Introduction

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Alternative dispute resolution (ADR) processes are used in widely varying contexts, including business, finance, health, family, community (including owners' corporation disputes), children's matters, government, human rights and employment. ADR processes are integral in civil and family justice systems the world over. This special issue is devoted to exploring the ADR landscape and identifying the breadth of ethical issues that arise in different iterations of ADR processes. The diverse settings in which ADR is used, the hybridisation of processes, and the fact that ADR practitioners come from different professional backgrounds creates a complex environment within which to consider ethical issues. It is a challenge to establish the parameters of ADR practitioners' ethical responsibilities in these varying contexts and the policy steps that may assist them in discharging their responsibilities. The articles in this edition are a step in this process.

The breadth of ethical issues experienced by ADR practitioners ranges from how to support party self-determination, particularly when concerns are raised about a party's capacity to act in their best interests, aspects of ADR practitioner competence, conflict of interests, confidentiality, impartiality, power imbalance between parties, and the extent to which practitioners should promote substantive fairness. The approach taken by a practitioner in addressing ethical issues can influence the quality of justice, both procedural and substantive.

Addressing ethical issues in the wide variety of ADR processes is no easy feat. Although standards of ethical practice have been developed and codified for some ADR processes, for the majority there are no clearly defined ethical standards. Even where standards have been developed, the system is voluntary and there are no clearly defined ways of enforcing standards imposed on practitioners. In addition, there are divisions among practitioners as to the best approach to regulating ADR. Is ADR to be treated as a profession, and should there be a generic code applicable to all processes or should different processes have distinct ethical codes? These questions arise in the context of ADR's exponential growth across various sectors.

In 2015, La Trobe University's School of Law and the Dispute Settlement Centre, Victoria co-hosted an ADR Ethics symposium for ADR practitioners. The aims of the symposium were to further strengthen the ADR field by identifying difficult issues that arise in relation to ethics in ADR; raising awareness of ADR practitioners' ethical responsibilities in addressing these issues; and enabling intersection between research and practice. The articles published in this special issue developed from that symposium. They reflect the diverse nature of the ADR field. They address both empirical and theoretical analyses of ethics in ADR and in more

specialised fields including family law, statutory dispute resolution and restorative practice. Each article provides insights into different aspects of quality and practice issues in ADR. Together the articles advance our knowledge of the complex issue of ADR ethics and provide some answers to probing questions in the minds of practitioners, academics and policy makers.

In the opening article, Akin Ojelabi and Noone explore various ADR processes and the extent to which the values underpinning the organisations providing the ADR processes influence practitioners' approaches to issues of ethics and justice. Drawing on empirical research and data collected from ADR organisations, this article analyses different contexts (including legislative bases) in which ADR processes are used. The relationship between processes and their underlying values and practitioners' ethical responsibilities and commitment to achieving justice goals are explored. Differences exist between processes with clear normative purposes under enabling legislation and charters as well as industry-scheme ADR processes and processes with no normative purpose. While some processes allow practitioners more freedom to address issues of justice, other processes adhere strictly to party self-determination and impartiality thus precluding practitioners from certain types of interventions. The article concludes that ADR processes and approaches to ethical and justice issues vary and diversify based on both the context and practice of ADR. These variations make it unlikely that a general set of ethical standards could be applicable to different ADR contexts and processes.

The implications of growing inequality for users of mediation and ADR parties is the focus of Ellen Waldman's article. Although drawing on the US experience, this article resonates with the Australian practice. Waldman questions how inequality affect the experience of parties in mediation? Do the 'haves' end up with a better experience and outcomes in accessing justice? She argues that growing inequality is resulting in poorer access to justice for the 'have-nots', both within the adversarial justice system and in mediation. Mediation, according to Waldman, is well on its way to becoming a process with outcomes determined to a large extent by parties' socio-economic status. She argues that mediators should no longer be hampered by ethical standards and be able to provide information to parties especially in the context of costly legal practitioner fees and shrinking government resources for legal aid. While mediators are not prohibited from providing information, they are reluctant to do so as this may contravene mediator impartiality and party self-determination, both core values of mediation.

Douglas examines the revisions to the ethical standards for Australian mediators accredited under the Australian National Mediator Accreditation System (NMAS). She argues that although the revised version of the Standards retains two traditional values of mediation, self-determination and mediator impartiality, the abandonment of mediator 'neutrality' in the NMAS standards, which was the cornerstone of party self-determination, calls for a new framework for mediation ethics. Douglas argues for ethical standards predicated upon the relationship of

trust between the mediator and parties: mediators as fiduciaries. This is based on the conception of a mediator as a professional in a position of trust and with authority to be exercised for the benefit of others. It accommodates different models of mediation practice and different professional backgrounds while allowing an 'other focus' in which mediators can act in the best interest of parties. This approach enables mediators to ethically address substantive justice issues that may arise.

