

MEDIATION AND THE ART OF REGULATION

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In a political climate filled with talk of how to best regulate mediation, it is surprising that so little regulatory theory has been brought into the discussion. The aim of this paper is to provide a conceptual framework for informed debate in relation to the regulation of mediation. The framework comprises two parts. First, four international regulatory trends in mediation are introduced: the market-contract, self-regulatory, formal framework and formal legislative approaches. Against this background the second part deals with the specific content of regulatory provisions on mediation. The resulting framework is called the Mediation Mix, which brings form and content together and addresses the questions: What aspects of mediation are, or should be, regulated, and how? The Mediation Mix is useful for analysing regulation trends in a given jurisdiction, for comparing trends in different jurisdictions, countries and regions, and for planning regulation policy. Finally, it highlights how different types of regulation can address tensions thrown up by the eternal diversity–consistency debate in mediation.

I DIVERSITY–CONSISTENCY IN MEDIATION PRACTICE

There are many forces at play in the regulation of contemporary mediation practice. They reflect a rapidly growing mediation marketplace moving in different, sometimes contradictory, directions. Press has identified six trends in mediation practice:

- Institutionalisation (co-option of mediation into court programs, government agencies and business and community organisations)
- Regulation (codes, standards, rules and legislation)
- Legalisation (case law on aspects of mediation)
- Innovation (experimentation with court-annexed mediation models)
- Internationalisation (international mediator accreditation), and
- Co-ordination (for example among legislatures in relation to model laws and among ADR organisations).²

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² S Press, 'International Trends in Dispute Resolution' (2000) 3 *Alternative Dispute Resolution Bulletin* 21, 21-22.

Regulation has been, and continues to be, one of the most controversial topics in the development of mediation from a life skill to an industry, and finally, to a profession. In considering approaches to regulating mediation, it is useful to begin with the theme that continues to dominate and define discussions, debates and developments in relation to ADR around the world: the diversity–consistency dilemma.

The diversity–consistency dilemma refers to the multiple tensions between the desire to embrace diversity in practice through flexibility and innovation, on one hand, and the call to establish consistent and reliable measures of quality in mediation service provision through regulation, on the other.³ Essentially the debate is about the long-term sustainability of mediation as an informal dispute resolution forum that offers parties autonomy and ownership of their conflict in addition to cost and time savings.

The diversity–consistency debate begins with the issue of definitional consistency and the risks of excluding certain mediation practices in the search for uniformity;⁴ it extends to concerns that rule consistency may stifle the growth of mediation, inhibit its opportunities for innovative development and lead it down the highly legalised path that arbitration has travelled.⁵

Diversity-consistency tensions reflect a multiplicity of interests related to consumers, practitioners, service providers and governments. In a professional field as new as mediation, many consumers remain uninformed about quality and unable to judge mediator qualifications and performance. Consumer confusion is exacerbated by the sheer diversity of mediation practice, spanning transformative, settlement, facilitative and advisory models.⁶ Protecting consumers from incompetent and unconscionable practices demands mediator accountability. However competing concerns for protection of the integrity of the process through strong confidentiality provisions may reduce accountability. Appropriate practice and approval standards will play an important role. However there is also a need for a certain level of transparency and disclosure in confidential mediation processes. Finally the question of accountability raises the issue of the obligations of mediation service providers to inform clients about the nature of the dispute resolution process they are entering and the qualification and skills of their mediators.

This article shows that it is neither a question of diversity at the expense of consistency, nor flexibility over form. Rather decisions need to be made about the aspects of

³ National Alternative Dispute Resolution Advisory Council (NADRAC), *A Framework for Standards* (Attorney-General's Department, 2001) 4, 70–1, in particular Recommendation 1.

⁴ On concerns that standardisation will have a negative effect on Australian indigenous mediation, see H Bishop, *Influences Impacting on Aboriginal ADR Processes in the Context of Social and Cultural Perspectives* (2000). On similar concerns regarding the interests of family mediators and their clients see NADRAC, *Fairness and Justice in Alternative Dispute Resolution*, Discussion Paper (1997).

⁵ For debates about rule consistency see T Altobelli, 'New South Wales ADR Legislation: The Need for Greater Consistency and Co-ordination' (1997) 8 *Australian Dispute Resolution Journal* 200; T Altobelli, 'Mediation in the Nineties: The Promise of the Future' (2000) 4 *Macarthur Law Review* 103, 106. See also comments in relation to the adoption of the *Uniform Mediation Act 2001* in the United States, for example: R Benjamin, *The Uniform Mediation Act: A Trojan Horse?* (2001) Mediate.com <www.mediate.com/ethics/ethicsforum2.cfm> at 4 August 2008; the Uniform Mediation Act Working Reporter's Notes; copy of Reporter's notes; and the draft *Uniform Mediation Act (2001)* available at <www.mediate.com/articles/umaJune01draft.cfm> at 4 August 2008.

⁶ The Australian National Mediator Standards (2008) make specific provision for advisory mediation. See §§ 2(4), 5(4) Approval Standards and §§ 2(6) and (7) Practice Standards.

mediation that are most usefully standardised, and those best served by more flexible arrangements.

II YOU CANNOT NOT REGULATE

Regulation is often associated with statutory intervention. This represents an outcome-focused and now outdated view, based on ‘simplistic and mechanistic models of economic rationalism, legalism and government control’.⁷ Traditional distinctions between public and private, and regulated and deregulated can be confusing as regulatory frameworks increasingly consist of different layers. Contemporary theories of regulation and law have shifted their focus from outcomes to process, and from government rule-making to the broader context of institutions and interest groups engaged in the process of decision-making. Regulation in the 21st century embraces pluralist thinking and views regulation as a system – or a web – comprising various stakeholders, democratic processes and a range of regulatory instruments and interactions.⁸ Similarly pluralistic approaches to law move beyond western understandings of legality to embrace eastern notions of persuasive law and chthonic approaches to regulating society.⁹

Market regulation is often thought of as the absence of regulation or the result of deregulation. However ‘deregulated’ spaces are not empty. They refer to the reduction, removal or absence of one kind of regulation only, such as legislation. So-called deregulated spaces may be filled with other forms of regulation such as industry or professional codes of conduct, complaints and disciplinary mechanisms. Alternatively, as explained below, where the marketplace dominates, the laws of supply and demand have a regulatory effect.

In short, the current debate about whether or not to regulate mediation is misinformed. Regulation is occurring already and it cannot be – and could not have been – avoided. An exceedingly more useful question relates to the appropriate regulation of mediation in the context of culture and legal-political traditions.

III FOUR APPROACHES TO THE REGULATION OF MEDIATION

There are many forms of mediation regulation. They include market regulation, private contractual instruments, self-regulation through standards, benchmarks and professional ethics, domestic legislation, judicial decisions, judicial and administrative pronouncements, international legal instruments, and customary law. Regulatory forms do not operate in isolation, rather they are bundled together in various ways depending on factors such as government policy, legal tradition and culture. From a global perspective, four primary approaches to regulating contemporary mediation can be identified:

1. market regulation,
2. self-regulation,

⁷ J Braithwaite, ‘Responsive Regulation for Australia’ in P Grabosky and J Braithwaite (eds), *Business Regulation and Australia’s Future* (1993) 97.

⁸ For a description and analysis of regulatory theories and models, see H Collins, ‘Regulating Contracts’ in C Parker et al (eds), *Regulating Law* (2004) 29 et seq.

⁹ See P Glenn, *Legal Traditions of the World* (Oxford University Press, 2nd ed, 2004) chs 3, 9 and 10.

3. formal framework, and
4. formal legislative approach.

These approaches are presented on a scale of increasing institutionalisation and top down formalism. They do not represent an evolutionary or developmental model of regulatory approaches to mediation. Each of these approaches will be discussed in turn.

