

# Situating the Current NMAS Within the Broader Dispute Resolution Field: An International Comparative Analysis

## NMAS Review 2020-21

In the global field of dispute resolution (DR), there are many mediator accreditation systems, ranging from highly regulated and centralised accreditation processes to mediation as a largely unregulated and ad hoc profession. In reviewing the National Accreditation System (NMAS) in Australia and its future, it is important to understand and situate our existing system within a context of the broader DR field. This report highlights some key similarities and differences between the NMAS and mediation systems from jurisdictions selected for comparison. We conclude that Australia is well placed to set a high benchmark in mediator standards.

*Refer to the table at Appendix 1 to view more in-depth comparisons and sources.*

## Regulation of Mediation

When it comes to the regulation of mediation worldwide, Australia sits somewhere in the middle of a broad spectrum of regimes. On one side, mediation has undergone five phases of mediation regulation in Italy, with its current law mandating initial mediation sessions for a limited category of cases. On the other side, while most jurisdictions have some form of civil procedure rules that consider and promote ADR before litigation (including Australia), mediation remains largely unregulated in the UK and the USA.

In Australia and New Zealand (NZ), government regulation has come in the form of legislative schemes for family dispute resolution and conciliation in particular dispute areas.

## Mediator Accreditation

All mediator accreditation systems analysed from the selected jurisdictions require training (usually a five-day course) with an assessment and application process. There are national mediator accreditation systems in Australia, Hong Kong and Italy. Hong Kong and Italy operate centralised accreditation systems (Hong Kong Mediation Accreditation Association Limited (HKMAAL) and the Italian Ministry of Justice, respectively), while Australia has a decentralised system through Registered Mediator Accreditation Bodies (RMABs).

In other countries, accreditation systems are managed by various professional organisations, which each have their own standards. Therefore, the credibility or status of

accreditation from a particular organisation would seemingly depend on the organisation's reputation.

## Presumption of Mediation Style/Process

There is a consensus among jurisdictions that mediation standards either do not presume a particular style of mediation or presume the facilitative style of mediation. Jurisdictions, including Australia, NZ and the EU accommodate flexibility in mediation style, for example, allowing mediators to decide with parties how a mediation is to be conducted.

## Family Dispute Resolution

Most jurisdictions provide for family mediation through legislation, court rules or government schemes. Australia and NZ each have specific legislative schemes that set out requirements for family dispute resolution (FDR) practitioners and operational measures for the use of FDR.

In Singapore, judges of the court take a proactive approach in managing family disputes: They can appoint anyone as mediator and direct parties to attend mediation. There is no legislative scheme for the requirements of mediators. Other jurisdictions, such as the UK and Hong Kong, maintain registers/panels of family mediators, again without any legislative scheme for the requirements of mediators.

## Conciliation

As a process distinct from mediation, conciliation is often provided for under regulatory schemes in particular subject matters such as labour relations and discrimination cases. The NMAS and the NZ Ministry of Business currently refer to conciliation as a blended or combined process, where the conciliator may have an advisory role on the content or outcome of a dispute, but not usually a determinative one. In Singapore, the distinction comes in the form of parties seeking guidance from a State Court judge during a conciliation process.

## Online Dispute Resolution

The growth in popularity of online dispute resolution (ODR) in recent times (especially considering the COVID-19 global pandemic) has seen the development of international standards/principles and regimes for ODR. Such principles include specific mention of issues related to using online platforms, such as accessibility, confidentiality of data, security, transparency and informed participation. Various online platforms and models have been established with great success, such as the Condominium Authority Tribunal, a fully online tribunal in Ontario, Canada.

## Conclusion

Having conducted a comparison of mediator accreditation systems worldwide, we conclude that the NMAS is unique in comprising of standards for both mediators and the practice of mediation. Our system remains flexible in allowing for different styles of mediation while still maintaining robust standards for training and competency of accredited mediators. While the accreditation system is decentralised through RMABs, the NMAS remains a central framework to promote consistent and high-quality practice. The regulatory landscape of Australia provides for some legislative intervention in particular categories of disputes and allows for a strong culture of private practice and referrals. These factors set a high benchmark in mediator standards and position Australia as a world leader.