Also honing in on the NMAS Standards, Wolski argues that the ethical standards outlined in the NMAS may conflict, thus giving the mediator discretion in decision-making about an ethical issue. To this end, Wolski identifies factors mediators may take into consideration in such instances. These include the mediator's personality and style, professional background, model of mediation practised, context of mediation and characteristics of parties as well as the nature of the dispute. This decision-making process is referred to as an 'ethical evaluation process'. Wolski argues that this process allows the mediator to assess the situation on different levels while also giving prominence to self-determination in mediation. Giving thought to ethical decision-making leaves each mediator with valid justifications for their final decision.

The last four articles focus on different ADR contexts: family dispute resolution, civil mediation, restorative practice in institutional abuse cases and owners' corporation disputes. Ethical issues that arise in these specific contexts of ADR processes are identified and discussed.

Although family mediation has many positive support elements, Field and Crowe argue that parties face challenges because of underlying expectations and aspirations that may be opaque to first-time, inexperienced participants. Consequently mediators have an ethical obligation to be aware of these barriers and work actively to address them. Field and Crowe adopt Ludwig Wittgenstein's idea of a *language game* (referred to as a 'holistic form of social behaviour, where language and behaviour intertwine to create a web of expectations') to explore the lack of knowledge or awareness of mediation norms by first time users of family dispute resolution. This creates a *clash of genres* whereby parties' modes of communication and conduct clash with unspoken responsibilities imposed on them by the mediation process. This in turn limits their abilities to participate effectively in the process. With families' futures hanging in the balance in this context of ADR, they argue for a rethinking of mediation ethics so that parties are adequately supported to participate in the process.

Gutman and Grant further explore ADR contexts and associated ethical issues by comparing processes in civil law mediations at Victoria's Magistrates' Courts and family dispute resolution at Relationships Australia Victoria (RAV). While the facilitative model of mediation is formally adopted in both forums, they suggest actual practice indicates otherwise. Mediation of civil claims resembles settlement conferences where mediators' ethical responsibilities conflict with the shadow of the law and the goal of reducing case-loads. Family Dispute Resolution at the RAV may also take the settlement turn although practitioners have

a legislative duty to ensure agreements are in the child's best interests. In both forums, opportunity for party self-determination may become considerably reduced and attending ethical standards which are greatly influenced by the forum and the nature of the dispute tend to conflict. The authors argue for mediator self-awareness, reflective practice, supervision and continuing professional development to help practitioners address ethical conundrums.

In the discrete area of Owners Corporation (OC) disputes where the mediators are not regulated under the NMAS, Douglas and Leshinsky draw on empirical research to examine the role of OC managers as 'informal' mediators. OC managers face ethical issues relating to their inability to be completely impartial as they act as agents of the OC and in relation to competency as there are no legislative requirements for OC managers to undertake dispute resolution training. OC managers rely on their professional experience when mediating disputes but acknowledge the need for more training. In discussing specific training needs, most OC managers interviewed did not identify ethics training which may indicate a lack of awareness of the ethical aspects of dispute resolution. Douglas and Leshinsky recommend a community of practice with the responsibility of providing informal mediation and ethics training for OCs.

The last article in the volume, by Vernon, focuses on the ethics of appropriate justice approaches. Vernon posits that questions about fair rules, fair play and fair outcomes in ADR should be addressed by all ADR actors across the justice system, policy makers and program developers rather than left to individual practitioners. As an example, Vernon focuses on the Defence Abuse Response Taskforce's (DART) restorative practice approach (Restorative Engagement Conferencing) for institutional abuse and sexual offending within the Australian Defence Force. This program draws on principles and values from restorative practice, mediation, conciliation and trauma-informed care with the overall principle of 'do no harm' in addressing ethical issues. Another advantage of the program is the adoption of a case-management approach involving multiple professions and agencies including legal, health and human services agencies and practitioners whilst responding to victims' specific needs.

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All the articles in this volume point to the complexity in achieving ethical ADR processes and the need for further exploration of ADR Ethics. The discussion generated at the 2015 symposium and this special issue, illustrate how this might be achieved through collaboration between ADR organisations, policy makers, academics and practitioners.