and bargaining. Therefore, I will tell you my bottom line position. If that is unacceptable then we both walk away; if it is acceptable then we can make a deal'.

Exercise 13 Matters of 'face'

Protecting our own dignity, status or prestige and those of the other negotiating party may be one of the most important but (often) hidden agenda items in any negotiation. How can you go about this?

Exercise 14 Identifying interests

The integrative style of negotiation stresses the importance of identifying interests rather than positions as a potential way of providing gains to both parties. Behind any position a number of interests may be identified so that it may be possible to find shared interests behind the positions of any two or more negotiators. Discuss recent conflicts you have had and identify the position/s you and the other parties had and the interests that underlined them. Preparing a chart as follows may facilitate this exercise.

Brief description of conflict	Positions adopted	Interests behind the position/s

Identifying positions may be relatively easy, but identifying interests may be somewhat harder. It is useful to ask 'why' questions to uncover interests.

Are there issues where it may be difficult to use the integrative approach? What if the other party to a negotiation does not want to discuss or negotiate around interests?

Exercise 15 Power arguments

Refer back to 'Power arguments' (see **6.17**). These types of arguments may be characterised as 'defensive' or 'offensive' in nature. Can you identify a situation where you have employed these sorts of tactics yourself or where they have been used against you? If so, what has been the result of their use?

Zartman and Rubin (2000) in their book *Power and Negotiation* argue, somewhat counterintuitively, that negotiations between countries that are not equal in power tend to be more efficient and effective than symmetrical negotiations (that is, where the parties' relative power is similar). They suggest this is because weaker and stronger parties negotiating together know their roles and are able to shift appropriate benefits to each side in a negotiated agreement. This is particularly true when a relationship holds the parties together. In cases of symmetry or near symmetry, the countries, whether they are equally weak or equally strong, tend to

spend most of their time maintaining their status and waste inordinate amounts of time before they ever come to an agreement. This often leads to impasse. They define power not as related to the

resources of a party or the ability to apply force but as actions that cause another party to move in the direction wanted by a party.

Do you think this analysis would hold true for other types of negotiation?

At a more practical level, we can readily see that all negotiation involve issues of power or the ability to move the other party or parties in the direction you may want them to go in. Some of the most common sources of negotiation power are listed below:

- *Normative power:* This is the application of general norms or the other party's standards and norms to advance your own arguments. For example, you have normative power when the other party says that it will only negotiate the sale of a house on the basis of values within the range established by the local real estate guide. You show him that the value is within the range for the suburb where the house is located.
- *Positive or incentive power:* This is a negotiator's ability to provide things that the other party wants; for example, a prospective employee states that they would really like to work in your organisation because of its proximity to where they live.
- *Negative power:* This is a negotiator's ability to deny the other party something that could damage the negotiator's business or position; for example, you have negative power if you have research data that the other party wants to use to establish a case for a project they are pursuing.
- *Your relative BATNAs:* This power is related to the ability of the parties to go to alternative processes or to negotiate similar outcomes. This may be particularly influential in the buyer–seller dynamic, where elements such as product scarcity, product substitutes and alternative suppliers or buyers can be crucial. This may be why many organisations use procurement managers, who can build up a profile from past purchases to get better deals from sellers vying for their business.
- *The level of preparation:* As noted in this chapter, the understanding of parties can be crucial in how they frame and conduct a mediation, and it is an important source of power. For example, when buying a second hand car, a car dealer will often try and deter a buyer from delaying a purchase because the buyer may gather further information about the purchase and the product they are about to buy.

Exercise 16 Negotiating with more powerful people

Taking into account **Exercise 15** you may wish to consider the following question: In inter-personal negotiations, what makes another party more powerful? What if the other more powerful person is reluctant to negotiate? Here are some guidelines:

- Invite criticism and therefore advice; for example, 'I'm having some trouble in this situation. Can you advise me?'.

- Ask the other person to step into your shoes and then ask what he or she would do about the issue that troubles you.

- Ask questions rather than make statements, because the former are less threatening. Try to bring the interaction back to the principles of negotiation.

Exercise 17 Aspirations, anchoring, Pareto points and negotiation results: Managing the 'first offer' trap

Read the article in the box below and then answer these questions:

- How could you use the information gained here to deal with the problems posed by the issue of who is to make the first offer, sometimes called the 'first offer preference gap problem'? (See **6.57**, 'Managing impasse: Some ideas'.)
- Do you think that the ability to make a first offer may in fact give a negotiator an advantage?

This excerpt is from an article titled 'Aspirations, Anchoring and Negotiation Result' by Charles B Craver, Professor of Law at George Washington University. It is reproduced with the kind permission of The Negotiation Training Experts: see <www.negotiations.com/articles/negotiation-result/>.

Note that there is reference below to the 'Pareto efficiency or improvement point', which refers to the perception that at least one party is better off and no one is worse off in a particular exchange relationship. This point can be contrasted with the 'Pareto inferiority point' where at least one party is worse off even if the other parties are better off, and the 'Pareto optimality point', where no move by the parties can make them better off. These terms are named after Vilfredo Pareto (1848–1923), an Italian engineer and economist who used the concept in his studies of economic efficiency and income distribution. The concept has applications in academic fields such as economics, engineering and the social sciences. These Pareto efficiency measures are a minimal notion of efficiency and do not necessarily result in a socially desirable distribution of resources; they make no statement about equality or the overall well-being of a society. Nevertheless, these terms are extensively used in the negotiation literature. For a good introduction to these terms, see Barr (2012, p 46).

Aspirations, anchoring and negotiation result

When people prepare for negotiations, they spend considerable time thinking about the factual issues, the legal doctrines, the economic matters, and anything else they consider relevant. They frequently spend no more than ten to fifteen minutes pondering about their negotiation strategy. In fact, most negotiators begin an interaction with only three things in mind that directly relate to their encounter:

1. Where they plan to begin;
2. Where they hope to end up; and
3. Their bottom lines.

Once they declare their opening positions, they wing it thinking of the interaction as wholly unstructured. They are mistaken. Negotiations tend to be quite structured. They move from the Preliminary Stage during which the parties establish their

identities, and set the atmosphere for their interaction. They then proceed into the Information Exchange during which capable negotiators ask open-ended questions designed to induce the other side to reveal their underlying needs and interests and their bargaining intentions. Once this 'value creation' stage is completed, and the parties have a good idea of what can be distributed between the parties, they shift into the Distributive Stage which involves 'value claiming' as the negotiators advance the items available for distribution. When they begin to approach an actual agreement, they enter the Closing Stage as they work to solidify their agreement. Negotiators who move too swiftly to achieve the certainty of an accord tend to yield more than more patient opponents, and they close more than half of the gap remaining between the parties when they've arrived at this point in their interaction. Once the parties attain the final terms, they should use the Cooperative Stage to see if there is any way they might be able to expand the overall pie, while enhancing their current positions at the same time. They should strive to reach the *Pareto superior point.* If they can establish which items may have ended up on the wrong side of the table, they can exchange these terms for issues each would prefer to have and achieve more efficient final agreements.

In this article, I would like to discuss two factors which significantly affect agreements reached by negotiators:

1. Their preliminary aspiration levels and
2. The anchoring effect of their initial positions.

I. Importance of Beneficial Aspirations

When I teach my negotiation class to law students, I give them an early exercise in which the parties must attempt to resolve a typical personal injury claim. I give them the information relevant to their exercise, and ask them to complete an accompanying questionnaire. In that questionnaire, I ask those representing the claimants how much they hope to obtain, and I ask those representing the defendants how little they hope to pay. I then ask them to negotiate with each other and try to achieve settlements. As soon as they are done, I ask them to answer another question: How well do they think they have done compared to other negotiators in the class? Are they well above average, above average, average, below average, or well below average?

I then prepare a table listing their questionnaire answers and the actual terms agreed upon. For this particular exercise, I typically obtain agreements that vary from about $300,000 to $2,000,000 even though they all possessed the identical information. I then discuss their preliminary assessments and their final outcomes. Claimants who thought they might obtain $4 or $5 million tend to get at least $1.5 million or more. Individuals who only believed they could get $1 million tend to have agreements in the $500,000–$750,000 range. Defendants who thought they would have to pay $1,000,000 tend to pay $1,500,000 or more, while those who believed they should settle for $300,000 or $400,000 tend to be in the $500,000 to $750,000 range. I do this to graphically demonstrate the direct correlation between their preliminary aspiration levels and their final outcomes.

People who want more when they negotiate usually get more and individuals who don't want as much generally don't get much. One of the best students I ever had told me that whenever he received a negotiation exercise, he attempted to determine the best deal he could hope to obtain for his side. He then added some things until his position seemed unreasonable. He then worked to defend his seemingly unrealistic position

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until he became comfortable defending it. Only then did he begin to interact directly with his opponents. Week after week he cleaned his adversaries out. At the close of the term when we discussed the most successful bargainers, several of his opponents indicated that he was not really that good a negotiator. They said that when they got down to the end of their interaction, he seemed so certain he was right; they thought maybe they were wrong. In one sentence, they deftly defined the art of negotiating.

By developing a solid and positive aspiration level and convincing himself that he deserved what he was seeking, this person had the ability to obtain optimal results for himself. The confidence he expressed induced less confident opponents to accept his assessment and move in his direction. This is a factor I have noted in all of the students who have done well in my classes over the past thirty years. They are able to establish good aspirations and defend their positions forcefully.

When individuals prepare for bargaining encounters, they must gather all of the relevant information and start to ask themselves how well they could realistically hope to do. When in doubt, they should reach a little higher, remembering that no one can hope to obtain more than they think they can achieve. They have to be especially cautious when setting their aspiration level. If they set it too low, they will achieve less beneficial results than they could have achieved. On the other hand, if they begin with wholly unreasonable objectives, they may either turn off their opponents or cause them to lose interest from the outset or produce non-settlements that could have been avoided had they had more realistic goals.

When setting their aspiration levels, negotiators have to not only consider their own side's circumstances, but also those of the other party. How much does that side need to realize a deal? What happens to that party if they fail to reach any agreement? If that side's non-settlement options are worse than this side's alternatives, this side has the greater bargaining power. What bargaining leverage does that side possess, and what are their objectives likely to be? If they think that party will set modest objectives, they should plan to exploit this weakness by persuading that side that they can't hope to achieve too much.

The second part of my questionnaire concerns how the participants feel once they have reached agreements. I find the information given by the answers to this question especially revealing. Claimants who have obtained the most beneficial deals think they are average or below average, while those who have attained the least beneficial terms think they are average or above average. Why? Those who anticipated outstanding deals — $4 or $5 million — are disappointed that they were only able to

get $1.5 to $2 million. On the other hand, the individuals who only hoped to get $1 million are especially pleased with anything over $750,000. The students on the defence side tend to have a more realistic picture, since they understand that they would have to pay something. Nonetheless, the defendants who thought they would have to pay at least $1 million tend to be pleased with anything under $1.2 or $1.3 million, while those who hoped to pay no more than $600,000 or $700,000 are disappointed with anything over $1 million.

From the answers to these last questions, I point out a paradox that affects most negotiators. Those persons who are the most satisfied at the conclusion of an interaction are apt to achieve less beneficial results than those who are less satisfied. Those who did not hope to obtain much were able to come close to their preliminary goals and they were happy. Those who established more generous goals are disappointed by their failure to get everything they wanted. I then tell my students that they should feel

comfortable at the end of bargaining encounters if they believe they did all right even though they are disappointed that they didn't do better. On the other hand, when they are completely pleased with their results, they should be nervous. What else might they have obtained had they only established higher initial objectives?

Persons who usually obtain everything they want when they negotiate should raise their aspiration levels. They must do this in increments to prevent future disasters. They should initially raise their goals by five or ten percent. If they continue to get most of what they desire in the coming weeks, they should increase their goals by another five or ten percent. They should continue this practice until they start to come up short. If they never feel disappointed at the end of their negotiations, they should recognize that they have probably failed to establish sufficiently elevated aspiration levels.

II. Impact of Anchoring

Many negotiation teachers instruct students to begin their interactions with reasonable positions that will encourage their opponents to respond in kind. This win–win approach will permit the bargaining parties to achieve results that are fair to both sides. The problem with this advice is that is empirically untrue. The fact that one side has begun with a reasonable position does not pressure the other side to respond with a similarly realistic offer. In fact, manipulative opponents can use opportunistic behaviour to seize the advantage. They can begin with a less generous offer and implement strategic tactics to obtain better deals for themselves.

The beginning positions articulated by people when they negotiate significantly affect the final terms they achieve. When someone begins with a reasonable opening offer, their opponent begins to believe he or she will do better than they initially imagined. They are emboldened. They increase their goal and articulate a less generous position than they might have expressed to take advantage of the other side's naivety. On the other hand, if they initially receive a lower generous opening offer,

they begin to doubt their preliminary assessment. They think that they will not be able to do as well as they originally hoped. As a consequence, they lower their expectation level and begin to think they will have to give the other party a better deal for that side than they hoped.

Individuals who use a cooperative negotiation style should be cautious not to announce reasonable opening offers unless they are absolutely certain they are interacting with persons who share their philosophy and will reply in kind. If they have any doubts, they should always formulate initial positions that offer them more bargaining room. They must remember that less generous offers are inclined to undermine opponent confidence, while more generous offers tend to embolden those parties.

To demonstrate the impact of anchoring, I provide my students a fact pattern describing a typical motor vehicle accident. They all receive the exact same fact information and are told they represent the defendant. They are advised of the initial demand they have just received from the plaintiff lawyer and asked how much they think they will have to pay to settle the matter. I vary only one factor. Half of the students are told they have been given a $60,000 demand, while the other half are told they have received a $30,000 demand. Those facing a $60,000 demand indicate that they will have to pay more than those facing a $30,000 demand. In many cases, those facing the $60,000 demand reveal that they will have to pay more than $30,000 to settle the case.

I generally suggest that negotiators should start with opening offers that are as far away from where they hope to end as they can — and which they can rationally

defend. If they begin with wholly impractical positions, they lose credibility and undermine the likelihood they will achieve agreements. On the other hand, if they begin with positions which don't favour their own side, they put themselves at a distinct disadvantage.

One other reason for beginning with opening offers that favour one's own side pertains to the use of 'bracketing.' Negotiators tend to move from their opening positions toward the centre. If people can entice their opponents to articulate the opening position, they can reply with an initial offer that places their goal in between the parties' opening positions. As the parties make reciprocal concessions, they can proceed to use bracketing to keep their objective near the midpoint between their present positions. If they do this successfully, they can often achieve better deals than they could have obtained had they not started with a position which placed their objective near the midpoint between the parties' opening offers.

III. Conclusion

Negotiators should always remember the importance of beneficial aspiration levels and the affect of anchoring. People who hope to achieve better deals tend to do so, while those with lower aspirations are inclined to generate less generous results. It thus behoves individuals preparing for bargaining interactions to establish high, but

rationally defensible, goals. They should also value the impact of anchoring. When they begin with high demands or low offers, they begin to undermine opponent confidence and influence those persons to question their preliminary assessments. On the other hand, when they begin with modest demands or overly generous offers, they embolden opponents and prompt them to contemplate better deals than they preliminarily thought possible. If they can induce their opponents to articulate the first offer, they should use bracketing to maintain their objective between the parties current positions. As the participants move toward the midpoint between their respective positions, this may allow them to achieve optimal results for their own side.

Persons who usually obtain everything they want when they negotiate should increase their aspiration levels. They must do this in increments to avoid future disasters. They should initially raise their goals by five or ten percent. If they continue to get most of what they want in the coming weeks, they should raise their goals by another five or ten percent. They should persist with this practice until they begin to come up short. If they never feel disappointed at the end of their negotiations, they should recognize that they have probably failed to establish sufficiently elevated aspiration levels.

Exercise 18 Persuasion: Uses and defences

In this chapter, Cialdini's six principles of persuasion were outlined (*Influence: The Psychology of Persuasion*, 2006). Use the template below to consider each of the principles and how they may be used or misused in negotiation and give examples of each. It is clear that each can be used to mislead others (for example, to sell products at unfair prices or promote unfair practices); however, many of these principles also underlie good practice and are useful to enhance your negotiating skills. The question is then, how can these principles be used but also 'defended against'?

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Persuasion principle: examples	Productive uses	How to defend against if necessary
Reciprocity		
Commitment (Consistency)		

Social Proof		
Liking		
Authority		
Scarcity		

Exercise 19 *Budgie v Kicker:* Analysing a factual scenario using ZOPA and other devices

This role-play is derived from one developed by the Victorian Bar for training in its accredited mediation course. It provides a rich source of information for analysis and role-playing for both negotiators and mediators. It is a dispute about the laying of some allegedly defective roofing material in a shopping mall development and is based upon a real case.

The Troubador Company (Troubador) was the general contractor for the construction of a shopping mall. Budgie Roofing Company (Budgie) was the roofing sub-contractor. The manufacturer and distributor of the roofing material in dispute was Kicker Pty Ltd (Kicker).

The mall area of the project was built as a promenade. The roof was a concrete deck to which Budgie applied MUC Waterproofing (MUC). Then a Styrofoam protection board was installed and, finally, a concrete wearing surface.

Before starting the job, Budgie contacted Kicker, the manufacturer of MUC, for a recommendation as to the type of flashing (flashing is the joining between the horizontal floor and vertical walls) to use on the horizontal to vertical walls. Its recommendation was to use a vinyl flashing adhered to the concrete deck and run up the wall for approximately 8-10 centimetres. Budgie followed this recommendation. After the concrete was poured over the Styrofoam protection board, leaking occurred at the perimeter almost immediately. Several measures were taken to correct this leak. Some were extensive.

On 1 October one year ago, Budgie advised Kicker in writing that the additional costs for completing the remainder of the perimeter that needed

repair would be $73,600. Budgie claimed reimbursement of this amount and threatened

litigation. Budgie then proceeded to take the corrective measures for the remainder of the perimeter.

On 8 October one year ago, Kicker wrote to Budgie and stated that it was putting Troubador and Budgie on notice that it was not properly notified in writing before the commencement of the initial repair work.

The matter of the claim by Budgie is now in dispute. Both parties have consented to a meeting as per the terms of their contractual arrangements.

Kicker's views

As Kicker, this job has been a nightmare for you. Budgie asserts that the vinyl flashing that you recommended for use was incompatible with your MUC waterproofing product. There is probably some truth to the charge but you suspect that faulty workmanship also contributed to the problem.

You know that you will have to pay something for the last bit of work that was done but you want to minimise your losses. The contract clause states that you could not be responsible for costs incurred for damages arising from defective products unless you were notified in writing of the alleged defect and you subsequently gave written authorisation to proceed in an agreed upon manner. In the previous 'corrective efforts' that Budgie and Troubador had undertaken, everything was agreed verbally.

However, you thought that the $73,600 claim was greatly inflated. So you relied upon the written contractual provision to deny any payment whatsoever:

(a) You are sure that the prevailing rate in the area to have completed this job would be approximately $42,000. Budgie's price is not simply inflated — it's outrageous.

(b) You know that Budgie enjoys a good reputation for its work. But you will not admit complete responsibility for this situation — there has to be some 'face saving' for everyone. You were advised by a local competitor of Budgie that Budgie's rates are generally 10 per cent higher than the average.

(c) The job has been frustrating for everyone. It is worth an additional $5000 beyond the prevailing rate just to settle this matter.

You will seek to explore the various expenses in the bill of $73,600. If you are persuaded that the costs are legitimate, you will pay. However, you do not want to pay more than $54,000 to settle this matter.

Budgie's views

As Budgie, you are furious. The whole problem developed because Kicker's MUC waterproofing material and the vinyl flashing were incompatible. You and Troubador tried everything you could think of to fix the roof, after consulting with Kicker. That Kicker is withholding payment for the amount claimed is, in your view, the straw that broke the camel's back.

You proceeded to fix the remainder of the roof without waiting for Kicker's reply because you felt it was the only way to protect yourself against extensive back charges claimed by the owner for interior damage and loss of income from rentals.

You acknowledge that the figure of $73,600 is an 'inflated figure'. You want to make Kicker pay for the pain and suffering you experienced on this job. A closer estimate of the actual price for completing the job would be $51,000. You know that even that figure is high for the area. Kicker would probably find the prevailing rate to be approximately $11,000 less.

You are the best in the business, so it costs more to use you. Besides, this is not simply a new job, but the remainder of an old job. There is a history to this and Kicker is going to pay for that history.

You believe that your reputation will be severely tarnished as a result of this job. Since Kicker is responsible for this problem in the first place, it should pay you $10,000 as a token payment for the loss of goodwill that you anticipate suffering.

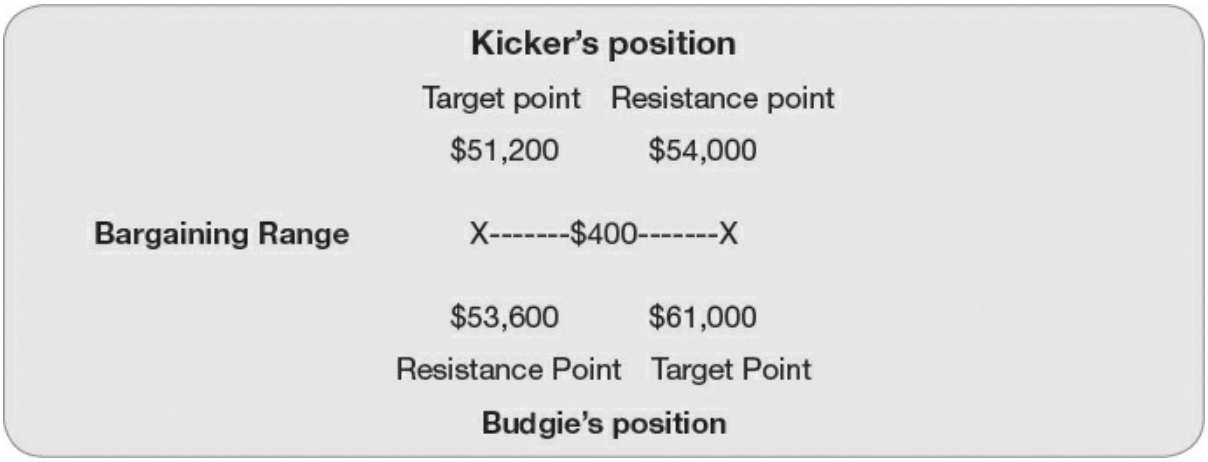
You included $10,000 in your bill to Kicker to compensate for your pain and suffering. Of course, in the actual bill, both this item and the goodwill item were hidden as 'labour, material, and overhead' costs. You want a nominal payment for this item.

Your bottom line for settlement is $53,600.

Some questions that emerge from this case study are:

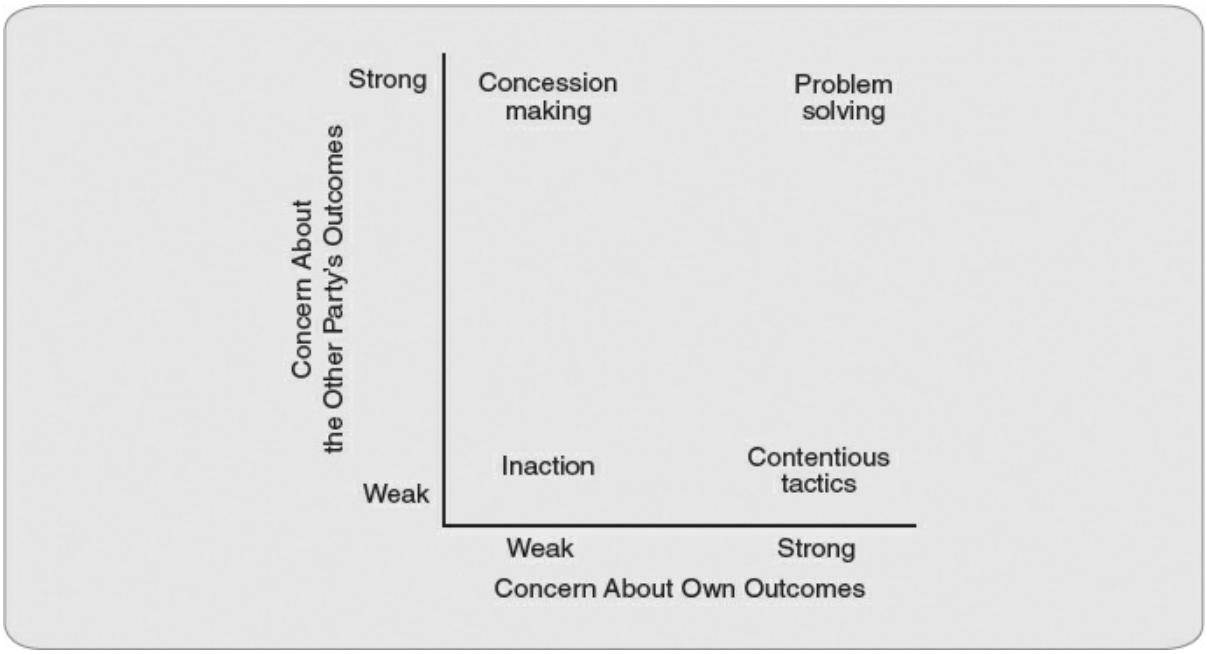
- Can you identify the possible positions and interests of the parties and the key issues that need to be resolved in this negotiation?
- Can you analyse what the ZOPA may be and the resistant and reservation points?

In the box below is a possible analysis examining the bargaining range. Do you agree with this analysis? Where would the ZOPA be on this diagram? (Refer back to **6.3–6.4** for an explanation of the terms 'target point', 'resistance point' etc.)



Exercise 20 The dual concern model

According to the dual concern model (see figure below and also refer to **Exercise 5** above for a slightly different view of this model) when negotiating, parties have high self-concern and low other-concern, it is more likely for contentious tactics to be adopted and for the parties to approach the negotiation competitively (Carnevale and Pruitt, 1992). In the *Budgie v Kicker* case in **Exercise 19** above, both parties hold negative emotions towards the other while being highly concerned about gaining the best outcome for themselves. Do you think this could lead to contentious tactics, and how could you avoid this?



Exercise 21 The Bem Sex Role Inventory

Leading gender research Sandra Bem developed the Bem's Sex Role Inventory (BSRI), which was developed as a means of identifying gender schematic and gender aschematic individuals. Composed of 60 words (which are divided into 20 stereotypically masculine traits, 20 stereotypically feminine traits and 20 neutral traits), the test asks participants how strongly they identify with a given characteristic. The BSRI does not dichotomise masculinity and femininity; a person does not have to be characterised as male or female in inventory results. The BSRI ranks masculinity and femininity on a continuum; scores may include evidence of high levels of masculinity and femininity (androgynous) or low levels of both (undifferentiated). You can view and score yourself on the inventory at <http://garote.bdmonkeys.net/bsri.html> (accessed 1 July 2015).

Exercise 22 The Hofstede Model of Cultural Difference

Assume you are travelling to Mexico and then onto Germany to negotiate a new supply deal for your company. Using the website <www.geert-hofstede.com/hosfstede_dimensions.php> research the dimensions of the two countries you

are visiting, then isolate those dimensions you think may be most important in negotiating your contract.

Exercise 23 Applying the Peterson and Shepherd model of preparation

This model, which was outlined at **6.42**, involves four elements to enable proper preparation: intelligence gathering; formulation; strategy development; and preparation. How could you apply this model to the role-play outlined in **Exercise 19** above? You can use the table below to help you work through each element. You can use some of the comments following the table to enable you to complete this exercise.

Phase 1	Intelligence gathering	
Phase 2	Formulation	
Phase 3	Strategy development	
Phase 4	Preparation	

Intelligence gathering

Research similar disputes that have occurred between other parties and looking at the law applicable to the situation; for example, what are the applicable contractual provisions and do they require a process to be followed?

Formulation

Identifying positions and interests and predicting those of the other party are crucial here. Both manifest (open) and latent (hidden) needs should be addressed. For example, referring to *Budgie v Kicker* in **Exercise 19** above, Kicker's business may be quiet and demand for his product may be low. If he has to reimburse Budgie and pay damages, this only reduces his profits further, especially if orders are down. A BATNA can be an important consideration, as is the bargaining range, especially where money is involved. (See the bargaining range outlined in **Exercise 19**.) The ZOPA is where a settlement is likely to be reached — it outlines the overlap between both parties' target and resistance points. In negotiations where there is no overlap,

reaching a settlement will be far more difficult, and often alternative forms of dispute resolution are necessary. Another aspect to keep in mind in the formulation phase is the desirability of an ongoing relationship between the parties.

Strategy development

This phase requires the parties to think about trade-offs: what you will give up for something else in return? The notion of reciprocity comes into play and is the one of the most powerful principles you can use in a negotiation. What could Budgie and Kicker give to create a sense of reciprocal obligation? The Thomas and Kilmann (1974) model outlined in **Chapter 2** can be considered in terms of ways in which the negotiation will be approached interpersonally. As noted, they identify five approaches to managing conflict: avoiding; accommodating; competing; collaborating; and compromising. The model suggests that where concern for own outcome is high, competing is the best approach, whereas a high concern for both your own and the other party's outcome means that collaboration is the best approach. Integrative and distributive negotiation frameworks and how these may be used can also be considered.

Preparation

This includes role-playing the negotiation to practise the implementation of your negotiation plan. Analysing the other party's communication predisposition can help in understanding them and dealing with any problems that may arise. Communication style and tone, verbal and non-verbal, is critical here, as it is the primary function that parties use to reach agreement in a negotiation.

Exercise 24 Questions

(a) The Workplace Gender Equality Agency (WGEA) reports that 'women hold fewer senior positions in Australian workplaces than men, earn lower wages on average and retire with lower savings' (WGEA, 2014, p 2). Do you think this is contributed to by differences in the way men and women negotiate or systemic and structural issues in the workplace?

(b) What are the advantages and disadvantages of negotiation as compared with other forms of conflict management? Are there circumstances in which mediation, for example, would be a preferred mode?

(c) Fisher and Ury describe negotiators as hard, soft and principled. Is another way of describing negotiators as simply cooperative or competitive?

(d) Do you think power is an ever-present element in negotiation? If so, are negotiations with more powerful parties more difficult than parties who may be your peers?

(e) What do you think are the key attributes of a successful negotiator?

(f) Distinguishing positions from interests is crucial to the integrative approach. Why?

(g) How could you use the Bird et al (2010) typology of cross-cultural competence (see **6.40**) to improve your ability to negotiate in cross-cultural settings?

Chapter 7

Mediation

Summary

Mediation is a flexible process that can occur in a variety of contexts. This chapter outlines the functions of a mediator, gives an overview of the evolution of mediation and provides an insight into how you can be, or become, a better mediator and appropriately intervene as a 'third party' in conflict. An outline of the advantages and disadvantages of different models of mediation is included.

Recent debates about the place and use of mediation are canvassed. The knowledge, skills and values required of mediators are outlined, including those required by the National Mediation Accreditation System.

A nine-phase mediation process is described in detail. The phases are: preparation; introduction (outlining the process and creating trust); taking statements and summarising; agenda; the optional stage of private sessions; exploration; negotiation; agreement-making; and implementation, review and revision.

This chapter should be read in conjunction with **Chapter 6** ('Negotiation'), because much of the underlying theory, models, strategies and techniques overlap.

Introduction

7.1 Nadja Alexander, an Australian academic, noted (2001, p 2):

> Australia's role as a global leader in ADR developments has been recognised on an international level. Court-related ADR exists in every court and tribunal in Australia; community mediation and private mediation exist in all Australian jurisdictions. In other words, mediation has been applied in practice to all types of disputes.

Ulrich Magnus, a German academic, suggests that (2012, p 871):

> Next to the United States, Australia has become a global forerunner in mediation law and practice. Mediation is officially seen in Australia as a preferred, cheaper and quicker alternative to traditional court litigation. There are a great number and variety of legislative acts providing for mediation, partly enabling courts to order mediation procedures against the will of the parties, partly requiring the parties' consent. Outside the courts, a whole mediation 'industry' has been established with many private organisations and institutions offering mediation services for any kind of dispute.

Despite these sentiments there has been considerable debate within the Australian as well as the international literature about the nature of mediation. As Riskin noted (1996), there is 'a bewildering variety of activities that fall within the broad, generally accepted definition of mediation — a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction (p 8). There have been numerous efforts to define the process. One of the most popular definitions has been (Moore, 1986, p 14):

> [T]he intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.

A widely accepted Australian effort to define this process is that provided

by the now disbanded National Alternative Dispute Resolution Advisory Committee (NADRAC) (1997):

> Mediation is a process in which parties to a dispute with the assistance of a neutral third party (the mediator), identify disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

The debate around these various definitional issues, which has chiefly occurred in government and human services sectors, was compounded by the acceptance of mediation into mainstream legal processes, where it has become an adjunct to court and tribunal processes (Menkel-Meadow, 2001; Astor and Chinkin, 1992). As Joanna Kalowski, a former National Native Title Member and mediator states (2009):

> Mediation theory asserts that in order to be a good mediator, you must excel in the process; whether you are a content expert or not matters little. In reality, in Australia, where lawyers have become the de facto gatekeepers of mediation, content expertise is highly regarded, and the 'market' favours lawyer-mediators expert in the area of law of the dispute. The result is a rapidly growing trend towards evaluative mediation, and most often the process resembles conciliation more than mediation. Mediators regularly report that they are asked to 'give a view', that is, provide a legal opinion on who is likely to win which points, or win the case as a whole, if the matter goes to court.

Boulle (1996b, pp 28–30) attempted to clarify some of the confusion inherent in the definitional issues by proposing a taxonomy of four mediation models as follows:

- *evaluative mediation*, where a mediator with substantive expertise focuses on rights, entitlements, industry standards and norms;
- *facilitative mediation*, where a skilled mediator assists the parties to negotiate around their interests to explore the problem and develop options upon which they can agree;

- *settlement mediation*, where a high-status mediator makes procedural interventions to steer the parties towards a compromise position; and
- *therapeutic mediation*, where a mediator helps the parties find the underlying cause of their conflict in order to improve their relationship and, subsequently, allow decision-making directed at resolving their dispute.

Boulle suggests that the models can overlap and even change during a single mediation, but that most discussion about mediation relates to the facilitative model, as it is seen to be the classic or 'pure mediation'. However, as Wolski has commented in an article principally concerned with lawyers' ethics in mediation (2015, pp 30–1):

> But there are at least three reasons for not overstating the importance of 'models'. First, while these models are useful for analytical purposes, they are not distinct alternatives to one another and they can disguise the extent to which they may 'mix' or 'blend' techniques associated with two or more models. Legal representatives must be ready to respond to a wide range of mediator interventions. Second, while the 'model/s' of mediation chosen by the mediator will have an impact (perhaps even an enormous impact) on the behaviour of lawyers, the lawyer's ethical orientation does not change — a lawyer is always a partisan advocate for his or her client. Third, as Boulle concludes, '[u]ltimately … mediation values are realised in its application by individual practitioners in particular cases.' As a result, it is difficult to make generalised statements about the objectives and values of mediation, with perhaps one exception.

The exception noted by Wolski is 'self-determination' of the parties in mediation, which she notes has received wide acceptance (2015, p 31). This is the ability of parties to participate and make decisions in the mediation process Sourdin comments that most mediation practitioners believe that two main forms of mediation exist: the facilitative and the evaluative (Sourdin, 2012, p 69). She notes that in some Australian jurisdictions the mediator is perceived to be more active in making recommendations and providing advice. This was recognised by the Mediator Standards Board (MSB), which regulates mediator accreditation, training and standards, to emphasise the fact that they are an amalgam of processes (MSB, 2015).

Although the MSB description of the mediation process does not include the giving of advice, Practice Standard 10.2 provides for the giving of advice

in a 'blended' mediation process. This requires that the consent of the parties has been obtained and that the mediator has a professional certification that enables him or her to give that advice. The mediator must also have the requisite professional indemnity insurance. Go to **Exercise 18** for an outline of the NMAS.

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Paragraph 2.2 in the current Practice Standards is as follows:

2.2 Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:

(a) communicate with each other, exchange information and seek understanding

(b) identify, clarify and explore interests, issues and underlying needs

(c) consider their alternatives

(d) generate and evaluate options

(e) negotiate with each other; and

(f) reach and make their own decisions.

7.2 The Family Law Act 1975 (Cth) uses the term 'primary dispute resolution.' Section 14 states that the Act:

… encourages people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made.

The Federal Magistrates Act 1999 (Cth) s 21 defines primary dispute resolution processes as:

… procedures and services for the resolution of disputes otherwise than by way of the exercise of the judicial power of the Commonwealth, and includes:

(a) counselling; and

(b) mediation; and

(c) arbitration; and

(d) neutral evaluation; and

(e) case appraisal; and

(f) conciliation.

Mediation and conciliation: What is the difference?

In Australia, unlike most countries, a distinction has developed between the terms 'mediation' and 'conciliation'. Compare the following definition of conciliation from NADRAC with its definition of mediation at **7.1**. The key difference is that the conciliator can be more actively involved in developing options and providing expert advice on settlement terms.

NADRAC (1997) has defined conciliation as follows:

> Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

Mediation is conventionally understood as an informal and private dispute resolution procedure. As was explored in some depth in **Chapter 4**, it is now widely used within the legal system to resolve disputes more speedily, inexpensively and efficiently compared to the trial process. However, as Judge Harman of the Federal Circuit Court noted (2014, p 6):

> The early development of mediation occurred away from, and largely uninfluenced by, Courts and litigation. Whilst negotiation had always occurred within the process of (and usually also prior to) litigation, the more formalised, third party facilitated models of negotiation were entirely separate to Court processes. However, Courts were quick (and perhaps quicker) than the legal profession (and public) to see the potential financial and workload benefits of mediation and to embrace them and '*annex*' them to Court processes.

There has also been emphasis on the claim that mediation is more satisfying to disputants than court processes. Most of the research in this area

shows that generally mediation remedies some of the faults of the adversarial system and that for the most part litigants are more satisfied with mediation than with adversarial procedures (ALRC, 2001).

7.3 In the family law jurisdiction a number of alternative models have developed. One of the most interesting is a model of child-inclusive practice developed at the Family Mediation Centre in Melbourne. It became part of a national *Children in Focus Program* (McIntosh, 2002). In this model, a psychologist interviews the children involved in a family separation and then attends the family mediation to provide some input on the way in which the children in the relationship have been impacted. The Family Court until the early 2000s retained its own mediation services but these, along with those of the Federal Court, have now been largely outsourced. The Federal Court, uniquely among Australian courts, has kept its own in-house mediation service.

Following amendments which came into effect in 2006, it is now a prerequisite under the Family Law Act that parties attend mediation in 'children's matters' and obtain a certificate from a registered family dispute resolution (FDR) practitioner. This must be done prior to an application to the court for an order in relation to children under Pt VII of the Act. Part VII specifies initiating applications for a variety of orders relating to children, and of these, parenting orders are the most common. Parenting orders regulate who children live with and have contact with, in addition to other related aspects of their care and welfare. For further information about this and pre-action protocols in this court see **Exercise 20** at the end of this chapter.

As a result of these developments, mediation is now largely mandatory as a 'pre action procedure' at a federal level, a requirement introduced by the Civil Dispute Resolution Act 2011 (Cth). While this Act does not apply in the family law jurisdiction, s 60I of The Family Law Act creates a similar obligation, both as a pre-action procedure and an obligation upon the court. As noted in **Chapter 4**, all Australian jurisdictions have adopted similar legislation to encourage parties to take steps to settle their disputes before the

issue of proceedings and/or before hearing. (See **Exercise 22** at the end of this chapter for the specifics of each legislative provision.) The most popular 'step' is mediation. The 'reasonableness' of the imposition of such obligations on disputing parties in the early part of their dispute has sometimes been contentious,

but for the most part they have retained their popularity with governments and courts (Sourdin, 2012).

Another developing and important area of mediation practice are the industrial relations disputes that fall under the Fair Work Act 2009 (Cth). All employment awards and enterprise bargaining agreements now require dispute management clauses and processes to be included: for further information about this go to **Exercise 25** at the end of this chapter.

7.4 There are many philosophical, ideological and ethical issues that have emerged around the practice of mediation since I wrote the first edition of this book. For example, as we shall see in this chapter, some theorists and practitioners argue that mediation has the ability to transform disputants into more morally and socially aware individuals (Bush, Baruch and Folger, 1994). These proponents of mediation maintain that mediation may therefore not only help resolve conflicts between individuals, but create greater tolerance and interconnectedness in society as a whole.

It would seem that the context or place where mediation occurs is important in the expectations of it as a process. Within the legal system, for example, the emphasis is on greater procedural fairness and more flexible outcomes when compared with the traditional legal process. Within this context there is more tension between the need for self-determination of the parties and their respective legal rights. Compare this with a human resources practitioner in an organisation who gives primacy to self-determination. In

this context the mediator will more likely attempt to lead the parties to a discussion around their joint perspectives and of themselves. Using Boulle's taxonomy referred to above, they will tend towards a facilitative or therapeutic style. Those who are concerned with legal rights, the relative power of the parties and their respective obligations will tend towards an evaluative and settlement-orientated approach. They will seek settlement as their primary objective and will be more inclined to use interventionist techniques based on rationalist assessment strategies. This will, for example, include such things as discussing the relative strengths and weaknesses of the parties' cases, likely outcomes if the case goes to court and relative legal merits (Riskin, 1996).

In many mediations where litigation has commenced or is contemplated there is often considerable pressure on the parties to come to settlement. Lawyer mediators often do not allow the parties to talk to each other — after a short introduction they are placed in separate rooms with their advisers, with the mediator acting as a 'shuttle' between them. The mediator becomes the bearer of information, offers and counter-proposals. This process does not lend itself to maximising party self-determination because it focuses on settlement, which is the framework that predominates in the legal system. While commentators such as Riskin (1996) and others may question if this is indeed 'mediation' within the definitions provided above, I consider that it does indeed qualify as mediation provided the mediator does not slip into the role of adviser on the substantive issues. The fact that the process is largely a distributive one based on rounds of oscillating bargaining is not, in my view, relevant to this question. One may say that this process looks more like 'assisted negotiation', but in most regards and most situations this is what mediation is. If we consider the long history of mediation we see that it takes many forms and defies easy definition.

Recent claims in the Western world that mediation must take a certain form, with certain processes and defined outcomes, would condemn a whole range of both ancient and modern informal processes to some other as yet undefined definitional basket. Various professional groupings, principally revolving around the legal and social science (chiefly psychology) fields, want to make the process in their own image, to suit their particular ideological and theoretical underpinnings as well as their practice imperatives.

Within the legal system, mediation often appears to fail the parties' search for greater understanding and self-determination, which may be because of a lack of skills in some lawyer mediators. However, it is probably more related to the construction of legal practice and how participants are expected to act within that context. We could say the same thing about mediation within human services fields dominated by other professional groups. The discussion that follows concerning narrative mediation may indicate this. This is a mediation process that comes directly out of counselling and therapeutic practice. These considerations also place transformative mediation, also outlined below, into a sort of 'half-way position' between the evaluative and therapeutic models as defined above.

7.5 The rise in popularity of processes like mediation described some controversy in the 1990s and early 2000s, particularly in relation to court-annexed mandatory mediation that was raised earlier in **Chapter 4** (see **Exercise 22** at the end of this chapter). Ingleby (1991) first raised possible concerns, in the Australian context, in the early 1990s. He cited concerns with issues of good faith and attendance. The *Australian Dispute Resolution Journal* ran a continuing series addressing these issues (see, for example, Spencer, 2000; Dearlove, 2000; and Ardagh and Cumes, 1998). Menkel-Meadow (1997) and overseas commentators (Rueben, 2000; Wissler, 1997) have also been concerned to air the various issues that these developments have raised. The issues related to court-annexed or court-referred mediation can be summarised in the following way:

- legal principles and precedents may be downplayed and justice thereby denied;
- the perception of mediation as a fair and balanced process may be undermined;
- the role of lawyers predominates and their attitudes to settlement may mitigate against maximising the potential of the process (see also Robertson, 2006);
- when court officials conduct mediations, constitutional (the court's role as a 'judicial' body), confidentiality and misconduct issues may be difficult to resolve (see also Astor, 2001);
- power imbalances may be exacerbated, particularly for women and disadvantaged groups, and lead to unfair outcomes; and
- the pressure to settle often causes a moral vacuum.

Whatever the pros and cons of these arguments it is likely that the expansion of mediation and like processes into the judicial system will continue. The research clearly shows that parties are more satisfied with mediation than with traditional judicial processes and, as shown in **Chapter 4**, there is a perceived need to reduce caseloads in the formal court system (ALRC, 2001; McEwen and Maiman, 1984). There is little support for the notion that we should go back to the situation in the 1980s where there

was considerable resistance to, or more often non-comprehension of, the possibilities that mediation presented.

These debates about the meaning and role of mediation emphasise the key elements of a mediator's role. An early formulation of these aspects provides some useful insights (Folberg and Taylor, 1986, p 7). In their comprehensive

book, Folberg and Taylor argue that mediation defies a strict definition and its specific elements depend on a number of variables. They prefer to think of mediation as a process that transcends the conflict itself. Even earlier, Stulberg (1981, p 85) provided a very useful perspective by preferring to look at the functions of the mediator. According to Stulberg, a mediator is:

- *a catalyst for interaction between the parties:* the mediator should be able to provide a positive, constructive environment;
- *an educator:* the mediator must become familiar with the background of the parties, the dynamics of the conflict, and the context of the dispute;
- *a translator:* the mediator must try to interpret and convey each party's proposals in a way which is faithful to the objectives of the party and which ensures a high degree of receptivity;
- *a resource person:* the mediator may be a source of information and provide access to other services;
- *a 'stable hand':* the mediator is expected to provide support to both parties in what are sometimes very emotional encounters. A mediator aims to create a context in which the conflict is not worsened;
- *an agent of reality:* the mediator tries to inform the parties of the different perceptions and solutions that may apply to any given situation; and
- *a scapegoat:* the mediator can be the focus of blame for any agreed settlement; that is, a party can suggest afterwards that a better agreement may have been forthcoming except for the presence of the mediator.

As noted, mediation, like any alternative dispute resolution (ADR) technique, can occur in a variety of contexts — formal or informal; structured or unstructured. A mediation in a government-funded Dispute Settlement Centre is very different from one conducted between a union and industry group as part of an industrial dispute. In fact, the variables that shape mediation are numerous and include the type of conflict involved; the experience, training and backgrounds of the disputants; the experience,

training and background of the mediator; and the formality and type of procedures adopted.

The National Mediator Accreditation System

7.6 The NMAS commenced operation on 1 January 2008. It is an industry-based scheme that relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standard. These organisations are referred to as Recognised Mediator Accreditation Bodies (RMABs). NADRAC, abolished by the Federal Government in 2013, was instrumental in the development of the NMAS and the impetus came primarily from non-lawyers rather than lawyer mediators. However, NADRAC was not involved in the implementation of the NMAS.

The independent industry body — the MSB — officially launched on 7 September 2010 by the Hon Justice Murray Kellam AO, Chairman of NADRAC, and is responsible for developing and maintaining the NMAS.

In launching the MSB, his Honour noted that Australia was the only country to have established a national scheme for mediator standards and accreditation and that the NMAS had 'prompted the biggest transformation to the professional landscape in the history of mediation in Australia by providing an overarching, base level of accreditation for all mediators irrespective of their field of work' (Kellam, 2010). While funds were made available from the Federal Government to initiate the NMAS it is now clear that the MSB will need to be wholly funded by RMABs and for practical purposes, mediators seeking accreditation through RMABs. The MSB passed a significant milestone in 2015 when it successfully concluded a process of

consultation and revision of the NMAS; see **Exercise 18** (MSB, 2015) at the end of this chapter.

Mediation organisations can opt to accredit mediators under both the NMAS and more specific field-based accreditation schemes. The approval standards specify requirements for mediators seeking to obtain approval under the voluntary national accreditation system. They define minimum qualifications and training and require that prospective participants and others involved are informed of what qualifications and competencies can be expected of mediators (NADRAC, 2008; MSB, 2015). RMABs apply the approval standards when assessing applications for national accreditation as a mediator.

Mediators accredited by the NMAS must comply with the Approval Standards and the Practice Standards. The NMAS represents a type of self-regulation of mediator accreditation practice, which is probably the most popular regulatory form used in many jurisdictions around the world. Corporate and government pledges to use ADR and avoid litigation are also a growing form of self-regulation.

The Evolution of Modern Mediation

7.7 The above description of mediation may lead one to think that the concept is a somewhat new one. However, I would disagree with the suggestion that it is a 'new process' or 'philosophy' and thus a new idea as suggested by Paratz (2015). In fact, it is quite the opposite — it is a very old and even ancient idea. For example, Auerbach (1983) documents the history of non-legal dispute resolution practices in the United States, which date from the time of the earliest Dutch settlers through to the Quakers, Mormons and Mercantilists of the 1700s, and to the Scandinavian, Chinese and Jewish immigrants of the 19th and 20th centuries. He notes a resistance to the

introduction of formalised legal procedures in these communities and that there is (Auerbach, 1983, p 42):

> … a persistent cultural dialectic between individuals and their communities … [and] the emergence of a persuasive legal culture, yet the persistence within it of stubborn pockets of resistance to legislation.

His examples of pre-20th century conciliation and mediation occur in close-knit communities. He describes the revival of ADR procedures in the United States in the 1960s as arising out of the 'communication euphoria' of that period (pp 116–17).

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Henderson (1965), in his exhaustive and brilliant work on Japanese mediation, which goes back some thousands of years, makes a distinction between pre-state, didactic and voluntary mediation, which he relates to social evolution and the rise of effective legal institutions (see extract in box below). Mediation has been documented in China for over two thousand years (Cohen, 1966).

Pre-state, didactic and voluntary mediation

Pre-state mediation

This refers to pre-legal dispute settlement between independent entities like families, clans, tribes, villages or nations where there is no legal system mutually binding on the parties. The disputes are therefore not specifically legal or justifiable. The parties must proceed on the basis of negotiating power and sometimes even force. Much international and labour mediation is of this type, as is most 'primitive' mediation between members of different tribes and villages.

Didactic mediation

This refers to a type of mediation between members of the same social group although it may not have a formal legal structure or process. The didactic mediation process is predominantly authoritarian and characterised by background coercion, either because of the social context, the relative positions of the parties and the mediator, or because there is no practicable alternative remedy 'in court'. It is didactic because it is characterised as being educational and instructive as well as being coercive. In some

societies law enforcement and adjudication procedures develop out of this form of mediation.

Voluntary mediation

This also takes place between members of the same social group; the major difference is that there is a practicable legal remedy available as well as the mediation itself. That is, either party to mediation may leave and revert to legal remedies. Voluntary mediation is thus premised on an effective legal system to protect the position of the parties and to enforce any agreement that may be reached, as well as to provide an alternative remedy in case it fails.

(Henderson, 1965)

As Erin Johnson (2009) notes:

> The Eastern Civilizations were known for peaceful persuasion rather than coercive conflict. Confucians and Buddhists have a long history of respecting the natural harmony of life. To this day, if a person cannot resolve local conflicts peacefully, that person might lose the respect of others. Several other ancient cultures had similar traditions. Villages had at least one leader who was skilled at helping people solve problems. People who followed the Roman example even created professional job descriptions — intercessors, conciliators, etc. — for those who ran back and forth between the bickering parties and traded offers of goods and services for the promise of peace.
>
> Eventually, as populations increased, the king or the wise men ceased to be able to hear each dispute individually. With the Code of Hammurabi and the signing of the

> Magna Carta, laws began to be written down, and there were formal positions created for those delegated to use those laws to resolve disputes.

Nadja Alexander (2001, p 1) states, in relation to the European context:

> In Australia we call it 'Mediation', the French say 'la mediation', and the Germans 'die Mediation'. The term is global, stemming from the Latin, *mediation*, the process universal, its inherent flexibility transcending historical and national legal norms and systemic differences. Indeed, forms of mediation can be traced back to sources in ancient Greece, the Bible, traditional communities in Asia and Africa, and to the fourteenth Century English 'Mediators of Questions'.

7.8 As outlined in **Chapter 4**, the development of ADR practices in Australia has seen the rise of mediation as the most popular modern

alternative to traditional and more formal processes. What perhaps distinguishes modern practice from what has gone before is that it has been formally and consciously adopted by governments, courts and other institutional frameworks, as a way of resolving certain deficiencies and inefficiencies in those systems; that is, it has moved beyond ad hoc local community or agency application to a more formalised system-wide movement. But even this may have modern antecedents in the Chinese adoption of mediation into its constitutional arrangements in the 1950s: see **Exercise 24**. However, the way in which mediation has developed has not been uniform; the process adopted across various organisations and systems in Australia has varied.

Facilitative mediation

7.9 Since its beginning in the 1980s the principle form of mediation practised in Australia has been 'facilitative mediation'. In this style of mediation, the mediator structures a process to assist the parties in reaching a mutually agreeable resolution. It builds on and follows the integrative model of negotiation outlined in **Chapter 6**. The mediator obtains statements and asks questions; validates and normalises parties' points of view; explores and searches for interests underneath the positions taken by parties; and assists the parties in finding and analysing options for resolution. The facilitative mediator avoids giving advice or making recommendations, and attempts to enable the parties to develop and choose their own options. A clear distinction is made between process and outcomes, with the mediator in charge of the former and the parties the latter.

In facilitative mediation there is an emphasis upon exploration and moving the parties through a process of increasing understanding of their conflict towards agreement. Facilitative mediators traditionally keep the parties together to ensure they listen to each other. Private sessions or caucuses are held so that the parties can reflect upon what has happened and plan ahead. If

there are lawyers present the facilitative mediator wants to ensure that the parties have some real and relevant input.

Facilitative mediation developed in community justice and dispute resolution centres where the mediators were community members on generally very low pay scales (sometimes they were referred as 'paid volunteers') and were not expected to have any professional expertise in the areas of dispute they were mediating. This became, and still is, the dominant mode of training in mediation and provides a sound basis for general mediator practice. The process outlined in the remainder of this chapter is

based upon this model. As the field has professionalised, more mediators, particularly from the legal profession, have become involved and have adapted or moved away from this model.

Evaluative mediation

7.10 Evaluative mediation has developed principally in the legal system and is a process modelled on settlement conferences held by lawyers and judges. In effect, it reflects the negotiation values of the legal profession. Evaluative mediators assist the parties in reaching resolution by pointing out the relative strengths and weaknesses of their cases, and predicting what a court or tribunal may do. An evaluative mediator may make formal or informal recommendations, or give advice on legal points, to the parties as to the outcome of the issues. Their emphasis is more on rights than needs and interests although they can blend these elements. 'What is fair?' becomes an important question that the evaluative mediator is likely to ask often. Also, because the mediation is commonly a part of a legal process or court ordered (see **Exercise 22** at the end of the chapter) the question of costs is likely to

be an active or important part of the elements considered and used in reality testing of the parties. Private sessions become more dominant in this mode of mediation, which is therefore sometimes called 'shuttle mediation'. The evaluative mediator not only structures the process, they often directly influence the outcomes as well.

The role of the party lawyer becomes more pronounced and parties are sometimes not present or their role is not as central in the mediation process. Sometimes the mediator may meet only with the lawyers and sometimes only with the parties. There is an assumption in evaluative mediation that the mediator has some substantive or legal expertise in the substantive area of the dispute.

One thing that is certain is that the practice of mediation continues to evolve. One of the more interesting developments has been the emergence of what have been termed 'transformative mediation' and 'narrative mediation'.

Transformative mediation

7.11 Transformative mediation caused quite an impact in the mid- to late-1990s, although on closer inspection it largely appears to be a 'recycling' of ideas from the 1960s and 1970s derived from the social sciences. The difference in the 1990s was that these ideas found a new audience, largely in the legal and other traditional professions, to whom they seemed both novel and interesting. Because the idea of transformative mediation encompasses and brings together many of the aspirations of the last 30 years, it is worth outlining it in a little more detail here.

The key elements of the transformative mediation process are *empowerment* and *recognition* (Bush and Folger, 1994). Empowerment in this context is the capacity of parties to make their own decisions. This can lead to self-determination, which is predicated on them knowing what their options are and making the right decisions. Recognition in this context is the capacity of parties to understand the other's perspective and be responsive to it. Bush

and Folger, the major advocates of this approach, describe mediation as a process 'that enables people in conflict to develop

a degree of both self-determination and responsiveness to others, while they explore solutions to specific issues' (1994, p 11). Their definition of mediation centres on the parties rather than outcomes or process. They refer to mediation as a process in which the parties work with the help of a neutral third person to change the quality of the conflict interaction. You may have noticed that these constructions of mediation are very different to the definitions given at the start of this chapter. In this way, the major emphasis of the transformative approach is highlighted; that is, it is not focused on outcome or settlement, which Bush and Folger state has become the typical focus of modern mediation approaches, nor is their model process focused in the sense that there is no rigid adherence to a staged process outlined later in this chapter. The authors see most mediation practised today as being impositional, non-participatory and settlement-focused. Because of this, the mediator exerts pressure on the parties to settle according to his or her definition of what is fair.

Rather than seeing conflict simply as a problem to be solved, Bush and Folger prefer to see it as a proactive facilitative process where the mediator's orientation is one in which conflict is viewed as an opportunity for individuals to change their interactions with others, if they choose to do so. The choice is to change from a destructive interaction to a constructive one, thus bringing about a conflict transformation. The mediator helps to create an environment where parties move from being uncertain and hostile to being more certain and accepting. The success of the process then becomes not whether mediation is cheaper and faster or that a settlement is reached, but rather the way the process works, the sense of control over decision-

making and the quality of the interactions. As Fisher (2006, p 45) elegantly states, 'Its practice is a micro-focus on the moment by moment party interaction in the room, though it also is optimistic about long-term social change'. Fisher is impliedly critical of the attempt by Boulle to define mediation into four 'paradigmatic models', one of which he calls 'transformative' (p 45). Boulle includes in his definition of transformative mediation therapeutic or reconciliation mediation, emphasising emotional, relationship and counselling dimensions.

The parties' reasons for high satisfaction with mediation, according to Bush and Folger, relate to the extent to which parties can deal with issues that they themselves feel are important, the extent to which they can present their views, and their view that it is a process which helps them to understand each other.

According to Bush and Folger, the way this happens is largely dependent on the mind-set of the mediator. This in turn largely depends on the mediator asking himself or herself what he or she is doing and why. The key question for the mediator becomes, 'What is the purpose of mediation?'. In Bush and Folger's view, in transformative mediation 'purpose drives practice'. The mediator's purpose in assisting the parties to bring about change is to support them in a non-directive way. Facilitating discussion with the purpose of transformation has the goals of helping parties to gain clarity and empowerment about their options and helping them see and appreciate the other side's view (recognition). In this way the parties become more open, less defensive and more responsive. The process is not designed to get the parties to agree, but to recognise each other's viewpoints. The mediator's goal within the transformative model is then to help parties to improve their communication and their decision-making,

subject to their own choices, by fostering empowerment and recognition. Bush and Folger maintain that the two major paradigms of mediation — the problem-solving approach and the transformative approach — are both 'fundamentally distinct and inconsistent' (1994, p 108).

They further argue that the transformative approach may result not only in the immediate problems being dealt with (although not necessarily 'settled'), but can also bring about changes in the parties' capacities for self-determination and responsiveness in future relationships and life matters.

This is a relational philosophy of resolving conflict, as opposed to the individualistic one that they believe the win–win, satisfaction or interest-based bargaining model aims to achieve. They see their model as a departure from the dominant prevailing views of mediation. It is premised on several 'new' assumptions, including that:

- conflict is a crisis in human interaction that represents an opportunity to change;
- the most important product of mediation is the shift from negative to positive interaction between the parties — a change and improvement in the quality of the parties' interaction;
- the parties' motivation or drive comes from a moral impulse to act with self strength, but with concern and responsiveness to others; and
- people's abilities include the capacity for self-determination and choice and an inherent aptitude for responsiveness.

Fisher (2007, p 87) describes five basic behaviours in the transformative approach:

- *reflecting:* mirroring the tone and words of the party; also referred to in this text as 'paraphrasing';
- *summarising:* condensing the essential topics described by the parties;
- *questioning:* usually open-ended to allow parties to expand or clarify what

they have said;

- *checking in:* used in conjunction with questioning to ensure that what has been said by the mediator is correct; for example, 'Is that right?'; and
- *staying/backing out:* allowing the parties to converse with each other. The mediator allows and encourages this to happen.

In the process of mediation described below you will see that all of these behaviours, or variations of them, are included.

The transformative approach has moral growth as part of its goal, as well as transforming human character. Bush and Folger argue that the modern mediation movement has lost sight of this goal.

As a further distinguishing feature of the transformative approach, proponents also seek the direction of the parties in determining how the process will operate. In transformative mediation, the parties structure both the process and the outcome of mediation, and the mediator follows their lead. This requires great skill and patience on behalf of the mediator and shifts the onus onto the parties to reach agreement.

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The 10 hallmarks of transformative mediation: Distinguishing the process from others

The summer 1996 issue of *Mediation Quarterly* was a special issue on transformative approaches to mediation. The lead article was written by Folger and Bush as a follow-up to their 1994 book *The Promise of Mediation.* Their article, 'Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice', listed ten 'hallmarks' (summarised below) that distinguish transformative mediation from other forms of intervention. Transformative mediators:

- in their opening statement will explain the mediator's role and the objectives of mediation as being focused on empowerment and recognition;
- will leave responsibility for the outcomes with the parties;
- will not be judgmental about the parties' views and decisions;

- take an optimistic view of the parties' competence and motives;
- allow and are responsive to parties' expression of emotions;
- allow for and explore parties' uncertainty;
- remain focused on what is currently happening in the mediation setting;
- are responsive to parties' statements about past events;
- realise that conflict can be a long-term process and that mediation is one intervention in a longer sequence of conflict interactions; and
- feel (and express) a sense of success when empowerment and recognition occur, even in small degrees. They do not see a lack of settlement as a 'failure.'

There are, in my view, a number of limitations and problems with the transformative approach. First, it takes an either/or approach to the various models and techniques employed by mediators. It assumes that the problem-solving and interest-based approaches are separate from a transformative approach. In fact, it may be better and more productive to see these approaches as forming a continuum, with considerable overlap between them. Bush and Folger's argument that much of modern mediation practice has lost those features that they label 'empowerment' and 'recognition' has merit, yet there is still much in mediation practice that reflects its early derivation from the communitarianism of the 1960s and 1970s that emphasised these aspects. For example, as noted, Fisher, a keen supporter of the transformative approach, says that the two basic principles of the approach are encompassed by the five basic behaviours (Fisher, 2006, p 87) described above at **7.11**. These are, however, behaviours that occur in most models and do not distinguish this approach as may be implied. He also suggests that the transformative approach includes five basic strategies: orienting parties to a constructive conversation; orienting parties to their own agency (that is, autonomy and the ability to make decisions); orienting the parties to each other; supporting the parties' conflict talk; and supporting the parties' decision-making process (p 89). Again, these strategies occur across a range of so-called 'models' of mediation and are important elements of mediation generally.

Second, Bush and Folger's view of what mediation is or is not may appear overly rigid. Mediation in many jurisdictions is now provided for by legislation and is often court-annexed or part of administered schemes. It may be asked whether transformative mediation is possible or workable in those settings, particularly where

time limits apply. Bush and Folger concede that settlement rates are much lower — around 60 per cent — within the transformative framework. However, agreement in their model is not an indication of success in mediation. Their response, which in my view is quite unrealistic, seems to be that mediators should choose not to be involved in such programs and/or to call such models something other than mediation, for example 'settlement conferences'.

Third, the view that transformative mediation can change social institutions and human consciousness and therefore represents a 'paradigm shift' ignores the cultural milieu in which it operates. In other words, it confuses cause and effect. Bush and Folger take the simplistic view that their model is an instrument, or cause, of social change, rather than a result of wider social changes. (Refer to the discussion on culture and conflict in **Chapters 1** and **6**.) Perhaps it may be better to see the transformative approach as an important part of the evolution and development of modern mediation, not as a new paradigm. In this sense, the elements it emphasises can be seen as important fundamentals to be nurtured and for mediators to think about. They also reflect the ideals and aspirations, not only of mediators, but of many parties in conflict. It is also interesting to note that in the 2005 edition of their book Bush and Folger play down their claim of the paradigm shift represented by transformative mediation and give more emphasis to the interactions between the parties. In an extended critique of

the model, and particularly of the case examples and available empirical research Bush and Folger used in their books, Robert Condlin, a law professor at Maryland University, stated (2013, p 680):

> The argument for TDR also is substantively confusing. After all these years it still is not clear, for example, whether TDR is supposed to transform character, or conflict, or both. In the beginning, proponents argued that it changed character, but they were criticized for this and seemed to back away from the claim, shifting their focus from people to conflict. The argument for second generation TDR continued to rely on the character transformation claim; however, sometimes explicitly so, but more often by implication, and TDR proponents still may be committed to it. If so, they have yet to explain how character can be changed in discrete, isolated, and unconnected experiences that are too irregular, sporadic, and context-specific to permit a systematic and sustained effort at modifying habits, values, and beliefs. Learning to resolve disputes, even with the help of others, is not the same as learning to become a better person, even if the two processes sometimes overlap.
>
> The argument that TDR transforms conflict, moreover, cannot explain how this is done consistently with TDR's other principled commitments. Conflict is not a freestanding, sentient, willful, and purposive being: it is the collective behavior of people confronting and resolving disputes. To transform conflict one must transform the behavior of people. This can be done slowly over time, by reinforcing new habits, values, and beliefs individuals learn on their own, or immediately, by suggesting, encouraging, and sometimes even coercing parties to behave in specific ways in the present. The 'slowly over time' option is not available to TDR, as we have seen, because disputes do not provide the conditions for long-term character change; nor is the 'immediate' option, since telling people how to behave, either expressly or implicitly, violates TDR's commitment to party empowerment.

Despite the criticisms and uncertain aspects of the transformative approach, its focus on empowerment and recognition, and away from simply 'solving the problem',

provides a solid and respectful basis for the involvement of disputants in their own disputes. It has also enabled many mediators to broaden their skills base and perhaps better contextualise the conflict from a moral as well as an analytical viewpoint: see **Exercise 27** at the end of this chapter for a critique of a transformative case study.

The chicken fight: An example of Chinese mediation

One of my favourite examples illustrating the different varieties of mediation is an one taken from the English-language Chinese weekly *Beijing Review.* Liu Shuanghe and Li Chengnian got into a fight over a three-month-old chicken. When the chairman of the local mediation committee arrived on the scene (almost every neighbourhood in China has a mediation committee), he asked them to stop fighting and explain the problem. Each man claimed that the other had stolen his chicken. The mediator listened and concluded that although the situation was not serious, it could become so unless the dispute was quickly resolved. Remembering that chickens have characteristics similar to dogs, he came up with a novel suggestion. The mediator asked each man to go home and return the next morning with his chicken coop. The news had spread quickly about this fight so many people from the village were on the scene the following day when the two men arrived with their coops. The mediator told each man to place his coop in the street at an equal distance from the young chicken in question. After the coops were in place, the young chicken was released. It promptly strutted over and joined the chickens from the Liu family's coop. This experiment was repeated for three days in a row and the result was the same each time. Given this, Li Chengnian relinquished his claim to the chicken and the dispute was resolved. See **Exercise 24** at the end of this chapter for more on Chinese mediation.

(Zhou Zheng, 1981, p 28)

Narrative mediation

7.12 Narrative mediation is a relatively recent approach that has come out of psychology, specifically the practice of narrative family therapy developed by Australians White and Epston in the 1980s (White and Epston, 1990). It is based on the social constructionist ideas briefly mentioned in **Chapter 1**; however, it also incorporates post-modernist ideas, particularly how language filters meaning and the subjective interpretation of events (Winslade and Monk, 2001). There is no one 'truth' to discover, no point of view privileged over another. Within the therapeutic framework from which narrative mediation originates, the clients identify their own problems and resolutions through a process of storytelling and story making, thereby gaining more control and agency. Language is thus crucial in this process, not only as a descriptive device but as a reality-creating device (pp 39–40). Giving something a name changes it. Narrative mediators do not assume that they

can be neutral and do not distinguish between content and process issues, rather preferring to see these as a part of the overall 'meaning-making system'. They believe that psychological and relational issues are as important as the substantive or content issues in a conflict, or even more so.

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Narrative mediation rejects the individualistic emphasis of the problem-solving approach (Winslade and Monk, 2001, pp 35–7). It seeks to challenge dominant discourses, which particularly disadvantage marginal and disadvantaged groups. Rather than see the problem in the parties themselves it sees the problem in the surrounding social discourse. It is a therapeutic style of mediation. One could say that psychologists have invented a discourse around mediation and its practice that reflects their practice. Face-to-face contact between parties is therefore maximised. The emphasis is on uncovering the underlying issues and interests, and on improving communication (Folger et al, 2001, p 290).

Narrative mediation passes through three phases: engagement; deconstructing the conflict story; and constructing an alternative story (Winslade and Monk, 2001, p 58). However, 'these are not discrete stages. They do not always follow one after the other in tidy sequences. At times mediation may move back and forth between these stages' (p 91). The way in which the parties assume things about each other is important (pp 58–61). By challenging the old narratives the parties can move towards a new, shared narrative which enables them to better manage the relationship. As Garagozov (2015, p 1) states:

> Within the 'narrative' framework conflicts in some essential ways are considered as competing stories. As evidenced by many cases parties at conflict strive for legitimizing their claims by creation and dissemination of their own version of 'what happened in reality' while at the same time trying to delegitimize the claims and version of their opponents. In this connection it is argued that for effective conflict resolution the competing narratives should undergo certain

transformations that could bring them towards their convergence into a common one. The underlying assumption is that a common narrative would help parties at conflict to create a shared, internally consistent vision of the past, present and future, which is considered as an important precondition for civil peace.

As indicated in this quote, narrative mediation tries to move beyond our normal sequential view of time where events follow one another, towards a more flexible view where past, present and future influence and merge with each other. It is therefore important for disputants to understand not only what has happened in a sequential sense but also how it shapes their futures. Narrative mediation is like viewing the conflict as a series of events, which then develops into a narrative that we use to explain and categorise what has happened. This becomes important not only to explain the past and present but also the future. There are two important points here that may be useful to contemplate: the way in which we think about the events of the conflict in their time frames and the way in which we move to categorise them, and the people associated with them, in certain ways. Narrative mediation leads us to critique or deconstruct both these aspects: see **Exercise 38** at the end of this chapter on 'categorisation'.

Views of time

How we describe and construct time in relation to a conflict can be instructive and also useful in helping disputants understand what has happened, is happening and how they are shaping what is going to happen. The ancient Greeks had a number of words for

time that can add some flexibility to our conceptualisation of this important element in conflict:

- **Chronos** is a quantitative measure that we still use in words like 'chronological' and 'anachronism'. It refers to time that can be measured — seconds, minutes, hours or years.
- **Kairos** is qualitative. It measures moments, and means 'opportunity', 'season' or the *right* moment.
- **Aeon** (or aion) is an indeterminate period of time, sometimes likened to an 'age.' We sometimes see ourselves as being in an 'age' or 'period.'

According to Winslade and Monk, the first phase of narrative mediation, the engagement phase, like in other mediation models, concentrates on establishing a relationship with the parties. Once the parties feel comfortable and some rapport is established (crucial to the process), the narrative mediator invites the conflict parties to relate their stories. It is at this point that the process is claimed to look different from other models. There are two key processes that follow: deconstruction and externalisation.

The second phase, deconstructing the conflict-saturated story, involves 'undermining the certainties on which the conflict feeds and invites the participants to view the plot of the dispute from a different vantage point' (Winslade and Monk, 2001, p 72). This vantage point comes out of a process called 'externalisation', in which the parties objectify the issue and treat it as a separate entity apart from them. A part of this process is naming the conflict in a way that enables the parties to view it as the antagonist.

Externalisation is a mechanism for redressing and destabilising 'totalising descriptions', or a person's tendency to 'sum up a complex situation in one description that purports to give a total picture of a situation', which inevitably favours the person himself or herself and places blame for the conflict on the other party (Winslade and Monk, 2001, p 5). The conflict is subsequently referred to as 'this conflict' or 'it' rather than 'your conflict'. In the preparation phase of the mediation the mediator may spend some time with the parties in private sessions where they are familiarised with the process of deconstruction and externalisation.

Once the problem has been externalised the parties and the mediator can enter the third phase, and work together to 'co-author' a new narrative, one in which the parties work together against their common problem. Winslade and Monk then describe how the mediator is able to take a stance with the conflict parties, joining them in a 'protest' against the conflict. This allows a movement towards a solution. In this process the power differentials in the

relationship, particularly those which become evident through the process of deconstructing dominant discourses, are addressed (p 48).

The model relies on several questioning techniques. The first is called 'recovering the unstoried experience', which helps the mediator bring out a new conflict narrative and explore it. Instances when the parties question or run parallel to the main conflict narrative are called 'unique outcomes' (p 84). These 'unique outcomes' can be shared agreements or understandings that perhaps demonstrate some shared

understandings. They appear similar to Bush and Folger's concept of recognition from the transformative mediation model. The mediator pursues these moments by taking a position of 'curiosity'. The mediator does not assume to know the answers and helps the parties work through the issues to discover possibilities for better management. These unique outcomes are built on during the process of developing a new narrative, and the alternative story is 'thickened'. To this end, links must be made between exceptional events. In so doing, attention must be paid to building on the potential for further alternative descriptions of the relationship.

'Smalling questions' may be required to break down the lived experiences. For example, the mediator might ask, 'Was there any occasion during the few interactions that you did have when some amount of mutual respect may have been evident?' (Winslade and Monk, 2001, p 86). These positive experiences are then integrated into a coherent narrative. It is clear that this approach overlaps with the problem-solving approach. Winslade, Monk and Cotter (1998, p 36) state that '[t]here is still a place within [this] framework for the processes of generating options and then exploring those options and negotiating mutually satisfying outcomes'. However, before getting to this point the alternative discourse or story is developed. In this way a sense of

hope or optimism is built that things can be different (Winslade, Monk and Cotter, 1998, p 37). This approach prefers to move beyond the simplified concepts of 'solutions' or 'win–win' outcomes. It attempts what is termed 'discursive repositioning', which includes the conscious shaping, albeit in some small way, of the discourses out of which needs and interests are produced (Winslade and Monk, 2001, p 62). It looks to alter the social arrangements around which the conflict is created and, like the transformative model, sees the process as something of a moral quest.

In some respects, narrative mediation represents the ways in which mediation has evolved to meet the demands of practice while still being consistent with underlying philosophical or theoretical underpinnings. As Alberstein eloquently muses in a 2009 article on the evolution of mediation and legal thought (p 4):

> Evolving models of mediation reflect the complex location of mediation on the theoretical and professional levels. On the theoretical level, mediation is located between the social sciences and the humanities. Two theoretical paradigms delineate the developing models described here: the rational-scientific paradigm, guided by game theory and the social sciences, and the interpretive paradigm, inspired by the humanities and based on storytelling and narratives. Both are descriptive and portray the situation of conflict as open to diverse forms of intervention.

Narrative mediation prefers or privileges relational issues over substantive issues, which in practice means that the negotiation phase of the process is shortened (Winslade and Monk, 2001, p 90). As is the case with the early work of the narrative therapists, written agreements are an important part of reinforcing the new narrative. This is because dominant stories can be expected to reassert themselves after a meeting with a mediator is over, and such strengthening may often be crucial to the survival of a new perspective (p 91). Thus, follow-ups and further sessions are considered important in this model.

Essential ideas and terms in narrative mediation

Alternative story: This is the story of cooperation that stands in contrast to the conflict-bound story.

Co-authoring: Where the mediator and parties share the responsibility for the development of the story of cooperation.

Curiosity: The mediator does not assume to know the answers and helps the parties move to new options and possibilities.

Deconstruction: The process of exploring the taken-for-granted assumptions and ideas underlying social practices that seem to represent truth or reality. It is achieved by bringing to light the gaps and inconsistencies in a dominant story so that acceptance of the story's message or logic no longer appears inevitable.

Discourse: A set of ideas embodied in language and non-verbal interaction that underlies and gives meaning to social practices, personal experience, and organisations or institutions. This often includes the assumptions that allow us to know how to transact in social situations

Dominant story: The 'normal' way of construing a situation, or the set of assumptions about an issue that has become so widely accepted within the society or culture that it appears to represent 'reality'.

Externalising conversation: The problem may be spoken of as if it were a distinct entity or even a personality in its own right rather than part of the person.

Mapping the effects: A question asked about an externalised problem to detail the relationship between the person and the problem. The map may be about the influence of the problem on the person or vice versa.

Positioning: The process by which discourses place people in relation to each other, usually in power relations of some type.

Problem-saturated story: The story that a party presents to a mediator in which the conflict is so dominant that there at first appears little sign of an alternative story.

Social constructionist: The movement in the social sciences that stresses the role played by language in the production of meaning. A central tenet is that people produce through discourse the social conditions by which their thoughts, feelings and actions are determined. In this way, meaning is made in social contexts rather than given.

Unique account: A story developed from the connection of a series of unique outcomes or 'sparkling moments'. The coherence of a unique account makes possible the performance of alternative meanings.

Unique outcome (sometimes called a 'sparkling moment'): An aspect of a lived experience that lies outside of or in contradiction to the problem story: see **Exercise 35** at the end of this chapter.

It is evident that narrative mediation offers mediators a range of innovative approaches to their craft. As was pointed out in **Chapter 3**, when

considering the management of complaints the emphasis is not on discovering 'the truth', but on a search to explore the perspectives and stories of the parties so that they can develop a new story or reality around the conflict. Narrative mediation builds on and reflects the work of Lederach (1995) (see **Chapter 1**), who proposed in his training programs

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an approach of curiosity and ignorance on the part of the presenter, to encourage the parties to develop process and options and also to explore their experiences. I have included an outline of a narrative mediation process below.

