Beyond Interest Based Bargaining - Incorporating Interests and Fairness in the Development of Negotiation Support Systems

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Abstract: One of the major concerns raised by people using negotiation processes is about the fairness of the process. Individuals undertake negotiation to derive better outcomes than could be obtained from conflict and litigation. Thus they often engage in interest based negotiation.

But interest based negotiation focuses upon the interests of disputants rather than upon objective measures of fairness. For example in family law, parents might focus upon their own desires rather than the needs of the children. In employment law, individual bargaining between employers and employees might lead to basic needs (such as recreation leave and sick leave) being whittled away.

It is thus vital to develop measures, or at the very least principles, for the development of *fair* negotiation support systems. In this paper, we suggest principles which when applied, will encourage fairness in the development of negotiation support systems. Such principles include transparency, bargaining in the shadow of the law and the need for discovery. We also illustrate the pitfalls of using such principles.

We indicate how some of these principles can be applied in Australian Family Law.

Keywords: Negotiation Support Systems, Fairness, Bargaining in the Shadow of the Law, BATNAs

1. Introduction

It is a common mantra, often accepted by courts and government, that negotiation is preferable to litigation in almost all circumstances. However, knowing when to negotiate and when to refuse to negotiate is vital (Mnookin 2003). For example, on September 30 1938, Neville Chamberlain, the prime minister of the United Kingdom, returned from Munich saying '*we have peace for our time*'. Within twelve months, Kristallnacht had occurred, the Molotov-Ribbentrop pact was signed and World War Two had commenced.

Even now supporters of Chamberlain rationalise that he was correct, and that his actions in Munich won the United Kingdom vital time to prosecute the war. So how

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can we measure when to negotiate and when to conduct conflicts, especially when knowledge is not transparent? Or should we just try to manage rather than resolve conflicts?

Blum (2007) argues that protracted armed rivalries are often better managed rather than solved, because the act of seeking full settlement can invite endless frustration and danger, whilst missing opportunities for more limited but stabilising agreements. In analysing enduring rivalries between India and Pakistan, Greece and Turkey and Israel and Lebanon, Blum notes that in each of these conflicts, neither party is willing to resolve the core contested issues but both may be willing to carve out specific areas of the relationship to be regulated – what she calls *islands of agreement*.

Similarly, rather than resolve a family dispute, should we just manage it so that minimal conflict or disruption occurs? Eventually, the dispute might be more easily resolved or due to the progress of time, the dispute may no longer exist – such as when dependant children become adults.

In this paper, we wish to develop certain processes for ensuring the negotiation support systems we are developing, can in some way be considered to be *fair*. This is a mammoth task, and our results are clearly preliminary. Further, the detailed literature survey required in such a project, cannot be presented in a mere conference or workshop article. A lengthy journal article on this topic is currently being finalized.

A primary motivation for our interest in the fairness of negotiation processes, arose when we examined bargaining about charges and pleas in the domain of criminal sentencing. In this domain, the two parties often have very different resources, a well supported prosecution versus an impoverished defence[2]. Further, the consequences of an unfair negotiation can be dire – the incarceration of an innocent defendant, can not easily be reversed.

In criminal law jurisdictions, a defendant can appeal a decision if they believe the judicial process was flawed. However, when negotiating about pleas – known as plea bargaining, a participant cannot challenge the decision. The reason for this situation is that unlike in a trial, the defendant has pleaded guilty and thus admitted that he committed the crime. This situation becomes problematic in the admittedly few cases where a person accepts a plea bargain even though they did not commit the crime. The defendant may plead guilty because he was offered a heavily reduced sentence (e.g. no jail time) and he felt the probability that he would be found guilty is reasonably high. Thus, it is very difficult to undo an '*unfair plea negotiation*'. But it is also essential that it be possible to reverse unfair decisions.

Because of the different proof requirements in civil and criminal law and the fact that criminal law cases involve the state prosecuting an individual, we shall restrict ourselves to discussing civil law, and primarily family law, in this paper.