A *Market-Contract Regulation*

As the name suggests, the market-contract approach to mediation is based on free market and contract law concepts and derives from values such as freedom of the individual, choice and competition. Anyone can engage in any kind of arrangement for mediation services subject to the laws of supply and demand, and of private contract.

Regulatory instruments of the market-contract approach include the relationship-specific ability of a bank to cut a line of credit to a small business or of a franchiser to revoke a franchisee's use of a trademark for breach of the franchising agreement. Here the power of the bank and the franchiser to withdraw a needed commodity will influence the behaviour of the small business and the franchisee respectively. Similarly the potential of repeat deals, reputation power, and individualised arrangements available through private contracting are powerful regulatory mechanisms in this approach.¹⁰ Where consumers have access to accurate information about mediators, reputations will influence choice of mediator and those with poor performance track records will gradually be pushed out of the market. In a Darwinian sense it is survival of the fittest. The opportunity for repeat mediations referred from ADR organisations, courts or other referral bodies encourages quality and consistency in mediation.

It has been suggested that the very low number of complaints about ADR service providers¹¹ supports a market-contract regulatory approach to mediation.¹² However the absence of consumer complaints by no means translates to satisfied consumers. Not only must consumers be sufficiently informed and educated about mediation in order to assess its quality, they also need access to feedback mechanisms to express their views. Australian research indicates that 'vulnerable consumers', that is consumers who live in low socio-economic geographical regions or rural areas, are more likely to experience difficulty in accessing ADR schemes than those from different demographic backgrounds.¹³

The risks of the market-contract approach lie in the imperfections of the market and the reality of access to information. People do not act rationally. All market participants do not have access to relevant information, and even if they do, they may not use the information rationally. Structural barriers such as wealth and education make choice more illusory than real. Moreover the use of standard contracts by major organisations

¹⁰ D Charney, 'Non-legal Sanctions in Commercial Relationships' (1990) 104 *Harvard Law Review* 375, 392–4.

¹¹ On ADR complaints statistics see, for example, NADRAC, above n 3, [2.76].

¹² See, for example, submission of the Law Council of Australia in 2004 to NADRAC in relation to the establishment of National Mediator Approval Standards, Law Council of Australia, *Who Says You're A Mediator* (2004) <www.lawcouncil.asn.au/get/submissions/2398301151.pdf> at 4 August 2008.

¹³ T Sourdin, *An Alternative for Whom? Access to ADR Processes* (2008) NADRAC <www.nadrac.gov.au> at 4 August 2008.

and other repeat players distorts the notion of freedom of contract in the sense that bargaining power is rarely equal in the consumer context. Hence the intervention of consumer legislation – such as implied consumer protection terms¹⁴ – to rectify market imperfections.

Resort to legal mechanisms to ensure accountability of mediators and legal advisers in market-based mediation processes has generated mixed results for plaintiffs. Numerous claims have been ultimately settled out of court and therefore information about final outcomes is limited.¹⁵ Furthermore the time and costs involved in litigating do not always make it a feasible option for consumers.

A market-contract approach to mediation regulation is evident in much of the early life of mediation before collectively organised and more formalised approaches to regulating mediation emerged. Despite the increased institutionalisation of mediation, a market-contract approach in relation to high-end commercial disputes continues to flourish in a number of jurisdictions such as Australia and the United States.¹⁶ Here parties choose to opt out of certain co-existing regulatory systems such as mediation codes of conduct, approval standards and default legislation in order to tailor the terms and conditions of the mediation to their individual needs. In mediation speak, they are exercising party autonomy by engaging in an individualised form of self-regulation (private contract) in terms of how they resolve their dispute.

B *Self-Regulatory Approach*

In this paper self-regulatory approaches refer to collective, community and industry led regulatory initiatives. Individual self-regulation through private contract is discussed in the market-contract approach above. Self-regulatory approaches embody reflexive and responsive theories of regulation. *Responsiveness* refers to collaboration between government and the group or collective being regulated.¹⁷ *Reflexion* means that actors have the opportunity to identify issues, reflect upon them and negotiate their own solutions. In their purest form self-regulatory approaches refer to community-based initiatives embracing collaborative, consultative and reflective processes, as distinct from top down policy regulation.

In the development of mediation practice around the world self-regulatory instruments have played and continue to play a significant role. In Australia popular instruments of self-regulation in the mediation field include approval and practice standards,

¹⁴ For an example of implied consumer protection terms to protect consumers from the potentially inappropriate use of ADR, see *EC Unfair Contract Terms Directive 93/13/EEC of 5 April 1993* [1993] OJ L 95/29, 29–34.

¹⁵ See, for example, *Tapoohi v Lewenberg* [2003] VSC 410 (21 October 2003) in which inter alia professional negligence on the part of the mediator was alleged. The mediator applied for a summary judgment to dismiss the claims made against him on the basis that the allegations were manifestly without prospect of success. However the Victorian Supreme Court confirmed that there was an arguable case to answer against the mediator. The dispute relating to the mediator's alleged professional negligence was subsequently settled.

¹⁶ See NADRAC, above n 3, 22; and comments by JAMS. President Jay Welsh at the Euro-Mediterranean ADR Conference, Rome 2007. For more information on JAMS see the website <www.jamsadr.com> at 8 August 2008.

¹⁷ As the self-regulatory approach applies to collective forms of self-regulation, contractual relationships between individuals are not relevant here.

precedents and model clauses. The Australian National Mediator Accreditation System (2008) is the most prominent illustration of national self-regulation on an industry basis. National mediator approval and practice standards came into operation on 1 January 2008 and a transitional period is envisaged until 1 January 2010. During this time the National Mediator Accreditation Committee (NMAC) comprising representatives of identified interest groups will negotiate the details of implementing the Standards and establishing a permanent National Mediator Standards Body (NMSB). These negotiations are being assisted and facilitated by the National Alternative Dispute Resolution Advisory Council (NADRAC).

The System, which includes national mediator approval and practice standards, is the result of years of informal and formal consultation and collaboration. According to the System mediators wishing to be accredited to the national standard must comply with training and assessment standards and join a recognised mediator accreditation body (RMAB). At the time of writing RMABs are self-recognising bodies. Practice and compliance issues within the System are dealt with by dialogue and consultation among members of NMAC. In so far as courts, tribunals, government departments and other users specify by formal regulation that mediators are required to meet the NMAS, a mixed model begins to emerge, embracing both reflexive and formalistic regulatory approaches.

Self-regulatory standards also can be found in organisations that offer mediation such as professional associations, and commercial and community providers of ADR. In many jurisdictions mediator approval and/or mediation practice standards have been developed on a sector-by-sector basis by court ADR programs, employer bodies of mediators, industry bodies and service providers.¹⁸

Self-regulation of mediator approval and practice standards is a popular regulatory form, which enjoys the support of a growing number of national and provincial governments.¹⁹ In the absence of a supra-national government and judiciary it is the preferred method for regulating transnational mediation. The private cross-border self-regulatory mediator accreditation initiative of the International Mediation Institute (IMI) is a case in point.

Self-regulatory instruments also extend to established practices of co-mediation, supervision, mediation intake and preparation, empirical research including client surveys, research forums and exchanges. Corporate and government pledges to use ADR and avoid litigation are a growing form of self-regulation. Prominent examples

¹⁸ See, for example, mediation developments in Germany, the United States, Canada, Denmark, Australia, England and Wales, Scotland, Italy, Switzerland, South Africa and France described in N Alexander (ed), *Global Trends in Mediation* (Alphen aan den Rijn, 2006).