## Key Differences and Similarities – Summary

### Regulation of Mediation

- Broad spectrum when it comes to regulation of mediation – Australia sits somewhere in the middle.
- On one hand, Italy is highly regulated, with law requiring an initial mediation session for a limited category of cases. History of five regulatory mediation phases.
- On the other hand, while most jurisdictions have some form of civil procedure rules that consider ADR before litigation, mediation is largely unregulated in the UK and the US.
- Australia and NZ have legislative schemes for family dispute resolution.

### Accreditation Systems

- All accreditation systems require training (usually 5-day course) and an assessment and application process.
- Australia, Hong Kong and Italy have a national mediator accreditation system. Hong Kong and Italy operate centralised accreditation systems (HKMAAL, Italian Ministry of Justice), while Australia has a decentralised system through RMABs.
- Accreditation systems in other countries are managed by various professional organisations which have their own standards. The credibility of a particular accreditation would seemingly depend on the reputation of the organisation.

### Mediation Style

- Consensus among jurisdictions is either no presumption or presumption of facilitative style of mediation.
- Jurisdictions including Australia, NZ and the EU allow for flexibility, such as by deciding with parties how mediation is to be conducted.

## Specialisations: Family Dispute Resolution, Conciliation and ODR

- Most jurisdictions provide for family mediation through legislation, court rules or government schemes.
- Australia and NZ have legislative schemes for FDR practitioner requirements.

## How does Australia Compare to the Rest of the World?

- NMAS is unique – comprising of standards for mediators and practice of mediation
- Flexible as to style of mediation
- Decentralised accreditation system through RMABs but still tied to central framework through the NMAS
- Some legislative intervention in particular types of disputes (family, conciliation)

# Appendix 1

# Appendix

Jurisdiction	Standards	Contents	Accreditation	Specialisation	Notes
Australia	<a href="#">National Mediator Accreditation System</a>	<p><u>NMAS – Practice Standards</u></p> <ul style="list-style-type: none"> <li>- Process (incl. preliminary conference and conducting mediation)</li> <li>- Power and safety</li> <li>- Procedural fairness and impartiality; confidentiality</li> <li>- Knowledge, skills and ethical principles</li> </ul>	<ul style="list-style-type: none"> <li>- 38 hours training course</li> <li>- Role play assessment</li> <li>- Apply to Recognised Mediator Accreditation Body (RMAB)</li> </ul>	<ul style="list-style-type: none"> <li>- FDR practitioner requirements set out in <a href="#">Family Law (Family Dispute Resolution Practitioners) Regulations 2008</a> and managed by Attorney-General’s Department (<b>legislative scheme</b>)</li> <li>- Complaints mechanism about FDRPs through RMAB rather than Department</li> <li>- Conciliation provided for under regulatory schemes (more info TBC) – refer 10.2 of Practice Standards (referred to as a <b>blended process</b> compared with mediation)</li> </ul>	<p>Requirements for RMABs set out in NMAS – must have capacity to assess accreditation, manage complaints, etc.</p> <p>Style: “facilitating negotiation”, also allows for evaluative style subject to consent from parties</p>
Hong Kong	<p><a href="#">Hong Kong Mediation Code</a></p> <p><a href="#">Hong Kong Mediation Ordinance (legislation)</a></p> <p><a href="#">Hong Kong International Arbitration Centre Mediation</a></p>	<p><u>Code</u></p> <ul style="list-style-type: none"> <li>- Mediator’s responsibilities to the parties</li> <li>- Mediator’s responsibilities to the process and the public</li> <li>- Sample agreement to mediate</li> </ul> <p><u>Ordinance</u></p> <ul style="list-style-type: none"> <li>- Confidentiality and admissibility</li> </ul>	<p><u>General Mediator</u></p> <ul style="list-style-type: none"> <li>- Stage 1 training course</li> <li>- Stage 2 centralised assessment through HKMAAL (x2)</li> <li>- Stage 3 application</li> </ul> <p><u>Family Mediator</u></p> <ul style="list-style-type: none"> <li>- Stage 1 training course</li> <li>- Stage 2 supervised live family mediation (x2)</li> <li>- Stage 3 advanced training course</li> </ul>	<ul style="list-style-type: none"> <li>- General Mediator &amp; Family Mediator panels managed by HKMAAL/HKIAC (<b>non-legislative scheme</b>)</li> <li>- <a href="#">Practice Direction 15.10</a> refers to Family Court mediation scheme (process rather than mediator requirements)</li> <li>- Conciliation referred to in various (eight) other ordinances, including labour relations, discrimination, Ombudsman,</li> </ul>	<p>Centralised and heavily regulated accreditation process.</p> <p>HKMAAL handles <a href="#">complaints</a> against accredited mediators/breaches of Mediation Code.</p> <p>Facilitative Style: “Mediator will not give</p>