Possible outline of a narrative mediation process, with typical questions

1. Intake: What are the parties' hopes/aspirations for the mediation?
2. Obtain a brief story or history of the conflict/problem and give it a name if possible and appropriate. Ask questions such as:
    a. Were things better between you before the conflict?
    b. How did you respond?
    c. How did the other person respond?
    d. How did you think/feel/behave?
    e. How is it that the conflict did not completely stop you from wanting to talk together and find your way through the present difficulties?
    f. Have there been any times in this dispute when you have not been so captured by the conflict?
    g. Why did hurt feelings and blame not stop you from cancelling this meeting?
    h. What is the history of your relationship before this problem dispute? What difference does it make to recall these times?
    i. Do any recent occasions stand out for you in which hurt feelings and blame did not completely erase efforts in searching for a solution?
    j. Have there been any instances recently when you experienced an intimation of not being beaten by hurt feelings and blame?
    k. How has the conflict affected significant others; for example, family, friends,

colleagues? How has it affected your relationships? Was the conflict in character? What have been the costs of the conflict to you? What assumptions were you making? Does your role demand that you behave in this way?

l. How would the law impact on you and how would it impede your own preferences?

3. Exploration: What do the parties want to do, or do they want to stay in the same place? Ask questions such as:

   a. Can the conflict get any worse?

   b. What is your preference? To continue the fighting or to cooperate? Has the conflict pushed you as far as you both are prepared to go or are you still willing to let it speak for you?

   c. Are the consequences of the conflict acceptable? What would you like the future to be?

4. Co-author a story of cooperation. Ask questions such as:

   a. What are the actions you have taken/the thoughts you have had/the plans you have considered/the hopes or intentions you have held that might diminish the power of this conflict?

   b. How do you explain that you were able to be more in charge of blame, humiliation, hurt feelings, or injustice than you initially thought?

   c. When other people may have held on to hate, how did you develop the resources not to be dominated by blame and claim a sense of space for yourself? What do you think it means that you are agreeing about that issue? How significant is it that

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the other party is willing to cooperate on your request in this case? Do you see yourselves as reasonable people? How have you tried to show that in this matter?

   d. Have there been any occasions when each of you has made a real effort to be more reasonable with each other? Have there been any occasions when you have thought about these things? What positive qualities does that suggest about your relationship? What does it mean to you to hear the other person speaking with understanding? Does it make it more likely that you can reach agreement?

   e. What sort of action/agreement/commitment might that spirit of cooperation require of you?

   f. If friends/colleagues of yours were struggling with this sort of problem, what advice would you give them about how to resolve it?

   g. Are there some parts of your relationship that have been left out because of these problems? Could you bring these parts back?

   h. Can you tell me things that are going on now that show a difference from the

past?

i. How would some of the things that you have learnt help you now?

j. How could you step out of this conflict/argument and free yourself?

k. What skills do you need for this conflict to be managed?

5. **Agreement-making. Ask questions such as:**

a. What are you prepared to do to defeat the problem? What does this tell you about yourself that you might not have known? What does your movement away from conflict say about your ability to resolve these issues?

b. Does cooperation suit you?

c. What might your next step be if you were to further cooperate? If you were able to cooperate what would your relationship be like? How would your continued cooperation affect others?

d. Is it important that you make your own decision or is it better that a judge make the decision?

(See Monk, 1997; Winslade and Monk, 2001, pp 87–9.)

Each of the models of mediation, as they have developed since the 1960s in western societies, share some underlying principles even if their intellectual frameworks are diverse. These shared principles, though defined differently in each model, have an emphasis on process: the search for underlying or latent causes and motivations, an acknowledgment of the importance of emotions, and an emphasis on democratic (and mutualising or sharing) but respectful dialogue and positive constructive interventions. For further insights into these frameworks see **Exercise 28** at the end of this chapter.

The Advantages of Mediation

7.13 Most commentators suggest that mediation can be consensual, constructive and educative; it can improve communication and so assist with negotiation, decision-making and problem-solving (Boulle, 1996b; Astor and Chinkin, 1992). Boulle claims in this context that too much emphasis is placed on a settlement being reached. He argues that there should be

additional criteria including: the parties' satisfaction with the mediator's conduct and the fairness of the process; durability of

the outcome; knowledge gained by the parties about problem-solving and handling disputes; and improvement of the relationship between the parties (Boulle, 2001, p 11). Other factors, such as cost, delay, complexity and formality, may dissuade individuals from initiating formal legal action and attract them to alternatives such as mediation. Astor and Chinkin (2002, p 33) believe that ADR has its foundations in notions of 'community participation and empowerment'. By attaching ADR processes like mediation to courts and other judicial tribunals, mediation can therefore increase access and be a powerful mechanism through which this empowerment can occur.

In brief, mediation has a number of distinct advantages, including:

- It is an educative process — participants can learn about each other's wants and interests.
- It provides a model for conflict management — participants can generalise their learning to future disputes that may arise between them.
- It is flexible — it is not restricted by any rules or procedures such as in the court adversarial process and so can be used in a wide variety of situations.
- It enhances the role of the participants — in an effective mediation participants are able to have a relatively high degree of control over the process. They are able to fashion an agreement unique to their own needs. The agreement will reflect the norms and interests of the parties themselves and not that of an 'objective' third party, such as a judge. The assumption is that the parties are good judges of what the real issues are and whether they can be resolved adequately.

- It emphasises a win–win solution — mediation is not concerned with who is right or wrong, or losses and gains, but reaching a workable agreement that is in keeping with the parties' needs.
- It reinforces the chances of a lasting agreement — the chances of success are heightened because the agreement is more likely to reflect the needs of the parties; the agreement is not imposed on them, and is one in which they have made an investment of time and energy.
- It is often perceived as being less threatening by the parties — mediation in conflict management is often seen as less intimidating than the formal (and expensive) legal process or a demanding face-to-face negotiation. In some instances it can be used in preference to counselling techniques, particularly in disputes involving couples where one or both of the parties do not want to be closely involved with the other.

The other great advantage of mediation is that it is a process that can deal with the variety and dimensions of disputes unable to be dealt with by the traditional dispute resolution services such as the court system. This is one of the reasons it has been used as an adjunct to formal courts, facilitating better administration of justice.

New South Wales set up a network of Community Justice Centres in 1979 and Victoria its Neighbourhood Mediation Centres in 1987 (the latter are now called Dispute Settlement Centres) (Dispute Resolution Project Committee, 1985). They were largely modelled on mediation services that sprang up in great profusion in the 1960s and 1970s in the United States. (For an outline of how ADR developed in Australia, see **Chapter 4**.) Mediation has also been integrated into Family Court proceedings

and by various industries in formal complaint management and dispute

management programs. However, as already noted, mediation is not a new process. It has been practised in nearly all societies for many centuries (Henderson, 1965; Auerbach, 1983). It is a process that can be quickly learned and applied by a wide variety of people. It can be usefully employed by most professional groups, as well as by those working in the community in voluntary capacities.

7.14 Over the past three decades mediation has been seen as a supplement to the services provided by such agencies and groups as local government, police and the legal profession, which have all been criticised for their earlier failure to provide adequate conflict management services. Perhaps the most important early research indicating the level of community dissatisfaction with existing community services was the Australian Household Dispute Study (Fitzgerald, 1982–84). This breakthrough study sought to provide an analysis of the legal and non-legal processes used to resolve disputes in Victoria. Interviews with 1019 householders were conducted by telephone. The survey found that the extent of neighbour-related problems (such as disputes involving animals, noise, trees, smoke etc) went far beyond any other category of grievance. Thirty-nine per cent of households interviewed had experienced one or more neighbourhood grievances within the preceding three-year period. Thirty-five per cent of these reached a dispute level; that is, one or both neighbours approached each other or a third party about the matter. There was a high likelihood that those conflicts that reached the dispute level would lead to a damaged or destroyed relationship. Lower-income groups were found to have a higher level of unresolved grievances that they did not act on, and ethnic groups tended not to take their grievances to a third party.

Results from the survey revealed that local government (39 per cent), police (29 per cent) and lawyers (10 per cent) were approached in almost 80 per cent of cases (p 3). Satisfaction with the role of all third parties was found to be low among those surveyed. Over one-half of the respondents claimed that their dispute had received no outcome or only a partial one. In fact, 29 per cent of

the third parties contacted suggested the use of force or threat to resolve the dispute! Only 7 per cent of the third parties were perceived as acting to facilitate an agreement between the parties in a conciliatory way. The escalation of such disputes can lead not only to an escalation of tensions but turn potential civil cases into criminal offences (p 4).

A more recent survey, also in Victoria, found that 35 per cent of residents had at least one dispute with business, government, family, neighbours or associates in the previous 12 months. Most of these disputes (65 per cent) were resolved without assistance; however, help from a third party was sought in around 15 per cent of cases (Peacock, Bondjakov and Okerstrom, 2007). The survey was conducted in two parts by telephone interview: first, 502 interviews with Victorians aged 18 years or more; second, 500 interviews with owners or operators of Victorian small businesses. Both surveys were designed to be representative of the populations. The survey estimated that there were around 3.3 million disputes among Victorians, of which:

- 1.8 million involved business or government; and
- 1.5 million involved family, neighbourhood or the community.

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The most prevalent dispute categories were 'electricity, water, gas or phone' (8 per cent), 'family' (6 per cent) and 'neighbours' (5 per cent). External help from a third party was more likely to be sought in disputes that related to business and government rather than disputes involving family, neighbours or associates (Peacock, Bondjakov and Okerstrom, 2007, p 5). Nearly one-quarter (24 per cent or 805,000) of all disputes were not resolved at the time of the survey.

The survey found that actions most frequently taken to resolve serious disputes with business were:

- tried to return or exchange the faulty goods (25 per cent);
- took the matter up with the seller or supplier of the goods or services (53 per cent);
- obtained information from Consumer Affairs Victoria (5 per cent);
- obtained information from an ombudsman or commissioner (4 per cent).

Actions most frequently taken to resolve 'serious' family, neighbourhood and association disputes were:

- sought information or advice from community legal or support service (8 per cent);
- sought information from a government agency (7 per cent);
- went to the police (15 per cent) or lawyers (8 per cent);
- went to courts (5 per cent) or the Victorian Civil and Administrative Tribunal (VCAT) (4 per cent);
- lodged a complaint or sought a mediation service from a third party agency such as Relationships Australia (1 per cent) or community legal or support service (2 per cent).

Interestingly, it was reported that the action that most helped to resolve a serious family, neighbourhood or association dispute involved the police (8 per cent) (p ii), although a smaller percentage went to them than reported in the earlier Fitzgerald study. The total cost to Victorians of resolving disputes was estimated at $2.7 billion per annum, including the amount of dollars and number of hours spent. The reported emotional cost of dispute resolution is high among Victorians, with most (91 per cent) of those who had disputes with business rating the cost as high or very high and most (87 per cent) of those with family, neighbourhood or association disputes rating the emotional cost as high or very high. The emotional cost of disputes involving third parties was higher, with 41 per cent rating the emotional costs as very high compared with 28 per cent of those who did not use a third party (p 41).

7.15 Survey findings suggest that the key factors influencing Victorians to make greater use of ADR services include relative cheapness and speed of resolution when compared with the courts, and access to subject or industry experts. Despite this, the survey found that in general, relatively low proportions of Victorians have contacted ADR services to help them handle a dispute. The majority of services were contacted by about 4 per cent of Victorians, while Consumer Affairs Victoria was contacted by 11 per cent (p 13).

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Respondents were questioned about the advantages of taking a matter to a court or tribunal. The top five advantages were related to the perception that these authorities would produce a final and quick outcome, as shown below (p 21):

1. final resolution (6 per cent);
2. used if other options fail (6 per cent);
3. depends on extent of dispute (serious disputes/when a lot of money is involved) (5 per cent);
4. quicker resolution (5 per cent);
5. legally binding (4 per cent).

What was most interesting when compared with the earlier Fitzgerald survey was that the survey showed that experience with third parties has a positive effect on Victorians when it comes to resolving disputes within family, neighbourhood and associations. The majority (63 per cent) of those who used a third party to resolve their disputes believe the help they received achieved a better outcome for them than they could have achieved on their own. Further, the majority (73 per cent) felt more confident or able to deal with a similar dispute in the future as a result of their experience of using a

third party (p 35). However, it is worth noting that the survey did not canvass in any detail the way in which the third parties behaved and what was helpful, or less helpful.

A claimed advantage of formal mediation services is that they are relatively quick and inexpensive. Most simple mediations are limited to one session of two to three hours and usually take place within 30 days of first notification. They also consistently report a high rate of agreement of around 80 per cent (Irving, 1981; Folberg, 1981; Dispute Resolution Project Committee, 1985; Sourdin and Matruglio, 2002; Peacock, Bondjakov and Okerstrome, 2007). These agreement rates are usually in excess of 60 per cent, and as high as 90 per cent (Mack, 2003). Reasons as to why this may be so are not entirely clear but could include party motivation and willingness to negotiate (Genn et al, 2007). Factors such as whether the parties attend voluntarily, or whether online or in person, seemed to have little impact (Tyler and Bornstein, 2006; Tyler and Bretherton, 2004).

Of course those using mediation services could be said to be more willing to negotiate anyway, so measuring success by agreement rates is not necessarily the best way to evaluate the worth of the process. We could also look at the durability of agreements made and the quality of their content (Astor and Chinkin, 2002, pp 68–70). This is because it is a more flexible process that allows the parties to come to a range of outcomes that would not be available through other processes. An objective analysis of 'fairness' remains elusive, however, and perhaps always will in the eye of the beholder.

Most litigation settles rather than concludes in a hearing by adjudication; therefore, any cost savings must be related to early settlement rather than the costs of a court case. The earlier a case settles the more likelihood that costs of the parties will be less. Cost is then both an incentive and a barrier to the use of mediation services if the latter is perceived to involve further delay and administrative costs (Astor and

Chinkin, 2002, p 72; NADRAC, 2005, p 3; Bickerdike, 2007). It is often claimed that even where ADR is unsuccessful, the process may narrow the issues in dispute, thus reducing the time taken to resolve the dispute if it is taken to court. The evaluation of the New South Wales Settlement Scheme in 2002 found that 86.8 per cent of surveyed mediators reported a belief that the mediation process had saved the parties costs (Sourdin and Matruglio, 2002, p 55). There is more research to be done to determine the savings that may arise from mediation processes.

A Canadian meta-analysis

In a meta-analysis of civil law cases where mediation had been used, undertaken for the Canadian Department of Justice, Lawrene et al (2008) found that overall, mediation processes are generally effective in creating both time savings and costs savings of around 30 per cent and in perceptions of fairness of around 10-15 per cent. They state:

> For 10 of the 17 outcome measures that we could analyse, mediation programs demonstrated a positive impact. Therefore, the meta-analysis does indicate some broad improvement in outcomes when there is a mediation program. In the following areas mediation is demonstrated to provide an improvement:

- Measured Staff Hours Saved
- Measured Case Length
- Perception of Time Savings
- Proportion of Cases Successfully Settled
- Perceptions of Fairness
- Satisfaction with the Outcome
- Satisfaction with the Process
- Perception of Compliance
- Perceptions of Cost Savings
- Measured Costs Saved

> In many cases we could not make statistically confident statements about outcome measures. This may be due to the level of variability in what the studies found or the sample may have been too small to provide a clear picture. It might also be that the impact of mediation to that outcome measure is actually very low, negligible or could even be marginally negative. This was the case with seven outcome measures:

- Measured Time Saved
- Number of Hearings
- Pre-Trial Conferences
- Number of Motions
- Long-term Satisfaction
- Perceptions of Reasonable Cost

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Even though agreements made in mediation may lack enforceability until reduced to a legal agreement and rely on litigation to be enforced, there is evidence to suggest that this does not affect their durability. An evaluation of family law mediation found that 61 per cent of participants reported that all or most of the terms of agreements were still in force after 12 months (Bickerdike, 2007). It is worth noting that mediation agreements often lack formal enforceability and rely on litigation if things do go wrong. However, most are complied with (NADRAC, 2006). A survey of intervention orders conducted by the Dispute Settlement Centres of Victoria found that 17 of 24 mediation clients who responded to the survey reported that the agreement had worked 'reasonably well' or 'very well' (Tyler and Bornstein 2006).

Enforcing a heads of agreement

A case in the Supreme Court of New South Wales is a good example of the readiness of Australian courts to enforce mediated agreements even where one of the parties indicates that they had no intention of entering a binding agreement.

In *Boardman v Boardman* [2012] NSWSC 1257, a 'heads of agreement' (a summary of the agreed points) was signed by the parties and their solicitors at the conclusion of a court-ordered mediation. The heads of agreement stated that the parties would later sign a consent order for the court to record the settlement in greater detail but without material variation. The consent orders were to replace the heads of agreement. The plaintiff subsequently prevaricated signing the consent orders and disputed whether he had agreed to the resolution reached during the mediation.

The defendant brought an action to enforce the heads of agreement. The plaintiff argued

that he had never intended to sign the consent orders and that the heads of agreement was merely an 'agreement in principle' because it required the parties to agree to consent orders that would require approval from the court.

Despite acknowledging that the plaintiff may genuinely have signed the heads of agreement with a mental reservation or subjective intention that he would not sign the consent orders, the New South Wales Supreme Court held that he was prevented from characterising the heads of agreement as a mere 'agreement in principle' because it did not contain those identifying words and because cl 2 of the heads of agreement in fact stated that the parties intended to be immediately bound by its terms. In those circumstances, the court held that the heads of agreement was enforceable, given that the plaintiff had freely and voluntarily executed the heads of agreement in the context of a formal mediation at which he and the defendant were both represented by lawyers.

Interestingly, the fact that the heads of agreement was subject to the approval of the court did not mean that the agreement was not a contract and not enforceable. On the contrary, the parties may instead be regarded as having had a further contractual obligation to apply for the court's approval: For enforcement principles generally see **Exercise 29** at the end of this chapter.

Mediation services are also said to be 'community empowering' (although this is also a very difficult element to measure) (Bickerdike, 2007). This may occur in a number of ways. Mediation, rather than emphasising the production of a result, as the legal system does, encourages disputants to develop their own view of events, while recognising the other party's perspectives. Rather than relying on a judge or magistrate

to make the right decision, the parties assume control and take responsibility for their own issues. It is hoped, therefore, that with greater experience of mediation mechanisms the community will increase its ability to sort out social disputes as well as private ones. The community will also have a greater understanding of the forces that create, escalate and continue disputes.

Participant satisfaction with mediation and ADR processes in general are used as another indicator to measure outcomes, although they are also difficult to both define and measure (Astor and Chinkin, 2002, p 72; Balstad,

2005). Typically, participants in mediation report up to 80 per cent satisfaction or partial satisfaction with the process (Tyler and Bornstein, 2006, p 60). Key factors include practitioner skills, timely resolution and perceptions of procedural fairness (NADRAC, 2005, p 3; Balstad, 2005, p 252). Compared to other processes, mediation also tends to obtain relatively high satisfaction rates. For example, Sourdin and Matruglio (2002) found satisfaction in the New South Wales Settlement Scheme 2001 with mediation proceedings to be significantly higher than satisfaction with other forms of dispute resolution, including hearing and unassisted negotiation between parties. Key findings included:

- 87.5 per cent of mediation participants were satisfied with the way the dispute was dealt with, compared with 62 per cent satisfied with hearings and 70 per cent satisfied with unassisted negotiation;
- arbitration led to less party satisfaction than mediation;
- 87 per cent of mediation participants were satisfied with the outcome of the dispute, compared with 50 per cent who were satisfied with hearings and 50 per cent who were satisfied with unassisted negotiation; and
- 91.7 per cent of mediation participants felt the process was fair, compared with 57.1 per cent of hearing participants and 71.4 per cent of unassisted negotiation participants.

The one-text procedure

A good way to illustrate the usefulness and flexibility of mediation is by looking at the 'one-text procedure' described by Fisher and Ury in their seminal work *Getting to Yes.*

The new house

A couple is in dispute about the type of house they want build, an impasse they find difficult to resolve. An independent architect is employed and proceeds, in the way of a mediator, to separate the people from the problem and focus the discussion on their relative interests and options. Further, she helps them separate inventing from decision-making, reduces the number of decisions required, and helps them anticipate what they will achieve. She does this by focusing not on their positions but on their relative interests; for example, by focusing not on how big the bay window should be but why one party wants it. The architect explores the couple's various positions in this way

without seeking to go to an immediate solution. She then prepares a list of the parties' needs and interests, brings it back to the parties and asks them to criticise it and suggest improvements. This results in a draft floorplan, and once again the couple is asked to criticise it and suggest improvements. This goes on for as many draft plans as is reasonable, the architect always drawing on the couple's criticism and focusing on their

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interests. The architect keeps this up until she thinks that the plan cannot be improved upon, and presents it. Both parties then have the right to say 'yes' or 'no'. They now know exactly what they are getting — the result is based on their respective interests and the conflict has been simplified.

The Camp David accords

In September 1978 the Egyptians and Israelis met at Camp David in the United States to try to negotiate a peace deal. The host country acted as a mediator, allowing both sides to argue their case. The United States then prepared a draft agreement to which neither side was committed, asked for criticism, and kept editing and re-presenting the draft until the two sides were in agreement. This took 13 days and 23 drafts, at which stage the United States recommended a draft to which the two parties then agreed.

The one-text procedure can be used in a wide variety of conflict situations. All you have to do is prepare a draft agreement and ask for criticism, either as a participant in the conflict or in your role as mediator. If you are a participant, and it is not appropriate or practicable for you or the other party to prepare the draft, you may wish to employ a third party to do this: for further process details of this procedure go to **Exercise 30** at the end of this chapter.

(Adapted from Fisher and Ury, 1981, pp 118–22)

Disadvantages and Criticisms of Mediation

7.16 Mediation has its limitations, like any other conflict management procedure. American legal academic Lon Fuller persuasively argued, in the formative stages of modern mediation development, that some relationships are best organised by impersonal legal rules rather than by mediation processes (Fuller, 1971). He argued that the relationship between the citizen and the state is an example of the former, and that mediation has no place in the enforcement of laws. Questions such as 'Did A drive through a red light?', 'Has B paid her phone bill?' or 'Has C accurately reported her earnings to the

Taxation Commissioner?' may be better dealt with by some process other than mediation (refer to **Exercise 4** at the end of this chapter).

The catalyst for resistance

Owen Fiss's 1984 essay 'Against Settlement' in the 93 *Yale Law Journal* delivered a powerful critique of the then emerging ADR movement, particularly its focus on settlement. Fiss' critical analysis caused a reappraisal of the importance of settlement in mediation. His polemic defended the role of a heavily criticised judicial system, which at the time was said to be in a 'Litigation Crisis'. Fiss' arguments can be summarised into four main criticisms concerning: possible imbalances of power between the parties; the absence of authoritative consent; the problem of ensuring judicial overview; and the potential lack of justice or fairness.

For commentary on Fiss' article and its legacy, see Fordham Law Review's Symposium Issue on Owen Fiss, *Against Settlement: Twenty Five Years Later*, Vol 7, No 3, December 2009.

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Tillett (1999, pp 76–7) lists various risks in undertaking mediation, including: a significant power imbalance; coercion of one party by the other (or of the parties by the mediator); lack of skills; trauma before, during or after mediation; conflict escalation from disclosures made or feelings expressed; 'position entrenchment' if an adversarial stance is taken; injustice from uninformed agreement; or 'misuse of process' where a party uses mediation for tactical reasons or to abuse or intimidate the other party.

Fairness in process and outcome in mediation is significantly moderated by notions of mediator 'neutrality' or 'impartiality'. There is an ongoing debate about what exactly these terms mean and how they are to be applied in practice, as summarised in 'The great neutrality debate' below.

The great neutrality debate

In the 1990s a vigorous and interesting debate raged in the literature about the role of the mediator and particularly the mediator's neutrality. Many commentators raised the issue

of the centrality of 'mediator neutrality' as both defining the process and protecting the parties. Below is a summary of some of the key moments in this debate:

- Smith (1991, p 428) says that mediators in all fields are biased as they have an interest in the outcome or are obliged to hold to standards, and that such interests should be declared at the right time 'rather than attempting to disavow them'.
- Astor and Chinkin (1992, p 228) argue that '[n]o mediator can be entirely neutral'. A mediator may not have insight into their own 'experience and opinions', and thus possibly unacknowledged prejudices might influence their view of the parties and the dispute.
- Silbey (1993, p 351) claims that research shows mediator neutrality to be a myth and just a 'linguistic device' used to legitimise mediation.
- Moore (1996, p 51) describes the mediator as having a 'neutral' relationship with the parties and an 'impartial' approach to the problem.
- Haynes and Charlesworth (1996, p 21) suggest professional training may allow the mediator to be self-critical of their own biases and to focus on 'a professional reaction rather than a personal one'.
- Boulle (1996b, p 18) suggests that neutrality is an attempt to 'counterbalance the ideology of judicial neutrality'. He emphasises that whereas mediators must act impartially, they need not be neutral in every regard.
- Astor (2000, p 149) concludes that there is growing confusion among academics and practitioners about what neutrality and impartiality mean, and suggests that this seemingly irresolvable issue be side-stepped in favour of the mediator constantly striving, through actions based on judgments made from continuous observation and reflection, to focus on maximising party control, and taking into account context and situation. A contextual concern would be the need to balance power to ensure that mediation does not become 'a venue for exploitation of the weak by the strong' (p 150).
- NADRAC (2001, pp 47–8) recommends that the mediator preserve neutrality by disclosing to the parties such matters as a conflict of interest, or any values or previous relationships that might affect the fairness of the mediation process.

The adoption and formalisation of mediation processes into a large number of different types of agencies both here and overseas has drawn a variety of criticisms, which are summarised in the box below ('Criticisms of mediation services').

It can therefore be seen that the very factors that make mediation attractive

as a conflict management tool also raise a number of professional, ethical and legal issues. However, the central feature of mediation is that it is a consensual process where the parties seek their own solutions. Mediation can therefore take into account the conflict between legal principles and personal norms. For example, in a divorce mediation, a couple can take into account 'fault' as an element of the mediation, whereas this is now discounted as an element for consideration under the Family Law Act 1975 (Cth). This does not mean that the mediation will proceed unfairly if the couple know the legal context and take this into account in their mediation. Further, the question of fairness is a matter for concern in all types of conflict management processes, not just mediation.

There are a number of ways to safeguard the parties in the process. These include:

- *The presence of a skilled and reasonable mediator*: Folberg and Taylor (1986, pp 247–9) see this as the principal safeguard, particularly against intimidation and overreaching. The mediator is an agent of reality who, while impartial, is there to promote reasonableness. The mediator is not there to promote compromise at all costs but to guide the parties through the process.
- *The possibility of independent legal review:* Such a review is a necessity in a wide range of disputes. The existence of this alternative can ensure that the mediated agreement will fall within acceptable legal norms. In a sense it acts as a double-check on the mediation process.
- *Make any agreement subject to review and adjustment if possible:* As mediation is a cooperative process it encourages the parties to build in future adjustment and evaluation. Folberg and Taylor suggest that the parties to a mediated agreement are more likely to review an agreement if it is unfair. Many written mediated agreements contain a clause to this effect.

Criticisms of mediation services

Historically there have been a number of questions asked about the claims made for mediation. These include the following:

Community empowering?

The extent to which individuals and communities are empowered may be limited due to the circumstances in which they find themselves, and other constraints. The assumption of 'expertness' by trained professional mediators may in fact make the process of mediation more mysterious than it actually is, and disempower participants from managing the conflict (Christie, 1977, p 7). Critics argue that even if the mediation process improves communication it ignores the structural roots (that is, social and economic conditions) that cause the distorted communication (Hofrichter, 1982).

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Mediation versus adjudication?

Tomasic (1982) suggests the way in which mediation services measure success is too narrow and ignores the quality of justice and community development. He maintains that if a need has arisen for such services then instead of forming a new type of institution we should be seeking reform of the lower court system.

The third parties?

While the Fitzgerald survey quoted in the Dispute Resolution Project Committee Report of 1985 indicated that local government and police did not always provide a satisfactory service in the management of conflict, is this necessarily an argument for mediation? Perhaps it is more an argument for improved training and resources in these areas of service.

Atomising dissent?

Abel (1982, p 181) argues that formalised mediation programs atomise dissent (that is, fragment it) and preclude the aggregation of grievances, so discouraging political action. There are some writers who argue that industrialised societies have too little internal conflict, not too much. Conflict can expose structural inequality and provides an opportunity for 'norm clarification' (Christie, 1977).

The vision of things past?

In traditional societies, mediation is not only a form of justice, it also maintains community cohesion (Singer, 1988). In modern urban societies in which the idea of community, or community cohesion, is not so apparent, mediation may in fact be a superficial way of treating society's ills without addressing the underlying issues. Some of the sociological literature is therefore critical of the 'palliative' nature of mediation (Abel, 1982). Hofrichter (1982) argues that mediation's emphasis on individual conflict may in fact undermine the process of community. Others have said that mediation services have a view of society based on a mythical view of the past (Adler, Lovaas and Milner, 1988).

The use of power?

It has been argued that the relative informality of mediation services compared to court processes is dangerous where there are differences in power between the parties. For a mediation agreement to be truly representative of the disputants' claims, parties should be equal in their negotiating power. If we assume the mediator to be neutral then the handling of a contest between a stronger and weaker party may effectively favour the stronger party. The formality of legal proceedings is meant to serve the function of redressing the real-world inequalities of power between disputing parties, such as between parties of different gender. Boulle (1996b) and Astor and Chinkin (1992) note that if a mediator does not intervene to redress a power imbalance between the parties there is the risk of an unfair settlement that will simply reflect the power relationship. Field (1998) is critical of those advocates of mediation who claim that it is capable of redressing power imbalances, especially between the genders. She concludes (pp 88, 89, 273) that:

> Power imbalances (arising from violence and other sources) and their impact on mediated outcomes must continue to be investigated and discussed if women and their rights are to be protected. However, I do not believe that because of this … mediation is inappropriate in all family law matters and should be abandoned as an appropriate and viable socio-legal response to family law litigation.
>
> [page 311]
>
> …
>
> To abandon mediation in this way is to deny women the opportunity of a process which they may prefer, which may be more affordable and which may result in a faster, more flexible outcome. It is not in the interests of women unilaterally to deny them access to mediation where they make a free and informed choice to participate. The views of Queensland family law practitioners and mediators support this.
>
> …
>
> However, a woman's decision to participate in a family mediation must be based on extensive information about the potential disadvantages she may face and the possible impact the disadvantages may have on the equitability of any mediated outcome. The decision must not be smothered with hopeful, theoretical assertions that power imbalances can be redressed or nullified by mediators.

Yet others have seen mediation as innately empowering and suited to dispute resolution where there is a power imbalance (Davis and Salem, 1984, p 18). Mayer (1987, p 81) suggests that the mediator's main aim is to handle power-related problems in the negotiation and 'to empower the parties by strengthening the process itself', starting by ensuring access to information and the right to be heard; assisting the articulation of 'feelings, values, perceptions and interests'; helping with the development of options; and evaluating the options while also considering the 'alternatives to a negotiated agreement'.

Privacy?

Some critics argue that while the legal system has many shortcomings it is at least open to scrutiny from which public debate can ensue, and social attitudes gradually change as a result. However, the private settlement of disputes can disguise social problems as personal disputes, isolating them from the inherent inequalities of society. Further, such means of dispute do not ensure justice because every dispute has a social context and the power imbalances present in society will be present in the mediation session (Scutt, 1988). Astor and Chinkin (1992) cautioned against too quickly accepting the rhetoric of processes like mediation, and suggest the need to consider disadvantages such as losing the protection of the legal system or, if a settlement is not reached, the extra costs in time and money that may be involved. Boulle (1996a, p 15) says that operating outside of the legal system is seen by some to 'encourage private justice behind closed doors, with few forms of scrutiny, accountability and publicity'.

Does it disadvantage women?

There has long been in feminist critiques an underlying uneasiness with some aspects of mediation, particularly those relating to power imbalances. For example, Rachel Field, a Queensland legal academic, expressed some misgivings about the introduction of mandatory mediation in children's matters within the family law jurisdiction in 2006 (Field, 2006). While she acknowledges that FDR can be a positive process for women, it can also be an environment in which women face significant disadvantages. These potential disadvantages mean that mandating FDR as a process of first resort in children's disputes will potentially create great post-separation injustice for women and, consequently, for many children.

Knowledge, Skills, Values and Artistry

7.17 What are the knowledge, skills and values required by a mediator?

When I was managing a small research team developing a course in conflict management for the Technical and Further Education (TAFE) system many years ago, we conducted four workshops as part of our investigations. Two were with practising mediators and two were with people working in the helping professions whose duties, in part, involved conflict management. Participants were asked to list the knowledge, skills and values they thought were important in the mediation process. They were then asked to rank each

according to its level of importance and frequency of use. The research team then collated and ranked each of these as shown in the chart below.

It is interesting to note that the 'ability to control the process' was regarded as the most important skill, followed closely by impartial verbal and body language, and then 'teamwork skills'. The emphasis on teamwork reflects the fact that the formalised mediation services in Victoria and New South Wales (where we conducted our research) use two mediators in each mediation.

More recently, in designing the national mediation course for the Institute of Arbitrators and Mediators Australia and the Lawyers Mediation Certificate I identified a number of competencies that would need to be addressed in the 5-day courses. These turned out to be similar to, and supplemented, those listed in the box below. Douglas and Goodwin (2015) make the useful point, which is worth keeping in mind when reading through the steps of the process, that mediation can involve artistry that transcends procedures and standards. Their study, based upon interviews with sixteen experienced mediators, concluded (pp 144–5):

> Analysis of the data in this study shows that the majority of mediators in the sample were practicing with artistry. From the preparation that they undertook to mediate, to how they reacted and acted in the mediation room, these mediators were intuitively responding in a manner that fits with Lang and Taylor's definition of 'artistry'. Mediators did not merely adhere to the steps of the mediation in a patterned way but rather they adapted practices tailored to fit party needs. Adaptations that occurred were people focused and developed through the application of the considerable experience of the mediators involved in the study. The findings make clear that the subject matter of a dispute is not as important to the majority of mediators as the people in the dispute. This result from the study has implications for the education and training of mediators. The finding also supports the view that expertise in a substantive area of the dispute is not as important as the generic mediation skills that the mediators in this study exhibited.

Key competencies: Rank ordering of knowledge, skills and values

Knowledge

- Knowledge of the mediation process
- Knowledge of the legal context

- Self-knowledge (self-awareness)
- Understanding of cultural diversity
- Knowledge of ethics
- Knowledge of how the mediation centre operates
- Awareness of social and political issues

- Understanding of group dynamics
- Knowledge of individual differences
- Awareness of how seating arrangements affect interaction

Skills

- Ability to control the process
- Impartial use of verbal language
- Impartial use of body language
- Teamwork skills
- Effective communication of aims and process of mediation and ground rules
- Appropriate use of silence
- Ability to write key issues
- Ability to write appropriate agreement
- Ability to appropriately time the stages in the mediation process
- Appropriate use of parties' verbal language
- Use of open-ended questions
- Ability to encourage exploration of alternatives
- Ability to allow parties to determine content and outcome
- Ability to direct communication between parties
- Attentive listening skills
- Listening to verbal content
- Observation and awareness of body language
- Ability to be empathic
- Impartial use of setting
- Ability to verbally summarise statements accurately
- Ability to encourage participation
- Ability to be flexible in the use of the process

- Ability to ask clarifying questions (for example, to check for 'liveability' — whether parties can live with their decisions and whether they are appropriate to the context in which they live)
- Ability to write accurate summary of parties' statements
- Ability to feedback parties' statements accurately, succinctly and in the appropriate tone
- Ability to debrief self and co-mediator appropriately
- Ability to provide positive feedback to parties
- Ability to negotiate use of agenda with parties
- Ability to clarify the positions of the parties
- Ability to assist parties to explore options and refine the focus of the agenda to the future
- Appropriate use of parties' language in the written agreement
- Ability to ask probing questions
- Ability to introduce self to parties
- Ability to maintain appropriate eye contact
- Ability to speak clearly
- Ability to be concrete (specific)
- Ability to seek out and clarify any hidden agendas
- Ability to distinguish facts from feelings
- Ability to be aware of emotional content

Values

- Confident
- Impartial
- Tolerant
- Empathic
- Assertive
- Non-judgmental
- Respectful
- Committed to teamwork
- Patient
- Caring attitude
- Sincere
- Sense of humour
- Honest
- Flexible
- Creative

7.18 John Haynes, a pioneer American mediator, suggested that the key to mediation lies in assessing the methods typically used by each party in a conflict. These are withdrawal, smoothing, forcing, compromising and confronting. Only the last two, in mediation, represent a cooperative rather than an adversarial resolution (cited in Barsky, 1984, p 102). Barsky, a divorce mediator, states that the mediator should be 'an observer, identifier, and manager of the interplay between the couple' (p 102) within the frame of reference provided by these two methods — compromising and confronting. She suggests there are two broad categories of techniques that the mediator needs to employ: *macro* techniques, which deal with the total planning of the mediation; and *micro* techniques, which are the specific interventions used to move the parties towards agreement. These are summarised below. (Note: **Exercise 6** at the end of this chapter will help you explore this concept and associated techniques further.)

Macro and micro techniques

Macro techniques	
These include:	
Use of the physical environment	Physical surroundings; placement of furniture; creating a climate that reflects equality, confidentially and business-like purpose.
Awareness of self	Awareness of one's biases, values, prejudices and so on.
Teaching the mediation process	In the initial sessions the mediator provides basic instruction and clarification about the process, and skills such as brainstorming, listening, confronting and compromising; the mediator is also a role model.
Identifying patterns, relationships, issues	The mediator identifies significant dynamics in the conflict, including chronology, power imbalances, communication issues and

	specific issues including substantive and symbolic issues.
Managing the process	The mediator provides the ground rules and enforces them, and has the responsibility for control of the process.
Micro techniques These include:	
Conflict reduction techniques	Mediation can be laden with much discord, both latent and manifest; the mediator should allow some ventilation of feeling where necessary so that the person can go beyond this emotional response and not be held back by it. The mediator identifies feelings; reframes the parties' assertions; includes both parties in the dispute instead of just one; directs the exchanges through himself or herself; and uses body language (for example, putting up one's hand to stop an interaction).

Communication improvement techniques	These include giving the parties positive reinforcement, directing the parties to talk to each other at the appropriate stage, restating angry outbursts to separate an idea from the emotion, and holding private sessions with each party. Role reversal, where one party is put in the role of the other, may be appropriate.
Clarifying fields of agreement	This involves developing a consensus and careful data collection. Issues need to be clarified and separated from one another and the conflict may have to be broken up into its several parts.

The Mediation Process

7.19 I have divided the mediation process into eight phases with an optional ninth phase if required. It is a model I developed as a result of conducting many workshops aimed at further developing the interest-based model used by the Dispute Settlement Centres in Queensland, the Institute of Arbitrators and Mediators Australia (IAMA), the Victorian Bar Course and other mediation services. One of the essential ingredients of such a model is simplicity. I have always found it difficult to follow models with a multitude of steps and pathways, especially in demanding interpersonal encounters. As Douglas and Warner (2015) point out, however, such models are eventually transcended by the 'artistry' of the mediator. But it is a useful beginning point, and can be modified for your own purposes. Importantly, it provides a range of skills that enable the mediator to develop a 'conversation' between the parties rather than assuming that this will just happen, as many alternative models suggest. It is a blend of the problem-solving/facilitative and narrative models in the main. Before presenting the model mediation process, in the box below is some useful information on the United Nations Guidance for Effective Mediation.

United Nations Mediation Guide

The United Nations Guidance for Effective Mediation was issued as an annex to the report of the Secretary-General on strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution (A/66/811, 25 June 2012). It is available at <www.peacemaker.un.org>. The guide lists a number of elements for the effective use of mediation:

- Preparedness
- Consent
- Impartiality
- Inclusivity
- National ownership

- International law and normative frameworks
- Coherence, coordination and complementarity of the mediation effort
- Quality peace agreements

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This model does not necessarily assume that the mediation will all take place in one session. It may take quite a few sessions to work through the entire process. In the detailed description of each phase I have outlined the goals and tasks for each. The eight phases plus an optional ninth phase are:

1. preparation;
2. introduction;
3. statements;
4. agenda construction;
5. exploration;
6. private sessions (optional phase);
7. negotiation;
8. agreement; and
9. implementation, review and revision.

Phase 1: Preparation

7.20 Before beginning, I suggest you revisit **Exercise 23** in **Chapter 6** ('Applying the Peterson and Shepherd model of preparation') to help you with some of the key variables in this phase of mediation. Preparation involves a number of essential tasks for the mediator, to ensure that the process that follows is appropriate and goes as smoothly as possible. It involves at least three interrelated steps. These steps are necessary in all

conflicts from the simplest to the most complex, even without mediation. Each step may only take a few minutes or it may take weeks or even months. These steps are:

1. assessing the nature of the dispute;
2. doing a 'party check' and preparing the parties; and
3. checking the location and resources.

Step 1: Assessing the nature of the dispute

7.21 As already indicated, not all disputes are suitable for mediation. The mediator, when contacted about a conflict, must ensure that the conflict is one which is amenable to this type of process. This is largely a matter of judgment for the mediator, who needs to get a 'feel' for what is happening. It may be that another form of conflict management — negotiation, arbitration, conciliation, voting or litigation — would be a better way to proceed. The mediator should therefore spend some time assessing the conflict and be prepared to recommend another form of conflict management and/or a referral to another person or service. I have included, as part of **Exercise 15** at the end of this chapter, a brief intake record, which can be used to record some basic preliminary information. Further, because this preliminary assessment is often made without full knowledge of the issues, the mediator should be prepared to recognise that as the conflict unfolds during mediation it may become obvious that it would be better handled by some other process.

Mediators usually ensure that all parties enter into a written agreement prior to the mediation. This is to protect confidentiality, to provide for payment of the

mediator's fee and to protect the mediator from litigation. Signing such an

agreement also gives a practical demonstration of the party's commitment to participating. Dispute resolution organisations such as IAMA and Leading Edge Alternative Dispute Resolution (LEADR) have developed sample 'agreements to mediate', which are available on their respective websites. (**Exercise 16** at the end of this chapter includes a simple mediation agreement.) A 'confidentiality undertaking' may also be useful and is usually incorporated into the mediation agreement. It specifies protection of confidentiality as far as the law allows. The purpose of such confidentiality is to enable discussion of the dispute in as open an atmosphere as possible and suitable to the parties and the dispute. Each support person who attends the mediation session should also sign such an undertaking.

Mediation agreement-making: Getting it right

The case of *Tapoohi v Lewenberg (No 2)* [2003] VSC 410 is a warning about what can go wrong if the mediator is not properly prepared. In this case the mediator did not check whether he had a referral from the court (which would have given him legal immunity), nor did he have a mediation agreement with a properly-worded immunity clause. A party to the mediation sued her solicitor and others in the action, in part, to set aside the terms of settlement agreed in the mediation. The solicitor joined the mediator to the action. The mediator sought to have a stay of the matter brought against him on the basis that it disclosed no cause of action. Although the case settled, the comments of the judge in deciding against the mediator on this application give a good indication of the risks to which the mediator exposed himself. In particular, make sure you have either a court order or a properly-worded mediation agreement with a clear indemnity. Also, keep your insurance up to date and make sure that the parties understand the process they are engaged in and the role of the mediator.

We have already looked at the changing way in which ADR clauses in contracts are being treated (**Chapter 4**). It is worth checking that this aspect is in order. Agreements to mediate have not had the same level of difficulties as ADR clauses in contracts and there is a dearth of case law on the subject. With regard to a mediation agreement, make sure it contains: a clause to describe the appointment of the mediator and the dispute to be mediated; the conduct of the mediation; the scope of the mediation; the role and functions of the mediator; an indemnity clause to protect the mediator; the procedures to be followed, either those specifically included or by reference; and the status of any agreements reached. The latter usually provides that the terms of settlement shall only be binding once put in writing and signed by all parties.

7.22 In legal and commercial mediations some preliminary exchanges may

be needed, and often these are made through the process of a 'preliminary conference'. These exchanges may include:

- documents needed to progress the negotiation;
- a short description of outstanding legal issues;
- expert reports;
- specified documents, including such things as photographs, maps and diagrams;

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- clarifying questions from each party to the other; and/or
- visit/s to any relevant site to clarify viewpoints.

It may also be advantageous to have a 'statement of issues', a 'statement of agreed facts' or a 'statement of the chronology of the dispute' prepared by the parties and exchanged by them before the mediation begins.

Wade (2003) reports that a 1999 survey of commercial lawyer mediators in Australia indicated that mediators see the following commonly-made mistakes by lawyer representatives:

- failure to prepare the 'right' information;
- overconfident prediction of court outcomes;
- overemphasis on legal as compared to commercial or personal issues;
- emotional and antagonistic involvement of lawyers; and
- entrapment — investing too much time and money into the conflict.

Preparation is therefore crucial to the success of most mediations. Whatever the formulation of preparation tasks, a mediator must ensure, as a

minimum, that as part of making an informed decision to participate in the mediation each party is aware of:

- what the mediation process entails, including time and costs;
- the role of the mediator;
- the role/s of the participants; and
- how they will present their case in this process.

Step 2: Doing a 'party check' and preparing the parties

7.23 The mediator, while assessing the conflict, should be checking who the parties are and what their interests in the dispute may be. This may sound straightforward, and in most cases it is, but there are instances where it is not. For example, as **Exercise 1** at the end of this chapter suggests, if you consider other groups or persons who may be interested in the outcome of any mediated agreement, the complexity of the issue becomes apparent. Other parties may have to be consulted as part of your preparation, and their agreement sought, both to conduct the mediation and to review and approve of any agreement made. These parties could include management committees, supervisors, unions, legal representatives and fellow workers. The mediator may also have to consider the possibility of conducting the mediation with more than two parties, which compounds the complexity of the process, but mediation may still be possible.

The mediator should also check if the parties to the dispute are able to enter mediation voluntarily. If the parties cannot do this, then any mediated agreement that results from the mediation may be both artificial and difficult to enforce.

Finally, the mediator should check the relative power of the parties. If there is likely to be a substantial power imbalance between them, then consideration should be given to another form of dispute management. Mediation is usually not appropriate

in these cases because the process is often not formalised enough to enable the parties to collaborate equally or fairly.

Support for the parties in mediation is often an important consideration, and can include accountants, lawyers, engineers, town planners, union representatives, trusted friends, family members and interpreters. The mediator should ensure that all parties have agreed to the presence of any support people needed by any party. The support people need to be adequately briefed on the mediation process and their role in it.

The preparation phase also gives the mediator a chance to not only gather information, but to educate the parties about the nature of a collaborative process and their own needs and interests. **Exercise 17** at the end of this chapter includes a questionnaire I often send to parties to help prepare them for the mediation. The questionnaire can also include other questions such as:

- What events created the issues, including your attitude?
- What do you perceive the issues to be?
- What is your position, and what are your interests and motivations?
- What do you want to achieve from the mediation?
- What is your BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement)?
- What are your feelings about the dispute?
- What do you think would be the best and worst outcome/s for you?
- What are the options and possibilities for resolution that would benefit you and the other party?

When talking with the parties, questions such as the following may be useful:

- What outcome do you really want?
- What if you were in the position of the other party?
- What do you think the other person wants and what are their interests?
- What is your principal motivation?
- What possible options could meet your needs as well as those of the other side?

Wade (2003, p 4) believes that lawyers preparing for mediation should ask themselves five questions, which he calls the 'five humble hypotheses', and that these should be shared with the mediator, the parties and possibly the 'opposition' before the mediation. He calls them 'humble' because the answers to these questions are not certain and continue to evolve. The five questions, with some minor adaptations, are:

- What goals does the client (yours and the other side's) have? This is the reverse of what risks does each client have if the conflict continues.
- What are the causes of this conflict?
- What interventions might be helpful?
- What bumps/glitches are predictable?
- What substantive outcomes are possible/probable?

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Step 3: Location and resources check

7.24 The mediator needs to consider where he or she will conduct the mediation, what time limits may apply and what facilities will be required. The space should provide privacy with no interruptions. It should have a telephone or other communications equipment as required and adequate

materials such as writing paper, pens and a whiteboard. It is often useful to hold the mediation on neutral ground, although this is sometimes not practicable. In such cases the mediator should be prepared to compromise. Sometimes the parties may have to come to an agreement within a short period of time and so the mediator should weigh up the implications of this and the practicability of going through with mediation.

NMAS and family law intake requirements

7.25 The NMAS (2015) provides for certain standards, discretionary and mandatory, in the intake phase of the mediation process which all nationally accredited mediators are required to adhere to. The NMAS Standards are comprised of the following parts:

- *Approval Standards*, which specify the training, assessment, personal qualities and experience required of an NMAS accredited mediator and for their renewal of accreditation;
- *Practice Standards*, which specify the minimum practice and competency requirements of a NMAS accredited mediator;
- *RMABs*, which accredit mediators according to the Approval and Practice Standards;
- the *Register of Nationally Accredited Mediators* (National Register), which is the authoritative list of NMAS accredited mediators; and
- the *MSB*, which oversees the NMAS. Members of the MSB comprise RMABs; professional, government, community and consumer organisations; and education and training providers.

If you are intending to become an accredited mediator, reading and understanding the Standards and how the system operates is imperative. Also, PS 10 requires that accredited mediators *must have* a subset of knowledge, skills and an understanding of eithcal principles: see **Exercise 32** at the end of this chapter. Practice Standard 3 states:

3. Conducting mediation: Preliminary conference or intake

3.1 In the preliminary conference or intake the mediator must ensure that participants are provided with the following:

(a) A description of mediation and the steps involved including the use of joint sessions, separate sessions and shuttle negotiations;

(b) Information on how to provide feedback or lodge a formal complaint in relation to the mediator.

The preliminary conference or intake may be conducted by a person other than the mediator.

3.2 The preliminary conference or intake includes:

(a) Assessing whether mediation is suitable and whether variations are required (for example, using an interpreter or a co-mediation model

in culturally and linguistically diverse communities or introducing safeguards where violence is an issue).

(b) Explaining to participants the nature and content of any agreement or requirement to enter into mediation including confidentiality, costs and how they are to be paid.

(c) Identifying who is participating in the mediation and to what extent participants have authority to make decisions.

(d) Advising participants about the NMAS and how it can be accessed.

(e) Assisting participants to prepare for the mediation meeting including consideration of any advice or information that may need to be sought and/or exchanged.

(f) Referring participants, where appropriate, to other sources of information, advice or support that may assist them.

(g) Informing participants about their roles and those of advisors, support persons, interpreters and any other attendees.

(h) Advising participants about how they or the mediator can suspend or terminate the mediation.

(i) Confirming each participant's agreement to continue in the mediation.

(j) Deciding venue, timing and other practical issues.

Ideally, this will take place some time before the commencement of the actual mediation. In some circumstances, however, the intake process will immediately precede the commencement of the mediation. The intake

process can be facilitated by the provision, in written form, of the information required, including a copy of any mediation agreement.

Of particular note is PS 10.2, which states that advice shall not be given except when using a 'blended process' and with the express consent of the parties (see **Exercise 31** at the end of this chapter).

The 'Intake Checklist' provided below is meant as a guide only to mediators and contains a listing of the base requirements. It is not meant as an exhaustive or definitive statement required for every mediation. Mediators should ensure that the intake requirements of each mediation are carefully considered and tailored to the needs of the particular parties and the circumstances of the case. Mediators should consult the Practice Standards and Approval Standards of the NMAS (2015) to clarify the exact requirements.

Practice Standard 3.1 states that at the preliminary conference or intake the mediator *must* ensure that the participants are provided with a description of the process and information on how to lodge a complaint 'in relation to the mediator'. This provision also provides that a preliminary conference may be conducted by someone other than the mediator fulfilling these requirements. Conceivably, the explanations/discussions required under these provisions could occur at the mediation session just prior to the commencement of the mediation.

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An intake checklist

This checklist incorporates the NMAS PS 3.1 and 3.2 and other Standards as applicable.

1. Is mediation appropriate for this dispute? Are variations required (such as an interpreter or co-mediator in culturally diverse communities)?
2. Has each participant received information about the roles of each party in the mediation? (This discussion may involve questions relating to the role of lawyers,

support people and others.)

3. Have checks occurred as to what information and documents need to be exchanged, how this can be done and what needs to be available during the mediation process?
4. Have preliminary procedural issues been settled including:
    a. the keeping of documents or notes by the mediator;
    b. confidentiality of the process (including reporting of the process); and
    c. authority of the participants to negotiate/settle?
5. Have the terms of any Agreement to Mediate been satisfactorily clarified and settled?
6. Has the venue been settled (including costs of same and how this is be borne by the participants)? (See PS 11.)
7. Has the timing of the mediation (including the length of time it will take) been settled?
8. Have you checked that all parties and others present have signed the Agreement to Mediate?
9. Have you run through the provisions of the Agreement to Mediate to ensure that all present understand its terms?
10. Have you described and explained the mediation process that is to be used?
11. Have you discussed, where necessary, the appropriateness of the process for the participants in light of their particular circumstances, the benefits and risks of the process, and the alternatives open to them?
12. Have you discussed the confidentiality of the process including the limitations, of confidentiality? (See PS 9.)
13. Have you discussed and explained how the mediator or the participants can suspend or terminate the mediation? (See PS 5.)
14. Have you reached agreement with the participants about any costs and how such costs are to be paid? (See PS 11)
15. Have you advised the participants about any indemnity provisions contained in any agreement to mediate?
16. Have you advised the participants about the mediator's role in the provision of advice or other services, including:
    a. informing the participants that you will not provide legal advice (unless using a 'blended process' model where, with the participants' prior consent and where they request advice, you may provide it if you comply with the 'blended process' requirements of the Practice Standards (see PS 10.2);
    b. informing the participants that you cannot represent any of the participants in any related legal action; and
    c. checking and advising any actual or potential conflicts of interest and if any of these are present obtaining the consent of the participants to proceed. (See PS 7.3.)

17. Have you discussed with or informed the participants about the procedures and practices in the mediation, such as:

    a. the circumstances under which separate sessions may be held;
    b. how participants may seek information and advice from a variety of sources during the process;
    c. how participants may withdraw from the process;
    d. that participants are not required to reach an agreement;
    e. the opportunities for separate communication with the participants and/or with their legal representatives; and
    f. the circumstances in which other persons can be involved in the process; for example, the participation of experts, support persons or interpreters.

18. Have you provided the participants with a copy of the Practice Standards or advised them where they can access a copy?

An intake or pre-mediation assessment process is a mandatory step in FDR under the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth) reg 25. Its purpose is to ensure that the parties are safe to proceed to mediation and that the issues in dispute are suitable for resolution in the FDR process. It is an opportunity for the FDR practitioner (FDRP) and the parties to make an assessment about whether the FDR process is the most effective way of resolving the parties' presenting issues: see **Exercise 33** ('Intake processes under the Family Law Act') at the end of this chapter.

Phase 2: Introduction — outlining the process and creating trust

7.26 The introduction phase is crucial to the establishment of an effective relationship that will enable the rest of the mediation process to proceed effectively. The mediator should provide a framework for the mediation, involve the parties and gain their trust.

This phase is divided into five steps. These are not necessarily separate

from each other; there can be a lot of overlap and 'backtracking' from one to the other as suits the particular circumstances of the case. The five steps are:

1. introductions and seating;
2. opening statement by mediator;
3. checking the parties' expectations and understanding of the process;
4. confirming background case material; and
5. discussing and clarifying any concerns or issues about the process.

Step 1: Introductions and seating

7.27 From the outset of the first meeting you should be aware of the parties' non-verbal and verbal behaviour and ensure that you establish the basis for impartiality. It is better not to engage in small talk. Seating arrangements can be crucial and therefore should be carefully considered. It can be worthwhile to allow the parties to determine how they would like to sit. The use of a small table may be an advantage. Usually the mediator sits at the head of a triangular arrangement with the two parties forming its base. If there are going to be more than two disputants then further consideration needs to be given to seating arrangements, ensuring always your own neutrality and 'equality' between the parties. Be aware that the participants may be coming to the mediation for

a variety of reasons. Some may want to avoid litigation, while others may be coming because they see no alternative. It is by no means certain that because participants are prepared to come to a mediation session that they understand or are necessarily willing to voluntarily proceed without resistance. It is therefore important to proceed carefully and slowly so as to ensure that the parties both understand and come to trust the process.

Step 2: Opening statement by mediator

7.28 It is useful at this early stage to outline to both parties the essential aspects of the process, including:

- the voluntary and consensual nature of mediation;
- your neutrality as a mediator;
- the importance of confidentiality;
- the authority of the parties present to make a decision in the mediation;
- the time constraints on the mediation session;
- the phases in the process;
- the rules of the process; and
- the nature and status of any agreement reached.

It may be useful at this point to encourage the participants by congratulating them on making the decision to initiate this process and for attending. It may also be useful to have prepared an outline summary of the whole process such as that provided at **7.59**. This can include a statement of 'rules' concerned with elements of the process, including confidentiality, the scope for interruptions, the circumstances in which the parties will be able to talk to the mediator alone, and so on.

The mediator should stress that he or she is impartial and is there to assist all parties find a solution they can live with. Where the mediator is being paid by one of the parties or by an employer, this should be openly explained.

Up to this time you have done almost all the talking. You should keep in mind that up to Phase 5 (exploration of options and negotiation) communication will be through you. The participants will not directly engage each other. This facilitates your control of the process and hopefully reassures the parties, so establishing confidence and trust in the process and you.

Step 3: Checking the parties' expectations and understanding of the process

7.29 We know that the parties may be coming to the mediation for quite different reasons. By asking the parties about their expectations of the mediation you are doing three important things. First, you may be helping to uncover 'icebergs' — conflicts that are barely discernible to the parties (Folberg and Taylor, 1986, p 42). Second, you are focusing the attention of the parties on the expectations that they may have had fixed in their minds before the session. In the light of the stated expectations of the other party, these may now be put in a more realistic context. Third, you are simultaneously (and paradoxically) causing the parties to focus not only on the past (that is, their expectations before they came into the mediation), but also on the future.

As part of this step you can check the parties' understanding of the process outlined so far. This not only helps the parties to feel comfortable and confident in the process but also allows them to regain their composure if any tension has arisen, especially during the discussion on expectations. Keep in mind that it is better (in my view) to keep the communication centred on you; that is, the parties continue to talk to you, not to each other.

Step 4: Confirming background case material

7.30 During this step the mediator checks the background referral notes or information. This serves the purpose of making sure that the information you have is correct and also gives the parties time to collect and 'anchor' themselves in reality. This may be especially important if one or both of the parties still appears to be anxious or became agitated during the preceding steps. It may be useful to use an 'intake record' which the parties will have

completed before they take part in the mediation and which can form the basis of examination in this step. Alternatively, you may complete this form during this step. See **7.24** and **Exercise 15** at the end of this chapter for examples of intake records.

Step 5: Discussing and clarifying any concerns or issues about the process

7.31 In this step you bring the parties back to the process of the mediation by asking them if they have any concerns or issues about the process so far or about the process in general. This step forms a bridge to the next phase of the mediation and enables the parties to further raise any process issues and commit themselves to the process.

Phase 3: Statements

7.32 At the beginning of all phases it is preferable to describe and explain the purpose and process of the phase to the parties. This helps to maintain your control and reassures the parties that there is a definite direction in which you are going. At this point the mediator asks each party in turn to share their perspective of the situation. You may have already indicated who is to go first in Phase 2. In my view, it is better to have a set rule or protocol that is made clear to the parties at the outset; for example, that the one who initiated the contact with the mediator goes first. Alternatively, you may prefer to be flexible and make a decision about this after seeing and evaluating the participants. You may decide that it would be better to allow the more passive, or more anxious, party to go first. Once you have decided who is to go first, the steps during this phase are relatively straightforward:

1. the mediator explains this phase (including ground rules) to the parties; and
2. the mediator invites the parties to describe and explain their perspective and then summarises.

Step 1: Mediator explains the phase (including ground rules) to the parties

7.33 The purpose of this step is to allow each party to relate their version or perspective of the conflict so that you, the mediator, understand it fully, and, perhaps more importantly, to allow the other party to hear and reflect on it (perhaps for the first time). The most important ground rule here is that there should be no interruption

by either participant. This may be facilitated by asking the party who is not talking to take notes of the important points or issues raised in the other party's version. You should therefore have spare pens and note paper ready.

Step 2: Mediator invites the parties to describe and explain their perspective and then summarises

7.34 You should be actively involved at this stage by asking open questions, summarising, paraphrasing, interpreting and asking for clarification. Ensure that you 'check in' with the parties by asking if you have 'got it right'. When parties are angry it may be helpful to allow them to relate their version of events without too much interruption.

You will usually want to take notes yourself. This may be awkward but is essential if you want to keep an accurate record to which you can refer later. Be constantly aware of the parties' non-verbal language because this can sometimes give you vital clues. Provide positive encouragement to the parties as they tell their story. Reassure each party that you are seeking to be as precise as possible in your understanding of their versions of events.

After the first party has finished talking, summarise their story back to them. This ensures that you properly understand and have accurately

recorded the facts. It also reassures both parties that you are attempting to be as thorough in your role as possible. It is beneficial to use the party's own words as far as possible so that you minimise the risk of over-interpreting the matter, and that you emphasise the party's 'ownership' of it. While you are doing this, check for accuracy and make any changes required.

It is important when summarising back to the parties that you use 'reported speech', which emphasises that it is the parties' perceptions that are important, not those of the mediator, lawyer or other support person. It also keeps the mediator at an appropriate distance from the substantive issues. Subtly, it reinforces the idea that what is being said by each party is only one version or story. This will subsequently make it easier for the parties to change these stories, or 'conflict narratives', more easily: see **Exercises 34** and **35** at the end of this chapter.

Examples of reported speech

- You said …
- Your view was …
- You told me you think …
- You mentioned that …
- You went on to say …
- You continued …
- You said that you felt …
- You also explained …
- You say …
- You then stated …
- You then added …

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If a person disagrees with the mediator's summary, the mediator should

accept the correction and continue. Often people will listen more attentively to the mediator's summary than they will to any statement by each other, because of the mediator's impartiality. Avoid interpreting or adding meaning to what has been said — this may skew the parties' accounts and undermine their trust in the mediator.

The Dispute Settlement Centres in Victoria and their equivalent in Queensland use a slightly different process, by waiting until both sides have made their statement before providing them with feedback. Which way you choose depends on your own style and reading of the situation.

During this step be mindful of the crucial issues that are arising and note them. This will be useful in constructing the agenda. You should also note the stated or manifest issues, and any unstated or underlying issues that may be apparent.

These elements of conflict were outlined in **Chapter 1**. It is important when you are helping a party through their story that you concentrate not only on the facts but also on subjective matters such as feelings about the conflict and the flexibility of the parties' positions. Conflicts are both interactive and intrapersonal; that is, the conflict not only involves somebody else; it creates strong internal pressures and conflicts as well. Acknowledgment of these subjective matters can be very helpful to the parties. They can also be included in the next phase.

In commercial and legal disputes where lawyers or other experts are present the mediator needs to consider what part they play in this part of the mediation. I think it is a matter of judgment for each case but generally I prefer the parties to make a significant part of the opening statement with clarifying and further information provided by their lawyers or supporters. This is because, where possible, the mediator wants to frame the conflict from the perceptions of the parties rather than their lawyers or experts.

Sometimes one of the parties may be reluctant to talk to the mediator. They may lack confidence in the process or be nervous in front of the other party.

This can usually be overcome with some sensitive questioning from the mediator, which demonstrates interest in what they have to say.

If the statements uncover common ground or agreement between the parties on some issues or perceived facts then it is usually a good idea to report back on this. This helps the parties and may give them confidence that other things can be agreed upon as well.

Early offers by one party to the other should be noted, summarised and treated as an option for consideration later in the mediation. Any discussion of or negotiation around these early options may degenerate into a round of bargaining and possibly deny the parties a full exploration of the issues and consequent development of a full range of possible options.

Phase 4: Agenda construction

7.35 Agenda construction can be a crucial phase of the mediation process. At this stage parties to the conflict need to understand the issues and have as much information

as possible in order to reach an agreement. As noted in **Chapter 6**, there are a number of key objectives in agenda construction, including:

- providing a visible structure to the session;
- reframing and mutualising the dispute, its content and context into less divisive and provocative terms;
- giving legitimacy and validity to each party's topics and concerns;
- objectifying the dispute so as to enable the parties to 'separate' or distance themselves from the issues; and

- reducing the dispute to manageable proportions

7.36 This is the phase where the parties begin to explore the issues (both interpersonal and intrapersonal) in more detail. There are three steps in this phase:

1. list all the issues using impartial language;
2. separate issues into 'conflict' and 'non-conflict' categories; and
3. create an agenda.

Step 1: List all the issues

7.37 It is important to list all the issues. Initially use the data you gathered in Phase 2 and supplement this by further questioning. In some cases you may be able to use the brainstorming technique to further involve the parties and elicit more information. Listing the issues is a difficult step and involves all the skills of communication outlined in **Chapter 3**. (Refer also to **Chapter 5**, in particular **5.4**.) It will help to use a whiteboard or pin butcher's paper to the wall to list all the issues raised. Remember, the parties are still directing their communication to and through you, not directly to each other: see **Exercise 35** at the end of this chapter.

Step 2: Separate issues into 'conflict' and 'non-conflict' categories

7.38 This step is optional and to be used at your discretion. In some cases, having listed all the issues, it is useful to divide them into several categories. This is because not all the issues raised will necessarily relate to the process of mediation; that is, they are not required to be resolved as part of the conflict. For example, two fellow employees, in conflict about a joint project, may raise some issues relating to the general employment conditions in their place of work. These issues do not necessarily relate to the particular conflict. They are, nevertheless, important in other ways and may be addressed at another time or by a different process. It may be important that the parties raise such

matters and briefly discuss and acknowledge them. Another example may concern a separated couple who cannot agree on access to their children. One or both may raise the issue of their inability to pay the legal expenses involved in litigation over the matter. This is not a matter that can necessarily be resolved in the mediation process but it may be important that it is acknowledged. Intrapersonal issues may also emerge and can be acknowledged during this phase; for example, one party's severe guilt feelings about confronting the other person. This may be an issue which, by being raised and discussed, can be resolved without needing to go into the agenda.

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Some issues may clearly overlap between the parties; that is, the issues are shared by both parties or are connected in some way. At other times the issues are not shared. You will need to consider this problem as it occurs. For example, one party may see an issue as important or relevant while the other will not and will question the need to discuss it at all. In this situation you will have to discuss the matter more fully and sometimes make a decision yourself about the issue being included as a conflict issue. In the latter case, you will have to ensure that the parties understand what is happening. You may want to elaborate on the issues further and focus upon the parties' positions and interests (see **6.57**).

In this step you are dividing the issues into those which should be included in the agenda (conflict issues) and those which need not (non-conflict issues). This process will help the parties differentiate between the intrapersonal and interpersonal nature of their conflict as well as help them begin to organise the issues and to plan their resolution. This leads into Step 3.

Step 3: Create an agenda

7.39 This step is effectively a continuation of Steps 1 and 2. If you opted to

use Step 2 you will now have two lists of issues you have developed. The basic tasks of this step are to order and prioritise the conflict issues you have isolated in the preceding steps. It is important that each party commit to the agenda as a whole.

Try to limit your agenda to fewer than six items. If you have a complex conflict with many items try to group these under headings. This is because we have a limited 'working memory': see box below. As we saw in **Chapter 6**, agenda construction is sometimes a difficult process. Not only will divergent interests be revealed, but there may be real concern about including, or defining, some issues in the agenda. It is therefore crucial that you use language that is impartial and does not favour one party over the other.

How much can we remember?

Early research found the working memory cut-off to be about seven items, which is perhaps why telephone numbers are often seven digits long. Now scientists think the true capacity is lower when people are not allowed to use tricks like repeating items over and over or grouping items together. (Roude, 2008; Cowan, 2001) Note that phone numbers are usually presented in groups of three and four, which helps us to remember the list. There is still some controversy over what the real limit is but it would seem to be limited. This is why it may be useful to keep agendas to a limited number of headings.

This phase comes to an end when the mediator and the participants have a good appreciation of both the overt and underlying conflicts, and what each party wants. It may take considerable time to get to this point, depending on the complexity of the dispute. Do not assume that this can necessarily be achieved in one session.

Phase 5: Exploration

7.40 This phase of the mediation process is designed to enable the parties to constructively explore the issues that arise between them so as to appreciate and

understand each other's perspectives. It should allow them to have a constructive dialogue without necessarily reaching any solutions, although options are often developed during this phase. The mediator directs communication between the parties and away from herself or himself. This is done by encouraging the parties to speak directly to each other through the use of such devices as transitions, paraphrases and round-ups, which are explained in more detail below. Through these devices, the mediators help the parties to hear each other and to reflect on both facts and feelings.

Using the agenda as the anchor to order this part of the session, the parties are encouraged to discuss the specific behaviour, emotional reactions and consequences of each issue that is presented. The mediator encourages the parties to generate possible options for management of the dispute, but there is no imperative at this stage that they agree to anything.

There are two steps in this phase:

1. the mediator explains this phase to the parties; and
2. dialogue.

Step 1: The mediator explains this phase to the parties

7.41 It is useful to explain this phase to the parties carefully so that they understand why the communication flow will now be directed between them rather than through the mediator. This phase is particularly useful to those parties who will have a continuing relationship with each other after the mediation is concluded, because it will enable them to have some practice in talking directly to each other about the issues in a relatively structured and 'safe' environment. Statements such as the following may be useful:

> At this stage, we will ask you to talk directly to each other about the issues within the agenda. It is not necessary that you reach any solutions or outcomes at this stage. This phase allows you to

explore each issue so that you both understand more fully the other side's point of view. This will help the process of negotiation later in the mediation.

There is no need for mediators to take detailed notes during this stage as they are facilitating the parties' discussion and assisting them to hear and understand each other's views; note taking may distract from this task. Options to settle raised by the parties during this phase should be noted but not focused on. This is because there is often a tendency to move too quickly towards outcomes rather than patiently working through the issues to build better understanding and hopefully cooperation. I often say to parties at the beginning of this phase that we are simply 'having a conversation so that you can understand each other more fully'. In many ways this phase is the central point of many mediations, where the parties can forge new stories and meanings from the narratives that have so far caused the parties to remain 'stuck.' Often, the simple process of listening and reflecting upon what is being said, assisted by a skilled mediator, can be a crucial part of the developing avenues for the parties to move down towards better management of the conflict.

Step 2: Dialogue

7.42 Trainees and inexperienced mediators often find the exploration phase very difficult to manage because they are unused to enabling parties to communicate with

each other directly while remaining relatively uninvolved. This seems to be especially so for professionals, such as counsellors and teachers, who are used to having communication directed through them and being in control. There are a number of devices that may be helpful to encourage the process of direct dialogue between the parties. These are transitions, paraphrases, round-ups and reframes and are briefly described below.

Transitions

7.43 Transitions are used to direct the flow of dialogue between the parties by encouraging one party to talk about some aspect of an issue directly to the other. Transitions combine open-ended questioning techniques that facilitate open discussion. They are the most important and basic way of encouraging direct communication between the parties, and may be achieved by one or more of the following:

- *Handover:* Invite one party to express their feelings, perceptions and views directly to the other instead of asking questions; for example, 'Peter, could you tell Zoe how you felt when …', 'Could you tell Zoe what happened', or 'Perhaps you would like to ask Kathy that question'.
- *Crossover:* Crossovers are designed to get each party to express their perception of the other's point of view; for example, 'Emma, could you tell Zoe what you think she meant'.
- *Clarifying:* For example, 'Joe, could you please tell Mary what was your understanding of the agreed terms' and 'Yale, could you please explain to Xeno what you understood the terms to mean'.
- *Encouraging:* For example, 'Jill, it might help the process if you were to explain to Jack how that event affected you'.

- *Identifying feelings:* For example, 'Bill, you sounded very upset when you said that. Would you feel OK explaining to Ron just how you feel/how the incident affected you?'.
- *Hypothetical:* For example, 'Fiona, you have described how you reacted to the comments made about you, and you have heard Josephine describe what led to those comments. Now you know all that, how might you have acted differently?'.
- *Role-reversal:* For example, 'Gerard, what would you say to Sam if you were in his position?'.

Paraphrases

7.44 The paraphrase briefly summarises what the parties are saying in their own words incorporating reported speech. Paraphrases are commonly used during exploration, to ensure that the parties understand the content. They use the parties' words and phrases as much as possible. They are useful to clarify progress, to assist parties who may be deadlocked or confused, when the parties have run out of things to say to each other, to lead into transitions, or to assert control by the mediator.

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Paraphrases can diffuse difficult exchanges as well as reframe the discussion. They assist with slowing the exchanges down, thus assisting reflection and furthering understanding.

Round-ups

7.45 The round-up is simply another form of paraphrase, but, as the name suggests, it brings together the threads of the discussion at appropriate times during the exploration phase. Whereas a paraphrase summarises the essence of the immediate dialogue, a round-up summarises the party's opening

positions, the discussion that has taken place, and any progress made and the current situation. Round-ups are a good way to move parties on from one issue or agenda item to the next. Incorporating reported speech is again useful.

Reframing

7.46 As Kaufman and colleagues (2013) state:

> Frames play a significant role in perpetuating intractable conflict. As lenses through which disputants interpret conflicts, frames limit the clarity of communication and the quality of information, as well as instigate escalatory processes. These frames, imbedded in personal, social, and institutional roles, are often quite stable over time, even through the ebb and flow of many dispute episodes. As such, they contribute to the intractability of the conflict. In addition, frames interact, often in ways that tend to reinforce the stability of other frames. Yet, in at least some intractable conflicts, changes in the context of the dispute or purposive interventions designed to alter frames have led to reframing that, in turn, has increased the tractability of the conflict. Strategies to accomplish this reframing include frame analysis and the construction of forums designed to enhance communication, understanding, and trust.

See **Exercise 37** at the end of this book for more details of this model.

Within processes of mediation or negotiation, the management of frames and the framing process may lead to important shifts in both the frames themselves and their impact on the conflict dynamics. This purposive management of frames is called 'reframing'. Philips (1999) describes three ways reframing happens:

- reflecting some words and ignoring others;
- inviting or discouraging collaborative meaning-making on selected topics; and
- reformulating what people say (that is, common usage of reframing).

7.47 Reframing can change the perception and context of a dispute, usually by detoxifying the parties' language. For example:

From: 'Every time he brings the children back there's a fight and we end up screaming and we end up crying. I'm not letting him have the

children again.'

To: 'Jill, can you tell Jack what specifically you believe each of you need to do in order for the transfer of the children to go smoothly and uneventfully for you both?'

Reframing can change positions into interests. For example:

From: 'I want her to pay the whole sum immediately.'

To: 'William, you appear to need money immediately. Can you tell Emma why that would help you?'

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In general, reframing can refocus:

- from power → rights → interests
- from positions and outcomes → interests
- from attacks on people → solving the problem
- from general → specific
- from negative → positive
- from destructive → constructive
- from differences → common interests

Mediators can use reframing to remove the negative or destructive aspects (communication blockers) of the communication, to enable the other party to hear and accept the message. This can be done by removing the accusation or blame from the message or by removing the aggression or hostility from it. For example:

From: 'He's not going to get the children unless he changes his ways.'

To: 'Could you tell Jack why it is difficult for you to let the children visit their Dad?'

Mediators also reframe by turning a 'you' message into an 'I' message. If a party is being negative, mediators can turn that into a positive direction. For example:

From: 'It's been a disaster.'

To: 'Could you tell John how it could be improved for you?'

From: 'I cannot do anything about that.'

To: 'Maureen, could you tell John what he could do?'

When this step is working extremely well it resembles a conversation between the parties, with the mediator acting as a guide through the topics.

It is important in this phase to use body language to maximum effect. Use your eyes, hands and posture to redirect communication between the parties. Destructive communication should be diverted or interrupted.

In this part of the mediation, if not before, the parties may become quite emotional. In conflict our emotions are often hard to control and express appropriately. In their important paper on the subject of emotion as it relates to the role of the mediator, Jones and Bodtker (2001) identify three particular challenges, which the mediator must understand in order to manage the process of mediation:

- '*Emotional contagion*' happens when the parties are in a certain mood, whether elation or depression, which is sometimes communicated to others. For example, when we are talking to someone who is depressed it may cause us to feel depressed, whereas if we talk to someone who is feeling self-confident and buoyant we are likely to feel good about ourselves.
- '*Emotional flooding*' occurs when one's emotions are so strong that it becomes difficult to function. We can become overwhelmed with anger, fear, hurt, sadness

or shame, and literally drown in the intensity of our own feelings, and then transfer these on and damage our relationships.

- '*Emotional reappraisal*' refers to how individuals go about regulating their emotions. One common form is playing down negative emotions. Examples include construing a critical remark as helpful rather than hurtful or simply maintaining the appearance of having taken no offence. There are two principal ways of emotional re-appraisal: antecedent-focused and response-focused reappraisal or regulation. The first form might take the form of construing a potentially emotional situation in a way that decreases its emotional relevance; for example, by thinking positively about an upcoming medical procedure. This is an attempt to pre-empt an emotional response. The second form occurs as part of or later than the event itself. As Richards and Gross (2000, p 411) suggest, this can take the form of inhibiting the emotional response leading to 'expressive suppression' in selective instances. They suggest that expressive suppression may indicate lower memory retention.

It is my view that it is better for the mediator to deal with the emotional component of any conflict before going on to other issues, especially if the emotional component is very powerful. (See **Chapters 3** and **6** for a discussion of emotion in conflict.)

Phase 6: Private sessions

7.48 Private sessions (sometimes referred to as a caucus or caucusing) are an integral part of the process for a number of reasons. In the problem-solving approach these include: to check how mediation is going; to prepare the parties for the negotiation phase; and to 'reality test' the party concerning their BATNA and WATNA, which cannot be done in front of the other party. Some lawyer mediators use private sessions as the centrepiece, or at least the most important element in their mediation practice. In Australia, this process

is often referred to as 'shuttle mediation'. This process is described well by Richard Calkins, an American lawyer, as follows (2006, p 111):

> Caucus mediation, which is described in some detail in the remainder of this Article, begins with all the parties together in conference. The mediator makes opening remarks, and the attorneys are invited to make opening statements. After this is completed, the parties are separated and placed in different rooms. The mediator then shuttles back and forth between them and conducts private sessions called 'caucuses.' This caucusing continues until the case is settled. Once completed, the parties meet again in a joint conference and affirm the terms of the settlement, or, if the case is not settled, whether the process is to continue by telephone or otherwise.