¹⁹ See European Consumer Law Group, *Soft Law and the Consumer Interest* (2001) European Commission <www.ec.europa.eu/consumers/policy/eclg/rep03_en.pdf> at 4 August 2008. For example, the Dutch Minister of Justice in a letter to the House of Representatives described his reticence at regulating mediation, H Ballin, *Director-General Administration of Justice and Law Enforcement* (2007) The Dutch Ministry of Justice <www.english.justitie.nl> at 4 August 2008. Further the European Commission has advocated self-regulation of mediation, see CEDR, *Proposed Mediation Directive Adopted by European Commission* (2004) CEDR News <www.cedr.com> at 4 August 2008. It is important to note that collective self-regulation is distinguished from individual self-regulation such as contracting, which falls within the market approach.

from around the world include the UK Government Pledge 2001,²⁰ the CPR ADR Pledge signed by more than 5500 American companies and law firms,²¹ the International Trademark Association ADR Pledge,²² the Individual and Corporate Pledges of the Mediation First Community in Hong Kong,²³ and the Euro-Mediterranean Charter on Appropriate Dispute Resolution 2007, signed by the Arab Union of Lawyers, the Egyptian Bar Association, the Council of the Bars and Law Societies of the European Union (CCBE), and the Union of Turkish Bars.²⁴

As a matter of best practice self-regulatory models should include consumer awareness and education initiatives and an effective feedback and management strategy to deal with complaints.²⁵ Finally it is vital to develop mechanisms for ongoing development of soft regulation to respond to the evolution and maturation of the field, such as issues relating to infrastructure and co-ordination of mediation services.²⁶ In Australia a topical illustration of such a mechanism is the NADRAC-facilitated transition process (2008–2010) to implement the Australian National Mediator Standards (2008) and to establish a peak body (NMSB) on accreditation issues.

The perceived benefits of self-regulation are numerous. Participants in the regulatory process are experts with an intimate and sensitive knowledge of the needs and interests of the regulated group and its various constituents. Self-regulation promotes innovation and choice in terms of the determination of the self-regulatory mix and is generally more flexible, adaptable and responsive than more formal regulatory forms. It is said to achieve a greater degree of ‘buy-in’ from industry members as they have the opportunity to participate in decision-making with respect to regulation issues. Legitimacy of the area subject to regulation and conformity with the regulation itself are also enhanced through the participatory nature of self-regulatory approaches. Self-regulation is also associated with reduced costs in relation to information collection, reduced monitoring and enforcement and less formality compared with legislative regulation. Many of the costs of regulation are absorbed by the industry itself in self-regulation models.²⁷ Finally successful self-regulatory models may remove the need for or at least postpone the introduction of comprehensive legislation in a given industry.

The primary risks associated with self-regulatory approaches relate to resource levels in terms of available expertise and funding. Effective responsive and reflexive processes

²⁰ The 2007 report from the Department for Constitutional Affairs on the Effectiveness of the Pledge is available at Ministry of Justice <www.justice.gov.uk> at 5 August 2008.

²¹ On the CPR ADR pledge, see International Institute for Conflict Prevention and Resolution <www.cpradr.org> at 5 August 2008.

²² On the INTA ADR pledge, see International Trademark Association <www.inta.org> at 5 August 2008.

²³ See Mediate.com <www.mediate.com.hk> at 5 August 2008.

²⁴ Informally called the Rome Declaration, the Euro-Mediterranean Charter is available at Project of the European Commission <www.adrmeda.org> at 5 August 2008.

²⁵ See Sourdin, above n 13, in relation to research on consumer access to ADR.

²⁶ For this reason the Australian standards are said to be ‘living documents’ and a review process has been put in place.

²⁷ Consider, for example, the proposed resourcing of the self-regulatory Australian mediation standards through a combination of fees from RMABs (registered mediation approval bodies) and funding from government sources: T Sourdin, *Australian National Mediator Accreditation System Report on Project* (2007) New South Wales Bar Association 38 <<http://www.nswbar.asn.au/docs/professional/adr/documents/AccreditationReportSept07.pdf>> at 5 August 2008.

require sustained ‘buy-in’ and input by key interest groups, communities and governments. Where levels of industry and expert input wane, self-regulatory structures lose their efficacy and more government-directed input may be justified. In addition self-regulatory schemes may be susceptible to dominance by individuals and groups, which do not reflect the broader industry and consumer interests.

C *Formal Framework*

As with the self-regulatory approach, the formal framework approach draws upon reflexive and responsive theories of regulation.²⁸ Initially however formal parameters or guidelines are established in the formal framework approach within which the mediation community can ‘self-regulate’ various aspects of mediation. As such the formal framework approach represents a meeting of top down and bottom up regulatory approaches. It is also referred to as co-regulation.

The framework usually takes the form of legislative or executive instruments such as international conventions, directives, legislation and model laws. It establishes formal and legally recognised parameters within which softer forms of regulation such as voluntary self-regulation can fill in the regulatory details. The European Union Directive on Mediation²⁹ illustrates this approach well. It defines mediation thereby establishing its scope and then goes on to identify the aspects of mediation that require regulation by EU member-states. The recitals clearly recognise different forms of regulation of mediation including self-regulation (recital 14), specifically referring to the European Code of Conduct for Mediators (recital 17) and market-based solutions (recital 17). Recital 16 encourages member states to ensure that appropriate quality control mechanisms for mediation services are in place. Article 4 of the Directive requires member states to encourage mediators and mediation organisations to adhere to voluntary codes of conduct and other quality control mechanisms, and reference is made to the European Code in Recital 17.

Formal framework approaches can accommodate diverse interest groups while still pursuing a common policy. They are most effective where a single body, such as the European Court of Justice, has the power to interpret and enforce regulatory issues as they arise. Uniform interpretation of framework provisions enhances the robustness of the framework itself. In 2001 the Report of the National ADR Advisory Council³⁰ suggested a framework approach to the standards debate in Australia, however the recommendations did not presuppose legislative intervention. Rather a self-regulatory framework was envisaged. As indicated earlier an industry-based self-regulatory minimum standards approach was adopted on a national level in Australia in 2008.

While model laws typically aim to achieve mirror legislative enactment in target jurisdictions (formal legislative), these instruments may also be effective as guidelines

²⁸ On reflexive regulation, see D Hess, ‘Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness’ (1999) 25(1) *Journal of Corporate Law* 41. Collins defines reflexive regulation as regulation which seeks to achieve the cooperation and collaboration of those subject to regulation, see H Collins, *Regulating Contracts* (Oxford University Press, 2001) 65.

²⁹ *Directive on Certain Matters of Mediation in Civil and Commercial Matters*, proposal as adopted by the European Parliament and the Council of the European Union 28 February 2008 (OR.en), Institutional File 2004/0251 (COD) <www.eurlex.europa.eu> at 5 August 2008.

³⁰ NADRAC, above n 3.

or frameworks for local regulators and interest groups. In Australia it has been suggested that a national model law dealing with evidentiary privilege and other rights and obligations of participants in mediation could effectively support the harmonising of local policy and law-making initiatives by offering guidelines for desirable regulatory outcomes.³¹ In other words, the Model Law would act as a reform guide regulatory policy. This approach may be attractive for countries able to maintain a manageable overview of their regulatory initiatives in mediation such as Australia. However countries with significantly larger population, higher number of states and correspondingly numerous pieces of local and state legislation, such as the United States, are likely to find a national framework approach for all aspects of mediation inadequate. Here formal legislative approaches may be considered a more attractive option.

D *Formal Legislative*

As the term implies, formal legislative regulation relies primarily on legislation supported by formal institutions, such as the judiciary, to regulate mediation. Arguably a manifestation of traditional Eurocentric civil law thinking, the formal legislative approach focuses on positive notions of law and sits well with the concept of an 'active' state. According to Damaska, active states tend to adopt paternalistic, welfare-oriented and interventionist approaches in relation to their citizens.³² In other words, active states adopt policies based on the premise that they know what is good for civil society. To this end a systemised body of legal norms and policies define what is appropriate and just according to state interests and values.