Alexander (1997) has argued that in Australian Family Law, women tend to be more reluctant than men to continue conflict and are more likely to wave their legal rights in a mediation session. McEwen et al (1995) believe family mediators focus upon procedural fairness rather than outcome fairness. Phegan (1995) argues that differences in power between men and women lead to negotiated results that favour men. Bargaining imbalances can thus produce *unfair results* unless mediators overcome them

But what are fair results? Take for example a marriage in Australia where the couple have been married for fifteen years and have three children, one of whom has special

[2] The trial of O. J. Simpson for the murder of Nicole Simpson and Ronald Goldman involved a very affluent defendant, who had the ability to present a very strong defence.

needs. Suppose the husband works full-time, whilst the wife is not employed outside the house and is a full-time carer for the husband and children. If this is a low income and low asset marriage, the wife might be expected to receive 70% of the common pool. The husband would also need to pay Child Support. In many circumstances, the fact that the husband has a low income and is paying substantial child support, may mean that he cannot afford to pay rent. He might thus be forced to return to living with his parents. Men's groups have vigorously protested at what they perceive as injustices.

Are such results fair or just? The answer depends on how we measure fairness. If we measure fairness by meeting the interests or needs of both parents equally, then the answer is clearly no. In Australia, our notion of justice focuses upon meeting the paramount interests of the children. Hence the solution suggested above, is eminently fair according to Australian Law.

It is vital that we develop '*fair*' and '*just*' negotiation support systems. Indeed, one of the barriers to the uptake of Online Dispute Resolution (ODR) relates to users' concerns about the fairness and consistency of outcomes achieved by any ODR approach. But how can we measure what is '*fair*' and '*just*' negotiation support? Pierani (2005), in discussing Online Dispute Resolution in Italy, argues that as with ADR models, ODR systems need to be impartial, transparent, effective and fair.

Family Law is one domain where interest-based notions of mediation conflict with notions of justice. In such domains, the use of negotiation support systems that attempt to equally satisfy both parties is limited. Nevertheless, we believe that our ODR environment may still play a positive role in the family-law setting. One safeguard for use of ODR in fields such as family law may be required certification of the result by a legal professional.

2. Fairness Principle 1 - Bargaining in the Shadow of the Law

Traditional Negotiation Support Systems have focused upon providing users with decision support on how they might best achieve their goals (Raiffa, 1982). A fundamental issue arises whenever anyone builds a negotiation support system for use in legal domains: is the system being developed concerned with supporting mediation or providing justice? When issues of justice are not reflected in the outcome of the mediation process, bargaining theory has its limitations. Bargaining imbalances can thus produce *unfair results* unless mediators overcome them.

Because most legal dispute resolution occurs outside the court-room, there are fewer opportunities to ensure fair decision-making. In support of this argument, Galanter (2004) claims:

> *In the federal courts, the percentage of civil cases reaching trial has fallen from 11% in 1962 to 1.8% in 2002. In spite of a five-fold increase in case terminations, the absolute number of civil trials was 20% lower in 2002 than it was 40 years earlier.*

In writing about the Vanishing American Trial, Galanter argues that whilst litigation in the United States is increasing, the number of trials decided by US judges has declined drastically**.** This is because litigants are using alternative forms of Dispute Resolution.

Most negotiations in law are often conducted in the shadow of the Law i.e. bargaining in legal domains mimics the probable outcome of litigation. Mnookin and Kornhauser (1979) introduced the bargaining in the shadow of the trial concept. By examining the case of divorce law, they contended that the legal rights of each party could be understood as bargaining chips that can affect settlement outcomes.