Even if you do not agree with this type of process there are many proponents of private sessions in legal systems, and Calkin's description provides some useful insights into it, in particular the way in which a private session can be employed. (See **Exercise 39** at the end of this chapter for a case example of this process in action.) Both transformative and narrative approaches use this technique as well and the latter gives some preference to it being part of the intake or pre-mediation process. For example, Bush and Folger state (1994, p 153):

> Exploring delicate relational issues and laying further groundwork for recognition is sometimes easier in caucus, especially in the early stages of the process. Parties often find it difficult at first to give recognition directly to the other party, because it is difficult to give recognition to another person when feeling vulnerable oneself.

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Narrative mediators Winslade and Monk state (2000, p 137):

> One of the first steps we prefer to take in a mediation is to meet with each of the parties separately … In our experience, it is in these separate meetings that a lot of the major work of the mediator is done … the separate meetings are a venue for significant developments in the mediation as a whole, not an optional adjunct to the process, to be used only when things are getting sticky. In our approach, they are central to what gets achieved.

7.49 The private session should be used to assist each party to move to a resolution that is acceptable and fair to both, which is based on full

exploration of all topics. The focus is always positive and forward-oriented. During the private session, a party may disclose the reasons for their particular stand — their 'hidden agenda' — which are preventing them from accepting what seems to be a 'reasonable agreement'. The mediator can use tools such as reality-checking and role reversal to assist them to view a wider range of resolutions. There are two steps to the process:

1. explain the rationale to the parties; and
2. hold private sessions with each party.

Step 1: Explain the rationale to the parties

7.50 You may want to go into private sessions because of the reasons noted above. However, there may be other reasons, including your intuition that one or both of the parties are not disclosing important underlying issues, or that one of them is at a severe disadvantage in relation to the other. Alternatively, you may want to use this session to help change the focus of the mediation. For example, it may be that the parties are focused too much on past issues and not enough on the present, so that they are not able to properly concentrate on the concrete issues necessary to resolve the conflict.

You should be open in explaining the rationale to the parties, although in some circumstances this may not be possible. For example, if a female party to the mediation seems to be intimidated by her male adversary you may not want to disclose this to the parties at this stage because such a disclosure might further undermine her position and/or threaten his. This may be counter-productive at this stage, whereas at a later stage it may be appropriate. However, you would want to discuss it with one or both of them in private session. The private sessions should be 'confidential' in the sense that matters discussed there will not be brought out in the mediation unless the party concerned does so, or indicates that they want it to be raised. This may help the parties to disclose any doubts or problems they are having about the process or the other party.

Your explanation to the parties of the private session may therefore include the following purposes and reassurance:

- to ensure that all aspects of the dispute are dealt with;
- to identify the base line of parties; and
- to ensure that parties are feeling comfortable and understand that this phase is confidential in the sense that the matters discussed during the private session will not be disclosed by the mediator but only by the parties themselves.

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Sometimes the mediation may reach an apparent stalemate. This may happen for a variety of reasons: the inability of one or both of the parties to abide by the rules established for the mediation; because one or both of the parties is, for some reason, not participating satisfactorily; lack of information; because facts need to be verified before the mediation proceeds; or because one of the parties indicates that they are unwilling to go on for some reason. For any of these reasons you may decide to terminate the mediation, or call a private session. This simply means that you indicate to the parties that you wish to speak to each of them alone. You will have already indicated to the parties that this may occur during your preliminary outline of the process in Phase 1.

You should avoid giving the impression that you are colluding or allying yourself with either party during the private session. The way in which you proceed with this phase will depend on why you called the private session in the first place. Sensitive questioning and active listening will be of crucial importance here. It may also be useful to give the parties positive feedback about how they are going in the mediation so far. Issues of ‘face

maintenance', 'face saving' or 'face restoration' (described in **Chapter 6**) may be important also.

Try to give the parties equal time to ensure that neither thinks that you are favouring one over the other. Link this phase with the next. Reinforce the notion that it is the parties' responsibility to raise new matters arising from this phase in the next.

Other private sessions can be used at any time during mediation. They do not serve the same purpose as a Phase 6 private session. They can be used where the nature of the interaction between the parties calls for a break or a separation.

Step 2: Hold private sessions with each party

7.51 It may be a good idea to start the private session with the party who spoke second during Phase 2. Make sure the party not in private session has access to tea- and coffee-making facilities, telephones, toilets and so on.

The mediator makes sure that the party who is going outside is comfortable and, if possible, gives them a task related to the mediation to keep them included in the process.

In my practice I have three interrelated parts or stages in the private session proper:

1. *Reassurance:* The mediator checks how the party in the private session is feeling about the mediation so far and encourages him or her to raise anything he or she needs or wants to discuss.
2. *Reality testing:* This is a process of testing the perceptions of the parties, to enable them to put these into the context of the conflict. In this regard it is usually important to explore the party's BATNA and WATNA through a process of exploration and questioning: see the box below for some examples. Sometimes the party's expectations of what is possible may be quite illusionary. In many ways this part of the process is one of

creating doubt in the mind of the party and even subverting the narrative or positions they are taking. It is a part of the process where the contradictions in the narratives of the party become apparent, even if this occurs at an unspoken level in the interaction. An experienced mediator will

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be able to do this while still maintaining the trust of the party. The mediator acts as the 'agent of reality' concerning non-settlement in the mediation session; for example, 'What do you think will be the result if this goes back to the court?' and 'Have you considered what may happen if you both don't reach agreement today?'.

Reality testing questions

1. What do you see as the strengths of your case?
2. What do you see as the weaknesses of your case?
3. What do you see as the strengths of the other's case?
4. What do you see as the weaknesses of the other's case?
5. What is your best-case scenario if you don't resolve this with negotiation?
6. What is your worst-case scenario if you don't resolve this with negotiation?
7. What is the most likely scenario if you don't resolve this with negotiation?
8. Is that better than the most likely negotiated settlement?

(Accessed from John Ford and Associates, available at <http://www.mediate.com/johnford/pg87.cf>.)

3. *Prepare for negotiation:* The mediator further explores the agenda topics as necessary, continues to explore options where needed and raises questions about how the party believes the dispute can be better managed. For example:

   a. How do you think the XYZ issue could be managed?

b. How could you put this proposition to the other side?

c. What do you think their reaction to that may be?

d. Would you be able to suggest a range regarding price?

e. What other options could you put to the other side?

It is important for the mediator to assist the party to think beyond positions and look for possible solutions that satisfy the concerns/interests of all parties. By using paraphrasing and round-up paraphrasing the mediator can clarify possible options that emerge.

In conducting the private session with the other party, the same rules and structure apply. Remember, the second party has had time to think and may start from a different perspective than that expressed at the end of Phase 5 (exploration).

Often the second party wants to know what happened in the first private session. The mediator needs to remind the second party of the confidentiality of both sessions and refuse to act as a 'shuttle negotiator' or to pass information between the parties. The parties will be able to exchange information with each other when they reconvene the negotiation in Phase 7.

At the end of the private session the parties will, hopefully, have a clear idea of the options and issues that might be raised in the next step of the process. Remind each party of the confidentiality of the meeting prior to closing it. The mediator should talk first when the joint session reconvenes to assert control of the process.

In the private session, the mediator does not attempt to fix the dispute or to coerce the parties. In other words, the mediator needs to ensure he or she does not attempt to 'guide' the parties towards a particular settlement.

Phase 7: Negotiation

7.52 This is the phase which is potentially the most exciting, interesting and productive. It is also the phase where the mediation takes a 'quantum leap', moving into the specifics of what needs to be done and thereby into the future.

It is during this phase that the parties begin to negotiate and the mediator becomes both the facilitator and monitor of their negotiation. The importance of this change cannot be underestimated. It demands of the mediator a different repertoire of knowledge and skills and enables the parties to truly 'own' and find their own agreement. Techniques and principles which are helpful during this phase are described at **6.45**, 'Designing a way through conflict'; and **6.57**, 'Managing resistance and moving through impasse: Further exploring interests'.

This phase can be divided into two steps:

1. creating and reviewing options; and
2. negotiation.

Step 1: Creating and reviewing options

7.53 It is usually useful to work through the agenda so as to anchor the process. One of the best ways of doing this is to create and examine options for each of the agenda items. During the exploration phase a number of options may have already been suggested, which you can list. It may be helpful to write these on a whiteboard visible to all parties. Some mediators prefer to simply list all possible options on a board, with each party contributing in turn — what method you choose depends upon the complexity of the issues. Keep in mind that the options generated may not be based upon 'objective criteria' but rather reflect the subjective understandings and feelings of the parties. Do not be disturbed by this aspect as, in general

terms, the widening of the number and type of options can be useful to enable the parties to better negotiate outcomes.

There are a number of criteria or questions, listed below, which you may need to consider when generating and examining the options available. These mainly concern the parties' anticipated needs, the socioeconomic context, and legal and financial constraints. Each mediation is different and each option listed should be examined in light of the individual merits of the case.

Some criteria for listing options

- Do the options meet the wants and needs of the parties?
- Are third parties likely to be affected by the exercise of the options and how are they likely to react?

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- Have the options been tried in the past and, if so, what was the outcome?
- Does the exercise of the options fit within the general socioeconomic circumstances of the parties and of the general community?
- Are the options legal and do they require some legal procedure or document to be completed?
- Can the options be modified and, if so, how?

Exercise 12 at the end of this chapter provides the opportunity to review and practise option generation.

The emphasis in this step is on helping the parties talk about and develop their own options. Your continued neutrality is crucial; however, it is in this phase that the temptation to offer your own solutions is greatest. This is not to say that it is not appropriate in some circumstances to suggest options. This may be particularly important where the parties are 'stuck'. Suggesting options is very much secondary in importance to your role as facilitator for the parties. It is more likely that the parties will take responsibility for, and improve, their own conflict management skills if they can work through these

difficult steps themselves. Mediation, like most interpersonal encounters, is more art than science and, like the artist, you sometimes simply have to trust in your own intuition, inspiration or whatever you may call it. Sometimes you have to take risks. If you do suggest options, always leave it to the parties to decide if they are acceptable within their frames of reference.

Brainstorming as part of the mediation may be useful at this time or, if the mediation is occurring over a number of sessions, you may want to set a brainstorming exercise as part of a 'homework assignment' for the parties. (**Exercise 11** at the end of this chapter focuses on practising the brainstorming technique.) Keep in mind that most people can only cope with a limited number of options for each issue during the negotiation that is to follow. Therefore, you may have to limit or simplify the options generated, although this can wait until negotiation is entered into in Step 2.

It is useful to keep in mind those tendencies that inhibit the generation of options during this phase (see **6.57**).

Folberg and Taylor (1986, pp 52–3) suggest that a trial period can be built into the process at this stage to test if the option can actually be used. It is a useful idea and can be noted in this step and incorporated as part of any subsequent agreement with a proviso to review. However, it is better not to interrupt the flow of the process unless it is absolutely imperative that the option be 'trialled' before going on to the next step. In some simple conflicts a trial period can be useful as the basis for ongoing management of the conflict. Folberg and Taylor (1986, p 53) give the example of two employees in conflict over how to complete a particular form. After checking to see if there is any underlying conflict, their manager suggests that they come up with two options, one of which they can trial for a set period before coming back and reviewing the results.

Step 2: Negotiation

7.54 The mediator initiates this by asking the parties to clarify the

objectives they want to achieve for each issue on the agenda and how these relate to the issues listed.

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These processes take some encouragement and time but hopefully by now the parties are relatively relaxed, and with skilful interventions by the mediator can begin to move in this direction. For example, the mediator may say, 'Jill, how could you explain that to Bill?' and 'Could you do that now?'.

Another technique is to ask the parties to consider the options as part of their joint needs; for example, 'What option will most likely suit both your needs?'.

The mediator needs to ensure that the terms of the agreement do not rely on contingencies that are beyond the parties' control.

This step clearly focuses on the future, and the parties negotiate the details of the options they have generated. The mediator should note offers made and accepted. These will form the basis for the draft agreement clauses. The focus of discussions should be whether a particular option is acceptable and liveable. During this step and, indeed, other steps as well, particularly private sessions, the role of the mediator will often require a need for confrontation as well as encouragement, as outlined in the box below.

The mediator as confrontor and encourager

Placing the responsibility with the parties and encouraging them to participate in option generation and negotiation will sometimes mean that you will have to confront the parties when necessary, and acknowledge blocks if they become stuck in the negotiation. During this step, for example, you want the parties to make decisions. This may not be possible unless you acknowledge the block that is causing the problem. This does not mean that you attack the party or parties or manipulate them. Confrontation in this context means pointing out the perceived problem. For example, the mediator may say something like, 'Bill, you seem unwilling to explore the options around this agenda item. Do you know why?' or 'You look decidedly uncomfortable discussing this issue. Is there anything that we need to go back over?'.

Acknowledging to one or both of the parties that they have the power to prevent a decision being made is often enough to relieve any impasse. These types of intervention require a great sense of timing and sensitivity on the mediator's part and should be used sparingly. Another way to move the parties over a block and towards a decision is by raising the option of finishing the mediation and going on to another process like arbitration or adjudication. Since mediation empowers the parties, suggesting another process where they do not enjoy that power will often be enough to break an impasse (Folberg and Taylor, 1986, p 58). This type of intervention should only be used where absolutely necessary and where other strategies have been tried first.

Negotiating alternatives is sometimes a difficult process. It is therefore important that the mediator gives encouragement and verbal rewards to the parties as they proceed through this phase. For example, when the parties have jointly made a difficult decision, you could say to them, 'It is really good how you both seem to be able to work together and make such positive decisions'. If the parties are stuck, the mediator may have to move them back to an earlier step or phase of the process. This may be quite discouraging to the parties, so give them some reassurance or encouragement while doing this; for example, 'You seem to be stuck at this point. I think it may be a good idea to go back to the options step and establish if we have the right range of choices. Because you have both made good progress in getting this far I think this will help you make the better decision in the end'.

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It has been mentioned several times that the principal aim of this step is to enable the parties to move into a position where they can begin to make decisions about the options they have developed. This should not assume such importance that the actual process of getting to this position becomes secondary. In other words, it is equally important that the parties engage in a process of negotiation which not only leads them to a decision but which also helps them resolve some of the difficult interpersonal issues that may have arisen between them. This is empowering — the parties sense and have a degree of personal control over what is happening, and acquire communication tools they may find useful in the future. It is therefore not desirable to move the parties too quickly to a decision. It is important to give them time to adequately discuss the issues while at the same time helping them through blocks.

Phase 8: Agreement

7.55 This is the phase in which the parties actually make the agreement. A mediated agreement has four important aspects to it. First, it symbolises the parties' new-found willingness to cooperate. This is why it should often be accompanied by certain rituals such as shaking hands. Second, the agreement

contains a statement of the parties' intentions. It crystallises the parties' hopes and aspirations for the future in terms of the particular conflict at issue. This is important because it continues the mediation's 'future' focus. Third, these intentions are spelt out in decisions concisely stated in the parties' own language and which they 'own'. Fourth, these decisions will incorporate the requirement of certain future behaviours by both parties to fulfil the requirements of the agreement.

During this phase, two particular issues should be kept in mind. First, the agreements made must be 'liveable'; that is, they should be capable of being performed by the parties and fit the context of their lives. Second, earlier unresolved or underlying conflicts may surface again during this phase, as the parties move closer to the final agreement. For example, in a dispute involving two fellow employees over their respective work responsibilities, one may be willing to acknowledge that he or she will have to behave differently in the future, but may be unwilling to accept a principle that there is joint responsibility and therefore will not sign the agreement. In this example the party in question might not sign an agreement containing a clause which states: 'Both parties acknowledge that they are jointly responsible for the continued success of the project and Party A will accordingly agree to attend the research evaluation meetings called by Party B'. While Party A may be willing to attend the meeting they may still not be willing to sign the agreement. This is because they are unprepared to accept the acknowledgment of joint responsibility and thus their own responsibility in the conflict. The mediator should be aware of these intricate possibilities and be prepared to go back to an earlier phase or call a private session to deal with the issue that has either arisen for the first time, or resurfaced. This particular aspect of this phase takes a considerable amount of skill, especially in getting the parties to articulate their objections to the wording or other aspects of any agreements.

This phase has two steps:

1. clarification of agreements made; and

2. formalisation of the agreement.

Step 1: Clarification of agreements made

7.56 During this step the mediator goes through the agreements reached and, in effect, clarifies and summarises the progress made to this point. This step, like others before it, can be better facilitated if the mediator has a whiteboard on which to jot down the agreements in point form. It is important that the mediator does not rush through this step simply because an agreement seems to be at hand. If this happens the parties may sense that the agreement is not one that they had much control over, and, therefore, if any difficulties arise in the future, one or both may find it easier to abrogate (cancel) it. The mediator should try to ensure that the parties participate as fully as possible so that they have a real sense that the agreement is one that was jointly made between them, and not imposed.

Reality-test agreements by asking clarifying questions to ensure each party is fully aware of what they are agreeing to. Then ask questions of each party to ensure they fully understand what the agreement means for them and check that it will work in the future. Also, ask questions about how they will be able to make the agreed terms work. The mediator also needs to ensure that the terms of the agreement are not reliant on contingencies that are beyond the parties' control. When absent or unrepresented people are mentioned in relation to the agreement, the mediator should sensitively ensure that only the parties present are responsible for implementing the agreement. In other words, the mediator needs to ensure the parties present are not making agreements on behalf of absent or unrepresented people.

Where the terms of an agreement appear to be reliant on an absent or unrepresented person or on another event occurring, the mediator needs to reality test the effect of such contingencies. For example, the mediator may

ask the parties, 'What will happen if XYZ does not eventuate?' or 'Are there alternatives you could agree to do if ABC does not happen?'.

When parties are unable to reach final agreement, the mediator can suggest a temporary or trial solution and then work towards achieving a final agreement later.

Where the parties are not reaching agreement, the mediator can:

- remind parties of the alternatives if they do not agree, by asking them open-ended questions; for example, 'If you don't agree today, what can you do?', 'If you return to litigation, what will happen?', 'When will the hearing be?' or 'What does your lawyer say will be the likely outcome?';
- seek agreement in principle and postpone agreeing on the details;
- draft possible settlement terms which the parties can use as a basis for negotiation on the final terms;
- document any partial agreement/s, stressing the positives/benefits from this session (that is, areas of agreement, future possibilities/options), and reassure the parties that not all disputes resolve through mediation; and
- try to ensure areas of resolution are not jeopardised by areas of non-resolution.

The options and agreement discussion should ensure that all necessary details are covered, including:

- timeframes — check when tasks and other things are meant to happen;

- consultation — the involvement of a third person such as a lawyer or expert may need to be explored;
- confidentiality — decide who needs to know about and have access to the

information contained in any agreement;

- responsibilities — be clear about who is to do what and when;
- announcements and media — decide how media, boards of management, shareholders and others will be consulted and managed; and
- review — set a date, time and place for any review meeting to take place; perhaps retain the possibility for further mediation in the future.

Step 2: Formalisation of the agreement

7.57 Although each mediation agreement is unique, there are usually a number of fundamental clauses in any written, or verbal, agreement. These are outlined in the box below. Remember to keep the agreement simple and phrased in positive terms. Not all these clauses are necessary in every mediated agreement and there may be other types of clauses necessary in particular cases.

The binding nature of any settlement made at mediation depends in the first instance on what has been provided for in the initial Agreement to Mediate. The Agreement to Mediate could, for example, provide that any documents executed after the mediation pursuant to a Heads of Agreement entered into at the mediation will be in conformity with the Heads of Agreement. The legal position appears to be that agreements need to be reduced to writing in order to be enforceable (Spencer, 2003; Spencer and Hardy, 2009). Sometimes, parties prefer not to reduce their agreement to writing. This is appropriate in certain circumstances and there is no legal obligation to write out an agreement. However, the enforceability of the agreement would become an issue if it is not in writing. Courts will permit parties to admit evidence of an agreement reached at mediation, and therefore it is necessary to do so in most instances: see, for example, *Al-Hakim v Monash University* [1999] VSC 511. Courts will not go behind mediation settlements except in exceptional circumstances (Boulle, 2005, p 451). In *Missingham v Shamin* [2012] NSWSC 288 the Supreme Court of New

South Wales granted a permanent injunction to restrain the husband of a mediation participant from breaching the confidentiality provisions of a deed of settlement. The court found that publication on a court website of some of the terms of the settlement deed in an ex tempore judgment granting an interlocutory injunction did not absolve the woman's husband and that limited disclosure did not mean the confidentiality provision was of any lesser utility.

NADRAC has concluded, from a study of Australian research, that there is a consistently high rate of agreements in mediation and that they are durable over time (2001, p 24). But there have been several cases where agreements have been disputed and the mere fact that an agreement has emerged out of mediation does not give it any special status. Normal contractual principles apply. Agreements can be enforced just as in any other contractual agreement, but this will depend on there being in a form that allows this. Where there is non-compliance, the dispute may be litigated. Therefore, although by this time in the mediation the parties and the mediator may be tired and want it to end, working methodically through the details is crucial.

The case of *Weimann v Allphones Retail Pty Ltd (No 2)* [2009] FCA 1230 (30 October 2009) is instructive in this regard. In this case the parties had been locked in substantial disputation for some time over the terms of a franchising agreement. As part of the process an extensive mediation was conducted as a result of which documents were produced which one party asserted constituted a binding agreement. McKerrarcher J concluded that the documents did not provide sufficient evidence of a binding agreement. As part of the mediation between the parties they had signed a document titled 'Agreed Outline of Mediation Settlement, 12 October 2009 — New

Agreement'. Only the mediator had signed this agreement. In concluding that it did not constitute a binding contract His Honour commented:

> [73] … I do not wish to be accepting that describing the document ultimately produced from the mediation (but not signed by anybody) as an 'offer' is accurate. Indeed, the title to the document which was a composite title achieved by joint contributions is in turn non-specific. Even the title 'Agreed Outline of Mediation Settlement — New Agreement' does not bear the precision which one might expect if firm agreement had been reached on each of the component elements of that which still had to be resolved. While the Agreed Outline might have been agreed, it is an outline that was agreed rather than an agreement, even in principle, as to every element in dispute. Some significant parts of it were still outstanding for determination.
>
> [74] … A statement that the complex litigation had settled from either party given that there had simply been oral exchanges perhaps evidenced by a jointly produced outline which left a number of matters outstanding does not, as a matter of objective fact, constitute a binding agreement.

His Honour pointed out that it would be artificial to say that at every mediation or negotiation, before a binding agreement is reached, the parties needed to ensure that every detail was contained in the agreement (at [85]). His Honour (at [86]) summarised the various possibilities as expounded by the High Court in *Masters v Cameron* (1954) 91 CLR 353; [1954] HCA 72, in which the court held (at 360) that where parties who have been in negotiation reach agreement on terms of a contractual nature, but agree that the subject matter of the negotiation is to be dealt with by a formal contract, the case may belong to one of three categories. These three possibilities as summarised by His Honour were:

1. The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.
2. The parties are completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.
3. It is the intention of the parties not to make a concluded bargain at all

unless and until they execute a formal contract.

His Honour (at [86]) noted that it has also been suggested that there is a fourth category by way of variation to the first; namely, where the parties intend to be bound immediately by the terms on which they have agreed, while expecting to make a further contract in substitution for the first containing by consent additional terms: *Baulkham*

Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622 at 628 per McLelland J. The *Baulkham Hills* decision makes clear that the question of whether the parties reach a final agreement is ultimately a question of intention to be objectively ascertained from the language the parties have used, or which may be inferred from their conduct. In the court's view subjective intention has a very limited role, if any, to play on this topic unless expressed as part of the exchange said to form or contribute to the oral agreement. The issue is primarily one of the construction of the language of the parties, whether it has been expressed orally or in writing.

In *Pittorino v Meynert (as Executrix of the Wills of Guiseppe Pittorino (Dec) and Guiseppina Pittorino (Dec))* [2002] WASC 76 (12 April 2002) there was an application to set aside an agreement reached at a mediation on the ground that the applicant was incompetently represented by her solicitor and alternatively that it was unconscionable due to a disability of the applicant. The first ground was not proven. The second ground depended on the applicant establishing that the other party had knowledge of the disability. The court found that even if the applicant did suffer from some disability on the day in question when the mediation was held, such as the ill-health from which she suffered and lack of confidence in her solicitors, there was no acceptable evidence that any of the defendants were fixed with knowledge of that disadvantageous position of the plaintiff. Further, the court found that

there was no evidence that the mediator (a Court Registrar) was aware of any loss of confidence between the plaintiff and her solicitor or that he improperly tried to influence the outcomes. Scott J stated (at [127]):

> … I accept that it would not be proper for a mediator to bring improper pressure to bear on any party to a mediation. That is a difficult and sometimes delicate role for a mediator to fulfil in that the mediator will from time to time convey offers made by one party to another. I accept that in some cases body language and the way in which a mediator expresses himself or herself may give rise to concern. In this case, however, having heard all of the evidence, I am quite unable to conclude that the mediator conducted herself other than with the utmost propriety. The fact that the plaintiff expressed concern about the way in which the mediator conducted the mediation, in my view, is a reflection on the plaintiff's own emotional instability and the fact that she visited upon the Registrar the consequences of her own emotional shortcomings.

For a good summary of the law in this area see *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; 46 ALR 402; [1983] HCA 14, a case in which the respondents were Italian migrants of advanced years with limited knowledge of written English. The respondents were asked by the appellant bank to execute a mortgage to guarantee moneys owing to the bank by their son. The bank was aware that the son was in a parlous financial situation and the respondents were mistaken about the extent in duration of their liability under the guarantee; see also *National Australia Bank Ltd v Freeman* [2000] QSC 295.

Fundamental clauses of a mediated agreement/settlement

1. **The preamble or introduction:** This part of the agreement briefly describes the parties and the nature of, and circumstances surrounding, the dispute. It may also state that the parties have reached this agreement voluntarily, through the process of mediation, and that the mediator was a neutral party.

2. **Statement of objectives:** This part contains a brief outline of the broad objectives that the parties hope to achieve. It is often a good idea to couch this in positive terms expressing the parties' hopeful intentions. It may be as simple as the following statement arising out of a conflict between two fellow workers: 'We agree to try to work together so that our mutual job satisfaction is increased and to reduce general friction in the workplace'. Alternatively, it may consist of several numbered clauses

which specify, in more detail, the various objectives of the parties.

3. **Statement of tasks:** This is usually the lengthiest part of the agreement and contains all those things which both parties must do to achieve their objectives. It usually comprises all the selected options that the parties have agreed to. It is better to draft this in as specific and concrete terms as possible so that the room for possible misunderstanding is minimised.
4. **Amendment clause:** It is sometimes preferable in a mediated agreement to have a clause that spells out for the parties the fact that amendment of the agreement is possible and how to go about it.
5. **Review clause:** The review clause may be advisable where the agreement is to operate for a period of time and it may be an advantage to arrange a procedure to bring the parties together for a periodic or one-off review of the agreement.
6. **Legal review or other necessary review clause:** If the agreement substantially affects the legal rights or obligations of the parties it is usually preferable to ensure that before the agreement is signed the parties seek legal advice and show their respective lawyers the agreement. This path, of course, sometimes runs the risk of reopening the conflict, but this is preferable in most instances to the parties' legal rights being undermined or ignored. This clause would indicate therefore that the parties have consulted their lawyers before signing the agreement, or, in some cases, it may allow for periodic legal review. Sometimes it may be necessary to inform other persons or bodies of the review and/or ratification. These could include work supervisors, committees of management, boards or other appropriate authorities. This type of contingency should be planned for and discussed with the parties. Sometimes it may even be possible for the other person or representative of a body to attend a session with the mediator and the parties to discuss the agreement. The mediator should check these types of contingencies before the mediation begins, to ensure that the effort put into the mediation is not wasted and that the participation by the parties is voluntary.
7. **Future conflict clause:** This clause both recognises the possibility that there may be future conflict between the parties and indicates what procedure they will adopt if this happens.
8. **Change of circumstances clause:** Sometimes the circumstances that will support an agreement may change. For example, in a conflict about access and maintenance of children, one or both of the parties may want to insert a clause about the effect of unemployment and the procedure to be then adopted to revise the agreement.
9. **Signature clauses:** Do not forget to include a space for the signature of the parties. This can be worded simply: 'I, John Doe, have read this agreement, understand its terms and hereby agree to abide by them'. Then leave room for the signature.

Note: Remember to keep the agreement simple and phrased in positive terms. Not all these clauses are necessary in every mediated agreement and there may be other types of clauses necessary in particular cases (see **Exercise 14** at the end of this chapter).

Phase 9: Implementation, review and revision

7.58 The stage is now set for the parties to actually do what they have agreed to. This demands a major shift for them from the vision of what is to be done to the actual implementation of the tasks. For some people this may not be an easy thing to do, especially if there are unresolved conflicts that emerge or if there is a change in circumstances. It is therefore important that the mediator builds into the process some anticipation of this change and the difficulties that may arise. Many mediated agreements are helped by one or both of the parties being referred to a consultant, expert, counsellor or some other process that will help them with any underlying conflict, and by establishing a system for follow-up. It is this latter aspect that is emphasised in this phase.

Because this phase of mediation is in the hands of the parties, the involvement of the mediator may vary enormously. It depends on the particular dispute and the skills and resources of the parties. The mediator would have already canvassed the need for follow-up or review procedures in earlier phases. It is usually a sound principle to be available for follow-up by one or both parties either by telephone or further consultation. The usual sensitivity and tact is required in these instances so that you are not inducted as an ally of one party against the other.

Sometimes a follow-up letter or phone call inquiring about the progress of the implementation is useful, especially when one or both of the parties are not especially assertive. It may even be useful to give the parties a handout listing the possible problems and difficulties that may arise during the implementation phase and the procedures for resolving these. As a general rule it is better to emphasise the parties' primary responsibility to resolve any difficulties between themselves before seeking outside assistance.

A summary of the mediation process

7.59 I have included here a summary of the mediation process which is useful not only as a guide to the mediator but also to the parties in a mediation, although my usual practice is to give a less detailed version to them to ensure they thoroughly understand the process.

A summary of the mediation process

Phase 1: Preparation (intake)

- Assess the nature of the dispute.
- 'Party check'.
- Location and resources check.

Phase 2: Introduction — outlining the process and creating trust

- Introductions and seating.
- Establish forms of address.
- Opening statement by mediator:
  - role of the mediator;
  - steps in the process;

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  - potential conflicts of interest;
  - agreement to mediate;
  - confidentiality/privilege;
  - ground rules;
  - notes.
- Check the parties' expectations and understanding of the process.
- Confirm background case material.
- Discuss and clarify any concerns and issues about the process.

Phase 3: Statements

- Projection (that is, tell the parties what is going to happen).
- The mediator explains this phase (including ground rules) to the parties.
- The mediator invites the parties to describe and explain their perspectives, and

summarises.

Phase 4: Agenda construction

- Projection.
- List all the issues.
- Separate issues into ‘non-conflict’ and ‘conflict’ categories.
- Create an agenda.
- Obtain agreement to agenda.

Phase 5: Exploration

- Projection and retrojection (that is, recount the process to this point).
- Discuss each issue in turn.

Phase 6: Private sessions (optional)

- Projection and retrojection.
- Explain the rationale to the parties.
- Private sessions with each party:
  - explain confidentiality;
  - work through agenda.

Phase 7: Negotiation

- Projection and retrojection.
- Create and review options:
  - brainstorm;
  - evaluate options.
- Negotiation.

Phase 8: Agreement-making

- Projection.
- Clarification of agreements made:
  - reality check workability;
  - include specific details of implementation;

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  - determine whether a review meeting is needed;
  - agree on terms of announcement.
- Formalisation of the agreement.

Phase 9: Implementation, review and revision

- Projection and retrojection.
- Make announcements/reports.
- Hold review meeting if necessary.

Some Particular Issues for Lawyer Mediators

7.60 Before considering some of the issues of particular concern to lawyers we should note that, as previously mentioned, those mediators who become accredited under the NMAS are obliged to consider and follow the Standards established thereunder (MSB, 2015). The NMAS provides a comprehensive overview of Practice Standards required to be considered by accredited mediators and includes the following topics:

- application;
- description of a mediation process;
- starting a mediation process;
- power issues;
- impartial and ethical practice;
- confidentiality;
- competent inter-professional relations;
- procedural fairness;
- information provided by the mediator;
- termination of the mediation process;
- charges for services;
- making public statements; and
- promotion of services.

Mediators seeking accreditation under these Standards, or those already accredited, should check the Standards. The following issues are of general application, but are of particular interest to those who are operating within legal systems.

Ethics

7.61 Mediation presents particular ethical challenges because it is conducted in a setting which is required to be private and confidential. Most of the ethical standards for lawyers have been developed in quite a different context, principally centred on the adversarial process. This can create particular issues for lawyers. For a comprehensive treatment of these see Wolski's text on the subject (2009).

A lawyer has two principal obligations. The first is to the proper administration of justice and the second is to the client. The obligation to the administration of justice overrides that to the client and is based on the need to promote fairness as well as efficiency in the legal system. Lawyers are officers of the court. The Australian Law Council Model Rules provide that lawyers must act honestly and fairly, with competence and diligence, in the service of a client (2007, r 1.1). In addition, the Australian Law Council has published and updated *Ethical Guidelines for Mediators*, which is a useful summary of the overall ethical obligations for legal mediators (2011). All legal professional bodies have similar rules.

In mediation these standards can be tested. The demands on the obligations of the lawyer to be truthful can become quite onerous. As you would observe from some of the negotiation tactics outlined in **Chapter 6**, many of the strategies employed by negotiators could be regarded as

deceptive or dishonest. Acting in the interests of the client has to be balanced with a need to be fair and honest.

Wolski notes that the present rules are inadequate and do not address the core values of mediation (openness, client self-determination, client participation, good faith participation, collaboration and honesty) (2009, p 546). She notes that there are three general minimal standards, or foundation principles, in the conduct of negotiations:

- A practitioner cannot knowingly, by some positive act or statement, lie or misrepresent a client's position. Silence is not prohibited.
- If a practitioner makes a statement about a client's case, which he or she then learns to be false, the practitioner is under a duty to correct the statement.
- A practitioner has no duty to inform an opposing party of relevant facts and documents, subject to the requirements imposed by substantive law and legislation.

These standards are reflected in the draft Solicitors and Barristers Rules prepared for the Council of Australian Governments (COAG, 2010). The problem with the Rules is that they do not appear to distinguish between adversarial and non-adversarial settings. As Hardy and Rundle conclude, the existing Law Council's Guidelines, although non-binding, may be better in the mediation context (2010, pp 222–3). These guidelines (see <www.lawcouncil.asn.au/>) allow for some 'puffing', as discussed in the comments section, but not misleading conduct (2011):

> **6.2 Offers and settlement**
>
> A primary aspect of a lawyer's role is to help formulate offers, assess the practicality/reasonableness of offers made by other parties and assist in drafting settlement terms and conditions.
>
> COMMENT
>
> *(a) Never mislead and be careful of puffing.*
>
> *(b) Be cautious about making a 'final offer' or delivering ultimatums which can limit future options*

and damage credibility for future negotiations.

(c) If possible, bring a draft settlement agreement to the mediation, or at least have a draft available on-line.

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(d) If it appears that the mediation will not produce a full settlement, try to obtain a written agreement on as many issues as possible. This may advance future negotiations or shorten a trial and leaves parties feeling like they have at least achieved something useful. It is also useful for future purposes to draft a list of issues on which agreement has not been reached.

See the case of *Legal Services Commissioner v Mullins* [2006] LPT 12 (23 November 2006) in which a barrister was found guilty of professional misconduct by intentionally deceiving an insurer and the insurer's lawyer during mediation. The barrister in this instance failed to disclose to the insurer that his client had recently been diagnosed with secondary cancers that reduced his client's life expectancy. This fact was highly material to the issues in dispute.

The lawyer's obligation to the client encompasses a number of intersecting duties, including an obligation to be competent and diligent, to advise about dispute resolution options, including legal and non-legal considerations as necessary, to follow instructions, to properly advise on costs, and to avoid conflicts of interest. All legal professional organisations have well-developed rules around these requirements. They are particularly tested in the mediation context because it is a process that tends to broaden the options for settlement compared with the adjudication process. This is acknowledged by the Law Council, which states in its guidelines:

5 Preparing for the mediation

Preparation for a mediation is as important as preparing for trial. A lawyer should look beyond the legal issues and consider the dispute in a broader, practical and commercial context.

COMMENT

Litigation defines the issues by pleadings. Before a mediation, a lawyer should, as well as assessing

the legal merits of the case, consider the dispute in commercial terms and in the light of the client's business, personal and commercial needs, generate possible practical options for resolution.

Confidentiality and admissibility

7.62 As the number of mediations connected to legal proceedings grows the issues of the confidentiality and admissibility of statements and agreements made in mediations will also grow. Sparke lists two contexts in which these issues arise (2011):

- representations (or other conduct) made which are said to lead to an enforceable agreement, or which affect/vitiate any agreement reached; and
- situations where costs are in issue at a subsequent hearing and where the conduct of the mediation may be relevant.

To illustrate the first point, the case of *Pihiga Pty Ltd v Roche* [2011] FCA 240 is instructive. In this case the court was called on to determine the admissibility of statements made at mediation which were said to be misrepresentations, so as to vitiate the agreement reached at mediation. The court rejected an argument that the parties should be prohibited from introducing certain intra-mediation documents and statements into evidence based on the mediation agreement: see Lander J at [111]. The settlement deed was admitted by the parties into evidence, but a document listing

various assets was disputed as being admissible. Broadly, the court accepted that the admission of the otherwise privileged document would be achieved on the ground that it goes to the question of misrepresentation, fraud or undue influence.

In regard to the second point, the usual basis for application relevant to the operation of the general confidentiality provisions in the Evidence Act 1995

(Cth) s 131(2) is on the question of costs (s 131(2)(h)). The courts universally admit communications on the question of costs: see *Bruinsma v Menczer* (1995) 40 NSWLR 716; *CF Liquorland (Aust) Pty Ltd v GYG Holdings Pty Ltd* (CA(NSW), BC9505008, 27 March 1995, unreported); and *Alexander v Australian Community Pharmacy (No 2)* [2010] FCA 467.

7.63 The confidential and privileged status of mediation is found in:

- *The mediation agreement:* The courts will permit a party to produce evidence of an agreement reached at mediation. Note, however, that several recent cases have raised the prospect of going around the mediation agreement so as to admit evidence: see *Pinot Nominees Pty Ltd v Commissioner of Taxation* [2009] FCA 1508; *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140.
- *The Evidence Act 2008 (Vic):* Section 131 of the Evidence Act details a number of exceptions to confidentiality of settlement negotiations.
- *Relevant practice rules:* See, for example, The Victorian Bar Inc, Practice Rules, Rules of Conduct & Compulsory Continuing Legal Education Rules (2009). This rule states:

  > 199. A mediator has the same obligations of confidentiality, with respect to communications made in the course of a mediation, as he or she would have if such communications had been made by a client to him or her as a barrister.

- *Any relevant statute governing mediation itself:* For example, s 24A of the Supreme Court Act 1986 (Vic) states:

  > **24A Mediation**
  >
  > Where the Court refers a proceeding or any part of a proceeding to mediation, other than judicial resolution conference, unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation.

In *Forsyth v Sinclair (No 2)* [2010] VSCA 195 it was held that s 24A prevails over the exemptions permitted under s 131(2)(h) of the Evidence Act 2008 (Vic). But see *Simply Irresistible Pty Ltd v Couper* [2010] VSC 505, where

the court allowed offers made in a previous case between the parties to be admissible under s 131(2)(g), which permits statements made at mediation to be led for purpose of contradicting or qualifying evidence that may mislead the court. Here, the statements as to mitigation were a part of the defence case, and the court may have been misled as to relevant factors, without admitting those statements. In this case, because the offers were not made in the existing proceedings s 24A did not prevail.

- *The common law and the principles that govern privilege:* Ramsay J in *Farm Assist Ltd (in liq) v Secretary of State for Environment, Food and Rural Affairs (No 2)* [2009] EWHC 1102 summarised the common law position as follows:

> [44] Therefore, in my judgment, the position as to confidentiality, privilege and the without prejudice principle in relation to mediation is generally as follows:
>
> (1) Confidentiality: The proceedings are confidential both as between the parties and as between the parties and the mediator. As a result even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality but where it is necessary in the interests of justice for evidence to be given of confidential matters, the Courts will order or permit that evidence to be given or produced.
>
> (2) Without Prejudice Privilege: The proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.
>
> (3) Other Privileges: If another privilege attaches to documents which are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege.

Normally a mediation agreement requires the consent of the parties and mediator before any information arising from the mediation can be used elsewhere. All of the parties must agree to this waiver. A number of courts have begun to lift this veil of confidentiality: see *Pinot Nominees Pty Ltd v Commissioner of Taxation* [2009] FCA 1508.

Boulle lists five main exceptions to the non-admissibility principles (2005, pp 558–71):

(i) Disclosure with the consent of the parties;

(ii) The mediation agreement;

(iii) Allegations of fraud and/or criminality;

(iv) Mediator reporting obligations; and

(v) Costs orders and procedural hearings.

Anthony Nolan SC, after considering the applicable legislation and the authorities relating to confidentiality, considered the situation to be as follows (Nolan, 2010):

- before litigation is started s 131 of the Evidence Act 1995 (Cth) applies and subject to certain exceptions, admissions or documents revealed in mediation are inadmissible (s 131(2));
- after proceedings are issued s 131 applies to an ADR process;
- if the proceedings are issued in the Federal Court and this court orders a mediation, then s 131 does not apply per s 53B of the Federal Court of Australia Act 1976 (Cth);
- if the proceedings are issued in a State, Supreme or District/County Court (Nolan's paper was limited to the Victorian jurisdiction) and are ordered to mediation, then s 131 probably does not apply and the Rules of Court will limit the evidence which may be adduced at the mediation; and
- if the proceedings are in the Family Court of Australia, then s 10H (relating to FDR and including mediation) of the Family Law Act 1975 (Cth) applies and s 131 does not apply.

Good faith requirements

7.64 The Law Council's Guidelines state that lawyers should act at all times in good faith to achieve settlement of disputes (2007, r 2.2). The problem is that the term 'good faith' is difficult to define, even though it is often included as a term in dispute clauses or legislation. Another problem is the difficulty of enforcing good faith requirements. Enforcement processes will inquire into a party's or lawyer's behaviour in the context of a process that is confidential.

NADRAC recommends that lawyers should check if there is a good faith requirement in any particular mediation and how this may then be interpreted (2009, Sch 2).

Managing lawyers and other third party experts

7.65 The Law Council of Australia Guidelines set out the role of the lawyer in mediation (2007 and revised 2011, r 1):

> **1 Role**
>
> A lawyer's role in mediation is to assist clients, provide practical and legal advice on the process and on issues raised and offers made, and to assist in drafting terms and conditions of settlement as agreed.
>
> A lawyer's role will vary greatly depending on the nature of the dispute and the mediation process. It may range from merely advising the client before the mediation, to representing the client during the mediation and undertaking all communications on behalf of the client.

The Law Council of Australia has also released a document for parties in mediations titled *Guidelines for Parties in Mediation* (2011), which can be found at the Law Council's website at <www.lawcouncil.asn.au/lawcouncil>. But what about the role of the mediator in managing lawyers representing clients in mediation? Hardy and Rundle's comprehensive book on this subject is a must for mediators seriously interested in this question (2010). They make the point that active involvement by parties is a feature of mediation and it cannot be assumed that the lawyers will do all the talking (p 133). Often the lawyer will play a constructive role in helping his or her client prepare for

and manage the mediation, and it is clear that this has improved in recent years. However, Sourdin makes the point that the presence of lawyers can 'silence' the parties (Sourdin, 2012, p 94). She reports that some lawyers actively exclude their own parties from the mediation process, which may be disempowering to them. In *Tapoohi v Lewenberg (No 2)* [2003] VSC 410 at [49], Habersberger J noted:

> [I]t was not suggested that it is any part of a mediator's function to coerce the parties or any party to settle its dispute. This is not to say that some encouragement from the mediator would be always out of place, but the decision to settle must always be the free decision of the disputant.

In its 1997 research report the Australian Law Reform Commission (ALRC) contended that clients depend on lawyers for information and advice on dispute management options and they may not be informed of all the alternatives and may be unable to counter a lawyer's preference for litigation (ALRC, 1997). The ALRC found that many lawyers have a limited familiarity with or understanding

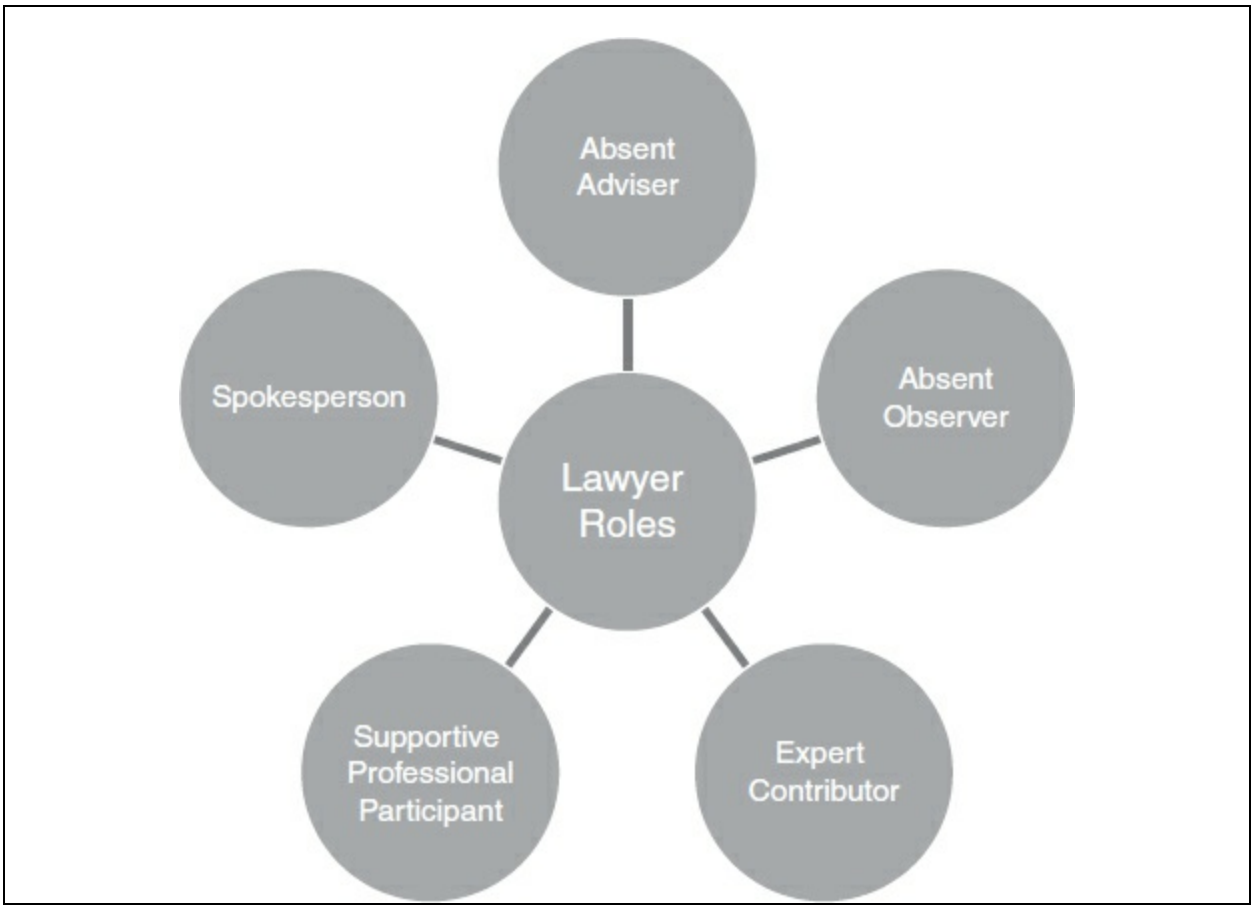
of other dispute management processes. Caputo more recently reported that there is now greater awareness of alternatives, but that some lawyers are still resistant to change or consider mediation and other ADR processes as inferior to judicial dispute resolution (2007). Further, it seems clear that some lawyers use mediation as a vehicle for making their client's case or intimidating the other party as part of their negotiation strategies rather than as a means to seek settlement (Robertson, 2006). Of particular importance will be the emotional interplay between the parties faced with not only the conflict, but also competitive and coercive tactics, particularly relating to time pressure. As Boulle notes, the 'affect heuristic' (see also **Exercise 40** at the end of this chapter), where emotions impact upon decision-making, can magnify irrational behaviour (2011, p 18). Boulle claims that 'mediation

clients might be influenced as much by what the opposition is gaining as they themselves are, contradicting orthodox utility theory' (p 12). Lawyers may either unwittingly or deliberately intensify competition and emotion in a conflict, thus making it more difficult for parties to view their decisions rationally. For a detailed examination of cognitive biases, heuristics and effects in decision-making, see **Exercise 40**. Despite the emergence of these issues as the role of ADR, and mediation in particular, increases within the legal system, lawyers are coming to terms with the way in which these processes work and their own role in it. Commensurate with this increasing awareness has been the introduction of regulatory rules and guidelines. As Wolski states (2015, p 10):

> When lawyers represent parties in mediation, they are engaged in the practice of the law and are governed by the rules of conduct issued by the law societies and bar associations to which they belong. Each branch of the profession is governed by a single generic or 'all purpose' set of rules. Solicitors (and amalgams) are governed by the *Australian Solicitors' Conduct Rules* ('*ASCR*') or by the *Model Rules of Professional Conduct and Practice* (or a variant of them) issued by the Law Council of Australia. Barristers are governed by the Australian Bar Association's *Barristers' Conduct Rules* ('*Bar Rules*') or by the Association's *Model Rules.*

In the Victorian Supreme Court in *Secombs v Sadler Design Pty Ltd* [1999] VSC 79 at [61] (citing *Hawkins v Clayton* (1988) 164 CLR 539; 78 ALR 69 at CLR 574) it was confirmed that mediation fell within the scope of 'professional work' of a lawyer. For an outline of the rules and guidelines relating to lawyers see **Exercise 41** at the end of this chapter.

It is important for a mediator to have a strategy for managing the interaction with and between lawyers and their clients and to make this known to the lawyers and parties during preparation for the mediation. Some bodies such as the Australian Human Rights Commission and the NSW Farm Debt Mediation Scheme limit the role of lawyers to one of assistance rather than representation. This is because it is often important that the disputants are able to tell the story of the dispute from their own perspective. As Hardy and Rundle indicate, the role of the lawyer can range from less involved to more involved (2010, p 144). This is illustrated in the following diagram.



Each of these roles has advantages and disadvantages. Many lawyers are most comfortable with the spokesperson role; however, all of these roles have their function and can be used to advantage. Each case should be considered on its merits and such factors as costs, need for expertise, vulnerability of the client, complexity of the issues, capacity of the client to mediate and the relationship between the disputants should all be taken into account in determining the best role.

Bear in mind that there are certain overarching professional and ethical obligations imposed on lawyers that impact on mediation practice: see **Exercises 41** and **42** at the end of this chapter. For example, The Law Council of Australia's *Model Rules of Professional Conduct and Practice* (2002) provides:

> 12.2 A practitioner must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case.
>
> 12.3 A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

Another matter to keep in mind is that lawyers are generally not permitted to communicate directly with the opposing party if that party has legal representation, although this requirement is generally relaxed in mediation: see Law Council of Australia, *Model Rules of Professional Conduct and Practice*, r 25.1.1 (2002). It is often useful for a lawyer to speak to the other lawyer's client, but this should be done with

the other lawyer's agreement. Obviously this would not allow cross-examination or criticism of the other side or their position and requires the lawyer to be respectful and cooperative with the other lawyer (Hardy and Rundle, 2010, pp 231–3).

Other issues with representatives include ensuring that those representatives have authority to settle and to disclose information (Sourdin, 2010, p 95). These are matters that need to be addressed in the preparation and intake phases of the mediation.

Conclusion

7.66 Mediation offers anybody who works with people a useful process for the management of conflict. It is not just the province of professional experts,

although as in any interpersonal process there is capacity to improve your knowledge and skills. It is my view that neighbours and friends can provide good mediation services to each other in relatively informal settings. In fact, the idea and processes of mediation can be employed in a multitude of settings. The process I have outlined above may seem to imply that mediation is necessarily a time-consuming, highly-skilled and complex business. Sometimes it is, but on other occasions it can be quite informal and much less complex. You can use the above process as a guide for your particular needs, not as a prescription for every conflict suitable for mediation. The exercises that follow will help you to think through the issues and further develop the knowledge and skills useful to a mediator.

Exercises

Exercise 1 A family role-play

Instructions

Role-plays are useful in helping participants in training groups understand the process of, and skills required in, mediation. Allow two hours for this role-play. You can vary your instructions to suit the needs of the particular group. This role-play is adapted from one used in the Victorian Bar's mediation course: The Legal Practitioner's Certificate. It can also be used to practise negotiation skills.

Facts

1. The parties started to live together in January 2004.
2. The parties married on 27 November 2006.
3. The parties separated in March 2014; the wife and children remain in the family home in Hawthorn and the husband rents locally, close by.
4. The parties have two children, Octavia, born 22 February 2012, and Iris, born 26 March 2013.
5. The wife, aged 40 years, is occupied in home duties and sells Amway and Nutrimetics products and wants to train as a chaplain or counsellor.
6. The husband, aged 41 years, works in IT and earns $120,000 per annum plus superannuation.

7. He branched out some three years ago and started his own business, which employs a bookkeeper and a contractor.

8. Three years ago the wife's father died and the wife's mother gave the parties $300,000, which they put into the mortgage and which is to be used for school fees at a local private school; the wife's mother did this for her other daughter also and wanted to ensure she could retain her Centrelink pension.

9. The wife wants to sort out parenting orders and property settlement and secure a child support agreement signed by the husband for periodic child support, health cover and lump sum extras, including school fees; now that the parties are separated the wife wants her mother to have her money back if possible.

10. The parties have been to marriage guidance counselling three times in the last three years.

11. The husband says that his business is suffering as a result of the present economic difficulties, the loss of a major client and because of the separation; the wife says that the husband is running down the business to avoid paying child support and to flatten its value for the purposes of the property settlement.

12. The wife was pregnant to the husband in January 2014; however, the husband was not supportive of that pregnancy and demanded that the wife have an abortion.

13. The husband said he would leave if there was a third child, as the family was stretched enough financially and he told the wife he only wanted two children and no more.

14. The husband accused the wife of not being the father of that child; there was a significant family violence incident at this time; the police were not called.

15. Prior to cohabitation the wife was pregnant to the husband and they agreed to have an abortion as at that point they had been seeing each other for only three months; they were not sure where their relationship was going. The pregnancy resulted in a natural miscarriage and there was no need for an abortion.

16. The most recent pregnancy, miscarriage and incident referred to in paragraph 15 above was an important catalyst to the separation from the wife's point of view.

17. There is no family report at this stage.

18. Proceedings have not been issued but may be if the matter does not resolve by way of application to the Federal Magistrates' Court at Melbourne.

19. The parties' assets and liabilities are as follows:

ASSETS

a. Former matrimonial home	$2,100,000
b. Cash at bank at separation	$32,000
c. Wife's car	$53,000
d. Wife's shares	$82,000

e. Husband's car (in the business)	$0

f. Husband's business	$60,000
g. Husband's	$110,000
h. Children's shares	$50,000
i. Chattels	to be divided
Total	$2 487 000
DEBTS	
a. Mortgage	[$100,000]
b. Visa cards at separation	[$32,000]
Total	[$132,000]
NET TOTAL HARD ASSETS	$2,355,000
SUPERANNUATION	
a. Husband's superannuation	$24,000
b. Wife's superannuation	$16,000
Total	$40,000

Facts known to the wife only

1. There have been instances of family violence which the wife has not discussed with anyone, save for the parish priest.
2. The wife wants to move from Hawthorn where the family home is to Sydney to have access to her sister (and her support) and to help take care of her mother, who has suffered a fall and is getting older. The wife has not told the husband of her wish to relocate from Melbourne to Sydney.
3. She proposes to sell the house but only on the basis that she can move to Sydney; if she is not able to move to Sydney for some reason, then her mother will help her raise the funds to pay out the husband; the payout needs to be kept to a strict minimum.
4. The wife attends personal counselling arising from the miscarriage, separation and stress of proceedings, without the husband's knowledge.
5. The wife receives periodic child support of $20.00 per month, as the husband's taxation return does not accurately reflect his actual earnings through the business.

6. The husband's father is confidentially paying the wife's legal fees up to and including the mediation only; the wife wants to repay her father-in-law and wants a lump sum of $15,000 on top of what she is getting from the husband to repay the father-in-law.
7. The wife makes arrangements with the husband's parents directly for them to see the children.
8. The wife wants a public apology from the husband for bullying her in respect of the two pregnancies and for making the child support issue harder than it needs to be; the wife will not negotiate without these apologies. She wants everyone to

know the truth about the husband and does not want people thinking that he is supportive or reasonable.

9. The wife believes that the husband is stubborn and will not budge and she anticipates getting stuck in negotiations; she says the dynamics during the relationship will repeat during the mediation — that is, she will have to give in to get anywhere, and she will not do so this time.
10. She wants all matters finalised if possible. She wants a property settlement of 80/20% in her favour given the contribution made by her mother. She is prepared to split the superannuation equally.
11. The wife has been advised to split the hard assets 70/30%; split the superannuation equally via a superannuation splitting order; and to secure a binding child support agreement if she can to avoid annual reviews with the Child Support Agency.

Facts known to the husband only

1. The husband's business has lost a client and is suffering in the global financial crisis; he is on the way to securing another big client. The husband feels distracted by litigation; he does not want 'to work for his ex wife'.
2. He wants to finalise the settlement as soon as possible, paying the minimum, as he wants to pursue another relationship that formed two years prior to separation. He does not want the wife to know about the other relationship. He proposes to move in with his other partner in about 6–8 months, once the dust settles. His new partner earns about $210,000 per annum as a CPA.
3. He does not mind whether the wife keeps the house or not; he does not see how the wife can keep it; there is no capital gains tax on a sale.
4. He wants to see the children each alternate weekend from Saturday to Sunday and each Tuesday and Thursday evening, given their ages. He works from rented premises and can do the driving. He does not want to sign a child support agreement; the parties can simply be assessed by the Child Support Agency.

5. He does not want to look at the wife or talk to her directly in the mediation as she twists what he says and continually raises the same issues over and over again.
6. He has made a 60/40% offer in the wife's favour with an equal split of the superannuation previously, and wants to know what his liability will be if the property matters go to court.
7. He does not think he needs to adjust for the funds provided by the wife's mother as they were a gift to both parties and the wife's mother probably has more money to give the wife anyway as her late husband ran a very successful chain of hotels/pubs with gambling machines.
8. He has 228,000 frequent flyer points which are not transferrable but may be redeemed as a cash advance on his credit card.
9. He has a tax refund due for the financial year in which the parties separated some $3000, which is not included in the business valuation; the wife won't know about this.

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10. He says his business has no value because he is the business and that there is no need to allow for the difference in the husband and wife's earnings because including the business in the asset pool means that that difference is acknowledged in 'building' the pool.
11. The husband's aunt, who lives in Adelaide, died last month (after separation) and he understands that he will inherit about $55,000.
12. The husband's legal advice is to split the superannuation equally and to split the hard assets 65/35%. He needs to include the tax refund and disclose the inheritance but not formally include it in the pool. The settlement is to be final with no ongoing spousal maintenance order. It would be ideal to get the wife to sign a Binding Financial Agreement but final orders would be satisfactory.

Exercise 2 Types of mediation

The way in which a conflict can be mediated depends on a large number of differing variables. Mediation can be used in environmental, labour, neighbourhood, family, couples, workplace and community conflicts.

Do you think the process of mediation would differ in each of these contexts? What do you think of Wolski's views on mediation models mentioned in this chapter?

Exercise 3 The one-text procedure

The one-text procedure (described at **7.15**) is a helpful technique to use, either as a third-party mediator, or even in direct negotiation with another person. Its success relies on a reasonable degree of trust being held by all parties towards the person writing the text, and the ability of the text writer to include the interests of all parties in the document.

The following exercises will help you explore the possibilities of this technique. If part of a group,

you can arrange to role-play them. Visualise the following situations. Add details to round out the stories:

(a) Two fellow employees are in dispute about their respective work roles. Acting as mediator, you have brought them together on several occasions to discuss the matter. Unfortunately, they are not able to come to the point where they can negotiate freely. At this stage you decide to write out a proposal for them to use as the basis of negotiation.

How would you draft this proposal? What would be important considerations for you as mediator?

(b) A couple has consulted you about their inability to resolve differences on how to plan the garden of their new house.

How would you proceed with the one-text procedure in this case?

(c) The Old Mines Hotel is one of the few remaining intact hotels from the gold rush era. Its new owners propose to add a drive-in bottle shop to the property. This would drastically alter the architectural lines of the hotel and destroy

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an historic courtyard. The new owners also want to alter the interior of the building to boost patronage. These proposed changes have concerned local environment and heritage groups, which have initiated action on a number of fronts (legal and other) to stop these changes.

You have been brought in as a mediator by both sides. The mediation will take place with two delegates from each side.

How could you use the one-text procedure as part of mediation in this case?

Exercise 4 Mediation and legal processes: Advantages and disadvantages of mediation

(a) Is adjudication in the legal system under threat from ADR processes such as mediation, as Baron and colleagues (2014) imply in a recent article in the *Monash University Law Review?*

(b) What are some of the potential disadvantages of mandatory mediation in the legal process?

(c) Why would mediation not be suitable for managing criminal matters?

(d) What are the advantages of adjudication as a disputing process?

Exercise 5 Better than a judge: Chinese mediation

China has the largest and best-developed system of neighbourhood mediation in the world. It arises out of a cultural tradition and social system based on the central idea of 'group' rather than 'individual'. Using the following example taken from the pages of the *Beijing Review*, a Chinese weekly newspaper, compare the process used by the mediators and the context in which they work with a similar problem in Australia: see also **Exercise 24** below.

Chen Mitao and Zhang Tianying had become involved in a fight with each other over the ownership of a watch. Unfortunately, there were no witnesses to testify if either woman had taken the other's watch. Moreover, neither had any evidence to substantiate the charges. Nevertheless, the women and members of their families went to the local mediation committee to determine if the dispute could be settled.

The mediation committee, with the help of the women's work units, proceeded to investigate the dispute. When no immediate solution could be found, the committee recommended the case to the local police and the district law court. However, because there was no substantive evidence the judge was unable to reach a decision.

To try to resolve the dispute, the mediation committee discussed it with people from the neighbourhood. After 14 discussions, the committee found out what had happened. During the fight, each woman had taken the other's watch. They refused to admit this because they thought that they might have to return the stolen watch without receiving the one lost in the fight.

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The committee finally got both of them to admit what had happened. After engaging in self-criticism they swapped watches and the matter was resolved. 'Their neighbours praised the mediators who, even though they weren't judges, had succeeded where the local judge had failed.'

(Adapted from *Beijing Review*, 23 November 1981, p 27)

Exercise 6 Confronting and compromising: Macro and micro techniques

Barsky's typology of macro and micro techniques, and her claim that mediation takes place within the frame of reference between compromising and confronting, can be quite useful for mediators. Confrontation in this context refers to the ability of the mediator and the parties to directly 'attack' the problem/issues by using appropriate questioning, clarifying statements, summaries etc. It does not mean being aggressive or attacking the party in personal terms. How do you think you could use confrontation in other contexts?

Exercise 7 Power imbalances

Two neighbours come to you to sort out their differences over a number of contentious issues that have built up over time, including:

(a) the behaviour of one of the party's children;

(b) noise levels; and

(c) car parking in the street.

One neighbour presents as an assertive, loud and large man while the other is a small, shy, very

quiet woman. The man seems to constantly talk over the woman, who verbally and non-verbally cowers away from him.

(a) How would these observations affect your decision whether to use mediation as a conflict-management technique?

(b) If you did go ahead with mediation in this context how would you ensure that the process was fair to both parties?

(c) What other examples of power imbalance can you think of? 'Power' can derive from many sources. Identify some of these.

Exercise 8 The case of the generation gap: A role-play

The following roles are typical of those that can be created as part of a training program in mediation. Organise a role-play with a mediator and two people playing the roles of Joan and Joe.

Joe Smith

As Joe, you are having an argument with your neighbour about her conduct. You consider yourself an easy-going man but with three teenage daughters, enough is enough. Your neighbour, Joan Kelly, is young (aged 19) and, you think, promiscuous. She has had a succession of boyfriends in the 18 months she has lived next door. The problem is she shares the 'secrets' of her romances with your daughters (aged 13, 15 and 17), who are wide-eyed and take it all in. They have begun to question the

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values you hold most dear — chastity, marriage and good Christian values. Your wife is particularly upset. This has resulted in many arguments and your oldest daughter has threatened to leave.

You have tried to talk to Joan in a friendly way but unfortunately this has ended in a heated argument with much abuse. She called you a 'tyrant' and 'the worst father in the world … your daughters think so anyway'. You want her to apologise for this.

You are also concerned about the noise level from Joan's house (her stereo) and object to her and her friends wearing skimpy bikinis and sarongs in hot weather.

The situation has gone from bad to worse. Joan's current boyfriend has threatened you and you have thought of consulting a solicitor.

Joan Kelly

As Joan, you are 19 years of age, attractive and socially active. You moved into a rented house in a good neighbourhood 18 months ago. Your neighbour, Joe Smith, has three teenage daughters whom you like and treat as sisters. You share with Joe's daughters in a carefree, loving way. You have had two to three relationships with men during the 18 months.

Recently, however, and quite surprisingly, Joe confronted you about your 'loose morals' and behaviour, and your detrimental effect on his daughters. You are angered and dumbfounded. This confrontation turned into a slanging match. You are in a quandary — you don't know whether to

leave the house or stay. You find that Joe's wife ignores you and the girls are no longer able to see you. This saddens you. Your boyfriend, Steve, is hopping mad and has told you that he has told Joe to mind his own business.

You object to Joe's threats and name-calling. You have also decided that it is time he cleaned up the tree along his boundary line and you want him to keep his German shepherd better yarded.

Exercise 9 Knowledge, skills and values

This chapter listed the knowledge, skills and values that are useful in mediation (see **7.17**). Go back over these and check off those you feel comfortable with or confident about and highlight those you feel uncomfortable with or less confident about. How can you, individually or as a group, increase your level of comfort and confidence in relation to the knowledge, skills and values you have highlighted?

Exercise 10 Role of the mediator

The NMAS (MSB, 2015) describes mediation in a certain way. What do you think it presumes about the role of the mediator?

Exercise 11 Brainstorming

Brainstorming is a useful technique in the mediation process. It involves getting the parties to quickly ('off the top of their heads') list the issues or options they think are apparent, while the mediator writes them down. This technique can be easily practised by using a role-play such as that in **Exercise 8** above. It can also

be practised in a group by using a question such as 'What are the different sources of power between people in conflict?' and encouraging group members to list as many examples as possible.

How could the brainstorming technique be used as part of a homework assignment for the parties to a mediation?

Exercise 12 Options

Parties to a conflict will often come up with a different range of options to suit their particular positions. For example, in the 'generation gap' scenario in **Exercise 8**, which is a difficult conflict about values, the mediator's case notes around the identified issue of 'contact with daughters' could look like this:

Issue: Contact with daughters

Joe's options	Joan's options
• That Joan refrains from inviting my daughters in.	• That I move house.

- That I limit Joan's contact with my daughters.
- That I continue to make next-door 'out of bounds'.
- That I invite Joe's daughters in but not as frequently.
- That I talk to Joe in more detail and in a mature way about the nature of my relationship with his daughters.
- That my family move house.
- That I talk sternly but fairly with my daughters about the problems we are having.

Can you see the possibilities for a negotiated compromise which dovetails the interests of both parties? To practise this, get the role-players to brainstorm further options and then negotiate around them. Note that this is a particularly difficult conflict because it involves a clash of values. Your own values may predispose you towards one or the other of the parties. If so, how do you stay impartial?

Exercise 13 Identifying interests

Fisher and Ury (1981, pp 51–7) treat the purpose of negotiation as being to serve one's own and the other party's interests. Part of this is identifying common interests'. They list a number of ways to help identify interests as part of negotiation (described in **Chapter 5**):

(a) Make your interests come alive — be specific and concrete in your description.

(b) Acknowledge the other party's interests as part of the problem — listen to and try to understand the other party's interests, and convey this to them.

(c) Put the problem before your answer — give your reasoning and interests first before anything else.

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(d) Look forward, not back — instead of arguing about the cause of the problem, it is better to argue, with a purpose, towards what can be done in the future.

(e) Be concrete but flexible — go into negotiation with a number of options developed, and an open mind.

(f) Be hard on the problem, soft on the people — separate the people from the problem and make this clear in the negotiation.

You can practise these techniques by thinking of a conflict you are presently in, or have just

experienced, and write down a few sentences under each of the headings. Preface each one with 'How could I …'.

Exercise 14 Agreements

Using the 'Fundamental clauses of a mediated agreement/settlement' outlined at **7.57** as a guide, role-play a mediation and direct those members who are not directly participating to draw up a written agreement. Compare the two and discuss.

Exercise 15 Brief intake record: Confidential

Read the brief intake record below and then compare it with the conflict mapping activity in **Chapter 2**, **Exercise 1**. Is there anything you think you could add to this?

INTAKE RECORD

1. Name_____
2. Address _____ Postcode _____
   Email _____ Facsimile _____
3. Brief description of conflict

4. What action have you taken so far to resolve the conflict?

5. What are the major issues in the dispute from your viewpoint?

6. What are the major issues in the dispute from the other party's viewpoint?

7. What options for resolving the dispute have you considered?

8. Have you initiated any legal action?
   Yes/No (please circle)
   If 'yes' please describe.

9. Are there any other comments you would like to make about the conflict?

Exercise 16 A simple mediation agreement

The following is a template for a mediation agreement that I use in a wide variety of disputes. How would you modify it for different mediation contexts?

MEDIATION AGREEMENT

Between

_____ First Party

and

_____ Second Party

and

_____ Mediator

PART I PRELIMINARY

Introduction

1.1 Issues have arisen (the Dispute) between the Parties which are briefly described in the Schedule.

1.2 The parties have requested the Mediator and the Mediator has agreed, on the terms and conditions contained in this agreement to help the Parties resolve their issues by a process of mediation.

1.3 The mediation will be conducted generally in accordance with the *Practice Standards* under the *National Mediator Accreditation System*, the full text of which Approval and Practice Standards is available at <www.msb.org.au>.

Definitions

In this Agreement:

'Mediation' is a process in which parties to the Dispute, with the assistance of the Mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The Mediator has no advisory or other determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

PART II THE PROCEDURE

Confidentiality

2.1 The Mediator, the Parties and all advisers and representatives of the Parties shall:

a. except as provided in paragraph 2.2 below, keep all information disclosed

during the mediation process confidential;

b. not use any information disclosed during the Mediation process for any purpose other than the Mediation.

2.2 The obligation of confidentiality under sub-paragraph 2.1a above shall apply except:

a. if disclosure is compelled by law;

b. to the extent necessary to give effect to the Agreement, or to enforce any agreement to settle or resolve the whole or any part of the Dispute;

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c. where disclosure is only of the occurrence of the Mediation (and not any communication during the Mediation), and the occurrence of the Mediation is relevant to subsequent arbitral or judicial proceedings relating to the Dispute;

d. where the parties consent to a disclosure.

Role of the Mediator

2.3 The Mediator shall be independent of, and act fairly and impartially as between, the Parties.

2.4 The Mediator shall assist the parties to negotiate between themselves a mutually acceptable resolution of the Dispute, by:

a. helping the parties to identify and define the issues in dispute;

b. helping the parties to develop a procedure which is aimed at achieving resolution of the Dispute quickly, fairly and cost-effectively;

c. where appropriate, suggesting particular dispute resolution techniques for individual issues aimed at narrowing the issues in dispute quickly, fairly and cost-effectively;

d. acting as the facilitator of direct negotiations between the parties.

2.5 During the mediation process, the Mediator may convene such meetings between the parties as the Mediator considers appropriate, for the purpose of:

a. identifying and defining the issues in dispute,

b. resolving or narrowing the issues in dispute, on terms acceptable to the parties.

2.6 During the mediation process, the Mediator may, in his [or her] unfettered discretion, communicate and discuss the dispute privately with any of the Parties or their representatives or advisers. The Mediator shall preserve absolute secrecy concerning the content of any such communication, and shall not expressly or impliedly convey the content of such communication (or part thereof) unless specifically authorised to do so.

2.7 No statements or comments, whether written or oral, made or used by the

parties or their representatives or the Mediator within the mediation, shall be relied on to found or maintain any action for defamation or any related complaint and this document may be pleaded in bar to any such action.

Role of the Parties

2.8 The Parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the Mediation.

2.9 Without limiting the generality of paragraph 1, each Party shall:

a. participate bona fide in the Mediation process;

b. comply without delay with any direction made on procedural matters;

c. if not appearing in person be represented at any preliminary conference by a person or persons with authority to agree on procedural matters and be represented at any Mediation meeting by a person or persons with full and unfettered authority to settle the dispute unless, prior to the Mediation meeting, that Party has disclosed to the Mediator and each other Party the nature of any limitation on that authority and the procedure required to obtain that Party's approval to settle the Dispute.

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Termination of the Mediation

2.10 The Mediator may terminate the Mediation, by notice to each of the parties and if the Mediator forms the opinion that the further conduct of the process will not be productive in achieving a resolution of the Dispute or for such other reason that would make the conduct of the mediation unfair to either or both parties.

2.11 Any party may terminate the Mediation by notice to each of the other Parties and the Mediator.

PART III GENERAL

Costs

3.1 The parties agree to pay the mediator's fees and expenses including –

$******** per day including GST until 6:00 pm and thereafter at the rate of

$******* per hour or part thereof plus GST; and any reasonable out of pocket expenses.

3.2 The mediator shall not charge any amount for preliminary conferences or intake sessions unless the mediation does not proceed.

3.3 If requested by the mediator, the parties agree to lodge a reasonable amount in advance with the mediator or his clerk to meet the mediator's anticipated fees and expenses. The mediator's trust account details are:

Name of Account: List A Barristers P/L Approved Clerk Trust Account

BSB:

Account No:

3.4 The parties agree that the mediator's fees and expenses shall be borne by them jointly and severally or otherwise in the following proportions:

- One-half by the parties represented by .....
- One-half by the parties represented by .....

3.5 A cancellation fee is payable to the mediator if notification of cancellation of the mediation or postponement to another date be received by the mediator within five working days of the scheduled mediation date.

3.6 The cancellation fee will be one half of the full fee which would have been payable if the mediation had taken place, to be paid by the parties in the proportions in which they are liable for the mediator's fees, irrespective of which Party might be responsible for the mediation being cancelled or postponed.

Subsequent Proceedings and Confidentiality

3.7 If the Dispute is not resolved, the Mediator shall not accept an appointment to act as arbitrator, or act as advocate or adviser to any Party, in any subsequent arbitral or judicial or other proceedings arising out of or in connection with the dispute.

3.8 The Parties agree that the mediation is confidential, according to law, and the following will be privileged and will not be disclosed or relied on or be the subject of a subpoena to give evidence or produce documents in any subsequent arbitral or judicial proceedings arising out of or in connection with the dispute:

a. any view expressed, or admission or concession made, by or on behalf of a Party;

b. any view expressed, or suggestion made, by the Mediator;

c. any document created for the purpose of the Mediation.

Liability for Acts or Omissions

3.9 The Parties agree that the Mediator is not liable to any party for, or in respect of, any act or omission in the discharge or purported discharge of his [or her] respective functions under this Agreement unless such an act or omission is shown to have been fraudulent.

Complaints

3.10 Any participant in the mediation may, in relation to the mediator, lodge a formal complaint with the Victorian Legal Services Commissioner at <www.admin@lsbc.vic.gov.au> or provide feedback to the Mediator Standards Board at <www.info@msb.org.au>.

PART IV THE SCHEDULE

Description of Dispute
(include space here for brief description of dispute)

Signatures of Parties and Support Persons
Signed by First Party _____ Date: _____
Name (Block Letters) _____
Signed by the Second Party _____ Date:_____
Name (Block Letters) _____
Signed by the Mediator _____ Date: _____
Name (Block Letters) _____

Exercise 17 Preparing for mediation and facilitation

The following document is one I often send to parties to help them prepare for mediation and facilitation. At what stage do you think this document should be sent to the parties?

Preparing for mediation and facilitation

Conflict may be resolved or productively managed by:

- reconciling interests;
- determining who is right; and
- determining who is more powerful.

Interests are the things people need, care about and want or want to avoid. Interests may be substantive, psychological or procedural.

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Rights are the standards or values that define what is fair and/or appropriate, or they determine what parties are entitled to. They may be enshrined in legislation, set by society or determined by personal values.

Power may be defined as the ability or authority to influence or 'to coerce someone to do something he or she would not otherwise do'.

Reconciling interests involves exploring needs and concerns, developing options, using objective criteria to choose between the options and negotiating trade-offs if necessary. Parties negotiate to reconcile interests within the context of what they believe to be their rights, bearing in mind their ability to influence the outcome.

Determining who is right may take place through negotiation. However, since rights are rarely clear or may be competing (for example, my right to play my stereo versus your right to peace and quiet on Sunday afternoon), an independent third party is usually called on to determine who is right. Determination of rights commonly takes place in the context of the power structure that operates between the parties.

Determining who is more powerful may be 'negotiated' through aggression or exchanges of threats and may depend on which party is more dependent on the other. Position/authority, financial resources and perceptions of the other's relative power/powerlessness may determine power contests.