Formal legislative strategies on mediation represent a strong endorsement of mediation by the state and go a long way towards its formal recognition as a legitimate dispute resolution practice and as a profession. The Austrian Law on Mediation in Civil Cases 2003 is a case in point. It demonstrates a dominant formal legislative approach to the regulation of the approval and practice of mediators in civil matters. Specific legislation focussing on areas such as court-annexed, family and victim-offender mediation has also been enacted in Austria.³³ Following Austria's lead, the Slovak Republic introduced comprehensive mediation legislation in 2004. A similar legislative strategy is being pursued in the German state of Lower Saxony and considered at the federal level.³⁴

Formal legislative approaches also aim to offer clarification of the status quo, set practice consistency goals, establish certainty on legal issues and consumer protection. In Australia a formal legislative approach has been adopted in the area of family dispute resolution. The Family Dispute Resolution Practitioners Accreditation System is regulated under the *Family Law Act 1975* (Cth) and the *Family Law Regulations 1984* (Cth). In addition to acknowledging the professionalism of the sector, the Accreditation

³¹ See R Carroll, 'Trends in Mediation Legislation: "All for One and One for All" or "One at All"?' (2002) 30 *University of Western Australia Law Review* 167, 207.

³² M R Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986) 73-88.

³³ On Austrian mediation legislation see S Ferz and E Filler, *Mediation: Gesetzestexte und Kommentar* (Wirtschafts-Universitaet Wien: Universitätsverlag, 2003).

³⁴ Entwurf eines Landesmediations- und Gütestellengesetzes (Niedersachsen, April 2007). An expert advisory board has been appointed by the German Federal Ministry of Justice in relation to the preparation of a mediation law.

System has a quality assurance goal.³⁵ It is a comprehensive and compulsory formal regulatory package, which came into force in July 2007 with a transitional period of two years. During this two year period further amendments are being made to the Regulations and practitioners wishing to be accredited under the FDRP System must be compliant by July 2009. The FDRP Accreditation System operates in stark contrast to the voluntary minimum standards of the national self-regulatory system outlined earlier. While the intention of the national self-regulatory standards is to operate as an entry point for all mediators, the relationship between the two sets of standards has not been clarified at the time of writing.

The *Uniform Mediation Act 2001* (UMA) in the United States is an example of a formal legislative approach in relation to the confidentiality aspects of mediation. It aims to 'replace the hundreds of pages of complex and often conflicting statutes across the country with a few short pages of simple, accessible and helpful rules'. The extent to which this goal has been achieved, however, is the subject of considerable debate.³⁶

Throughout the world, many transitional democracies indicate a preference for centralised and comprehensive formal legislative regulation of mediation.³⁷ Countries eager to attract investment and enter bi- and multilateral political and economic arrangements are highly motivated to demonstrate their democratic, dispute resolution friendly and modern legal systems to the rest of the world. Here formal documented laws are more readily recognised internationally than other 'softer' forms of regulation.

However there are limitations to legislative approaches in the mediation context. Legislative mechanisms are restricted in their ability to deal with non-legal perspectives, high levels of generality, complexity, unpredictability and innovation. It is difficult to be rigidly exacting and sweepingly general at the same time. This goes some way to explaining the widespread use of sector-specific mediation legislation in common law countries such as Australia, the United States and England, which have deliberately chosen not to enact comprehensive general national mediation legislation.³⁸ A focus on specific contexts, sectors and industries such as family dispute resolution in Australia allows for tailor-made legislative solutions.

Furthermore, while delegation of discretion is possible in the legislative process, it typically falls to state-funded regulatory agencies operating in accordance with government-approved policies. Therefore the benefits of direct industry expertise lauded in self-regulatory schemes may be lost in the legal layers of the legislative process. Finally top down processes of statutory regulation are antithetical to the very values mediation is seeking to support, namely party autonomy and participation in democratic decision-making processes.

³⁵ See T Sourdin, *Alternative Dispute Resolution* (Law Book Company, 2008 forthcoming) ch 13; and also Australian Government Attorney-General's Department, *Family Dispute Resolution* <www.ag.gov.au/fdrproviders> at 5 August 2008.

³⁶ See, for example, S L Schwartz, *International Academy of Mediators Oppose the Uniform Mediation Act* (2002) Mediate.com <www.mediate.com/articles/umaiaam.cfm> at 5 August 2008. See also W I Fagan and B D Shannon, 'A Potential Threat to Texas ADR' (2002) 65(1) *Texas Bar Journal* 27.

³⁷ On mediation legislation in Eastern Europe see R Morek, *Waiting for the Directive: Recent Developments in Civil and Commercial Mediation Law in Central and Eastern Europe: Selected Issues* (European Mediation Conference, 2007).

³⁸ For a sampling of Australian sector-specific legislation on mediation, see the Australian section on Mediation World <www.mediationworld.net> at 5 August 2008.

IV FOUR REGULATORY APPROACHES IN PRACTICE: A MULTI-LAYERED APPROACH

These four approaches to mediation regulation are not exclusive of one another. Virtually all jurisdictions have aspects of at least two regulatory approaches and jurisdictions with extensive mediation experience are likely to show evidence of all four.

Mediation in Anglo-American jurisdictions generally has followed a mixed regulatory approach with significant self-regulatory, marketplace and legislative elements. In Australia, for example, a formal legislative approach is evident in the hundreds of pieces of legislation that regulate mediation, mainly on a sector-by-sector basis.³⁹ As indicated earlier, a national framework approach has been recommended by NADRAC and at least one author has suggested the use of a Model Law with a framework function. Meanwhile national approval and practice standards for mediators reflect a clear self-regulatory direction.⁴⁰ Finally the voluntary nature of general national standards for mediation means that there remains scope for the marketplace-contract approach to continue to develop. Litigation against mediators suggests that mediation is low risk practice. Relative to the amount of practice, there are few cases against mediators and those that have emerged have influenced practice in a constructive manner.⁴¹ Therefore the current regulatory approach is likely to continue.

On the European continent a number of countries including France, Germany and Italy have permitted service-providers, industry and courts to develop their own self-regulatory schemes. However, despite some regulatory experimentation, there is a discernable European trend towards a formal legislative approach, which has been boosted by the emergence of the EU Directive on Mediation. In this regard the Austrian Law on Mediation in Civil Cases has been held up as a model legislative approach particularly for the transitional democracies of Eastern Europe. However, as explained in the next section, legislating on mediator standards, as the Austrian law has done, leaves many other aspects of mediation open to self-regulation and marketplace-contract approaches. As a result, a variety of self-regulatory initiatives to mobilise mediation have emerged throughout Austria. In various courts throughout Austria, for example, mediation organisations conduct information sessions to increase consumer awareness about the availability of mediation and encourage disputants to utilise mediation services.

Contemporary best practice models recommend a combination of private and public mechanisms with a high level of responsiveness to needs, interests and change in regulated markets. Experts further suggest that reflexive and responsive processes – often associated with self-regulatory approaches and even formal framework approaches – encourage performance beyond compliance.⁴² In other words, participation in determining regulatory measures does more than enhance awareness, understanding and compliance; it supports aspirations to achieve best practice in the regulated market.

³⁹ For an overview see L Boule, *Mediation: Principles Process Practice* (LexisNexis, 2005) 284 et seq.

⁴⁰ See National Alternative Dispute Resolution Advisory Council, *Australian National Mediator Accreditation System Standards*, <www.nadrac.gov.au> at 5 August 2008.

⁴¹ See, for example, the specific disclosure requirements for mediators who adopt an advisory model: Australian National Mediator Standards (2008).

⁴² N Gunningham, P Grabosky and D Sinclair, *Smart Regulation* (Clarendon Press, 1998) 391.