Bibas (2004) argues that:

> *the conventional wisdom is that litigants bargain towards settlement in the shadow of expected trial outcomes. In this model, rational parties forecast the expected trial outcome and strike bargains that leave both sides better off by splitting the saved costs of trial. … This shadow of trial model now dominates the literature on civil settlements.*

Walton and Mckersie (1965) propose that negotiation processes can be classified as distributive or integrative. In distributive approaches, the problems are seen as "zero sum" and resources are imagined as fixed: *divide the pie*. In integrative approaches, problems are seen as having more potential solutions than are immediately obvious and the goal is to *expand the pie* before dividing it. Parties attempt to accommodate as many interests of each of the parties as possible, leading to the so-called *win-win* or *all gain* approach. As (Kersten 2001) notes although Walton and McKersie did not suggest one type of negotiation being superior to the other, over the years, it has become conventional wisdom that the integrative type allows for better compromises, win-win solutions, value creation and expanding the pie

Traditional negotiation decision support has focused upon providing users with decision support on how they might best obtain their goals. Such advice is often based on Nash's principles of optimal negotiation or bargaining (Nash 1953). Game theory, as opposed to behavioural and descriptive studies, provides formal and normative approaches to model bargaining.

Most negotiation outside the legal domain law focuses upon interest-based negotiation. Expanding on the notion of integrative or interest-based negotiation, principled negotiation promotes deciding issues on their merits rather than through a haggling process focused on what each side says it will and will not do (Fisher and Ury 1981). Amongst the features of principled negotiation are: separating the people from the problem; focusing upon interests rather than positions; insisting upon objective criteria and knowing your *BATNA* (*B*est *A*lternative *T*o a *N*egotiated *A*greement).

The reason you negotiate with someone is to produce better results than would otherwise occur. If you are unaware of what results you could obtain if the negotiations are unsuccessful, you run the risk of:

1) Entering into an agreement that you would be better off rejecting; or
2) Rejecting an agreement you would be better off entering into.

For example, when a person wishes to buy a used car, they will usually refer to a commonly accepted set of approximate automotive prices. Using this initial figure and considering other variables such as new components, the distance travelled by the car and its current condition, the buyer then decides the value they wish to place on a car. If the seller is not willing to sell the car at this price, then you can argue the merits of your valuation, in an attempt to persuade the seller to accept your BATNA.

As an important starting point in a negotiation, BATNAs can be used to form a basis from which fair agreements can be obtained. Mnookin (2003) claimed that having an accurate BATNA is part of the armory one should use to evaluate whether or not to agree to enter a negotiation. Comparing the possible (range of) outcomes with alternative options encourages parties to accept methods that are in the interests of disputants and enables them to identify those that are not. It is likely that most parties, to some extent, test the values of their BATNAs when assessing whether or not to opt for a certain dispute resolution method.

3. Fairness Principle 2 - BATNAS

In their development of a three step model for ODR, (Lodder and Zeleznikow 2005) evaluated the order in which online disputes are best resolved. They suggested the following sequencing:

1. First, the negotiation support tool should provide feedback on the likely outcome(s) of the dispute if the negotiation were to fail – i.e. the BATNA.
2. Second, the tool should attempt to resolve any existing conflicts using dialogue techniques.
3. Third, for those issues not resolved in step two, the tool should employ compensation/trade-off strategies in order to facilitate resolution of the dispute.
4. Finally, if the result from step three is not acceptable to the parties, the tool should allow the parties to return to step two and repeat the process recursively until either the dispute is resolved or a stalemate occurs.

If a stalemate occurs, arbitration, conciliation, conferencing or litigation (or indeed any other ADR technique) can be used to reach a resolution on a reduced set of factors. This action can narrow the number of issues in dispute, reducing the costs involved and the time taken to resolve the dispute.

Lodder and Zeleznikow's model, in suggesting providing advice about BATNAs, facilitating dialogue and suggesting trade-offs, focuses upon E-Commerce applications. They claimed that their research assumes that disputants focus upon interests. But as we shall discuss in section four, the notions of Bargaining in the Shadow of the Law and BATNAs have important implications for developing just negotiation support systems.

Whilst this paper primarily focuses upon negotiation theory, we now examine the fairness of some negotiation support systems that we have constructed in Australian Family Law.