It is necessary to consider all of these issues when you are analysing and planning strategies around a serious conflict situation.

Effective dispute management is about employing the most suitable process to assist in managing each dispute, individualising the process to suit the dispute and the disputants involved in it.

All people, including business managers, partners, employees and clients need to be aware of the full range of processes available to manage disputes. The most commonly used processes are shown in the diagram below.

Commonly used dispute management processes

- Managed without assistance
- Negotiation
  - Self-help/unilateral action
  - Consensual/collaborative problem-solving
- Managed with assistance — no imposed decision
  - Facilitation
  - Mediation
  - Expert appraisal
  - Conciliation
- Managed with assistance — imposed decision
  - Expert determination
  - Arbitration
  - Litigation

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How are you going to open your negotiations?

There are four common ways of opening negotiations:

1. Soft high — make a high or 'big' bid for want you want and then bargain over this claim.
2. Equitable opening — claim that you deserve what you are claiming for some good reason, principle or because of 'fairness'.
3. Commitment or 'take it or leave it' opening — 'I will only negotiate if you give me what I want'.
4. Problem-solving — frame the issues as a mutual problem to be worked on or

managed.

The fourth opening is likely to be the most productive. However, it is recognised that most negotiations have elements of the other three as well.

The tension in negotiation

In most negotiation (which is the main ingredient of most mediations and facilitations) there is a tension between cooperation and competition. The parties to a negotiation have some incentive to reach agreement and, therefore, cooperate with each other. They also have an incentive to push for an agreement consistent with their own interests which may be inconsistent with the interests of the other party. In other words, negotiators tend to want to both cooperate (otherwise they would not negotiate in the first place) and compete (if there was no incentive to do so they would also have no need to negotiate). Also, negotiators compare the costs and benefits of no agreement with the costs and benefits of agreement; that is, negotiators tend to be constantly asking themselves questions like, 'What can I gain from this negotiation that I cannot gain from simply avoiding the situation or by doing something else?'.

Types of negotiation

Negotiation is usually divided into two types: integrative and distributive. Integrative negotiation is concerned with looking at the 'interests' of the parties. Interests are the motivations and reasons why people want things. By doing this it is thought that better and more comprehensive agreements can be made. Distributive negotiation is concerned with the relative positions of the parties. Positions are the parties' claims. This type of negotiation is therefore concerned with bargaining and compromising around these various claims.

Both types of negotiation often occur in any one situation, although distributive negotiation tends to be more predominant in our society.

Negotiation is also about telling your 'story' so that the other party may hopefully listen to and understand your point of view. New understandings can be reached because of the exchange that occurs.

Selecting the right process

Selecting the right process for any particular dispute is a difficult process and often requires some careful analysis. Factors that often need to be taken into account include:

- the nature and context of the dispute;
- how much time is available;

- the quantum or amount in dispute;
- the need for an authoritative or public ruling;
- legal complexities;

- the objectives of the parties;
- the relationship between the parties;
- the power balance between the parties;
- the ability of the parties to negotiate;
- the resources available to the parties;
- the number of parties;
- the likelihood of a continuing relationship; and
- the need for privacy.

Selecting and using the right disputing process often requires careful preparation and analysis.

The following exercise will help you further prepare yourself.

Exercise to help you prepare for a mediation or facilitation process

Emotions, values and interests are important components of all conflicts. Think about and write a short description of the conflict — work, family or social. Then try to identify the emotional, value and interests components. Use a table like the one below.

Short description of conflict	
What are your interests?	What are their interests?
How do you feel?	How do they feel?
What values are important to you?	What values are important to them?
What is the quantum/amount in dispute? What will you settle for?	What do you think the other party will settle for?
What are your three major issues?	What do you think are the three major issues for the other party?
How are you going to negotiate in the mediation?	How do you think the other party is going to negotiate in the mediation?
If the dispute was settled/managed what would	If settled/managed what would it look like to the other

it look like to you?	party?

Exercise 18 The National Mediator Accreditation System

When the MSB advised nationally accredited mediators on 8 March 2015 that it had approved changes to the NMAS it stated, among other things:

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> The revisions build on the excellent foundations of the initial Approval and Practice Standards, which were published in 2008 and on feedback from members during various stages of the revision process. The Board greatly appreciates in particular, the feedback on the draft revised NMAS distributed to members on 15 August 2014.
>
> The revised NMAS represents a comprehensive revision of the Approval and Practice Standards, contextualising these in a broader document covering ancillary aspects of the NMAS. Key additions and changes are as follows:
>
> - Part I outlines the purpose of the NMAS, its application, the role of mediators and the NMAS structure.
> - Part II the Approval Standards have been amended in the following key respects:
>   - The period within which the 38-hour training requirement can be completed has increased from 9 months to 24 months;
>   - The experience qualified pathway for gaining accreditation has been modified and additional pathways for gaining accreditation have been introduced;
>   - Accreditation and experience requirements for trainers, coaches and assessors have been added;
>   - The number of Continuing Professional Development (CPD) hours to be achieved/obtained in each two-year cycle has been slightly increased but the activities that can contribute to CPD have been broadened, and exceptions to completing the requirements have been restricted;
>   - There is a new provision for mediators to apply for leave of absence and also to apply for reinstatement following leave of absence or lapsed or suspended accreditation;
>   - The MSB has been provided with the ability, in exceptional circumstances, to waive compliance with any provision of the Approval Standards, on application by an RMAB.
> - In Part III, the Practice Standards have been amended to specify clearly the minimum practice and competency requirements for mediators, and also a requirement to inform participants about what they can expect of the mediation process and of the mediator. In addition, mediators must give participants information on how they can provide positive feedback or lodge a formal complaint in relation to services provided by them.

- In Part IV, more formal provision is made for the qualifications, functions and responsibilities of RMABs. The requirements relating to mutual recognition have been clarified. RMABs have a new express obligation to upload to the National Register the list of mediators accredited by that RMAB, and a requirement to notify the MSB of mediators who have been granted a period of leave of absence or have been suspended by an RMAB.
- Part V deals with the Register of Nationally Accredited Mediators.
- Part VI outlines the membership and responsibilities of the Mediator Standards Board.

The NMAS can be viewed on the MSB website. Why do you think it is necessary, or even a good idea, to have such standards?

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Exercise 19 Native title claims and mediation

Joanna Kalowski (2009), a former member of the National Native Title Tribunal (NNTT), notes that claims by Aboriginal people under native title legislation are mediated by members of the tribunal, and the claim and mediation process can last months, even years. She states that '[t]he Tribunal has set out its process in a document, and uses a circular model of mediation quite different from that used in more mundane matters, yet it would be recognisable to any practising mediator'. Although the NNTT model is not a court/tribunal-connected mediation process, the principles of interest-based negotiation perhaps reflect an attempt by the tribunal to include traditional indigenous dispute management processes as part of the court's overall dispute management procedures (Alexander, 2001, p 10).

Mick Dodson, a prominent aboriginal activist, identifies one of the fundamental difficulties in native title mediation as the implicit imbalance in power relationships between Indigenous and other Australians (Dodson, 1996). He stresses the importance of the 'awareness of the power imbalance in mediation … and its own processes'. As Dolman (1999, p 8) notes, the power imbalance can arise from the specific mediation and/or from the stipulated processes of the legislative framework in which the mediation is conducted.

Kalowski (2009) describes the following points made by Dodson in a workshop in 1999, which he said needed to be taken into account when working with indigenous groups:

- Seating — it's their decision. You can't know who should sit where. Just think of the impact of avoidance relationships imperceptible to non-indigenous eyes.
- You need some knowledge of the groups involved, e.g. kin connections, other relationships.
- Co-Mediation – male-female is a really good way of making it easier for indigenous groups to talk to you.
- Goal orientation is inappropriate: relationships and process matter more than the outcome or the deal.
- Be prepared for 'settling of old scores', the ventilation of issues long in the past but never before

able to be broached.

- Renewal of mandate will be necessary — create time for people to go away and do this. Mediation will not roll along without significant breaks in the process, and given the distances in Australia, sometimes weeks or months will be needed for this 'business' to be done in the proper manner.
- Ensure people understand the nature and purpose of the mediation and their role in it.
- Ensure people get access to quality information.
- Assume there is no pre-existing decision-making process: people haven't had to decide issues like these before, so they need time to develop decision-making mechanisms as part of the process.
- There may be little focus on outcome on the part of the indigenous parties, so the mediator must manage the frustration of the non-indigenous parties, typically more task-oriented.

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- Do lots of groundwork: 'pre-pre-pre-mediation'.
- Disputes will inevitably be complex and multi-layered.
- Pain and unresolved issues will intrude, and can't be wished away.
- Some of these issues will be inter-generational pain concerning parents' and grandparents' experiences of being mistreated, removed, etc.
- Dysfunction is common, and will impact on relationships within the group.
- Read widely.

Do you think most of these points could also be applied in mediations with non-indigenous groups?

Dolman (1999) pessimistically concludes as follows in relation to the NNTT mediation process:

> The Australian Law Reform Commission says that a threshold issue in assessing ADR is whether it delivers justice. It says that despite the imprecision of the term, justice is viewed as requiring:
>
> I. Consistency, in process and result — that is, treating like disputes alike,
>
> II. A process which is free from coercion or corruption,
>
> III. Ensuring that inequality between the parties does not influence the outcome of the process.
>
> Firstly, it is impossible to know if there was consistency, in the process and results of mediation, because the vast majority of negotiations and the resultant agreements are confidential. Secondly, there were no specific investigative processes within the *NTA* to ensure that it is operating free from coercion or corruption. Finally, the statistics suggest quite strongly that the inequality between the parties may be influencing the outcome of the process.

Therefore, the *NTA's* mediation processes may be an unjust alternative to litigation for native title issues.

How do you think these issues can be addressed?

Exercise 20 Family law and the pre-action protocols

The Family Law Rules pre-action procedures, introduced in 2004, were a very significant development in family law practice and procedure. The centrepiece was r 1.05 which, provides:

(1) Before starting a case, each prospective party to the case must comply with the pre-action procedures, the text of which is set out in Schedule 1, including attempting to resolve the dispute using primary dispute resolution methods.

(2) Compliance with sub-rule (1) is not necessary if:

(a) for a parenting case — the case involves allegations of child abuse or family violence;

(b) for a property case — the case involves allegations of family violence or fraud;

(c) the application is urgent;

(d) the applicant would be unduly prejudiced;

(e) there has been a previous application in the same cause of action in the 12 months immediately before the start of the case;

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(f) the case is an Application for Divorce; or

(g) the case is a Child Support Application or Appeal.

The court may take into account a party's failure to comply with a pre-action procedure when considering whether to order costs (see paragraph 1.10 (2)(d)). The introduction of such pre-action procedures is said to have reduced the number of cases going through to court. Do you think this is a good development?

Exercise 21 The rationale for mediation

Campbell Bridge lists a number of key factors in the development of mediation in Australia (2012):

> Historically Australia has been among the most litigious societies in the world. The burden, financial and otherwise, on litigants was severe. The public purse was severely strained by the necessity of allocating huge resources in terms of infrastructure and personnel (judges, juries, facilities and support staff) to the hearing of all these cases. In the late 1980s and early 1990s the courts decided that the days of litigation being conducted at whatever leisurely pace the protagonists chose were over. Case management became the weapon of choice of the judiciary in its quest to confine cases to real and relevant issues and compel litigants to conduct litigation quickly and efficiently. Compelling parties to settle those cases that should be settled

> as early as possible and to seriously address issues of resolving the more recalcitrant disputants were both philosophies at the centre of the case management drive. It is no accident that the rise of mediation in Australia coincided with the rise of case management and its underlying philosophy. Now the courts and the parties are very much focussed on alternative dispute resolution, with mediation in the forefront of that push.

Do you agree with Campbell's views? Can you think of other developments that may be linked to the increased use of mediation? (See **4.5** for comment on the development of modern case management in Australian courts and its links to ADR.)

Exercise 22 Mandatory referral to mediation

All Australian courts now have the ability to refer cases to mediation, with or without the consent of the parties. Go to the Austlii website (<www.austlii.edu.au>) and look up two or three of the following pieces of legislation. What do you think are the unifying elements of these different pieces of legislation? It is almost impossible today to go through a litigation process without being referred to mediation. What do you think would be the exceptions to this? Do you think this represents a move away from legal rights to a focus on private and commercial interests and concerns?

Jurisdiction	Applicable Legislation
Federal	Federal Court of Australia Act 1976 (Cth) s 53A
Australian Capital Territory	Court Procedures Rules 2006 (ACT) r 1179; Civil Law (Wrongs) Act 2002 (ACT) s 195

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Jurisdiction	Applicable Legislation
New South Wales	Civil Procedure Act 2005 Pt 4; Uniform Civil Procedure Rules 2005
Northern Territory	Local Court Act 1989 (NT) s 16; Local Court Rules (NT) r 32.07
Queensland	Supreme Court of Queensland Act 1991 (Qld) ss 102–103
South Australia	Supreme Court Act 1935 (SA) s 65(1)
Tasmania	Alternative Dispute Resolution Act 2001

	(Tas) s 5(1)
Victoria	Civil Procedure Act 2010 (Vic) s 48(2)(c); Supreme Court (General Civil Procedure) Rules 2005 (Vic) O 50.07
Western Australia	Supreme Court Act 1935 (WA) s 167(1)(q)(i); Rules of the Supreme Court 1971 (WA) O 8

Exercise 23 How 'successful' is mediation?

As shown in various references throughout this text, the ways in which the success of ADR processes is measured can be problematic. This can, in part, be related to their private, confidential and relatively informal nature. However, there are some indicators, including the following:

- The Australian Institute of Family Studies evaluation of the 2006 family law reforms has shown that Family Relationship Centres have been effective in the first five years of operation, with overall parenting applications to the courts dropping by approximately 32 per cent, and public use of mediation and counselling services increasing (Kaspiew, 2009, pp 304–5). The Family Relationship Centres are specialist family mediation services set up to provide mediation services to couples in dispute. As Parkingson has noted, they represent 'a modest level of expenditure to address issues that [if unsolved] will create other costs for government in one way or another' (Parkinson, 2013, p 211).
- A 2009 Evaluation of the 2006 family law reforms found the overall number of parenting applications declined by 22 per cent from 18,752 in 2005–06 to 14,549 in 2008–09 (Kaspiew, 2009)
- Bathurst CJ of the New South Wales Supreme Court reports favourably that based on a number of reports in 2009, almost 60 per cent of cases referred to a mediation program in New South Wales settled during mediation, and in Victoria, 43.2 per cent of cases surveyed that were referred to mediation settled the dispute, along with another 27.4 per cent that settled through negotiation; only 7 per cent were resolved at trial (Bathurst, 2012).

What do you think are the measures of success for mediation?

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Exercise 24 More on Chinese mediation practice

Article 111 of the Constitution of the People's Republic of China states: 'People's Mediation Committees are a working committee under grassroots autonomous organizations — Residents Committee, Villagers Committee — whose mission is to mediate civil disputes'. Established in the 1950s and based upon traditional models, these committees were regarded as a supplement to the judicial system, an autonomous arrangement for citizens to resolve their own disputes. It is a legal practice with Chinese characteristics. During the Cultural Revolution, the court system was

abolished entirely and laws stopped being enacted. This resulted in community mediation systems taking on more importance. The People's Liberation Army was put in control of judging cases. As the country has opened itself to international trade and commerce it has attempted to modernise its ADR systems.

The China's National People's Congress Standing Committee promulgated the Law on People's Mediation on 28 August 2010 and it came into force from 1 January 2011. The Law has 35 articles divided among six chapters, which cover such subjects as mediation committees, mediators, mediation procedures and mediation agreements. The Law defines 'people's mediation' as actions of people's mediation committees to induce parties to voluntarily reach agreement on an equal, consultative basis by using methods such as persuasion and guidance (art 2). (See Zhonghua Renmin Gongheguo Renmin Tiaojie Fa [People's Mediation Law of the People's Republic of China] (28 August 2010), The National People's Congress of the People's Republic of China website: <www.npc.gov.cn/npc/xinwen/2010-08/28/content_1593344.htm>.

What does this snippet on the Chinese experience tell you about the role of mediation in a society?

Exercise 25 Industrial relations dispute management

Effective conflict management can help employers maintain good relationships with their employees by dealing with workplace issues at an early stage. A good dispute resolution process with a focus on effective resolution at the workplace level may help to avoid the costs of resolving a claim externally, usually via arbitration before the Fair Work Commission or through litigation in the Federal Court of Australia. The Fair Work Act 2009 (Cth) requires that all awards include a term that sets out a procedure for resolving disputes between employers and employees about any matter arising under the award and the National Employment Standards (NES). The NES are 10 minimum employment entitlements that have to be provided to all employees.

The national minimum wage and the NES make up the minimum entitlements for employees in Australia. An award, employment contract, enterprise agreement or other registered agreement cannot provide for conditions that are less than the national minimum wage or the NES and they cannot exclude the NES.

The 10 minimum entitlements of the NES are:

- maximum weekly hours;
- requests for flexible working arrangements;

- parental leave and related entitlements;
- annual leave;
- personal carers leave and compassionate leave;
- community service leave;

- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- Fair Work Information Statement.

Every award must contain a dispute resolution clause. Generally, the clause will provide for a process with the following stages:

- employee/s meet with their direct supervisor to discuss the grievance;
- failing resolution, the matter is discussed further with more senior management;
- failing resolution of the matter, the employer refers the dispute to a more senior level of management or more senior national officer within the organisation;
- where the dispute remains unresolved, the parties may jointly or individually refer the matter to the Fair Work Commission; and
- the employer or employee may appoint another person, organisation or association to represent them during this process.

When making an enterprise agreement, the Fair Work Act requires the parties to include a dispute resolution clause. Enterprise agreements lodged with the Fair Work Commission without such a clause will not be approved. The dispute resolution clauses in enterprise agreements must provide a process to resolve any disputes:

- arising under the agreement; or
- relating to the NES.

The Fair Work Act requires that a dispute resolution clause in an enterprise agreement must:

- set out a procedure that requires or allows either the Fair Work Commission or some other independent person to settle the dispute; and
- allow for the representation of employees covered by the agreement when there is a dispute (for example by another employee or a union).

A 'model dispute resolution clause' is available in the Fair Work Regulations 2009 and can be used to develop a dispute resolution term in an enterprise agreement: see **Exercise 26** below.

Arbitration has always been the centrepiece of industrial relations dispute management. Do you think the move towards less formal processes in this jurisdiction is for the same reasons as occurs in traditional court systems?

Exercise 26 A Model Dispute Resolution Clause for Enterprise Agreements under the Fair Work Act 2009 (reg 6.1)

(1) If a dispute relates to:

(a) a matter arising under the agreement; or

(b) the National Employment Standards;

this term sets out procedures to settle the dispute.

(2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.

(3) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.

(4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Commission.

(5) The Fair Work Commission may deal with the dispute in 2 stages:

(a) the Fair Work Commission will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and

(b) if the Fair Work Commission is unable to resolve the dispute at the first stage, the Fair Work Commission may then:

(i) arbitrate the dispute; and

(ii) make a determination that is binding on the parties.

Note: If Fair Work Commission arbitrates the dispute, it may also use the powers that are available to it under the Act.

A decision that Fair Work Commission makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

(6) While the parties are trying to resolve the dispute using the procedures in this term:

(a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and

(b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:

(i) the work is not safe; or

(ii) applicable occupational health and safety legislation would not permit the work to be performed; or

(iii) the work is not appropriate for the employee to perform; or

(iv) there are other reasonable grounds for the employee to refuse to comply with the direction.

(7) The parties to the dispute agree to be bound by a decision made by Fair Work

Commission in accordance with this term.

What are the key process elements of this clause?

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Could you use this model clause as the basis for drafting a contract under a normal contract of employment?

Exercise 27 The case of the sensitive bully: Critiquing transformative mediation

Robert Condlin's (2013) comprehensive critique of the transformative mediation approach involves a review of the case studies that Bush and Folger used in their 1994 book *The Promise of Mediation.* Bush and Folger, used case studies as a centerpiece of their writing, believing that their approach is best understood by studying transcripts and videos of a wide range of cases in their unedited and unscripted forms. The following is an edited adaption of Condlin's critique.

> The case of the Sensitive Bully (p 630–633) involved the mediation of an assault complaint in a court-annexed mediation program in Queens, New York. The complaint had been filed by Regis, the father of thirteen-year-old Jerome, against Charles, a person Regis thought had attacked Jerome and his friends in a park. The mediator began the session by asking Regis to explain why he had filed the complaint, and Regis responded by describing the 'attacks' on Jerome and his friends, and how he (Regis) was not going to put up with them any longer. The mediator then asked Charles to explain 'how he saw the dispute.' Charles admitted that he had chased Jerome and his friends, but he also expressed remorse for it, and made the story more complicated by describing how Jerome and his friends had provoked him by calling him names and mocking his limp.
>
> After hearing Charles' more complete description of the events, and learning of his remorse, Regis agreed that 'kids can be cruel,' and changed his mind about the attack. He and Charles then worked out an agreement in which Charles promised not to chase Jerome and his friends, if in return, they did not call him names. Charles also promised to avoid contact with Jerome and his friends (by using a different route to his girlfriend's house and his bus), and to deal directly with Regis in the future should any difficulties arise. Bush and Folger do not say if Regis dropped the assault charge, but presumably he did. The story of the mediation in a nutshell then, is that two people, angry at one another over a series of incidents they understood differently, listened open-mindedly and fairly to one another's description of events, and changed their minds about who was at fault and for what.
>
> Bush and Foler, according to Condlin, characterize the mediation as an example of their approach at work. This was an instance of something 'much more powerful than the terms of the agreement the parties ultimately signed.' As they see it, 'two men came to see each other differently; by recognizing that they were alike [and] that they both wanted and deserved each other's acknowledgement as fellow human beings.' They 'found … capacities within themselves … they may never have learned in the streets of Queens, or in the court where the

original assault charge was filed,' and 'made decisions and commitments that redirected an escalation that easily might have ended up in the Queens' homicide files.' Bush and Folger say that this shows how a mediator 'fostering empowerment and recognition' can 'realize the transformative potential of the mediation process.'

Another take on the events, and one that avoids the overheated language of transformation and redeemed humanity, would go something like this: two people who thought they had a conflict listened open-mindedly to one another as each

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described his view of the events and discovered that they did not disagree after all. After learning the full story, they recognized that their first impressions were incomplete, acknowledged that fact publicly, and adjusted their views accordingly. They did this, not because of any personal transformation made during the mediation, but because they were honest, direct, open-minded, and fair people to begin with, and they approached conflict with those qualities in mind. Acting on an accurate understanding of events was as important to them, and as much a part of whom they were, as protecting their interests and asserting their views forcefully. They understood that stories about conflicts can be distorted, particularly when reported by children, and believed in getting all of the facts straight before taking action. During the course of their discussion they shifted perspective from aggrieved victim to good neighbor, changing their minds, but not their personalities.

One must believe in 'Road to Damascus' moments, and that a perfunctory mediator request to 'describe how you see things' could provoke one. To shift gears and listen fairly to one another so quickly, the two men must have come to the mediation already capable of, and predisposed to, doing that. Their short, introductory conversation, at the beginning of the mediation, did not last long enough to inculcate new values or skills. Their change in attitude was closer to a mood swing than a change in character, and the concept of mood swing lacks the gravitas needed to support a theory of disputing. For there to be character transformation in the Sensitive Bully story one must assume that Regis and Charles were close-minded and defensive people to begin with, but Bush and Folger offer no evidence that this was the case, and everything in the story suggests otherwise. Characterizing the case as an illustration of TDR-induced personality transformation seems fanciful at best.

Transformation through empowerment and recognition are key concepts in the transformative mediation approach. What do you think Condlin's key objections here are and do you think this warrants doing away with this approach altogether?

Exercise 28 Models of mediation

The evolution of mediation can be contextualised in many ways. In this chapter we have looked at, and critiqued, some of the dominant models. Here is a simple schema for the theoretical underpinnings of each. The pragmatic model may allow for both evaluative and facilitative modes. The transformative and narrative modes would probably not allow this. Why not?

The Problem Solving Model

A problem-solving approach to negotiation

A constructive perception and an effort to expand the pie

A belief in 'objective criteria' as overcoming private controversies

The Transformative Model

An emphasis on the relational framework underlying disputes Process is fluid

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The Narrative Model

A social constructionist view of conflict

Conflicts as evolving around exaggerated perception of entitlement

Progress as achieved through developing an alternative narrative

Exercise 29 Enforcement of mediation agreements

The leading Australian authority on the enforceability of heads of agreement is *Masters v Cameron* (1954) 91 CLR 353; [1954] HCA 72. In this case the parties reached an agreement on the sale of farming property. The agreement was made in the form of a memorandum stating that 'this agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions'. A deposit of £1750 was also paid in conjunction with this agreement. Prior to signing a formal contract of sale, the purchaser decided against purchasing the property. This refusal raised two significant issues that were to be decided. First, whether the written agreement constituted a binding contract; ultimately deciding whether or not the purchaser was bound by the agreement. The court was also required to determine which party was entitled to the deposit that had been paid.

The High Court of Australia identified the following possible outcomes of a negotiated agreement:

1. The parties reach finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.
2. The parties completely agree upon all the terms of their bargain and intend no departure from or addition to their agreed terms, express or implied, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.
3. The parties do not intend to make a concluded bargain at all.

The High Court concluded that in the case of the first two outcomes there is a binding contract, but

cases in the third class are not intended to have, and therefore do not have, any binding effect of their own. To determine which category the agreement falls within, the intention of the parties must be determined based upon the language used. In the case of *Masters v Cameron*, the use of the language 'this agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions' was held by the court to be an application of the third category.

Courts will defer to both the explicit terms of a heads of agreement and to other evidence of the parties' intentions. In *Cacace v Bayside Operations* [2006] NSWSC 572 the Supreme Court of New South Wales held that a heads of agreement was not binding because some clauses were drafted such that they would not commence

until 'the date of exchange'. The court also took into account a conversation that occurred between the parties while drafting the heads of agreement which included the statement '[l]et's prepare a handwritten minute of what has been agreed in principle to form the basis of a formal deed which can be prepared and finalised over the next week'.

The judge observed that 'although no general rule can be stated about the phrase "agreed in principle", I think it can be said that it is a phrase often used by lawyers to indicate that, although consensus on a matter has apparently been reached, there is not yet a final agreement'. Simply characterising a heads of agreement as an agreement 'in principle' will therefore usually capture the parties' intentions that they do not intend to be legally bound by its terms. Taking these matters into account, could the following words in an agreement bind the parties?

> Without affecting the binding nature of these heads of agreement, the parties within seven days [must] execute a formal document or documents as agreed between their respective solicitors to carry out and express in more formal terms and additional terms as these heads of agreement.

Note that the parties have not used the words 'in principle' in the agreement. For the answer to the question posed above, go to *Malago Pty Ltd v AW Ellis Engineering Pty Ltd* [2012] NSWCA 227.

Exercise 30 Operationalising the one-text procedure

Perhaps the key ingredient of the one-text procedure, described in this chapter, is the presence of an impartial third party to help acknowledge, explore and catalogue the interests of all parties and then facilitate the combined criticisms until the best outcome is found. However, it can be used in negotiations in the absence of a mediator. In summary, the process is:

- explore the positions, interests and motivations of the parties;
- draft an interim proposal and present it to all parties for criticism; and
- parties continually criticise the interim proposals until they can criticise them no more and the

facilitator has prepared the best possible outcome. It is only at this point that participants can accept or reject the final proposal.

Everyone is working from the facilitator's draft, which prevents parties from taking positions and becoming inflexible. By criticising the drafts of the facilitator, the parties can criticise the proposal without fear of alienating the other party.

The draft criticism and revision process continues until the facilitator feels the proposal cannot be improved further.

Can you think of a conflict where you could use this process?

Exercise 31 The blended process: Giving advice in mediation

The National Mediation Accreditation System (NMAS) (2015) is a national voluntary accreditation scheme for mediators run by an elected Mediation Standards Board (MSB). NMAS Practice Standards PS 10.2 states as follows:

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10.2 Where a mediator uses a blended process such as advisory or evaluative mediation or conciliation, which involves the provision of advice, the mediator must:

(a) obtain consent from participants to use the blended process;

(b) ensure that within the professional area in which advice is to be given, they

  (i) have current knowledge and experience;

  (ii) hold professional registration, membership, statutory employment or their equivalent, and

  (iii) are covered by current professional indemnity insurance or have statutory immunity, and

(c) ensure that the advice is provided in a manner that maintains and respects the principle of self-determination.

Why do you think this paragraph is needed in the Practice Standards?

Exercise 32 What knowledge, skills and ethical principles must mediators have and understand?

The MSB, the body responsible for national mediation standards and accreditation, has established a set of Practice Standards to guide mediators. Practice Standard 10 states as follows:

10.1 A mediator, consistent with the Approval Standards, must have the knowledge and skills, and an understanding of the ethical principles, outlined below:

(a) Knowledge

  (i) the nature of conflict, including the dynamics of power and violence.

(ii) the circumstances in which mediation may or may not be appropriate.

(iii) preparing for mediation; assessing suitability; preliminary conferencing or intake.

(iv) communication patterns in conflict and negotiation.

(v) negotiation dynamics in mediation, including manipulative and intimidating tactics.

(vi) cross-cultural issues.

(vii) the principles, stages and functions of the mediation process.

(viii) the roles and functions of mediators.

(ix) the roles and functions of support persons, lawyers and other professionals in mediation.

(x) the law relevant to mediators and to the mediation process.

(b) Skills

(i) preparation for and dispute diagnosis in mediation.

(ii) intake and screening of participants and disputes to assess mediation suitability.

(iii) the conduct and management of the mediation process.

(iv) communication skills, including listening, questioning, reflecting, reframing and summarising, as required for the conduct of mediation.

(v) negotiation techniques and the mediator's role in facilitating negotiation and problem-solving.

(vi) ability to manage high emotion, power imbalances, impasses and violence.

(vii) use of separate meetings.

(viii) reality-testing proposed outcomes in light of participants' interests, issues, underlying needs and long-term viability.

(ix) facilitating the recording of the outcome of the mediation.

(c) Ethical Principles

(i) competence, integrity and accountability

(ii) professional conduct

(iii) self-determination

(iv) informed consent

(v) safety, procedural fairness and equity in mediation including withdrawing from or terminating the mediation process

(vi) impartiality including the avoidance of conflicts of interest

(vii) confidentiality privacy and reporting obligations

(viii) honesty in the marketing and advertising of mediation and promotion of the mediator's practice

10.2 Where a mediator uses a blended process such as advisory or evaluative mediation or conciliation, which involves the provision of advice, the mediator must:

(a) obtain consent from participants to use the blended process;

(b) ensure that within the professional area in which advice is to be given, they

(i) have current knowledge and experience;

(ii) hold professional registration, membership, statutory employment or their equivalent, and

(iii) are covered by current professional indemnity insurance or have statutory immunity

and

(c) ensure that the advice is provided in a manner that maintains and respects the principle of self-determination.

Do you think a prescriptive outline like this is necessary for mediators?

Exercise 33 Intake processes under the Family Law Act

An intake interview is not only about information-gathering on the part of an accredited family dispute resolution practitioner (FDRP); there is an obligation to provide information to the parties at least 24 hours prior to the mediation session (Family Law (Family Dispute Resolution Practitioners) Regulations regs 28 and 30). There are a number of publications produced by the Attorney-General's Department to resource parties experiencing separation (available at <www.familyrelationships.gov.au> and <www.familycourt.gov.au>).

This information should be explained and given to the parties to take away with them and read. The confidential nature of the mediation should be explained in detail to the parties so that they are able to make full disclosure about the issues in dispute. While there are certain acts and admissions that may require reporting under the Family Law Act 1975 (Cth), a party should feel that he or she is able to speak frankly to the FDRP about any issue impacting on the parties and their separation (see generally Kochansky, 2011).

Parties need to be advised about the qualifications of the FDRP, with emphasis on their background degrees and their training in FDR. They need to be advised that the FDRP is not there to give advice, even if they are lawyers. All mediations under the Family Law Act require an acknowledgement, either verbally or written, that the parties understand the information given to them at intake and prior to the mediation. Most FDR organisations and private FDRPs have an 'agreement to mediate' that is signed by the parties prior to entering into the mediation session. The

agreement and its terms should be carefully explained to the parties and the cooling-off period also advised under the legislation.

If you were a FDRP how would these provisions change the terms of the mediation agreement in **Exercise 16** above?

Exercise 34 Inter-ethnic disputes and groups: Using the narrative approach

In his interesting and informative analysis of inter-ethnic disputes using the narrative approach, Garagozov (2015) states that 'creation of a common narrative is a difficult task, especially when it concerns interethnic conflicts. One of the obstacles arises from the fact that in periods of war and conflict, societies develop their own narratives which, from their viewpoint, become the only true narratives. These narratives tend to denigrate and disavow the narrative of enemy. This is definitely the case with the Israel–Palestine conflict. For example, in discussing narratives in the Israel–Palestine conflict, Adwan and Bar-On (2004) argued the impossibility of creating a joint narrative that could be accepted by both sides at the current stage of hostility and violence between the Israeli Jews and the Palestinians (Adwan & Bar-On, 2004). The contradiction between the two sides' intentions and between their narratives is so strong that Adwan and Bar-On concluded 'that a joint narrative would emerge only after the clear change from war culture to peace culture took place' (2004, p 516).

Garagozov goes on to argue that 'narrative embeddedness' and 'narrative truth' limit interventions into intractable conflicts. In simplistic terms, there are surface narratives and deeper embedded narratives which may be difficult to engage. He states:

> Regarding narrative intervention into intractable conflicts, at least two issues that could restrain intervention effectiveness are worth mentioning. One is what might be called narrative embeddedness into identity (Hammack, 2008). Thus, some scholars argue that national identities are grounded in a stock of stories (MacIntyre, 1984). In this connection, any desired narrative transformations should inevitably be limited by patterns of identity based in the larger stock of stories. Another issue

> may be called narrative truth. Wertsch (2012) distinguishes between propositional truth and narrative truth. Propositional truth is more about historical facts (dates, acts of particular historical personages, and so forth) that can be more or less easily verified, whereas narrative truth is about the motives of the personages or the meanings of the historical events. Narrative truth is maintained through the ways how the events are spun into a coherent story (Wertsch, 2012). In this connection James Wertsch proposed to make distinction between 'specific narratives' and 'schematic narrative templates' (SNT) (Wertsch, 2002). According to the author, specific narratives are surface texts that include concrete information about the particular times, places and actors involved in events from the past. In contrast the SNT provide the recurrent constants of a narrative tradition. They do not include any concrete

information, but are instead cookie cutter plots that can be used to generate multiple specific narratives (Wertsch, 2002).(pp 2–3)

I wonder if these limiters also apply to groups such as families and in workplaces. In my experience I think they might — what do you think?

Exercise 35 Narrative conflict coaching

Winslade and Pangborn (2015) have developed a narrative process for assisting a disputant in the process of a conflict coaching session. The following table is derived from their description and you can use this to understand narrative techniques and conflicts you may be involved in. Use the blank graph following to work through the steps. You can do this by thinking of a conflict/dispute you are involved in and work through the steps. Alternatively, you can use the table to help another person work through their conflict.

Understand the conflict story

1. *Denotation:* Establish the facts — What happened?
2. *Manifestation:* Inquire about people's desires and intentions. — What was your hope? What do you think the other party intended?
3. *Signification:* Ask about the influence of discourses and systems of meaning — What concepts, meanings or discourses govern the situation?
4. *Series of events:* Establish how events are part of a series — What was the sequence of events?
5. *Sense:* Ask what holds the series of events together — What is your sense of what is driving this situation?

Deconstruct the conflict story

6. *Double listening:* Listen to both the conflict story and the counter story — It sounds like … happened, but you would prefer … Is that right?
7. *Ask deconstructive questions:* Loosen the authority of dominating discourses or lines of force that run through a series of events — How much were gender stories, or race, or the conventional family idea, or normality etc affecting what happened?
8. *Explore assumptions:* Inquire into background assumptions — What were you assuming? What was the other person assuming?

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9. *Externalise the problem story:* Help people separate from the conflict story by naming it as outside them — What would you call this situation?
10. *Map the effects:* Explore the effects of the externalised conflict — What effect has it been having (emotional, physical, relational, financial, institutional or

academic)?

Grow the counter story

11. *Evaluate the conflict in relation to the arc of one's life:* Ask the person to look at the conflict in relation to a reading of time as 'aion' (see **7.12** in relation to this term) — Where does the series of events fit in relation to what is important to you?
12. *Ask about preferences:* Open the story of what the person would prefer — What would you prefer to happen?
13. *Find unique outcomes, and differences:* Identify moments which contrast with or contradict the conflict story — Have there been any times that are more like what you would prefer?
14. *Anchor the counter story in a value system:* Link the preferred way of handling the conflict with the person's values — When that happens, how does it fit with your values?
15. *Trace the history of these values:* Give the preferred values a history — How have those values been important in the past? Can you give an example?
16. *Extend preferred values into the future:* Extend the preferred values from the past into the future — How would you act in future in this situation if you were to apply your preferred values?

Coaching yourself in the narrative method

Step	Describe the Step	Example of the step from a conflict you are involved in
Understand the conflict story 1. Denotation 2. Manifestation 3. Signification 4. Series of events 5. Sense **Deconstruct the conflict story** 6. Double listening		

7. Ask deconstructive questions 8. Explore assumptions 9. Externalise the problem story 10. Map the effects		

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Coaching yourself in the narrative method

Step	Describe the Step	Example of the step from a conflict you are involved in
Grow the counter story 11. Evaluate the conflict in relation to the arc of one's life 12. Ask about preferences 13. Find unique outcomes, and differences 14. Anchor the counter story in a value system 15. Trace the history of these values 16. Extend preferred values into the future		

Exercise 36 Agenda construction practice

Using **Exercise 19** in **Chapter 6** (*Budgie v Kicker*) construct an agenda you think both parties

could use in a mediation.

Exercise 37 The dynamics of framing and reframing

Watzlawick, Weakland and Fisch (1974) describe the 'gentle art of reframing' thus:

> To reframe, then, means to change the conceptual and/or emotional setting or viewpoint in relation to which a situation is experienced and to place it in another frame which fits the 'facts' of the same concrete situation equally well or even better, and thereby changing its entire meaning

The diagram below from Kaufman et al (2013) is a very good representation of how framing and reframing works within negotiation and mediation frameworks.

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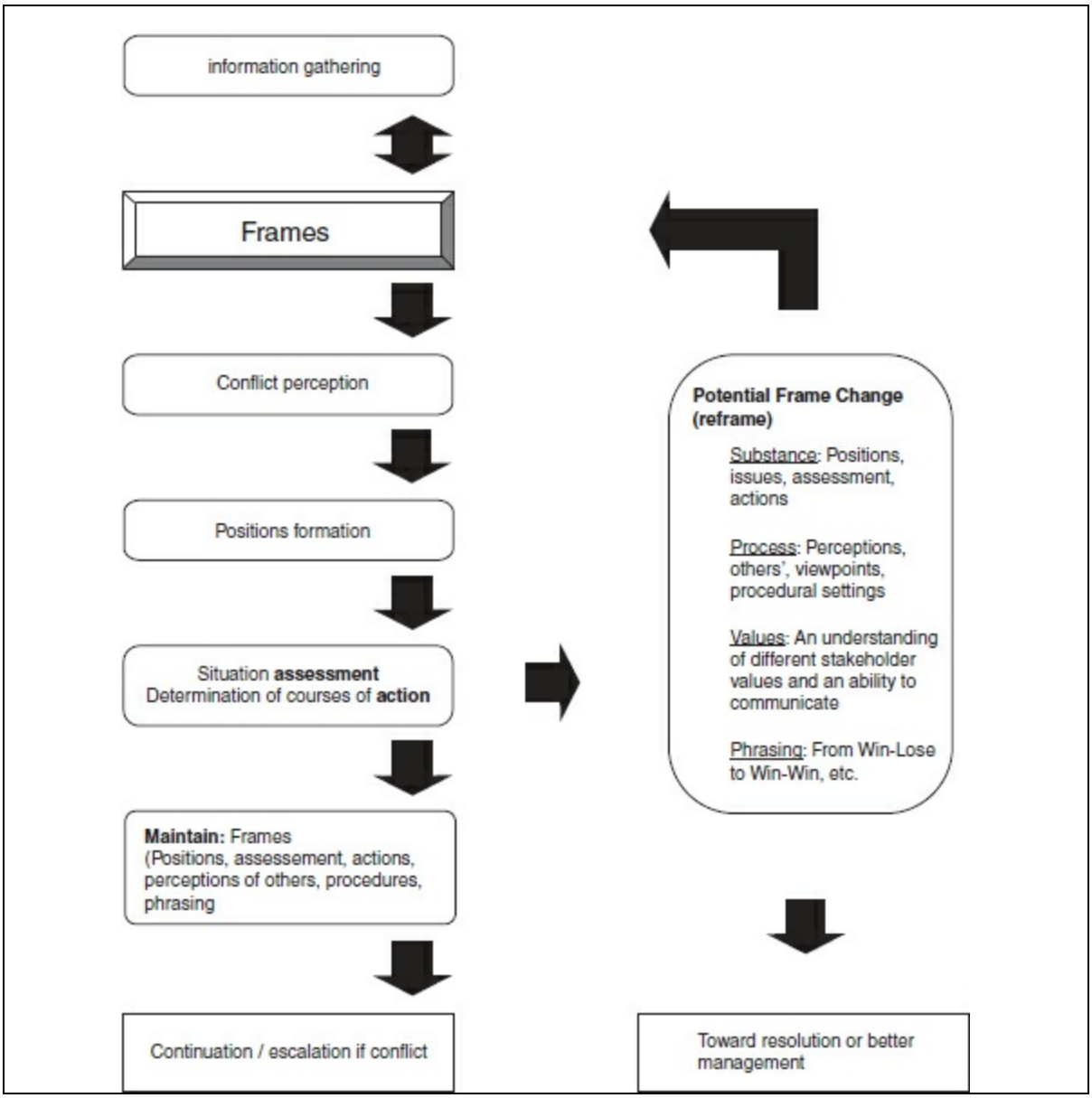

As the authors note, the diagram:

> … illustrates the roles frames and framing play in the dynamics of conflict development. It demonstrates how a frame change (or reframing) may cause a shift in conflict development, towards conflict management and/or resolution. Types of frame categories are numerous and coined differently by researchers in various fields. The categories cited in this diagram are: *substance* (reframing that affects how one views the world today or potential future states of the world), *process* (reframing that affects how one interacts with others in the dispute), *values* (reframing that allows parties to clarify the relationship between values and interests for both themselves and for other parties), and *phrasing* (the language used by disputants to communicate with one other).

You can use this model to analyse conflicts you may be aware of or involved in. As part of your potential preparation for a mediation, how could this be helpful?

Exercise 38 Categorisation

In the narrative mediation part of this chapter we looked at some ways in which narrative mediators regard events as forming narratives. These narratives often

have as one of their central features the 'categorisation' of the events and the people associated with them into various categories which can be regarded as cognitive shortcuts or heuristics to help us interpret and then communicate what has happened. They can also be quite destructive and unhelpful. Think of some conflicts you have been in and create a list of the categories you have created as part of them. Make a list and then think of some alternative ways you could have explained them. How could this idea of categories be useful in conflict management, and especially to mediators?

Exercise 39 Private sessions and 'shuttle mediation': A case study

Richard Calkins, an American lawyer and advocate for shuttle mediation, or what he terms 'caucus mediation', where the mediator quickly separates the parties, gives the following example as one of the demonstrated advantages of such an approach (2006, pp 118–19). Do you agree and could you do the same thing in different ways?

> The importance of confidentiality was illustrated in a case in which the plaintiff was injured in two separate automobile accidents where liability was admitted in both. In one, the defendant paid policy limits of $25,000. In the second, the defendant had no insurance and was judgment proof. Plaintiff sued her insurance carrier under the underinsured provision covering the first accident, and under the uninsured provision covering the second accident. The two provisions provided $100,000 coverage each; therefore, her claim was for $200,000, which the defendant recognized was well within what she could recover from a jury because of the seriousness of her injuries. The problem that arose was that the underinsured provision provided that income from collateral sources, such as Social Security, would offset payments made under the policy so that there would not be a double recovery. Plaintiff was receiving Social Security disability payments, which over her life expectancy of forty-two years would far exceed the $100,000 policy limits under the provision. The uninsured provision had no such offset.
>
> Plaintiff's counsel told the mediator *in confidence* that he was concerned with the above problem and would settle for $100,000 or slightly less under the uninsured provision. Defense counsel, who represented the insurance carrier, informed the mediator, *in confidence*, that his client would pay $100,000 if the mediator could get the plaintiff to agree to drop the underinsured claim. However, he was not very hopeful the plaintiff would agree, though he felt the law supported the defense. He added that the carrier might pay a little more to get rid of the case and avoid litigation costs.

The mediator was faced with a dilemma. Plaintiff would accept less than $100,000 and the defendant would pay more than $100,000. He solved this by putting a neutral mediator's figure of $100,000 on the table, and the case settled. He was able to do this because he learned where each side was willing to go in confidence. In straight negotiations, neither side would have disclosed that $100,000 was an acceptable figure for fear the other party would negotiate off that figure. In other words, if the plaintiff dropped substantially below $200,000, the carrier would know she was abandoning the underinsured claim because of the Social Security offset. In that event, the carrier would have expected to settle for less than $100,000. If the defendant signaled it would pay $100,000, the plaintiff would have demanded more because the costs of litigation would have to be added to the policy limits.

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Both sides would have been reluctant to 'show their hands' for fear the other would take advantage of it. Dealing in confidence with the mediator turned a complex negotiation into a very simple and short mediation, and both sides were pleased with the result

Exercise 40 Cognitive biases, heuristics and effects in decision-making

As a mediator I am constantly intrigued and fascinated by the ways in which disputants frame, evaluate and make decisions, often without regard to the utility or rationality of the outcome thus achieved. In our culture we usually come to a process like mediation fairly late in the conflict and therefore see these phenomena at work because the parties have had some time to 'practice' and include them in their narratives. Cognitive psychology — the study of mental processes — has provided us with many ways to think about these different ways of thinking. A 'bias' is a preference or predilection to think in some particular way. A 'heuristic' is a mental shortcut which has the purpose of saving us both time and energy. Many of the 'illusions' created by these cognitive mechanisms result in impasse and difficult behavior in disputes. It is here where your ability as a mediator to understand and have confidence in the structure of your process, and apply a range of necessary micro-skills and have patience in implementing them to meet and overcome these biases and effects, can be used to give the participants the best chance they may have to achieve good outcomes.

In the table below I have included some, but not all, of the various biases, heuristics and effects that cognitive psychology has revealed over the past 50 years For each of the identified biases try to think of how your own or someone else's behavior may have been influenced by them in a negotiation, mediation or decision-making process you may have been involved in. I have put an asterix next to the ones I see often in my practice. Much of the work derived from cognitive psychology has been integrated into various other modern disciplines, including the social sciences from which negotiation and mediation models draw much of their inspiration. For a good introductory guide to this important area of research, see *Cognitive Illusions: A Handbook on Fallacies and Biases in Thinking, Judgement and Memory* (Rudiger Pohl (ed), 2012).

Bias or effect	Brief description	Example where you have experienced this in a conflict/negotiation/mediation
Anchoring affect	The tendency to rely too heavily, or 'anchor', on a piece of information when making decisions, usually the first piece of information that we acquire on that subject; for example, a price or quantity	

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Bias or effect	Brief description	Example where you have experienced this in a conflict/negotiation/mediation
Prospect theory/choice relativity	Choices are influenced by the other options available.	
Affect heuristic	The tendency to be influenced by emotions in making decisions.	
Transference	Where feelings about one person (often	

	someone influential in your life) are transferred onto another. These can either be positive or negative.	
Groupthink or herd behaviour	The tendency to do (or believe) things because many other people do (or believe) the same.	
Bias blind spot	The tendency to see oneself as less biased than other people, or to be able to identify more biases in others than in oneself.	
Confirmation bias	The tendency to search for, interpret, focus on and remember information in a way that confirms one's preconceptions.	
Conservatism (Bayesian)	The tendency to revise one's	

	belief insufficiently when presented with new evidence.	
Dunning-Kruger effect	The tendency for unskilled individuals to overestimate their ability and the tendency for experts to underestimate their ability (for example, when I am playing golf!).	
Empathy gap	The tendency to underestimate the influence or strength of feelings in either oneself or others.	
Focusing effect	The tendency to place too much importance on one aspect of an event.	
Framing effect	Drawing different conclusions from the same information, depending on	

	how that information is presented.	

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Bias or effect	Brief description	Example where you have experienced this in a conflict/negotiation/mediation
Gambler's fallacy	The tendency to think that future probabilities are altered by past events, when in reality they are unchanged.	
Hindsight bias	The tendency to see past events as being predictable at the time those events happened.	
Output effect	The tendency to view the process as deficient if the outcome is not good and vice versa. ADR proponents also sometimes propose that if the process is good then the outcome will be	

	good.	
Illusion of control	The tendency to overestimate one's degree of influence over other external events.	
Illusory correlation	Inaccurately perceiving a relationship between two unrelated events.	
Impact bias	The tendency to overestimate the length or the intensity of the impact of future feeling states.	
Information bias	The tendency to seek information even when it cannot affect action.	
The sunk cost fallacy	The phenomenon where people justify increased investment in a decision, based on the cumulative prior investment, despite new evidence	

	suggesting that the decision was probably wrong. Also known as the sunk cost fallacy.	
Loss aversion	Loss of something is greater than the utility of acquiring it.	
Reactive Devaluation	The tendency of people, when evaluating the causes of the behaviours of a person they dislike, to attribute their positive behaviours to the environment and their negative behaviours to the person's inherent nature.	

Bias or effect	Brief description	Example where you have experienced this in a conflict/negotiation/mediatio
Negativity bias	Psychological	

	phenomenon by which humans have a greater recall of unpleasant memories compared with positive memories.	
Probability bias	The tendency to completely disregard probability when making a decision under uncertainty.	
Planning fallacy	The tendency to underestimate task-completion times.	
Post-purchase rationalisation (sometimes called 'satisficing')	The tendency to persuade oneself through rational argument that a purchase was for good value.	
Reactive devaluation	Devaluing proposals	

	only because they purportedly originated with an adversary.	
Selective perception	The tendency for expectations to affect perception.	
Status quo bias/Endowerment effect	The tendency to like things to stay relatively the same (similar to loss aversion) and to value what one has as more valuable than it really is.	
Stereotyping	Expecting a member of a group to have certain characteristics without having actual information about that individual.	
Zero-sum heuristic	Intuitively judging a	

	situation to be zero-sum (that is, that gains and losses are correlated). Derived from game theory, where wins and losses equal zero.	
Future impact bias	The tendency to view future events as having more impact, especially emotionally, than they actually will.	

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Exercise 41 The regulation of lawyers in mediation

The legislation and rules that guide lawyers in mediation across Australia are complex and difficult to follow as they evolve. Here is a snapshot of the situation at the time of writing. I would advise, however, that you consult your local law society or bar association for up-to-date guidelines and rules that may pertain to the jurisdiction you are in. These rules and guidelines are general in nature and set minimum rules for practice. As Wolski states (2015, p 12): 'The generality of these rules does not diminish their significance. The Australian Solicitors Conduct Rules (ASCR) describe them as fundamental ethical duties, while the Bar Rules describe them as "principles"'.

Topic	Rules and guidelines
Mediation as legal work	• The ASCR clarify that representation of clients in mediation is an aspect of legal practice: ASCR r 7.2, Glossary of Terms

	(definitions of 'matter' and 'legal services'). (Western Australia has adopted its own Legal Profession Conduct Rules 2010.) See <www.lawcouncil.asn.au>. • For barristers, the rules of professional conduct to which they are subject provide that representation (but not being a mediator) of a client in mediation falls within the scope of the work of a barrister: Australian Bar Rules (ABA) r 15(d), (definition of 'barristers' work'). The New South Wales Bar recognised the mediator role as 'legal work' in 2015 and the Victorian Bar is considering this change.
Standards in mediation	• Law Council of Australia (LCA) Guidelines (2011) (these are non-binding on lawyers).
Parties in mediation	• LCA, Guidelines for Parties in Mediation (at August 2011). • Law Society of New South Wales, *Charter on Mediation Practice — A Guide to the Rights and Responsibilities of Participants* (2008).
General Practice Standards	• ASCR r 2.2; Bar Rules r 10. • Legal Services Directions 2005 (Cth) (governs conduct of lawyers in Commonwealth agencies). • Family Law Act 1975 (Cth) ss 60I, 10F. • Note that each state has its own legislation governing lawyer regulation and conduct. • Note that ABA r 38 requires ADR to be brought to the attention of parties by legal practitioners

Exercise 42 An example of failing as a lawyer: Adversarialism vs non-adversarialism

Lawyers need to balance duties, including to the court, the mediator, their own client and the opponent (Wolski, 2015). A good example of the failure to keep these elements in balance is *Hopeshore Pty Ltd v Melroad Equipment Pty Ltd* (2004) 212 ALR 66, where the court held that a legal representative had acted inconsistently with his duty to assist the court in the management of proceedings involving his client, by failing to proceed with mediation as ordered by the court. In this case the referral to mediation was made by consent at a directions hearing. The lawyer concerned had, according to the court, taken the view that early mediation was not in his client's best interests and had acted in a way that was calculated to defer the mediation: at 76. In an application for security for costs (that is, to obtain security for costs from the other party in case they lost) before the court the conduct of the lawyer was taken into account in determining whether or not to exercise discretion in favour of that practitioner's client. The court dismissed the motion: at 77.

Most jurisdictions now have case management-type legislative provisions for proceedings, to ensure efficiency and timeliness, in particular. ADR has been very prominent in civil justice reform in both the state and federal jurisdiction. This has been established in Victoria in the Civil Procedure Act 2010 (Vic) and in the Federal Court in the Civil Dispute Resolution Act 2011 (Cth). Further, these Acts and various professional practice rules for solicitors and barristers require ADR to be brought to the attention of parties by legal practitioners. The Civil Procedure Act 2010 also provides for judicial early neutral evaluation and judicial resolution conferences, amongs other ADR processes. The role of the lawyer as advocate for his or her client must now be balanced with a non-adversarial approach. As King and his colleagues note in their book on non-adversarial justice, these are not dichotomies but are part of a continuum (2009, p 5):

> Adversarialism and non-adversarialism are not mutually exclusive. Key non-adversarial developments sit alongside more traditional aspects of the adversarial system. Rather than being mutually exclusive opposites, we prefer to conceive of adversarialism and non-adversarialism as a continuum, a sliding scale upon which various legal processes sit, with most processes combining aspects of adversarial and non-adversarial practice to varying degrees.

Do you agree with this view? Do you think it is difficult for lawyers to be advocates for their clients in mediation? If they are to continue as advocates, what degree of 'zealousness' are they then allowed to employ?

Exercise 43 Practice Hours and CPD under the National Mediation Accreditation System

Once accredited, the NMAS requires mediators to undertake at least 25 hours of mediation, co-mediation or conciliation within the two-year accreditation period must make this up by CPD activities as outlined by the NMAS Practice Standards.

Further, accredited mediators must participate in 25 hours of CPD activities. These requirements are provided for as follows:

3 Accreditation renewal requirements

3.1 An accredited mediator (a mediator) seeking renewal of accreditation must satisfy the approval requirements set out in Section 2.1 (except for 2.1(a)) above, and provide evidence to the RMAB that within the two years preceding application for renewal they have been conducting mediations and have engaged in continuing professional development (CPD) as described below.

3.2 A mediator must have conducted at least 25 hours of mediation, co-mediation or conciliation within the two-year cycle.

3.3 A mediator who has not met the requirement in Section 3.2 due to lack of work opportunities, health or career circumstances or residence in non-urban or CALD communities, must have conducted at least 10 hours of mediation, co-mediation or conciliation and must attend such supplementary training, coaching and/or assessment as the RMAB considers necessary, in addition to the CPD required in Section 3.5 below, to address the shortfall.

3.4 Renewal of accreditation in terms of Section 3.3 cannot be sought or granted for more than three consecutive renewals.

3.5 A mediator must undertake CPD of at least 25 hours that contributes to the knowledge, skills and ethical principles contained in the Practice Standards. This may be made up as follows:

(a) Participating in Education (up to 20 hours)

This means participating in formal structured activities such as training seminars and workshops (up to 20 hours) or attending conferences (up to 15 hours).

(b) Reflecting on Practice (up to 15 hours)

This means receiving professional supervision or coaching or participating in structured peer-based reflection on mediation cases.

(c) Providing Professional Development (up to 15 hours)

This means delivering presentations on mediation or related topics, including two hours of preparation time for each hour delivered, or providing professional supervision, assessment, coaching or mentoring of mediator trainees and mediators.

(d) Credit for related professional CPD (up to 10 hours)

This means hours of CPD completed to maintain professional licensing or accreditation related to their mediation practice, such as in law or in the behavioural or social sciences or in the professional field in which they mediate, such as building or engineering.

(e) Learning from Practice (up to 8 hours)

This means participating in up to four mediations as a client representative or in a formal learning capacity (up to 2 hours per mediation) or role-playing for trainee mediators and candidates for mediator assessment (up to 2 hours per simulation).

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(f) Self-directed Learning (up to 5 hours)

This means private study such as reading, listening to or viewing pre-recorded content such as podcasts, or writing articles or books relevant to mediation that are published in recognised journals or by recognised publishers.

(g) Other (up to 5 hours)

This means such other activities as may be approved by the MSB on application by an RMAB.

Part of the difficulty for newly accredited mediators is to obtain sufficient work to commence their mediation practice. This clause alleviates some of those issues. What, however, do you think it indicates about mediation practice?

Exercise 44 Questions

(a) Mediation and similar processes have long been used in workplace disputes. In your own place of work how could workplace mediation processes be instituted or improved?

(b) How could you further simplify the process of mediation described in this chapter?

(c) What do you consider to be the most important single element of mediation?

(d) Do you agree that mediation may 'atomise dissent' as indicated by Abel?

(e) While 'models' of mediation may have their limitations, what do you think are the benefits of these for practice?

Chapter 8

Restorative Justice and Conferencing

Summary

‘Restorative justice’ is a concept that includes a wide range of practices with common values but widely varying procedures. These values encourage offenders to take responsibility for their actions and to repair the harms they have caused, often in direct communication with their victims.

This chapter outlines the development of restorative justice processes in Australia. It highlights the issues that confront the adoption of the principles underlying restorative justice in the criminal justice system and summarises some of its key theoretical underpinnings, including reintegrative shaming, affect, interactional ritual chains and neutralisation theories. Finally, this chapter provides a comprehensive outline of a possible restorative conferencing process.

Introduction

8.1 Nils Christie, a Danish criminologist, in a seminal and brilliant polemic argued that conflicts are good for us, they strengthen us and we have much to learn from them (1977). Further, he said that we can think of conflicts as property and, therefore, we should guard them jealously. He argued that in contemporary Western society, conflicts have been, in many instances, taken away from the parties directly involved and, in the process, have either disappeared or become someone else's conflicts — usually those of lawyers, or the State. He concludes that this is a problem because conflicts are potentially valuable resources for us as individuals and as communities. Taking this argument to its logical extension, it can be argued that in the criminal justice system the community's 'interest' in crime has been taken away and another valuable source of social capital thereby depleted. Christie's views have crystallised many of the ideas that inform the phenomenon known as 'restorative justice'.

Restorative justice is most closely associated with the victim–offender mediation and conferencing programs that have emerged over the past 35 years, mainly as an alternative to criminal justice practice. These programs represent a systematic response to wrongdoing that emphasises healing the wounds of victims, offenders and communities caused or revealed by criminal and offending behaviour. In the past decade these developments have morphed into processes that can be used in schools and organisations (Roche, 2006). The conferencing process described later in this chapter is similar to, and can be adapted to, these particular settings. In the past two decades considerable academic interest has been generated in these processes, giving rise to a burgeoning number of publications and websites, outlined below.

(For an introduction go to the Victorian Association of Restorative Justice website, one of Australia's leading websites on restorative practices: <www.varj.asn.au>.)

Like the alternative dispute resolution (ADR) movement and other reform movements, modern restorative justice grew out of the informal justice, victim and consumer rights and restitution/diversion movements of the 1960s. Restorative justice processes have been adopted widely in Australia, as demonstrated in the following table adapted from Larsen (2014, pp 8–9).

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State	Process	Statute	Application	Exclusions	Referral point
NSW	Youth Justice Conferences	Young Offenders Act 1997	Youth (10 to under 18 years)	Sexual assault, drug and traffic offences, offences causing death and breaches of apprehended violence orders	Police and court (pre-sentence)
	Forum Sentencing	Criminal Procedure Legislation 2010 NSW (Pt 7)	Adults — 18 years and older	Murder, manslaughter and serious violent and sexual offences, offences of stalking and intimidation, drug supply, cultivation and manufacture, firearms offences	Court (pre-sentence)
Vic	Youth Justice Group Conferencing	Children, Youth and Families Act 2005	Youth (10 to under 18 years) and young adults (10–20 years)	None stipulated in the legislation but in practice, homicide, manslaughter, sex offences or serious crimes of violence are excluded	Court (pre-sentence)
	Youth Justice Conferencing	Youth Justice Act 1992	Youth (10 to under 17 years), although some adults may be referred by police	None stipulated in the legislation	Police and court (pre-sentence)
Qld	Justice Mediation Program	Dispute Resolution Centre Act 1990	Adults (17 years and over)	None stipulated in the legislation	Mostly diversionary but can come at all stages of the criminal justice process

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State	Process	Statute	Application	Exclusions	Referral point
SA	Family Conferencing	Young Offenders Act 1993	Youth (10 to under 18 years)	Legislation stipulates youth who admit to committing a 'minor' offence may be referred by police; however, no offences are specifically prohibited.	Police and court (pre-sentence)
	Port Lincoln Aboriginal Conferencing	Criminal Law Sentencing Act 1988	Adults — 18 years and older		Court (pre-sentence)
WA	Family Group Conferencing	Young Offenders Act 1994	Youth (10 to under 18 years)	Schedule 1 and 2 offences, which include homicide offences, sexual offences, some drug offences, arson and offences against justice procedures	Police and court (pre-sentence)

Defining Restorative Justice

8.2 A popular definition of 'restorative justice' is: 'A process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future' (Marshall, 1999, p 5). 'Restoration' in this context refers to the restoration of victims (through reparation), offenders (by taking responsibility for their actions) and the general community. Restorative justice is also sometimes referred to as 'positive justice' or 'reintegrative justice'.

It is difficult to define a particular practice as restorative justice (Daly, Hayes and Marchetti, 2006). Rather, there are a set of principles, which:

- accommodate the needs of those personally affected by wrongdoing/crime;
- see crime/problems/breaches in their social context; and
- have a forward-looking (or preventative) problem-solving orientation.

As several of the leading researchers in the field have concluded (Strang and Sherman et al, 2013, p 7):

> 'Restorative justice' is a recent name for community practices that are thousands of years old (Braithwaite, 1998). The name refers to a broad range of practices, all of which define justice as an

attempt to repair the harm a crime has caused rather than inflicting harm on an offender (Sherman and Strang, 2012). Other definitions emphasize a process of deliberation to decide what offenders should do that includes all people directly affected by a crime (Marshall, as quoted in Braithwaite, 2002: 11). Yet many procedures that lack such deliberation are also called restorative justice, including court-ordered

community service, payments that offenders are required to make to their victims, and victim-offender mediation that excludes their families and friends.

The Beginnings of Restorative Justice

8.3 The modern restorative justice movement 'began' in Ontario, Canada in 1974 with the localised implementation of a victim–offender mediation program. Victim–offender mediation programs have also had a relatively long history in the United States and, to a lesser extent, in the United Kingdom (Marshall, 1996). Victim–offender mediation programs are now widely dispersed around the world. For example, there are now more than 300 victim-offender reconciliation projects in Europe and North America, with 175 programs in the United States and Canada.

In these programs, victims and offenders are brought together to negotiate reparation. In Australia, victim–offender mediation was first trialled (unsuccessfully) by the ADR Branch of the Department of Justice in Queensland in 1992 (Department of the Attorney-General, 1991). In the 1990s another process known as 'conferencing' emerged. Conferencing originated in New Zealand and is commonly referred to as 'family group conferencing' (Brown and McElrea, 1993). Family group conferencing was incorporated into New Zealand juvenile justice and child protection legislation in 1989.

In Australia, restorative justice programs based on the conferencing

process have been widely adopted. Conferencing brings together not just the individuals involved in the particular criminal offence, but the wider 'communities of care' who may be affected, in order to discuss and respond to what has happened. For example, the family of an offender can provide support for an offender, but they can also describe their own 'secondary victimisation' in a conference. The focus of the conference is not on a dispute but on the offence, its consequences and on those affected and what they can do to repair the damage and minimise further harm (Palk, 1997). In Australia and the Pacific region, restorative justice programs based on the conferencing process have been widely adopted (Maxwell and Hayes, 2006). Each Australian state's jurisdiction has seemingly followed its own particular needs and predilections. There is consequently little conformity and one is left with a confusing jigsaw of legislation, models and practice (Condliffe, 2005).

Restorative justice practice brings the victim and the offender face-to-face to talk about and deal with offending behaviour. It is not a new or unique process. It finds its roots in the way many indigenous cultures traditionally dealt with deviant, disruptive or victimising behaviour in their communities.

The primary focus of restorative justice, and, consequently, the focus of the meeting between victim and offender, is not to establish guilt and exact punishment; rather, it is to provide an opportunity for the offender to take responsibility, recognise what his or her obligations are and make amends. The underlying goal of restorative justice can be summarised as restoring the victim, offender and the community to some better sense of wellbeing after the hurt and damage caused by the crime. The restorative justice approach argues that the goal when dealing with people who have broken social rules is to seek ways to heighten the future motivations that those people have to engage psychologically and behaviourally in society. This engagement

includes developing, or becoming more committed to, social values that promote self-regulation, and consequently adhering more closely to laws and social regulations in the future (Tyler, 2006).

Key to this process is the social connection that people feel to their family, friends and community. These parties are present at restorative justice hearings, along with the victim and their family and friends. All of those present are involved in reconnecting the offender to his or her sense of responsibility to the community, the goal of which is to encourage the feelings of responsibility to family, friends, and community and enhance commitment to self-regulatory actions. This commitment, in turn, works against future transgressions of the law.

The perceived shortcomings of the legal system have added impetus to the interest in the ADR movement, which promises to provide a more cost-effective, available and satisfying context for disputants. Most of the attempts to use ADR processes, such as mediation, case appraisal, conciliation and the like, have occurred in the civil sphere, but in the last few years in Australia there have been several attempts to bring similar innovations into the criminal justice system, particularly for juveniles.

A paper produced by the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunities Commission, 'A Matter of Priority: Children in the Legal Process', found that many laws and legal processes failed to meet the obligations established under the United Nations Convention on the Rights of the Child (ALRC, 1997). This was an important milestone in the search for new ways to proceed. It also found that services and assistance for children were inadequate (p 10). The 18-month investigation that led to the report found that there had been a national failure, in particular to look after the most vulnerable children — those in need of care and protection. The research showed that Australians tended to patronise or demonise young people, rather than adopt an approach designed to encourage self-esteem, individuality and a sense of responsibility.

Despite widespread media reports at the time the research was undertaken that there was a juvenile crime wave, it found no evidence of this. Nor was there any evidence of a collapse in standards, either among young people or in the wider community. The report found that all facets of the legal system had failed to accommodate the changing notions of children's evolving maturity. Instead, society seemed to be interested only in protecting itself from its children. The available statistics certainly portrayed a grim picture.

The research showed that the majority of young offenders do not reappear in the juvenile justice system after their first offence. Only a small number of children who reoffend account for a disproportionately large percentage of Children's Court appearances (p 10); therefore, only a small proportion of Australia's 5 million children have contact with the formal legal process. However, a majority of children have contact with the formal education system (p 7). As the draft recommendations paper noted:

> There are few formal protections for the children involved in such processes, although disciplinary decisions can and do have far reaching significance. Many children in the juvenile justice system, for example, have had poor experiences with the education system, whether through poor academic performance, persistent truancy or a significant number of exclusions and suspensions.

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Consequently, much of the emphasis in restorative justice reforms has been in the education system as well as upon the juvenile justice system; however, because of the 'implementation issues' discussed below, the incorporation of those reforms into the broader criminal justice system is yet to be achieved.

Implementation issues

8.4 Marshall analyses the various restorative justice programs as falling into seven categories differentiated by the parties involved (1999):

Parties	Programs
Victim–offender	Victim–offender mediation and/or reparation.
Victim–community	Community group support for victims.
Offender–community	Community programs that support offenders; for example, jobs, retraining, literacy, education, relationship counselling, drug/alcohol counselling, accommodation, support for isolated, activities to release energy and integrate people, and family support.
Victim–offender–community	Community involvement in victim–offender mediation.
Justice agency–victim	The justice agency takes a proactive role with respect to victims.
Justice agency–offender	The justice agency actively tries to reintegrate the offender.
Justice agency–community	The justice agency is integrated into the community. Examples may include probation services and opportunities for volunteering in relation to the criminal justice agencies. For example, in Vermont (US), non-violent offenders are sentenced by the court to a hearing before a community reparative board composed of local citizens.

This table indicates a wide variety of program types, although most

emphasis is given to mediation and conferencing varieties.

The programs generally apply to a wide range of criminal offences. They are often combined with police warnings, cautions and deferred prosecution, and can also occur parallel with prosecution, prior to sentence, as part of the sentence, or after sentence, including pre- and post-release.

When used in conjunction with cautioning, the agreements are not enforceable. The emphasis is therefore on the process and, in particular, the offender's realisation,

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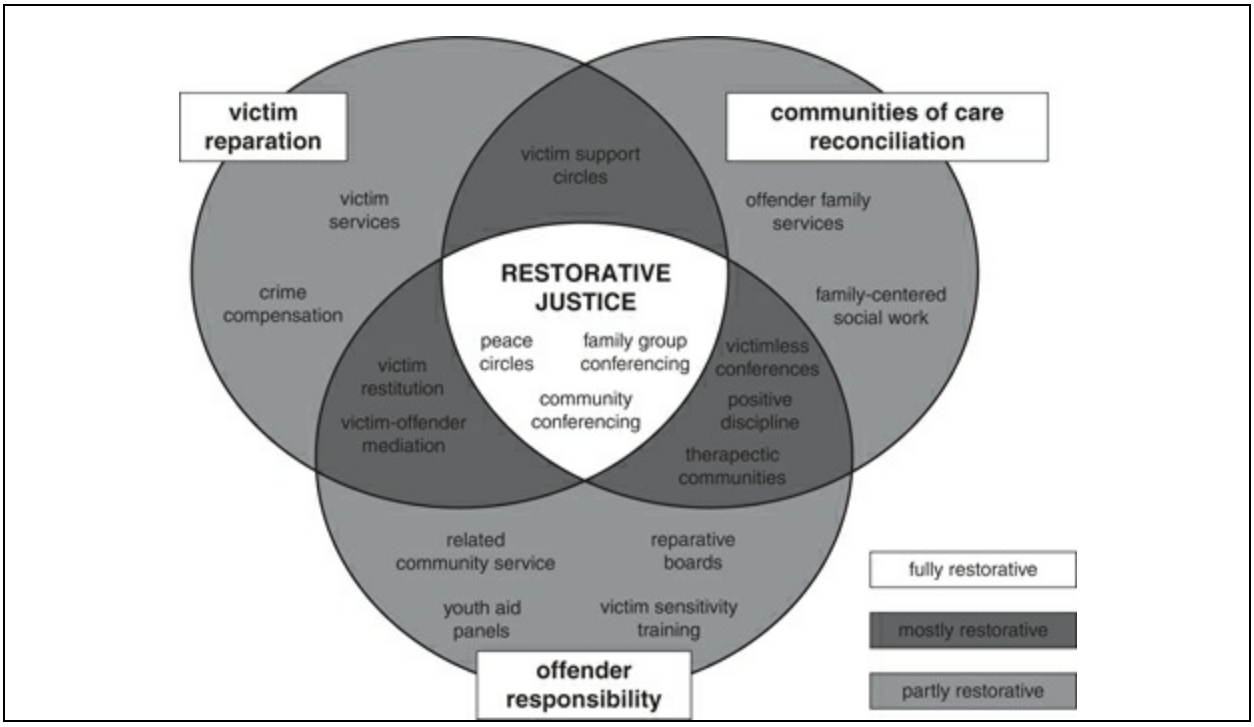
understanding and acknowledgment of the impact of his or her actions. When used in conjunction with a court appearance, the court may impose reparation as part of the sentence.

Miner (see <http://circle-space.org/>) depicts the various domains of restorative justice processes as follows:



Many of the United States, English and German victim–offender programs, as with the Australian programs, deal exclusively with juvenile offenders. In England, some mediation is conducted directly with the victim and the offender, who meet face-to-face. In other instances, indirect mediation or 'shuttle mediation' is conducted, where a facilitator liaises between the victim and the offender, who do not meet face-to-face. Recent programs in the United Kingdom have trained thousands of police to undertake 'restorative disposals' or 'community resolutions' that may involve negotiations on the street immediately after a crime has occurred, in which apologies are made and no further action is taken (Strang et al, 2013, p 7).

There are a considerable number of issues that have emerged in the development of restorative justice programs. Larsen (2014, p viii) outlines three key challenges facing restorative justice into the future:

- *Extending restorative justice to adult offenders:* While restorative justice has primarily been used for young offenders, an increasing number of practices extend to, or

  are designed for, adult offenders and the victims of their offences. There remains some debate as to whether it is appropriate to extend restorative justice to older offenders; however, the research to date has reported some positive outcomes in reducing reoffending, victim and offender satisfaction, and positive attitudinal change among adult offenders.

- *Extending restorative justice to serious offences:* Similarly, while restorative justice was formerly seen as appropriate only for less serious offences, it is increasingly being used to respond to the harm caused by more serious offending, such as murder, sexual assault and family violence, and there is growing evidence of positive outcomes in this space.

- *Achieving 'restorativeness'*: Whether restorativeness is achieved is highly dependent on the willingness of victims and offenders to engage in restorative justice processes. Further, it is difficult to assess whether restorativeness has translated into programs the way it was intended, as there are many variations in implementation and in what is considered to be 'restorative'. This is also complicated by the fact that theory in this space has, and continues to, develop alongside practice.

Other issues have included the co-existence of restorative justice with the traditional criminal justice system; net-widening; community alienation; and the overemphasis on individuality. I will deal with each of these briefly in turn. As Umbreight et al comment (2006, p 302):

> Is restorative justice in fact about developing an entirely new paradigm of how our criminal justice systems operate at a systemic level, or is it a set of processes, specific principles, and practices that can operate within our conventional criminal justice systems?

8.5 A critique of restorative justice points out that people who would want the wide-scale implementation of restorative justice programs have three choices (Minor and Morrison, 1996). They may:

- try to gradually replace traditional correctional practices with restorative justice programs;
- attempt to allow restorative and traditional programs to co-exist independently of one another; or
- try to integrate restorative practices into the repertoire of the State's court correctional interventions.

The first choice is bound to be hindered by resistance from the established political and correctional infrastructures. The central feature of the justice model of Western societies is that the State has dominant control over deviants, exercised through well-established institutional frameworks. The second choice implies that decisions must be made as to which cases are appropriate for restorative justice programming. Evidence so far indicates

that restorative justice in Australia is likely to be used in only a fragmented fashion for less serious offences in juvenile justice settings. The third choice would mean the attempted implementation of restorative justice practices in agencies that are occupied with bureaucratic needs and interests, and that can be antithetical to it. This can lead to corruption of the restorative practices.

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A personal experience

My own experience is instructive. Some years ago I worked on the Attorney-General's Working Party on the Criminal Reparation Scheme (1992), which, inter alia, looked at questions of implementation of victim–offender mediation within the Queensland criminal justice system. It soon became clear to me that there were difficulties in implementing a modest victim–offender mediation program into a system that was not prepared for it or perhaps not sympathetic to it. I did not fully understand the structural constraints or opposition that we encountered. In this case, despite a reasonably well thought-out report justifying the program, committed staff and the backing of several ministers, the program failed. This is not to say that the individual cases that went through the program were not successful or well managed. The simple fact is that the existing court structures did not see the merit of referring many cases into it.

Bureaucracy

8.6 Traditional criminal justice systems operate within highly bureaucratic frameworks. Emotion is jettisoned from vocational bureaucratic duties as civil servants become specialised and professionalised. Compassion and understanding are desirable outcomes of restorative practice, but these feelings may not be so forthcoming in settings where they are made subservient to bureaucratic priorities. The other concern is that restorative programs could become part of the mentality that cheaper control is better than no control at all, and the aims of restorative justice will become secondary to fiscal objectives. The work of Foucault has illustrated how

correctional systems have moved from being emotionally charged public spectacles to systems that are hidden from public view and administered by bureaucrats striving for rationalised management of punitive processes (Foucault, 1979).

This movement away from the public eye has caused criminal justice processes to be less emotionally charged, but with the result that the community feels alienated from them. This leaves a dilemma for those who would want to implement restorative justice programs. On the one hand, if such programs are tied to the existing criminal justice bureaucracy, there is greater potential for community alienation. On the other hand, those that are not tied to criminal justice bureaucracies are likely to experience difficulty in being widely implemented.

Social Control

8.7 Another point worth noting is that restorative justice programs can be viewed as another way of extending social control mechanisms. This net-widening occurs when a program such as the community conferencing program, which is designed to represent an alternative to more formalised and punitive intervention, takes in people who would have had little or no action taken against them if the program had been unavailable. For example, there may be a danger that cases which are too hard to prove in court instead may be referred by police to conferencing. In this way, increasing numbers of people are pulled into the criminal justice system and State control is extended. This is bureaucracy's justification for allocating more funds and creating new agencies and programs. The process feeds on itself, because once such agencies

and programs are created they must be used. When such a phenomenon occurs, often such programs derive their credibility and power from the threat of greater sanctions being applied against offenders.