The Organisation for Economic Co-operation and Development (OECD) *Guiding Principles for Regulatory Quality and Performance* provides a useful policy illustration. Adopted by the OECD Council in 2005, it endorses a regulation mix which promotes ‘innovation through market incentives and goal-based approaches’ and is compatible with ‘competition, trade and investment-facilitating principles at domestic and international levels.’⁴³ These principles echo those of legal reform projects in developing regions, which frequently feature mediation as a dispute management mechanism that provides benefits for trade and investment and economic growth and stability.⁴⁴

The art of regulation lies in the ability to translate the tensions of the diversity-consistency debate into appropriate regulatory form. It demands a sophisticated understanding of the possibilities that regulatory mechanisms can offer and what they can mean for the future of mediation practice. However, while regulatory approaches provide valuable insights into systemic trends, they do not tell the whole story. The first part of this paper has introduced four general approaches to the regulation of mediation. The next part introduces a classification method to describe the various aspects of mediation, which may be subject to different regulatory approaches.

V WHAT ASPECTS OF MEDIATION ARE TO BE REGULATED AND HOW?

There are many ways to classify and explain mediation regulation. Each method offers a different insight into the characteristics and possibilities of the regulatory instrument in question. The various descriptors and categories of mediation regulation described here are not exhaustive. Nor are they exclusive. Rather they highlight the complexity and plurality of mediation as an object of regulation.

Before considering the content of mediation laws, it is important to make a distinction between the law of mediation and law in mediation. Law *in* mediation refers to laws relevant to the substance of the dispute being mediated. Legal representatives often use law to support their arguments in mediation. Law sets the parameters for walk away alternatives in the event that the parties do not reach an agreement. It also influences the choice of content and terms in mediated agreements. The implications of taxation law for mediated settlements are illustrative of the significance of law in mediation. In the Australian case of *Tapoohi*⁴⁵ a party sought to have the agreement set aside on the basis that her lawyers did not advise her in relation to the taxation implications of the settlement. In other words, the argument centred on the role of law *in* mediation, or rather the lack of it. Another example of law in mediation is found in statutory conciliation, which takes place within a legislative framework. Here an expert advisory mediation model is usually employed. The substantive terms of conciliated agreements between the parties must fall within the parameters of the relevant legislation. In

⁴³ Organisation for Economic Co-operation and Development (OECD), *OECD Guiding Principles for Regulatory Performance and Quality* (2005) <www.oecd.org/dataoecd/19/51/37318586.pdf> at 5 August 2008.

⁴⁴ For examples of such reform projects see Project of the European Commission, *Facilitating Trade and Investment in the Mediterranean Region* <www.adrmeda.org> at 5 August 2008; and Foreign Investment Advisory Service (FIAS), *Vanuatu ADR/Mediation Project* (2007). Both projects highlight the aim of using inter alia ADR reform to improve the investment climate for both domestic and foreign investors and thereby maximise poverty reduction.

⁴⁵ *Tapoohi v Lewenberg & Ors* [2003] VSC 379.

relation to the Australian Human Rights and Equal Opportunity Commission (HREOC), Raymond and Georgalis comment that:

in facilitating the conciliation process, HREOC officers are seen to have a legitimate role to intervene to ensure a fair process for both parties, to provide information on a range of possible settlement options and to ensure any agreement does not contravene the interest and purpose of the legislation.⁴⁶

The law *of* mediation (also called mediation law) refers to the legislation, case law, contractual terms and other legally binding standards that set the legal framework for mediation. Mediation laws extend to any laws that directly or indirectly regulate aspects of the mediation process or outcome. Issues frequently the subject of mediation law include confidentiality of the process and the enforceability of mediation clauses, agreements to mediate and mediated settlements. Mediation model laws such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation 2002 (MLICC) and the UMA in the United States contain such mediation laws (laws *of* mediation). There are literally thousands of laws, court rules, and institutional standards in the United States alone, and a rapidly growing number in other countries of the world including Australia, that contribute to the law of mediation.

The differentiation between law *in*, and law *of*, mediation assists in understanding the relationship between the legal system and the mediation process. However the distinction is not straightforward. The law relating to mediated settlements highlights the point well. Where there is a specific regulation regarding the enforceability of mediated, as distinct from other, settlements, the regulation forms part of the law of mediation. Therefore regulations providing that mediated settlements adopt a special legal status, such court orders, form part of the law of mediation.⁴⁷ Conversely where issues of enforceability are left to the general law *of* contracts, it can be said to form part of the law *in* mediation. Similarly opinions vary as to whether regulatory provisions on the admissibility of evidence of what occurred in mediation in subsequent proceedings belong to the law *of* mediation or are rather classified as part of the general law of evidence applicable in mediation (law *in* mediation). Again where the law does not specifically refer to mediation it will likely fall into the category of a law *in* mediation or to use the words of an Australian commentator 'law applying incidentally to mediation'.⁴⁸

The remainder of this article focuses on the laws of mediation. These laws can be classified in different ways, for example, according to function or scope. They can be differentiated in terms of whether provisions regulate issues international to the process of mediation or alternatively issues relating to the interface between the legal system and the mediation process. Distinctions between default and mandatory laws are also made.

⁴⁶ T Raymond and S Georgalis, 'Dispute Resolution in the Changing Shadow of the Law: A Study of the Parties' View on the Conciliation Process in Federal Anti-discrimination Law' (2003) 6 *ADR Bulletin* 31.

⁴⁷ See, for example, *Commercial and Consumer Tribunal Act 2003* (Qld) s 119.

⁴⁸ Carroll, above n 31, 175.

A *A Functional Approach: Triggering, Procedural, Standard-Setting and Beneficial Laws*

Another approach is to characterise laws in terms of whether they facilitate access to mediation and trigger the mediation process (triggering laws), deal with the mediation process (procedural laws), enhance and support the recognition and practice of mediators by establishing standards for mediation (standard-setting provisions), or protect and benefit mediators and/or consumers by setting out their various rights and obligations (beneficial mediation laws).

Triggering laws may permit referrals to mediation with the parties' consent only, such as referrals under s 102 of the *Administrative Decisions Tribunal Act 1997* (NSW) and in Germany § 278 V 2 Civil Procedure Law. However they can also mandate mediation as is the trend in a growing number of Australian courts and tribunals. Examples of mandatory mediation regulation include pt 8 div 2 of the *Retail Leases Act 1994* (NSW) and § 15a *Introductory Law of the Civil Procedure Act* in Germany. Article 1(1) of the European Union Directive on Mediation⁴⁹ specifies its objective as inter alia to 'facilitate access to alternative dispute resolution'. Article 5 sets out different mediation triggering mechanisms that member states may consider in their regulation policy. These include court information sessions on mediation and voluntary and mandatory referrals to mediation by courts.

Procedural laws manage aspects of the mediation process such as commencement, protocol and termination of mediation, as well as selection and appointment of mediators. Examples can be found in arts 4 through to 7 of the UNCITRAL MLICC. In addition the mediation rules of ADR organisations, bar associations and other professional bodies typically deal with procedure.⁵⁰ Insofar as they are incorporated into private contracts and therefore bind parties, institutional mediation rules are illustrative of procedural laws.

Standard-setting regulations address issues such as qualifications, competency standards for, and certification or registration of, mediators. Standard-setting provisions can be prohibitive in the sense that they forbid those who do not meet the standards to use the title, 'mediator'. It is difficult to find regulatory instruments in relation to mediation that have this effect. However the Family Dispute Resolution Practitioner System discussed earlier has a monopoly on the title 'Family Dispute Resolution Practitioner' so that only practitioners who meet the requirements of the System can use this title. More typically standard-setting provisions offer mediators a regulatory framework within which to operate provided they meet the required standards. The Australian National Mediator Approval Standards (2008) illustrate such a policy. Mediators who demonstrate that they meet the Standards may operate under the National Mediator Accreditation System. Those who do not meet the Standards may still call themselves mediators but do not offer the quality assurance that national accreditation promises. Nationally accredited mediators are subject to the Australian National Mediator Practice Standards (2008), which according to art 1(1) 'govern the relationship of mediators with the participants in

⁴⁹ *Directive on Certain Matters of Mediation in Civil and Commercial Matters*, proposal as adopted by the European Parliament and the Council of the European Union 28 February 2008 (OR.en), Institutional File 2004/0251 (COD) <www.eurlex.europa.eu> at 5 August 2008.