3.1. Enhancing Interest Based Negotiation: The Family Winner and AssetBuilder Systems

Bellucci and Zeleznikow (2006) supported interest based negotiation in their Family Winner system. They observed that an important way in which family mediators encourage disputants to resolve their conflicts is through the use of compromise and trade-offs. Once the trade-offs have been identified, other decision-making

mechanisms must be employed to resolve the dispute. They noted that while it appears counterintuitive:

- The more issues and sub-issues in dispute, the easier it is to form trade-offs and hence reach a negotiated agreement, and
- They choose as the first issue to resolve the one on which the disputants are furthest apart – one party wants it greatly, the other considerably less so.

In assisting the resolution of a dispute, Family_Winner (Belluci and Zeleznikow 2006) asked the disputants to list the items in dispute and to attach importance values to indicate how significant it is that the disputants be awarded each of the items. The system uses this information to form trade-off rules. The trade-off rules are then used to allocate issues according to a '*logrolling*' strategy[3].

The trade-offs pertaining to a disputant are graphically displayed through a series of trade-off maps (Zeleznikow and Bellucci 2003). Their incorporation into the system enables disputants to visually understand trade-off opportunities relevant to their side of the dispute. A trade-off is formed after the system conducts a comparison between the ratings of two issues. The value of a trade-off relationship is determined by analyzing the differences between the parties.

The system implements compensation by either increasing or decreasing a party's rating. It is then expected that changes made to a rating will influence the decision of a future allocation. The amount of any compensation resulting from the triggering of a trade-off has been empirically determined from an analysis of data. Even though Bellucci and Zeleznikow (2006) have tried to explicitly define utility functions, they are indeed developed implicitly and are only approximations.

Our interest about fairness in family mediation was raised when Bellucci and Zeleznikow first evaluated the performance of the Family_Winner system. They met with a number of family law solicitors at Victoria Legal Aid. Whilst the solicitors were very impressed with how Family_Winner suggested trade-offs and compromises, they had one major concern – that Family_Winner in focusing upon mediation had ignored issues of justice. They claimed that Bellucci and Zeleznikow had focussed upon the interests of the parents rather than the needs of the children.

Relationships Australia (Queensland Branch)[4] wants to use a modified version of Family_Winner to provide decision support for their clients. The application domain concerns agreements about the distribution of marital property. Instead of Family_Winner attempting to meet both parents' interests to basically the same degree, mediators at Relationships Australia determine what percentage of the common pool property the wife should receive (e.g. 60%).

The new system, Family_Mediator (Zeleznikow and Bellucci 2006) helps resolve the issue by:

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[3] Logrolling is a process in which participants look collectively at multiple issues to find issues that one party considers more important than does the opposing party. Logrolling is successful if the parties concede issues to which they give low importance values. See Pruitt (1981).

[4] See http://www.relationships.com.au/who-we-are/state-and-territory-organisations/qld last accessed 30 October 2008

1. The mediator involved in helping resolve the dispute makes decisions about the relative points the husband and wife should each receive[5]. Say the wife receives X% and Husband (100 – X) %
2. The mediator decides on the value of each item in dispute.
3. Both the Husband and Wife give points to each of the items in dispute[6].
4. The Family_Mediator system then suggests trade-offs and compensations so that the wife receives T*(50 + X) points and the husband receives T*(150 - X) points where T is the number of points each party would receive under the original Family_Winner system.

Unlike the Family_Winner system, the AssetDivider system (Bellucci 2008) allows users to input negative values. This development is necessary because family mediation clients often have debts (such as credit card debts and mortgages) which are as much items in the negotiation as assets.

Further, to ensure that AssetDivider system proposes an acceptable solution, it might be necessary to include as a universal issue in all disputes, a cash variable payment item. For example, where the wife has identified that her highest preference is to retain the family home, an outcome might provide for her to keep the matrimonial home and the mortgage. In order to reach an acceptable settlement, the wife might need to make a cash payment to the husband. Hence the requirement that a variable appear in the output is stipulated.