The Theft of Crime

8.8 Restorative justice advocates often argue that the criminal justice system represents the theft of crime by the State out of the hands of the victim and the offender. They argue that the real issues lie between these particular individuals (victim and offender) and that the State should be kept completely out of it or at least remain in the background. These arguments can be traced back to the seminal article by Nils Christie in 1977 referred to above. However, the English theorist Tony Marshall argued that we would probably regret it if the State did keep out of these matters. He went on to say that Christie's argument is flawed because the State has a stake in 'right behaviour' and stable social relationships (Marshall, 1996, p 21). This is because crime is a product of social processes for which we all collectively bear some responsibility. Any of us could be a victim, and we are all victims in some way. If we therefore concentrate too much on the relationship between the individual victim and the individual offender we may fail to deal with the greater social issues that arise out of these wider relationships between parties, communities and society, and with the State.

Public Sentiment

8.9 Even though restorative justice may provide a more constructive basis for crime control, it needs to better mesh with public sentiments about crime, and responses to it, if it is to be widely implemented. Unless the community learns about and appreciates the value of restorative justice programs, there might in fact be a backlash against them. Calls for greater punishment

emanating from the community may result in restorative justice programs adding to, rather than reducing, the levels of punishment. Thus, it is necessary for reformers to understand the possible connections between these various issues and crime if restorative justice programs are not be reduced to a panacea.

Circles and restorative justice

The juvenile justice system, neighbourhoods, workplaces and schools have been using 'restorative circles' in increasingly innovative ways over the past decade. This approach involves a much wider circle of participants than conventional victim–offender conferencing, and begins with establishing a restorative system in the neighbourhood, workplace or school where circles will be held. Typical elements of a circle include opening and closing ceremonies, a talking piece, a facilitator or keeper, collectively established guidelines and consensus decisions. Modern ideas of democracy and inclusive speech relate to the value of equality and the opportunity for participants both to give and to receive from others. The philosophy of circles also emphasises connectedness and story-telling (Pranis, 2003; 2005). To work well, circles require organisational commitment and change. Circles have been used to allow prisoners to meet with their families and friends in a group process to support their transition back into the community. Meetings specifically address the need for reconciliation with victims of their crime(s). 'Circles of Support and Accountability' have been used by the Mennonite community to enhance the safe integration of otherwise

high-risk sex offenders within their community. 'Sentencing circles' use traditional circle ritual and structure to involve all interested parties to manage sentencing of offenders (Roffey, 2005). With the exception of Tasmania, circle sentencing operates in all Australian jurisdictions for Indigenous adult offenders (Rossner et al, 2013): see **Exercise 3** at the end of this chapter for an outline of these programs.

Tom Fisher and Carmel Benjamin, leading advocates of restorative justice processes in Australia in the 1990s, in their introduction to a course on victim–offender mediation (1998) pointed out that in the latter half of the 20th century, the growth of the victim movement both highlighted and exacerbated problems of the criminal justice system (Fisher and Benjamin, 1998, p ii). They raised issues concerning the rights of victims of crime and the difficulties of enforcing those rights. Perhaps not surprisingly, drawing

attention to the plight of victims tends to generate myths and feed ideologies in which revenge plays a major role. One of these with disturbing currency and deceptive credibility is that giving rights to victims of crime, such as those who have been assaulted, has some direct correlation to the status of accused persons. This focus on rights and retribution plays into a philosophy of a purely punitive law. In some circles it gives rise to fears that the victim 'movement' may be hijacked into 'radical victimology', a worldwide phenomenon that is particularly visible during election campaigns to further the law and order concerns of vested interests (McShane and Williams, 1992, pp 258–71).

Today, to the outside observer, punishment and retribution as a primary response to crime might seem more securely established than ever, notwithstanding the efforts of concerned criminologists and commentators, who struggle to find satisfactory and viable options within, parallel to, or co-existing with traditional criminal justice processes.

A purely punitive law can readily mask the importance to the victim and to the community of an offender's acceptance of responsibility for wrongdoing, a psychological moment defined by the experience of an offender's remorse and the victim's act of forgiving. It is a time when true rehabilitation can begin for both parties. It is a time when victim-offender mediation can provide an appropriate and positive mechanism through which restorative justice can be introduced and lead to creative change for all concerned. As Mace notes in an early commentary on victim–offender mediation (1993, p xiii):

> Mediation is not a panacea, but it is an encouraging element in the growth towards a more directly responsible and healing community approach to dealing with crime. For the victim, it offers the opportunity to participate actively in the resolution of offending and its consequences, in putting right a wrong that has been done. The offender involved in mediation is directly confronted with the responsibility for what has happened, and is less likely to project blame or fault elsewhere and more likely to do something that will have positive meaning for the victim. For a proportion of offenders, the learning and attitude shift that occurs is profound and brings about real and lasting changes in their lives and outlook.

Theoretical Underpinnings

8.10 A number of theories and models have been developed to help understand how restorative justice processes work and what the potential benefits are. These include neutralisation theory, affect theory, reintegrative shaming, Tyler's theory of procedural justice, Sherman's defiance theory, Collins' ritual chain theory and Briathwaite's theory of responsive regulation.

No one theory can adequately describe what happens in a restorative conference or mediation. Sometimes things happen in a conference or mediation that will not neatly fit any theory.

Restorative justice has provided a different way of looking at justice and, increasingly, at regulatory functions. Instead of understanding justice simply in terms of guilt and punishment the restorative justice framework attempts to understand justice in terms of responsibility and reparation. From the perspective of restorative justice, justice is achieved not when guilt has been determined and the offender punished, but through the offender accepting responsibility for his or her actions and taking steps to make amends.

Obviously there are occasions when an offender does not accept responsibility for his or her actions. In these situations the restorative justice approach would hold that the traditional court and regulatory processes are the most just mechanism available for testing the evidence and determining what outcomes are necessary.

The first writer to create a comprehensive restorative justice model was Howard Zehr in 1985 (Zehr, 1985). Zehr considered restorative justice as an alternative justice paradigm that is fundamentally opposed to the principles underlying legal or retributive justice. Several writers in the 1980s treated restorative justice as being virtually synonymous with victim–offender

mediation, and emphasised private negotiation as a response to crime. In the early 1990s there was some criticism of the over-individualised nature of restorative justice, and greater emphasis on community involvement emerged, which then gradually translated into an emphasis on conferencing, with its focus on wider communities of care. This approach will provide the foundation for the conferencing process outlined in this chapter. A conference should accordingly be directed towards:

- assisting the offender/regulatee to accept responsibility;
- allowing full involvement as practicable by those effected;
- involvement of 'communities of care'; and
- directing the conference towards a negotiated agreement focused on reparation and repair of harm.

Neutralisation theory

8.11 Some criminologists have argued that a major psychological component in the commission of crime and wrongdoing is what is referred to as 'neutralisation'. This is the cognitive process by which offenders excuse their behaviour, denying its criminality or immoral nature. Neutralisation consequently enables an offender to overcome the moral constraints against the behaviour.

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There are at least six ways offenders can engage this technique of neutralisation:

Denial of harm	The argument that the crime did not hurt anyone because losses could be recovered (for example, insurance) or

	injuries were not long-lasting.
Denial of responsibility	The claim that the actions were the result of circumstances beyond his or her control (for example, poverty or drunkenness).
Denial of victim	The assertion that the injury is a form of rightful punishment against a morally inferior victim (for example, the victim was homosexual).
Condemnation of the enforcers	Shifts attention from the offender's own misdeeds to the hypocritical behaviour of those who disapprove of the illegal act (for example, corrupt police officers).
Appeal to higher loyalties	The argument that the demands of some individuals or groups (for example, family, peers or gangs) take precedence over the demands of the larger society.
Denial of intent	The argument that no harm was meant by the actions.

There is some debate as to whether neutralisation occurs before the wrongdoing is committed, as opposed to being a rationalisation after a crime has happened. However, studies have consistently shown that neutralising statements by offenders are frequent and universal. Whether or not neutralisation is a causal factor, it is certainly a barrier preventing the offender from accepting guilt and from taking a realistic view of the consequences of his or her behaviour.

Tony Marshall, in the introduction to his book *Crime and Accountability: Victim Offender Mediation in Practice*, observed (1990, p 1):

> One important element in neutralisation is the fact that the offender may never have to deal directly, either during the commission of the offence or subsequently, with the victim, never

having to face up to their individuality or the harm they have suffered. The victim can, therefore, be seen in terms of conventional stereotypes that reinforce the denial of harm. That is, they can be seen as members of that society against which the offenders see themselves rebelling — the rich and heartless, the authoritarian, the hypocritical conformist, the sententious snob, or whatever the favourite imagined target may be.

A consistent goal of all community conferencing programs is to provide an opportunity for the offender to accept responsibility for his or her actions. This involves understanding his or her actions in terms of the harm and hurt caused to others. Community conferences can be occasions when the neutralisation mechanisms employed by offenders are seriously challenged.

A conference also provides an opportunity for the 'victim' to discover a more complete picture of the offender.

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Affect theory

8.12 Affect theory, as developed by Silvan S Tomkins in a series of four volumes entitled *Affect Theory*, published between 1962 and 1991, has been particularly influential on restorative justice practice and has been used in wide variety of settings: see Kelly and Thorsburne (2014). Tomkins's concepts challenged the established theories about emotions, including the drive theories of psychoanalysis and those of cognitive behaviour therapy. Affect theory contends that human infants are born with a finite set of innate affects. These affects provide the biological component of emotion. The affects are experienced throughout the body, but are most visible on the face. The actual experience of an affect state is quite brief, but affect states can be maintained by thoughts and memories which continue to stimulate the affect. This leads to the difference between affects and emotions. Emotions are composed of an assemblage of affect and cognition. Children are born with the ability to experience affects, but their emotions only develop over time as they develop

memories associated with specific affect states. The result is that everyone has the same affects but each person's emotions are unique. This leads to considerable potential for misunderstanding in intimate relationships.

Tomkins's insight was that affects provide the vast majority of our motivation. The positive affects motivate us to seek or continue the events that activate them, and the negative affects motivate us to diminish or escape the events that activate them. It is not our cognitive understanding that motivates us to leap out of the way of the oncoming vehicle — it is our fear affect. Interest-excitement and enjoyment-joy, the two positive affects, are counterbalanced by six decidedly negative affects (fear-terror, distress-anguish, anger-rage, dismell-disgust ('dismell' is a term created by Tomkins to indicate a negative reaction to a situation, and is associated with or similar to experiencing a 'bad smell') and shame-humiliation), all of which may be halted instantly by surprise-startle, an affect that is too brief to have either a positive or a negative flavour. By their effects on bodily structures that evolved for other reasons (for instance, heart rate, voice, facial musculature or sweat), these nine innate affects call attention to their triggering source in nine quite different ways.

Affect theory views the drives as simple biological needs. Thus, there is a drive to acquire sufficient water, a drive to reproduce, and a drive to maintain a continuous supply of oxygen. The drives provide relatively weak motivation — a drive must recruit an affect to bring a sense of urgency to the need. So it is not simply the drive to have air that helps us find the strength to fight our way to the surface if we are stuck underwater — it is the affect or affects that have been recruited by the drive. Tomkins also noted that there are some affects that function only to moderate other affects. One of these is the shame affect; it functions to moderate the positive affects. If a person is experiencing the pull of a positive affect toward some goal, and then encounters an impediment to achieving that goal, the shame affect is activated. The shame affect is not the same as the emotion we know as shame, but it is an essential part of that emotion.

Tomkins's work was further developed by Daniel Nathanson, especially in his study of the effects of shame (1998). Nathanson explains that shame is a critical regulator of human social behaviour. Tomkins defined shame as occurring any time that our experience of the positive affects is interrupted (Tomkins, 1991). So an individual does

not have to do something wrong to feel shame. The individual just has to experience something that interrupts interest-excitement or enjoyment-joy (Nathanson, 1997). Nathanson explains that shame is a critical regulator of human social behaviour.

The most critical function of restorative practices like victim–offender mediation and conferencing is restoring and building relationships. Because these processes promote the expression of affect or emotion, they also foster emotional bonds. Tomkins's writings about the psychology of affect (Tomkins, 1962; 1963; 1991) assert that human relationships are best and healthiest when there is free expression of affect — or emotion — minimising the negative, maximising the positive, but allowing for free expression. Nathanson adds that it is through the mutual exchange of expressed affect that we build community, creating the emotional bonds that tie us all together (Nathanson, 1998). Restorative justice practices such as victim–offender mediation, conferences and circles provide a safe environment for people to express and exchange intense emotion.

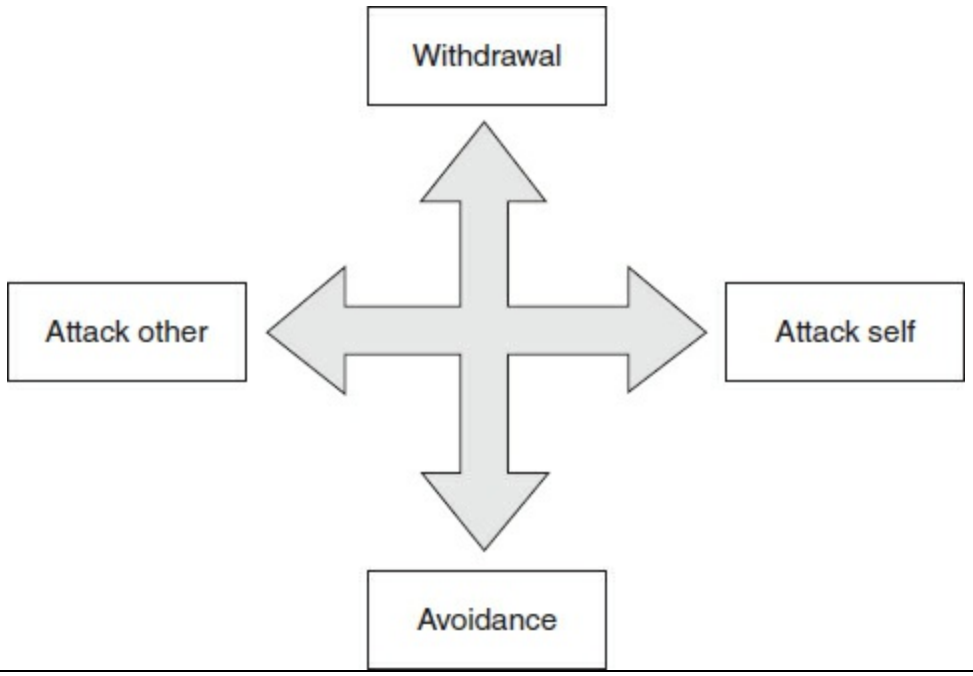
The way in which we cope with, or defend against, shame has important implications, especially within the criminal justice system, but also more generally in conflict management work. The 'compass of shame' scale was developed to assess use of the four shame-coping styles described by Nathanson (1992): attack self, withdrawal, attack other, and avoidance. These

four modes of response can be arranged in the shape of a compass, as shown in the diagram below.

8.13 The four poles of the compass of shame and behaviours associated with them are:

- *withdrawal* — isolating yourself; running and hiding;
- *attack self* — self put-down; masochism;
- *avoidance* — denial; abusing drugs; distraction through thrill-seeking; and
- *attack others* — turning the tables; lashing out verbally or physically blaming others.

The compass of shame



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According to this model, we all react to shame, in varying degrees, in the ways described by the compass. When one is entrapped by the compass of

shame we create a new network of defences and a new set of problems. At the 'withdrawal' pole it ends up costing us our social safety net — the sense of security we have when we are surrounded by friends and family. The 'attack self' pole places us in relationships with those who take pleasure in being unkind to us. We do not want to be alone so we reduce ourselves — it is like a form of masochism. These relationships are usually unstable and often deeply unsatisfying. When we operate from the 'attack other' compass pole, the way we treat people makes us feel bigger and better, at least temporarily, but it does not make us feel good. Life at this pole of the compass is risky, dangerous, contentious and lonely. Nathanson says that the 'attack other' response to shame is responsible for the increase of violence in modern life. People who live at the 'attack other' pole are, in reality, cowards who seek partners for their shame-borne sense of inferiority. This allows the attacker to cheat at the task of self-esteem. This is the bully, the scourge of the playground, the office and the classroom. When we defend against shame using the 'avoidance' pole of the compass, we trick ourselves into believing that we are part of an important crowd that is really connected to others. While most behaviour at this pole is relatively normal and is often characterised by escapes into consumerism and material things, to the extent we are avoiding learning about our shame it is counter-productive. According to this model it also manifests itself in drug-taking, yet those friends with whom we may be drinking or using drugs are usually escaping similar problems and are faking connection.

Restorative practices, by their very nature, provide an opportunity for us to express our shame, along with other emotions, and in doing so reduce their intensity. In restorative conferences, for example, people regularly move from negative affects through the neutral affect to positive affects. Restorative practices are not merely reactive, however. That is as a response to wrongdoing. The free expression of emotion inherent in restorative practices not only restores, but also proactively builds, new relationships and social capital. Many schools in Australia now use restorative practices such as

'circles' to provide students with opportunities to share their feelings, ideas and experiences, in order to establish relationships and social norms. In a similar way, other organisations and workplaces can use team-building circles or groups in which employees are afforded opportunities to get to know each other better.

Reintegrative shaming

8.14 The Australian academic, John Braithwaite, developed and published the theory of reintegrative shaming in his work *Crime, Shame and Reintegration* (Braithwaite and Mugford, 1994, pp 139–71). Through observing community conferences in Australia and New Zealand, Braithwaite recognised that the process of reintegrative shaming was a key dynamic that consistently occurred in community conferences. The consequent notion that community conferences are shaming ceremonies has attracted significant, and at times heated, criticism.

Shame, especially as it is used in the context of this discussion, is closely connected to a suite of emotions, feelings and responses that include both positive and negative components. These include humility, remorse, powerlessness, embarrassment,

vulnerability, grief and hurt. In a conference, shame is not something experienced only by the offender. Both the offenders and victims, as well as their supporters, are likely to experience a mixture of these emotions in the conference process. Some commentators argue that the success of conferences depends largely on the management of shame in the conference process.

According to Braithwaite, shame is an emotion which is largely repressed

in Western society. In his view we are 'ashamed of shame'. Consequently, the language of shame has acquired a predominately negative definition in Western usage. Braithwaite's theory of reintegrative shaming developed out of a comparison of societies with low levels of common crime (such as Japan) with those with high levels of common crime (such as the United States). He argues that those societies that achieve lower crime rates manage to effectively shame criminal acts while subsequently reintegrating the deviant actors once redress and apology has been made. Conversely, high-crime societies engage in stigmatising shaming, which does little to effectively prevent re-offending. Braithwaite suggests that there are two related dynamics that stop most people from offending. First, we do not offend because of our own private sense of right and wrong. This dynamic is traditionally referred to as our conscience. We would be personally ashamed of committing an offence or participating in some victimising behaviour. We are shamed internally. Second, we do not offend, because we would experience shame or disgrace in the eyes of those who are important in our lives. We are shamed externally. Our conscience operates in the private domain, but it has been formed as a result of our socialisation. For most people, an informed and active conscience effectively deters them from committing acts that the community holds as unacceptable. However, we experience 'disgrace shame' in the public domain. The experience of this shame depends on our connectedness or integration in the community. We will not experience disgrace shame if we do not feel we belong to a community of people who care about us.

The theory of reintegrative shaming argues that an effective response to offending behaviour is to shame the actions of the offender, while through the same process strengthening the connectedness of the offender to his or her community of care. Braithwaite suggests that the Western criminal justice system effectively manages to stigmatise people who have offended.

The conference is often conceived as a process which can achieve the dynamic of reintegrative shaming. This is most effectively achieved not by lecturing or castigating the offender, but rather through the participants

explaining the way his or her behaviour affected them and the hurt or damage caused.

John Braithwaite explains (1994, p 142):

> In a reintegration ceremony, disapproval of a bad act is communicated while sustaining the identity of the actor as good. Shame is transmitted within a continuum of respect for the wrongdoer. Repair work is directed at ensuring that a deviant identity (one of the actor's multiple identities) does not become a master status trait that overwhelms other identities. Communicative work is directed at sustaining identities like daughter, student, promising footballer, in preference to creating 'master' identities like delinquent.

Tyler's theory of procedural justice

8.15 There are a number of models of procedural justice: see **Chapter 9** for a more detailed summary. The two major model types are the 'instrumental' and the 'relational'. Tyler's model is the exemplar of the latter. Whereas the instrumental model posits that fair process will lead to fair outcomes, Tyler's relational model contends that the psychological implications of procedural justice operate independently of outcomes (Tyler, 1990; Tyler and Huo, 2002). His model is based upon the assumption that membership of a group is a powerful part of individual identity and social life. He argues that procedures are evaluated in relation to group membership and the relationship with the group authority. In these terms, a fair procedure elicits a positive relationship with the group, while an unfair procedure indicates low status and that the group does not care. Because of these factors one's attitudes are impacted by our evaluation of the fairness of procedures. There are two key elements in this model. The first is our interpersonal treatment. This particularly relates to evaluations of being treated with respect and with one's dignity or face being protected or enhanced. The second is to do with the quality of decision-making and, in particular, its

accuracy, neutrality, consistency and opportunities to participate. These elements have considerable impacts upon our propensity to accept the decisions made in processes like conferencing or mediation.

From this it follows that criminal sanctions in our justice system are less likely to ensure compliance, because they often lack or perform poorly on some of these elements for participants. This is because compliance depends upon self-regulatory behavior. Of course, the favourability of a decision is an element of importance along with fair outcomes and fair procedures. But in Tyler's model the fairness of procedure is thought to be most important.

Restorative processes, and for that matter most ADR processes, attempt to build in many of these elements that Tyler mentions, to ensure compliance and to encourage more positive self-regulatory behaviours.

Sherman's defiance theory

8.16 Sherman's defiance theory, like neutralisation theory, is useful because it goes some way to explain the ways in which offenders respond to punishment (Sherman, 1993). The theory identifies four concepts in the emotional response to punishment: (1) legitimacy of the sanctioning agents; (2) strength of the social bond between the offender and the sanctioning agent; (3) shame; and (4) pride. The theory holds that punishments will provoke future defiance depending on the degree to which offenders perceive punishment as illegitimate, have weak bonds to society, deny their shame, and feel prideful about their rebellious spirit. These factors have long been identified by restorative justice practitioners and theorist alike.

Collins' theory of interaction ritual chains

8.17 Drawing on some key sociological works, Collins argues that in a situation of co-presence such as a group, a ritual can be created when those physically present focus their attention on specific people, objects or symbols

(Collins, 2004). Through this focus those present are thereby constituted as a distinct group with more or less clear

boundaries. This would obviously include religious rituals, but also a large number of interpersonal interactions, which can include restorative justice conferences or mediation.

The key point is that such rituals emphasise and amplify emotion. They leave us excited and sometimes exhilarated. Importantly, they motivate us to do things like read books, change our behavior and become further involved with like groups. These rituals can also be demotivating and sap us of energy. They can cause us to feel sad and even depressed.

Collins posits that we actively seek out these emotional energy sources to energise and thereby motivate ourselves. Our ability to access these various rituals is dependent on our resources to do so. Some of us have more of these resources than others. Therefore, we can see our 'interests' as being intimately connected with the rituals we are able, or forced, to be involved in and how we are motivated or de-motivated by them as the case may be. Further, these rituals frame and charge particular values and symbols, which is obvious in a religious-type ritual but which also applies to other rituals as well. (I am reminded of the reverence I have for the red sash on a black background of 'my' football team.) Of course, demotivating rituals can have the opposite effect as well. The success of the ritual can be measured by its ability to motivate us to do certain things; for example, joining a football club so you can attend games for the season. The symbols then have value in social situations and participants in the rituals carry their meaning like apostles around other groups and with other individuals they encounter. In this way, identity is formed through the adoption of values and symbols and their carriage beyond the ritual group.

But this means that such values and symbols are relative and have motivational potential, depending on other people's understanding of them. In other words, outside the immediate context of the ritual the emotional energy can be transmitted to motivate people, but this depends upon how others view such symbols.

Collin's theory enables us to understand how belief systems, religious or otherwise, can be intimately attached to rituals and the symbols thereby generated. Often the ritual allows us to enter or brings us into a value system. There is also in this sense a need for reinforcement (although Collins does not use this term) where the rituals need to be repeated at regular intervals to maintain their potency for the particular belief system. Regular meetings and gatherings reinforce the solidarity of the group and its ability to stay motivated. The rituals of attending a protest rally or political meeting are not necessarily to learn anything but to be with others and to reinforce our solidarity. We could therefore interpret attempts to curb the ability of groups (unions, workers, bikies, criminal gangs, etc) as attempts to disrupt their ritual chains and their ability to motivate their members.

In a restorative justice conference, and in some mediations, one can see the emotional charge being built up through the carefully choreographed sequence of interventions and exchanges orchestrated by the convener. It is the joining of the group in the emotional exchange that can be very charged and motivating for the group. The ritual of physically being together is powerfully reinforced also by the circular seating arrangements and egalitarianism of the placement. The intensity of the emotional experience generated is central to the restorative process, just as it may be in a religious

meeting. For a micro-analysis of the application of this model to a restorative justice process see Rossner (2011; 2013). Rosser analyses a single video-

recorded conference in detail involving the theft of a handbag, with particular regard to facial expressions and body language, and excerpts are transcribed. There is an emotional turning point in this case when the offender's partner describes graphically the state her family was in when the offender took his desperate step and grabbed the victim's handbag. Her motivation for providing this narrative may be questioned, but Rossner argues that her motivation does not matter because the conference gains an emotional energy that makes it work.

Restorative justice and responsive regulation

8.18 Braithwaite builds his model featured in the book *Crime, Shame, and Reintegration* from earlier work on the regulation and control of the pharmaceutical and mining industries (Braithwaite, 1984; 1985; Braithwaite and Makkai, 2007). Braithwaite's theory of reintegrative shaming was originally motivated by studies of white-collar crime, which he subsequently applied to common street crime. His central idea was to focus on the regulation of conflict and wrongs rather than on methods of controlling or punishing wrongdoers.

In *Restorative Justice and Regulation* Braithwaite extends these ideas to incorporate regulation and to far-reaching legal and social reforms across a multitude of sectors (2002). Like in his other works, Braithwaite's concern is not just process, but values. His list of these includes (2002, pp 14–15):

- restoration of human dignity;
- restoration of property loss;
- restoration of injury to the person or health;
- restoration of damaged human relationships;
- restoration of communities;
- restoration of the environment;

- emotional restoration;
- restoration of freedom;
- restoration of compassion or caring;
- restoration of peace;
- restoration of empowerment or self-determination; and
- restoration of a sense of duty as a citizen.

Braithwaite argues that punishment should be in the background and not in the foreground. In particular, he draws on his earlier (1992) work that identified the tension inherent between punitive sanctions and cooperation and between State control and free-market theory. The argument here is that regulation should, and can, be framed as an interactive process, the content and outcome of which are mutually determined by the State and the regulatees rather than as a one-sided event. The authors identify four contradictions or tensions that develop as part of the interactive process, and the possible responses to them. These are summarised in the table below.

Contradictions and/or tensions	Response
1. Between punitive action and cooperation concerning regulators and regulatees.	Regulators can apply a tit-for-tat strategy; that is, cooperation then hierarchical punitive action — reduce costs of cooperation.
2. Between regulators being 'close' to the regulatees	Regulators can allow public issue groups or other

	and being 'captured' by them.	stakeholders into the process of monitoring.
3.	Between applying general standards and between regulatees.	Regulatees could write their own compliance plans subject to approval.
4.	Between applying full regulation and laissez faire freedom.	Partial regulation (upon, for example, individual large corporations) and subsidies to fringe or marginal players to enable them to comply.

Evaluation of Restorative Justice Processes

8.19 As restorative justice processes have been developed and implemented over the past 20 years, there has been an increasing but still limited interest in research into and evaluations of them. Despite this, most of the practices described as 'restorative justice' have never been subjected to controlled field tests (Strang et al, 2013, p 7). Those tests that have been conducted have shown a positive impact on participant satisfaction, recidivism and reductions in negative impacts for victims; however, most have focused on restoration of the victim (Latimer, Dowden and Muise, 2005). The 2005 study by Latimer, Dowden and Muise reviewed eight conferencing and 27 victim–offender mediation programs. The major results of this analysis are summarised as follows:

- *Victim Satisfaction:* In all but one of the 13 restorative programs studied, victims were more satisfied than those in traditional approaches. However, the authors interestingly note (p 136) that the victim–offender mediation models tended to yield higher levels of victim satisfaction rates than conferencing models when compared to the non-restorative approaches.

They suggest that this result may be explained by the conferences typically having more participants and thus it may be more difficult to find much satisfaction with an agreement (p 136).

- *Offender Satisfaction:* Initial analysis shows 'no discernible impact' on offender satisfaction. However when an outlier program was removed, moderate to weak positive impact on offender satisfaction was noted (p 137).
- *Restitution:* Offenders who participated in restorative justice programs tended to have substantially higher compliance rates than offenders exposed to other arrangements (p 137).
- *Recidivism*: 'Restorative justice programs, on average, yielded reductions in recidivism compared to non-restorative approaches to criminal behaviour.'

Mark Umbreit et al (2002) completed a major review of programs in five countries, evaluating them on criteria including client satisfaction, fairness, restitution, diversion, recidivism and costs, and found similar results to the study

cited above. The findings were overwhelmingly positive, with victims reporting very high satisfaction rates (Braithwaite, 1999), although the findings were tempered by a self-selection bias. Equally important, some would argue, is offender reparation (Bazemore and Dooley, 2001). Offender reparation involves taking responsibility for the harm caused and preventing future offending. This latter outcome is extremely important to a general public that expects the criminal justice system to reduce the likelihood of re-victimisation.

8.20 A review by Sherman and Strang (2007) of research on restorative justice in the United Kingdom, Australia and other jurisdictions found that in

36 direct comparisons to conventional criminal justice processes, restorative justice:

- substantially reduced repeat offending for some offenders, but not all;
- doubled (or more) the offences brought to justice as diversion from criminal justice;
- reduced crime victims' post-traumatic stress symptoms and related costs;
- provided both victims and offenders with more satisfaction with justice than criminal justice;
- reduced crime victims' desire for violent revenge against their offenders;
- reduced the costs of criminal justice, when used as diversion from criminal justice; and
- reduced recidivism *more than* prison did (adults) or *as well as* prison did (youths).

These conclusions were based largely on two forms of restorative justice: face-to-face meetings among all parties connected to a crime, including victims, offenders, their families and friends; and court-ordered financial restitution. Most of the face-to-face evidence is based on consistent use of police officers trained in the same format for leading restorative justice discussions. These meetings were tested in comparison with conventional criminal justice without benefit of restorative justice, at several stages of criminal justice for violence and theft:

- as diversion from prosecution altogether;
- as a pre-sentencing, post-conviction add-on to the sentencing process;
- as a supplement to a community sentence (probation);
- as a preparation for release from long-term imprisonment to resettlement; and
- as a form of final warning to young offenders.

In relation to violent crimes, six rigorous field tests found that restorative justice reduced recidivism after adult or youth violence. Three of the six field tests were randomised controlled trials conducted with people under 30 years of age in Canberra, females under 18 years of age in Northumbria and (mostly) males under 14 years of age in Indianapolis.

Reasonable comparisons also showed effects for adult males in West Yorkshire and the West Midlands, as well as for violent families in Canada.

In relation to property crimes, the Sherman and Strang research found that five tests of restorative justice have shown reductions in recidivism after property crime. Four were random controlled trials done with youth: in Northumbria, Georgia, Washington

and Indianapolis. In contrast, diversion of property offenders to restorative justice increased arrest rates among a small sample of Aboriginals in Canberra. In relation to victim benefits, two random controlled trials in London showed that restorative justice reduces post-traumatic stress; in four random controlled trials, restorative justice reduced the desire for violent revenge; in four random controlled trials, victims preferred restorative justice over criminal justice processes.

In a comparison of restorative justice versus prison, an Idaho-based random controlled trial of restorative justice showed that as court-ordered restitution it did no worse than short jail sentences for youth in relation to recidivism. In Canada, adults diverted from prison to restorative justice had lower reconviction rates than a matched sample of inmates.

Five random controlled trials in New York and Canberra showed diversion to restorative justice resulted in much higher rates of disclosure of offences into the justice system. The rates of disclosure were 100–400 per cent higher

than criminal justice processes, including for robbery and assault, when offenders take responsibility but need not give a full admission to the crime.

Sherman and Strang conclude that the evidence on restorative justice is far more extensive and positive than for many other policies that have been rolled out nationally (Sherman and Strang, 2007, p 88). They suggest that restorative justice is ready to be put to far broader use, 'perhaps under a "restorative justice board" that would prime the pump and overcome procedural obstacles limiting victim access to restorative justice. Such a board could grow restorative justice rapidly as an evidence-based policy, testing the general deterrent impact of restorative justice on crime, and developing the potential benefits of "restorative communities" that try restorative justice first.'

As a comprehensive multiplex evaluation of a Canadian project involving serious criminal offenders concluded (Public Safety and Emergency Preparedness, 2005, p 4):

> Further research is required that explores the differences between those who participate in restorative initiatives and those who do not, as well as to determine the optimal conditions for restorative justice values and approaches to thrive, providing the 'richest' results. Studies utilizing random assignment will likely be more successful at detailing the effects of restorative justice programs. Lastly, in order to examine participant change over time, future studies need to incorporate comprehensive pre-program and post-program structured measures that include assessments of offender criminogenic needs and a lengthy follow-up period for assessment.

A more recent review by Strang et al (2013) investigated the effects of conferencing on offenders' subsequent convictions (or in one case, arrest) for crime, and on several measures of victim impact. The review considered only randomised controlled trials in which victims and offenders consented to meet prior to random assignment, the analysis of which was based on the results of an 'intention-to-treat' analysis. A total of 10 experiments (two from Australia) with recidivism outcomes were found that met the eligibility criteria, all of which also had at least one victim-impact measure. The authors found that on average, conferences cause a modest but highly cost-effective reduction in repeat offending, with substantial benefits for victims. A cost-

effectiveness estimate for the seven United Kingdom experiments included found a ratio of eight times more benefit in costs of crimes prevented than the cost of delivering the conferencing program.

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The evaluation of restorative justice is closely related to the development of regulatory or other standards which may be developed in relation to its use.

Standards and the Regulation of Restorative Justice

8.21 After much debate in the mediation industry, there has been progress relating to the implementation of accreditation and standards for mediators; two approaches to accreditation have been formulated. The first is a voluntary base-level accreditation scheme, recently accepted by the mediation industry, known as the National Mediation Accreditation System (MSB, 2015). The second approach is a legislated compulsory accreditation system provided for in the Family Law Amendment (Shared Parental Responsibility Act) 2006 (Cth) which outlines an accreditation system for family dispute resolution practitioners, including mediators. The United Nations had already moved towards the establishment of a set of principles for restorative justice in criminal matters (2002; 2005). Clause 12(c) of its Basic Principles on the Use of Restorative Justice Programs in Criminal Matters (2002) provides that Member States should, inter alia, consider establishing guidelines for the qualifications, training and assessment of facilitators of restorative justice processes.

8.22 The question of regulation in relation to restorative justice is complex

(Condliffe and Douglas, 2007). At present there is no systematic accreditation of restorative justice practitioners within Australia.

Many of the reasons for the introduction of accreditation protocols for mediation could be applied to conferencing, although there are a number of issues that differentiate the two areas and require some consideration. These include the comparative 'newness' of the conferencing field and its dependence on government subsidiaries or outsourced government-funded services. Related to this is the fact that the practice of conferencing, unlike a substantial amount of mediation, occurs principally within highly-regulated contexts. Conferencing mostly occurs as an adjunct to court-based schemes and is increasingly used in other institutionalised settings such as schools (Roche, 2006). Finally, the role of the convenor is little researched, explained or understood in the literature. Roche argues that in this respect convenors have much to learn from the literature relating to mediation, in both understanding differences in models of dispute resolution and in the role of the third party (2006, p 226).

Arguably, since the bulk of conferencing practice occurs in agencies rather than in private practice, the overall need for accreditation in the conferencing sphere is less evident than in the mediation industry, where institutional regulation already occurs in many places. However, this argument should be tempered with the knowledge that, due to the paucity of research into conferencing practice, conferencing standards in agencies are unclear and it may be the case that practice is somewhat ad hoc.

Braithwaite (2000) refers to the debate around standards and accreditation as 'dangerous'. He states:

> I worry about accreditation for mediators that raised the spectre of a Western accreditation agency telling an indigenous elder that a centuries-old restorative practice does not comply with the accreditation standards.

Braithwaite is concerned that standards may become too prescriptive and thus inhibit innovation. He observes that restorative justice is still evolving and the industry is still learning how to do restorative justice well. Braithwaite's caution is also fuelled by observations regarding the still rudimentary state of evaluation research. Nevertheless, he concedes that because a 'practice masquerading as restorative justice' exists, there is little option but to enter into a prudent standards debate. He favours 'open-textured' standards, meaning broad statements of standards. He is concerned to avoid 'legalistic regulation' of restorative justice practices to which overly specific standards may lend themselves. This approach is a values-based one using the framework of various United Nations human rights instruments and emphasising the need to prevent 'domination' (or power imbalances) within restorative process practices.

Braithwaite clearly belongs to the body of opinion that prefers a relatively informal, non-bureaucratic approach to the accreditation of convenors. This is contrasted or opposed by a view that convenors should be highly professionalised and qualified (Nadeau, 2004). It is interesting to observe that Braithwaite and other commentators place the accreditation of practitioners within the context of standards of practice. These two matters surely overlap, but the latter is a wider concern that brings in not only the individual training and standards expected of the practitioner but also organisational, structural and system-wide issues, particularly related to resourcing, placement and legislative safeguards. There is a wide range of programs identified as 'restorative' in Australia, with dissimilarities between their various systemic and organisational contexts but still with a reliance on conferencing.

The United Kingdom's Training and Accreditation Group's advice to its government on these issues concluded that core skills across the various contexts of conferencing practice in the United Kingdom were the same (United Kingdom Home Office, 2004, p 5). They further concluded that there was a need for new occupational standards for restorative practice (p 6). The report recommended that the Association of Restorative Practices (ARP

(UK)) ensure that the criteria for membership should be based on the attainment of certain training or pre-existing training (p 17). The report lists a set of key knowledge and skills and outlines six separate areas of competencies that should be considered in training and accreditation of restorative practitioners. The competencies are: core restorative practice; sensitive and complex cases; family group conferencing and processes involving welfare planning; co-working; case supervisors; and line managers (pp 15ff). The rationale for these recommendations is essentially twofold: first, to ensure quality of service to all participants in such processes; and second, because restorative practice is a 'recognised and respected activity and profession' (p 5).

Clearly, the extent and practice of conferencing in the United Kingdom is more extensive than in Australia. Moreover, it has the distinct advantage of having a relatively unitary system of justice administration, unlike Australia with its kaleidoscope of state jurisdictions and their jigsaw of programs. In my view, this diversity in programs presents one of many impediments to a national accreditation and training scheme in Australia, and may slow down any attempt at a similar unitary scheme to that which operates in the United Kingdom.

This diversity of Australian programs perhaps points to the need for some identification of core knowledge and skills that can be then applied to training and accreditation systems as suggested above. This is because, while legislative and procedural requirements may differ, there is a core of similar practice paradigms.

It is clear that the accreditation of conveners and the implications this has for their training, educational qualifications and perceived 'professionalism' will have a significant impact on the way the programs are run and

administered. Along with the establishment of standards for the administration of such programs, this will lend itself to the relative formalisation of restorative justice within the criminal justice system or other systems. The traditional ways of measuring success within the criminal justice system, such as recidivism, cost-effectiveness, timeliness and satisfaction rates, may not be the best way of measuring the success of restorative justice processes. There is a basic difference in underlying values between the retributive and restorative modes of operation. This is not to say that restorative justice programs are not successful using these traditional parameters; rather, that measuring something which is fundamentally different in its underlying values approach requires some different thinking.

The development of a set of overly rigid accreditation standards and protocols may not only stultify practice (as Braithwaite suggests), it may also affect the development of the underlying values and the ethical ethos that is emerging. In some ways we can equate this to the slow development of ethical principles over many centuries in our criminal justice system. If prematurely developed, such standards may further impede developments in restorative justice. This necessarily implies both a thorough understanding of the core values and their recognition in developing accreditation and standards protocols.

Traditionally, the Western criminal justice system has relied on well-established principles of natural justice to protect participants in the pre-trial and trial process. The question posed by the debate around accreditation and standards is: Do these principles apply to restorative justice processes in the same way as in traditional justice system? If not, does this mean that standards of accreditation and practice should be broad enough to allow flexibility in process? In attempting to heal the harm to victims and communities affected by wrongdoing, the role of the offender and the network of rights surrounding him or her may be affected. However, imposing strict guarantees of due process on restorative justice processes may

be detrimental to their effectiveness and even change their fundamental meaning.

Related to this concern is the role of lawyers in the process. Most standards would include the need for offenders, and sometimes victims, to be ensured legal representation and advice. The issue is the extent of the representation. Most restorative justice advocates would argue that the processes they engage in are more understandable and transparent and less combative (conflict-escalating) than traditional adversarial processes; therefore, the need for lawyers is lessened. This may indeed be the case, but most restorative justice systems in Australia are relatively small in scale and scope. The potential abuse of persons will become more evident as these systems grow or become incorporated as part of large-scale programs. Procedural safeguards are required and will need to be carefully worded.

Restorative justice has developed, in part, as a way of ensuring that not only victims but also wider sections of the community can participate, and understand their participation, in the criminal justice process. In the traditional legal system, a select and highly educated and trained group of people administer and run the system. Would the development of accreditation protocols and standards be the first step in this direction? In particular, would it lead to the co-option of restorative justice by a select group of legal practitioners? An underlying principle of restorative justice is community involvement, including that of the convenors with their communities. Placing arbitrary and excessive constraints on participation in the process on convenors may begin or accelerate the progression to a co-opted system removed from its community. This is especially so for our Indigenous communities. If guidelines and standards are to be adopted they need to take account of these underlying communitarian principles.

Not only does the convenor of a restorative justice process have to create a safe environment in a relatively informal setting, he or she must do so in a way that enables the parties to explore and ventilate deep-seated feelings and beliefs. These approaches are not generally characteristics of the legal process, except perhaps in new problem-solving courts in our criminal justice system such as the Drug and Alcohol Court in Victoria. The traditional legal system needs to be flexible enough to allow these innovations; that is, to respect and value these processes.

Power imbalance, for both victims and offenders, is a crucial concern in restorative justice literature. Notably, Braithwaite argues that power rests in conferencing with the stakeholders rather than the third party and due to the 'plurality of voices' there is less need for the convenor to act to address power concerns as participants will collectively deal with such concerns (Braithwaite, 2006, p 396).

Young offenders are particularly subject to such imbalances. Victims can easily be re-victimised in processes that do not recognise the various layers of power. Accreditation protocols and standards must take into account the subtleties of power in restorative processes (Presser, 2006). The concept of power in mediation has been extensively debated (Astor, 2005).

Conveners must be able to understand and screen not only offenders, but victims as well. As many administrators of restorative programs attest, most of the work is done in screening and preparing parties for processes such as conferencing, rather than in the conference itself. Offenders tend to be heavily screened in most Australian programs because they are mainly in the juvenile sphere and pre-court processes. Also, issues of guilt or culpability have often been dealt with already. However, this may not be so evident in programs that move outside the sphere or which occur in systems such as schools. It is possible for both offenders and victims to manipulate restorative justice processes to ends that are not within the objectives of the program. Obviously, convenors need training in these dynamics, to be able to safeguard

the range of individuals involved. This will be especially so as these programs expand.

The potential for an accreditation system for conference convenors to provide an articulated core process along with appropriate standards, training protocols, and possibly a forum for ongoing theory and skills development is enticing. However, the

dangers of such an endeavour are real and I do not believe that a mandated system is appropriate. Rather, a voluntary system may be worth exploring as a means of providing convenors with a benchmark for practice.

Following a period of consultation, the Law Reform Committee (LRC) of the Victorian Parliament (2009), as part of an inquiry into ADR and restorative justice, recently recommended (2009, p 307):

> **Recommendation 64: Identification of core skills and attributes of restorative justice practitioners**
>
> The Victorian Government, in consultation with practitioners and the Victorian Association of Restorative Justice, should develop a list of core skills and attributes required by restorative justice practitioners.

The Victorian Association of Restorative Justice (VARJ), a voluntary non-governmental organisation, had been developing draft standards and an accreditation protocol before the LRC began its inquiry. Encouraged by the LRC's recommendations, VARJ began a comprehensive consultation process in 2009. The result was the development of an Accreditation Scheme and related Best Practice Standards for Restorative Justice Facilitators (VARJ, 2009). You can view this accreditation scheme at <www.accreditation@varj.asn.au>. In this Australian first, and perhaps world first development of an accreditation scheme, the VARJ documents offer a useful overview of practice standards in this field.

The preamble to these documents claims that the benefits identified by the National Alternative Dispute Resolution Advisory Committee (NADRAC, 2006; 2008) in relation to regulating mediation practice can be replicated in restorative justice conferencing (2009, pp 4–5). These include to:

- maintain and improve the quality and status of restorative justice practice;
- protect consumers;
- facilitate consumer education about restorative justice practice;
- build consumer confidence in restorative justice practice services;
- improve the credibility of restorative justice practice;
- build the capacity and coherence of the restorative justice practice field; and
- promote Victoria's, and Australia's, profile in the restorative justice practice field.

The consultation process conducted by VARJ revealed strong support for the development of standards and accreditation procedures in the evolving field of restorative justice. At about the same time as this was happening in 2008, the United Kingdom Restorative Justice Consortium commissioned a consultancy (JPA Europe Limited) to conduct a 12-month project to define and test accreditation for restorative practice and, based on the results, develop a blueprint to map out the way forward in accreditation for the restorative practice sector. The Restorative Justice Council of the United Kingdom consequently set up a voluntary accreditation scheme, which can be viewed at <http://restorativejustice.org.uk/how-do-i-become-accredited-practioner> (accessed 28 July 2015). Accreditation can be achieved depending upon experience and/or training completed and acceptance of a practitioner code of

practice. Australia does not have equivalent arrangements as yet; however, the National Justice CEOs Group, Standing Committee of Attorneys-General (SCAG) produced a discussion paper, 'National Guidelines or Principles for Restorative Justice Programs and Processes for Criminal Matters', released in March 2011: see <www.lawlink.nsw.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_natrestorativ The Standing Council on Law and Justice endorsed the Restorative Justice National Guidelines at its meeting on 10–11 October 2013. The Guidelines are intended to promote consistency in the use of restorative justice in criminal matters across Australia and provide guidance on outcomes, program evaluations and training in line with the United Nations principles noted above (SCLJ, 2013).

The Conference Process

8.23 Jasmine Bruce describes the conferencing process as a dramatic event rather like conducting an orchestra (Bruce, 2013). There is some truth in the metaphor, particularly if the 'music' being played is one with potential to generate emotions. The process described here is not definitive of how a conference should proceed; however, it covers the essential elements of such a process and can be adapted to the needs of the participants and of particular settings. The material is taken mainly from *The Conferencing Handbook: Practising Restorative Justice* (Condliffe, 2006). Other useful material based upon an evaluation of the New South Wales Forum Sentencing Program (Conferencing with Offenders) can be found in Rossner, Bruce and Meher's *The Process and Dynamics of Restorative Justice* (2013). As Umbreight noted, in the context of victim–offender mediation, it is a 'dialogue driven' process with an emphasis on engagement and relationship building rather than outcomes (Umbreight, 1999, p 13). He stated that it is a:

> … 'dialogue driven' rather than 'settlement driven' form of conflict resolution. It emphasizes the importance of: meeting with the parties individually and in person prior to the joint mediation

session, in order to listen to their story, build rapport, explain the process and prepare them for engagement in a mediated dialogue; a non-directive style of mediation in which the parties are primarily speaking to each other with minimal intervention by the mediator/facilitator; and a mediator/facilitator attitude of unconditional positive regard and connectedness with all parties, while remaining impartial (eg, not taking sides).

Conferencing is the third-party facilitation of an issue, usually through the bringing together of those affected in a circle arrangement, to discuss concerns and to possibly develop an action plan to address those concerns. It is a staged process where the convenor, or coordinator, gives participants the opportunity to tell their story of the experience of a crime or a conflict. It is closely aligned with victim–offender mediation, but differs from that process due to the inclusion of a wider group of people in the meeting (Moore, 2008). Conferencing in the criminal justice context generally includes family members, police, youth workers, victims and victim support workers and, possibly, lawyers.

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Components of successful restorative justice processes

Rossner, Bruce and Meher (2013, p 7), in a report to the New South Wales Attorney General and Justice Department, suggest the following as important elements of any successful restorative justice process. This includes a well thought-through preparation stage and then they describe three stages in the process itself:

Preparation

- Streamlined referrals process.
- Eligible cases (identified harm).
- Suitability assessment of offender.
- Identification of appropriate participants.
- Consent and preparation of participants.
- Finding appropriate venues.
- Facilitator training.

Stages 1 and 2

- Primary participants present.
- Active participation.
- Sincere expression of responsibility.
- Meaningful expression of harm.
- Narrative or story that everyone involved in the process agrees with.
- Non-domination.
- Facilitator management.
- Scripted questions and prompts.

Stage 3

- Apology and symbolic reparation.
- Agreement is made to repair harm.
- Agreement is made to address reoffending.
- Agreement is effectively negotiated.
- Balanced negotiations and non-domination.
- Active participation and empowerment.
- Forum length.

Mediation and Conferencing

8.24 When considering the synergies and differences between mediation and conferencing, it is important to remember that neither is clearly defined in the literature. The practice of conferencing is diverse. Most conferencing practice is informed by various theoretical approaches as outlined above, and these theories differ in terms of the definition they may apply to processes (Daly, Hayes and Marchetti, 2006, pp 441–6). Put simply, restorative justice attempts to place the victim with the offender at the centre of the process. Therefore, instead of defining crime solely in terms of a violation of the State, it attempts to define crime in terms of the violation of one person by another. The focus is on providing a forum for the offender to take

responsibility and to make amends, rather than to establish guilt and exact punishment (Braithwaite, 1989; 2002). The potential benefits include increased participation for victims who, rather than being spectators to a court sentencing process which they do not fully understand, can participate and discuss their feelings directly with the person who caused them injury. Victims also can attempt to seek answers to questions about why the crime occurred and participate in the process of working out how the injury and damage can be repaired. Offenders also have an opportunity to admit their offence, understand the consequences of their behaviour on others and participate in the discussion on how to make things right. Generally, offenders will only participate where there has been an acknowledgment of guilt and they voluntarily agree to be part of the process. Restorative justice therefore attempts to move the emphasis from guilt and punishment to responsibility and reparation. In this model, justice is achieved through the offender taking responsibility for his or her actions, taking steps to make reparation and addressing the harm to the victim.

Conferencing also tends to acknowledge the role of the community in the process of 'restoring harm' (Moore, 2004, p 82). One of the key differences in the practice of conferencing from most mediation models is the inclusion in conferencing of a wide group of participants who are given the opportunity to tell their story as part of the process. Braithwaite maintains that this wider group, a 'plurality of voices', supports the convenor to handle inappropriate behaviour (Braithwaite, 2006, pp 395–6).

The role of the community is limited in some models of mediation; for example, the settlement and evaluative models do not normally consider the community in the dialogue. Arguably, interest-based models of mediation using negotiation theory tend to focus on individual needs. In contrast, the transformative model of mediation includes in its philosophy of conflict

transformation a consideration of community (Bush and Folger, 2005). Thus, the transformative model, particularly with its emphasis on social psychology and the emotional dimensions of conflict, is possibly closer to the practice of some forms of conferencing than other models of mediation. Narrative mediation, with its emphasis upon dialogue, is also perhaps more attuned to the restorative approach: see **Chapter 7** for a description of these various models of mediation.

Moore makes the point that conferencing generally occurs in a different 'administrative place' to mediation, and is based on a 'transformative conflict' approach (2004, p 73). He argues that mediation typically takes place as an adjunct to court systems, while conferencing can be both an 'alternative' and an 'adjunct' to court processes. He also argues that conferencing differs from mediation in its emphasis on a whole community affected by an incident or incidents and the associated conflict. Further, he states that conferencing is designed for cases where interpersonal conflict is the presenting problem. This assertion is obviously debatable, given the diversity of practice in mediation and the significant use of mediation in contexts that are not connected with the courts, such as disputes in business teams or as part of internal grievance processes. Moore also makes an interesting distinction between the term 'conflict' and the term 'dispute' (2004, p 82). He regards the term 'conflict' as a more general description than the term 'dispute', and categorises a dispute as involving at least two persons but not necessarily involving negative feelings. Conflict, in his view, specifically involves negative feelings. He concludes that when someone admits,

as in the typical pre-conference scenario, to having acted in a way that offended or victimised others, there is an undisputed harm — although not necessarily any dispute — between participants. Therefore, rather than

negotiating (as in a mediation) to solve the problem of the dispute, the primary goal in conferencing is to acknowledge the conflict (that is, the negative emotions) between people and then transform this conflict into cooperation.

The empowerment model

An interesting and practical contribution to the literature for practitioners which brings together many of the above ideas is the book *Restorative Justice — The Empowerment Model* (Barton, 2003).

Barton suggests that the disempowerment of primary stakeholders in a conflict often undermines the effectiveness and potential of restorative meetings. In order to address the issue of disempowerment he thinks the practitioner should take the parties through an empowering process, which includes consultation, discussion, venting and negotiation. This empowering progression can often allow reconciliation and healing to occur. Barton explains that all parties need to be collectively empowered, so they can all be satisfied with the ultimate result, by collectively addressing the causes and consequences in a way that is meaningful for them.

According to Barton, restorative justice is characterised by a number of principles, including the following:

- participants should be empowered to tell their story in, and before, a conference and encouraged to do so in a way that reveals the emotional harm and hurt caused by the offending;
- offenders should be supported and treated with respect;
- the focus of condemnation should always be the actions of the offender rather than the person themselves; and
- shaming is not something done to the offender; rather, shame is something that the offender will experience when he or she hears how his or her actions have hurt or damaged others.

In a sense, conferencing can be seen as a subset of mediation practice, or a type of mediation practice where the focus is on dialogue and transformation. Moore's approach follows further consideration in the mediation movement itself of paradigms of conflict that seek to maintain the need for transformation in a manner similar to the way that he describes. The catalyst for this change in thinking around mediation (arguably, not yet fully developed) has been largely the work of Bush and Folger in their discussion of transformative mediation, but there are also a number of other writers and

practitioners that might also be described as 'transformative' in their approaches.

Stages of the conferencing process

8.25 Describing the stages or phases of the conferencing process is difficult, as it often needs to be varied to meet the circumstances of particular cases or programs. Nevertheless, the stages outlined below will provide a general guide to what may occur in a typical case.

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Stage 1: Pre-conference

The intake process

8.26 Prior to a conference, pre-conference preparation (intake) is conducted with all participants. Intake includes the administrative function of arranging a suitable time and venue for the conference. The most substantial component of the intake process is the pre-conference preparation of each of the participants

Usually, intake will involve face-to-face interviews with the key participants: the victim(s), people affected by the actions of the offender, the offender and, where applicable, their support persons.

Victims sometimes present with significant levels of trauma and pain as a result of the harm and suffering experienced from the offence. The intake process gives them the opportunity to discuss the offence and its impact. Normally this would take place in a face-to-face meeting. The process should ensure that informed consent has been given by those participating in the process.

The conference process should be outlined and the participants asked to consider realistic outcomes. It may also be useful to ask them to identify suitable support people.

In some programs, two convenors will attend each conference. The purpose is to:

- provide support to each other through the conference process;
- enable less experienced conference convenors the opportunity to work with more experienced convenors;
- assist in debriefing after the conference is completed, including providing feedback to the other convenor and completing the report to the coordinator; and
- provide training and to 'share' the process with a trainee, to further sensitive them to the process and assist in peer review.

Seating plan

8.27 In a conference, participants typically sit in a horseshoe-shaped pattern where possible, not separated by a table. Each person should have a nametag if there are numerous parties — these may be placed on seats prior to the conference to help participants know where to sit. (Ask participants how they would prefer to be addressed.)

Because of the number of people who may be involved in conferences it is suggested that convenors work out seating prior to the conference and draw a map for themselves. This will avoid confusion and uncertainty when they bring the parties into the room. It is suggested that young people are seated between their parents or within their family group.

As part of the conference preparation convenors should consider likely dynamics between the participants. Seating plans should attempt to take into account these dynamics.

Stage 2: Introductions and ground rules

Introductions

8.28 It is important that the conference gets off to a positive start, with the convenors asserting their control and acting with some surety as to how the matter will proceed. Introductions can be made by the convenor, who should then discuss his or her role in the process. This process ensures that everyone is aware of each other's names and their relationship to the incident. If there is a large group involved it may be easier for the convenor to invite participants to introduce themselves and explain their relationship to the incident. In this case convenors should ensure that introductions are kept brief.

Stage 3: Narratives

8.29 In the narrative stage of the conference process, each of the participants tell 'their story'. The purpose of this stage is to elicit the facts of the incident and the impact of the alleged breach. Each person should be able to speak without interruption — this will most likely occur if the suggested order below is maintained.

Begin with the offender/regulatee's account. The conference should not move beyond this story until he or she has touched on:

- what happened to cause the breach or problem;
- who has been affected by what happened; and
- in what way people have been affected.

After the offender has finished, the convenor can then turn to the victim to tell his or her story. The use of open questions, basic listening skills and some

paraphrasing and summarising is helpful in assisting this process. Silence can also be used at this stage to encourage reflection. Victims do not require the same level of prompting as offenders; however, convenors may use specific questions to explore the victim's response to the incident in greater depth; for example, 'You sound very upset. What was the most upsetting part of this for you?'.

The purpose of this phase is not for the victim to abuse or castigate the offender. If the offender has already begun to accept some level of responsibility for his or her actions, a display of moral indignation is less likely. It is important for the victim to feel he or she has been heard, but if the victim simply ventilates anger and abuse it is likely the offender will switch off.

It is important that the victim and his or her supporters focus on specific incidents and how he or she was affected. The victim and his or her supporters must focus on the specific circumstances of the incident which is the subject of the conference. Generalisations are not helpful and will quickly cause an offender to switch off. Such generalisations can include the victim blaming the offender for other occasions when he or she was victimised or blaming the offender for all 'these sorts of problems'. In these cases the convenor should simply refocus the discussion on the specific incidents in question.

After the victim has had an opportunity to tell his or her story, ask if he or she has any questions relating to the facts of the incident they would like to ask the offender. It may be useful at this stage to ask, 'What are the most important issues for you?'

All participants should be given the opportunity to speak during this stage

of the conference: for a list of useful questions go to **Exercise 7** at the end of this chapter.

Stage 4: Exploration and transition

Exploration

8.30 The purpose of the first phase of the conference is to develop an understanding of the facts and effects of the incident, including the emotional content of the breach or wrongdoing. The purpose of the exploration stage is to further explore the incident so that all participants can develop a mutual understanding about what happened and its affects.

As this stage proceeds it is normal for discussion to become more spontaneous and free-flowing. Conference practitioners suggest that the general rule of thumb for convenors at this stage is the less intervention the better; however, the discussion should continue to focus on the incident and its affects. Convenors can use the following strategies in this stage:

- keep the exploration incident-based;
- keep the exploration focused on the offender/regulatee's actions, and not on punishment;
- remind the parties of the purpose of the conference (once again, focus on repairing the harm caused by the incident, not on determining punishment for the regulatee/offender); and
- encourage exploration by asking questions relating to issues previously raised but not yet thoroughly discussed.

Sometimes the exploration stage can be quite short. This is especially the case if the narrative stage is thorough. If there are quite a few participants involved in the conference, then the breach and its consequences may be fully explored by the time all of the participants have told their stories. If the

incident is simple in nature it may be appropriate to move straight from telling the story to transition.

Transition

8.31 After everyone has had an opportunity to discuss the incident the focus of the discussion can shift from the past to the present. The object of this phase is to mark the changed perception of the participants about the alleged breach and about each other. It is a pivotal point, marking a change in time focus from past to present to future. Ideally, this phase will flow easily into the next, which focuses on developing a plan for doing something to repair the damage done.

The key sequence in conferencing

8.32 Conference convenors sometimes describe a 'key process', the components of which are as follows:

- Offender admits the offence.
- Victim describes the hurt and 'shame' caused.

- Offender develops understanding of the impact of his or her actions.
- Offender outwardly acknowledges harm caused.
- Victim begins to understand what led to the offence and the offender's situation.
- Offender expresses remorse.
- Victim forgives offender.
- Offender and victim experience the relief of having some resolution to the

matter.

- Reintegration of victim and offender.

Stage 5: Agreement/outcome plan

8.33 The focus of stage 5 is clearly on the future. Its purpose is to develop a workable and fair agreement that meets participants' needs for repairing the harm or potential harm that has been done, if any. It is more appropriate to frame the goal of this stage in terms of working out how the offender can 'make amends' rather than in terms of setting punishment. An introduction such as the following may be useful: 'Having heard everything, what would you like to come out of today?'.

The offender should have input into the outcome agreement. The convenor should test all proposals for workability and fairness. Each participant should be asked, 'Is this fair?' or, if necessary, 'What else would you suggest?'.

The discussion must include monitoring or evaluating the agreement, although the victim may not wish to have a role in this.

During this stage the convenor should take detailed notes outlining each component of the agreement. The convenor will normally complete this task at the end of the conference, while the participants are having refreshments. Prior to finishing the formal section of the conference the convenor should confirm with the participants their recording of the agreement.

The agreement should be as detailed as possible, so there can be no misunderstandings about what has been agreed. It should include times, dates and duration. If there is more than one offender, there needs to be a separate agreement for each one. If the agreement is acceptable, distribute the copies for signing. The victim, offender and convenor can sign the agreement to acknowledge their understanding, and each receive a copy.

Stage 6: Conclusion

8.34 The conclusion stage provides informal reintegration for victims, offenders and supporters, as well as providing a structured closure for the conference. It also overlaps with the agreement stage.

Where practicable it is useful to invite participants to make tea or coffee at this point.

Each participant should be asked if they want to say anything at the end of the conference: 'Is there anything anyone would like to say before closing?'. Although this is a closed question, it acts like an open one. It is a gentle invitation to speak without limiting and directing the participants' contribution.

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It is important to offer everyone an opportunity to speak at this point. Often, participants will say constructive things to each other at this time. Apologies not previously expressed may now be given and satisfaction with the conference process may be expressed, and sometimes participants feel there is nothing more to be said.

The convenors can then conclude with some positive comments about the conference and the outcome plan, thanking everyone for their attendance and participation. The participants can be congratulated on making an agreement. It may also be acknowledged that it has not been easy for any of them. Be sure to be even-handed with your thanks, acknowledging everyone: victim, offender, supporters for both, and others attending.

Overview of the conference process

Stage 1: Pre-conference
The pre-conference phase consists of two parts:

- *intake:* establish the suitability of the matter for conferencing, and preparing the parties; and
- *set-up:* case familiarisation, develop a seating plan and conduct brief meetings with the offender, the victim and any supporters.

Stage 2: Introductions and ground rules
Introduce the convenor and participants. Explain the purposes of the conference and give the ground rules for the process.

Stage 3: Narratives
Each of the main stakeholders in the process is engaged to relate their stories in the following sequence:

- *Offender's story:* The offender is invited to explain his or her story.
- *Victim's story:* The victim tells how he or she was affected by what happened.
- *Victim's supporters:* The victim's supporters describe the impact of the offender's action on the victim and themselves.
- *Offender's supporters:* The offender's supporters talk about how they were affected by what happened.

Stage 4: General exploration and transition
Focus of the discussion begins to shift from the past to the present, and the parties are given the opportunity to ask questions of each other. Focus on the future and ways the offender can help repair the damage caused.

Stage 5: Agreement
Develop an appropriate agreement.

Stage 6: Conclusion
Evaluations, tea or coffee, agreement signed, conference concluded, and participants thanked.

Conclusion

8.35 Victim–offender programs present some of the most difficult philosophical, ethical and practical issues for conflict resolution service providers. These concern the balance of power between the participants; and

the power of the State (in the combined authority of parliament, the courts, police and corrections services) as a silent but all-powerful third party in, and to, the 'dispute'. Added to this are critical issues surrounding 'voluntariness', 'confidentiality' and 'plea bargaining', which give rise to questions of the human rights and civil liberties of participants, and underscore the importance of dedicated, highly-skilled and highly-trained mediators or convenors as service providers.

It is in the presence of skilled mediators or convenors, and in a 'safe' environment, that the offender meets his or her victim and takes concrete steps towards rehabilitation through the acceptance of accountability and responsibility for wrongdoing. A focus on the harm caused acknowledges the needs of the victim, who in turn has the opportunity of addressing the person responsible and dealing with the effects of the crime. It is a time in which forgiveness can play a critical part and healing can commence.

The traditional criminal justice system provides sanctions for criminal behaviour. The use of mediation and conferencing is not intended to undercut these, but to supplement them. The key question is: Can the two approaches readily co-exist and provide a constructive response to crime that addresses the needs both of society in general and the individuals concerned?

Exercises

Exercise 1 Role-playing

Role-playing is a vital part of training for restorative justice convenors. This is a typical variation that can be used in a variety of settings.

Role-play: Stolen vehicle

Common facts

Jim Brown, aged 16, stole Alison Healy's brand new sub-compact car, for which she had just put down a payment of $5000 and still has $7000 owing. The police found the vehicle three days later, out of petrol and abandoned. Aside from the stereo, which was missing, there appeared to be no material or mechanical damage. The interior was littered with cigarette butts and empty beer cans, and Alison's collection of CDs was gone. So too was the photo album of her 21st birthday party a month prior, contained on a USB device from which she had intended to make

copies. Purchase and installation of a new stereo will cost $350. Jim has no prior convictions and has pleaded guilty to vehicle theft.

The convenors know that, under circumstances like these, it is likely the offender will be required to pay full compensation and be placed on a good behaviour bond.

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Objective

To demonstrate the process of conferencing.

Expected time to conduct role-play and debrief

Three hours.

Kind of preparation and preparation time required by participants

(15 minutes in class)

- disputants must become familiar with role; and
- conference convenor set-up conference room.

Setting, equipment and other requirements

- tables, chairs;
- blackboard, whiteboard, or butcher's paper and appropriate writing instruments;
- extra paper and pens/pencils for disputants; and
- video camera and VCR playback (optional).

Instructions for Jim Brown

You took Alison's car for a joy ride when, one night after a rare encounter with alcohol, you accepted a dare that if your mate George could hot-wire it you would drive it. You were never enthusiastic about doing this but you were drunk and afraid of looking like a wimp in front of the 'cool' set in school. You were mortified when the cops came to your house and charged you in front of your whole family. Although your family has given you emotional support, they have made it clear that you must take the consequences of your action. They also grounded you for a year, so you cannot go out at night without their express permission and then only under stringent conditions. You are extremely sorry for what you did and hope that the conference will look good for you in the eyes of the Children's Court. You are also terrified of meeting the owner of the vehicle. You have about $200 in savings and, in anticipation of having to pay restitution, have found a weekend job that brings in $45 a week.

Your Mum (Brenda) and Dad (Bill) will be attending the conference with you.

Exercise 2 Restorative justice and family violence

Much of the emphasis in the restorative justice literature has been concerned with criminal justice issues. How do you think it could be adapted to family and workplace contexts? A book entitled *Restorative Justice and Family Violence* (Strang and Braithwaite (eds), 2002) addresses this issue and the potential of restorative justice to resolving conflicts within families. It focuses on feminist and indigenous

concerns in family violence that may warrant special caution in applying restorative justice. The ALRC in a report entitled *Family Violence — A National Legal Response* (ALRC, 2010, Report 114) concluded that:

> In the Consultation Paper, the Commissions expressed a preliminary view that the use of restorative justice practices in the context of family violence appears to be fraught with difficulties. The Commissions also suggested that the dynamics of power in a relationship where sexual offences have been committed make it very difficult to achieve the philosophical and policy aims of restorative justice, and that the use of restorative justice practices in that context appears to be generally inappropriate. Many of the comments made in submissions reflected these concerns.
>
> As noted in the Consultation Paper, the Commissions agree with the Victorian Law Reform Commission (VLRC) that appropriate models of restorative justice must be based on rigorous research. Further research, trials and evaluations had been recommended by the VLRC, the Victorian Parliament Law Reform Committee, and the National Council to Reduce Violence Against Women and their Children. Given current and proposed developments, the Commissions conclude that it is premature to make any recommendations in this area, and that this issue should be revisited at a later stage.

Exercise 3 Aboriginal circles

With the exception of Tasmania, circle sentencing operates in all Australian jurisdictions for Indigenous adult offenders (Rossner et al, 2013). The term 'circle sentencing' comes from a circle of representatives sitting together and trying to decide a sentence which does not include a jail term. Representatives from the community are present and are mainly aboriginal elders, but also members of the prosecution or police and a magistrate. The circle will usually talk about the background and effects of the offence and can involve meeting the victim. The sentence should, where possible, involve community work:

The following is a listing of all such schemes in Australia:

- ACT: Ngambra Circle Court
- NSW: Circle Sentencing
- NT: Community Court
- Qld: Murri Court, Youth Murri Court

- SA: Nunga Court, (Special) Aboriginal Court
- Vic: Koori Court
- WA: Circle Court, Aboriginal Court, Community Court.

(Source: <www.creativespirits.info/aboriginalculture/law/circle-sentencing#ixzz3h30UYsxq> (accessed 28 July 2015).)

The Justice Education Society of British Columbia, Canada describes the circles process as follows (<www.justiceeducation.ca>):

> The core of an Aboriginal restorative process is generally a healing circle, which aims at developing a consensus on how to repair the harmful results of the offence.

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> A healing circle:
>
> - Will include members of the community including the offender, elders, and often the victim if they agree to participate
> - Will discuss the offence and how it has affected the victim and the community and the relationships between these and the offender
> - In addition to healing community ties, the circle focuses on the offender and the underlying causes of their offence
> - For example, if alcohol or child abuse experiences contributed to the offence, these impact factors will be identified and discussed.
>
> The process is intensive and in many ways more difficult than a passive jail sentence since offenders are made to face and accept the harms they have caused. Victims often find the process much more satisfying and empowering than conventional justice procedures as well. They often report feeling less fear and trauma after taking part in a healing circle.
>
> The healing circle often leads to an organic consensus of what steps should be taken by the offender to correct the harms caused by their actions. These could include:
>
> - Specialised counselling or treatment programs targeted at the impact factors that contributed to the offence (alcohol programs, abuse counselling)
> - Community work service at the direction of an elder's counsel
> - Potlatch and other traditional remedies specific to the customs of the tribe
> - Direct restitution to the victim or the community
> - Sometimes unique and creative solutions emerge, such as the offender agreeing to tell the public their story and speak out against the conduct that led to their offence.

What do you think would be the limitations of this process? How could this process be adapted to

workplaces or other settings?

Exercise 4 Restorative justice standards

VARJ's Best Practice Standards for restorative justice can be viewed at their website at <www.varj.asn.au>. They have been produced to meet the following range of objectives:

- to provide participants with a detailed explanation of the kind of service they should expect from restorative justice facilitators and services;
- to enable and encourage restorative justice facilitators to reflect on how they can sustain or improve the quality of their work;
- to provide line managers and case supervisors with a resource that will enable them to reflect on how they can better support and monitor best practice;
- to enable organisations delivering restorative justice with a set of standards by which they can monitor and assess the quality of their service-provision;
- to provide funders with criteria by which they can evaluate existing services or proposals to implement new services;

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- to give trainers a recognised benchmark for best practice and a resource to enable them to develop courses and procedures manuals;
- to give trainees a transparent and objective means of assessing the quality of the trainer and the course content;
- to enable institutions providing qualifications or an accreditation scheme in restorative justice with a resource that will enable them to design curricula content and structure; and
- to enable researchers to design monitoring and evaluation tools that take into account the extent to which restorative justice facilitators are operating in accordance with best practice standards.

Do you think such standards are needed for restorative justice processes?

Exercise 5 Restorative justice links

The following links provide some useful resources to enable you to stay up-to-date with developments in the field:

- Australian links:
  - VARJ: <www.varj.asn.au>
  - Centre for Restorative Justice (SA): <www.restorativepracticesinternational.org>
  - Circlespeak (NSW): <www.circlespeak.com.au>
  - Australian National University Centre for Restorative Justice (ACT): <http://crj.anu.edu.au/>
  - Australian Institute of Criminology: <www.aic.gov.au/rjustice>

- International links:
  - Restorative Practices International: <www.rpiassn.org>
  - Center for Restorative Justice, Simon Fraser University: <www.sfii.ca.cfrj>
  - International Institute for Restorative Justice, Bethlehem, Pennsylvania:<www.iirp.org>
  - Restorative Justice Aotearoa (NZ) (professional association for restorative practices agencies in New Zealand): <www.restorativejusticeaotearoa.org.nz>

Exercise 6 Case study: What sort of outcomes are achieved?

Rossner, Bruce and Meher (2013) provided a number of case studies to illustrate the ways in which the restorative justice process can work within the context of the New South Wales Forum Sentencing Program, one of which follows. What do you think could be the agreement between the victim and offender to settle this case?

> The offence: A $10,000 deposit owed to Fasi, the victim, was accidentally put into Monty's account. Monty noticed it in his account and, knowing it was not his, was under the impression the bank would withdraw it. Over time he began 'dipping into it' and eventually used it up. He claimed to have not heard from the bank even

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> though the bank personnel said they had sent Monty three letters. The bank said they could do no more beyond that. At the forum, Monty was nervous and very apologetic. He was especially upset to learn that Fasi had suffered a loss in his family shortly after the mislaid deposit, which was why he had not followed up with the police sooner. Prior to the forum, Fasi seemed disgruntled and wanted his money back, but did not think it would be possible as the offender was 'a young guy with nothing to his name'. However, at the end of stage two Monty tearfully apologised to Fasi and offered to pay back the full amount, telling him he had already saved $2,000. Fasi noted that Monty was 'not the kind of person who'd do this again'.

The authors go on to describe and analyse the different 'items' in each 'intervention plan' from the 203 cases studied (p 45):

	No.	% of plans with item
Voluntary work	108	56.0
Counselling	108	56.0
Apology	97	50.3
Drug-related	85	44.0
Personal development	85	44.0
Other	39	20.2
Employment	33	17.1

Education	22	11.4
Public accounting	17	8.8
Banned from premise	13	6.7
Follow-up meeting/letter	11	5.7
Compensation	9	4.7
Medical	9	4.7
Gambling-related	8	4.1
Good behaviour	6	3.1

These findings indicate the diversity of outcomes possible in the conference process compared with traditional judicial processes. What do you think are the some of the issues that would accompany the implementation of such outcomes?

Exercise 7 Useful restorative questions

To the offender

- What led up to your involvement?/What happened just prior to the incident?
- How did you come to be involved?
- What were you thinking at the time?
- Tell us what happened. What happened next?

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- What did you do? What was your part in it?
- What has happened since the incident?
- What do you think now? (A 'then' and 'now' focus is useful.)
- Who do you think has been affected by your actions?

To the victim

- Tell us what happened.
- What did you think when you …? (for example, discovered what had happened?)
- How did you feel?
- How were you affected by the offender's actions?
- What did you do when you …? (for example, discovered what happened?)
- What did you have to do later (or as a result of the incident)?
- What do you think now?

- How do you feel now?
- What is the most important thing for you about what happened?

To the victim's/offender's supporters

- How did you find out what happened?
- What did you think when you found out?
- How did you feel about what happened?
- How did it affect you personally?
- What do you think now?
- How do you feel about it now?
- What is the most important issue for you?

Chapter 9

Conflict, Justice and System Design

Summary

Conflict can be socially integrative as well as socially destructive. In groups and organisations conflict centres around two contradictory principles: collaboration and competition. The analysis in this chapter of conflict as a tension between task, lifestyle and career highlights this contradiction.

Understanding 'power' is one of the essential ways of understanding conflict. In this chapter a number of sources of power are listed. A typology of organisations as unitary, pluralist and radical is described and a brief outline of Dahrendorf's view of conflict is included. Senge's 'fifth dimension' is explored and the principal ideas from this important work are outlined.

An analysis of conflict at organisational interfaces is used to illustrate how conflict can occur dynamically at a number of different levels.

A number of strategies to increase organisational responsiveness to conflict are examined. These include early identification, institutional dissenters, exposing differences and dissemination of conflict management skills. 'Group think' is also described.

The meaning and use of 'justice' is explored, as an important element in conflict management. Distributive, procedural, interpersonal and informational forms of justice are explained and contrasted.

Conflict management system design (CMSD) is explored around two central aspects: responding to emerging or potential conflict and planning a more responsive conflict management system. Effective dispute system design requires consideration of three different but overlapping ‘sectors’ where interventions can be made:

- communication, resource allocation and their underlying structures;
- teams and roles; and
- decision-making.

Introduction

9.1 Conflict is essentially a clash of interests, emotions and values and the way in which these are perceived or constructed. In group and organisational contexts it is often regarded as a negative factor, but as Lewis Coser (1956, p 31) in his important work on social conflict explains:

> No group can be entirely harmonious, for it would then be devoid of process and structure. Groups require disharmony as well as harmony, disassociation as well as association; and conflicts within them are by no means altogether disruptive factors. Group formation is the result of both types of process … Far from being necessarily dysfunctional, a certain degree of conflict is an essential element in group formation and the persistence of group life.

For Coser, conflict is a useful instrument of social integration. Conflict helps to facilitate communication, define structures and create conditions for equitable and effective settlements (p 121). Conflict, therefore, far from being something that will go away if we try hard enough or if things improve, is ever-present in groups and organisations. Conflict can be intrapersonal, interpersonal or between rival groups. Within organisations and groups it is often compounded, because it centres around two contradictory principles: collaboration and competition, which we examined in earlier chapters of this book.

