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Nadja ALEXANDER

Singapore Management University, nadjaa@smu.edu.sg

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Mediation in Practice: Common Law and Civil Law Perspectives Compared

*Nadja Alexander*¹

1 Introduction

1.1 Comparing Australian and German mediation practice

Australian mediation practice is thriving. Effective forms of mediation are practised in court-connected schemes, in the public sector, in the community justice sector and in the private business sector. Indeed, no industry is excluded from the application of mediation.

In contrast, Hoffmann-Riem laments that despite many years of discussions about ADR (alternative dispute resolution) in Germany, mediation plays a marginal role only.² Further, Labes states that 'ADR mechanisms are relatively obscure methods in Germany.'³

The comparison between Australia and Germany is particularly interesting because it considers both a common law and a civil law tradition. This essay will discuss the practice of mediation in Australia and Germany with a view to elaborating upon comparative points of interest.

1.2 Definitions and terminology

In English-speaking jurisdictions there is considerable academic debate about the precise definition of mediation. Alone the question as to the point at which mediation becomes conciliation or case appraisal, evokes a deluge of conflicting views. In legal contexts one often finds the terms, mediation and conciliation, used interchangeably.

1 Dr Alexander is a Reader in Law and Director of the Dispute Management Centre at the University of Queensland.

2 Hoffmann-Riem, W., *Konfliktbewältigung in einer angebotsorientierten Rechtsschutzordnung*, ZRP 1997, 190.

3 Labes, H., Germany, in: Campbell and Cotter (ed), *Dispute Resolution Methods: The Comparative Law Yearbook of International Business Special Issue*, London 1995, 205.

In this paper mediation refers to interest-based or facilitative mediation.⁴ Conciliation refers to a similar process that is generally rights-based and more evaluative in style. It is sometimes referred to as evaluative mediation.⁵

In the interests of considering all processes that may be referred to in practice as mediation, both mediation and conciliation processes (as defined in the previous paragraph) will be discussed in this paper.

Within the German language, there is inconsistent use of ADR terminology. Indeed, no precise word for the term, mediation, exists in the German language. German words that are used to describe mediation include the terms, *Schlichtung* and *Vermittlung*. *Schlichtung* is translated in English/German dictionaries as arbitration. Yet, there exist fundamental conceptual and practical differences between the two processes. Common usage of the word, *Schlichtung* can refer to mediation, conciliation and arbitration collectively, or alternatively any one of the three processes. *Vermittlung*, on the other hand, is usually used to describe people involved in brokering deals, for example real estate agents. Therefore, to advertise oneself as a *Vermittler* may be confusing and even misleading for potential clients. Accordingly, many practitioners and academics have adopted the English word, mediation. While it is now commonly used in German literature and at conferences and training, one still finds frequent use of the word *Schlichtung*, particularly amongst lawyers. Apart from contexts in which arbitration is specifically meant, *Schlichtung* generally suggests a more evaluative and legalistic form of mediation. Therefore, in this paper I have translated *Schlichtung* with the term, conciliation.

2 Mediation practice in Australia and Germany

Mediation is playing an increasingly important role in the culture of dispute management in Australia. The current state of mediation practice in Australia can be traced back to the establishment of community justice centres in New South Wales in the early 1980's.⁶ Continuing plans for reform on federal and state levels focus on streamlining court processes. Current suggestions for reform emphasise integrating mediation and other dispute resolution processes such as case appraisal into the litigation process, and establishing criteria to match dispute resolution processes to particular disputes. The background paper of the Australian Law Reform Commission (ALRC)⁷ indicates that the growth of mediation has been supported by a number of factors. First, long

4 Boule, L., *Mediation: Principles, Process, Practice*, Sydney 1996, 29.

5 *Ibid.*

6 Community Justice Centres Act 1983 (NSW); see also Faulkes and Claremont, *Community Mediation: Myth and Reality* 8 ADRJ 1997, 177; Astor and Chinkin, *Dispute Resolution in Australia*, Sydney 1992, 9.

7 ALRC, *Alternative or Assisted Dispute Resolution: Background Paper 2*, Canberra 1996.

court waiting lists have prompted the development of court-annexed mediation procedures allowing courts to refer matters to mediation. Second, the concept of mediation has been pro-actively promoted in the wider community.