A further limitation of the AssetDivider system is the need for users to enter numerical values. Whilst disputants can probably linearly order the significance to them of all items in dispute, it is unrealistic to expect them to give a numerical value to each item. But it is not unreasonable for the users to assign a linguistic variable to each item. A seven point Likert scale which can then be converted into points is suggested:

Suppose the parties enter the following terms for the issues in dispute in the example given in section 3.4 of Zeleznikow et al (2007).

Item	**H description and thus unscaled points**		**W description and thus unscaled points**	
Residency	Little Significance	*10*	Essential	*60*
Visitation Rights	Very Important	*50*	Irrelevant	*0*
Shares	Important	*40*	Little Significance	*10*
Superannuation	Little Significance	*10*	Moderate	*30*
Child Support	Moderate	*30*	Irrelevant	*0*
Matrimonial Home	Irrelevant	*0*	Important	*40*
Investment Unit	Marginal	*20*	Irrelevant	*0*
Holiday House	Irrelevant	*0*	Marginal	*20*
Mitsubishi Car	Marginal	*20*	Irrelevant	*0*
Holden Car	Irrelevant	*0*	Moderate	*30*
Boat	Marginal	*20*	Irrelevant	*0*

[5] Essentially evaluative mediation – where the mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases and predicting what a judge is likely to do. This prediction tries to encourage the negotiation to be fair and just.

[6] As in the entering of the points into the Family_Winner system, the points are normalized to 100.

The husband's total score is 200. Thus to scale his scores each number is multiplied by 100/200 = 0.5. The wife's total score is 190. Thus to scale her scores each number is multiplied by 100/190 = 0.53. This leads to a points table:

Table 2. Points table

Item	H Points	W points
Residency	5	32
Visitation Rights	25	0
Shares	20	5
Superannuation	5	16
Child Support	15	0
Matrimonial Home	0	21
Investment Unit	10	0
Holiday House	0	11
Mitsubishi Car	10	0
Holden Car	0	16
Boat	10	0

These points are then utilised by the original Family_Mediator algorithm. The development of Family_Mediator and AssetDivider allows the concept of interest-based negotiation as developed in Family_Winner to be integrated with notions of justice. The advice about principles of justice can be provided by decision support systems that advise about BATNAs or human mediators.

But how can we develop reasonable BATNAs?

3.2. Developing BATNAs: The Split Up System

In the Split-Up project, Stranieri *et al* (1999) wished to model how Australian Family Court judges exercise discretion in distributing marital property following divorce The resulting system uses rules and neural networks to determines which assets will be paramount in property considerations and then determines a percentage of the property to be awarded to each party.

Whilst the Split—Up system was not originally designed to support legal negotiation, it can be directly used to proffer advice in determining one's BATNA. Suppose the disputants' goals are entered into the Split—Up system to determine the asset distributions for both W & H. Split—Up first shows both W and H what they would be expected to be awarded by a court if their relative claims were accepted. The litigants are able to have dialogues with the Split—Up system about hypothetical situations which would support their negotiation.

Bellucci and Zeleznikow (2001) give an example of a divorcing couple who had been married twenty-years and had three children. The husband worked eighty hours per week whilst the wife did not engage in employment outside the home. They entered three scenarios into the Split—Up system. The system provided the following answers as to the percentages of the distributable assets received by each partner.

Resolution	H%	W%
Given one accepts W's beliefs	35	65
Given one accepts H's beliefs	58	42
Given one accepts H's beliefs but gives W custody of children	40	60

Clearly, custody of the children is very significant in determining the husband's property distribution. If he were unlikely to win custody of the children, the husband would be well advised to accept 40% of the common pool (otherwise he would also risk paying large legal fees and having ongoing conflict).

Hence, while Split-Up is a *decision* support system rather than a *negotiation* support system, it does provide disputants with their respective BATNAs and hence provides an important starting point for negotiations. This problem can arise where a fully automated ODR environment is used in which resolution is based on consensus.