	<a href="#">Rules (mainly procedural)</a>		<ul style="list-style-type: none"> <li>- Stage 4 application</li> <li>- Conversion process available both ways</li> <li>- Minimum 3 years' work experience</li> </ul>	etc. – Mediation Ordinance does <b>not</b> apply to conciliation	legal or other professional advice; impose a result; or make decisions”
New Zealand	<a href="#">New Zealand Dispute Resolution Centre Rules</a>  <a href="#">Arbitrators' and Mediators' Institute of New Zealand (AMINZ) Inc Code of Ethics</a> / <a href="#">Mediation Protocol</a>  <a href="#">Family Dispute Resolution Act 2013</a> / <a href="#">Family Dispute Resolution Regulations 2013</a>	<u>NZDRC</u> <ul style="list-style-type: none"> <li>- Appointment procedure</li> <li>- Mediation process incl. representation</li> <li>- General rules – confidentiality</li> <li>- Template documents</li> </ul> <u>AMINZ</u> <ul style="list-style-type: none"> <li>- 13 ethical statements with commentary/guidance</li> <li>- Protocol is largely procedural</li> </ul> <u>FDR Regulations</u> <ul style="list-style-type: none"> <li>- Criteria for approving dispute resolution organisations</li> <li>- Qualification and competency for FDR providers</li> </ul>	Accreditation by professional organisations with their own standards.  <u>Resolution Institute</u> <ul style="list-style-type: none"> <li>- 5-day training course</li> <li>- Mediation assessment</li> </ul> <u>AMINZ</u> <ul style="list-style-type: none"> <li>- <a href="#">Associate membership</a> (<i>broad and simple</i>)</li> <li>- Fellowship (interview, 1-day seminar, 2 x 2 hour written exams, 1-day practical exam)</li> <li>- Understanding of laws</li> <li>- Determinative OR consent-based dispute resolution</li> </ul> <u>NZ Law Society Panel of Mediators – Family Specialist</u> <ul style="list-style-type: none"> <li>- Training</li> <li>- Membership of Law Society</li> <li>- 5 years' experience</li> </ul>	<ul style="list-style-type: none"> <li>- FDR providers: 3 approved organisations (RI, AMINZ, NZ Law Society) or appointed by Ministry of Justice</li> <li>- FDR Act &amp; Regulations set out duties of FDR providers for specified disputes and provides operational measures required for use of FDR (<b>legislative scheme</b>, similar to Australia)</li> <li>- Conciliation as defined by Ministry of Business: “processes used to resolve complaints and disputes including:             <ul style="list-style-type: none"> <li>• Informal discussions held independently between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute.</li> <li>• Combined processes in which, for example, an impartial party facilitates discussion between the</li> </ul> </li> </ul>	No national/centralised standards.  Each body has complaints handling process.  Facilitative or Evaluative Style: The Mediator may, at his or her sole discretion, provide an analysis or evaluation of the relevant facts, evidence, and legal merits of the matters in dispute in the Mediation to promote settlement discussions. (NZDRC)