Compared with the Australian experience, mediation in Germany is travelling a more difficult and winding path to recognition as a legitimate and valuable alternative to litigation. Indeed, it took many years before the German pioneers of mediation attracted any significant attention from practitioners and the wider community. Despite early discussions on the topic, it was not until the latter half of the 1990's that the mediation movement began to enjoy more than academic attention.⁸ Over the past five years a plethora of mediation books and articles have been published, not to mention the many mediation conferences and seminars that have taken place. Current litigation reform discussions are heavily focussed on reducing court waiting lists through court-connected mediation schemes. These developments indicate that the German mediation movement is repositioning itself from the academic into the practitioner-focussed political arena. As a well-recognised and practised form of dispute management, however, mediation in Germany is still waiting in the wings.

In painting a more detailed comparative picture of mediation practice in Australia and Germany, the following categories of mediation practice will be considered:

- 1 government sponsored programs and organisations,
- 2 court-connected programs,
- 3 industry specific legislation, and
- 4 private mediation initiatives not regulated by legislation.

I will also discuss mediation standards, and training and education in Australia and Germany.

2.1 Government sponsored mediation programs

2.1.1 Australia

Australian community justice centres are well established government mediation centres located throughout Australia. The centres offer mediation services either free of charge or for a very low cost to the public. Generally, mediation in all industry areas is available, although most mediations that take place deal with family, neighbourhood, small business or consumer disputes. The mediation process applied in community justice centres is regulated by state legislation as are other mediator relevant issues such as standards of care and mediator liability.

⁸ See Gottwald, W., *Streitbeilegung ohne Urteil*, Tübingen 1981 for the work of an early German mediation pioneer.

In addition, mediation in Australia is offered by government subsidised organisations such as UNIFAM with respect to family disputes, Relationships Australia for family, neighbourhood and consumer disputes, and legal aid offices and community legal centres that primarily provide inexpensive legal advice to members of the public. School mediation projects and competitions can be found in most Australian states.

The National Alternative Dispute Resolution Advisory Council (NADRAC) was established by the Australian federal government with the task of providing the government 'with co-ordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes before they come before the Federal courts'.⁹ The members of NADRAC comprise representatives from academia, government and the private sector.

2.1.2 Germany

In Germany, on the other hand, most government sponsored mediation programs are still in their infancy. One of the better known of these programs is Mediationsstelle Brückenschlag. This particular program was founded by Tillman Metzger in 1996. It is the first community mediation centre in Germany. The Centre is based on the American community justice centre concept. It is financed partially by public funds and partially by a mixture of private donations, profits from training courses and the voluntary work of mediators and other staff. The practice of mediation at the Centre is supported through educational efforts with a view to developing a constructive culture of conflict in the community.

Other government subsidised mediation projects include Waage in Hanover (victim offender mediation), Förderverein Umweltmediation e.V in Bonn, which focuses on environmental mediation, and various school mediation projects.

In Germany publicly sponsored legal centres providing legal advice may also offer conciliation services (Schlichtung).¹⁰ Generally, these services are inexpensive or free for those with limited financial resources. Despite the fact that the bulk of their work consists of legal advice, these centres are officially recognised conciliation centres (anerkannte Gütestellen), which means that a number of legal consequences follow when parties enter into a conciliation process. First, the German equivalent of the statute of limitations (Verjährung) ceases to run for the duration of the conciliation process, and second any agreement between the parties can be enforced in a court of law.¹¹

9 NADRAC Secretariat, Establishment of National Alternative Dispute Resolution Advisory Council, 3 CDRJ 1996, 94.

10 A prominent example of one of these conciliation centres is the ÖRA in Hamburg.

11 § 209 I Nr. 1 and II Nr. 1a of the German Civil Code (BGB).

The institution of the Schiedsmann has a very long tradition (up to 180 years) in various German states (Länder). There is not an Australian equivalent. Generally, the local government is responsible for appointing persons to the office of Schiedsmann. Appointees are highly respected members of the community, who fulfil the role on a voluntary basis. Bierbrauer has examined the role of the Schiedsmann.¹² He concludes that the nature of the dispute resolution process offered by the Schiedsmann varies considerably according to both the individual Schiedsmann and the jurisdiction. While a number of Schiedsmänner offer processes similar to mediation, others demonstrate a much more inquisitorial approach, sometimes offering the disputants legal advice.

2.2 Court-connected mediation

2.2.1 Australia

Court-connected mediation exists in various forms at federal, state and local levels.¹³ Both voluntary and mandatory court-connected mediation schemes exist. Depending on the jurisdiction, mediators can include court personnel such as registrars or other employees trained as mediators, or private mediators registered on a court mediation panel. The costs associated with a mediation are either borne by the court (for example, when the mediator is an employee of the court) or by the parties (for example, where the parties select a private mediator).