4. Principles for Developing Fair Negotiation Support Systems

Having examined interest based and principled negotiation and bargaining in the shadow of the law as well as family mediation and bargaining about charges and pleas, we now wish to develop a framework for developing fair and just negotiation support systems.

4.1. Transparency

As we have seen from a discussion of negotiating about pleas and charges, it is essential to be able to understand and if necessary replicate the process in which decisions were made. In this way unfair negotiated decisions can be examined, and if necessary, be altered. The same is true in family mediation.

The November 2001 declaration of the Fourth Ministerial Conference of the World Trade Organisation , held in Doha, Qatar, developed guidelines for the organization and management of their free trade negotiations. One of their principles (number 49) says:

> *The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.*

Bjurulf and Elgstrom (2004) discuss the importance of transparency in negotiations re the European Union directives on public access to European documents. They argue that the development of norms helps facilitate fair negotiations.

We can in fact also consider two distinct forms of transparency: transparency about the process and transparency of the data in a particular negotiation.

4.1.1. Transparency in Negotiation Processes

There is wide spread support for the development of transparent processes in dispute resolution. For example, at the commencement of all mediation conferences, Relationships Australia (Queensland) clearly indicate to the disputants, how the process will be managed. They follow the model discussed in Sourdin (2008): *Opening, Parties' Statements, Reflection and Summary, Agenda setting, Exploration of Topics , Private Sessions, Joint negotiation sessions and Agreement/Closure*

To emphasize the importance of transparency in charge negotiations, Wright and Miller (2003) believe that pervasive harm stems from charge bargains due to their special lack of transparency. Charge bargains, even more than sentencing concessions, make it difficult after the fact, to sort out good bargains from bad, in an accurate or systematic way.

To improve the dilemma of plea bargaining, Wright and Miller (2002) introduce the notion of *prosecutorial screening*. The prosecutorial system they envisage has four interrelated features: early assessment, reasoned selection, barriers to bargains and enforcement.

4.1.2. Transparency and Discovery

Even when the negotiation process is transparent, it can still be flawed if there is a failure to disclose vital information. Such knowledge might greatly alter the outcome of a negotiation.

Take for example the case of a husband who declares his assets to his ex-wife and offers her eighty per cent of what he claims is the common pool. But he has hidden from his ex-wife, ninety per cent of his assets. Thus, in reality, he has only offered her eight per cent of the common pool.

Cooter and Rubinfield (1994) and Shavell (2003) point out, in litigation, the courts may require that a litigant disclose certain information to the other side; that is, one litigant may enjoy the legal right of *discovery* of information held by the other side. Shavell claims that the right of discovery significantly increases the likelihood of settlement because it reduces differences in parties' information. This benefit is often lost in a negotiation.

The failure to conduct adequate discovery can be a major flaw in ensuring that negotiations are fair. But how can we conduct sufficient discovery without losing the benefits of negotiation – speed, lower cost and flexibility?

Requiring specified aspects of disclosure in a negotiation might help enhance the fairness of a negotiation process.

4.1.3. Using Bargaining in the Shadow of the Law in Negotiation

As discussed in section 2, most negotiations in law are conducted in the shadow of the law. The probable outcomes of litigation provide beacons or norms for the commencement of any negotiations (in effect BATNAs). Bargaining in the Shadow of the Law provides standards for adhering to *legally just* and *fair* norms.

By providing disputants with advice about BATNAs and Bargaining in the Shadow of the Law and incorporating such advice in negotiation support systems, we can help support fairness in such systems.

For example, in the Family_Mediator system, interest based negotiation is constrained by incorporating the paramount interests of the child. By using Bargaining in the Shadow of the Law, we can use evaluative mediation (as in Family Mediator) to ensure that the mediation is fair.

The Split_Up system provides BATNAs for commencing fair negotiations. Such BATNA advice is now being provided on the internet. The BEST-project (*B*ATNA *E*stablishment using *S*emantic web *T*echnology), based at the Free University of

Amsterdam aims to explore the intelligent disclosure of Dutch case law using semantic web technology[7]. It uses ontology-based search.