⁵⁰ See, for example, The Institute of Arbitrators and Mediators Australia, *Conciliation Rules* (2006) pt II <www.iama.org.au/pdf/ConciliationRules.pdf> at 5 August 2008.

the mediation, their professional colleagues, courts and the general public so that all will benefit from high standards of practice in mediation'. Article 1(2) goes on to explain that the Practice Standards specify practice and competency standards for mediators and provide information about what is to be expected from the mediation process and from mediators. Standard-setting provisions can take the form of recommendations only. The European Code of Conduct for Mediators is a useful regional illustration of standard-setting regulations that are advisory in nature.

Beneficial mediation laws set out rights and obligations of mediation participants and outside parties, thereby protecting the integrity of mediation process and benefiting its participants. Illustrative here are legislative provisions and common law principles relating to confidentiality, such as laws relating to confidential information, without prejudice privilege, legal professional privilege and – where it is recognised – mediation privilege. The UMA primarily deals with beneficial laws relating to confidentiality and privilege. In addition to, for example, confidentiality, there are many other examples of beneficial laws. Articles 6, 7 and 8 of the European Union Directive contain beneficial laws on enforceability of mediated settlements, admissibility of evidence and the operation of limitation periods. The UNCITRAL Model Law also addresses these issues in articles 10, 13, 14 and the optional article [x].⁵¹

As the above discussion shows, regulatory instruments may contain different types of mediation provisions. Consider, for example, the extensive Slovakian law on mediation, which contains (1) triggering provisions establishing courts as (non-exclusive) referral agents for mediation, (2) procedural provisions about commencement and termination of mediation, (3) standard-setting provisions for mediator qualifications and approval and (4) beneficial laws relating to mediation clauses and contracts, confidentiality, evidence and the legal effect of mediated settlements.

The Austrian law on mediation is an example of legislation, which contains standard-setting (mediator qualification standards) and beneficial laws (provisions relating to confidentiality, evidence and suspension of court proceedings). Unlike the Slovakian law, it does not provide a path to mediation for parties or address process issues such as commencement and termination. For this reason it has been described as a law for mediators, and not one for the mediation process.⁵²

The UNCITRAL MLICC contains mainly procedural and beneficial provisions, preferring to leave mediation triggers and quality control to nation-states. The EU Directive requires member states to regulate with respect to triggering, standard-setting and beneficial laws. Little attention is given to procedural issues in the Directive.

Carroll points out that in relation to court-related mediation, standard-setting provisions are often found in the court rules, while procedural and beneficial provisions can be found in legislation. This is certainly the case in Australia.⁵³

⁵¹ Article [x] on limitation periods is found in the footnote to art 4 of the *UNCITRAL Model Law on International Commercial Conciliations* (2002).

⁵² E Filler, *Expertenrunde zum Stand der Gesetzgebung Mediation in Europa*, a Joint Initiative of Berliner Anwaltsverein (BAV) and the Internationale Vereinigung für Konfliktmanagement und Mediation (IVKM) e V (2007).

⁵³ See, for example, *Rules of the Supreme Court* (Qld) s 99.2 in relation to standard setting rules.

B *Laws Regulating the Interface between Mediation and Legal System*

Yet another approach to describing mediation laws is to distinguish them in terms of whether they regulate the interface between mediation and other proceedings, or focus solely on procedural aspects of mediation. This distinction highlights the role of mediation in the legal system and the fact that mediation does not and cannot exist in a legal vacuum. Procedural mediation laws have been considered earlier. Interface laws, that is mediation laws dealing with the interface between the mediation process and other proceedings such as arbitration and litigation, regulate issues such as the admissibility of information from mediation as evidence in subsequent arbitral and judicial proceedings, the enforceability of mediated settlements before a court of law, and the suspension of limitation periods for making legal claims. There is considerable overlap between interface provisions and beneficial provisions. This occurs because rights and obligations, dealt with in beneficial laws, frequently have an impact upon other proceedings such as discovery and subsequent arbitral and judicial proceedings.

The following articles of the EU Directive can be categorised as interface provisions: art 3 to the extent that it draws the boundaries between judicial settlement and judicial mediation, art 6 on enforceability of mediated settlements, art 7 on admissibility of evidence, and art 8 on limitation periods. The following articles of the UNCITRAL MLICC also provide examples of interface provisions: art 10 on admissibility of evidence, art 12 on mediators as arbitrators, arts 13 and 14 on enforceability of agreements to mediate and mediated settlements, and the optional article on limitation periods.

Moreover the interface–procedural distinction is significant in terms of identifying the types of issues that are suitable for legislative regulation and those more usefully dealt with by other regulatory forms. In general legislation better serves the objectives of regulatory provisions dealing with what happens when mediation processes interface with the legal system. Here legislation is able to promote certainty and consistency in relation to other legal procedures in so far as they may come into contact with mediation. Regulation about mediation procedure, however, can accommodate different approaches as parties exercise their autonomy to tailor processes to suit their specific needs. The interface-procedure distinction is also useful in determining whether or not legislative provisions on mediation should be mandatory or default in nature.

C *Default and Mandatory Laws*

Yet another approach is to differentiate mediation laws in terms of whether they operate as default or mandatory. Default rules support the notion of party autonomy and operate only in the absence of an express contrary agreement by the parties (*ius dispositivum*). Many dispute resolution arrangements are regulated through a combination of contract and dispositive law. The UNCITRAL MLICC is an example of a default model law. Here parties can enter into contractual arrangements that displace the application of the entire law. However once subject to the law, certain provisions operate as default while others are mandatory in nature.

Mandatory rules apply irrespective of arrangements to the contrary (*ius cogens*). In other words, parties cannot contract out of mandatory rules, whereas they can with respect to default rules. Article 6(3) MLICC, which enshrines the principle of fair

treatment in mediation, operates as a mandatory rule. Encapsulating notions of procedural fairness and impartiality, this provision was considered by the drafters of the Model Law to be so fundamental as to override the other primary tenet of mediation, party autonomy.

In another illustration, the UMA in the United States provides mandatory beneficial rules relating to issues of admissibility of evidence from mediations in subsequent proceedings. It was considered that this aspect of confidentiality was most in need of uniformity and certainty as it had the potential to directly influence legal proceedings as well as the integrity of the mediation process.

D *The Scope of Mediation Laws: General, Sector-Specific and Context-Integrated Laws*

Finally mediation laws can be categorised according to their target audience. Mediation laws may be described as general, sector-specific or context-integrated. General mediation laws extend to mediations and/or mediators generally in a given jurisdiction, unless specifically excluded. Here mediation is accorded a high level of recognition as a dispute resolution practice by the law-making body.

In 2003 Austria became the first country to enact a national general mediation law. The legislation recognises mediation as a profession in its own right. In terms of scope the law extends to all civil disputes. The Philippine *Alternative Dispute Resolution Act of 2004* also fits the description of a general law. Its full title indicates the general nature of its application: ‘An Act To Institutionalize The Use Of An Alternative Dispute Resolution System In The Philippines And To Establish The Office For Alternative Dispute Resolution, And For Other Purposes’. It deals not only with mediation but with all forms of facilitative and advisory dispute resolution as well as arbitration. In relation to mediation it covers voluntary mediation, both ad hoc and institutional, while court-annexed mediation is subject to more specific legislation.