An organisation is often portrayed in hierarchical terms as 'both a system of cooperation, in that it reflects a rational subdivision of tasks, and a career ladder, up which people are motivated to climb' (Morgan, 2006, p 155). Morgan sees organisational conflict, at the individual level, as a tension that exists between one's job (task), career aspirations, and lifestyle (which includes one's values). These three areas can interact but essentially remain separate. As Morgan (p 149) states:

> In working in an organisation we try and find or are forced to strike a balance between the three sets of interest. Most often, the balance is an uneasy and ever-changing one, creating tensions that lie at the centre of political activity.

For example, in the organisations in which I have been employed I have had to balance my career interests of teacher, community worker or lawyer with those of a preferred provincial (rural) lifestyle and a variety of community development projects. This has been a difficult, sometimes impossible, task and a cause of frustration and conflict for me at intrapersonal, interpersonal and organisational levels.

The emphasis we give to each of these spheres of interest varies enormously. Some people seek to increase the level of convergence between the three, whereas others prefer to separate and keep these interests as far apart as possible.

If Morgan's analysis is right, then it follows that any group or organisational context is likely to be permeated by a number of competing as well as collaborative interests. For example, the perennial conflict between administrative and service staff usually results from the fact that they are engaged in activities which run counter to each other in some ways — administration often requires budgetary constraint which affects the activities of service staff. Such a conflict is often compounded by an identification with specific roles, work, groups or professions, at the expense of the wider organisational

goals. Thus, specialisation of roles and work groups within organisations creates the potential for ongoing conflict.

The Maintenance of Group Conflict

9.2 Conflict within groups is often institutionalised and maintained by certain values, stereotypes and rituals that exist as part of its 'culture'. By the term 'culture' I mean established values, beliefs and assumptions. This factor, combined with the hidden nature of much group conflict, makes it extremely difficult at times to identify and constructively manage. It is often characterised by negative attitudes and perceptions, competitive goal-setting, and, in extreme cases, de-individualisation and dehumanisation of others. This often causes group conflict to escalate and be maintained for long periods of time. For example, I can recall a middle manager in a public service organisation telling me that a dispute about rosters (who was to work when) had been going on for about 12 years! This was accompanied by the polarisation of the workplace into different sides, the breakdown of communication at certain levels, a lack of internal group empathy, the characterisation of certain people as being akin to 'beasts' and the rise of militant leadership around the issue. As the conflict escalated, the four basic psycho-emotional states in conflict — anger, fear, blame and image threats — intensified.

Conflict is also maintained and often not managed well in groups for a number of other reasons. The first is that various individuals and coalitions in the group may benefit from the status quo. Any change to the way things are done is resisted in order to preserve power or status, or prevent resources being used elsewhere in the group. Loss of control by the managerial sector of the group may be a particularly potent locus of resistance. This maintenance of the status quo may be perceived as protecting a personal or group self-interest. However, this may not always be the case. Sometimes there is a 'false consciousness of interests' where the status quo is regarded as the best option even if it is not necessarily so. For example, some people will act against their own apparent self-interest because they identify or align themselves with a more powerful group or individual. In this way it is often not the most but the least powerful who will resist change. Second, the routinisation of behaviour, which often maintains underlying conflict, may be a protection against stress

that may be incurred as a result of any proposed change. The phrase 'we've always done it this way' reverberates through the halls of organisational conflict! This sentiment is often based on fear of change.

Third, and probably most importantly, the group culture may mitigate the adoption of processes which will ease the internal or external conflict that the group is facing. For example, I have worked with several groups where the culture was not to create or entertain the idea that conflict (through its various manifestations) may be occurring or needed to be positively addressed. Therefore, to initially attempt to set up formalised dispute management systems would, in most of these cases, be met with distinct resistance and/or apathy. Relatively informal processes revolving around training and leadership development may be better suited as the starting point for change.

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Kantor and systemic feedback loops

In his structural dynamics model, Kantor (2012, pp 9–11) uses systems theory and applies it to interpersonal relations. A system is a set of elements standing in interrelation among themselves and with the environment. This means that every element is interdependent. Kantor borrows two major concepts from systems theory: the concepts of circularity and positive and negative feedback loops. Circularity refers to the idea that if one element or person does something in a system it will have an impact on someone else in the system and their reaction will in turn have an effect back on the other. This sets up a pattern where people in the system come to anticipate each other's actions. In this way, people create what is going to happen by anticipating it. Circularity therefore negates cause and effect. Positive feedback loops enhance or amplify changes; this tends to move a system away from its equilibrium state and make it more unstable. Negative feedbacks loops tend to dampen or buffer changes; this tends to hold a system to some equilibrium state, making it more stable. With regards to feedback loops Kantor identifies three types of operating systems:

- *Closed systems:* This is where negative loops predominate and speakers are regulated by formal rules and tend to be oriented to the larger system. Closed systems rely on negative, or balancing, feedback; when something new happens, group members instinctively move to regulate it and tamp it down.
- *Open systems:* These are governed by both positive and negative feedback loops

where speakers are regulated by one another and orient themselves to the collective. These systems combine the two forms of feedback; they are positive until they reach some point of dysfunction.

- *Random systems:* These are regulated by positive feedback loops, which gives priority to individuals over system rules and where speakers are encouraged to self-regulate. These systems reinforce novelty and make the system stronger.

For Kantor, and indeed many others, systems thinking relies on circular ideas rather than linear ideas about cause and effect. In Kantor's view, leaders who do not understand systems theory will fail to appreciate crucial feedback from the organisation: see **3.1** for further information about the Kantor model.

Diabolical solutions

9.3 In many groups experiencing severe and escalating conflict the situation is worsened because the solutions that the group implements to try and resolve it become part of the problem. For example, a community housing group I once visited had a problem between those householders who owned shares in the joint property and those who were renting. The former considered that the renters were not contributing enough to working bees and other maintenance tasks around the property. The property in question was situated in the country and required regular, and extensive, work around it. After some preliminary discussion the shareholders decided, and minuted in their meeting, to compulsorily require all renters to participate in working bees with the potential penalty being the cessation of water supply. Water was provided out of a local creek, which was the only source. This attempted solution to the problem (if it was a problem) caused not only outrage at the arbitrary nature of the decision but at its inherent inhumanity as denying a basic human right. It also split the shareholder group, some of whom were not involved in the decision, and somewhat blackened

the name of the group in the local community. The attempted solution had

created a whole new set of issues, clouded the initial conflict and dangerously split the group. The solution was diabolical in the sense that it had become part of the problem and increased, rather than decreased, tension. This phenomenon is very common in groups experiencing escalating conflict and requires some careful analysis before any further solutions are attempted.

Group Change in Conflict

9.4 As conflict is maintained over a long period of time there is a tendency for it to escalate and increase in intensity. When this happens the group begins to undergo considerable and sometimes traumatic change. Rubin, Pruitt and Kim (1994, pp 92–6) list six ways groups change when they are subjected to continually escalating conflict. These changes further feed the escalation of the conflict:

- *Group polarisation* occurs because as group members share and discuss views with each other they tend to reinforce their mutual resolve or viewpoints. This means that feelings such as hostility and distrust can be magnified in groups and 'sides' readily formed to pursue the conflict.
- *Runaway norms* is the tendency in groups for established patterns of behaviour, speech and viewpoints to be taught to new members and imposed on existing members so that they become associated with 'right thinking'. In this way these norms attain enhanced credibility in the group and can contribute to the escalation of conflict; for example, new members may be instructed to keep away from or not to trust certain people.
- *Contentious group goals* refers to the ability of groups to organise themselves around conflict, especially through the division of labour, so as to further the conflict. For example, it is decided in a group that only certain people will directly deal with 'the problem' while others will provided 'backup' through offering advice, covering for time lost, and so on.

- *Group cohesiveness* or solidarity encourages conformity, fear of being ostracised and social pressure on individuals. This can have a particularly potent effect on the ability of the group to maintain its conviction that it is right. In many groups that I have worked with there is often a real fear about expressing differences or alternative viewpoints.
- When a group is in a long-term and escalating conflict it is more likely that *militant leaders* will take over. This is particularly so where the conflict is heavily contentious, giving the militant, who can mirror and give voice to members' anger, more opportunities to take over leadership positions. This will often leave the more moderate members of the group at a disadvantage in their ability to influence the situation.
- *Militant subgroups* may develop. These subgroups, which tend to support radical spokespersons and to actively seek the support of others, will most likely lead to an escalation of the conflict.

Conflict is often regarded as a wholly negative factor. However, conflict can be a useful instrument of positive group development. Conflict can facilitate better

communication, define structures and create conditions for equitable and effective settlements. One thing we can be sure of is that conflict will be ever present. The reasons for, or sources of, conflict can be numerous. Conflict within organisations is often institutionalised and maintained by certain values, stereotypes and rituals. This factor, combined with the often latent (hidden) nature of organisational conflict, makes it extremely difficult at times to identify the original cause. One of the most important ways of understanding conflict is through the medium of power (Morgan, 1986, pp 158–85).

Power

9.5 It is through power that members of organisations are provided with the means to enhance their interests and resolve or perpetuate conflict. Morgan's description of sources of power is a checklist of ideas through which one can examine important aspects of group and organisational conflict. However, it does not give us any answers to understanding whether power should be understood as an interpersonal phenomenon or as the manifestation of deep-seated structural forces, as Morgan himself recognises (p 185). These questions are the subject matter of ongoing debate among those interested in the study of organisations.

Important sources of power

9.6 Morgan lists 14 important sources of power (1986, p 159);

- *Formal authority:* A form of legitimised power respected and acknowledged by those in the organisation. It has one or more of three characteristics: charisma, tradition, or rule of law. It is usually associated with the position you hold.
- *Control of scarce resources:* Resources can include money, materials, information, personnel and support. The relative scarcity of, and dependence of people on, resources are key aspects of this source of power.
- *Use of organisational structure, rules and regulations:* Organisational structure is often used as a way of realigning power within organisations. 'Restructuring' is one of the major ways of achieving changes in power or holding onto it. Similarly, rules and regulations are often used to alter power differentials.
- *Control of decision processes:* As organisations are in large part decision-making systems, control of these processes is a major source of power, thus the preoccupation with meetings and agendas.

- *Control of knowledge and information:* The control of these elements is important because they define the reality of decision-making processes; that is, the definition of organisational situations.
- *Control of boundaries:* Boundaries are the areas of interface between different parts of an organisation. Those who control boundary transactions have access to a basic source of power and determine the relative autonomy or integration of these various elements.
- *Ability to cope with uncertainty:* Generally, uncertainty is of two kinds: environmental uncertainties concerned with the organisation's external context (for example,

  a new budgetary restriction from government); and operational uncertainties concerned with the organisation's internal operations (for example, the breakdown of machinery). Those who can deal with these contingencies enhance their own power.
- *Control of technology:* Organisations usually become dependent on some form of core technology as a means of converting organisational inputs into outputs; for example, assembly lines or computer software. The control of technological change is important in accessing power.
- *Interpersonal alliances, networks and control of 'informal organisation':* Power is derived from informal coalitions of people, friends, sponsors and mentors. All organisations have these 'networks' through which much information is exchanged and plans made.
- *Control of counter organisations:* Wherever a concentration of power is built up there is a tendency towards establishment of 'counter-organisations'; for example, employer organisations and trade unions. Those who control these have access to a major source of power.

- *Symbolism and the management of meaning:* The ability to persuade others to enact realities which are in the furtherance of one's interests is an important source of power. This can be done in authoritarian or relatively democratic ways and often involves such elements as use of symbolism, theatre (that is, appearances, style) and gamesmanship.
- *Gender and management of gender relations:* Many organisations are dominated by gender-related rules that are biased in favour of one sex, usually male. Organisations are often encouraged to be rational, analytical, strategic, decision-oriented, tough and aggressive — as are men are typically perceived. Women are often caught in a double bind. If they conform to these stereotypes they are often charged with being 'overly assertive'. If they do not, they do not conform. Much of this bias is found in rituals, myths, stories and other important symbolism.
- *Structural factors:* Sources of power depend on and are defined by the particular social epoch in which the organisation operates. Even the powerful in organisations often have little real choice as to how they behave in the face of social imperatives or social change. Class relations, processes of socialisation, education, ownership of wealth and so on all shape these underlying elements and hence the sources of power.
- *The power one already has:* Power is often used to gain more power by the use of favours, exchanges and so on, creating a system of 'credits and debits'. Further, the attainment of power or success often energises people to go after more. In other words, power can have its own inherent dynamism.

Unitary, pluralist and radical organisations

9.7 Morgan's analysis of power, which he describes as a 'pluralist' view, can be compared with what he terms 'unitary' and 'radical' views. The comparison between the unitary, pluralist and radical views of organisation is shown in the table below (Morgan, 2006, pp 158–85).

The unitary, pluralist and radical views of organisation

	Unitary	Pluralist	Radical
Interests	Places emphasis on the achievement of common objectives. The organisation is viewed as being united under the umbrella of common goals and striving towards their achievement in the manner of a well-integrated team.	Places emphasis on the diversity of individual and group interests. The organisation is regarded as a loose coalition that has just a passing interest in the formal goals of the organisation.	Places emphasis on the oppositional nature of contradictory 'class' interests. Organisations are viewed as a battleground where rival forces (for example, management and unions) strive for the achievement of largely incompatible ends.
Conflict	Regards conflict as a rare and transient phenomenon that can be removed through appropriate	Regards conflict as an inherent and intractable characteristic of organisational affairs and stresses its	Regards organisational conflict as inevitable and as part of a wider class conflict that will eventually change the

	managerial action. Where it does arise it is usually attributed to the activities of deviants and troublemakers.	positive or functional aspects.	whole structure of society. It is recognised that conflict may be suppressed and thus often is a latent rather than manifest characteristic of both organisations and society.
Power	Largely ignores the role of power. Concepts such as authority, leadership and control tend to be preferred means of describing the managerial prerogative for guiding the organisation towards the achievement of common interests.	Regards power as a crucial variable. Power is the medium through which conflicts of interest are alleviated and resolved. The organisation is viewed as a plurality of power-holders drawing their power from a plurality of sources.	Regards power as a key feature of organisation, but a phenomenon that is unequally distributed and follows class divisions. Power relations in organisations are viewed as reflections of power relations in society at large, and as closely linked to wider processes of social control, such as control

			of economic power, the legal system and education.

Each of these views of organisations is influential and impacts on the behaviour of members. Certainly the efforts of some managers to view conflict as bad, rare and running counter to what should be a team approach is often seen as preferable to a view that sees organisations as the balancing of competing interests perpetually in conflict. The ideology underpinning the unitary approach seems to be pervasive in society at large. This is despite the experience of most people, at least at a group or organisational level, of ongoing conflict in the pluralist or radical sense described above. If conflict is inevitable, then the aim of an organisation's members is to manage it so that the elements of cooperation and competition are balanced in an appropriate way. This last view recognises that conflict can be both positive and negative. Nobody is neutral in their view and everybody participates in the ongoing political life of the organisation. The ability of a group or organisation to achieve its aims and objectives depends in large part on the ways in which the different interest groups are able to manage their ongoing conflicts. Later in this chapter we will examine in more detail some specific strategies to foster this management.

Dahrendorf and conflict

Ralf Dahrendorf is a theorist whose views on social and organisational conflict are both insightful and useful (Dahrendorf, 1959). He sees social change in terms of group conflict which in his view is always present. Society can only be understood when one considers coercion and constraint as well as unity and coherence. Organisations reflect societal structures in the sense that they usually consist of two 'positions' or types of interests. The first position is occupied by those who have, or exercise, authority and the second by those who are subjected to this exercise of authority. It is this differentiation of

authority which is crucial to any understanding of change. While these two types of interest 'groups' do not perceive or act on their interests, they are 'quasi-groups'; that is, groups that are not formed or organised. Their interests remain 'latent'. However, there is a tendency for these quasi-groups to form themselves into organised interest groups where their interests become manifest (that is, open).

It is at this stage that the group forms a structure (organisation) and a program for achieving its goals. The conflict between the two types of groups, which may have been latent, may then become manifest. In turn, this affects the way in which organisations and groups are structured, as they play out the conflict between these differing interest groups. Change in structures will depend upon the conflict that occurs.

Decision-Making, Thinking and Bias

9.8 Another approach to understanding conflict in groups is to look at the decision-making styles that are being employed. They are often important indicators of how the organisation works and how it processes conflict. Before we do this, however, we will consider some of the ways in which we think in order to make decisions so that we can keep a perspective on the potential of decision-making. In the past 20 years there have been enormous advances in thinking about thinking. This has mainly happened in the field of psychology but also in philosophy, economics and neuroscience. For example, Nobel Laureate economist Daniel Kanheman in his book entitled *Thinking Fast and Slow* (2011) divides thinking into two subsystems: type 1 and type 2. Type 1 thinking

is fast, intuitive, unconscious thought. Most everyday activities (like driving, talking, cleaning etc.) make heavy use of the type 1 system. Kahneman uses heuristics (thinking short-cuts) to assert that type 1 thinking involves associating new information with existing patterns, or thoughts, rather than creating new patterns for each new experience. Type 2 thinking is slow,

calculating and focused upon conscious thought. When you are doing a difficult math problem or thinking carefully about a moral or philosophical problem, you are engaging the type 2 system. From Kahneman's perspective, the big difference between type 1 and type 2 thinking is that type 1 is fast and easy but very susceptible to bias, whereas type 2 is slow and requires conscious effort but is much more resistant to cognitive biases. However, even Type 2 thinking is open to bias and those who may think they are good at Type 2 thinking may be even more open to such bias. This may be because of overconfidence or because these people have also more developed Type 1 thinking which is susceptible to greater bias. The point is that these biases creep into, if not always present, in our decision-making. This indicates that we need to develop systems that give us ways to prepare, reflect upon and consult about our decision-making, especially those decisions that need to be made quickly: see also **Exercise 40** in **Chapter 7**, 'Cognitive biases, heuristics and effects in decision-making'.

Taking these heuristics and biases into account, there are many ways in which decisions are made in groups and it is around these processes that conflict often occurs. There is no right way to make decisions. How we make a decision will depend on the nature of the decision to be made and the context in which it will operate. However, we can identify certain types of decision-making and evaluate their efficiency in a particular situation.

Typical decision-making styles

9.9 The following list summarises a variety of decision-making styles. No doubt you will have experienced some or all of them at some stage in your organisational and group experience:

- *Authoritarian:* The decision is made on the basis of formal or informal power; for example, the work manager makes a decision after the work group has discussed the matter.
- *Bulldozing:* This is where decisions are made by a minority of those eligible

to be involved. This may occur even when there may be strong objections. Bulldozing is often contingent on the non-assertiveness of others; for example, several people come up with a plan of action and present it to others as the only course to follow.

- *Vote:* This is decision-making by the majority; for example, a show of hands after a matter has been discussed.
- *Vacuum:* Sometimes in meetings an idea or suggested action is put forward and either ignored or greeted with absolute silence — the idea or action may be taken to have been 'agreed to'. This sometimes happens in groups where there is a lack of trust, or insufficient information available for people to make a decision; for example, where a complex budgetary formula is put before a group to discuss and agree on and members do not feel confident enough to indicate their ignorance and seek further information.

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- *Unanimity:* This is where everyone genuinely agrees; they are unanimous in their consent; for example, where every member of a group participates and indicates their acceptance of a course of action.
- *Consensus:* The decision is made on the basis of a majority opinion, but with the crucial extra ingredient that everyone will unanimously support the action to be taken.
- *Deflection:* A decision is 'made' by raising other peripheral or side issues to distract from or avoid the main or real issue to be decided; for example, where a departmental restructuring is required by management this may be delayed by concentrating on an 'emergency' which would preclude any such moves.

Groups and organisations develop 'frameworks' or 'cultures' for a particular style of decision-making. If a change in leadership or policy

requires a different style of decision-making there can be a period of considerable dislocation or conflict. For example, if a manager who relies on a consensus approach replaces an authoritarian bulldozer-type manager, there will have to be considerable effort put into preparing members of the organisation for this change. This may take some time. It is unrealistic to expect people to be able to change their mode of operating overnight. The manager may have to set up new structures, forums and processes so that the new style can become part of the organisational framework. Likewise, workers often have to 'train' or teach their managers appropriate styles of decision-making and consultation; decision-making is not just a 'top-down' process, but a group process. This is especially so if we see organisations as pluralist entities composed of a variety of disparate and competing elements. (Decision-making is the framework around which **Chapter 10**, 'Practical Group Facilitation', is built.)

The process of conflict in groups

9.10 Conflict in groups normally involves at least six phases, from problem formation through to stalemate. This is not a linear process. Several of these stages may be occurring at the same time or overlap and the process will not necessarily move progressively through each phase. The phases are:

- Problem formation and collaboration — awareness of a potential conflict emerges:
  - partnering;
  - focus on issues;
  - commitment to remain open;
  - interests explored;
  - team-building and role clarification.
- Perception of conflict — differences uncovered:
  - latent differences perceived;

- tension and frustration begin to mount;
- communication becomes more difficult;
- normative tightening.

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- Dispute — differences acted on:
  - position taken and polarisation;
  - information withheld;
  - sabotage;
  - competition;
  - information distortion;
  - recruitment.
- Fight and avoidance — the dispute intensifies:
  - avoidance or withdrawal becomes a viable option;
  - desire to punish and inflict hurt on the other;
  - 'principles' become more important;
  - militants arise;
  - factions develop.
- Winning — one side takes the advantage:
  - one side is exhausted;
  - one or both yield;
  - one side is overwhelmed;
  - unilateral advantage taken; that is, one party 'takes' or possesses the disputed item/matter.

- Stalemate — both sides are ‘stuck’:
  - both sides are exhausted;
  - both sides are afraid to approach each other;
  - demarcation lines are established;
  - the idea of peace becomes unobtainable.

This checklist of the process of group conflict can be extremely useful in analysing what is happening in a group. Like all checklists it has its limitations and is a simplification of what usually happens, especially in those complex interactions which happen around ‘organisational interfaces’, which we will touch on next. In a brilliant summary of how conflict can escalate in and between groups, Brown (1983, pp 377–8) states:

> Intergroup relations, left to themselves, tend to have a regenerative, self-fulfilling quality that makes them extremely susceptible *to* rapid escalation. The dynamics of escalating conflict, for example, have impacts within and between the groups involved. *Within* a group conflict with another group tends to increase cohesion and conformity to group norms (Sherif, 1966; Coser, 1956) and to encourage a world view that favors ‘us’ over ‘them’ (Janis, 1972; Deutsch, 1973). Simultaneously, *between-groups* conflict promotes negative stereotyping and distrust (Sherif, 1966), increased emphasis on differences (Deutsch, 1973), decreased communications (Sherif, 1966), and increased distortion of communications that do take place (Blake and Mouton, 1961). The *combination* of negative stereotypes, distrust, internal militancy, and aggressive action creates a vicious cycle: ‘defensive’ aggression by one group validates suspicion and ‘defensive’

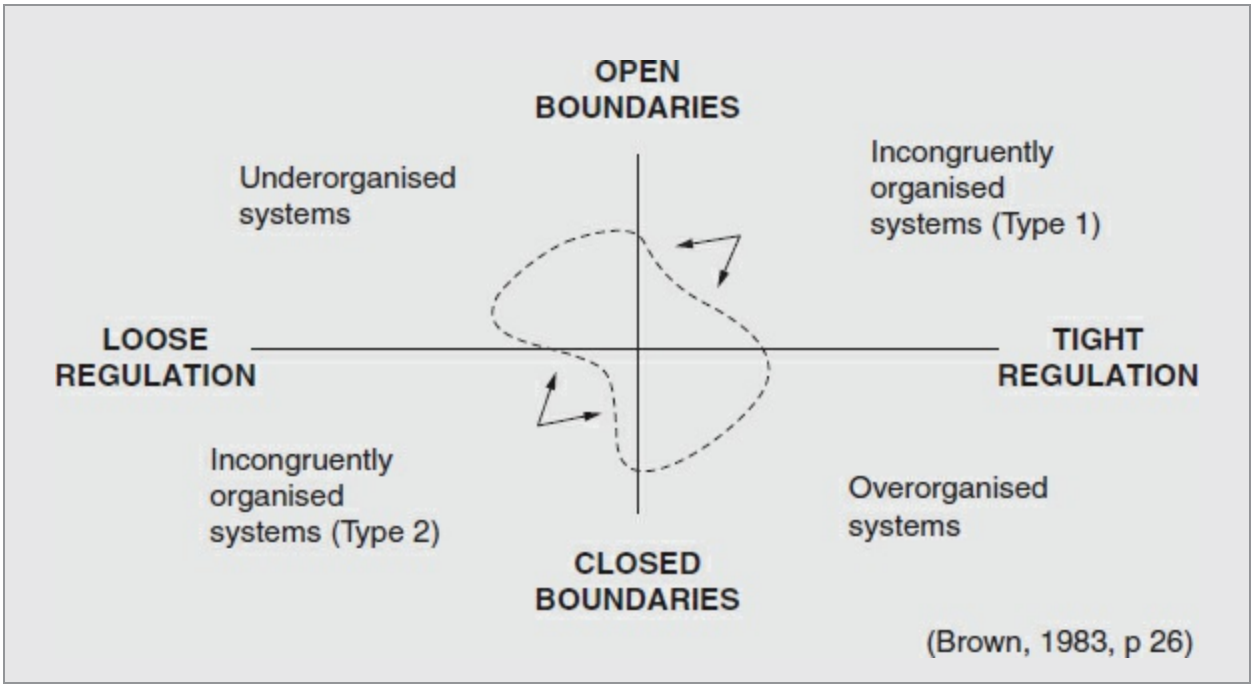
> counteraggression by the other, and the conflict escalates (Deutsch, 1973) unless it is counteracted by external factors. A less well understood pattern, in which positive stereotypes, trust, and cooperative action generates a benevolent cycle of increasing cooperation may also exist (Deutsch, 1973).

Conflict at Organisational Interfaces and

Groupthink

9.11 'Organisational interfaces' are the 'meeting grounds where social units come face to face and parties interact' (Brown, 1983, p 1). The first type of interface is a level interface that brings together different ranks in an organisational hierarchy; for example, headquarters and branch; committee and employed staff. Cultural interfaces are the result of the history of the larger social context; for example, gender and racial relations; rich and poor. The third interface is the organisational interface that is the meeting ground between different organisations; for example, bank and borrowing organisation; consumer group and service organisation.

The degree of openness of an organisation and its internal regulations are important in determining how it will manage these interfaces. This is represented in the following graph, which depicts four types of systems operating within a framework of closed/open boundaries and loose/tight regulations.



(Brown, 1983, p 26)

Organisations with closed boundaries tend also to be tightly regulated.

Organisations with open boundaries are likely to be loosely regulated. Brown suggests that there is an 'area' of viability for organisations outside of which they are unstable. This area is represented by the dotted line. You will notice that in the two incongruently organised systems this area is much smaller. (**Exercise 12** at the end of this chapter will help you to explore these two characteristics of organisations.)

The type of systems that result from internal regulation (loose or tight) and permeability of boundaries (open or closed) will affect the type of interface conflict organisations will have.

Under-organised systems typically have ill-defined and open external boundaries. 'Leaks' are rife and new information cannot often be controlled. Personnel and

resource flows are hard to manage. Because internal regulation is loose there is often a problem with establishing who has authority or responsibility, and interface goals are often undefined or conflicting (Brown, 1983, p 28).

Over-organised systems have clearly defined boundaries that, however, are excessively closed off. Interface responses are usually very slow and cumbersome. Because internal organisation is very tight, leadership tends to be centralised and unquestioned. Interface goals are well defined and formalised. Roles are well defined and there are detailed rules to guide conduct. Theories and values tend to be shared. Representatives of over-organised systems generally find it difficult to use much discretion. Innovation is not a characteristic of such organisations and conflict is often suppressed, leading to little productive analysis.

Incongruently organised systems, which can have either loose regulation and closed boundaries or open boundaries and tight regulation, are

theoretically possible, but in reality unstable. An example of the former (Type 2), is the Khomeini regime in Iran, which was relatively closed to the external world but loosely regulated internally.

An example of the latter (Type 1) is the Catholic Church in Latin America, where many parish priests have been radicalised by their exposure to the poor. These priests have come face to face with the church's traditional tight internal regulation.

Because organisations with incongruently organised systems are unstable there is a tendency for them to move in the directions indicated by the arrows in the graph. Type 1 organisations will want to open their boundaries further, tighten their regulations or both. Type 2 organisations will want to loosen their regulation, close their boundaries further or both. The struggles that evolve out of these movements create an ongoing instability.

How do organisations deal with, and indeed create, interface conflict? This will depend on a number of crucial factors, including their internal structures and the openness of their boundaries. It is perhaps useful to note that organisations with open boundaries tend to be loosely regulated and those with closed boundaries tend to be tightly regulated. For example, police services generally have closed boundaries and tight internal regulation while universities have relatively open boundaries and loose internal regulation.

Organisations with open boundaries and less regulation have interface responses characterised by the following features:

- information flow is often more difficult to control;
- personnel and resource flows are more difficult to manage;
- there is often a problem with authority or responsibility; and
- goals for working in interfaces are sometimes not well defined or they may be conflicting.

Systems with closed boundaries and which are heavily regulated have

interface responses characterised by the following features:

- they are quite slow and cumbersome in responding to conflict;
- leadership tends to be centralised and unquestioned;

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- interface goals are well defined and formalised;
- roles are specified and there are rules of conduct to guide behaviour;
- there is usually little room for discretion, as innovation is not one of their central characteristics; and
- conflict is often suppressed, leading to little constructive analysis.

It is useful to think about these boundary and internal regulation issues when conflict occurs.

This outline of conflict at organisational interfaces also leads us into a phenomenon called 'groupthink', which can cause serious conflict within and between organisations. Groupthink happens when too much emphasis is placed on group harmony so that individual views and values are subordinated to group loyalty and consensus. Often these sorts of groups have strong, charismatic leaders who have a tendency to dominate. Groupthink also occurs in groups that are isolated or under threat or surveillance. The symptoms of groupthink (Janis, 1982) include:

- a sense of overconfidence leading to unnecessary risk-taking;
- a tendency to over-rationalise, particularly when unwelcome information is disclosed that may cut across the group's objectives;
- ethical and moral issues are sometimes downplayed;
- enemies or adversaries are often stereotyped and their negative characteristics emphasised;

- internal pressures are such that individual members are often under considerable pressure to keep quiet;
- there is a high degree of self-censorship; and
- divergent views tend to be screened out and dissent stifled.

The way to manage groupthink when it becomes a problem is to encourage self-criticism and self-evaluation. The introduction of new and external ideas and the broadening of authority within the group may also be helpful. In these ways the group can open up its boundaries to outside influences. The role of an external facilitator can be crucial in this process: see **Exercise 14** at the end of this chapter for some further ideas of how to manage groupthink.

Partnering: A Way of Managing the Organisational Interface

9.12 Another way to deal with interface conflict between organisations is through a process called 'partnering'. The Australian Competition and Consumer Commission has described partnering as a collaborative relationship that has structured processes to enhance communication, enables parties to self-manage their issues and uses a nominated facilitator for those issues which are difficult to resolve (1997, p 20). Many government agencies use this process, as does the construction industry. Smyth and Prykes' research into the effectiveness of this process in the construction industry concluded that the process takes considerable effort and careful planning in relation to the development of relationships (2009). Partnering groups are composed of equal numbers of employees, union and management representatives.

Participation in partnership arrangements is equal and decisions are reached by consensus. The partnering group meets initially to:

- assess the current relationship;
- discuss partner expectations;
- identify a common interest;
- develop a future vision;
- fix meeting procedures; and
- create a 'partnership charter'.

The group then meets at regular intervals to:

- share information;
- discuss training needs;
- review reports on problems;
- identify new problems; and
- evaluate the relationship.

The partnering group does not operate within the legal/contractual systems of the parties, but operates at the 'relationships' level. It has proved to be an extremely useful process, especially in complex project developments such as roads and large buildings.

The Five Dimensions: Developing a Learning Organisation

9.13 In 1990 Peter Senge published a book entitled *The Fifth Discipline: The Art and Practice of the Learning Organization* (revised in 2006), which popularised the concept of the 'learning organisation' and which has been

deeply influential in the organisational literature. This is an organisation which enables the individuals within it to create new learning and where innovation and new thinking are encouraged. Five disciplines are described as the means of building learning organisations. Case studies are provided to show how the disciplines have worked in particular companies. According to Senge (p 3), learning organisations are:

> … organizations where people continually expand their capacity to create the results they truly desire, where new and expansive patterns of thinking are nurtured, where collective aspiration is set free, and where people are continually learning to see the whole together.

Senge suggests that the need for learning organisations is due to business becoming more complex, dynamic and globally competitive. Senge argues that excelling in a dynamic business environment requires more understanding, knowledge, preparation and agreement than one person's expertise and experience provides. While all people have the capacity to learn, the structures in which they have to function are often not conducive to reflection and engagement. Further, people may lack the tools and guiding ideas to make sense of the situations they face. Organisations that are continually expanding their capacity to create their future require a fundamental shift of mind among their members.

The five disciplines are:

- systems thinking;
- personal mastery;
- mental models;
- shared vision; and
- team learning.

The first three disciplines have particular application for the individual participant, and the last two have group application. Let us look briefly at each of these disciplines as described by Senge.

Systems thinking

9.14 As has been briefly described at **9.2** above in relation to Kantor's model, systems thinking is a highly conceptualised way of understanding issues which has been developed since World War II. It looks at systems in terms of particular types of cycles (archetypes), and it includes explicit system modelling of complex issues. The essence of the discipline of systems thinking lies in a shift of mind to:

- seeing interrelationships rather than linear cause–effect chains; and
- seeing processes of change, rather than snapshots.

It is the discipline that brings together a number of models and disciplines, fusing them into a coherent body of theory and practice (Senge, 1990, p 12). Systems theory's ability to comprehend and address the whole, and to examine the interrelationship between the parts, is, for Senge, both the incentive and the means to integrate the disciplines. Senge states that the practice of systems thinking starts with understanding a simple concept called 'feedback' which shows how actions can reinforce or counteract (balance) each other. This then develops an ability to be able to learn to recognise types of 'structures' that recur again and again. Eventually, systems thinking forms a language for describing a huge range of interrelationships and patterns of change. It helps us explain the deeper patterns lying behind the events and the details. Senge advocates the use of 'systems maps' — diagrams that show the key elements of systems and how they connect, especially as they relate to the short-term and long-term consequences of our behaviours.

Personal mastery

9.15 Personal mastery is the discipline of continually clarifying and deepening our personal vision, focusing our energies, developing patience and seeing reality objectively (p 7). Senge talks about how we are constantly balancing our personal visions with views of current reality, which maintains a 'creative tension'. This tension is the catalyst for change and movement. Personal mastery is also to do with self-improvement such as developing and understanding the subconscious through processes such as meditation or contemplation. Senge (1990, p 142) describes it thus:

> People with a high level of personal mastery live in a continual learning mode. They never 'arrive'. Sometimes, language, such as the term 'personal mastery', creates a misleading sense of definiteness, of black and white. But personal mastery is not something you

> possess. It is a process. It is a lifelong discipline. People with a high level of personal mastery are acutely aware of their ignorance, their incompetence, their growth areas. And they are deeply self-confident. Paradoxical? Only for those who do not see the 'journey is the reward'.

Mental models

9.16 Mental models are deeply ingrained assumptions, generalisations, or even pictures or images that influence how we understand the world and how we take action. They also include the ability to carry on 'learningful' conversations that balance inquiry and advocacy, where people expose their own thinking effectively and make that thinking open to the influence of others. The 'ladder of inferences' that is briefly explored in **Chapters 3** and **10** is an example of this approach. Knowing ourselves and how we think and imagine things is important in this respect. As Senge (p 9) states:

> The discipline of mental models starts with turning the mirror inward; learning to unearth our internal pictures of the world, to bring them to the surface and hold them rigorously to scrutiny.

Building a shared vision

9.17 Building a shared vision involves the skills of unearthing shared 'pictures of the future' that foster genuine commitment and engagement rather than compliance. Senge starts from the position that if any one idea about leadership has inspired organisations for thousands of years, 'it's the capacity to hold a shared picture of the future we seek to create' (p 9). Such a vision has the power to be inspiring and to encourage experimentation and innovation. Crucially, it is argued, it can also foster a sense of the long term.

Discipline of team learning

9.18 The discipline of team learning starts with 'dialogue' — the capacity of members of a team to suspend assumptions and enter into a genuine 'thinking together'. Things that undermine learning in the group also need to be recognised, including defensiveness. Dialogue involves being able to exchange views in the group while suspending judgment. This should result in a relatively creative and complex exploration. It is a process that usually requires a facilitator. Conversely, a discussion involves a presentation of different views and the defence of those views to bring forward the best one to support decisions that need to be made. The notion of dialogue that flows through this discipline is very heavily dependent on the work of the physicist David Bohm (where a group 'becomes open to the flow of a larger intelligence', and thought is approached largely as a collective phenomenon). When dialogue is joined with systems thinking, Senge argues, there is the possibility of creating a language more suited for dealing with complexity, and of focusing on deep-seated structural issues and forces rather than being diverted by questions of personality and leadership style.

Senge argues that learning organisations require a new view of leadership. He sees the traditional view of leaders (as special people who set the direction, make key decisions and energise the troops) as deriving from a deeply

individualistic and non-systemic worldview. At its centre the traditional view of leadership ‘is based on assumptions of

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people’s powerlessness, their lack of personal vision and inability to master the forces of change, deficits which can be remedied only by a few great leaders’ (p 340). In a learning organisation, leaders are designers, stewards and teachers. They are responsible for building organisations in which people continually expand their capabilities to understand complexity, clarify vision and improve shared mental models.

Despite the complexity of Senge’s vision for organisations and its inherent conceptual problems, it does offer a more creative and holistic vision of what organisations can be, even if few actually are. He challenges us even as we struggle with the difficulty of doing what he suggests. The focus on investment in learning and development reminds us where intellectual capital is created and how it will grow. If the work lacks a moral connection with broader issues of social learning and development, it relates to an important aspect of our social lives — the groups we work in. Senge’s work is reflected in many of the ideas in this book.

Benchmarks for Good Alternative Dispute Resolution Practice

9.19 Over the past 20 years industry groups have been active in setting up a range of alternative dispute resolution (ADR) schemes to provide a means for dealing with complaints (organisational interface conflict) about their products or services. These developments relate to the increasing recognition of the need for effective self-regulation. Having an ADR scheme also makes

good business sense because, if set up properly, it can lead to better goods and services for customers and improved business practices, as well as saving on resources.

The following benchmarks and underlying principles for ADR schemes have been developed by the Department of Industry, Science and Tourism (1997, p 5):

- *Accessibility:* The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
- *Independence:* The decision-making process and administration of the scheme are independent from scheme members; that is, those who are funding it.
- *Fairness:* The scheme produces decisions which are fair, and are seen to be fair, by observing the principles of procedural fairness, making decisions on the information before it and having specific criteria upon which its decisions are based.
- *Accountability:* The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.
- *Efficiency:* The scheme operates efficiently by keeping track of complaints, ensuring they are dealt with by the appropriate process or forum and by regularly reviewing its performance.
- *Effectiveness:* The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

After extensive consultation, the Australian Competition and Consumer Commission (1997, p 26) has produced a more detailed guide for business. The benchmarks it offers to assist effective management of disputes include the following:

- the use of an in-house disputes manager to settle disputes;

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- a dispute resolution clause in contracts/codes/disclosure/statements;
- recognition/use of a small business negotiator;
- having the right negotiators;
- setting out clear and simple dispute-handling policies and procedures;
- commitment and coverage;
- early intervention by a neutral third party;
- establishment of panels of appropriately trained and appropriately oriented dispute resolvers;
- industry awareness, endorsement and active support of the scheme;
- accountability; and
- good administration.

The Australian Standards *Guide to the Prevention, Handling and Resolution of Disputes* (1994) (AS 4608-1999) and *Dispute Management Systems* (2004) (AS4608-2004) outline a number of principles and processes for dispute management. The former outlines a number of principles similar to the above schemes. The latter outlines a process including the need for risk management, research, consultation and evaluation of the system to be designed and implemented. These can be accessed at <www.standards.org.au>. Another useful resource is a report by the National Alternative Dispute Resolution Advisory Council (NADRAC), *Managing Disputes in Federal Government Agencies: Essential Elements of a Dispute Management Plan* (2010), which sets out how government agencies can

manage and record their disputes (available at <www.nadrac.gov.au>). The key principles outlined are that:

- adjudication of disputes should be a last resort where ADR processes are inappropriate;
- in civil disputes, interest-based facilitative processes should be encouraged at the first stage of dispute management;
- ADR processes should be encouraged at all stages of court processes; and
- any barriers and disincentives to the use of ADR in the court system should be removed.

A central theme through most of these efforts to develop principles and models for system design is to ensure justice for those involved.

Fairness and Justice

9.20 Justice or fairness is usually listed as one of the objectives of good dispute system design as noted above. 'Justice' is a term widely used but perhaps little understood. For example, Bingham identifies 29 'types' of justice in her review of the justice research (2008–09, pp 28–31). She states (p 28):

> There are many different forms, names, definitions, and varieties of justice depending on context: a sampling includes corrective, substantive, distributive, social, procedural, organizational, interactional, interpersonal, communicative, communitarian, restorative,

> and transitional justices. Even within this sampling, there are multiple definitions for a given term. For example, procedural justice has a variety of meanings, depending on whether you examine the term from the perspective of social psychology or jurisprudence.

The major typologies or groupings that have arisen out of this diffusion of the term and which have become standardised in the research literature are distributive, procedural, interpersonal and informational justice. Greenberg and Colquitt (2005) construe the development of theory in this field as consisting of three overlapping 'waves':

- 1949–75: focus on distributive justice;
- 1975–95: focus on procedural justice;
- 1980s to present: focus on interactional justice (interpersonal and informational justice).

Distributive justice derived mainly from social equity theory. It posits that an allocation is equitable when outcomes are proportional to the contributions of group members. This suggests that satisfaction is a function of outcome, specifically the fact and content of a settlement or resolution. In theory, participants are more satisfied when they believe that the settlement is fair and favourable. Classic expositions of this approach include Pruitt (1981), Raiffa (1982) and Pruitt and Rubin (1986). In the ADR literature, the terms 'substantive justice' and 'distributive justice' tend to be used interchangeably to reflect the justice of an outcome produced by a decision process. Most significantly, Rawls distinguishes between substantive justice, reflected in the assignment of fundamental rights and duties and the division of advantages from social cooperation, and formal justice which relates to regularity of process. Substantive justice is also related to social justice and corresponds to the way in which a society organises itself. Distributive justice generally is associated with the distribution of outcomes, which Rawls would describe as 'allocative justice'. Rawls refers to it in connection with the distribution of advantages in a society (1971, p 58).

Within jurisprudential theory, procedural justice tends to focus on those procedures that will result in a just outcome, but in the social science field the focus is on the perception of fairness of the participants in the dispute. For an influential description of the jurisprudential approach, see Rawls (1971).

Tyler and Lind in their paper titled 'A Relational Model' provide a classic description of the social science approach (1992, pp 115–19).

Informational justice focuses on the enactment of decision-making procedures (Greenberg and Colquitt, 2005, pp 6–7). Research suggests that explanations (that is, information provided) about the procedures used to determine outcomes enhance perceptions of informational justice. Interpersonal justice reflects the degree to which people are treated with politeness, dignity and respect by authorities. The experience of interpersonal justice can alter reactions to decisions, because sensitivity can make people feel better about an unfavourable outcome.

Greenberg, in an earlier commentary, usefully conceptualised the move in focus from distributive and procedural justice to interactional elements of justice as a move from the 'structural' (defined as the 'mechanisms by which distributive and procedural justice are accomplished') to the 'social' (defined as 'the quality of interpersonal treatment one receives') (1993, pp 79–80). Research by Thibaut and Walker indicates

that a principal reason people care about procedural justice is that it maximises the expected fairness of outcomes (distributive justice) (1978, p 541). In other words, parties assess that fair procedures are more likely to yield fairer outcomes than unfair procedures, even if fair procedures can sometimes produce unfair outcomes. Disputants expect fairer outcomes from someone who treats them fairly (both the third party, if there is one, and the other disputants) than from someone who treats them unfairly. Therefore, procedural justice perceptions usually show a strong relationship with distributive justice perceptions. There would also appear to be a proven relationship between the other justice variables as well.

Colquitt et al's meta-analysis of the research described above indicated

clear correlations between the four types of justice (2001). The types of justice, therefore, seem strongly related to one another, and the research reveals that they do seem distinguishable to disputants. Typically, distributive justice is more strongly related to attitudes about outcomes, while interpersonal, informational and procedural justice perceptions are more strongly related to attitudes towards the other party. Research has generally focused on the main effects of the outcome and procedural variables. A number of studies have shown that distributive justice is more influential than procedural justice in determining an individual's satisfaction with the results of a decision, whereas the latter is more important than the former in determining an individual's evaluation of the system or organisation that made the decision (see Brockner and Wiesenfeld, 1996; Cropanzano and Folger, 1991; Greenberg, 1990; Lind and Tyler, 1994).

Instrumental and relational theories

9.21 Justice researchers today tend to construct their work using two content theories: the instrumental model and the relational model (Colquitt, 2001). The instrumental model is principally concerned with the distribution of control in intervention processes. Relational models, including the group-value model (Lind and Tyler, 1990) propose that justice decisions lead to conclusions about a person's self-identity and self-esteem and how needs around these are met (Tyler and Lind, 1992). 'Outcomes' in the relational model tend to be concerned with how these needs are affected. For example, Lind suggested that interactions characterised by fair treatment may reduce people's concern for their immediate outcomes (2001, pp 220–26). So, whereas the instrumental model posits that fair process will lead to fair outcomes, Tyler's relational model contends that the psychological implications of procedural justice operate independently of outcomes (1990; Tyler and Huo, 2002). Tyler's model is based on the assumption that membership of a group is a powerful part of individual identity and social life. Both models can be seen as being principally concerned with 'self-interest',

with an emphasis on different sorts of outcomes, as Folger has argued (1998, pp 13–34). Folger developed the alternative idea of what is termed a 'moral virtues model', which attempts to challenge this premise of dominant self-interest involving economic benefits or group needs, arguing that we care about justice because of a basic respect for human dignity, worth and justice. This concept has been quite influential in the development of mediation practice and related theory (Bush and Folger, 1994). In this model, concern about justice is related to a basic respect for human dignity and worth. Many of us are motivated by this aspect, and in this article Folger reviewed evidence suggesting that

people care about justice even when doing so offers no apparent economic benefit and involves strangers. Folger noted that there are times when 'virtue [serves] as its own reward' (Folger, 1998, p 32).

The relational model holds that people are concerned about their treatment by others because it provides self-esteem and identity information. It does this principally in two ways: through the group value (Tyler and Lind, 1992; Cropanzano, Prehar and Chen, 2002) and fairness heuristic models (Folger and Kass, 2000). The former relates to how one is considered as a valued member of the group through a process of comparison (particularly relevant in organisational contexts), while the latter maintains that in the absence of social comparison information, individuals are more likely to infer the quality of their outcomes from their perceptions of their treatment using readily available information (Conlon et al, 1989). These fairness judgments are made through a psychological shortcut or automatic (heuristic) process often related to what 'would', 'could' or 'should' have happened. (For more about these mental shortcuts, see **Exercise 40** in **Chapter 7**.) That is, expectations are established as a cognitive process to enable judgments to be

made in an efficient, although not necessarily rational or accurate, way. A good example of the combination of these approaches is Folger and Kass' 2000 analysis.

Do outcomes affect perceptions of the process?

9.22 Folger and Kass (2000) argued that procedural and interactional justice perceptions recruit counterfactuals (alternative comparisons that may be either positive or negative, often referred to as 'upward' or 'downward' counterfactuals, respectively), which are used as referents for judging our obtained outcomes. They emphasise that most people expect to be treated fairly in most situations, and thereby achieve better outcomes. Unfair treatment may therefore lead to counterfactuals on the basis of the perception that a better result could have been achieved in a fairer or better process. Fair process, therefore, would make it more difficult to perceive a better outcome and thereby develop negative counterfactuals. The model provides an approach that suggests that unfair treatment is likely to engender negative counterfactuals. In their view, fair treatment signals that the other party holds one in high regard, sees one as a valued member of the group, and cares about one's well-being. Folger and Kass suggest that procedural and interactional processes (in this research this is divided into informational and interpersonal aspects) act as a simple heuristic to make judgments on fairness.

Conflict in the compact city: An experiment

In 2009 I conducted an experiment involving 252 participants which demonstrated that the outcome of a third-party decision materially affected the judgment of the overall fairness of the process (Condliffe, 2009). The participants played the roles of complainants and respondents in a dispute in an owners corporation over rubbish on common property and water distribution through the property. They went through a mediation-arbitration process, with students playing the role of mediators and arbitrators at various points. In this research the procedural and interactional justice perceptions were not manipulated, but the outcome was — heavily favouring one party — reflecting the actual decisions

in two cases they were based on: see *Rossetto v Owners Corporation SP 71067 (Strata & Community Schemes)* [2008] NSWCTTT 859 (29 February 2008) and *Tanner v OC SP 21409 (Strata & Community Schemes)* [2008] NSWCTTT 806 (23 January 2008). The disputant parties were randomly placed in one of three processes based on a mediation-arbitration sequence. If the procedure did not result in an agreed outcome at the end of the mediation phase, then an arbitration was held. The outcome of the arbitration was manipulated by giving the students acting as arbitrators a pre-prepared decision, at the end of the process, which favoured the respondents. The roleplay accurately represented the decisions made in the above cases.

The opportunity to develop negative counterfactuals during the actual process and interactions was limited. The emphasis of the exercise was on the impact of the outcome itself, and the simple individual heuristic of the fairness of this outcome; that is, judgments concerning procedural and interactional fairness judgements could be isolated for analysis.

Those participants who received a relatively negative outcome reported that the whole process, including procedural, informational and interpersonal aspects as well as distributive (substantive outcomes) were significantly worse; that is they generalised or projected their perception of fairness from one aspect of the role-play to the whole process. The revelations about these thinking processes that cognitive psychology and neurology, among other disciplines, have revealed to us in the past 20 years is also contributing to a greater emphasis on the role of emotions in conflict. See **Chapter 3** if you would like to consider this latter aspect further; see also **Exercise 40** in **Chapter 7**.

This approach, in my view, is generally consistent with the available research findings; that is, that good outcomes are more likely to result in perceived fairness for the entire process, whereas unfavourable outcomes are more likely to engender perceived unfairness. The effect is more likely to be significant if the loss is regarded as relatively large and seen as a 'loss' rather than failure to make a gain. This is important for a number of reasons, not least because there is some evidence that once formed, justice perceptions are difficult to change (Cropanzo et al, 2001, p 172).

There is considerable research that indicates that outcomes and perceptions of process interrelate, and there has been a lively discussion in the literature among procedural justice researchers concerning the relative importance of outcomes as determinants of fairness judgments. In a well-known experiment, Lind and Lissak found that individuals evaluated the

process as less fair when the outcome was unfavourable than when it was favourable (Lind and Lissak, 1985). Generally, however, the effect is usually small and inconsistent (Lind and Tyler, 1994). Lind and Tyler had earlier argued that because process evaluations are made before outcome evaluations these are more likely to be 'held onto' (p 228). In their view, the former is stronger than the latter. These findings reflect the ongoing tension between those who regard process as the dominant variable and those who regard outcomes as more important (Conlon, Lind and Lissak, 1989, pp 1085–99). Others have argued that those who emphasise self-interest explanations are probably more likely to believe that outcomes will be the dominant element and that procedural concerns play a relatively minor role in the acceptance of decisions. Lind provides a useful overview of the literature in respect to this and argues the importance of considering the fairness heuristic and procedural justice judgments in explaining the effects of outcome and process on acceptance

of authoritative decisions (1995, pp 225–8). Lind hypothesises that outcomes and procedural justice perceptions could correlate in two principal ways. First, there could be those who have an egocentric bias: disputants think that part of what it means for a procedure to be fair is that the procedure yields a favourable outcome for them. Second, outcomes are regarded as information and disputants feel that the outcome tells them something about the fairness or otherwise of the procedure (p 248). Brockner and Wiesenfeld offer a comprehensive review of the literature in this field (up to 1996), and take the view that whereas perceived outcome favourability differs from an individual's perception of procedural fairness, their impact cannot be studied in isolation from one another (1996). They state (at p 190):

> The effects of procedural justice on individuals' reactions to a decision depend on the level of outcome favorability; similarly, individuals' reactions to outcome favorability depend on the

degree of procedural fairness with which the decision is planned and implemented. As Cropanzano and Folger (1991) suggested, 'outcomes and procedures work together to create a sense of injustice. A full understanding of fairness cannot be achieved by examining the two constructs separately. Rather, one needs to consider the interaction between outcomes and procedures'.

Brockner and Wiesenfeld conceptualise an 'interaction effect' between procedural and distributive justice. They posit that people expect and want procedures to be fair and they expect and want their outcomes to be favourable. For example, they argue that when procedures are unfair or outcomes are unfavourable people go into 'a sense-making mode' where external cues that address their informational needs can be particularly influential. Therefore, when procedures are unfair, the degree of outcome favourability may have high informational value. Unfair procedures may lead people to believe that the receipt of favourable outcomes in the future is not ensured, thereby heightening the effect of the current outcome on their reactions to a decision. Similarly, when current outcomes are unfavourable the level of procedural fairness should be highly informative. For example, unfavourable outcomes may lead people to scrutinise the procedures that gave rise to those outcomes, thereby increasing the effect of procedural fairness on their reactions to the decision (pp 101–3). This is especially so if the outcome is unexpected, as unfavourable outcomes often are.

Can role affect justice perceptions?

9.23 Research on the question of whether role affects justice perceptions is usually centred on the disputants' behaviour as complainants and respondents (Delgrado, 1985; McGillicuddy, 1987). Pierce et al found in two experiments that, compared with complainants, respondents favoured inaction and disliked arbitration (1993, p 199). Their hypotheses about complainant-respondent differences were based on the observation that complainants are usually trying to create change while respondents are trying to maintain the status quo. Respondents should also like the more consensual

procedures (negotiation, mediation and advisory arbitration) because these procedures allow them to refuse to change. Complainants generally prefer arbitration and struggle, because these procedures have the greatest potential for overturning the status quo by, respectively, providing a third party to enforce potential change and by defeating the

other party. Ross, Brantmeier and Ciriacks give the example of landlords who prefer a process maximising disputant control and tenants who would prefer a third party to make the decision (2002, pp 1151–88).

Researchers into fairness have also considered a number of demographic factors, including gender, ethnicity and age, which might be related to fairness perceptions (Kulik, Lind, MacCoun and Ambrose, 2011; Lind and Early, 1992).

Combining justice and institutional analysis with ADR

9.24 NADRAC, which was disbanded in 2013, identified three core objectives for ADR in 'A Framework for ADR Standards' (NADRAC, 2001). ADR should:

- resolve or limit disputes in an effective and efficient way;
- provide fairness in procedure; and
- achieve outcomes broadly consistent with public and party interests.

There has been, and continues to be, a recognition that the usefulness and appeal of ADR programs goes beyond simple measures of efficiency towards broader measures of social surplus or the social good. However, as Bingham notes in her recent survey of the literature (Bingham, 2008–09, p 33):

> What institutional analysis does not bring to the conversation is the normative concept of justice. Institutional analysts are examining the performance and outcomes of an institution from the standpoint of how they affect relevant public policy. This form of analysis is essential for the field of DSD [dispute system design]; however, it is not sufficient. In addition to using institutional analysis, DSD analysts should be examining the performance and outcomes of a particular design in relation to its impact on some conception of justice.

She gives the example of mandatory arbitration in many workplace contracts as an example of an imposed dispute system which may lack elements of distributive justice (2008–09, pp 23–5). Similarly, van Gramberg in a study of workplace mediation schemes in Australia found that justice for disputants often came second to the needs of the employing organisation (2006). Indeed, there has been unease among a number of Australian commentators about aspects of ADR and its relative fairness since Ingleby's critique in 1991. The *Australian Dispute Resolution Journal* has run a continuing series addressing these issues since then: see **7.16**. Baron et al's article 'Throwing the Baby out with the Bathwater' (2014), about the ongoing efficacy of the traditional adjudication system, is one of the latest manifestations of the way in which change continues to create anxieties about our disputing systems. The needs of the system is juxtaposed against the fairness of processes and outcomes for those who live in, work in or use them. This question and others will be addressed in the section that follows dealing with dispute system design.

Conflict Management System Design

9.25 When managing conflict in groups and organisations it has become increasingly apparent to managers, policy-makers and the general community that ad hoc responses are often no longer sufficient. Rather, well-considered processes that provide fairness,

certainty and timely responsiveness are now increasingly expected. It is to this emerging field of conflict management generally called 'dispute system design' that we will now turn. Consistent with the long-term views expressed in this book, I prefer the term 'conflict management system design' (CMSD) because it emphasises preventing and managing disputes rather than merely settling existing ones. This term will include the concept of dispute system design (Constantino, 2009, p 81). As Constantino states (pp 82–3):

> DSD has two components: a *system*, which is a coordinated set of processes or mechanisms that interact with each other to prevent, manage, and/or resolve disputes, and a *design*, which is a deliberate and intentional harnessing of resources, processes, and capabilities to achieve a set of specified objectives As such, CMSD is the *process* of working with a system to make choices about the *substance* of managing conflict and resolving disputes.

Galtung, who worked mainly in international conflict, was one of the first to recognise the need to ensure systemic diagnosis of conflict (1971). This involves diagnosing the conflict and its causes, then exploring the subjective attitudes of those involved and then the behaviour that prolongs the conflict. CMSD refers to the design of systems or procedures that are used to handle similar, repeated and anticipated disputes. The concept was first developed by Ury, Brett and Goldberg in their book *Getting Disputes Resolved* (1988). This book divides conflict resolution processes into three types: those that negotiate interests; those that adjudicate rights; and those that test relative power. According to this model, CMSD typically involves creating a hierarchy of dispute resolution procedures, starting with the relatively informal processes that assist parties to negotiate interest-based solutions, then going to more complex and formal processes to adjudicate rights-based questions. Some systems will end with a mechanism for testing relative power while others will not, assuming that all disputes can be handled with interest- or rights-based approaches.

Another major work in this field, Costantino and Merchant's *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (1996), added the important idea of consulting and

participating with stakeholders because they are more likely to use a system which has been designed in a participatory fashion. The authors also describe and give some emphasis to the process of evaluation. For a resource that provides some useful case studies from an interdisciplinary perspective, see *Designing Systems and Processes for Managing Disputes* (Rogers et al, 2013).

There are two aspects to CMSD. The first is to respond to emerging and/or existing conflict where there are no procedures in place or where current procedures are inadequate or inappropriate, or where there is not sufficient time to establish a system. This often emerges out of a crisis facing the organisation or group. The second is integrating into an organisation or group a more responsive conflict management system, which will deal with future conflict. This can occur where there are no existing conflict management systems in place or where the existing system needs an overhaul. Both aspects overlap and require a similar process of intervention, although the first may necessarily require a speedier, and therefore less planned and researched, approach.

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The analytic framework

In an article which outlines a model for teaching law students about CMSD, Smith and Martinez (2009) describe what they call an 'analytic framework' to enable students to (p 124):

- analyse a system historically, to understand its evolution, functioning and impacts (as might be done by an academic or a system design advisor);
- advise on the best process to create the design (or, more likely, redesign) mechanism for a system; and
- design (or redesign) a system itself.

The outline of this model is reproduced as follows.

1. **Goals**
   a) Which types of conflicts does the system seek to address?
   b) What does the system's designer seek to accomplish?

2. **Processes and structure**
   a) Which processes are used to prevent, manage and resolve disputes?
   b) If there is more than one process, are they linked or integrated?
   c) What are the incentives and disincentives for using the system?
   d) What is the system's interaction with the formal legal system?
3. **Stakeholders**
   a) Who are the stakeholders?
   b) What is their relative power?
   c) How are their interests represented in the system?
4. **Resources**
   a) What financial resources support the system?
   b) What human resources support the system?
5. **Success and accountability**
   a) How transparent is the system?
   b) Does it include an evaluation component?
   c) Is the system successful?

Responding to emerging conflict

9.26 Responding to emerging conflict involves at least four steps:

- *conflict analysis:* obtain information about the people, stakeholders, issues, sources and dynamics of the conflict. Make a comparative analysis of the desired positions, interests and outcomes of each party in the conflict, as well as an assessment of barriers to achieving them. It is usually best to involve as many stakeholders in the analysis process as possible;
- *strategy selection and design:* select a management strategy to meet the identified interests;
- *action plan and implementation:* decide on the particular activities that need to occur; and

- *feedback and review:* decide on ways to evaluate what is happening and feed this information back into other systems.

Each of these steps is outlined in more detail below.

Conflict analysis

9.27 Conflict analysis provides the basis for developing an appropriate conflict management response. Without this analysis the response to the conflict is likely to be misplaced or make the situation worse. There are two parts to analysis. The first is fact-finding through consultation; the second is the integration and interpretation of the information. This enables a person attempting a conflict management plan to understand who the parties in conflict are, what relationships exist among them, and what interests are involved. A brief checklist of the areas that can be covered in conflict analysis is provided in the box below.

A checklist for conflict analysis

- Parties and stakeholders in the conflict — individuals, groups, peripheral groups, a ranking of individuals in groups:
  - goals
  - values
  - attitudes
  - perceptions
  - motivation
  - style
  - power
- Relationships:
  - history
  - current situation
  - trends and possibilities
- Issues in dispute:
  - central stated issue/s
  - possible unstated issue/s
  - secondary issue/s
  - sources of conflict
  - manifestation of the conflict
- Attempted conflict management:
  - What has been done so far to attempt to manage the conflict?
  - What has been the response of other parties to the attempts

	so far?

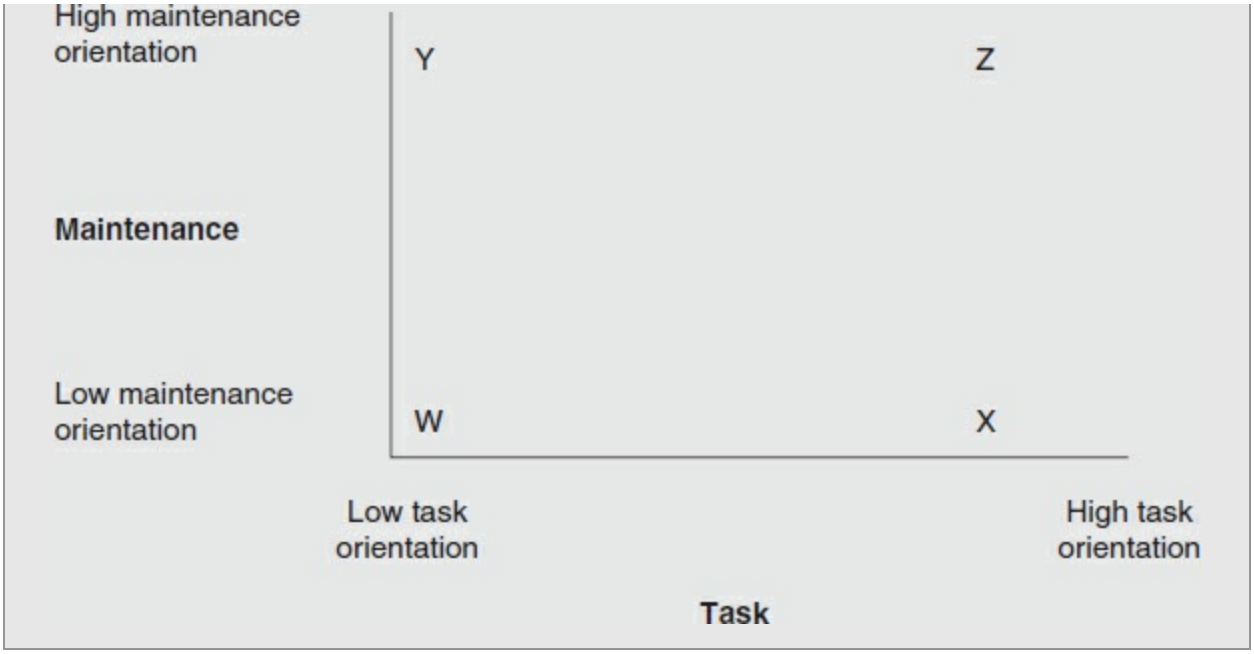
Essential elements to consider

9.28 As well as the above there are a number of 'essential elements' which have to be considered in any analysis. These are the sources of the conflict, the maintenance and task functions in the conflict, the decision-making processes and the attempted solutions.

Bisno, in his book *Managing Conflict* (1988), discusses five sources of conflict (as outlined in **Chapter 1**): biosocial; personality and interactional; structural; cultural/ideological; and convergence.

The second element is to examine the way in which the group balances task functions (achieving group aims and goals) and maintenance functions (maintaining group cohesion and relationships). These two aspects of group functioning, while often complementary, also lead to conflict because of members' different needs and perspectives. The interplay between these can be shown as in the diagram below.

Interplay between task and maintenance functions



Position W on this graph indicates both low maintenance and task orientation. People who are not involved and show little initiative may fit this position. Position X indicates high task and low maintenance orientation. Those with little time for people but who 'get the job done' may fit this position. Position Y indicates high maintenance and low task orientation. People who spend much of their time encouraging and supporting others and relatively little time completing tasks may fit here. Position Z indicates both high maintenance and task orientation. This position may fit the gregarious and energetic person who achieves highly — at least some of the time. There is no 'right spot' on this graph. Different tasks require different maintenance positions and vice versa. Many managers, for example, have to spend much of their time on maintenance functions to ensure that the tasks of the organisation are achieved. What is often crucial is group members' perceptions of what is important in particular functions. Misunderstandings about this can lead to serious conflict: see **Exercise 8** at the end of this chapter.

The third essential element to consider is decision-making: see **9.8**, 'Decision-Making, Thinking and Bias'.

The fourth element, to which I give special consideration, is the attempted solutions to the conflict because it is these that often both escalate the conflict further and become its major focus. See **9.3**, 'Diabolical solutions' for an outline of this.

Strategy selection and design

9.29 In broad terms, people come into a conflict with three types of needs or wants: substantive, procedural and psychological:

- *Substantive* needs/wants are the tangible outcomes that parties feel they need for satisfactory resolution of the conflict; for example, a monetary payout or an agreement to stop certain behaviours.

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- *Procedural* needs/wants are concerned with the way in which the conflict management process is carried out. People in conflict are particularly sensitised to issues such as getting a fair hearing or having their particular viewpoint considered.
- *Psychological* needs/wants are concerned with the types of relationships that a party desires from the conflict management process. They involve being respected and treated well in the process.

In groups, we often need to feel accepted and valued. This schema is often termed the 'triangle of satisfaction', and can be represented as shown in the diagram below. This model was created by Christopher Moore, author of *The Mediation Process* (1986), and is based on the idea that there are three distinct but interrelated types of interests, as outlined above. Each of these interest areas needs to be taken into account in any process or system. The triangle of satisfaction model is a tool of both analysis and practical interventions.

Another way to think about this is to distinguish interests from positions. Each of the above types of needs/wants can be categorised as an interest or position. The former are those things that motivate people: the 'why?'. Positions are the 'what?': the concrete expressions of those motivations. An example of this would be the demand of employees for a pay increase — such interests as the need for greater security, recognition or compensation for greater efficiencies may be implicit here. It is the parties' interests that largely define the conflict, not just the stated positions of the parties.

Also, discovering the interests of parties is important because they are likely to give us a far greater variety of material to work on in the management of the conflict than by merely focusing on positions.

When considering the range of possible dispute resolution options and strategies that can be employed in any situation, there are at least five categories: preventative, collaborative, facilitative, fact-finding/advisory and mandatory. These are outlined in the table below.

Possible options and strategies

Option	Definition	Examples
Preventative	Used to pre-empt disputes. Usually designed in advance.	Dispute management clause in a contract or policy document as part of partnering/consensus building/team building/training.
Collaborative	Parties come together to work on a problem or issue.	Collaborative problem-solving/negotiation.
Facilitative	An impartial or third party neutral intervenes to assist the parties in dispute.	Conciliation/mediation/arbitration ombudsperson.
Fact-finding/advisory	Third party expert employed to provide data or an opinion — usually non-binding.	Case appraiser/non-binding arbitration.
Mandatory	Where a third party neutral makes a binding decision on the parties.	Tribunal/court/binding arbitration.

The fact that there are numerous procedures with which to handle disputes implies that no one particular procedure is necessarily the best for every kind of dispute. Therefore, some care is involved in selecting an appropriate response for the particular conflict. Also, you may consider using a combination of the various responses. This will depend on the nature and intensity of the conflict, and the particular context in which it occurs. In CMSD all options should be considered.

In general terms, where conflict is acknowledged or manifest, but the parties are not highly polarised, then team building or a collaborative problem-solving approach may be used. Where the conflict is intense, and the parties are highly polarised, a process involving mediation or similar may be more appropriate.

Conflict management responses

Manifest but not highly polarised	Highly polarised and intense
• Team building • Collaborative problem-solving	• Conciliation • Mediation/facilitation • Negotiation

Team building may be desirable in certain situations. Collaborative problem solving is also a useful approach because it can be used quickly and with a relatively limited amount of resources.

Team building

9.30 A useful way to manage task and maintenance functions within groups is to develop a continual process of team building. This is a preventative approach that will

often head off potential conflicts and divert them into more constructive outcomes. There are basically three ways of doing this: team building through problem-solving, task differentiation and role integration:

- *Team building through problem-solving:* Solving problems in groups is quite different from individual problem-solving. There are many different ways to problem-solve in groups, but to do it in a systematic way that builds the team involves at least four well thought out stages:
  - obtaining commitment to a possible solution;
  - planning and task allocation;
  - coordinated action; and
  - feedback arrangements.
- *Team building through task differentiation:* This team-building approach is useful when it is important to clarify or change the ways in which tasks are defined and allocated. Probably the most useful way of doing this is through a task and skills analysis of at least three factors:
  - *complexity:* identifying the number of variables involved in the task;
  - *difficulty:* the number of different skills and amount of knowledge required; and
  - *risk:* the consequences if the worker fails.
- *Team building through role integration:* Role integration is a process of ordering tasks together into roles and allocating these to individuals in such a way that sensible areas of authority or work are created. There are three essential elements in this process:
  - *deciding priorities:* what are the important factors in this work?
  - *specialisation:* what factors will each individual be concerned with, and what is the individual's area of responsibility?

– *workload allocation:* who is to do what, and when?

Collaborative problem-solving

9.31 Collaborative problem solving seeks to enlarge the range of alternatives or options available to the parties. It may take a variety of forms depending on: what stage the dispute is at; the degree of polarisation that has occurred; the nature and context of the problem; and the time period that is involved. In general terms, cooperative problem solving moves the parties through a seven-step strategy as follows (refer to **Chapter 5** for a more detailed overview):

- reviewing procedures and expectations;
- defining the issues/problems;
- identifying interests (that is, motivations);
- generating options;
- selecting options;

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- implementation; and
- evaluation.

To work well, collaborative problem solving depends on the parties having, or developing, a reasonable level of trust in each other. It is also helpful if the parties have interdependent interests and there is not a great disparity of power between them. Chances of success are improved if there is motivation to reach mutually satisfactory outcomes.

Where disputes are intense, and the parties polarised, it may be useful to employ a more formal process of conflict management such as conciliation,

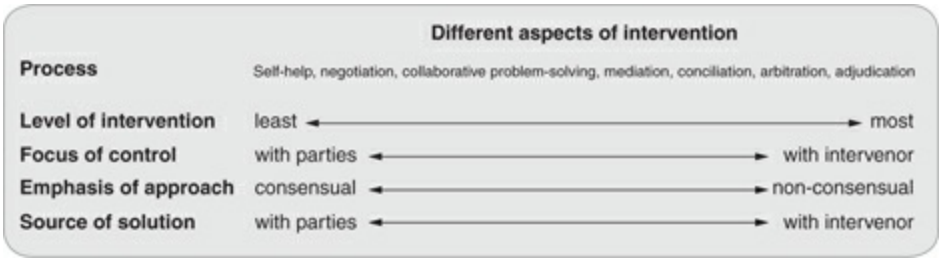
mediation or facilitation. All of these processes substantially overlap. They are all aimed at bringing the parties together in a relatively formal way, to help them define the issues and to negotiate around them. Arbitration, expert determination and similar adjudicatory-like processes may be used in those situations where the complexity of the issues requires some particular expertise to be employed; for example, where the matters in dispute are so complex that the third party would require some expertise to be brought to bear to interpret and make a coherent decision.

Action plan and implementation

9.32 You should establish criteria for selecting a particular type of intervention. In particular, you should assess the subjective needs of the parties that are likely to be affected by the intervention. You can also assess the objective issues by doing a cost–benefit analysis.

You will also need to review the time frame you will have to make a decision. You may have to engage in a consultation process, to ensure that whatever selection is made will be accepted by those affected.

The box below shows some of the variables involved in the different forms of intervention.



The following checklist can be helpful when deciding on a conflict management plan.

Checklist for implementing strategies

- Is the current nature of the conflict appropriate for the strategy selected?
- Who are the parties and have they all been appropriately contacted?
- Will the parties be attending in their own right or will they be representatives of other

people or groups?

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- Do the parties have authority to enter into decisions as part of the strategy?
- Are the parties relatively balanced in terms of power, gender and so on?
- Will a third party neutral be necessary to conduct the strategy or can somebody within the organisation do this; that is, will a non-neutral party from within the organisation be able to remain impartial in dealing with the parties?
- Will it be necessary to hold the meetings on neutral ground?
- What equipment will you need?
- Are the parties' expectations and understanding of the selected strategy realistic and appropriate?
- Should you generate background case material to assist the parties in understanding the issues?
- Do you need to discuss and clarify any concerns and issues about the process?
- Do overriding codes of conduct and behaviour need to be established?

At some stage in the process, the parties will have to actually do what they have agreed to do. This demands of them a quantum shift from thinking and having a vision about what needs to be done to the actual implementation of the task. This may be difficult for some people, especially if there are still unresolved conflicts or there is a change in circumstances. It is therefore usually important that the process contains some anticipation of this shift and the difficulties that may arise. This is usually best achieved by 'reality testing', where the decisions made are analysed as to their applicability and practicality of implementation.

Feedback and review

9.33 Where possible, it is a good idea to build in a review process right from the start. This may be as simple as making sure that notes are taken in each meeting, or it may involve a complex round of consultation and research. This will depend on the nature of the dispute. It is also usually a

good idea to build in a follow-up process so that the parties are consulted after the formal process has ended. Sometimes a more formal process of review can be built in, so as to systematically monitor the implementation of any decisions or agreements reached.

Developing a more responsive conflict management system

9.34 This second aspect of CMSD involves some of those things we have already mentioned, including building organisational responsiveness, team building and conflict analysis.

Most organisations and groups will benefit from anticipating and planning for disputes, but unfortunately many do not have a coherent policy; if they do have a policy, it is often not understood or well known by the participants in the organisation. Also, existing conflict management systems may not be functioning well or may be dysfunctional. Constantino and Merchant, pioneers in this field (1996), describe six principles in CMSD as follows:

- develop guidelines to determine if ADR is appropriate;
- tailor the process to the problem;

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- ensure that disputants have the necessary information and skills to use ADR;
- create simple to use and easy to access ADR systems for early intervention;
- build prevention into the system; and
- build in disputant empowerment so that disputants have a choice over the process and the third party is neutral where possible.

These are useful principles to keep in mind as the process is designed. The process itself involves at least five basic steps, in designing a new conflict management system or re-invigorating an existing one:

- fact-finding and analysis;
- outline the principles and objectives;
- reality test the proposed system;
- implementation and the 'R quadrant' model; and
- evaluation.

Fact-finding and analysis

9.35 Establish what the existing conflict management system is and assess what kind of, and how many, disputes are involved. Refer to **9.27**, 'Conflict analysis'. Do a cost–benefit analysis of the present system, especially in terms of its efficiency, and the effect it has on organisational relationships. A 'SWAT analysis' may also be useful. This acronym stands for:

- *Strengths* — What are its strengths?
- *Weaknesses* — What are its weaknesses?
- *Analysis and action* — What do we need to do?
- *Threats* — What obstacles/problems/issues do we face?

Consult with existing users of the present system or the proposed new system. During this phase you will get a clear picture of the organisation's responsiveness to conflict and the culture that permeates it. Keep in mind that the process of fact-finding and analysis is in itself a powerful intervention which will begin the process of change, hopefully in the direction you want it to go, and therefore must be undertaken in a sensitive way so as to develop trust and rapport. You may find it useful to combine consultation with the CATWOE 'root definition' referred to in **Chapter 10**.

Outline the principles and objectives

9.36 It is useful to establish the broader principles for an effective conflict management system before proceeding. I have outlined above at **9.19** some of the principles that governments have introduced as a guide: see Australian Standards, *Guide to the Prevention, Handling and Resolution of Disputes* (1994) (AS 4608-1999); and *Dispute Management Systems* (2004) (AS4608-2004). In addition, you may wish to consider some of the following criteria:

- Set clear and achievable objectives for the system.
- Build in data collection and evaluation from the start.

- Early intervention is usually best, although remember that where people have experienced serious conflict or loss, the ability to respond cooperatively may take some time.
- Move from least intervention to more.
- Establish the level of transparency of the system; that is, the ability of participants to know where they are in the system and the level of disclosure of decisions made.
- Any system should be seen as non-linear; that is, there is the ability to go back to less interventionist processes.
- Disseminate information, education and training relevant to the system, to make it accessible.
- Each part of the system should be time-limited.
- Privacy and other rights are to be respected.
- Ensure the 'prevention strategies' are in place using the 'R quadrant' model as a guide (see **9.38** below).

- Rather than simply prescribing processes a system should, if possible, provide a 'road map'; that is, several possible ways to proceed.