Boulle identifies four forms of court-connected mediation in practice in Australia.¹⁴

- 1 Informal referral to mediation. The court encourages the parties to mediate their dispute in the absence of formal regulation.
- 2 Formal referral to mediation according to legislation where (a) the court considers the matter suitable for mediation, and (b) the parties to agree to mediate. This form of court-connected mediation can be found in the Federal Court of Australia and some New South Wales courts.
- 3 Formal referral to mediation according to legislation where the court considers the matter suitable for mediation. According to this form of

12 Bierbrauer, G., Factors Affecting Success in the Mediation of Legal Disputes: Third Party Conciliation through the German 'Schiedsmann'. in: Lloyd-Bostock (ed.), *Law and Psychology*, Oxford 1981, 103.

13 For an overview of court-annexed mediation in Australia, see Sordo, B., *Australian Mediation Initiatives to Resolve Matters Awaiting Trial*, 5 ADRJ 1994, 62. On the institutionalisation of mediation in Australia, see Hughes, *The Institutionalisation of Mediation: Fashion, Fad or Future?*, 8 ADRJ 1997, 288.

14 Boulle, L., *op. cit.*, 4, pp. 188–192.

mediation parties may find themselves at the mediation table against their wishes. This form of court-connected mediation can be found in Queensland, Victorian and Western Australian courts.

- 4 Formal routine referral to mediation according to legislation. This form of court-connected mediation envisages a referral to mediation without consideration of the suitability of the dispute or the attitude of the parties towards mediation. Variations of this form of court-connected mediation can be found in the family law jurisdiction, the Administrative Appeals Tribunal (AAT)¹⁵ and more recently in South Australian Magistrates Court.¹⁶

In addition to the above mentioned forms of court-connected mediation, reference should be made to National Native Title Tribunal (NNTT). Although the NNTT does not have a court/tribunal-connected mediation process, the principles of interest-based negotiation provide the basis of dispute resolution processes in the NNTT, reflecting an attempt by the tribunal to include traditional indigenous dispute management processes as part of the court's overall dispute management processes.¹⁷

2.2.2 Germany

Court-connected mediation has not yet played a major role in German dispute resolution. In this regard, however, German practice is poised for a potentially significant change in the form of § 15a Introductory Law of the Code of Civil Procedure (EGZPO).

The new § 15a EGZPO, effective from the 1st January 2000, has two primary aims. First, the federal government envisages that the legislation will promote the practice of mediation as a dispute resolution method amongst lawyers and disputants, and second, it hopes to dramatically reduce the case load at magistrates court level.

To qualify for mandatory mediation, the disputes must be either:

- financial disputes before the magistrates court up to a litigation value of 1500 DM,
- neighbourhood disputes, or
- defamation disputes, where the alleged defamation has not occurred through the media.

The federal law empowers state parliaments to legislate to require participation in a mediation process as a prerequisite to formally beginning court proceedings. In other words, the form of mandatory mediation envisaged by the federal government leaves no discretion with either the parties or the

15 Section 34A Administrative Appeals Tribunal Amendment Act 1975 (Cth).

16 Cannon, A., Lower court pre-lodgement notices to encourage ADR, 2(9) ADR Bulletin 2000, 1.

17 French, R., Role of the Native Title Tribunal, 1 NTN 1994, 9.

court as to whether the dispute is suitable for mediation. Therefore, where corresponding state legislation is enacted, all disputes that fulfil the above mentioned criteria must be mediated before court proceedings can be instituted.

At the same time the German federal government hopes to encourage innovation and diversity in terms of the mediation models adopted in the various states. Each state will have the opportunity to take into account regional factors such as the local disputing culture, available resources, and the existing infrastructure when selecting an appropriate model.

It is important to note that the German states are not obliged to legislate on mandatory mediation. §15a EGZPO merely puts the legal mechanisms to do so at their disposal. To date a number of states have developed mediation models to be incorporated into their respective proposed state mediation laws.¹⁸

In terms of other forms of court-connected mediation in Germany pre-dating § 15a EGZPO, four Bavarian Magistrates Courts continue to offer a voluntary court-connected conciliation program.¹⁹ In other words, the disputing parties must agree to the conciliation beforehand. The mediators are retired judges with a high standing in the community. To date this program has been scarcely utilised by the public. This is likely to change with the introduction of mandatory mediation in Bavaria.