The UMA, the EU Directive and the Australian National Mediator Accreditation System have general application, while the UNCITRAL MLICC is aimed at commercial disputes. Given the very wide definition of ‘commercial’ in the MLICC the target audience could still conceivably be described as general. However enacting member states may choose to further broaden or, alternatively, to limit the target audience.

Sector-specific regulation refers to stand-alone legislation dedicated to mediation in a specific industry, court, ADR program, group of individuals or other defined context. In some cases the introduction of such regulation is a response to a crisis in a specific industry sector. Farm debt legislation in Australia and Canada is illustrative of this type of regulation. It provides for mediation before foreclosure on farms can be executed. Here Australian and Canadian legislatures reacted to a specific crisis situation, namely the inability of significant parts of their respective farming sectors to repay banking loans. Similarly the *Watertight Homes Resolution Service Act 2002* in New Zealand was created as a response to a crisis in the building industry.

Context-integrated mediation laws are similar to sector-specific laws, however they are not stand-alone. Rather they are incorporated in statutes or other forms of regulation dealing with a particular topic. Court-related mediation legislation is commonly

integrated into the legislation of the relevant court such as mediation provisions in the *Federal Court of Australia Act 1976* (Cth) and the *Family Law Act 1975* (Cth). In 2008 most Australian court and tribunal legislation contains provisions on mediation and ADR. International examples of context-integrated court legislation include the *Alberta Provincial Court Act 2000* and the regulations under the Act, and the *Small Claims Tribunal Act 1985* of Singapore.

Other illustrations of context-integrated mediation laws include the *Native Title Act 1993* (Cth) in Australia, which deals with a range of issues related to native title claims by Aboriginal and Torres Strait Islanders including mediation. Similarly in New Zealand the *Treaty of Waitangi Act 1975* deals with claims made against the New Zealand Government for breaches of the Treaty of Waitangi and mediation is one of many topics addressed within the legislation. In the United States the *Californian Evidence Code* (ss 1115–1128) contains provisions relating to admissibility of evidence as to what occurred in mediation. Here mediation provisions are integrated into the laws of evidence and are therefore described as context-integrated mediation laws.

The tripartite classification of general, sector-specific and context-integrated regulation highlights significant differences in common law and civil jurisdictions. An emphasis on sector-specific and context-integrated laws is characteristic of countries of the common law tradition. It reflects a reactive, decentralised and piecemeal approach to regulation and a tradition of experimentation, and trial and error, consistent with the development of the common law itself. While countries of other traditions such as the civil law have also passed a limited number of sector-specific and context-integrated laws mainly related to court-relation mediation, there has been a strong trend to enact general, more centralised laws. This pattern is consistent with the more interventionist, paternalistic active state, which leaves limited space for experimentation. The EU Directive on Mediation is likely to further encourage the trend to comprehensive general legislation among member states.

VI WHAT ASPECTS OF MEDIATION ARE TO BE REGULATED AND HOW?

The classifications of mediation introduced in the previous section are not only useful for describing and comparing mediation regulation, they also offer valuable guidelines for the strategic choices that need to be made in regulation design. This section draws on these classification approaches and sets out issues and questions, which may be useful in the planning of mediation regulatory policy. As has been the case throughout this article, the terms ‘regulation’ and ‘law’ are used in a broad sense and do not refer to one particular regulatory approach.

The threshold design question relates to target audience. Is the regulation to extend to all mediators and mediations or be restricted to a particular sector? The suitability of general as opposed to sector-specific and context-integrated regulation depends on a number of factors.

General mediation laws usually result in broadly worded provisions, which may be difficult to apply across all sectors, thereby increasing confusion about expectations in relation to dispute resolution processes. The risk of crushing the diversity and flexibility of mediation through precisely worded general legislation is greater than through differentiated types of regulation.

Conversely, sector-specific and context-integrated laws are able to accommodate precise language, which responds to specific needs. There are many aspects of mediation that may be regulated differently according to context. These include approaches to confidentiality, mediator accountability and enforceability of mediated settlements. Confidentiality needs may vary according to culture and on the level of public interest. Certain types of disputes such as environmental and town planning may not require the same level of confidentiality as commercial litigation matters. Mediator accountability is a controversial issue and different sectors deal with it in different ways. In court-related, government and statutory contexts the issue of accountability is often addressed through mediator immunity provisions,⁵⁴ whereas private commercial mediators rarely enjoy such protection. The level of enforceability of settlements varies from clear statements that mediated outcomes are not legally binding,⁵⁵ to the granting of special enforceability status in relation to mediated settlements, for example through orders of the court. Where no special provisions are made in relation to mediated settlements, the general law of contract applies.

Baylis laments the increasing absence of detail, and as a consequence, transparency, in mediation legislation and argues for greater use of sector-specific and context-integrated regulation to provide clarity in relation to how standards, rights, obligations in relation to, and process elements of, mediation are to be managed.⁵⁶

Further, the more general the legislation, the more likely that it will overlap with other regulatory instruments which primarily or incidentally regulate mediation. This can cause confusion and have serious consequences especially in relation to standard-setting and beneficial provisions. Carroll illustrates this point very well in the context of s 27(3) *Commercial Arbitration Act 1984* (NSW), which makes provisions for arbitrators to mediate, and s 51 of the same Act providing for arbitrator immunity except in cases of fraud. If the Australian federal legislature were to pass a general mediation law, the following two issues would immediately arise:

- Would arbitrators still be acting as arbitrators when mediating, or would they fall under the provisions of the proposed general mediation law?
- Would s 51 immunity apply to mediating arbitrators or would they be subject to general mediation provisions relating to mediator accountability?

It is therefore imperative that policy and lawmakers review existing legislation with a view to determining how proposed mediation laws will interact with existing regulation of dispute resolution processes.

If a non-general law is proposed then consideration must be given to whether a stand-alone sector-specific or context-integrated form is suitable. While stand-alone regulations may raise the profile of mediation, they also contribute to a piecemeal proliferation of statutes and therefore a potential reduction in the transparency of mediation regulation overall. Context-integrated laws expand existing laws and

⁵⁴ For example, *Supreme Court of Queensland Act 1991* (Qld) s 113. Similarly, under s 35 of the *Dispute Resolution Centres Act 1990* (Qld), which establishes a government-based community mediation service, mediators possess immunity.

⁵⁵ *Dispute Resolution Centres Act 1990* (Qld) s 31(3).

⁵⁶ C Baylis, 'Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions' (1999) 30 *Victoria University of Wellington Law Review* 279, 283-285 and 291-293.

therefore do not as such contribute to statute proliferation. However mediation provisions in context-integrated laws necessarily operate within the existing structures of those laws – a factor likely to influence how mediation is practiced under the relevant statute.

Once the target coverage of the regulation has been established, its content must be considered. Here reference is made to the classification system of triggering, procedural, standard-setting and beneficial regulation. The following comments and questions may be a useful guide for policy decision-makers:

1. Is the aim of the regulation to trigger the use of mediation, and if so, how? Here important policy questions relating to the nature of the gatekeeper role and the extent to which parties have discretion as to their participation in mediation arise.
2. Are any process aspects of mediation to be covered under the regulation? If so, which elements of mediation process will be covered by the proposed legislation and which elements will not? What is the rationale for this choice?
3. Are standards to be set for mediators or in relation to the conduct of the mediation process? Standards for mediators typically relate to the approval to act as a mediator, called variously approval, accreditation, qualification and certification standards. Standards for the practice of mediation are generally referred to as practice standards or codes of conduct. Standards may also be set for service-provider organisations.⁵⁷
4. Questions about rights and obligations of participants in the mediation process are regulated in beneficial laws. Here tensions surrounding inter alia the accountability of mediators and other participants in the process, confidentiality, enforceability of agreements to mediate and mediated settlements can be addressed.