4.2. The negatives in using Transparency and Bargaining in the Shadow of the Law for Negotiation Support

In section 4.1, we outlined the benefits of promoting transparency and bargaining in the shadow of the law to support fair negotiation. There is however a certain danger in promoting transparency and Bargaining in the Shadow of the Law for negotiation support.

a) **In such situations, disputants might be reluctant to be frank** – one of the benefits of negotiation (as opposed to litigation) is that outcomes are often kept secret. Thus the resulting negotiation does not act as a precedent for future litigation. If this benefit is lost then parties might be more reluctant to negotiate.

b) **Mediators might be seen to be biased** (such as in evaluative mediation) – if mediators need to offer advice about transparency and bargaining in the shadow of the law, then both the disputants and other interested parties might be reluctant to engage in the negotiation.

c) **The difficult and dangers of incorporating discovery into negotiation support systems** – discovering appropriate information is complex, costly and time consuming.

d) **The inability to realise the repercussions of a negotiation** – often disputants focus upon resolving the dispute at hand. They fail to realise that the resolution they advocate may have larger scale repercussions. In 2005, the Australian Competition and Consumer Commission (ACCC) convened a number of examinations of VISY executives (whose chairman is Richard Pratt) over allegations that VISY entered illegal price-fixing and market-sharing arrangements with arch-rival Amcor. Initially VISY denied any wrongdoing. In October 2007, Pratt secured an early negotiated settlement with the ACCC, avoiding months of potentially damaging publicity for Mr. Pratt and Amcor. But this changed evidence has led, in June 2008, to the ACCC beginning criminal proceedings in the Federal Court against Mr Pratt for allegedly providing false or misleading evidence in the course of an investigation[8]. Despite expensive legal advice, Mr. Pratt did not realise that his negotiated civil plea negotiation with the ACCC could lead to later criminal proceedings against him.

Thus, our proposed principles for developing fair negotiation support systems also have some drawbacks.

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[7] See www.best-project.nl/description.sthml Last accessed August 4 2008

[8] See www.accc.gov.au/content/index.phtml/itemid/832393 last accessed August 6 2008.

5. Current Work and Conclusion

A further extension of the move towards ADR, is the notion *if negotiation is good, then compulsory negotiation is even better*. In Australia, mediation – generally facilitative mediation – has been used to handle disputes in the family arena for about twenty years. Initially it was considered essential that the couple enter mediation voluntarily. However, this is not the situation in Australia today: at least one meeting with a family mediator is mandatory before lodging an application for a parenting order in the Family Court. Often parties who have no intention of settling their conflict without adjudication are forced into mediation before they can continue to court. In a joint project with Relationships Australia, we are investigating the benefits and pitfalls of compulsory mediation.

In conjunction with Victoria Body Corporate Services[9], we have developed model dispute resolution rules for condominium owners. These rules are used to promote constructive mediation following the resolution of disputes. Techniques used involve conciliation and arbitration (both with the same mediator and arbitrator and a different person undertaking the respective roles) and a sealed arbitration followed by mediation.

We are also hoping to build an ODR environment to house negotiation support systems to support both housing and family disputes.

We have seen that one of the major concerns from disputants using Alternative Dispute Resolution is about the fairness of the process. Without negotiation procedures being seen as fair and just, there will always remain legitimate criticisms of the process. But how can we measure the fairness of Alternative Dispute Resolution procedures?

Through an examination of the relevant literature in a variety of domains – including international conflicts, family law and sentencing and plea bargaining – and an in depth discussion of negotiation support tools in Australian Family Law, we have developed a set of important factors that should be incorporated into 'fair' negotiation support processes and tools. These factors include:

* Transparency;
* Bargaining in the Shadow of the Law and BATNAs; and
* Limited Discovery.

Incorporating these factors, does however have some drawbacks for the development of negotiation support systems.

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