At this point, it is useful to make mention of the fact that German judges are legally obliged to attempt to settle a dispute before they hear the matter.²⁰ This requirement has a long tradition in Germany and other civil law countries. Strictly speaking it is not a form of court-connected mediation, as it takes place within the courtroom and is conducted by the judge, who will directly hear the matter. In practice judges' attempts to encourage parties to settle are very legalistic and interventionist. In fact, the majority of judges do not engage in a process that could be paralleled with mediation.²¹

18 See, for example, the proposed Bavarian Mediation Law, BaySchlG.

19 The mediation service is available at the Magistrates Courts in Würzburg, Munich, Regensburg and Traunstein.

20 §279 German Civil Procedure Law (ZPO).

21 See Treuer, D., *Impressionen über den gerichtlichen Vergleich*, in: Gottwald, W. / Haft, F. (ed.), *Verhandeln und Vergleichen als juristische Fertigkeiten*, Tübingen 1993, 116; Rottleuthner, H., *Alternativen im gerichtlichen Verfahren*, in: Blankenburg, E. / Gottwald, W. / Stempel, D. (ed.), *Alternativen in der Ziviljustiz: Berichte, Analysen, Perspektiven*, Köln 1982, 145; Rogowski, R., *Die aktive Rolle des Richters im Prozeßvergleich: Überblick über die rechtssoziologische Forschung zur vermittelnden Rolle des Zivilrichters in der Bundesrepublik Deutschland*, in: Blankenburg, E. / Gottwald, W. / Stempel, D. (ed.), *Alternativen in der Ziviljustiz: Berichte, Analysen, Perspektiven*, Köln 1982, 171.

2.3 Industry specific legislation on mediation

One indicator of the prevalence of mediation in the dispute management practice of a country is the amount of legislation relating to mediation. Legislation establishing court-annexed mediation schemes has been discussed above. Here, legislation governing mediation (not connected to the court) in relation to specific types of disputes or specific industries will be considered.

2.3.1 *Australia*

In a paper delivered at the 5th National Mediation Conference in Australia in May 2000, Altobelli identified 104 statutory instruments throughout Australia that refer to mediation or mediation like processes.²² Most of these statutes have emerged in the past ten years and the number continues to grow. While a number of these pieces of legislation deal with court-annexed mediation programs, the majority concern the introduction of mediation (not annexed to the court) to specific industries or types of disputes before the parties engage in the litigation process. Areas covered by such legislation include migration, workplace relations, health, telecommunications, postal services, environmental protection, sugar industry, commercial tenancies, housing and many other areas. For example, the South Australian Cooperative and Community Housing Act 1991 states that disputes arising under the legislation can only be determined by the relevant appeal authority if a genuine attempt has been made to settle it first by mediation.²³ Similarly, the Farm Debt Mediation Act 1994 (NSW) grants the farmer under a farm mortgage the option of going to mediation before the creditor may take enforcement action against the farmer.²⁴ Sometimes parties are referred to a particular mediation program. For example, model rule 10 of the Associations Incorporation Regulation 1999 (NSW) refers disputes between members to the community justice centre for mediation in accordance with the Community Justice Centres Act 1983 (NSW).

2.3.2 *Germany*

Specific legislation on mediation is very limited in Germany. It does, however, play a role in insolvency, family and criminal matters.

In terms of insolvency, § 305 I Nr. 1 of the German Insolvency Law (InsO) was introduced in 1999. The law provides creditors and debtors with the option of mediation to settle their dispute.²⁵

22 Altobelli, T., *Mediation in the Nineties: The Promise of the Past*, 5th National Mediation Conference, Brisbane, May 2000.

23 Section 84 South Australian Cooperative and Community Housing Act 1991. See also Altobelli, op. cit., 13.

24 Sections 8 (1) and 9(1) Farm Debt Mediation Act 1994 (NSW).

25 See also Zipf, T., *Schuldnerberatung,—Vermittelnde Tätigkeit zwischen Schuldner und Gläubigern im Hinblick auf die Insolvenzordnung*, 1 Konsens 1998, 79.

With respect to family law disputes, a mediation process for the examination and confirmation of visitation rights can be found in § 52a of the German Family Procedural Law (FGG).

In the context of criminal law § 10 Nr. 7 of the German Juvenile Criminal Procedural Law (JGG) provides for victim-offender mediation between youth offenders and their victims. A similar law exists for adult offenders in the form of § 46a of the German Criminal Code (StGB).

2.4 Mediation services in the private sector not regulated by legislation

2.4.1 Australia

The Australian private sector has played an active role in the development of mediation practice in Australia. Well known private sector service providers include Leaders in ADR (LEADR), the Australian Commercial Disputes Centre (ACDC), the Australian Dispute Resolution Association (ADRA), the law societies of the various states, and the Australasian Dispute Centre (ADC) whose members represent other mediation groups as well as stakeholders.