Where regulatory provisions provide an interface between mediation and the legal system (interface provisions), there is a strong argument that they should take the form of mandatory as distinct from default regulation. In the diversity–consistency debate the principle of party autonomy is reflected in parties’ ability to help shape the process and determine its outcome. Therefore rules dealing with procedure often take the form of default rules, that is, the parties can opt out of them. In this manner diversity of practice is encouraged. Conversely where minimum standards and legal certainty are desirable, for example in relation to legal evidentiary rules, consistency is likely to increase confidence in the use of mediation – especially in cross-border contexts. Consistency can be achieved through the application of mandatory rules.

Once the above questions and issues have been considered, it is important to go back to the first question and to review the suitability of the regulation design for the target audience. Proposals for a general mediation law may need to be revised, where detailed and precise legislative regulation on multiple aspects of mediation is envisaged. Conversely where minimum standards for any aspect of mediation are being regulated in a specific sector, consideration might be given to the question of a general or wider application of the regulation. The achievement of a lowest common denominator for mediator accreditation in Australia is a case in point.

⁵⁷ See, for example, art 3(5) Australian National Mediator Approval Standards (2008), which sets out the required ‘characteristics’ of Recognised Mediator Accreditation Bodies (RMABs). The standards are available at <www.nadrac.gov.au> at 8 August 2008.

The above discussion has examined the content of mediation regulation. The final section of this article builds on this analysis and reintroduces the four regulatory approaches to mediation outlined earlier in the article. The resulting regulatory model is called the Mediation Mix.

VII THE ART OF REGULATION: BRINGING FORM AND CONTENT TOGETHER IN THE MEDIATION MIX

The Mediation Mix brings together issues of regulatory form, explained through the four regulatory approaches to mediation, and regulatory content, analysed through a series of descriptive classification schemas. The Model provides a conceptual map to assist law and policy-makers navigate the labyrinth of regulatory issues in mediation and is represented in the following diagram.

Regulatory approach →				
Content of regulation ↓	Market– contract	Self- regulation	Framework legislative	Formal legislative
1. General 2. Sector-specific, or 3. Context-integrated				
1. Triggering 2. Process 3. Standard-setting 4. Beneficial				
Interface between process and legal system?				
1. Mandatory, or 2. Default				

Table 1: The Mediation Mix

Despite the visual simplicity of the diagram, this article has shown that the complexity of the issues surrounding mediation regulation precludes a checklist approach. It is not a simple matter of placing ticks in boxes. Rather the Mediation Mix offers both a language and a method for planning regulatory approaches to mediation. In particular it highlights how different layers of regulation can address tensions thrown up by the diversity–consistency debate.

For example, a national mediation regulatory policy desirous of encouraging party autonomy without jeopardising legal certainty or dispute resolution quality may choose the following Mediation Mix. Legal certainty and predictability needs can be addressed by a formal legislative approach using mandatory regulation of beneficial provisions, especially those that interface with the legal system, for example admissibility of

evidence in subsequent proceedings, limitation periods and enforceability issues. Approval and accreditation of mediators requires a sensitive approach, which balances the need to accommodate diverse mediation practices with the need for consumer clarity about what to expect from mediators. Accordingly formal framework self-regulatory approaches are useful here. Self-regulatory and marketplace–contract approaches in relation to practice and conduct issues would recognise party autonomy and encourage experimentation on sector by sector basis. To the extent that approval and practice issues are subject to legislation, the use of default laws, allowing parties to agree to do things differently, would maintain the policy goal of party autonomy while at the same time setting a policy standard. Finally, legislatively backed triggering provisions can be useful to encourage the uptake of mediation in a jurisdiction or specific sector.

The EU Directive on Mediation is an interesting regulatory instrument in that it does not focus on one regulatory approach; rather it encourages member states to use a variety of regulatory mechanisms in relation to triggering, standard-setting and beneficial aspects of mediation. The Mediation Mix is therefore a useful tool in planning and decision-making in relation to implementation of the Directive.

The Mediation Mix is useful for analysing regulation trends in a given jurisdiction and for comparing trends in different jurisdictions, countries and regions, as the following illustrations show.

The UNCITRAL MLICC can be analysed according to the Mediation Mix. As a Model Law, the MLICC envisages a formal legislative approach by nation states. It is a law of general application for commercial disputes and contains mainly beneficial provisions and a limited number of articles setting standards for the conduct of the mediation process. It does not concern itself with mediator qualifications or the issue of how parties get to mediation. Finally the MLICC is a default law in the sense that parties can contract out of it. In fact, they can also contract in to the Law, even if their dispute technically falls outside its scope. However once parties have accepted the entire Law as such there is still much room for the expression of party autonomy through private contractual instruments as only two of the Law's provisions are mandatory. This aspect of the MLICC has been criticised by a number of commentators, who argue the default nature of provisions dealing with the interface between the mediation process and the legal system defeats the very purpose of a transnational law on mediation, namely to increase legal certainty around these issues.⁵⁸

Like the MLICC the UMA is a model law of general application, which adopts the formal legislative regulatory approach. However it has a much narrower focus than the MLICC. Its primary focus is on issues of privilege and admissibility of evidence in subsequent determinative proceedings. These provisions can be described as beneficial and interface laws. The drafters of the UMA considered this the single most important point where uniformity and legal certainty were required and therefore the provisions are intended for prima facie mandatory application with limited exceptions.⁵⁹ Other aspects of mediation regulation are left to the individual states, ADR organisations and the marketplace to regulate.

⁵⁸ See, for example, E van Ginkel, 'The UNCITRAL Model Law on International Commercial Conciliation: A Critical Appraisal' (2004) 21(1) *Journal of International Arbitration* 1et seq.

⁵⁹ See, for example, *Uniform Mediation Act 2001* s 3(c).

As the case of Austria shows, a jurisdiction may take a general formal legislative approach in relation to standards and beneficial aspects of mediation, while at the same time adopting a predominantly market-contract approach to the question of how to get to the mediation. In Australia there is a clear preference for context-specific and – integrated legislation with hundreds of regulatory instruments triggering and supporting mediation in a variety of sectors such as family and franchising mediation. Such an approach supports diversity in mediation practice on a sector-by-sector basis while striving for uniformity within the relevant sector. The introduction of national mediator approval and mediation practice standards in 2008, however, has signalled the emergence of a general, self-regulatory approach to minimum level standard-setting regulations. Importantly the voluntary nature and minimum standards level of the national self-regulatory initiative encourages diversity over and above the minimum standard. Moreover it does not prevent mediators from operating outside the standards, leaving the market place to make choices about whether to engage mediators approved to the national minimum standards or mediators without this accreditation.

The practicalities of selecting an appropriate mix of regulatory instruments for an emerging mediation profession and implementing them are challenging tasks. Two New Zealand commentators emphasise how difficult it is to find a formula that accommodates the different philosophical approaches to regulatory mediation. They point out that courts in different jurisdictions around the world are grappling with these dilemmas and suggest that this is at least partly:

due to the relative immaturity of mediation as a profession and the somewhat unnatural and conflicting principles that underline the differences between ADR and mediation processes (consensual and subjective) and adversarial litigation processes (imposed and ostensibly objective).⁶⁰

This paper has argued for a multi-layered approach to regulation in mediation – a combination of market-based legislative and self-regulation with strong responsive and reflexive review mechanisms in place. In a dynamic and developing professional field, participative regulatory processes with the ability to review and adapt the mediation mix to changing circumstances are vital.

⁶⁰ D Clapshaw and S Freeman-Greene, 'Do We Need a Mediation Act? Parts 1 and 2, 6(4) and 6(5)' (2003) *Alternative Dispute Resolution Bulletin* 61, 95, 97.