Clear objectives are crucial for the system to work. These will also be the benchmark for ongoing evaluation. Objectives could include, for example:

- stable and realistic agreements;
- user satisfaction;
- cost-effectiveness/efficiency; and
- fairness.

The objectives must be spelt out fully and explained to everyone involved.

Appreciative inquiry

Some years ago a fellow mediator introduced me to an interesting and relatively new 'post-modernist' approach to effecting change in stressed groups, called 'appreciative inquiry'. It rejects traditional problem-solving models of intervention concerned with 'what's wrong?' (that is, deficits), and is more concerned with 'what works'. It is an approach underpinned by an emphasis on pluralism, social relativity and construction. It is an approach derived from action research (that is, where the process of inquiry is an essential part of the process of emancipatory change) methodologies, where the object is to find the 'life-giving focus' within the group; that is, it begins with 'appreciation'. As Bushe (2013) states: 'The theory's central management insight is that teams, organizations and society evolve in whatever direction we collectively, passionately and persistently ask questions about'.

Appreciative inquiry is an exploration of what is possible. Appreciative inquiry practitioners emphasise the need to be both provocative (that is, to go outside the established norms of the group) and collaborative.

The process of appreciative inquiry usually goes through four stages:

- discovery — what does the group find that is inspirational, exciting;
- dreaming — visioning valued and crucial features and the group's potential;

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- design — constructing the new social architecture of the group that may better reflect its dream; and
- destiny — practical delivery of the architecture through innovation, learning and adjustment.

Many of these ideas are instructive for those interested in working with groups in conflict. I would recommend you read Cooperrider (1990; 2005) and Wheatley (1992) if you are interested in using these methodologies: see **Exercise 16** at the end of this chapter for further information about this model.

Reality test the proposed system

9.37 Reality testing the proposed system involves consulting with those who are likely to use the system and adjusting it as necessary. In particular, you will need to ensure that sufficient resources are available to properly implement the system, especially those relating to training, adequate staffing levels, facilities and equipment. It may be useful to commence the new system with an initial trial period.

Implementation and the 'R quadrant' model

9.38 Before a system can be effectively implemented, those issues dealt with in the reality testing stage must be completed. Particularly important is training and education for those in the group who will be affected by the new system.

Any intervention to manage conflict in an organisation should take account of four interdependent sectors of change: perceptions, communications, resources and structures. Each of these sectors has to be managed within the meanings (culture) ascribed to them by the members of the group or organisation. This can change from one organisation to another.

'Culture' refers to values, beliefs and assumptions about how things operate. This, or any model of conflict management, is sterile if it does not incorporate or take account of organisational culture. When intervening in a conflict do not forget this aspect. In the model described below it is the central aspect because it will determine how the other parts are both operationalised and interpreted. It is the 'gateway' into and out of the organisation. In this way the whole of a group or organisation can be considered rather than just part of it, as is so often the case — a piecemeal

approach that is one of the main reasons why CMSD does not work as well as it could.

The term 'R quadrant' is a convenient way of remembering the four avenues of possible change: reframe, redirect, resources and restructure. This model has the advantage of dealing with not only the 'hard' aspects of organisational life (resources and structures) but the 'soft' as well (perceptions and communication).

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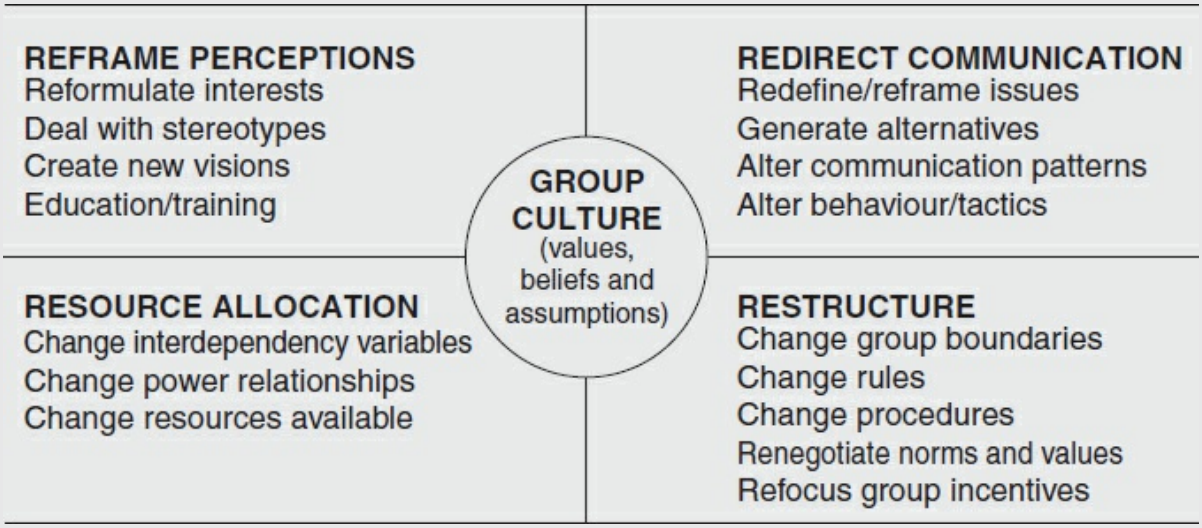
The R quadrant model of conflict management in organisations



The following table outlines the elements in each sector and provides examples for possible change. I have used this table extensively in workshops, along with a questionnaire, and it has proved to be a valuable vehicle for training, exploration of group conflict and developing possible programs of implementation.

The R quadrant: An holistic approach to change

Reframe perceptions	

Elements of the quadrant	Examples
Reformulate interests: Why people are doing or justifying what they are doing.	Get participants in conflict to reality test their needs. ‘What if’ and ‘why’ questions are useful.
Deal with stereotypes: How others (people or things) are depicted as particular ‘types’.	Change the language of description.
Education and training: Developing group personnel.	A course in conflict management.
Create new visions: Where group members think the organisation is going or what it will be.	A group planning day.
Redirect communication	
Redefine/reframe issues: Changing the way in which issues are considered.	Look at issues from the other’s perspective.
Generate alternatives: Change the way people relate by giving them a range of alternative venues in which to interact.	Install a coffee maker so that people can have time together.

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Alter behaviour/tactics: Altering another’s behaviour often requires a change in your own behaviour.	Rather than questioning subordinates, ask them to question you.
Resource allocation	
Change interdependency variables: Groups usually rely on the interconnectedness of various dependant ‘parts’ or ‘processes’.	Move the marketing/research function of the organisation into the service delivery function.

Change power relationships: There are various sources of power in any group or organisation at both informal and formal levels.	Require that project officers report to an all-staff meeting rather than just to their direct supervisor.
Change resources available: All activities require not only inspiration and application but things such as office space, travel allowances, time off in lieu, or computer processing assistance.	Provide secretarial assistance to a project team.
Restructure	
Change group boundaries: Organisations and groups are usually 'divided' up into various subgroups.	Merge the information technology section into the various departments it services.
Change rules: Rules are those stated and unstated injunctions that regulate behaviour.	Allow professional staff to dispense with time sheets.
Change procedures: Procedures are established (often formalised) ways of doing things.	Implement a new meeting procedure.
Renegotiate norms and values: Broad and long-lasting rules in groups are called norms, and values are the belief systems we usually construct to sustain them.	Ask a visiting student or consultant to critically reflect on the way things are done in the group and then have them suggest possible alternatives.
Refocus organisational incentives: These are the things that motivate people such as status, satisfaction and companionship.	Create a clear set of incentives (bonus; extra leave) for those who reach reasonable performance targets.

It is often important to build into the process of intervention 'organisational responsiveness' as part of the strategy of conflict management so as to reduce resistance to the desired change. For example:

- *Naming the demons (identification of potential conflict):* Where possible it is useful to identify potential conflicts before they emerge in the form of disputes or other damaging behaviour. Naming the problem is often a crucial step in preparing the group for change. It can also serve the function of positively reframing the emerging or potential conflict so that it becomes both an 'object' of analysis and intervention

as well as less threatening. Knowing the demons and giving them names is usually much better than hiding from them.

- *Costing the present system:* It is useful to examine the costs of the present system, not only in conventional financial terms but also in areas such as absenteeism, staff health, morale and teamwork.
- *Developing lines of communication:* This can include regular meetings, conferences and telephone calls. Often these most basic of processes can be neglected, especially in a group experiencing severe conflict.
- *'Institutional dissenters':* In group meetings or forums, it is often useful to designate, on a rotating basis, one or more persons to be critical of proposals being discussed. This allows disagreements to be aired on a low-risk basis.
- *Provide conflict management skills training:* These skills can be spread throughout the organisation by formal and informal means; for example, in-service days, workshops and case discussions. This is particularly

important in building committed leadership, particularly in management, in relation to the proposed changes.

- *Appeal structure:* At a more formal level the establishment of review or appeal structures to deal with grievances and issues can be important. Policies that reward risk-taking and accountability to clientele may be appropriate. Organisational responsiveness presumes that conflict can be dealt with in a positive and constructive way.

Reaction and resistance

9.39 When considering your implementation plan it will be necessary to take account of the reactions and resistance that it will create. In his scientific treatise *Principia*, published in 1687, Isaac Newton conjectured that every action in nature provokes an equal and opposite reaction. From there the term entered the vocabulary of the social services (hence the term 'reactionary'). For the would-be change agent this is an important term to keep in mind. Reaction to attempted change is inevitable. It should therefore be planned for and met. Who and why 'they' are reacting are useful matters to consider and you can help the group prefigure this by including the concept of reaction in planning and implementation. When the reaction is such as to impede or stop the process of change it is usually termed 'resistance'.

The *Australian Concise Oxford Dictionary* defines resistance in three different ways (biological, physics and electrical) as follows:

> **resistance** *n.* **1**. (Power of) resisting *(showed resistance to complying, to wear and tear);* (Biol.) ability to resist adverse conditions; PASSIVE *resistance;* ~ (**movement**), secret organisation resisting authority, esp. in a conquered country. **2**. Hindrance, impeding or stopping effect, exerted by material thing on another *(overcome the resistance of the air);* **line of** ~, direction in which this acts; **take line of least** ~, (fig.) adopt easiest method or course. **3**. (Phys.) Property of failing to conduct (electricity, heat, etc.); amount of this property in a body; (Electr.) resistor. *resistance, resistence.*

All three variations are worth considering when thinking about how group members will respond to proposed changes.

The table below lists possible causes of resistance and responses. There may be other ways resistance may occur.

Causes of resistance	Possible responses
The new process is not understood or mistrusted	Outline the process in a variety of ways; for example, briefings, wall charts, case studies as well as conventional reports.
Fear of loss of control	Ensure consultation takes place with the group and make it a noticeable part of your public planning. Point out that having a designed structure in place makes it easier to deal with difficult situations.
People are unsettled by change	It is normal that people will have some issues and the discussion of these may improve the end result.
Management will be sidelined and receive no kudos	Having an agreed process in place should maximise satisfaction and outcomes, creating a perception of better management.
We will be seen as weak	Supporting a more collaborative approach does not mean betraying the public trust or accepting less. It should produce a better end result for the group and other interests involved or it will not be accepted.

Autistic hostility (see below)	Ignore it and remain friendly and cooperative/polite.
Outcomes will be uncertain if we use an ADR process	Judicial and administrative outcomes are also uncertain. Parties in more collaborative approaches can agree to disagree and seek a traditional decision process if they are not satisfied.
Inefficiency	The long-term costs of conflict, hostile and deteriorating relationships and group disharmony are even less efficient.
The best alternative to a negotiated agreement	Over 90 per cent of people going into litigation think they will win and only 50 per cent do. Explore worst and best case scenarios and the positive value of win–win solutions.
No one is skilled enough to manage the new process	Discuss skills needed. Most groups have services that can be readily adapted to the necessary processes through training, use of consultants etc.

The costs are too high	Explain the potential cost savings in avoiding litigation, staff time and resources.
Winning is important	Preserving and building relationships needs to be given emphasis. Winning does not necessarily achieve this.

Resistance can sometimes manifest itself in 'dirty tricks', which may take the form of:

- deliberate deception;
- psychological warfare; and
- positional pressure tactics.

The typical response to dirty tricks is to respond in kind, or let the other party get away with it. Instead:

- recognise the tactic and raise the issue explicitly (but not in an attacking way) — often this will be sufficient to stop the behaviour;
- if necessary, negotiate first over negotiation rules; and
- remain objective — remember you have always got your BATNA (best alternative to a negotiated agreement) or the option to turn to a third party for help.

Autistic hostility

I was once involved in the restructure of a group where the resistance to change was considerable and the reaction long-term. As well, there was a considerable array of dirty tricks brought into play. However, the most difficult aspect of the change effort was dealing with 'autistic hostility'. This refers to the tactic that was used by some group members to completely ignore certain others and myself in a very deliberate way. My response was to consider what their intentions were and particularly what reaction they were expecting from me. Normally, this type of resistance is aimed at provoking an equally negative response. Instead, I remained friendly and cooperated as much as possible. While this did not resolve the issue in this case, it probably contributed to its containment. When faced with hostile reactions like this it is usually best to respond rather than react; that is, rather than blindly reacting to what is happening, consider the intention of the other and pause before responding.

Evaluation

9.40 Evaluation should be built in from the start, and it is important that any system have an appropriate record-keeping procedure so as to enable this

to effectively happen. In some instances an independent evaluation by outsiders may be preferable. Evaluation is only truly effective where the group recognises that the conflict management system must be flexible and open to change where necessary. It may be useful to appoint a senior officer to a position that involves overseeing the conflict management systems of the organisation. This is a process that is already occurring in many large public

and private organisations. As well, a committee representing various interest groups involved in the conflict management system may be formed to meet on an ongoing basis to review and provide feedback into the system.

The usual way of assessing decision-making processes is through a process of consultation that may have a number of related aims, including involving people, generating and clarifying ideas, generating and selecting options, and providing feedback. The type of consultation will vary depending on the time commitments, level of skills and level of information required.

Consultation can be one-to-one, in small groups or in large meetings. The type of interaction depends on the aims of the consultation. For example, if the aim is to educate or inform people, then a large group or meeting may be the appropriate way to go. If an expression of views or opinions is the objective, then a one-to-one or small group exercise may be appropriate. This chapter concludes with a description of a number of well-known consultative techniques. Before getting to this, however, consider the following in-depth case study based on real events which illustrates many of the principles described above (Condliffe, 2006).

A case study in organisational meltdown: Managing the restructure of an organisation through a period of intense conflict

Initial terms

The subject of my intervention was a school which had experienced a long, intense and

disruptive period of conflict. When I entered into my terms of reference and contract of engagement with the school it was important to ensure that I had the support of the school Board. I understood and sensed that I would be encountering quite a deal of resistance to the change effort and wanted to ensure that I had a secure base from which to launch it. Once this was established, I proceeded to interview a cross-section of staff involved in the various conflicts identified. There were several other key matters requiring careful consideration, including examination of previous change efforts, taking careful note of the language being used, critically assessing my own values/assumptions and making them explicit and also ensuring that any change had to occur across a number of identified levels. In a fundamental way I developed a model of change for the school which attempted to be compatible with its underlying ethos and needs as an organisation.

Past efforts

The school had attempted to restructure itself and deal with various intense conflicts between staff which had enveloped much of the school community. All such attempts had been largely unsuccessful. However, they did provide vital and important information for the task I was given. What was striking about these earlier attempts to deal with the problems is that they focused primarily on process and values. In my view, there needed to be an equal consideration of a number of other elements which were important to my eventual proposal to make significant change.

Language

It was notable that the description of the school in various forums and in the documentation provided to me emphasised 'consensual decision-making'. The school was stated to

operate in a 'collegial manner' and to represent a 'democratic/republican form'. This was also typically described as an 'organic' rather than a 'hierarchical' way of managing so as to encourage widespread participation and sense of responsibility. The potent symbolism of these descriptions and their actual manifestations had to be carefully understood and managed.

Assumptions

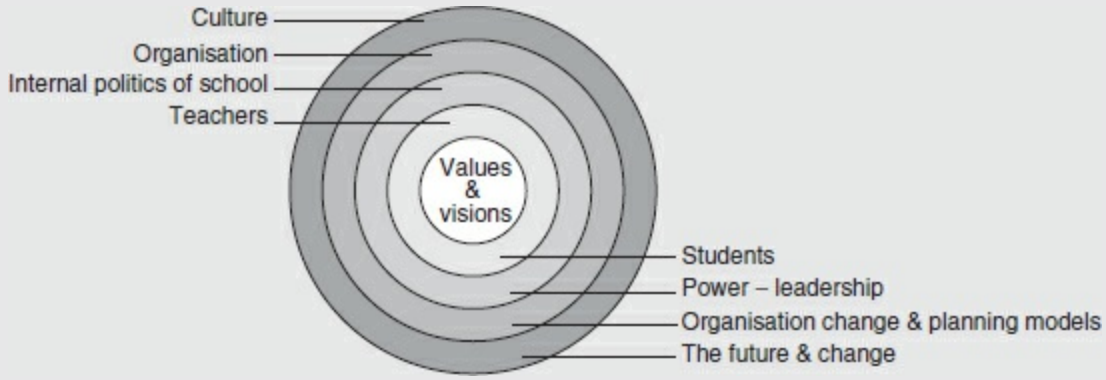
There were a number of key assumptions that I made and communicated in developing the proposal for change: first, a whole-school effort was necessary for long-term change to be effected; second, I emphasised the value of the participants' perceptions of their experiences in developing and implementing change; and third, I recognised that school change was influenced by events in the external environment.

Working across different levels: Developing a model to understand and develop the change effort

As part of my engagement with the school I had to leave my law and ADR texts behind me for a time and plunge into the relatively unfamiliar world of the education organisation

as a target of change. My previous training and experience as a teacher and academic started to pay some dividends here. I quickly came to the conclusion that any change at the school had to take account of and operate across a number of different levels. Adapting Starratt's (1993) model of the school as an 'onion', as further developed by Daniels (2001), there were a number of levels conceptualised that required consideration in the change effort. This is shown in the following diagram. The model became the 'centrepiece' of the change effort and was used extensively throughout.

The school change model



At the core of the model are the *values and visions* that underpin the actions of school members. The next layer out from this represents the fundamental area of interaction in the school — that between *teachers and students.* This layer is near the centre of the model for the simple reason that any change in the school had to take account of, and be of benefit to, this particular level. The next level is the *internal politics of the school*, which represents the exercise of power and leadership by individuals and groups. It is in this level where most of the conflict occurred within the school. The fourth layer is the *organisation.* Within this layer various models for organisational change and planning were considered. It was from within this layer that I considered the conflict generated within the internal politics of the school had its genesis. The outer or final layer represents the school *culture.* It is represented as a force for the future and change, but it also represents the possibility of stability. Including this layer was important in bringing in parents to the change effort.

It is not the intention of this brief case study to explore each of the levels of this model in any detail. However, it was important that all school members eventually became acquainted with some of these key concepts.

Values

Values are important as both a source and motivator for change. Also, it became apparent that any change should be congruent with the strongly-held philosophical and pedagogical underpinnings of practice within this organisation: see Goodlad (1975). The various groups and individuals who were taking leadership positions or were

stakeholders, and their value systems, were crucial in this area as well: Chu, Sharpe and McCormack (1996).

Teachers and students

The teachers and students level was crucial because it was here where the change to structures had to become apparent in the outcomes sought to be effected. It is obviously a key area of relationships and any change which does not have benefit in this area is probably not worth the effort. As Barber (1997, p 160) commented:

> It's time to recognize that reforming structures alone will not bring about real change, least of all in education, where quality depends so heavily on a chaotic part of personal interaction.

Any restructuring of the school had to allow these relatively 'chaotic relationships' to flourish and remain positive. It was my view that teachers needed encouragement and 'space' for this area to flourish and, further, it needed to be balanced against 'collegiate norming'. In other words, there was a need for support of the teaching and student bodies for the changes in structure to have long-term and positive benefits. The viability of the proposed changes and the amount of resistance encountered depended very much on the perception of the school's teachers, whose role would be to largely implement them.

Internal politics

The next layer from the centre of the model is the internal politics of the school. This level is largely to do with decision-making and the way in which power and leadership are exercised. As Cooper (1988, p 54) stated:

> To the extent that participation in the profession, in decision-making, in the rights of power and control helps children, then professional culture will have meaning. That being the benchmark, the effort will not be self serving.

It was at this level that conflict had largely shown itself. The fulcrum had been around decision-making processes. This is not to say that it was necessarily because of the way in which decisions were made (that is, process issues) that these conflicts became so intense. Rather, it was possible to speculate that the conflicts had reached a level where the school had in some respects become dysfunctional because of the organisational structures which had developed in the school. These dynamics are described below in some further detail.

It is at the internal politics level that various confrontations and interactions within the school community were played out. It was to be expected and natural that there would have been a certain level of conflict. This in itself would not necessarily be a bad thing and in most organisations it spurs creativity and helpful change. In any organisation there will be different perspectives on power, goals, ideologies, interests, political activity and control. The management of the conflicts that occur around these various aspects of

internal politics are crucial in maintaining organisational cohesion and help: see Ball (1987). However, if the conflict is badly managed then trust will necessary fall off within the group and efforts to make meaningful changes will become more and more difficult.

In the environment in which this school found itself, it was crucial that the various leadership elements should take a central role in managing this conflict productively. Redeveloping trust in the teacher group was the most significant aspect of developing school leadership in the future. Developing more appropriate structures would assist in this endeavour but by itself, in my view, could not achieve organisational peace. There was a need for a strong leadership group to develop which could re-establish a sufficient level of trust across the broader organisation. I described this need in terms of 'transformative leadership' in the way in which Lakomski (1995, p 211) described it:

> … developing teachers' (and students') potential, altering awareness, introducing vision and mission and generally transforming the organisation and its members.

In the longer term this type of leadership would need to be balanced by broadening the leadership potential of the whole teacher group. The 'leadership', as Blackmore et al (1996, p 15) described:

> … have a sense of direction which they communicate but do not impose on others and they can be persuaded to change their minds when convinced … consult and are committed to democratic practice as much as is possible … make difficult decisions but justify them openly to those affected and provide alternative ways of doing things. They share responsibility and power, encourage individuals and groups to work collaboratively and 'lead'.

In other words, the new leadership emerging out of the conflicts and crisis besetting the school would have to energise all levels of the school.

Organisation

The next level is organisation. There are various frameworks which one could use to develop a model for intervention, including organisational development, total quality management, a systems-based approach, evolutionary planning and a self-managed model. These are briefly described below:

Name of possible framework	Description
Organisational development	A framework developed from business contexts, which tends to apply behavioural science using system improvement and self-analytic methods. It usually revolves around a planned intervention including values, goals, planning,

	practice and evaluation.
Total quality management (TQM)	TQM is another business-derived change theory that attempts to move beyond traditional hierarchical systems and instead develops structural forms that focus on empowering staff. Focus is usually on needs, processes, continual small changes and involvement of all staff.

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Name of possible framework	Description
Systems-based approach	The organisation is viewed as a behavioural system comprising various levels. Interdependencies between various levels are a crucial consideration. Teamwork and participation are usually regarded as central in this framework.
Evolutionary planning	This model emphasises selecting broad and multiple goals but in a framework which gives some emphasis to ambiguity. Incremental change is important as is learning from experience.
Self-managed model	This model emphasises planning, shared decision-making, and being responsive to the environment through a continuous process of evaluation and updating of goals.

Although my preference is the evolutionary approach, elements of all approaches were

adapted to the change effort and in particular the management of the range of conflicts that had emerged.

It was my view that the genesis of the conflicts was essentially in this level of the school. In simple terms the administrative (that is, the non-teaching and non-pedagogical functions) and teaching systems in the school, rather than complementing and assisting each other in their respective roles, had become oppositional and were enmeshed in a relatively long-term and intense rivalry around decision-making on various issues. As the conflict developed and positions hardened, it degenerated into a series of interpersonal clashes which masked the underlying structural failures in the organisation. A new 'administrative team' (composed largely of former teachers, several of whom were brought in from outside) had been set up to deal with emerging problems in managing the day-to-day affairs of the school, but due to a lack of appropriate role definition and a resultant lack of authority, had found itself propelled into areas of decision-making which had increasingly been resisted by the traditional centre of decision-making in the school — the teachers.

In a sense this new body had moved to fill a vacuum, but in a culture not prepared or organised to accept this and without adequate organisational adjustment. In turn, the other key parts of the school organisation, centred in the teaching staff, resisted this encroachment on decision-making by asserting the traditional leadership function of teachers. As the conflict developed, more and more individuals within the school community were drawn in. The dynamics were described as increasingly complex and somewhat chaotic. The organisation underwent considerable, unplanned and sometimes traumatic change. There was evidence of all of the following integers of conflict: group polarisation; 'run away norms' (a tendency to impose 'right thinking' on new people joining the organisation); 'contentious group goals' (a tendency for various subgroups to organise themselves around the conflict); militant leaders; and militant subgroups. The presence of all of these integers in the conflict indicated a high and intense level of dysfunctional conflict which required some significant and ongoing management (see Condliffe, 1999).

It was because of the presence of these various integers of intense conflict that a significant change in structures was called for. The change had to be implemented in the short-term

but evaluated in the mid- to long-term. The core of the proposed change was to clearly subordinate the administrative functions to the academic functions of the school.

This was to be achieved through the disbandment of the relatively new administrative system which had been set up and its replacement with several new positions to both lead the teaching and administrative wings. Administration was separated from the teaching and curriculum functions but made clearly accountable. Teaching bodies could no longer involve themselves in administration. No longer would administrators have a role in academic and curriculum matters; they were to be solely concerned with business administration. The link between the two functions of teaching and administration was a

new leadership group. Clear lines of reporting and accountability were built into new position descriptions and policies.

'Internal management' structures were set up for the new organisational groupings so as to guide elections to positions, meeting processes and the like. The new leadership group was to be the key link to the Board, which itself was provided with new meeting protocols.

Culture

The final layer of the model is culture. Culture is the shared values and symbols within the school community. I saw it, in this context, as a somewhat elusive concept particularly bound up with school leadership and the educational philosophy of the school. Proposed changes in the school needed to take account of this cultural level and, in a sense, the culture of the school had to change as well. At the same time it was readily apparent that the school needed to retain its particular identification with certain values and attitudes. These provided not only a sense of identify but a sense of connectiveness to the past which could fortify the organisation against an uncertain future.

Stages of intervention

As we moved to change the school and its structures so that it could emerge out of this period of dysfunctional conflict, the process was rather conventionally seen and described as a series of stages which have to be gone through. These are entry, planning, implementation, evaluation and institutionalisation.

Entry is the initial engagement of a meaningful change agent in the process and involves scouting the parameters of the various elements of the conflict and the issues being faced by the organisation. It also involves a level of diagnosis of the problems.

Planning involves setting time lines and objectives and putting forward the diagnosed scheme.

Implementation involves the actual action phase of the change, putting in place the new personal structures and processes.

Evaluation involves ongoing feedback to designated elements and evaluating changes as a result.

Institutionalisation is the process of formally accepting the changes into the 'whole organisation' as relatively permanent.

Each stage of the change process was seen as a recurring cycle of activity and it was emphasised that we must be prepared to go back as well as forward.

Resistance

It was to be expected that throughout these various phases levels of resistance were met and had to be managed. Also, it was necessary for the proposed plan, which centred on

structural change, to be modified as feedback was received and contingencies which

may not have been foreseen were encountered. The change process was a complex one and the prime leadership elements being developed had to be prepared to work at a number of levels and across the whole school community, to ensure that the change was successful. It was essential that the management of the school, as expressed through the Board and in the new managerial structures, supported the changes.

Conclusion

This case study outlines only the beginning of those changes made in the organisation. There have been and will need to be further changes as the process moves forward. A review of the changes indicated overall success in restoring relative harmony in the school, better management and decision-making. The school is working again in a functional and productive way. Interestingly, the return of peace has revealed the true extent of the damage done by the preceding period of extreme conflict. But that is another story! Importantly, the school has moved forward and been able to confront the resistance and conflicts that have emerged. There is still much to be done, but with patience, the appointment of the right staff, some luck and the traditions inherent in its type of education providing the backbone, the school will continue to become a better place for staff and students. Meanwhile, I can softly tiptoe away and get on with reading law books and the occasional ADR tome!

Useful Consultation Techniques

The Delphi technique

9.41 The 'Delphi' technique was so named because, like the oracle at Delphi in Greece, it is used to develop strategies for the future. Originally developed by the American Rand Corporation in the 1950s, it was conceived as an aid to help predict technological developments (Delbecq and Van de Ven, 1975). It is useful in generating creative ideas around a particular issue and maximises the potential to pool resources and enable greater participation. It is not an appropriate technique when the issue or topic to be discussed is one about which the participants do not have much information or knowledge. Further, it is not particularly useful for resolving conflict, because disagreements are not fully explored. It should thus be seen as a conflict prevention technique rather than a conflict management one. As will

be seen, it is also a time-consuming process that needs to be adequately resourced.

Essentially, the Delphi technique is a systematic drawing out of people's opinions on a particular issue through a series of questionnaires, and a feedback of summaries to group members, so that they can further consider their responses. The process is concluded when there is consensus or enough sharing has occurred that allows group members to clarify their views. The technique does not rely necessarily on people meeting face-to-face; mail-outs of questionnaires and feedback summaries are all that is required.

The Delphi technique involves a number of steps (McElreath, 2001), described below.

Step 1: Preparation — reviewing expectations and selecting participants

9.42 By asking group members about their expectations of the consultation, the initial questions can be agreed. For example, participants may want to develop a policy

about how clients should be treated in certain situations, or they may want to review the range of techniques available to meet a certain contingency, or to review current management structures within the organisation. It is important to be very clear about what the consultation is about so as to formulate relevant and concrete questions.

Next, you need to clarify who will be included in the group. This is a crucial part of preparation because you usually want to include all those who have an interest in, or power in relation to, the issue to be discussed. Politically this is a sensitive process and should be done carefully. As part of this process you

need to decide on how many people you want to include and get a commitment from those who are to participate. The more people there are the more complex the process becomes and the more work required. You need to accurately inform people of the time commitments involved; the success of the Delphi process depends on their ongoing commitment.

Step 2: The first questionnaire

9.43 Usually the first questionnaire consists of several, or even just one, open-ended questions such as: 'What should be in the new policy to guide our future conduct with clientele?'.

The aim is to generate as many ideas as possible. However, if you are trying to explore in more detail a number of options already developed, you need to ask questions that are more detailed. You may want to pilot-test this questionnaire by asking someone not involved to respond.

A letter explaining how the process works should be sent out or given to each participant with this questionnaire. It is probably a good idea to include a stamped, self-addressed envelope to facilitate the process of return. Be sure to set a return date.

Step 3: Analysis of returns

9.44 Make sure that all participants return their feedback sheets. In this step you sort through all the feedback sheets and make a list of all the ideas generated. Where two or more people have listed the same idea (even if in different words) the idea is only listed once. Be careful to describe each idea in a way that will be clear to everyone involved. This will be used in the second questionnaire.

Step 4: The second questionnaire

9.45 The second questionnaire is constructed from the description of each idea developed in step 3. The aim of this step is to move people to give their

opinions about other people's ideas and to rank order or rate them. The covering letter should carefully explain the process to respondents and can include instructions to:

- state reasons for and against each idea;
- clarify any ideas; and
- add any ideas they think have been left out.

The letter should be clear as to how each idea is to be ranked or rated. For example, do you want them to be ranked in order of importance, priority, agreement/disagreement, or ease of implementation? An example would be: 'Rank order each of

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the ideas listed giving number 10 to the most important item and number 1 to the least important'.

Rating requires each respondent to give a score out of a set scale to *every* idea. For example: 'Rate each item on a scale from 1 to 5. Score 5 indicates most important'.

Again, you might want to test this questionnaire by piloting it with other people before sending it out. The questionnaire and covering letter are again forwarded to respondents.

Step 5: Analysis 2

9.46 This second analysis involves adding any additional ideas to the list; summarising the comments made about each idea; and adding up the rankings or ratings given to each item. This can be organised as follows:

Step 5: Analysis 2

Idea:	
Idea no:	
Comments made:	[List all comments]
Summary of comments:	[Sentence or paragraph]
Ranking/ratings:	[All rankings noted here for each item. For example, item 1: 4, 5, 3, 4 (that is, item 1 ranked 4th, 5th, 3rd and 4th, respectively); 2: 6, 3, 2, 3 (that is, item 2 ranked 6th, 3rd, 2nd and 3rd, respectively).]
Total of rankings/ratings:	[For example, item 1: 16 (that is, item 1 total rankings equal 16); item 2: 14 (that is, item 2 total rankings equal 14).]

Step 6: The third questionnaire

9.47 This builds on the responses already made and gives respondents the chance to make a final assessment. The questionnaire will usually contain the list of ideas, the results of rankings and a summary of the comments made. It should ask respondents to make a final ranking or rating and add any final comments.

Again, a test of the questionnaire may be advisable. The questionnaire and covering letter are sent out as before.

Step 7: Final analysis and feedback

9.48 The final analysis draws on the feedback sheets from the third questionnaire. It should contain a final list of ideas, a summary sentence on each idea, and rankings after questionnaires two and three.

You can then produce a final report that is circulated to all participants and others who may be involved. At this stage you may wish to add further

interpretative comments about the results and enough background to enable non-respondents to understand the exercise.

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The Delphi technique can be varied to suit the particular circumstances for which it is to be used. Although originally devised as a means of planning for future technological changes, it has been used in a wide variety of situations. It is particularly useful when the group is spread over a wide geographic area or when it has difficulty in finding time to come together. It is also useful in prioritising action and assessing options.

Nominal group technique

9.49 The nominal group technique was developed in the 1960s as an attempt to improve the efficiency of meetings (Delbecq and Van de Ven, 1975). In particular it was conceived as a way of preventing needless and destructive conflict and involving group members more fully in the process of decision-making. It is most useful when creative solutions to problems are required and where group members have been reluctant to participate. It can be adapted to create options for the development of services, for needs assessment, and as a predictive device.

The nominal group technique relies on face-to-face meetings so, unlike the Delphi technique, is not as useful where people are spread over a wide geographical area or where they have little opportunity to meet. It requires some preparation time and therefore cannot usually be quickly substituted for more traditional meeting formats. It may also be difficult to use when there are competing factions with fixed views or positions. In this case it is probably better to use negotiation or mediation. The process is outlined below.

Step 1: Preparation and participant selection

9.50 The group leaders meet to formulate a question to be considered by the nominal group. The question should be simply worded and open-ended. Examples are:

- What is required to meet the new budgetary constraints required by the Finance Department?
- What are the variables we need to consider to develop the new client-centred service?

After this is done, consideration should be given to who should be included in the nominal group. This will depend on the reasons the consultation is being undertaken and the organisational context. Nominal groups are usually restricted to five to nine people. It is possible that in any one consultation you may run a number of groups simultaneously. Each group should have a recorder who understands the technique and is seen as neutral by the group.

Step 2: Explanation and presentation of question

9.51 The recorder explains to participants the nature of the process and the question is given to each person in writing as well as verbally. Each person then lists his or her responses to the question. There is no discussion or conversation at this time.

Step 3: Listing of ideas and discussion

9.52 When step 2 is completed each person, in turn, lists one of his or her ideas. Identical or very similar ideas are not listed more than once. The ideas are briefly

written up by the recorder on a whiteboard or butcher's paper. This process continues until no one has any new ideas. Each of the ideas listed is then

discussed. Each idea is clarified, and positive and negative aspects of it discussed. There is no obligation to defend any of the ideas and time-consuming debates are avoided.

Step 4: Independent summaries, rating or ranking

9.53 After each idea has been discussed, each person independently writes down a summary of his or her assessment of the list of ideas. They are also asked to rank or rate them as was done using the Delphi technique. It is important to be clear to group members on what dimension you want them to rank or rate the ideas. This could be for priority, significance, conflict, and so on. Whether you use ranking or rating will depend on your needs at the time and the context in which the consultation occurs; however, ratings are likely to give you a better scope for analysis of results.

Step 5: Collective rating/ranking and discussion

9.54 After the completion of step 4 the rankings or rating are collated. The results can then be clarified and discussed. Another ranking or rating round can be entered into after this discussion and a final result obtained. If there are several nominal groups running at the one time you can bring the groups together for this collective process. First compile a master list of all ideas with their relative scores; then, after discussion, have another round of ranking or rating.

Step 6: Voting

9.55 If necessary, the participants can then vote on the various ideas generated. They may not need to do this and may prefer to come to a consensus through further discussion.

Search conferences

9.56 Search conferences were used in the 1950s to enhance group learning

and output. They are formal processes that bring people together to look at future developments and options for change (Weisbord and Janoff, 2010). This is referred to as a 'searching process' (Emery (no date)). Searching emphasises people's ideas and values and the importance of the social environment in the planning process. It is concerned not with the means to get to a future goal but the goal itself. For example, what sort of organisation or town would we like to work in in the year 2020? Search conferences are particularly useful as part of a consultative process.

Shortened versions of the searching process can be used in a wide range of meetings and conferences. Searching facilitates bringing together people from different areas (for example, different departments or professional groups) and enhances group learning. It is particularly valuable for assessing the impact of particular policies or programs and for assessing values. It is not so valuable for a small-scale consultation or one that involves large groups of people (more than 50). Neither is it particularly valuable for getting quantifiable results because the main outcome of this process is group learning. It has been used successfully between parties in conflict and as part of organisational redevelopment.

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The outline below is meant to be a guide only to this process. If you want to run a search consultation you should obtain a copy of Merrelyn Emery's paper (see Bibliography) or seek the assistance of somebody who has conducted such a consultation. The process is outlined below.

Step 1: Preparation

9.57 Selection of participants is a crucial part of the preparation. You will need to keep numbers relatively small (below 50) and choose people who can actively contribute to the process. Depending on the type of consultation,

participants should be varied enough to reflect a wide diversity of views and have some interest in the focus of the search. 'Experts' may be invited to act as resources for participants.

You should also plan sufficient time over which the search will take place — preferably two to three days or even up to five days if required. The venue, ideally, should be away from regular work or family environments so that a real sense of group is achieved. It may also be a good idea to send out a brief explanation of the search process to participants beforehand so they can discuss the process with you and raise any concerns.

Step 2: Establishing group identity — the future we are in!

9.58 This step can last for up to two hours and consists of creating an atmosphere where all participants feel free to participate. If the focus of the discussion is on looking at an organisation's future, for example, you could get people to share their ideas about what is happening in the external environment by compiling a list of recent events. These could include technical, environmental, social and demographic changes. The events are then listed on butcher's paper or whiteboards around the room. 'Brainstorming' or a similar technique may be useful here (Emery (no date), p 21).

It is important in this step to avoid focusing on a group leader or 'expert', so avoid lengthy speeches or opening addresses.

Step 3: Desirable futures — identifying values

9.59 Working from the list created in step 2, the group now goes on to consider general futures that it sees as desirable. If the group identity is reasonably secure you can decide at this stage to break the group into smaller subgroups to look at different aspects of 'the general future'. It is still important to have the focus of the group upon cross-group interaction, not

on the group leaders. The discussions are summarised on butcher's paper and stuck around the wall.

The focus at this stage is on the 'what' (or value position) rather than the 'how' (or implementation position). For example:

- What sort of organisation do we want?
- What is desirable?
- What is probable?

Participants may want to negotiate over these value positions. There will probably be a natural tendency in the group to move on to the 'how' or implementation issues, and group members should be gently redirected back to the broader value

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questions. There is no set agenda in a search conference as it moves along at the group's own pace. It is up to the group leaders to use their judgment as to when to move between steps.

Step 4: Becoming specific

9.60 In this step the group is moved into considering more specifically the generalised futures that emerged in step 3. The broad pictures of step 3 are broken down into a number of smaller concrete ones.

Step 5: Constraints and reality testing

9.61 The group now considers the constraints that may have a bearing on the concrete futures outlined in step 4. The group also considers whether these futures are consistent with the original lists and value positions

generated in steps 2 and 3. Discussion of these matters can lead to some further clarification and modification of the futures envisaged.

Step 6: Implementation

9.62 In this step the group moves back to the present and considers how the futures generated in step 4 can be implemented. Given the constraints raised it is probable that only one or two desirable futures will be selected as most obtainable by the group.

The participants can also discuss in this step the way in which they would like to have the information generated and circulated. For example, they may decide on a formal written report to be prepared by the group leaders or a more collaborative process involving further consultation and meetings.

Conclusion

9.63 In this chapter we have touched on many of the considerations that need to be addressed by the conflict manager within groups and organisations. Certainly, the aspects of power, structure and roles would all have an effect on the way in which conflict is both generated and managed. Viewing the management of conflict in systemic ways can assist groups and organisations strategically manage this important aspect to achieve their overall goals. The processes of conflict management, especially the use of the R quadrant, and consultation described here can go some way towards dealing with conflict and, in some cases, bring about a fundamental shift in group structure and culture. The exercises that follow will further stimulate your thinking about these ideas and processes.

Exercises

Exercise 1 Discussion questionnaire

This questionnaire will help you focus on some issues of importance in groups or organisations. It will also act as a catalyst for group discussion and for analysis of participants' communication styles.

The exercise is based on one developed by Dyer in his book *Team Building: Issues and Alternatives* (1987).

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Read each statement in the list below and mark whether you agree (A) or disagree (B). Take about three minutes for this. Then in small groups try to agree or disagree unanimously with each statement as a group. Discuss any reasons for disagreement. If you cannot come to agreement, see if you can change the wording of the statement so that unanimous agreement can be achieved.

Conflict in groups and organisations

1. Organisations are always beset by latent conflict.
2. Strong leadership in a group allows members of that group greater freedom to participate.
3. Power in organisations is the key element fuelling conflict.
4. The clash of interests in groups is always resolved by the use of power.
5. Any group or organisation needs a balance between the task and maintenance functions of its members.
6. Groups cannot sustain a purely cooperative framework for functioning over long periods of time.
7. Conflict is most often caused by personality clashes.
8. Ongoing processes of consultation are always necessary in groups and organisations.
9. Conflict is a positive aspect of group functioning and should in some cases be encouraged.
10. Organisations are the means by which class conflict is perpetuated and played out in our society.

Exercise 2 Task, career and lifestyle

Most of us experience some tension in our organisational lives between task, career and lifestyle. A 'task' is the job you are actually employed to do; a 'career' is your longer-term work goals; and a 'lifestyle' is your values and living preferences. Because people in any organisation generally have different mixes of these variables, the 'internal life' of organisations is not always rational. Rather, there is a constant tension in the interplay between these various interests. The following exercise allows groups to look at the importance placed on the three variables by individual members.

Instructions

For each of the categories below, list the three most important aspects of each. Then rank order each

of the nine items, from 9 (most important) to 1 (least important). Add up the resultant 'scores' in each of the three categories. This will give you an idea of your priorities in each of these areas.

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Task, career and lifestyle preference sheet

Categories	Overall ranking	Score for each category
Task: The job or role you play in the organisation/group 1. 2. 3.		
Career: Your longer-term ambitions and aspirations 1. 2. 3.		
Lifestyle: Your values and lifestyle preferences 1. 2. 3.		

The category with the lowest score represents the area of lowest priority while the category with the highest score is the area with the highest priority. You can also use this as a useful organisational or group exercise.

In discussion in the group you can (depending on group trust) list each person's relative ratings in each category on a whiteboard or butcher's paper. The relative scores of participants are a useful way of focusing on these variables, and the way in which they impinge on work.

Exercise 3 Searching for harmony

This chapter emphasised the inherent conflictual nature of groups and organisations. However, many of us assume that conflict is unfortunate and unnecessary. Think about the groups and organisations you belong to and analyse any conflict you are aware of. Assess why this conflict is present in each case.

Exercise 4 Power

Some sources of power in organisations and groups were listed in this chapter. Think about groups or organisations you belong to, such as family, workplace or interest group, and identify the sources of power.

Exercise 5 Allocation and use of resources

I once worked in an organisation where one subgroup came up with a scheme to have its own staffroom and typist, which would have duplicated existing facilities.

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I could not understand why they were doing this until I realised that it was an attempt to reduce their dependence on the larger group. I also realised that in many organisations there is unnecessary duplication of resources for this very reason. There is also often a high level of conflict over the allocation and use of resources within organisations.

Do these conflicts happen in organisations that you are familiar with?

Exercise 6 Decision-making: A trinity

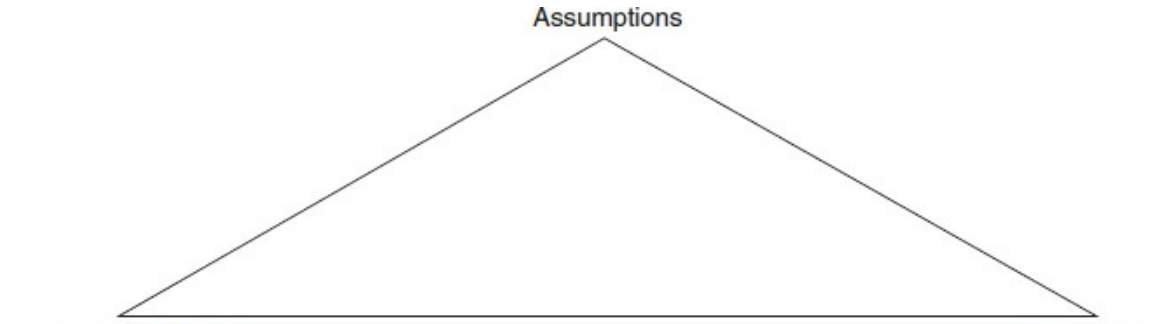
Decision-making in organisations is not always a simple matter. Three elements have an important bearing on how decisions are made: assumptions, processes and aims and objectives.

The consultative mechanisms outlined in this chapter are premised on group participation and sharing. In many organisations, however, the assumptions on which decisions are made are quite different; for example, assumptions may be premised on the belief that a strong leader is the one who will make important decisions.

Another important element of decision-making is the processes employed; for example, what person or committee is needed to make the decision and what evidence is required to support the decision.

Finally, the aims and objectives of organisations influence decision-making. If the aims and objectives of an organisation can he changed then decisions about how the organisation operates will be necessarily changed.

Reflect on your own organisational and group experiences. What do the above comments suggest to you about organisational decision-making? If in a group, use the following diagram to assist discussion.



The trinity of decision-making

Exercise 7 Enquiry mode

A useful way to approach disagreements is by means of an 'enquiry mode'. This involves finding out the other party's views rather than trying to convince them of the rightness of your own. It simply involves asking questions which are aimed at understanding the other party's viewpoint and the assumptions, opinions or

facts underlying it; and questions about other sources of information available. The enquiry mode is summed up in the following questions:

- Do I understand your viewpoint correctly?
- What assumptions, opinions or facts do you have that cause you to take that point of view?
- What information can we request from available sources to help our enquiry?

This type of enquiry can be used in a wide variety of group situations and can even be adopted as a formalised but simple process of group interaction.

List areas of latent or actual conflict in your organisational or group experiences where you could potentially use this method. How could it be incorporated in your group processes?

Exercise 8 Task, maintenance, individual needs and outside forces

In this chapter a simple way of analysing group interactions using task and maintenance functions was outlined. If we add the variables of 'individual needs' and 'outside forces' we have a basis for powerful analysis of such interactions.

Use the chart below and list or brainstorm items under each heading, either individually or as part of a group. Through this exercise useful insights can be obtained and group learning and cohesion enhanced. In particular, you can explore how these various factors interrelate and enhance or restrain group processes, aims and objectives.

You can also rank or rate each of the items either individually or as a group. Ranking can be done

by listing each item from most important to least important, or listing the 'top five' under each heading. Rating involves giving a score on a scale for each item (for example, 1 to 5).

Test	**Maintenance**	**Individual needs**	**Outside forces**
Examples	*Examples*	*Examples*	*Examples*
Supervising	Encouraging	Support	Budget cuts
Clarifying	Feedback	Encouragement	Government policy

Exercise 9 Role clarification

Roles can be an important source of conflict. When conflict emerges in a group over role issues a simple way to deal with it is to use a 'role clarification' card/sheet. This can be exchanged with another and/or used as part of a group

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exercise. In a small-group exercise, each person completes a 'seeker card' and gives it to another person in the group to look at prior to a discussion about roles and role conflict. This exercise only works when the group members know each other reasonably well.

Seeker card: Role clarification

To: [other person in group]

In order to perform my role/s well I want from you:

1. What I am already getting:
2. I need more of:
3. What I am not yet getting is:

From:

Exercise 10 Roles and groups: The Belbin Model

Roles are a critical variable in determining the ways in which groups and organisations work. We usually think of our role as that collection of tasks assigned to us by our employer or required of us

in our work. However, there is another way to think about our roles. Roles can be seen as our individual predispositions which, when brought into the context of a particular group dynamic, lead us to behave in characteristic ways. In **Chapter 3** we looked at this in the context of dealing with certain communication problems. In Belbin's book *Management Teams: Why They Succeed or Fail* (1981) he lists eight such roles which are not always complementary and are therefore the potential cause of conflict and failure. For conflict to be productively managed, an understanding of these roles and the way in which they affect behaviour is necessary. The roles are briefly described below.

- *Company workers* are able to adapt concepts and plans into practical working procedures, and carry them out efficiently. Ideally, they are disciplined, conscientious and practical, with a high degree of internal control. They tend to respect the established ways of doing things.
- *Shapers* are instrumental in setting objectives and priorities. They are called 'shapers' because of their tendency to want to impose some shape or pattern on group interaction and outcomes. Ideally, they are extroverted, energetic and fearless, with a will to achieve. They can be aggressive and prone to frustration, but good-humoured when challenged.
- *Chairpersons* are controllers who direct the way in which the group sets objectives. They try to use all team resources, recognising strengths and weaknesses. They are trusting but with a tendency towards dominance. Although task-orientated (to external goals) they are usually calm people, practical and self-disciplined.

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They can be aloof and tend to concentrate on the more talented members of the group.

- *Team workers* are supportive of other group members and are largely concerned with improving communication. They usually have a strong interest in people. They value harmony over conflict and are protective of weaker team members.
- *Resource investigators* are those who like to explore and report back on ideas and developments from outside the group. They value external contact and are generally innovative, curious, enthusiastic and communicative. They like to socialise and network but sometimes lose interest rapidly.
- *Plants* are original thinkers and are entrepreneurial. Creative and innovative, they often lead the group to new insights. They have a broad imagination and can be unorthodox. They sometimes lack practicality and may not have a good head for details.
- *Monitor-evaluators* like to dissect and analyse issues and problems. They tend to be highly organised and somewhat detached, if not serious. They can make sound judgments even in highly charged surroundings. They usually want time to make decisions and are often conservative in their approach. They can tend to be critical.
- *Completer-finishers* like to cover all the details in any plan and make sure that nothing is overlooked. They often like to stay in the background, are self-disciplined and conscientious with a good dash of perfectionism. Inwardly anxious, outwardly they appear calm.

We all have a predisposition to favour one or more of these roles in particular contexts. Certain combinations of these roles will make any particular task easier or more difficult to perform. Belbin provides a questionnaire so that respondents can determine what roles they favour. Below is a good exercise for a work group.

Provide each member of the group with a brief outline of the roles as described above and use this as the basis for general discussion within the group. After the discussion is completed ask participants to list the three roles they think most closely match how they operate within the group. If the group members know each other reasonably well, ask them to describe the roles they see each other member of the group performing. These can be shared and, if appropriate, written on a whiteboard or butcher's paper and used as the basis for discussion about how the group functions. The discussion can be assisted by asking participants to cite specific examples to illustrate the roles they have identified.

If the group members do not know each other well, break them up into pairs or triads to discuss how the roles they have described for themselves affect their functioning within groups. After this initial discussion, reconvene the whole group and discuss what was learnt from this exercise.

An additional activity could be to give groups a task (for example, **Exercise 1** above, 'Discussion questionnaire') and then ask them to reflect on the group interaction and the importance of the roles they played.

Exercise 11 Studying groups

The following activities provide four ways of studying groups.

(a) *Group norms:* These are the assumptions and expectations people have about what constitutes correct behaviour. Group norms are often hard to identify but very important in determining group functioning. Thinking about and discussing group norms is a useful way to enhance group functioning and reduce potential or actual conflict. Brainstorm about the norms you think apply to your group and then analyse them in terms of a number of important criteria such as:

i. Are they explicit (open)?

ii. Are they implicit (not openly stated but recognised by group members)?

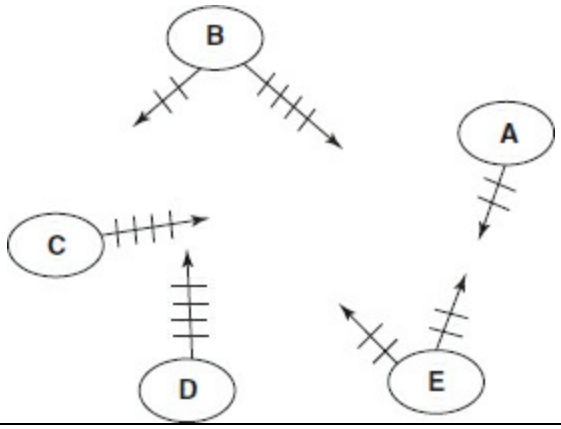
iii. What are their origins?

iv. What purpose do they play?

It is usually only possible to engage in this type of exercise where there is a reasonable degree of trust. If you are leading this type of exercise or are studying privately you can use the dot points as column headings for individual worksheets, or for listing group norms on a whiteboard.

(b) *Group interactions:* Another way to analyse groups is by looking at their normal pattern of interaction; for example, the number of times someone directs the conversation to a particular person. This type of analysis generally relies on tabulated information or diagrams like those

shown below.



Each time one of the participants talks to another, a stroke is added. The arrows indicate to whom the participant is talking. These diagrams can be elaborated on in a variety of ways; for example, dotted lines or different colours can be used to indicate hostility and aggression. Simple devices such as these can help observers and group leaders analyse group interactions.

(c) *Group development:* There is a vast literature on group development generally describing how groups change over time by means of phases or stages. Perhaps the best known of these is Tuchman's five-stage model developed in 1965, which may be so popular because of its rhyming qualities! Tuchman's model (Tuchman, 1965) describes group development as follows:

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Phase 1:	Forming	Attempts to identify task and testing of relationships.
Phase II:	Storming	Development of internal conflict and raising of emotions as task demands grow.
Phase III:	Norming	Group members feel free to express their views and there is a development of group cohesion.
Phase IV:	Performing	The group begins to achieve the objectives and find solutions while members function better together.

Phase V:	Adjourning	Separation anxiety begins while the group leader is regarded more positively. The group is disbanded and previewed.

It is useful for any group to trace its development and plot its futures. By using questions in the following chart as the basis for analysis, a group can devise its own model of development.

Our group development

The past

- What are the group's origins?
- What are the group's myths?
- What are significant events?
- Was the group different in the past?
- How?

The present

- How does the group reflect its past?
- What is the best way of describing what it is presently like?
- Is it adapted to future development?

The future

- What are desirable futures?
- What are probable futures?

(d) *Leadership:* Another focus of analysis is group leadership. This does not necessarily mean the formal leadership in a group but informal leadership provided at different times by people with particular skills and/or power. There are four critical areas or functions of leadership. These are briefly described below:

(i) *Leadership in creative and critical thinking:*

- contributing fresh ideas;
- provoking original thought in others;

- critically evaluating the ideas of others;
- encouraging critical thought in others;

- making the abstract concrete or the concrete abstract.

(ii) *Leadership in procedural matters:*

- initiating discussion;
- making agenda suggestions;
- clarifying;
- summarising;
- verbalising consensus.

(iii) *Leadership in interpersonal relations:*

- climate-making;
- regulating participation;
- encouraging others by listening;
- instigating group self-analysis.

(iv) *Helping to manage conflict.*

These functions can be used as the basis for a useful discussion of leadership roles.

Instructions

Outline on a whiteboard, butcher's paper or individual instruction sheets the four areas of leadership: creative and critical thinking, procedural matters, interpersonal relations and conflict management.

Ask group members to individually write down a brief summary of what they think each of these categories means and in what ways they provide leadership in each. Then divide the group into pairs to discuss their summaries. After a reasonable time (about 20 minutes) reconvene and ask members to individually rank order each of the categories using their level of leadership as a criterion; for example, if members feel they offer most leadership in creative and critical thinking they would rank this as 1. If managing conflict is the area in which they showed least leadership they would rank this as 4.

Now ask members to go back into pairs briefly to compare and discuss their rankings, and then to list two ways they could improve their leadership in each category. Then reconvene and discuss individual findings. Often this is best done by going around each member in turn. Direct the group's discussion to how individuals' leadership capacities affect group functioning. If the group is large (more than 20 people) divide it into subgroups for these discussions and bring group members back together for a final group discussion.

Exercise 12 Organisation continuums

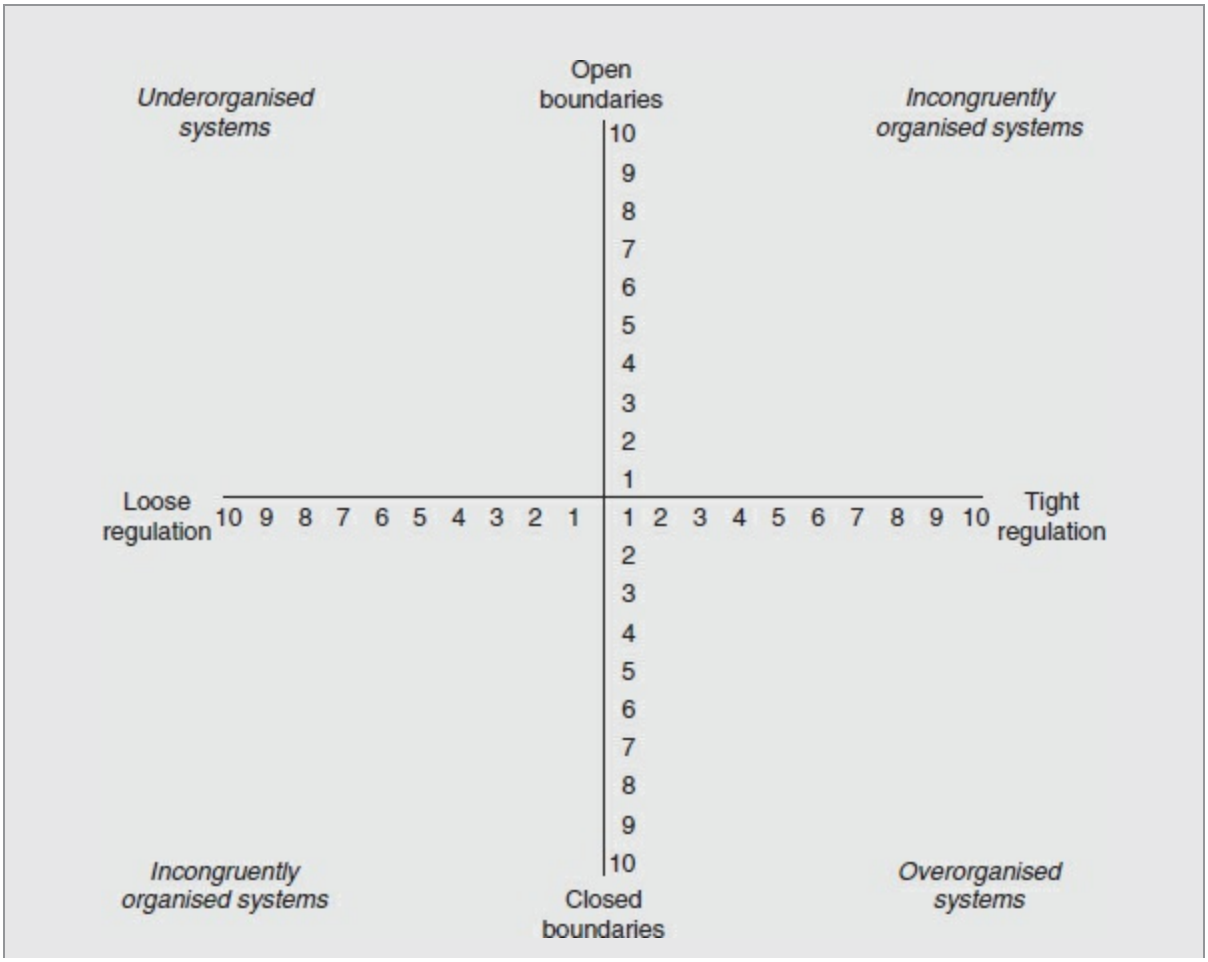
In this chapter we briefly examined Brown's (1983) analysis of conflict management at organisational interfaces. Part of Brown's analysis is that the permeability

(openness) of boundaries, and internal regulation, will affect how conflict occurs at such interfaces. This exercise asks you to apply this type of analysis to organisations you belong to or are familiar with.

Instructions

On the diagram below plot the positions, either individually or in small groups, of the various organisations you belong to (such as workplace, church, political parties, clubs etc). Indicate these with a cross alongside which you can write the organisation's name. After compiling this list, discuss the characteristics of boundary permeability and internal regulation for each organisation, and the implications these have for interactions at its interfaces (that is, with other organisations) so that communication can be enhanced. Include in your implications how interfaces are resourced (the provision of personnel, communication systems, travel support etc), how much energy is put into them and how these factors affect conflict management.

Finally, using Brown's four general types of intervention modes, list and discuss strategies for managing interface conflict (see **9.11** and **9.12** for a brief explanation of each of these interventions).



Exercise 13 Kantor's system approach

In this chapter and in **Chapter 3** the ideas of David Kantor were introduced. They can have particular value in coming to better understand interpersonal relating and organisational behaviour. For example, you could ask a team member in a work group, 'What is it that you do that causes X, whom you do not like, to behave in such a way that you cannot tolerate?' (taken from an example by Kantor, 2012, p 16). This is an

example of 'circularity'; that is, the idea that behaviours in systems are interdependent and continually impact on each other outside the normal bounds of cause and effect. You can apply the same reasoning to different parts of the organisation. Can you think of some examples of circularity in groups you have been involved in?

Exercise 14 Remedies for groupthink

Decision experts have determined that groupthink may be prevented by adopting some of the following measures (see <www.risk-management.argospress.com/groupt.htm> (accessed 14 August 2015)):

a) The leader should assign the role of critical evaluator to each member.

b) The leader should avoid stating preferences and expectations at the outset.

c) Each member of the group should routinely discuss the groups' deliberations with a trusted associate and report back to the group on the associate's reactions.

d) One or more experts should be invited to each meeting on a staggered basis. The outside experts should be encouraged to challenge views of the members.

e) At least one articulate and knowledgeable member should be given the role of devil's advocate (to question assumptions and plans)

f) The leader should make sure that a sizeable block of time is set aside to survey warning signals from rivals; leader and group construct alternative scenarios of rivals' intentions.

Think of a situation where you think groupthink has occurred. This would normally be in a workplace but can also occur in a familial context as well. Do you think any of the above tactics may have worked?

Exercise 15 Scenario: Finding the interests

Sharon, an employee whom you supervise, comes to you and wants to talk about her conflict with a workmate, whom you also supervise. She explains that her working relationship with a workmate is strained following Sharon's recent promotion, which her workmate also applied for but failed to gain. According to Sharon, her workmate is not cooperating and is deliberately undermining her with other workers. You heard at a management seminar that discovering and exploring the

'interests' of people in conflict may be useful. (Interests are the motivations or reasons why people want something.)

How would you proceed in this situation? Refer to the Triangle of Satisfaction described at **9.29** to begin your analysis.

Exercise 16 Appreciative enquiry

Cooperrider and Whitney (2005) published a set of five principles about the appreciative enquiry model that are widely cited and applied. These are outlined below:

(1) *The constructionist principle* proposes that what we believe to be true determines what we do, and thought and action emerge out of relationships. Through the

language and discourse of day-to-day interactions, people co-construct the organisations they inhabit. The purpose of inquiry is to stimulate new ideas, stories and images that generate new possibilities for action.

(2) *The principle of simultaneity* proposes that as we inquire into human systems we change them and the seeds of change, the things people think and talk about, what they discover and learn, are implicit in the very first questions asked. Questions are never neutral, they are fateful, and social systems move in the direction of the questions they most persistently and passionately discuss.

(3) *The poetic principle* proposes that organisational life is expressed in the stories people tell each other every day, and the story of the organisation is constantly being co-authored. The words and topics chosen for inquiry have an impact far beyond just the words themselves. They invoke sentiments, understandings, and worlds of meaning. In all phases of the inquiry effort is put into using words that point to, enliven and inspire the best in people.

(4) *The anticipatory principle* posits that what we do today is guided by our image of the future. Human systems are forever projecting ahead of themselves a horizon of expectation that brings the future powerfully into the present as a mobilising agent. Appreciative Inquiry uses artful creation of positive imagery on a collective basis to refashion anticipatory reality.

(5) *The positive principle* proposes that momentum and sustainable change requires positive affect and social bonding. Sentiments like hope, excitement, inspiration, camaraderie and joy increase creativity, openness to new ideas and people, and cognitive flexibility. They also promote the strong connections and relationships between people, particularly between groups in conflict, required for collective inquiry and change.

Imagine you are a new manager about to embark upon an investigation into a conflict between two competing parts of your organisation. How could these principles guide you?

Exercise 17 Questions

(a) Do you think the unitary, pluralist and radical models of organisations provide valid ways of

viewing organisations? Which model do you prefer? How has your experience of organisations led to your preference?

(b) '"Groupthink" is an insidious process that works to some degree in all groups and organisations.' Do you agree with this statement?

(c) What are the styles of decision-making predominant in the organisations or groups you are most familiar with?

(d) Are the consultative processes outlined in this chapter adaptable, in your view, to the groups or organisations you belong to?

(e) When a disputing system extols the need for it to be 'just' or fair what are the competing possibilities of this concept?

Chapter 10

Practical Group Facilitation

Summary

This chapter is effectively a checklist of key strategies and skills for the group facilitator. It draws on many of the resources already outlined in this book, although, unlike the rest of the book, it is less scholarly in tone and more focused on the 'how' of group work. The chapter is also informed by my many years of experience in running and facilitating groups.

Topics covered include first and second order problems, moving from convergent to divergent conversations and back again, and managing resistance and difficult scenarios. Fundamental or beginning skills as well as advanced facilitation skills will be explored in some detail.

Introduction: What is Facilitation?

10.1 The *Collins English Dictionary* defines the verb 'facilitate' as 'to make easier: assist the progress of'. The Latin root of the word means 'to enable'. In this chapter the noun 'facilitation' is used to describe the ability to provide skilled assistance to a group to enable it to achieve its objectives. It is a skill, or more correctly a cluster of skills, which when applied alongside an understanding of groups and how they function (as described in **Chapter 9**), enables a group to function more effectively. It is a skill that thereby enhances *esprit de corps*, reduces or prevents conflict and generally increases the effectiveness of groups and organisations. Facilitation aims to harness a group's intellectual potential, goodwill and energy. It also enhances participants' sense of security and confidence in their ability to meaningfully participate.

Generally, to be effective groups need to be able to:

- accommodate differing opinions;
- develop shared responsibility;
- manage and overcome resistance;
- develop participation to realise the potential of participants and encourage mutual understanding; and
- make inclusive decisions.

To achieve these outcomes often requires the presence of a skilled facilitator (or facilitators) who may be either a member of the group or brought in from outside to assist.

The term ‘facilitation process’, as used in some texts, is described as a series of phases or steps: see, for example, Schein (1969; 1987). This implies a linear and logical progression of steps from beginning to end. In practice, however, it may be more accurate to depict it as a non-linear asymmetric progression that incorporates a range of elements. These elements are outlined in this chapter.

A facilitator is a person who enables groups and organisations to work more effectively. He or she is impartial and thereby can advance fair, open and inclusive processes. The independent facilitator is also in a good position to challenge the underlying beliefs and assumptions of the group or organisation. These skills can extend beyond the role of the single facilitator working with a particular group to include individuals or whole groups who act as ‘facilitative leaders’ within larger organisations. These leadership functions support processes which are collaborative and inclusive, by developing interpersonal skills, including collaborative problem-solving and planning, consensus building and conflict management. This often involves changing the mind set or values of the existing group culture.

The context of facilitation

10.2 Facilitation can occur in a variety of contexts and for this reason it is not possible to be prescriptive about the processes to be used. It is preferable to be flexible and to always work from the context presented and the needs of the group. Applying too rigid a process to a situation will often be counter-productive.

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Facilitation can include the following processes:

- consultation to gather facts or to evaluate;

- decision-making;
- planning;
- group problem-solving;
- information exchange;
- conflict management; and
- negotiation.

The issues can include:

- workplace disputes;
- organisational matters;
- planning problems;
- conflicts in organisations; and
- public issues and public policy disputes.

It is this need to be flexible and to adapt to the context in which the facilitation occurs that makes this process so interesting, and also demanding, for the facilitator. To be successful a facilitator requires a set of particular social and interpersonal skills that do not necessarily come naturally. However, these skills can be learned and improved upon, and it is with this underlying premise that this chapter is written.

The IAP2 Public Participation Spectrum

In a recent facilitation process involving numerous public stakeholders and a government department, I used the 'IAP2 Public Participation Spectrum' as a guide to help participants understand the level of participation that was sought and expected. The spectrum moves across five levels of participation, summarised as follows:

1. *Inform* — to provide information and to keep people informed.
2. *Consult* — to obtain feedback and to keep people informed on how public input was used in decision-making.
3. *Involve* — to work directly with the public to ensure that public input is reflected in the alternative developed and decisions made.

4. *Collaborate* — to partner with the public and to directly incorporate input as far as possible in decision-making.
5. *Empower* — to put decision-making in the hands of the public and to implement those decisions.

By outlining these alternatives to a group, a facilitator can contextualise the appropriate level of consultation in particular cases. It helps manage expectations of those involved and sets limits on the level of input required: for further information go to <www.iap2.org.au/resources>.

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Group Dynamics and the 'Initial Position'

10.3 Group dynamics, or the way in which group members interact with one another, is influenced by:

- individual personalities and expectations;
- external factors that the group members may or may not control, such as the media;
- outside events;
- human alliances; and
- a seeming and often actual complicated interaction of facts, law, values, attitudes, perceptions and emotions.

People usually bring to the group clear expectations of being able to resolve or manage these various elements to their satisfaction. The willingness to resolve issues often hinges on an initial expectation that the other group members will give in to their particular viewpoint or position. This is an expectation that is not necessarily achievable or constructive. The role of the facilitator is therefore to encourage the exploration of needs and concerns so that the group can move on from this initial position to one where there can

be a shared understanding and commitment to better manage the issues; in other words, to some recognition of the interdependence of group members and the ability to find genuinely joint outcomes.

In facilitation, the interdependence of group members is often related to the goal of resolving expectations and differences in relation to processes, content and objectives. Any group needs to manage these expectations to be able to function at an optimum level. In relatively unformed groups participants rarely feel ready to 'get on with the job' until they have some information about these various elements. Group members will have an amount of anxiety based on their as yet unexpressed assumptions, expectations or needs.

The first job of facilitators is, therefore, to prepare participants for the task by giving information which:

- minimises anxiety;
- establishes rapport; and
- focuses on task.

As the group develops, the changing dynamics require different strategies and responses from the facilitator.

Stages of group development

10.4 There is a vast amount of literature on group development. Generally, it describes how groups change over time by means of phases or stages. Perhaps the best known of these models is Tuchman's five-stage model developed in 1965, which is described in **Chapter 9** (Tuchman, 1965). Tuchman's model is a developmental model that describes the ways in which group members interact with each other.

Decision-Making: The Stepping Stones of Group Life

10.5 Another approach to understanding groups is to look at the way they make decisions. In every group, decisions have to be made. The typical decision-making styles in groups are described in **Chapter 9**. They are often important indicators of how an organisation works and how it processes conflict. These decisions can vary from who is to take notes, to the time to be spent on a particular issue, or what policy to adopt in a particular context. Decisions are the stepping stones of a group's ongoing life. Therefore, good decision-making is crucial to both the success and ongoing health of most groups. Most decisions in groups are made without undue effort and relatively efficiently.

We discovered in **Chapter 9** that much day-to-day decision-making is made using mental shortcuts or 'heuristics', which although efficient and fast in processing can be prone to bias and mistakes. This in turn can lead to misunderstandings and conflict. We noted that Kahneman, a world renowned theorist, in his book *Thinking Fast and Slow* (2011) divides thinking into two types: system 1 and system 2. System 1 thinking is fast, intuitive, unconscious thought. Most everyday activities (like driving, talking, cleaning etc) make heavy use of system. Kahneman asserts that system 1 thinking involves associating new information with existing patterns or thoughts rather than creating new patterns for each new experience. System 2 thinking is slow, calculating and focused upon conscious thought. When you are doing a math problem or thinking carefully about a moral or philosophical problem you are engaging the system 2 system. From Kahneman's perspective, the major difference between system 1 and system 2 thinking is that system 1 is fast and easy but very susceptible to bias, whereas system 2 is slow and requires conscious effort, but is more resistant to cognitive biases. However, even system 2 thinking is open to bias and those who may think they are good at system 2 thinking may be even more open to

such bias. This may be because of overconfidence or because these people have also more developed system 1 thinking, which is susceptible to greater bias. The point is that these biases creep into, if not always present, in our decision-making. This indicates that we need to develop processes that give us ways to prepare, reflect upon and consult about our decision-making, especially those decisions that need to be made quickly: see also **Exercise 40** in **Chapter 7**, 'Cognitive biases, heuristics and effects in decision-making'. Problems can also occur at a number of other levels: first, around the process of decision-making; and second, when the context or issue at hand is so new or contentious for the group that the group needs to learn new or different ways of dealing with it. I call these 'first order' and 'second order' problems, respectively.

First order problems: The process of decision-making

10.6 There are many ways in which decisions are made in groups, and it is around these processes that conflict often occurs. I call these 'first order' problems. There is no right way to make decisions. How we make a decision will depend on the nature of the decision to be made and the context in which it will operate. However, certain types of decision-making can be identified and then evaluated as to their efficacy in a particular situation. In other words, changing the way in which decisions are made can often help the way in which a group is working.

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A 'framework' or 'culture' for a particular style of decision-making in groups is often well established, even if it is not well understood or articulated by the members of that group.

A useful exercise for any group is to look at the way in which it makes decisions. A list such as the one entitled 'Typical decision-making styles' at **9.9** (see also the exercises at the end of the chapter) may be useful as a starting point for this discussion. As noted previously, decisions are more likely to be implemented if group members are able to participate in and have ownership of them to some extent. Balancing this against other contextual constraints on the group (usually associated with time, expense and hierarchy) is always a challenge. Also, there are often entrenched beliefs and assumptions — what I earlier referred to as a 'group culture' — that favour one particular way of making decisions. Evaluating and challenging these beliefs and assumptions can be a useful way of moving the group forward if the members are experiencing difficulties or want to improve their performance, or to maximise the potential of group members or the group as a whole. Further, the inadequacies of the existing decision-making system may be highlighted by second order problems.

Second order problems: Dealing with new or contentious issues

10.7 When dealing with new or contentious issues, outside normal experience, groups usually have to go through a period of disagreement or what was in earlier chapters referred to by Tuchman and others as 'storming'. I call it 'divergent conversation'. The biggest challenge for facilitators is encouraging and enabling groups to have this divergent conversation before bringing it back to a convergent or agreement-making conversation. Many groups want to have the convergent conversation before they have dealt with the divergent one! By doing this they will often miss important ideas and contributions from various members of the group. In other words, the decisions made will be premature and ill formed with little chance of successful implementation.

When faced with a second order problem the group tends to look for

solutions within the boundaries formed by the group's culture or what they have done before. Although many problems can be managed through the group's traditional ways of decision-making, in a proportion of cases, where decisions are difficult, the traditional ways are sometimes no longer adequate. The group will have to look beyond simple solutions, to a wider range of possibilities; that is, it needs to move into a divergent conversation. Unfortunately, many groups cannot do this — at least by themselves. The method of facilitation that I will outline in this chapter is primarily predicated on enabling the group to move into a divergent conversation so that it can then 'come out' into a convergent conversation. This will enable it to make better decisions and also empower and recognise the contributions of all members of the group.

It is in divergent conversation where tensions arise, and people become irritable, impatient and even disoriented. It is for these reasons that individuals within the group, or often the whole group itself, look for an ending and a quick and usually premature decision or solution. Sometimes the person with authority comes in and makes a decision for the group which can further exacerbate distrust and tension. Sometimes the group tries to focus on 'process issues' ('How can we make this decision?').

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These attempts at trying a new process often get lost because groups generally find it difficult to stay focused on process. To move through a divergent conversation and into a convergent conversation requires a range of different skills and sometimes a challenge to the existing culture — it will not happen automatically.

To get to the convergent conversation the group will need to overcome some resistance before better decisions can be made. Resistance can be manifested in a number of ways, as we will see later in this chapter, but its

salient features are risk aversion (people do not want to take risks) and self-censorship (people do not want to disclose what they are really thinking). This is particularly evident in those groups where 'groupthink' has gone too far, as described in **Chapter 8**.

Working on possibilities

The group needs to look beyond 'solutions' to 'possibilities' or options in a divergent conversation. This is because it is easier to think of possibilities than solutions. The latter term has a finality about it which may be difficult for the group to envisage. Also, the eventual solution, if there is one, often only makes sense in hindsight. However, many things can prevent the group from moving in this direction, including:

- *Oversimplification or either/or thinking:* The issue is reduced to a simple cause and effect analysis, even though many problems cannot be analysed in such simple terms. Another characteristic is to conceive of issues in simple binary terms; that is, the solution can be reduced to one of two alternatives.
- *Denial:* The group refuses to acknowledge that there may be a problem and spends a lot of its energy on presenting a facade of normality. Naming what is going on may be seen as a betrayal.
- *Working at the wrong level:* Attempted processes and solutions are pitched at the wrong level; for example, instead of working on attitudes, emphasis is placed on behaviour. Often this creates a paradox for the group which in turn leads to confusion. Another common example is that there are no solutions to a problem for a variety of reasons, and working on a solution will create frustration and confusion. Alternatively, there may be no problem or the group is working on the wrong problem; the results will be the same — confusion.
- *Stuck in the past:* Some groups cannot escape, or do not want to escape, their past because 'it was better then'. Alternatively, the group can use this to avoid what is going on in the present.
- *Utopian visions:* The group has an overly idealistic view of what may be possible when faced with a difficult issue. This can result in one of three typical reactions: introjection (the group blames itself); procrastination (the issue is regarded as so difficult that nothing is done); and projection (others are blamed for the failure to deal with the issue).
- *Stuck in routines:* The group has certain ways of doing things and to change this routine would represent some threat to the status quo and is thereby resisted.
- *Diabolical solutions or more of the same:* Attempted solutions to the issue cause it to get worse. When confronted by this reality the group can be immobilised out of fear of trying anything else.
- *The continuity syndrome:* Similar to being stuck in a routine, this syndrome is characterised by the saying, 'If it ain't broke don't fix it'. This is an attitude that permeates

some groups and is born from a sense of overconfidence or complacency that what is being done cannot really be improved on. The problem is that it often can be.