These organizations offer a rich variety of mediation services including mediations, catalogues or panels of mediators who are available to mediate with disputes, mediation venues, standard mediation documentation (for example, agreements to mediate, mediation clauses), publications about mediation, and conferences.

As Altobelli points out, many industries have integrated mediation and other forms of ADR into their dispute management processes/grievance procedures without legislative compulsion.²⁶ Examples of these dispute management schemes include the Telecommunications Industry Ombudsman, the Life Insurance Complaints Scheme, the Australian Banking Industry Ombudsman and the National Electricity Code.

Australian Law Societies have directed resources into the further development of mediation and ADR practice. In general, the societies provide training and education as well as accreditation of mediators who form a panel of mediators from which disputants may choose. As law societies are professional bodies that represent the interests of their members, that is, solicitors, it follows that all mediators who wish to offer their services via a law society must also be admitted to practice as a solicitor. Law societies also provide information and documentation about mediation and ADR for lawyers and the public.²⁷ A notable initiative of the Queensland Law Society is the now national SCRAM (Schools Conflict Resolution and Mediation) competition for high school students. In SCRAM participating students are

26 Altobelli, T., *op. cit.*, 23.

27 Vickery, G., 13 *Alternative Dispute Resolution Update*, The Proctor 1993, S.15.

required to form small teams to mediate a conflict scenario. This highly successful educational initiative was recently recognised in the report of the EDR Task Force of the Law Society of NSW that recommended continued support for the program.²⁸ The competition has been instrumental in increasing awareness of mediation and mediation skills amongst school children, and at the same time, promoting the role of lawyers as mediators.

The conditions under which private mediators perform their mediation services vary according to whether or not they mediate under the umbrella of a particular private sector organization, and, if so, which one. For example, unless provided by the organization for which they mediate or by specific legislation, mediators do not enjoy immunity from prosecution as do judges.²⁹ Where lawyers mediate as part of their legal practice, it would seem that they are bound by the same professional and ethical standards as for all other aspects of their legal practice.³⁰

2.4.2 Germany

In Germany, the number of private sector mediation services on offer has risen dramatically since the mid-1990's. To date family mediation has proven to be the most practised form of private mediation.³¹ The primary family mediation organisation in Germany is the interdisciplinary body Bundesarbeitsgemeinschaft für Familienmediation (BAFM). In 1993 the BAFM established guidelines for mediation in family disputes. This initiative was followed by the development of a mediation accreditation program.³²

The practice of environmental mediation has been also growing in Germany since the early 1990's both in the private and public spheres. In 1998 a national association for environmental mediation, the Förderverein Umweltmediation e.V., was formed as an alliance between private and public groups.³³ The mission of the association is to oversee the implementation of widespread mediation practice in environmental disputes in Germany.

Despite the fact that mediations of medium to large-scale commercial disputes in Germany are few in number, a small number of senior German legal practitioners and academics are determined to promote the use of commercial mediation. To date members of this group have successfully held conferences, seminars, training, formed a number of associations and

28 Report of the EDR (Early Dispute Resolution) Task Force, Law Society of NSW, August 1999.

29 For an example of where legislation has granted immunity to mediators, see Dispute Resolution Centres Act 1990 (Qld) and the Mediation Act 1997 (ACT).

30 See, for example, Legal Practitioners (Amendment) Act (No 2) 1997 (ACT), in particular the definition of 'legal practice'.

31 See Gerwens-Henke, H., *Zehn Jahre Familienmediation – Ein persönlicher Rückblick in die Anfänge*, 1 Konsens 1998, 15.

32 See 2.5 below for further details on the BAFM standards.

33 The Association is an alliance between the Arbeitsgemeinschaft für Umweltfragen and the Deutschen Bundesstiftung Umwelt.

conducted a number of mediations. In 1996 the National Association for Mediation in Business and the Workplace (Bundesverband Mediation in Wirtschaft und Arbeitswelt – BMWA) was formed.³⁴ 1998 saw the establishment of the Society for Commercial Mediation and Conflict Management (Gesellschaft für Wirtschaftsmediation und Konfliktmanagement – GWKM), an organisation whose members largely consist of lawyers from major German commercial law firms. Another organisation that has become a focal point for publications and mediation events is the Centrale für Mediation based in Cologne.

The German Law Society (Deutscher Anwaltverein DAV) is also playing a growing role in the German mediation industry. Unlike its Australian counterpart the DAV does not have an officer or a department devoted to the development of mediation and ADR in Germany. As a consequence, the DAV relies primarily on the voluntary efforts of its members.

