

**PUBLIC****Jewell, Renae**

upon tabling of Committee's Report

Submission 16

**From:** Margaret Halsmith [Margaret.Halsmith@Halsmithconsulting.com.au]  
**Sent:** Friday, 21 October 2011 8:16 AM  
**To:** Jewell, Renae  
**Cc:** Farina, Adele; Reid, Philippa; Behjat, Liz; linda.savage@mp.wa.gov.au  
**Subject:** Enquiry into the Commercial Arbitration Bill 2011  
**Attachments:** Profile 1107.pdf; Commercial Arbitration Bill 2011\_ppt.pptx

Dear Renae

I have missed the deadline for making submissions. I found the turnaround time to be very short given my commitments.

I am writing this email in my capacity as a mediator in private practice and in the context of my being the Chair of the Australasian Board of LEADR: Association of Dispute Resolvers and a member of NADRAC [National Alternative Dispute Resolution Advisory Council] which advises the Federal Attorney General on matters pertaining to ADR.

Overall I regard the Bill as internally sound and eminently practical.

Arbitration is a form of ADR [formerly known as Alternative Dispute Resolution, now more often known by its acronym]. Huge advances in practice and legislation have occurred during the last 5 years. In 2011 ADR practice is identified by definitions of the various strands and increasingly by corresponding Standards. I believe the Bill would benefit from consideration of this recent material. I would therefore be grateful if you would request that the Committee considers the following brief notes and/or refers to two web sites if it has not already had the opportunity to do so:

- [www.nadrac.gov.au](http://www.nadrac.gov.au) NADRAC [National Alternative Dispute Resolution Advisory Council] including 'Legislating for ADR: a Guide for Government Policy Makers and Legal Drafters'
- [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate)
- [www.msb.org.au](http://www.msb.org.au) Mediator Standards Board [MSB]

My comments with respect to the Bill at

## 2. Definitions

I suggest that the attached definition of mediation, which is derived from the NADRAC definition or that the NADRAC or MSB definitions is included in the Definitions a propos of clause 27D

27D. (1) (c) I suggest "the arbitrator is accredited according to the Mediator Standards Board"

(7) This clause encapsulates the dilemmas of med-arb. Mediation is facilitative, addressing the needs of each party. Arbitration is determinative along the adversarial axis. [see attached slide]

- **Issues for arbitrator**

If an arbitrator uses material from a mediation, when they gathered that material they were, by

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definition, contaminating their role as mediator.

If an arbitrator misjudges which material to gather while in mediator role, which is likely as it is not the role of a mediator to assess the material on its merits, the arbitrator could be vulnerable to action by the parties pertaining to any future disclosure by the arbitrator

- **Issues for parties [particularly self represented parties]**

Mediation relies on parties' trust of the mediator and on confidentiality of private sessions. Trust will not be established in one who may later selectively reveal what has been referred to in confidence.

Parties' strategy is quite different when cooperating [mediating] compared with competing [arbitrating]

- **Issues for advisors**

Preparation and advice differ according to process, putting advisors in a difficult position

I refer the Committee to the recent NADRAC report to the Attorney General "Maintaining and Enhancing the integrity of ADR processes: from principles to practice through people" Chapter 3 deals succinctly and in detail with confidentiality. Chapter 4 addresses the related issue of inadmissibility.

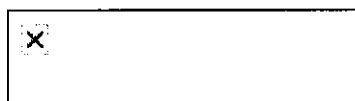
(8) as 'mediation' is clearly defined by the Mediator Standards Board and by NADRAC and distinguished from conciliation and other non-arbitral processes, I submit that it should be clearly distinguished in this Bill ie that 'mediator' should be distinguished from 'conciliator' etc in keeping with current practice in Australia

I have attached my short profile for your information. I am happy to discuss my comments if this would be of assistance.

If the Committee finds it is able to consider my brief comments I will be most grateful. I do appreciate the importance of maintaining the timeline on such matters.

Yours sincerely

Margaret Halsmith  
Chair LEADR Australasia  
Council member NADRAC  
Deputy convenor WADRA



**Halsmith Mediation**

Mediation | Clinical Supervision

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# Mediation

Mediation is the process in which, with the even-handed assistance of a **third party** and together with **advisors and/or support people**, who may or may not be present, the **people in dispute**:

- listen to and are heard by each other
- identify mutual issues to be addressed
- develop options to address mutual interests
- consider alternative approaches for resolution
- endeavour to reach an agreement

## Mediation [cont]

- The mediator
  - advises on and determines the process by which resolution is attempted
  - has no advisory or determinative role in regard to the content of the issues, nor the outcome
- Mediation may be undertaken
  - voluntarily
  - compulsorily
    - complying with legislation
    - under a court order
    - subject to an existing contractual agreement

## Conflict resolution choices from Party B POV

**Party A  
concerns**

Submission  
Lose-win

Mediation  
Win –win

Compromise  
Lose-lose

Avoid  
Under carpet

Domination  
Win –lose

**Party B  
concerns**

## Halsmith Mediation

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### **Margaret Halsmith** **Director and Principal Mediator**

#### **Mediation**

Since 1996. Based in Perth. Mediation of a wide variety of two party and multiparty disputes. From Esperance to Kununurra. For business, government, families and individuals; legal and relationship. Settings listed below.