- *Entrapment:* This occurs when the group devotes considerable resources to an issue but it cannot resolve it in the terms that it seeks. Some groups respond by continuing to commit resources while not evaluating expenditure, despite the fact that the situation continues to get worse or stagnates. As a result, the group becomes stuck in certain unproductive processes, pursues unobtainable objectives and/or creates unnecessary enemies.

These impediments to group decision-making can lead to impasse and resistance. They are discussed further at **10.62**, 'Mean groups: Working with resistance'.

The Role of the Facilitator

10.8 The facilitator's role is to encourage the group to appreciate and evaluate its decision-making processes and to move it through divergent conversations to convergent ones, which often means being able to help the group through difficult periods of internal resistance. (Resistance and related issues are considered at some length in **Chapter 6** in relation to the process of negotiation. Some of the ideas there will help you in this chapter as well.) This is achieved by assisting the group to:

- accommodate differing opinions and divergence;
- develop shared responsibility;
- manage and overcome resistance;
- develop participation to realise the potential of participants and encourage mutual understanding; and
- make inclusive decisions.

For each of these functions there are a number of facilitator objectives, which are outlined in the box below.

Group functions and facilitator objectives

Function	Facilitator objectives
Accommodate differing opinions and divergence	Create an atmosphere of trust and safety.
Develop shared responsibility	Reframe to move thinking from a blaming and individualising stance to a shared group responsibility.
Manage and overcome resistance	Encourage risk taking and reduce self-censorship.
Develop participation to realise the potential of participants and encourage mutual understanding	Create space for conversations around the group and move people away from positions (what they want).
Make inclusive decisions	Move participants away from them/us, win/lose thinking.

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In terms of process, the facilitator's role can be summarised in five words:

- *Groundwork* — prepare participants for the task.
- *Translation* — help people to hear each other.
- *Balance* — equalise space and draw out contributions.
- *Clarification* — paraphrase to enhance clarity; encourage discussions.
- *Control* — time interventions appropriately; guide parties through and manage the process.

Key facilitator attributes

10.9 The key attributes required of a facilitator are:

- a belief in the creative ability of people;
- patience;
- flexibility;
- an ability to identify and name feelings;
- an ability to listen openly and actively;
- a good understanding of group dynamics;
- an understanding of cognitive (thinking) processes;
- good collaborative problem-solving skills;
- high frustration tolerance, especially for ambiguity;
- respect for difference; and
- a belief in the creativity and potential of groups.

Facilitators can be 'insiders' who are part of the group they are facilitating or an 'outsider' brought in to assist the group. While in this chapter it is generally assumed that the facilitator is an outsider, most of the principles and processes outlined apply to the insider as well.

Preparing for your role in the facilitation

10.10 Preparation is the key to most successful facilitations and is a crucial part of the facilitator's role. The aim of preparation is to understand the context of the facilitation, plan an appropriate process and prepare the parties to participate.

Checklist: What you should know before the facilitation commences

- **Background information:**
  - What is your expected role?

- Who needs to participate?
- Who is sponsoring the process?
- What objectives are meant to be achieved by the process?
- Who are the people likely to benefit from the process?

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- **The parties:**
  - What are their assumptions about what is happening?
  - What are their concerns about participation?
  - Explore what is their next best alternative or next worst alternative to participation.
  - What will happen if they do not participate?
- **Identifying participants:**
  - Are representatives from various groupings required?
  - Identify other parties or those interested in the matter — should anyone else be invited or at least spoken to?
- **Preparation:**
  - What does the group need to do to prepare itself?
- **Confirmation:**
  - Is confirmation of attendance required?
- **Briefing:**
  - Would a planning meeting or a private session with the host agency be beneficial?
  - Do you have sufficient background information so that you feel confident and competent to do the job; for example, newspaper articles, historical or technical material, or site inspection?
  - Do you need information to help you understand cultural factors and differences, political and organisational processes and strategies?
  - Do you understand how the outcomes of the group will be dealt with by the host agency?
- **Venue:**
  - Clarify who is responsible for arranging the venue.
  - Check availability of tables, whiteboard, butcher's paper, microphones, and so on, as necessary.
- **Resources:**
  - Will maps, data, background papers and so on be available if needed?
  - Who will be responsible for records of meetings?
  - Name tags — are they needed? Who will supply them?
- **Planning — facilitators need to consider:**
  - briefing material;

- size of the group;
- nature of the task;
- seating arrangements;
- introductions — what needs to be said and by whom;
- setting ground rules;
- use of whiteboards;
- process options, strategies for statement taking and agenda setting;
- strategies for dealing with difficult behaviours.

- **Process:**
  - What is the most appropriate process?
  - Should the process be highly structured or open?

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Important considerations in this phase include:

- clarifying the nature of the process required and what will happen with the outcomes from the group;
- identifying all the relevant parties;
- specifying operating arrangements; and
- contacting parties.

Through these discussions the facilitator should develop an accurate and highly specific appreciation of the nature of the process required and the decision-making authority of various participants, and participants should develop a clear and shared understanding of the task and their roles.

Setting up the facilitation: seating and whiteboards

Seating

Seating can be important to the success of the facilitation, although options may be limited by the venue. The size and nature of the group will determine what is required. For example, at a departmental policy and planning meeting a formal arrangement with tables may be required, whereas a community meeting might be held outdoors, with participants sitting on the ground.

Facilitators need to be able to see and hear everyone and the group will be easier to manage if the participants can see each other. For best results:

- a horseshoe or circle is better than rows;
- use tables when participants have papers to consider;
- arrange small tables in a horseshoe if possible; and
- position yourself so you have easy access to whiteboards.

For very large groups consider using:

- a stage or podium;
- amplification equipment, including roving microphones; and
- a circle or series of concentric circles with one facilitator in the centre and others around the circle to ensure all participants can be seen and heard.

Whiteboards and butcher's paper

Although not always appropriate, whiteboards or butcher's paper can be used to acknowledge contributions, visualise concepts, provide a group memory, and maintain group cohesion. Butcher's paper or electronic whiteboards are best for recording information that needs to be retained, including listing issues, options, actions, outcomes, off-limit topics, issues outside the scope of the meeting, recording of decisions, and plans.

Private sessions

10.11 Private sessions with each party are often very useful after a facilitation commences. Private sessions may be formal or informal, in person or on the telephone, or in breaks or at pre-arranged times. In particular, private sessions may:

- defuse and deal with strong feelings;
- identify options or common ground or areas of agreement;

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- consider options for settlement; and
- generate agenda items.

In ongoing facilitations, private sessions are usually held before the first meeting, after every 4–6 meetings, when any major decisions need to be made, or if problems arise. Facilitators may:

- encourage parties to review their goals;
- assess the success of strategies;
- challenge positions by exploring the needs behind the positions;
- plan strategies for future meetings; and
- provide feedback and/or coaching to the parties.

Private sessions are particularly useful in dealing with resistance and difficult behaviours. On some occasions I have run the private session as a 'facilitation within a facilitation'. Confidentiality of the private session is always a pertinent consideration. You will need to discuss this both in the whole group and the private sessions. If it is not canvassed, group members are not likely to have much confidence in this part of the process.

Private sessions are sometimes used to instruct in conflict management or negotiation techniques. They may also be an opportunity to focus on the group process and how the parties can use it.

Core Facilitation Skills

10.12 Core facilitation skills are those that are useful throughout the entire process. If you liken facilitation to building a house, these skills are akin to the foundations and frame on which all else rests. Fundamental facilitation skills revolve around encouraging and creating discussion in the group. This involves two important clusters of skills or questions:

- Focusing — How to focus discussion?
- Sequencing — Who talks when?

Focusing and sequencing depend on a range of fundamental and overlapping skills, listed in the table below. Each of these skills is placed under either the focusing or sequencing heading, based on a general tendency rather than an absolute position; for example, stacking can not only manage the sequencing of talk in a group but can also focus the discussion.

Fundamental facilitation skills: focusing and sequencing

Focusing	Sequencing
Questions to focus	Stacking
Paraphrasing	Turn taking
Mirroring	Listing

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Focusing	Sequencing
Using connectors	Tracking
Transitional questioning	Balancing
Refocusing	Averting
Response calling	Encouraging
Common ground	Space taking
Engaging	Silence
Developing themes/principles/synoptic statements	Speakers' list
	Chart writing

Each of these facilitation skills is discussed below.

Core facilitation skills in detail

Questions to focus the group

10.13 It is important to be able to focus the group, and keep it focused, on the task at hand. For example, when a particular issue or principle is being discussed it is often important to keep the group on task by reminding them to focus on the issue or principle rather than simply specific examples. It is easy for the group to be side-tracked by focusing on particular cases or examples and become lost in detail. Conversely, sometimes you will want to lead the group to the specifics (this happens more in the agreement-making phase of a facilitation) and away from general principles or issues. To do this you will need a repertoire of questions that focus the conversation the group is having. For example:

> 'It seems that you are speaking about a specific case here. The discussion is about general principles. Can you tell the group about any principles you could draw out from this specific example you are giving?'
>
> *or*
>
> 'You have described a particular case. Can you tell the group what general principles you would like to see drawn from your experience with this case?'
>
> *or*
>
> 'Are there any general principles you would like to put forward about how specific cases would be dealt with in the future?'
>
> If the conversation is going off-track:
>
> 'The cases you are discussing are about … The task is to formulate some general criteria that can be applied to …'
>
> *or*
>
> 'You have made several suggestions about how the problem could be solved. What the group is trying to formulate are principles. Is there a general principle that could be put to the group regarding these options?'

When a person persists in wanting to discuss something other than the topic, or a side issue:

- Check whether he or she is clear about the task.
- Try to get the person back to the issue.
- Acknowledge the person's strong feelings and ask him or her to tell the group why he or she feels it is important to talk about the specific case in detail.
- Note the person's issue or concern and tell him or her it will be discussed later.
- Note the person's issue or concern and include it on the agenda for this purpose; for example, 'You seem to feel very strongly about discussing … Could you tell the group why, and what you hope can be achieved by discussing …?'.
- Check with other group members — is this useful to the whole group? Explore responses.
- Round up and ask whether the time should be spent on specific discussion: Now? Later?
- Go with the group decision after rounding-up.

Paraphrasing

10.14 Paraphrasing is a fundamental listening skill and a foundation for other listening skills. Paraphrasing briefly summarises what people are saying as far as possible in their own words. It communicates to the speaker that he or she has been listened to and valued. Paraphrasing also acts as a 'feedback loop' because the speaker has a chance to hear how his or her thoughts are being heard by others. It is particularly useful when long-winded, confusing or complex statements are made. If the speaker's statement is more than two or three sentences long, summarise it but try to use the speaker's words or at least some of his or her key phrases.

Begin your paraphrase by making a comment like:

'Joe, you are saying …'

'Mary, you went on to say …'

'If I understand you correctly you are saying …'

When you have completed your paraphrase ensure that you check the speaker's reaction and, if necessary, check by saying something like, 'Is that right?'. If you are not quite right, keep checking until you demonstrate you understand what the speaker meant.

Mirroring

10.15 Mirroring is, in essence, a more formalised way of paraphrasing. It emphasises the exact words of the speaker and is useful in situations where there is less trust or cohesion in the group, or where there is a need for exactness in describing the issues. This is particularly so in newly-formed groups where the role of the facilitator is being established and the group members are getting to know each other. It is also used in brainstorming and tracking techniques described below.

If the speaker only says one sentence you can usually repeat the whole sentence. If he or she says more than one sentence you usually have to limit yourself to repeating

the speaker's key words or phrases. Do not, however, repeat the speaker's tone of voice if it is anything but your normal accepting and warm tone as facilitator.

Using connectors

10.16 Using connectors is a way of both clarifying ideas and supporting group participants to expand and refine them. By doing this the facilitator sends the message that they are following the speaker and would like to hear

more. Connectors are particularly useful when a speaker's words are unclear or if they are having difficulty articulating an issue.

There are two basic ways of using connectors. First, paraphrase the speaker's words then ask an open-ended connecting question. For example:

'Can you tell us more about that?'

or

'How will that follow?'

or

'What do you think is meant by …?'

The second way is to paraphrase and then use connecting words like 'because', 'and' and 'so' to encourage the speaker to say more. For example:

'You said that the stress on the crossbar was intolerable because …'

Transitional questioning: Handovers and crossovers

10.17 Transitional questions are used to direct the flow of communication between group members, by encouraging one to talk to the other. They are the most important way of encouraging direct communication between group members. Few facilitation (or mediation) courses include this skill except those in which I have had a hand in designing. There seems to be an assumption that aspiring facilitators will already have these skills. My own experience is that they do not and therefore need to practise them alongside other skills. There are two basic forms of transitional questions: handovers and crossovers.

The handover is where you invite one person to talk directly to another person in the group or to the whole group. For example:

'Peter, could you tell Zoe how you felt when …'

or

'Could you tell Zoe what happened …'

or

'Zoe, could you tell the rest of the group how you saw this …'

Crossovers are designed to put a group member into the position of another person in the group. This is useful to help develop understanding. For example:

'Emma, could you summarise what you think Kathy meant?'

or

'Kathy, would you be able to describe to the group what you think the Finance Department's view is?'

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Transitional questions can be used in a variety of ways, particularly in the early stages of a facilitation, to develop different avenues of conversation and encourage more in-depth exploration of issues.

Refocusing

10.18 Refocusing is a method for keeping the discussion balanced and to ensure that potentially valuable ideas and contributions are not lost in the group. Because it is a relatively directive type of intervention, the facilitator should be careful not to overuse it. To do so may cause the facilitator to be viewed as biased and it can cut across the direction in which some people may have been moving.

Refocusing is particularly useful when one thought or idea is dominating a conversation or where certain alternative viewpoints may be useful in developing the group's conversation. For example:

'We have been discussing issue X for some time now and I am concerned that we have not as yet got to issue Y. Would this be a good time to move on to issue Y?'

or

'Zoe raised an issue before that we have not yet discussed. Would now be a good time to go on to this?'

Response calling

10.19 Response calling is when the facilitator focuses the conversation on what has just occurred by calling for further responses. It is a way of ensuring that particular items are not glossed over or missed — points suggested by the facilitator are more likely to be discussed. To ensure that this occurs in a productive and group-centred way it is important that the facilitator asks for broad participation. In this way the facilitator's intervention is less likely to be resisted or distrusted. For example:

> 'We have now heard from four speakers about this issue. Does anyone else have anything to contribute or questions of them?'
>
> *or*
>
> 'Emma has just mentioned the possibility of a "meltdown" in the relationship between this group and the Personnel Section. Does anyone have any questions they would like to ask about this?'

Common ground

10.20 This is a particularly good technique to use when the group is conflicted or polarised, because in most disputes there are elements of agreement or 'common ground'. The facilitator also names the areas of disagreement and in this way both these and any common ground are validated. This technique can be crucial in giving to the group some hope that the issue can be dealt with. For example:

> 'Let me sum up what I am hearing so far. There are some areas of difference and some of agreement. It seems that some of you want to … while others of you want to … Having said this, it seems that you all agree that it is in your common interests to agree on a policy decision to ensure that people know where they stand. Is this right?'

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It is important to check at the end that you have got it right as the facilitator. This will ensure that the group does not feel you are taking the conversation over and that they are still involved.

Engaging

10.21 Engaging is the ability to create openings for group members to participate. In many groups there are participants who will sit back or not become involved. This may be for a number of reasons, including that they do not feel particularly involved or stimulated by the discussion. With some encouragement this can change. This is a technique that is particularly useful during the formative stages of a group or in the early part of a conversation. For example:

> 'So far we have heard from the men in the group. Can we have some contributions from the women in the group?'
>
> *or*
>
> 'Can we hear from someone who has not contributed yet?'
>
> *or*
>
> 'We have been discussing this issue in general terms. Can someone give a case example of this in practice?'

Developing themes, principles and synoptic statements

10.22 Many groups are assisted if the various comments made by group members can be integrated or related to each other by means of tying them to a general theme or principle. This is particularly useful in the beginning phase of a group when there may be a range of opinions and statements emerging and where the anxiety level about the amount of information being generated is high. Groups often suffer from information overload and become overwhelmed with the variety of information being generated. They may also become so bogged down in the specifics of an issue that they lose sight of broader objectives and meanings. The facilitator, by developing themes and principles, can help the group move through this.

The method is simple. As the group discusses an issue make a mental note of themes and/or principles stated. After several speakers, use these notes to round up and check what seem to be emerging as themes/principles. For example:

'It seems that … (state position of discussion) … Can I just check back with you what seemed to be emerging …'

or

'Most speakers seemed to agree on … There seemed to be differences about … but overall the group appeared to agree that the principle of conservation was important.'

or

'It seems that there is a lot of agreement on … Would someone like to propose a general principle that can be drawn from that?'

In large groups I have often used a variation of this skill which I call 'synoptic statements'. The word 'synoptic' derives from the word 'synopsis', which is a

condensation or brief overview of a subject. The term was applied to the Gospels of Matthew, Mark and Luke, who took a similar position or view on the life of Christ. I use it mainly in large groups where the issues are complex and varied. After the group has had an initial chance to discuss the issues I call a break and then write onto a whiteboard or butcher's paper a synopsis of those broad themes the group members agree on. For example, in a discussion about boundaries for a national park, the synoptic statement included the following:

'The group agrees that certainty in the line of the boundary is of fundamental importance to all of the stakeholders represented here.'

By doing this, and then giving the group an opportunity to discuss and refine the statement, the group begins to practise and experience some cooperative conversation. This can be useful in the lead-up to a discussion of more contentious issues.

Stacking

10.23 Sequencing or working out who talks when in a group is a real issue for many groups. This is especially so in large groups dealing with a contentious issue. Some members are tentative and wait for 'spaces' to arrive within which they will be able to have their say. Others, who are more assertive, speak up as soon as another stops talking and may be considered 'pushy' by the more tentative members. Stacking can be particularly useful in a number of situations, including when the group is:

- heavily hierarchical;
- faced with a difficult decision;
- stressed; and/or
- confused.

The facilitator can perform a valuable role for the group by structuring the turn taking in the group through the process of 'stacking'. To stack, the facilitator asks those in the group who want to speak to raise their hands. As group members raise their hands each person is assigned a number (first, second and so on). Then the facilitator asks each person to speak in turn. After everyone who is in the stack has spoken the facilitator can then ask anyone else if they want to speak.

The problem with stacking is that it robs the group of some of its natural spontaneity. It can appear to be 'schoolmarmish' or overly structured. It can also lead to long monologues and cause some loss of concentration in the group if not handled well. Therefore, facilitators should be prepared to interrupt the stack if this is appropriate. For example, if the group looks like it may want to respond to an issue raised you could say, 'Let's interrupt the stack now. I would like two or three people to respond to the issue just raised'. After this, go back to the sequence of the stack. It may be useful when setting up the stack to indicate to the group that you may interrupt it if something important or useful comes out of the discussion. This prepares the group for the interruption and prevents it being perceived as biased. Another problem

with stacking is that it can result in information overload or a lack of focus. Therefore, while useful, it should not be overused.

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Turn taking

10.24 Turn taking is a basic but necessary skill to enable as many people as possible in the group to have a say. It can be done in a variety of ways. Most commonly in groups it is achieved by means of a 'structured go-around'. For example:

> 'I would like to give each person a chance to comment on the issue of the contract date. We will proceed clockwise around the group from my left. No one may interrupt. When you have finished speaking, say "Pass".'

You may wish to set time limits on each speaker or give people the option to pass without saying anything more.

Turn taking can also be regulated by having an object such as a ruler or ball which is passed to the person who is speaking and is then passed onto the next person speaking.

Turn taking is particularly useful to help structure complex discussions. It is also useful in a newly formed group where trust may be low. It can assist quiet members of the group and it facilitates the gathering of a diverse range of perspectives on any particular issue. When a group is dealing with a controversial subject arousing intense emotions, a turn taking procedure is useful to allow time for people to reflect, sit back and share the risks of being involved. Turn taking can also help end a session.

Listing

10.25 Listing enables a group to gather together ideas about an issue. It combines the skills of mirroring and paraphrasing described above and helps

the group both focus and sequence its input. It is similar to brainstorming but a little more focused. For example:

> 'For the next 15 minutes let's evaluate this issue by looking at its strengths and weaknesses. Let's deal with the strengths first and then we will go on to the weaknesses. I will write these on the board. At this stage we will not judge or discuss these ideas but simply list them as they occur.'

As the ideas are called out you may have to mirror or paraphrase them. Write everything down. This process will often help a group make more sense of an issue and allow broad participation in a simple analysis. It can be used as an exercise when breaking a larger group into several smaller groups.

The analysis may be broadened by adding extra categories depending on the context; for example, 'threats', 'potential participants', 'cost drivers' or 'likely good outcomes'.

Tracking

10.26 When a group becomes involved in a discussion there will often be a multiplicity of different ideas emerging and crisscrossing each other. The facilitator can help the group by tracking these various lines of thought. It also heads off that phenomenon in groups where excessive competition develops around ideas, leaving some people feeling that theirs have not been adequately considered. If this can be brought under some sort of control then the anxiety level in the group will correspondingly go down. Tracking occurs through a process of naming, summarising and checking for accuracy. For example:

> 'There appear to be a number of different themes emerging here. I want to make sure we are capturing them. The first is about … the second … the third … Is this right?'

You may want to follow this up by listing the ideas on a whiteboard or butcher's paper and then discussing each in turn.

Balancing

10.27 Many discussions in groups follow the direction set by the first speakers. Often these speakers are the more powerful or articulate in the group. This tendency can leave other group members and their ideas out of the flow of the conversation. Balancing helps to redress this and also deals with those situations where silence is interpreted as consent. It ensures that a range of people in the group can contribute meaningfully. For example:

'Are there any other views about this?'

or

'Joe and Elsie have expressed their views. Who else has any ideas about this?'

or

'Are there any alternative opinions about this?'

or

'We have some people in favour of this. Who would be opposed?'

Averting

10.28 A variation of using silence is a technique I call 'averting'. Groups often sequence their talk through the facilitator. Averting breaks this up by subtly encouraging the group to talk to each other rather than through the facilitator. The process is simple, although it is more difficult than it seems and often calls for some strong inner discipline as well as excellent timing. When the group is engaging in conversation within itself, simply avert your eyes. I find it is best to focus on a notepad or something in front of me (averting is easier sitting down). Because group members then find it difficult to focus on the facilitator, they instead have to focus on other members of the group, particularly whoever is speaking. I have been in groups where this technique has set up a lengthy and productive conversation, allowing the facilitator to take a background position for some time and thereby further empowering the group.

Encouraging

10.29 In many groups, people sit back and let others do the talking. This may be because they are feeling discouraged, disinterested or anxious, or they may be unable to comprehend the content. Encouraging is a way of creating space for people to become involved without feeling put upon. There are many ways to do this. Some examples are:

'Has anybody else got a contribution?'

'Is this discussion bringing up issues for anyone else?'

'Can we hear from someone who has not spoken for a while?'

'The women have been talking so far. Let's hear from the men.'

'Are there any more suggestions?'

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Space taking

10.30 Space taking is similar to encouraging but is more directive and is contingent upon non-verbal cues from group members. As previously noted, most groups have members who either find it difficult to contribute at times or who are shy or less verbal. Sometimes these members require some 'space' to allow them to participate. By watching their non-verbal cues, you may pick up that they want to say something. When this happens invite them to speak. For example:

'Kathy, was there anything you wanted to contribute?'

or

'Joe, you look like you were going to say something …'

If the person you have encouraged to speak does not want to, then move on quickly. Do not put them on the spot as this may cause embarrassment.

Silence

10.31 Reflecting silently on an issue can be a powerful way of focusing the

group. It can be done in a number of ways, including with a simple question such as, 'Can we take a few minutes, in silence, to think about what this issue means to us?'. At other times we can use silence at the end of a group member's contribution by simply pausing for a few seconds. The facilitator can usually do this by continuing to pay attention to the speaker after they finish speaking. This can be awkward for the group but at times it can be a simple and unobtrusive way of reinforcing something said. Sometimes this technique can also be used to encourage the speaker to say more and elaborate or explain further.

Speakers' list

10.32 To control interjections, questions and debate during discussions some facilitators use a speakers' list. This is particularly useful in large groups such as public meetings. How this list will be used can be explained to the group during introductions. For example:

> 'To ensure everyone has a chance to speak it is preferable if people can speak uninterrupted. If you wish to speak to the point please indicate that by raising your hand and I will write down your name so that it will not be forgotten. Whenever possible we will cover issues one at a time.'

Jot down names, in order, as people indicate they wish to speak. A non-verbal acknowledgment from the facilitator will reassure them they will get a turn. If someone interferes, stop the interference, acknowledge the wish to speak and tell them who is before them in speaking order. For example:

> 'Jack, can you wait a moment please until Margaret finishes what she's saying, then it's Zoe's and Emma's turn and then you.'

Groups quickly catch on to the fact that the list can work for them and usually respond favourably to its use.

It is sometimes relevant to check whether those waiting on the list wish to speak to the point under discussion or to raise a new issue for consideration. It is preferable to

focus on one issue at a time, so you might want to ask those with new issues to wait a little longer for their turn.

Chart writing

10.33 Writing group members' suggestions or ideas onto flip charts or butcher's paper is often crucial in helping the group sequence and balance contributions. It helps counter the tendency for only one or two people to dominate contributions. This is because:

- the chart provides a record of the proceedings so that participants can relax about what has gone on before (we can only keep about six to eight items in our short-term memory at any one time). This means that rather than hanging on to favourite items, participants can concentrate on others as well. Also, if they forget something they have a ready and accessible resource to jog their memories; and
- the chart validates what is being said and gives people a sense of participation.

There are various ways to lay out your chart: simple list, table, circle diagram, flowchart and boxing. Each of these is briefly described in the box below.

Remember to keep the chart simple and not too cluttered. Title every page and invite corrections. Be creative — use arrows, stars, circles, question marks and other devices to emphasise what you think are worthy of note.

Chart writing layouts

- *The simple list* — put one item under another.
- *The table* — useful when you have a number of categories or related elements; for example, listing strengths and weaknesses side by side. These can be made more

interesting by adding further clarifying categories down the side. The combinations are endless.

- *The circle diagram* — useful when you want to divide an issue into various subcategories and then apportion a percentage (or part of the circle) to each one.
- *The flowchart* — useful to demonstrate the interconnectedness between various elements of a process.
- *Boxing* — put separate items in boxes. Useful when you want to place a number of elements on to a flip chart and relate one to the other.

To reiterate, fundamental facilitation skills are those that provide you as a facilitator with the foundation on which everything else rests. They tend to be used over and over again. Experienced facilitators will elaborate and vary their use, and become expert at judging the right time for their use. Some, like transitional questions and averting, look easy but are quite difficult for most people to master. They require practice.

Finding Out: Group Evaluation Skills

10.34 There are many ways of finding out what is happening in a group. I have included here those approaches that I have often used and find particularly helpful. The circumstances in which I will use one or more of these depend on the group and the task you have been brought in to do. They fall into two broad categories.

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First, there are those that can be quickly used at various times in a group's life. They include CATWOE, the SWAT analysis, plotting group development and conflict analysis. The second category involves some degree of pre-planning and includes the 'R quadrant' and consultation techniques such as

Delphi, nominal group technique and searching, which were included in **Chapter 9**.

Before considering these various techniques remember that as a facilitator you also need to be prepared: see **10.47**, 'Preparing for group change: A checklist for the facilitator' for some pointers.

CATWOE: Arriving at a 'root definition'

10.35 When working with a group as a facilitator one of the most valuable things you can do to help is put a name or names to what is happening. This is not as simple a task as it may seem, because most groups have an array of explanations to describe what is going on. To help groups with this I have often used the acronym 'CATWOE' to focus discussion. It is what David Patching (1990), the inventor of the term, calls a 'root definition'. By this he means a description of what is going on that people in the group can agree to and which is comprehensive enough to satisfy a range of possibilities. The advantage of this approach is that it takes account of the people likely to be affected by any decision — those who are part of it and who could participate in it in some way. It also defines the transformation that could or may take place and the environment within which the group is working.

CATWOE is a checklist that helps ensure that all the important components of a state of affairs presenting to a group are present in the root definition. It is a simple way to help a group discuss and name what is going on. The components of the definition are set out in the box below.

CATWOE

- *Clients* — who will benefit from the change/decision?
- *Actors* — who will participate in the process?
- *Transformations* — what has to be changed and how is it to be changed to achieve the desired outcomes?
- *World view (assumptions)* — what are the belief systems operating that may affect any process?

- *Owner* — who is resourcing/paying for the process?
- *Environment* — what are the crucial events or phenomena in the group operating context that may be relevant?

The SWAT analysis

10.36 Another simple and often-used tool is the SWAT analysis. It is useful in quickly analysing an issue or decision and a group's ways of dealing with it. Sometimes the letter 'A' is changed to an 'O' to stand for 'opportunities'. The components of the analysis are:

- *Strengths* — what are its strengths?
- *Weaknesses* — what are its weaknesses?

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- *Analysis and action* — what has happened and what do we need to do?
- *Threats* — what obstacles/problems/issues do we face?

Three questions

When meeting with a group (or a referral source) for the first time, I keep in the back of my mind three important questions:

1. What are your objectives?
2. What is the content of the issues you need to discuss?
3. What process would suit working through 1 and 2?

These are the three most important dynamics of the group process.

Plotting group development

10.37 It may be useful to trace the group's development and plot its futures. This can be as simple as using questions like those contained in the

box below which can then be used as the basis for further analysis and discussion.

Plotting group development

The past

- What are the group's origins?
- What are the group's myths?
- What are significant events?
- Was the group different in the past?

How? The present

- How does the group reflect on its past?
- What is the best way of describing what it is presently like?
- Is it adapted to future development?

The future

- What are desirable futures?
- What are probable futures?

Conflict analysis

10.38 Many groups into which facilitators are brought are experiencing a significant degree of conflict and, while this is not the place to analyse this in detail, a simple checklist of the things that need to be looked at when working with a group in conflict is a good start. I usually obtain this information in initial interviews and by reviewing relevant documentation provided by the group. When interviewing participants in the group it is useful to have this checklist before you as a guide. Alternatively, in some instances you can use it as the basis for a questionnaire to be completed by participants before they come into the group or as homework between sessions. You could also adapt it as a handout which could then form a basis for discussion. The R quadrant and other consultation models outlined in **Chapter 9** will also be of assistance in this regard.

A checklist for analysis

Parties

Individuals, groups, peripheral groups, a ranking of individuals in groups — what are its/their:

- goals;
- values;
- attitudes;
- perceptions;
- motivation;
- style;
- power?

Relationships

What is its/their:

- history;
- current situation;
- trends and possibilities?

Issues

What are the:

- central stated issue/s;
- possible unstated issue/s;
- secondary issue/s;
- sources of conflict;
- manifestation(s) of any conflict; and
- what has already been tried?

Concept building and the ladder of inferences: At what level are we talking?

10.39 In the process of evaluating what is going on, in building an agenda

and in exploration the technique of ‘concept building’ may prove useful. In simple terms it means that we can move from a general description of something to a more specific description and vice versa. This movement can be extremely helpful to a group when it is considering how to think about an issue. For example, a group may be considering an issue related to its relationship with other groups in the same organisation. This can be characterised from the very broad to more specific instances, as follows:

> The organisation has communication problems.
>
> *to*
>
> The community services group is not talking to human resources.
>
> *to*
>
> Helen and Joe are not talking to Beth and Fred.

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These issues could therefore be presented in a number of ways at different levels of generality. For example, when constructing an agenda it is usual to use quite generalised concepts so as to ensure that the various specific levels of the issue are also captured. Also, when discussing an issue with a group it is helpful to keep in mind the concept level at which they are working. If you are able to do this and then help the group move into more specific concepts or, conversely, more generalised concepts as the case may be, the group can often begin to see different ways of managing the issue.

Another thing to notice is that people are often speaking at the level of conclusion or at other times description or observation when describing a difficult issue. For example, take the comment, ‘The organisation has communication problems’. This is expressed at the level of conclusion. Now consider the following comment, ‘Helen and Joe have not talked to each other for two weeks’. This is expressed at the level of description. Therefore, another way to move a group around an issue is to be able to switch it

between these different levels. When someone in the group makes a concluding-type comment you can bring it back to description by asking a question like, 'What information do you have that would explain that?'. This will lead to a more specific description-type response. The opposite can be done when the group is entering into a lot of descriptive talk. Asking the group what this leads to can move the group to the level of conclusion. The useful thing about this technique is that it leads individuals and the whole group through a process of thinking and analysis which helps them to question their underlying thinking and assumptions. This model is based on what has become known as the 'ladder of inferences'.

The ladder of inferences is a representation of the different ways that individuals make sense of, and deal with, everyday events. Individuals select and process certain aspects of events, and introduce elements from this processing into their thinking, feeling and interactions. These elements include inferences, attributions and evaluations that may have considerable error relative to objective observations of the same events. The further an individual moves or extrapolates from the actual, original data, the greater is the potential error. This model can be useful in helping individuals and groups reduce such errors and the resulting interpersonal problems.

Establishing the Climate for Creative Cooperation

10.40 How well facilitators commence the meeting will often set the tone for the whole process. Facilitators need to ensure the group has a sense of the purpose of the meeting, their roles in it and the process which will be adopted initially. Group ownership of the process is critical to the meeting's success. Any suggestions by the facilitators on process need to be accepted by the group. To enable the group to feel comfortable often requires consideration

of a number of key factors in the introductory phase. These are described below.

Introductions checklist

10.41 Introductions may include a welcome by the host agency and may be less formal than those made during mediation. Ground rules may also be negotiated with

the parties at this stage. Whatever format is chosen, introductions should usually include the following:

- the neutrality or impartiality of the facilitator;
- time frames;
- confidentiality;
- ground rules;
- an outline of how the facilitator plans to work; and
- introductions of parties themselves and who they represent.

Ground rules

10.42 Establishing ground rules may be a brief or extended stage in the facilitation, depending on circumstances. Ground rules may be explicit or implied. They can be suggested by the parties or the facilitator. Tentative ground rules may be discussed and/or negotiated with parties before the facilitation, with time being set aside at the first meeting to confirm acceptability.

Ground rules may be committed to writing where:

- the group is operating over a long period of time;
- there is little trust between members; and
- where substitutes for members will be attending from time to time.

It is important to ensure ground rules are appropriate to the group and the process. Spending one hour developing ground rules for a two-hour meeting is excessive. However, half a day may be devoted to this task if the process is to continue for a year and the issues are contentious.

There are three overlapping types of ground rules: behavioural, procedural and substantive or content oriented. These are outlined in the box below.

Plotting group development

The past

- What are the group's origins?
- What are the group's myths?
- What are significant events?
- Was the group different in the past?

How? The present

- How does the group reflect on its past?
- What is the best way of describing what it is presently like?
- Is it adapted to future development?

The future

- What are desirable futures?
- What are probable futures?

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The three kinds of ground rules

- **Behavioural ground rules** establish how participants will behave towards one another. For example:

- One person speaks at a time.
- How long will people be able to speak?
- If an interest group has more than one representative present, do all representatives have equal say?
- When will representatives speak?
- Sequencing guidelines.

- **Procedural ground rules** concern the procedures the group adopts to guide its operations, and may include:
  - Meeting procedures:
    - Role of the facilitator.
    - Role of the host agency.
    - Meeting times, venues, substitutes for absent members.
    - Consulting with interest groups.
    - Observers or visitors to the meeting, tabling documents/submissions, circulating agendas and/or minutes.
    - How decisions will be made.
    - Dealing with non-unanimous decisions.
    - Dealing with consultants, advisers and so on.
    - Terms of reference/task specifications.
  - Confidentiality is a particularly important area of procedural rule making and can include the following considerations:
    - Confidentiality of discussions, background material, draft plans, proposals and so on.
    - The way in which confidential papers (for example, unpublished research; government documents) can be disseminated or discussed by representatives within their interest group.
    - Media involvement — access to and of the media.
    - Confidentiality of decisions — may be particularly important when the decision needs further approval or impacts on the public.
- **Substantive ground rules** focus on content. For example:
  - The meeting will develop recommendations to the executive manager for new systems. It will not evaluate the performance of the current management.
  - The group will use a negotiated list of principles to guide decision-making.
  - The group will clear the content of progress reports.
  - Information in submissions from the public will only be accepted if it fits the terms of reference.

Preliminary statements and summaries

10.43 Preliminary statements and summaries can be a useful way to establish a climate in a group that values listening and a sequence of interaction that is productive. It is

particularly useful in groups where people do not know each other well and/or are locked into opposing positions.

Statements can provide an opportunity for participants to establish how they see the matter in the presence of other participants. This may be the first time they have been able to do this and it may also be the first time that the other participants have listened. When participants are supported to tell their stories without being interrupted they are usually more willing to listen to others. It may also assist the facilitator to gain a better understanding of the issues.

Statement-taking exercise

Go around the group one by one, asking each person to answer the following questions:

- What is the issue from your perspective?
- What are the outcomes you would like to see?
- What is your rationale for this?

When this is done, ask the group for thoughts and reflections on what has occurred.

The size of the group and how much time is available will need to be considered when choosing if and how to take statements. Options, with rough guidelines as to when they might be used, include:

- No statements at all. Use with groups larger than 25 or at public meetings.
- Full statements taken during the pre-facilitation private session, followed up

by either a brief statement at the meeting or by the facilitators setting a draft agenda. Use when time is limited, issues are very emotive, or in groups of more than 10.

- Short statements made in the group, perhaps time limited; for example, to three minutes. Use when time is limited, in groups of more than 10, or when issues are emotive.
- Written statements submitted in advance and used as above. Use with large groups, in formal proceedings or when part of legal proceedings, when face to face, or when phone contact is not possible.
- Statements taken from each participant summarised and read back. Use with groups of less than 10, at the start of an ongoing facilitation, or in emotive issues.
- Brief statements that focus on who participants represent or issues that need discussion. Sometimes it may be useful to ask what they hope to achieve or what they think the group may be able to agree to. The facilitator can use paraphrasing to check understanding of key issues after each speaker has finished. Use with groups of 8–20, where there is more than one representative for each party, in task-oriented groups, or during planning processes.
- Brainstorming and listing issues for discussion. Paraphrase to clarify and assure parties they have been heard. Use with groups of more than 10, in complex issues and short time frames, or in public meetings.

- Goal setting or visioning exercises instead of statement taking. Use at the commencement of an ongoing facilitation, or when interests are diverse.
- Presentations by key individuals or groups to outline proposals for

consideration by the group. Use at public meetings.

- Summaries demonstrate that the facilitator comprehends the issues, help clarify those issues in dispute and acknowledge the importance of facts and feelings.
- Summaries will vary according to the statement-taking techniques used, the size of the groups, time frames, and the nature of the exercise. Options include:
  - no summaries at all;
  - full summaries of statements taken during the pre-facilitation private session;
  - full summaries taken and read back;
  - a paraphrase of the key issues or concerns in a short statement made in pre-facilitation private session or in the group;
  - written summaries given back to parties following pre-facilitation private sessions;
  - brief paraphrases of key points made during introductions; and
  - listing of issues, concerns, and so on on butcher's paper or whiteboard with a very brief verbal check as you write up.

Trust builders: A checklist

Trust is built in small increments. It takes time to develop within the group. Important means of developing trust within a group include:

- good preparation;
- careful analyses — check assumptions; name doubts; avoid emotive terms;
- open communication;
- a sense of being heard and input valued;
- confidentiality maintained by facilitators;
- setting clear objectives;
- progress that truly reflects views of groups;
- good communication between interest groups and representatives;
- working together on shared tasks;

- informal time together;
- acceptance as individuals;
- safe environment to create solutions and negotiate;
- respect;
- control of destructive communication; and
- timing (too fast creates anxiety; too slow creates frustration).

Goal statements

10.44 Goal statements are sometimes referred to as mission or vision statements. They generally focus on objectives or end points, not solutions or 'how to'. They are useful for groups taking part in long-term ongoing facilitations or where interests are diverse. They are used to:

- set the parameters or framework within which the group will make decisions; and
- incorporate or lead to the development of a set of principles that will guide decision-making.

Facilitators should encourage discussion to clarify:

- type of statement (goal, vision or mission statement);
- style required for the statement; and
- content.

The facilitator can encourage negotiation between the parties until he or she is satisfied that all aspects important to the group are included. For example, when working with a group about a national park, the goal statement may look something like the simple following statement:

'To identify the approximate location of the park boundaries.'

However, it may be that the group could have decided on a goal statement that read:

> 'To identify those elements we have to consider when establishing the location of the park boundaries.'

The difference in these two statements is profound and will have a significant impact on the group's deliberations. Therefore, the way in which you assist a group to arrive at a goal statement is crucial.

In a large group a selected number of participants may take responsibility for wording the final statement and bringing it back to the group. This can save a considerable amount of time.

It may be useful to do some reality testing. For example, you can ask questions such as:

- Does the statement reflect the group goal?
- Can it be realised?
- What should have to happen to achieve that?
- Is it within the scope/authority of the group to realise the goals?

Throughout this part of the process, facilitators may need to keep the group on track and focused on broader principles, rather than becoming immersed in details.

Developing constructive agendas

10.45 The agenda both defines the order and creates the 'reality' of the meeting. It is usually the most important tool for the facilitator to focus discussion. Therefore, care and appropriate time should be put into its preparation.

It is usual for the group to decide how the agenda is developed and whether it is circulated prior to meetings. Options for agenda setting can include a:

- draft agenda from pre-facilitation meetings and private sessions;
- draft agenda prepared from items submitted to a central collector (for example, host agency, facilitator or a specified person);
- draft agenda suggested by convening body;
- list developed by group at start of each session from statements or brainstorming; and
- rolling agenda (that is, one with pre-set permanent items) proposed at the outset of the facilitation and added to as meetings progress.

Agendas should always be treated as tentative until confirmed by the wider group. It is important to:

- use neutral terms;
- retain parties' language;
- establish the order for discussion;
- display the agenda on a whiteboard or a printed page; and
- raise any problems such as apparent contradictions or inconsistencies.

Including outcomes with agendas

10.46 It is sometimes useful when planning an agenda to consider including not only the issue to be discussed but the desired outcome as well; that is, what can be achieved by the group in this meeting? For each outcome, design a process to reach that outcome, as shown below.

The advantage of doing this is to clarify both what the group is being asked to do and how it can do it in the time available.

Developing an issue through an agenda

Issue: Appointment of a new staff member.

Possible outcomes:

1. Outline criteria for appointment.
2. Develop timelines for advertisement, interview, and so on.
3. Appoint interviewing committee.

Process: Brainstorm to list criteria; sort into categories or themes: small group discussion to refine each category; in whole group, map the possible best starting date and work back from this; discuss in whole group who may be available and should or would be most suitable for inclusion in the interviewing committee.

This process can be used for each issue. Simple and smaller issues can be dealt with in a single meeting. Those that are more complex may require working on over a longer period of time. Developing a new employment policy, for example, may take several meetings, with some work in between. It is important therefore to set timelines and contextualise the issues to be considered.

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It is often useful to have an agenda planning session before the main meeting, to look at the issues, the process required to manage them and the timelines.

Exploration: Moving into divergent conversations

10.47 During exploration the facilitator assists the group to discuss the issues constructively. Exploration is crucial in ensuring the group deals constructively with second order problems (described earlier) — when the issue confronting the group is a new or particularly contentious one. In these situations the group will often need to go through a lengthy and intensive period of exploration. This will usually involve a considerable amount of

divergent conversation; that is, group members expressing different ideas about how something should be dealt with. Exploration is different to negotiation in that it is not concerned with the generation and selection of options to settle the matter. Rather, it is focused on developing greater understanding of the issues. A thorough exploration of an issue is often the necessary precursor to a successful negotiation of the issues. However, exploration may merge into negotiation and decision-making.

Preparing for group change: A checklist for the facilitator

Resistance and difficult behaviour often accelerate and intensify during periods of programmed change. Facilitators often are brought in to help manage these sorts of processes. Here are some points to keep in mind.

- Help the group prepare a carefully prepared and comprehensive plan.
- Make sure everybody is clear about expectations.
- Remember that written communication is limited, especially for complex change.
- Give the group time to integrate change.
- Give examples of change and talk about it.
- Analyse carefully what attitudinal changes people will have to make.
- Analyse carefully what behavioural changes people will have to make.
- Consider carefully and talk through what people will have to give up.
- Communicate what is the problem that is being rectified.
- Take into consideration physical and spatial relationships where people may have to change locations.
- Proactively find out what problems and issues people are having with the change and transition process.
- Organisational charts are one-dimensional.
- Training is useful if it is integrated into the plan and deals with the behavioural and attitudinal changes required.
- The roles of those responsible for the change effort should be carefully spelt out.
- Note that incentives are useful but should be carefully subordinated to the overall goals of the change effort.
- Sometimes it may be useful to consider transitional systemic arrangements.
- Encouraging improvements and innovations during the period of change and transition may be helpful; that is, there is no need to wait to the end.

- Leadership in the group should not only explain but also model the new approaches.
- Ask the group to consider other successful models, and visit them.
- Conflict and resistance always happen in times of change. Treat them as opportunities.

The fundamental skills we touched on earlier in this chapter are used to help participants explore the issues, and hear, appreciate and understand each other. Remember to:

- focus parties on agenda items, to minimise digressions;
- balance input; and
- ensure quieter participants have the opportunity to speak.

During exploration it is important to listen very carefully. Appropriate note taking will assist facilitators to make concise but relevant paraphrases and round ups and to keep track of areas that need further follow-up. This may be very important when technical information needs to be paraphrased.

Round ups at the end of each cycle of discussion ensure the group is clear on the position reached before moving on. (Some minute secretaries will use round ups to record the progress of discussion.) After rounding up, check if the group is ready to move on. Facilitators need to be sensitive to requirements — too many round ups may slow the process and frustrate parties. Ask one of the parties or the recorder to do a round up to share group responsibility and check whether others have been understood. Paraphrase and round-up paraphrase are particularly useful if the talk is going round in circles, people are becoming entrenched, when discussion on an issue has reached an impasse or when the discussion has dried up but the issue is still unexplored.

Transitional questioning can be crucial in developing conversation across the group. I tend to use it extensively as a way of moving the focus away from myself to the whole group.

As you assist the group members to explore the issues, keep asking yourself, what are the needs and concerns of the parties? Frame transitions (questions and statements that direct conversations between the participants) around these. Frequent reference to the agenda is useful. Generally, it is preferable to work through the agenda in a preferred order.

Useful exploratory exercises

The following exercises may help the group to open up to conversation and explore the issues it wants to work on:

- **Opinion and observation:** In the early stage of a group exploration it may be useful for participants to differentiate between observation and opinion. This can be operationalised by writing these on different coloured post-it notes and sticking them onto different parts of the wall or butcher's paper, for example, opinions about a particular issue on blue and the observations on red. Participants can write as many of either opinion or observation as they like. After this has been done, discuss in the

  group. The value of this exercise is that it moves the group away from a consideration of what is good or bad/right or wrong about a particular issue. Instead, the group focuses on generating information and data that may be useful. It also helps participants differentiate between what they think about something and what they have actually observed.
- **Perspectives:** At certain times it is helpful to focus group members upon their own perspectives without commenting on what other group members may think. This enables both the group and the facilitator to quickly gauge the breadth of opinion that exists across the group as well as validating these differences. Paradoxically, this exercise often helps participants focus on the symbiotic nature of group relationships. The exercise is simply performed by going around the group one by one, asking each participant to give their own view or perspective on an issue or task. The facilitator may wish to include summaries of the various perspectives on butcher's paper or whiteboard. This is similar to the process of 'dialogue' described by Senge (1990) (see **9.18**). In a dialogue as described by Senge, participants are asked to talk about an issue without being challenged or questioned by others.
- **Root cause analysis:** Some groups have a problem not just in managing differences but in expressing these differences. In other words, they tend to operate under common assumptions developed through shared experiences that do not allow consideration of the views of other stakeholders or those outside the group. This exercise counters this tendency. First, ask the group to list the perceived causes of an issue. Second, get the group to list the various people or stakeholders who may be affected. Third, ask the group to speculate on what may be the effect on these people.

Fourth, ask the group to consider if these various people or stakeholders need to be involved or considered. A variation I sometimes use is to get the group to imagine the issue as being like a tree and draw this on a board or butcher's paper. Each part of the tree is then related to how this issue may 'look'; for example, the roots are the causes, the trunk is most of what we see or experience and the branches (and leaves) are both visible and have some hidden elements as well.

- **Reaction check:** This exercise is a useful way of both personalising what is going on for group members and helping them reframe their experience more positively. First, ask each person to reflect on how he or she is reacting to an issue (group members may write this down individually). Second, ask how this has affected his or her decision-making. Third, share these in the group by a go-around or ad hoc volunteers. If the group expresses a lot of emotion, ensure that there is sufficient discussion to vent and explore this.
- **Hot Spot:** This exercise promotes understanding by building confidence about expressing difference. First, ask for a volunteer to be the focus of attention or come to the front of the group. Second, ask this person to express his or her opinion, view or assumptions about or experience of a particular issue. Third, ask the group to ask this person a series of questions beginning with 'Who', 'What', 'When', 'Where' or 'Why'. Fourth, when this is finished, ask for a volunteer to be the focus person and repeat. Fifth, repeat as necessary. Finally, discuss in the whole group. A variation is to use this exercise to test how a decision or agreement will affect members. The question can be changed to, 'What effect would this have on you?'. This variation allows the group members to understand and express the impact the agreement may have on them.
- **Milestones:** Some decisions or projects confronting groups take a considerable period of time. This exercise will help the group deal with the various milestones and

steps it will need to take. First, identify the group's goal. Second, ask the group to brainstorm four to six milestones that need to be completed to reach the goal. Third, divide the group into small groups and ask them to consider one or two milestones and what will be needed to achieve each milestone. Fourth, bring the group together and discuss.

- **Focus on interests, not solutions:** Groups often get stuck because they prematurely focus on outcomes and solutions before they have properly understood each other or developed shared meanings. First, discuss with the group the difference between 'interests' (why you want something) and solutions (the end result). Second, ask group members to write their interests and their solutions on separate pieces of paper. Third, share these in the group and write onto a board or butcher's paper. Fourth, brainstorm for any other interest or solutions from the whole group. A variation of this can be to add 'management' as an alternative to, or replacement for, the term 'solutions'. This recognises the possibility that some good outcomes are not solutions as such but do manage the issue to a reasonable degree.
- **Hidden agendas:** Sometimes group members may need to bring into the open

concerns they have that may impede their participation. This exercise will help deal with this phenomenon. First, ask each person to write on a piece of post-it paper a question or issue which, if it were to be answered by other members, would enable that group member to participate more fully. Second, post these on to a wall or board and discuss. For example, some members of the group may have some questions about a senior person in the group overriding the decision of the group as a whole. This issue can be aired and the group can move on.

About questions

- **Open questions** identify needs and concerns, isolate issues and consider options and actions.
- **Clarifying questions** assist parties to explore needs and concerns.
- **Helicopter questions** (questions posed in a hypothetical and non-specific way) get the whole group thinking about the issue before asking a particular person to answer or everybody to respond in turn.
- **Transitional questions** direct the flow of talk between the members of the group rather than back to the facilitator; for example, 'Mary, could you explain to the group what you mean by that?'.

Keep asking the parties to clarify facts and feelings for each other. If the discussion is excessively negative, try to move to the positive by reframing. For example:

'I won't …'	'Explain to A what would make you willing …'
'They always …'	'Tell B about the times they don't…'
'It's disastrous …'	'Tell A how it could improve for you/how it could be made better …'
'It's too expensive …'	'Describe to B, compared to what, is it too expensive…'
'How can I …'	'Explain to A how you think you could…'

'I can't do anything …'	'Tell B what needs to happen for you to be able

…’

‘It’s too late now …’ ‘Tell B when it would have been better …’

Move the group through questions that deal thoroughly with each of the how, when, where, why and what of an issue.

Structured Interventions to Assist Open and Divergent Discussion

10.48 Creating open discussion that is able to adequately explore second order problems can also be helped along by a number of structured exercises. They are particularly useful when the group becomes stuck or is finding it difficult to deal with their differences. Brainstorming is the most well-known of these but they can also include making reports, categorising, small groups, individual reflection and structured go rounds. The key features of each of these techniques are outlined below.

Brainstorming

10.49 The facilitator asks the group to provide ideas ‘off the top of their head’ which are listed onto a board.

Key process variables: Value every contribution. Once started do not vary the process. Suspend judgment; that is, do not evaluate or censor ideas. Mirroring language is an important skill for brainstorming.

Potential limitations: Needs follow up to be effective. Managing the list of ideas generated is often not done well (see ‘Categorising’, below). It can also go too long if time limits are not set.

Potential strengths: Can be used in a wide variety of situations. Can unlock the group’s enthusiasm and creativity. Demonstrates that there is more than one

or two ways to look at a problem. Provides structure when a problem seems overwhelming or confusing.

Making reports

10.50 Reports are often used in groups but to little effect. By using some simple techniques, they can become valuable additions to the discussion.

Key process variables: Ask the report giver to make a list of key points from the report beforehand then put the key points onto a board or overhead. Ask the report giver to underline the most important point from the report and put it at the top of the list and ask them to set aside some time for questions. Ask the report giver to tell the group what his or her expectations are for using the report's information. Restrict handouts to after the presentation or, if short, pause while they read the material.

Potential limitations: Can be complicated and confusing to the audience; can be slow or boring. Group members can be overwhelmed with information.

Potential strengths: Provides valuable background information and summarises complex issues. Reports provide information that can be taken away for further analysis and use.

Categorising

10.51 When finished with a brainstorming exercise, categorising is a process of managing the resultant list of ideas, options and suggestions. We cannot hold long lists in our brains so we need to simplify.

Key process variables: Categorise the list either using pre-determined categories or ones that are created after the list. Categories can be workshopped by the group or suggested by the facilitator. It is usually best to

limit categories to six to eight separate items so that they are kept manageable. Categories can include: urgency, usefulness, feasibility, cost, time needed and desirability. Selecting the most important items can be done in a variety of ways (see below).

Potential limitations: Many groups find this difficult because people will not easily agree on the importance or meaning of a particular category. Some people can handle more categories than others. It also takes time.

Potential strengths: Creates a structure for dealing with long lists. Generates a sense of control and order thus reducing anxiety, and provides focus for the discussion.

Small groups

10.52 Breaking a larger group into a number of smaller groups is often useful to encourage deeper and more open communication.

Key process variables: Provide a one- or two-sentence introduction to the task. Wait until the small groups are formed then state the ground rules, timelines and expected outcome or provide a handout. Before the end, announce the time remaining. Reconvene to large group and obtain feedback.

Potential limitations: If not used at the right time or with the right configuration it can polarise a group. Some members can use it as a 'rest period' or a time to discuss 'other' matters.

Potential strengths: People often feel safer and less reticent, can become energised, and build useful relationships. Small groups can increase understanding of a topic and enhance commitment to an idea or project. Finally, they can speed up consideration of an issue.

Individual reflection

10.53 Group members individually reflect on and/or write down their

thoughts and reactions in relation to an activity just completed or about to begin.

Key process variables: Provide an overview of the task. Ask participants to reflect on or write down some ideas, reactions and so on. Indicate the time available and give a warning before the time is up. Reconvene the group and allow time for discussion.

Potential limitations: Can dissipate energy and slow down the group and can create too much information for the group to process at that time. It can also reinforce separateness, which may not be helpful.

Potential strengths: Ensures input from a range of people, reinforces learning and allows time for 'cooling off' if necessary. Allows time for preparation.

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Structured go round

10.54 Involves the facilitator asking each member to provide some thoughts on the issue being discussed by going round the whole group one by one. Variations include: passing a stick (the one with the stick talks); 10 words or less (comments are limited); random go round (anybody talks and finishes by saying 'Pass'); 'pass the hot potato' (an object is thrown from one person to the next, signifying who is to speak next).

Key process variables: Explain what you are about to do. Summarise the topic to be discussed. Explain ground rules, including the ability to 'pass' or time limits.

Potential limitations: Can take time and in large groups may not be possible. Can escalate difference in some situations.

Potential strengths: Useful to prepare or warm up a group. Can be helpful in

structuring a difficult conversation and gives everyone a chance to participate. It can be useful for closing off a meeting.

Talking paper

10.55 A variation on brainstorming and similar strategies is the 'talking paper' technique developed over the past 20 years as self-adhesive paper has become readily available. It involves a number of steps, including the generation of ideas, collection and clarification. A question is posed and participants write their responses on separate cards or post-it notes. This is done without any discussion. This is to encourage proactive thinking and to avoid the reactive responses that may occur in some meetings. This method also ensures that all participants have an equal chance to participate. The cards are then collected and placed on large adhesive posters or, if self-adhesive, onto the wall of the meeting room. The cards can then be grouped according to theme or subject. In this way, a comprehensive overview of the meeting emerges. The abiltity to move the cards around enables flexibility in approach and the patterning of ideas, which can help creative thinking. Finally, the ideas or suggestions noted can be evaluated using ranking and/or rating devices (Wolfson, 2007).

As Wolfson and Fowkes state in their book *Turning Myself Forward* (available at <www.turningforward.org>):

> In summary, the Talking Paper method:
>
> - Manages the process of communication so that resources, especially peoples' time, expertise, emotions and energy, are used effectively
> - Can be used as a conflict management tool because it separates people from their ideas; explores ideas in a 'neutral' space; makes it less possible for people to dominate and play out hidden agendas
> - Is flexible, and so its applications are as varied as the creativity and skill of the facilitators.

Selecting items from a long list

10.56 Groups, through brainstorming or other exercises, often end up with long lists of suggestions, ideas or options. Being able to select those which are of most importance to the group is an important skill for facilitators. The simplest way of creating order out of these lists is first to categorise them as described above. However, the group may want to go further and rank order these so as to select or prioritise the information generated. Below are four ways of doing this:

- *Rating* — each member of the group is given a number of votes (say five or ten) and is asked to prioritise the items using their votes. They can give any one item the whole number of votes or can divide it up by allocating a number of votes to a number of items. The top five or 10 items become the selected list. This can be varied in a smaller list by allowing every item to be rated from 1 to 5 or 1 to 10 and then tallying the score.
- *Division* — divide the number of items on the list by, for example, three or four. Each person receives that number of choices to indicate his or her selected items. That person can distribute these any way they like. The top third or quarter, as the case may be, is then the group's selected list.
- *Open selection* — each group member can select any of the items by casting a vote for those he or she considers to be of highest priority. There is no limit to the number of votes that can be used by each person. Group members can put a tick or other mark against the items they vote for. The items that receive most votes become the highest priority items.
- *Vote* — each member gets a certain number of votes which they can allocate individually to each item. The highest scoring items become the priorities.

Variations on the brainstorming technique

There are many variations on the typical brainstorm. Below are several that may prove useful:

Personal brainstorm: First, instead of asking each member to share their ideas for

inclusion on a list viewable by the whole group, ask them to write them down on a piece of paper. Second, when this is complete ask for a volunteer to share his or her ideas with the whole group and discuss for four or five minutes. Third, repeat around the group. Fourth, when everyone is finished ask the group to list the ideas they would like to put up for view to the whole group.

Bandwagon: First, ask a group member to write three or four ideas on a piece of paper. Second, ask the group member to pass this paper around to the left and ask each member to add one idea to the list in front of them. Repeat until the paper has gone around the group or a reasonable time has elapsed. Third, discuss in the whole group. This can be varied in a number of ways, such as having a number of pieces of paper circulating at the one time.

Post-it: First, ask each group member to write one idea on a post-it. Second, put each of the post-its onto a wall or board. Third, repeat, but ask the group not to replicate those ideas already on the wall. Fourth, when the group has exhausted its ideas, discuss.

Some Techniques for Breaking Through Impasse During Exploration: Using NRCP

10.57 When a group is exploring a difficult issue it will sometimes reach an impasse. When this occurs I often go through the following acronym or checklist in my mind: NRCP. It stands for naming, reframing, confrontation and provocation. In order, they represent a low to high intensity intervention to move through an impasse:

1. *Naming* — has the issue or subject been properly identified and defined to the satisfaction of the group? Often the naming of an issue is very important in beginning to establish some control over it.
2. *Reframing* — has the group looked at the issue from a number of different angles or ways? Has the group been able to modify the conceptual and/or emotional viewpoint in relation to which it is experienced? Has the group been able to place the issues in another frame which fits the facts but which offers new meaning?

3. *Confrontation* — has the facilitator confronted the group in a constructive way? Confrontation is not criticising an individual or the group; it is posing questions in such a way that the group is required to move beyond its present position. Ways of doing this include:

   (a) *Blocking:* Pose a question such as, 'What if you were not able to precede this way, what could you do?'.

   (b) '*Why' questions:* Why questions generally require the responder to provide a rationale for their answer; for example, 'Why would you do it that way?'.

   (c) *Escaping:* Some groups get hooked on a dominant idea that they find hard to move away from. Ask a question like, 'The group has been focused on this idea for some time. What about looking at it from another point of view?'.

   (d) *Dropping:* Moving groups from one set of ideas or idea to another can be prompted by asking them to simply drop or put on hold the idea they are now focused on; for example, 'Let's assume we can put that on hold. What other ideas can be presented by you now?'.

4. *Provocation* — posing different conceptual frames to the group so as to challenge them to think differently. Again, it is not an attack on the group or any individual in it. Ways of doing this include:

   (a) *Reversal:* Deliberately 'turn around' the meaning ascribed to something; for example, 'What if instead of the sales figures coming in higher they came in lower?'.

   (b) *Exaggeration:* Deliberately overstate the meaning of something; for example, 'Let's assume that instead of the sales coming in at $2 million they increase to $3 million'.

   (c) *Distortion:* Deliberately alter the meaning of something; for example, 'For the sake of this conversation let's assume that we are mistaken and that our sales are actually in the order of $1.5 million'.

(d) *Wishful thinking*: Deliberately move away from the idea by assuming some other reality; for example, 'What if we were an organisation that did not have customers who buy things. How would this change our process?'.

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For other ways of working through impasse, see **10.62**, 'Mean groups: Working with resistance' Also, in **Chapter 6** you will find a range of techniques in the negotiation framework to manage impasse and resistance: see **6.57**.

Remember, the exploration stage should allow the group to express its differences through divergent conversation. It is usually, therefore, a period of some discomfort and heightened emotion in the group. I usually help the group through this phase by reminding them occasionally that this is what we are in fact doing ('naming it'), before we move back onto a convergent conversation. Also, it is useful to remind them that the expression of these differences through a divergent conversation is often necessary to both make the best decisions and to promote constructive change within the group. Further, convergent conversations are often impossible without a divergent conversation occurring first. Before moving onto a consideration of moving the conversation back into a convergent one it is useful to consider the way in which emotions can be managed in the group.

Developing Creative Options and Negotiating Outcomes: Moving into Convergent Conversations

10.58 Developing options and negotiation may be a discreet stage in more structured meetings or it may occur throughout the process overlapping with and blending in toward the end of exploration. If it is appropriate to the process I like to ensure that there is adequate exploration through the divergent conversation before moving into option generation and negotiation proper. The reason for this is simple. If options are considered too early in the process there is a good chance that the parties will not have exchanged sufficient information with each other or established a strong enough relationship to make the best possible decisions. Further, it is less likely that the most suitable or best options will be forthcoming if negotiation comes too early in the process. Also, if the group comes too quickly out of the divergent conversation it will often not have had enough opportunity to ventilate and express the strong emotional content often associated with difficult issues. This emotional content can get in the way of option generation and negotiation.

It is common for a structured process to go as follows:

- outline of task/agenda item/action/issue;
- explore feelings/positions/interests on the issue;
- develop options and negotiate to a position of consensus;
- round up points of agreement for noting in minutes;
- move to the next issue and repeat the process.

At whatever stage option generation and negotiation occurs it is important to generally:

- focus on interests (why we want something), not positions (the outcome we want);
- look for preferences (rather than adopt an either/or position, see options as part of a continuum of preference) and objective criteria (some data everyone can reasonably trust); and

- reality test options.

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During the facilitation a number of options may have been suggested which you can list. It may be helpful to write these on a whiteboard or flip chart visible to all parties. There are a number of criteria or questions, listed below, which you may need to consider when examining the options available. These mainly concern the group members' anticipated needs, the organisational context, and legal and financial constraints. Each facilitation is different and it is best to proceed on the basis that the options to be listed should be examined in light of the individual merits of the case.

Criteria for listing options include:

- Do the options meet the wants and needs of the group members?
- Are third parties likely to be affected by the exercise of the options and how are they likely to react?
- Have the options been tried in the past, and, if so, what was the outcome?
- Does the exercise of the options fit within the general organisational context?
- Are the options legal and do they require some legal procedure or document to be completed?
- Can the options be modified, and, if so, how?

The emphasis in this step is on helping group members talk about and develop their own options. Your continued neutrality is crucial. However, it is in this phase that the temptation to offer your own solutions is greatest. This is not to say that it is not appropriate in some circumstances to suggest options, particularly where the parties are 'stuck'. Suggesting options is very much secondary in importance to your role as facilitator for the parties. It is

more likely that the parties will take responsibility for and improve their own skills if they can work through these difficult steps themselves. Facilitation, like most interpersonal encounters, is more art than science, and like the artist you sometimes simply have to trust in your own intuition or inspiration. Sometimes you have to take risks. If you do suggest options always leave it to the parties to decide if they are acceptable within their frames of reference.

Brainstorming as part of the facilitation may again be useful at this time; or, if the facilitation is occurring over a number of sessions, you may want to set a brainstorming exercise as part of a homework assignment. Keep in mind that most people can only cope with a limited number of options for each issue during the negotiation that is to follow.

Remember, you are not looking for decisions or solutions yet. You are simply listing a number of options for each of the issues identified in the agenda. Negotiation and decisions regarding these options are the next thing you do.

Useful phrases to promote negotiation include:

'Could you tell the group what would concern you about …'

'One option seems to be …'

'Tell Greg what other options you have thought of.'

'Could you explain to the group how this might work …'

'Could you explain to the group what the benefits of that would be …'

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To reality test options, use transitions or open questions to lead the group into a purposive discussion about the merits of any particular matter. For example:

'What sort of …'

'What would it be like if …'

'What if …'

'Would it work if …'

'Suppose you don't reach agreement?'

When there are sticking points during option generation and negotiation, try the following strategies:

- Round up where the group has come to.
- Look for objective criteria.
- Take a break.
- Change the dynamics in the group through an exercise or small group division.
- Explore needs and concerns that may be contributing to the sticking point.
- Ask stakeholders to air their position on the issue.
- If there are representatives ask each in turn to state their interest group's position (they may not be prepared to do this without consultation). Round up before moving on.
- Obtain more information, check with interest groups, record minority views, negotiate another issue and come back to it.
- Go to the group's BATNA (best alternative to a negotiated agreement) or WATNA (worst alternative to a negotiated agreement), to help the group reality test the alternatives they may encounter.

Sustainable Agreement-Making

10.59 A sustainable agreement is one that has a reasonable chance of surviving the next second order problem that confronts the group; that is, a crisis or situation that it normally does not have to deal with on a day-to-day

basis. It is often presumed that the process of achieving this type of agreement relies on there being consensus, although this is not always desirable or possible.

Consensus — where group members agree to follow a certain decision — is often presented as an ideal. However, in some groups consensus may not be necessary or possible. The aim may be simply to gather information and options and to gauge the public or organisational response, rather than to achieve group unanimity and decision-making. Also, in some groups decisions are made not on the basis of consensus but through majority decision-making.

The following matters are important considerations when working towards a sustainable agreement:

- It is often not necessary to have a formal agreement in writing. The decisions of the group may be built into a plan or recommendation to be approved at a higher level. In many situations all that will be necessary will be to minute the decision made or otherwise note and distribute.

- The best agreements are usually those where everyone involved has been able to contribute effectively.
- Reality testing is important, especially if there has been no clear negotiation phase.
- In public issue disputes, involving matters that may affect large numbers of people, agreements need to be able to withstand public scrutiny.
- Groups may arrange to have verbatim minutes and/or a tape recording. These options sometimes stifle discussion and introduce an element of competition. Decision minutes may be more useful to the group.

- Usually, it is not the facilitator's role to take minutes, although they often draft the agreement.
- Working towards an agreement is usually slow and requires perseverance, particularly in covering all the necessary details.
- Once an agreement is made the group tends to 'speed up' and the facilitator will need to constantly be aware of the tendency to gloss over or forget details and contingencies that may have to be considered.
- Some groups are so used to doing things in certain ways that they cannot process a decision or outcome in a different way.

When decision minutes are needed, facilitators can encourage the group to take responsibility for the wording of the minutes.

Alternatively, discussions and decisions may be recorded on butcher's paper or an electronic whiteboard, using different pages to record 'Issues', 'Outcomes', 'Options' and 'Actions'. Using round ups at the end of each agenda item will assist the group to move through each of these. Go back to phase 8 of the mediation process in (see **7.55**ff) to review the elements that can go into an agreement.

When consensus cannot be reached

10.60 When consensus is sought but cannot be reached, the facilitator and group have a number of options. A first step is to clarify how widespread and strongly held is the disagreement within the group. This may alert the facilitator to the fact that adequate exploration of an issue has not occurred; that is, participants have not had the opportunity to hear and/or appreciate the concerns of one or more members, or those members have not felt heard. In this case, further exploration of the concerns and alternatives is warranted. It is also necessary to consider if enough time has been allowed to deal with the issue. If not, consider the timelines already established or raise this as an issue to be considered.

Where consensus is still unobtainable, the facilitator may choose to exercise one of the following options:

- The facilitator may suggest ending or breaking the session, asking participants to reflect on the impasse. It is surprising how often additional solutions can be identified in the intervening interval or a re-evaluation of the significance of the issue takes place.

- The facilitator may suggest that the group seeks more information, particularly of a contextual nature. Conflicts within the group may be redundant in the sense that forthcoming events are likely to overtake them or the views of higher order decision-makers are fixed anyway. If members of the group can be apprised of such a state of affairs, it may free them to work together on other issues over which they are not deadlocked.
- The facilitator may refer some group members to a sub-committee to work on the problem. The different dynamics of a smaller group may enable significant positional shifts to occur which can then be endorsed by the larger group.
- The facilitator can suggest that the participant's dissent to the majority decision is recorded, and the group proceed on the basis of the majority view. This will satisfy some individuals who feel that they are obliged to record a dissenting view on behalf of their constituency but wish to remain part of the process.
- The facilitator can suggest that the dissenter/s prepare a minority report for submission either to the group or to an external decision-maker. Again, this may satisfactorily address the needs of the dissenting parties to remain with the group but to record a strong dissenting view.
- The dissenter/s may choose to renounce their membership of the group,

clearly releasing themselves from any obligation to support the implementation of the group's decisions.

- The group may decide to override the dissenter/s objections or even to ask the dissenter/s to leave the group. This frees the group to progress its decision-making, but is an option that should be exercised reluctantly. It will often create external resistance to the group's decisions, thus undermining effective implementation of its plans.

Voting

10.61 Sometimes a participant may suggest that an issue should be voted on. If resolution by voting has not been initially adopted for the process, the facilitator needs to check with the group how it feels about voting on the issue. If there is a strong view to proceed to a vote, issues that need to be considered and negotiated include:

- the method of voting; for example, show of hands, or secret ballots;
- who can vote;
- how the resolution will be recorded; and
- if the dissenting view will be recorded.

Mean groups: Working with resistance

10.62 No group can be entirely harmonious, for it would then be devoid of process and structure. Groups require disharmony as well as harmony, disassociation as well as association; and conflicts within them are by no means altogether disruptive factors. Group formation is the result of both harmony and conflict. Far from being necessarily dysfunctional, a certain degree of conflict is an essential element in group formation and the persistence of group life (Coser, 1956, p 31).

For Coser, conflict is a useful instrument of social integration. Conflict helps to facilitate communication, define structures and create conditions for equitable and effective settlements (p 121). Conflict, therefore, far from being something that will go away if we try hard enough or if things improve, is ever-present in groups and organisations. Conflict can be intrapersonal, interpersonal or between rival groups. Within organisations and groups it is often compounded because it occurs because of two contradictory principles: collaboration and competition.

Principles for establishing effective conflict management systems in groups

In some groups and organisations it may be useful to implement a conflict management system that will systematically deal with disputes as they arise. Below are some of the essential principles to keep in mind:

- Treat the group in a holistic way.
- The culture of conflict within the group should be closely examined.
- Set clear and achievable objectives for the system.
- Build in data collection and evaluation from the start.
- Early intervention is usually indicated, although remember that where people have experienced serious conflict the ability to respond cooperatively may take some time.
- Move from least intensive intervention processes to more intensive.
- Any processes should be seen as non-linear; that is, there is the ability to go back to less interventionist processes.
- Disseminate information, education and training relevant to the system so as to make it accessible.
- Each part of the system should be time limited.
- Ensure that privacy and other rights are respected.
- Ensure ‘prevention strategies’ are in place using the ‘R quadrant’ as a guide.

For more information about implementing a conflict management system, see **9.32** and **9.38**.

Strategies for Empowering Individuals and Groups

10.63 When working with resistance or through difficult periods it is sometimes useful to keep in mind why you are there. As a facilitator your underlying principle is to empower the group and the individuals within it. You can do this by:

- valuing contributions;
- setting goals and ground rules together;
- sharing information;
- being flexible;
- sharing tasks and responsibilities;
- making it safe to be wrong;
- brainstorming without evaluation;

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- controlling dominant parties;
- checking with quiet parties before moving on;
- always leaving space for those who have not spoken yet;
- in private sessions, exploring with participants what might make it easier for them to contribute;
- encouraging the group to explore rights;
- making procedures culturally appropriate;
- clarifying what group members want and encouraging them to consider

their best or worst alternatives to negotiated agreements.

Resistance and impasse are dealt with extensively at **6.57** and in **Chapter 9**.

Closing Off

10.64 Allow at least 10 to 15 minutes for closure at the end of each meeting. Details that may need to be discussed and clarified include:

- whether there will be a further meeting;
- the date, time, place for the next meeting;
- the actions to be taken by particular groups before the next meeting;
- any agenda items (how they will be generated for the next meeting) and circulation of meeting and/or other material;
- media contact;
- contact with support groups, sponsoring organisations and so on;
- thanking groups for input
- rounding up any details to ensure that all parties are clear about decisions made; and
- if parties leave early, facilitators need to check with the group whether it is useful to continue.

At the final termination of a group process:

- the group may wish to have a celebration or wind-down activity, particularly if the process has been long running; and
- formal evaluation instruments may be useful.

Debriefing

10.65 Debriefing will enhance individual development and job satisfaction. It gives facilitators the opportunity to deal with emotional issues which may have affected them and enhances understanding of the process. While debriefing may not always be possible, facilitators would be wise to attempt it in some form as an aid to professional development and as a quality assurance process.

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Conclusion

10.66 Facilitating a group can be one of the most challenging activities we can engage in during our working lives. It can also be one of the most enjoyable and exhilarating. It calls for special skills and abilities as well as an attitude of calmness. The approaches, exercises and skills I have outlined in this chapter will help you to meet these challenges and feel more confident about your work in and management of groups.

Exercises

Exercise 1 Building relationships

There are hundreds of exercises in the group work and facilitation literature that help to build relationships in groups so that they are better able to work through difficult problems. We know when we have been in a 'great group' or a well functioning team. Senge describes it beautifully in his influential book *The Fifth Discipline* (1990 (rev. 2006), p 13), as follows:

> When you ask people about what it is like being part of a great team, what is most striking is the meaningfulness of the experience. People talk about being part of something larger than themselves, of being connected, of being generative. It becomes quite clear that, for many, their experiences as part of truly great teams stand out as singular periods of life lived to the fullest. Some spend the rest of their lives looking for ways to recapture that spirit.

Below are a few activities that you may find useful:

- *Positive feedback:* First, ask each group member to write on a post-it note something they

appreciate about each of the other members — one for each person. Second, have them fold these over, stand up and place them in front of the person concerned. Third, read and debrief.

- *Giving feedback:* First, ask the group to divide into pairs. Second, ask each person to tell their partner about what they have observed about the other and whether this is based on something concrete or something they assume. Third, change partners. Fourth, after going around the group for a number of rounds bring the group back together and discuss.
- *Something mine:* First, ask everyone to bring something to the group that is personal, such as a photograph, story or object. Second, ask for volunteers to share their story or object and what it means to them. Third, go round the group, allowing time for a few questions.

Exercise 2 Managing the high-status individual

Groups tend to defer to high-status individuals or persons with authority. It is best to deal with this by naming the issue beforehand. Other tactics include:

- ask the high status person to speak first then ask for other contributions;
- have the high status individual speak last;
- use consensus decision-making;
- use structured go rounds;

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- have individuals write down their thoughts then share them;
- break into small groups;
- ask the high-status person to leave the room;
- act on the group decision after rounding up; and

Would some of these tactics work for you in your workplace?

Exercise 3 Questions

(a) What similarities and differences can you discern between mediation and facilitation?

(b) If a group is 'stuck' on an issue what could you do as facilitator?

(c) How could you facilitate the many questions that are likely to be asked of a panel at a large public meeting?

(d) What do you think are the three key attributes of a good facilitator?

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