In addition to the creation of the above named organisations in the 1990's, there are a number of long-existing conciliation centres in various branches of German industry. Generally, these conciliation centres operate through chambers of commerce (such as the German Chamber of Industry and Trade), industry associations (for example, in the textile, radio and television, technical and motor vehicle industries). Like the government legal centres offering conciliation services,³⁵ most of the dispute resolution processes associated with these conciliation centres do not follow an interest-based mediation model. Rather, the processes offered tend to be directive, interventionist and rights-based in nature.

In contrast to the law applicable to government legal centres offering conciliation services (anerkannte Gütestellen), the German equivalent to the statute of limitations continues to run with respect to private industry mediations. Further, any agreements resulting from participation in the mediation process are not automatically enforceable by a court of law.³⁶

2.5 Mediation standards and accreditation

2.5.1 Australia

Standards for conduct and accreditation in mediation continue to be a controversial issue worldwide. To date the Australian mediation industry has not been subject to national regulation. As far as regulation does exist, it is imposed by service providers, and therefore varies from provider to provider and industry to industry. So, for example, the law societies of the various Australian states prescribe standards for education and conduct in a mediation,

34 BMWA, 1 Konsens 1998, 75

35 See 2.1 above.

36 Hegenbarth, R., *Privatisierte Konfliktregelung* in: Blankenburg et al. (ed.) *Alternativen in der Ziviljustiz*, Cologne 1982, 257. See also Proksch, *Mediation in Deutschland*, 1 Konsens 1998, 11.

as do other organisations such as Relationships Australia, community justice centres and LEADR (Leaders in ADR). In other words, the forces of a free market regulate the practice of mediation in Australia.

In March 2000, NADRAC (National Alternative Dispute Resolution Advisory Council) launched a discussion paper entitled, 'The Development for Standards for ADR'. According to NADRAC, its 'approach has been guided by the need to balance the objectives and interests of parties, ADR service providers, governments and the broader society.'³⁷ In essence, NADRAC has taken the path of encouraging diversity of standards in recognition of the broad range of professional backgrounds and practices of Australian mediators. In other words, the Council has refrained from recommending a national uniform code of conduct that would regulate issues such as neutrality, impartiality, confidentiality and other ethical issues. The rationale for this policy lies in the view that 'the development, attainment, maintenance and enforcement of standards should be a shared responsibility of different parties in the ADR community, particularly in the early development of ADR.'³⁸

In terms of the nature of programs offered to train and accredit participants as mediators, these vary from organisation to organisation. In general, the vast majority of accreditation programs comprise a four day intensive course, in which participants are required to complete a number of mediation role plays and play a mediator in at least one of them. Numerous universities and private institutions offer mediation accreditation programs.

2.5.2 Germany

As in Australia, mediators in Germany are not subject to national regulation, and as a consequence standards and mediation styles vary greatly. Current trends in Germany indicate the likely development of mediation accreditation and practice standards according to industry. For example, the BAFM has set out mediation standards and a training curriculum for family law mediators. Over ten German training institutes now offer mediator training and accreditation according to the BAFM's guidelines. As such the BAFM guidelines have become the de facto national family mediation standards in Germany.³⁹ Similarly, the GWMK has established a code of conduct for mediators as well as standard mediation clauses and procedural guidelines for conducting commercial mediations.

In terms of education and training the 'mediation experience' in Germany has taken a considerably different route to that of Australia. Interestingly, many accreditation programs are being designed and offered on an interdisciplinary basis and often at postgraduate level.

37 Taken from NADRAC's website <http://law.gov.au/ahome/advisory/nadrac/ForumSynopsis.html>

38 *Ibid.*

39 Gervens-Henke, *op. cit.*

For example, the European Masters in Mediation is a European education initiative that offers both lawyers and non-lawyers a postgraduate degree in mediation. The University of Hagen is the German partner in this European initiative. The Masters program consists of a one year foundation course in which mediation is taught in an interdisciplinary context drawing from legal, communication and psychological theories. The second year allows students to specialise in particular areas of mediation such as family mediation or commercial mediation and is very practice-oriented including an exchange program with another European country.⁴⁰

In addition, a number of other universities and private institutions offer mediation training. These include the universities of Ludwigshafen and Oldenburg. Although the format of the programs varies to a large extent, there appears to be a trend towards one to two year programs consisting of intensive training modules of about 200 contact hours in total and opportunities for clinical practice.⁴¹

2.6 Mediation in legal education

In the late 1980's Australian law schools were among the first to respond to the mediation movement by offering studies in mediation and ADR as part of the law curriculum at both undergraduate and postgraduate levels. In the year 2000, the vast majority of Australian Law Schools have integrated ADR into their law studies program either in the form of elective or compulsory subjects. Furthermore, a growing number of law schools now offer postgraduate studies such as graduate certificates or masters courses specialising in ADR.