#### **Professional Consultancy & Support**

Mentoring	Consultation
Clinical supervision	Training
Debriefing	Diffusing

**Aged Care, Apology, Business, Child Support Payment, Commercial, Corporate, Community Consultation, Child Migrant, Child Protection, Defamation, Education, Estate Planning, Family, Family Business, Family Dispute Resolution, Franchising, Industrial Relations, Interpersonal, Institutional, Inheritance, Insurance, Neighborhood, Parenting, Property, Public Policy and Process, Reparative, Reunification, Separation, Sexual Harassment, Sexual Abuse, Succession, Sport & Recreation, Victim Offender, Wills, Workplace, Youth**

**Margaret Halsmith** is the Principal Mediator at Halsmith Mediation, her specialist mediation and clinical supervision practice. Halsmith Mediation provides best practice mediation in the wide range of areas above and clinical supervision of professional practice. Margaret has been mediating full time since the mid-1990s.

Margaret came to mediation after a career in psychology and education, including extensive experience with organisations and families and in the juvenile and adult justice systems. Among her areas of particular interest are: maximizing the efficacy of mediation; standards of mediation practice; mediating when there is entrenched conflict; the role of apology in mediation, and participants' overall wellbeing, during and as a result of mediation.

#### **Qualifications**

B Psych BA Dip Ed

#### **Accreditations**

- Australian National Mediation Approval and Practice Standards operating under the National Mediator Accreditation System through the Mediator Standards Board
- Registered Family Dispute Resolution Provider no R1002758 under the Family Law Act 1975
- LEADR Advanced Panel mediator
- IMI [International Mediation Institute]

## Halsmith Mediation

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### Current Clinical Roles

#### **Mediation**

Margaret has over 30 000 hours' mediation experience in the settings listed above.

#### *Membership of Mediation Panels*

The Law Society of Western Australia

Aboriginal Mediation Service

Office of the Franchising Mediation Advisor

Signs of Safety Pre-Hearing Conferences; appointed by the Court in accordance with the regulations made pursuant to section 136(4)(b) of the *Children and Community Services Act 2004*

Legal Aid WA

#### **Mediation Process**

*Intake session:* to address pressing questions, often by phone or email

*First Separate Session:* to assess for suitability for mediation: personal, procedural and substantive

*Mediator's opening comments:* to recap the elements of mediation in a way that conveys the essence of the mediation mindset

*Participants' opening comments:* to provide an opportunity for each participant to be heard with respect

*Mediator's summary:* to provide an opportunity for everyone in the room to hear and consider what has been said

*Agenda setting:* to identify agreed, neutral, future focused topics to commence discussions

*Clarification:* to encourage participants to explore the context of each agenda item

*Option generation:* to identify a wide range of possible components of an agreement;

*Option reality testing:* to consider the more probable components of an agreement

*Negotiation:* to adjust and fine-tune the most promising options

*Agreement:* to express agreements reached in a way which is meaningful to participants

*Close:* to enable participants to leave with dignity and self-respect and with more certainty than they came in

#### **Professional Consultancy & Support**

Please contact Margaret for further information. Margaret provides and takes part in clinical supervision of her practice.

#### **Training**

Most recently Margaret provided training for the Magistrates of Western Australia

## Current Professional Roles & Affiliations

In addition to her clinical practice, Margaret holds positions in a number of organisations which directly influence mediation and ADR in Western Australia, Australia and internationally.

- Margaret is the Australasian Chair of LEADR: Association of Dispute Resolvers, the Australasian not-for-profit organisation formed in 1989 to serve the community by promoting and facilitating the use of consensual dispute resolution processes. She is also an active member of the WA Chapter of LEADR.
- She is a member of NADRAC (National Alternative Dispute Resolution Advisory Council) which advises the Federal Attorney General and federal courts and tribunals with respect to ADR issues with a view to achieving and maintaining a high quality, accessible, integrated federal ADR system.
- Margaret is a member of the IMI (International Mediation Institute) Independent Standards Commission which creates and oversees international mediator competency standards.
- Margaret is a Director of National Mediation Conferences Ltd, which is responsible for the biennial National Mediation Conference.
- She is the Deputy Convenor of WADRA (Western Australian Dispute Resolution Association), through which she initiated SCRAM (Schools Conflict Resolution and Mediation competition) in WA in 2001, convened the Committee which managed the grant for the development of the National Mediator Approval and Practice Standards in 2007 and authored the successful bid for the National Mediation Conference in Perth in 2008.
- She is a member of the editorial panel of the 'ADR Bulletin'.
- Margaret is an Associate Member of The Law Society of WA

## Recent roles: sample

- Director on the Board and Co-Chair of the National Mediation Conference held in Perth in September 2008.
- Convenor of the SCRAM [Schools Conflict Resolution and Mediation competition] committee in WA from 2000 - 2007.
- Convenor of the committee which administered the grant from the Federal Attorney General for the creation of the National Mediator Approval and Practice Standards
- Member of site committee of the United Nations Forum on Online Dispute Resolution held in Melbourne in 2004
- Author of the ADR chapter of the 2005 WA Law Handbook.

## Codes of Ethical Conduct

LEADR Ethical Standards  
<http://www.leadr.com.au>

IMI Code of Professional Conduct  
<http://www.imimmediation.org>

## Feedback



## **Halsmith Mediation**

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LEADR: Association of Dispute Resolvers

<http://www.leadr.com.au>

Law Society of Western Australia Grievance Resolution Process

<http://www.lawsocietywa.asn.au>

IMI Complaints Process

<http://www.imimmediation.org>

### **Professional Indemnity Insurance Policies**

AON Risk Services Australia

CGU Professional Risks

### **Contact Details**

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