In the context of legal education mediation plays a minor role in Germany. Specialised courses in mediation within the legal education curriculum are not offered on a regular basis.⁴²

3 Comparative discussion

It is clear from the above commentary that the interest-based model of mediation plays a significantly greater role in the Australian legal system than in the German. In this section I will discuss the differences in mediation practice as they have emerged from the previous discussion in light of the following perspectives:

40 Spegel, N. 'Mediation – European Style' (1998) 4 ADR Bulletin, 8.

41 Dillßner, H. and Munske, B., *Mediation in der Bundesrepublik Deutschland*, Bonn 1996.

42 Ad hoc seminars on negotiation and mediation are offered at a very small number of law schools in Germany. See Haft in: Gottwald and Haft (ed.) 1993, 116, who report on the seminars at the University of Tübingen.

- 1 The role of the state at both federal and state level,
- 2 Participation of the private sector in the development of mediation initiatives,
- 3 The approach to the development of mediation – holistic or piecemeal, and
- 4 Training and accreditation of mediators.

3.1 Role of the State

Compared with the German practice, governments in Australia provide valuable support for many mediation initiatives. For example, various state parliaments and the federal parliament have passed laws empowering judges and registrars to refer matters to mediation.⁴³ In addition, the government subsidises community justice programs and projects.

Federal and state legislation has played a major role in development of mediation throughout Australia. It has increased considerably the profile of mediation amongst lawyers and their clients and has contributed to an increasing demand for mediation services. Importantly, the government also finances NADRAC, an organisation which through research and publications advises the federal government on ADR, in particular, mediation.

In terms of government subsidised mediation programs, Wade has identified a 'more for less' trend that began to emerge in the latter half of the 1990's.⁴⁴ In other words, while the government is still supporting mediation in its rhetoric, financial support is either stagnating or dwindling. Yet the demand for mediation services has not subsided and therefore, in many instances, mediation services are still conducting the same number of mediations as before with fewer resources. As a result, the continuing standard of quality in government mediation is open to serious question.

In Germany, the government on both a federal and state level is playing an increasing, although still limited, role in the development of mediation.

Apart from the existence of isolated legislation dealing with mediation in the areas of criminal law and family law, it was not until the mid-1990's that increasing political discussion about reducing court waiting lists and cutting litigation costs challenged the mediation movement to deliver a solution. In Germany today, a small band of politicians and lawyers continue to espouse the pragmatic political advantages of court-connected mediation in publications, seminars and at conferences throughout the country. Yet, apart from one or two isolated projects, court-connected mediation is not practiced in Germany. As discussed in 2.2, however, § 15a of the EGZPO may signal a

43 See 2.2.

44 Wade, J., *Current Trends and Models in Dispute Resolution Part II*, 9 ADRJ 1998, 60.

significant turning point in terms of the role of legislation in mediation practice at least at magistrates court level.

Despite the existence of financial support for specific mediation projects such as the Mediationsstelle Brückenschlag and the Waage project, the government's support for mediation initiatives in Germany remains very limited in comparison to that in Australia. There are, for example, no government departments or branches set up specifically to advise on or offer mediation services. The government sponsored conciliation centres that do exist are essentially legal advice centres. Where mediation is offered at these centres, a highly legalistic and evaluative model is usually employed. Accordingly, the German government sponsored conciliation centres cannot be likened to the Australian community justice centres, where interest-based models of mediation are strictly practiced.

3.2 Mediation initiatives in the private sector

Mediation initiatives in the Australian private sector embrace a broad spectrum of practice areas including personal injury, succession law, employment law, commercial law and family law.

On the other hand, the practice areas where mediation has developed in Germany are relatively limited in comparison. The primary area of private mediation practice in Germany is family law.⁴⁵

The mushrooming of private sector ADR organisations has been a common feature of the development of mediation practice in both Australia and Germany. These organisations generally offer information about mediation, mediator training and education as well as assisting in the selection of mediators for consumers. A quick scan through the Australian Dispute Resolution Directory,⁴⁶ which refers to the number of mediations each mediator has conducted, indicates that these mediation services are meeting a demand. In Germany the supply far exceeds the demand.

The role of professional organisations has played a major role in the extent to which mediation has developed in Australia and Germany respectively. In Australia the role of ADR directors in the various law societies has been a significant contributing factor to the promotion of the mediation concept not only amongst lawyers but also amongst their (potential) clientele. In Germany, on the other hand, the development of mediation has relied on individuals or isolated initiatives of the German Law Society (der Deutsche Anwaltverein). The limited nature of these initiatives can be attributed to the limited financial support that German legal professional associations, in particular the Law

45 See 2.4.

46 Bagshaw, D., et al, *The Australian Dispute Resolution Directory*, Magill South Australia, 1996 – 1999.

Society, have offered mediation. For example, mediation initiatives are often undertaken on a voluntary basis and ADR directors or their equivalents do not exist as full time senior salaried positions.

3.3 Holistic or piecemeal approach

Initially (in the early 1980s), many Australian mediation organisations and initiatives were established as very distinct entities and operated independently from one another. Some examples include the community justice mediation centres, court-connected mediation, and organisations such as LEADR, ADRA, ADC and ACDC. Most of these organisations offer mediation for all sorts of disputes.⁴⁷ Membership of most if not all of them is open to lawyers and non-lawyers, although some organisations, like LEADR, have a strong legal membership base.

In the past five years, however, there has emerged a distinct trend for programs and organisations to collaborate and develop strategic alliances. Many of these organisations played a significant role in the pioneering years of Australian mediation. In establishing their own identity, they were experimental and innovative, bringing different ideas and experiences into the mediation marketplace. More recently, many of these organisations have collaborated in terms of exchanging ideas and war stories, convening to deliberate issues such as the development of standards and guidelines for mediator accreditation, thereby pooling their knowledge and experience. At the same time, one may well ask whether such a diverse pool of collaborating programs and organisations pursuing similar or the same goals is still today more advantageous than not. In other words, would it make sense in this coming decade to streamline resources, and create fewer organisations with more centralised foci? The jury is still out on this question.

As was the case in Australia in the early 1980s, the current 'pioneering' years of mediation in Germany are also characterised by the flowering of a diverse range of mediation organisations and programs. Unlike the early Australian experience, the tendency in Germany has been to categorise and separate mediation services and training strictly according to legal practice area. For example, the majority of mediation organisations focus on a practice area such as family law disputes, commercial disputes or environmental disputes, while a minority offer a general mediation training program. In Australia, on the other hand, the majority of organisations offer either (1) general mediation services and training without limiting their offer according to practice area, or (2) a general mediation training course followed by the opportunity to specialise in a particular practice area.

47 One exception is the ACDC, an organisation that focuses its services in the area of commercial mediation. Nevertheless, ACDC will also mediate or provide mediators for matters in other practice areas.

In Germany a piecemeal and non-uniform approach, similar to that of the early Australian mediation days of Australia best describes current developments. At the same time, the piecemeal approach in Germany is, in part at least, the result of a deliberate policy to encourage diversity in the marketplace. For example, the German federal legislator has pursued a deliberate policy of encouraging diversity in mediation practice in order to encourage innovation and creativity in terms of the development of the initiatives. Indeed, one of the reasons behind the introduction of the federal law, § 15 EGZPO, is to encourage a healthy competition between the German states (Länder) in terms of their development of mediation practice models.

3.4 Training and education in mediation

In contrast to the situation in Germany, Australian university education plays a major role in the development of knowledge, understanding and skills of future lawyers in the area of mediation. Mediation courses at universities have undergone a period of major growth and attracted significant interest from both students and employers of lawyers. Furthermore, indications are that this interest is likely to continue and even increase. The selection of subjects at universities at both undergraduate and postgraduate level continues to expand as even more specialisations are offered.

On the other hand, law faculties in Germany have resisted offering course in mediation on a regular basis. In part, this state of affairs reflects the slow development of mediation practice in the German legal marketplace. Another part of the answer, however, no doubt lies in the structure of German legal education. German legal education is organised around two sets of final exams that occur at the end of approximately six years of study. The German government without input from the universities conducts the exams. In other words, from a student's perspective it is important to study the topics that the government exams are likely to include. Mediation, and any other skills subjects are not examined by the state. Accordingly, despite interest, there will not be a large demand for mediation at law schools until the nature of assessment changes.

Apart from law faculties, a number of German universities and private institutions do offer training and education in mediation. As mentioned earlier, many mediator training courses in Germany focus on one particular practice area. The major difference in mediator accreditation training between the two countries is the depth of study and supervised practice required in order to receive a mediator accreditation certificate from a given organisation. German programs are vastly superior to the majority of Australian accreditation programs in terms of depth of theoretical study, number of supervised mediations required, assessment and number of contact hours. Australian mediation educators would benefit greatly from a consideration of the German approach in this regard.