				<p>parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement.</p> <p>The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution but not usually a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.”</p>	
International Mediation Institute (IMI)	<a href="#">Code of Professional Conduct</a>  <a href="#">Competency Criteria</a>  <a href="#">Qualifying Assessment Program (QAP)</a>	<u>Code</u> - Appointment - Impartiality - Mediation process - Confidentiality  <u>Competency</u> Minimum standards for: - IMI Certified Mediators	<u>IMI Certified Mediators</u> - 200 hours or 20 mediations - Knowledge - Skills	- <a href="#">Academy of Professional Family Mediators</a> (certification + ethical standards) – founded in 2012	<a href="#">Complaints for breach of Code – Professional Conduct Assessment Process</a>  No presumption of style.  This Code is inspired by and based on:



	<p><a href="#">and Guidelines – to approve mediators for IMI certification</a></p> <p><a href="#">Certified Mediator Training Program Requirements</a></p>	<ul style="list-style-type: none"> <li>- IMI Certified Mediation Advocates</li> <li>- IMI Intercultural Competence specialisation</li> <li>- IMI Online Dispute Resolution specialisation</li> </ul> <p><u>QAP Criteria</u></p> <ul style="list-style-type: none"> <li>- Mediator experience</li> <li>- Mediation knowledge</li> <li>- Mediator skills</li> <li>- Program transparency</li> </ul>			<p>(1) The Model Rule for the Lawyer as a Third Party Neutral of the CPR-Georgetown Commission on Ethics &amp; Standards in ADR (2002)</p> <p>(2) Code of Conduct for Mediators of the UIA Forum of Mediation Centres (2003)</p> <p>(3) European Code of Conduct for Mediators of the European Commission (2004)</p> <p>(4) Model Standards of Conduct for Mediators (2005) adopted by AAA, ABA and ACR</p> <p>(5) Ethical Guidelines for Mediators of the Law Council of Australia (2006)</p> <p>(6) JAMS Mediators Ethical Guidelines</p> <p>(7) The Guidelines for the appointment of</p>
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					mediators, confidentiality and termination of the Chartered Institute of Arbitrators  (8) The Swiss Rule of Commercial Mediation under Mediation Rules and Clauses
Singapore	<a href="#">Singapore Mediation Centre</a> – accreditation only  <a href="#">Singapore International Mediation Institute Code of Professional Conduct</a> (subsidiary of National University of Singapore)  <a href="#">Mediation Act 2017</a>  <a href="#">State Courts of Singapore – Code of Ethics and Basic Principles</a>	<u>SIMI Code</u> - Independence, neutrality and impartiality - Confidentiality - Procedure  <u>Mediation Act</u> - Stay of court proceedings - Admissibility and confidentiality  <u>State Courts</u> - Core mediation principles - Statement of ethics	<u>SMC Accredited Mediator</u> - Training course - Mediation skills assessment: 2 x written assessments + 1 practical assessment  <u>SIMI</u> - 4 tiers: Accredited Mediator level 1, level 2, level 3, Certified Mediator	- Family Justice Rules 2014 (regulation): Court can appoint anyone as mediator and direct parties to attend mediation – judges, staff family mediators, court family specialists and volunteer specialists - Note: proactive management by judges - Family Justice Courts Practice Directions on court-ordered mediation – refers to Singapore Mediation Centre for private mediation, unless parties have agreed private mediator - No legislative scheme for mediator requirements - Stage Courts of Singapore: “Conciliation is a court dispute resolution process for you and the other party in your case to resolve your dispute without going for a trial in Court. It	No presumption of style.

				allows you and the other party to seek guidance from the Judge during the conciliation session and tap on his experience and knowledge to come up with an optimal settlement for all of you.”	
American Bar Association	<a href="#">Model Standards of Conduct for Mediators</a>	<u>Model Standards</u> - Self-determination - Impartiality - Conflicts of interest - Competence	No accreditation.	APAFM (as above).	Facilitative Style: “Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”
Italy	<u>Law Decree no. 69/2013 and no. 28/2010</u> (Note: Italy has undergone five different mediation regulatory phases)	- Required initial mediation session “consultation with mediator” for limited category of cases (parties can then decide to opt out or try mediation) - Law requires parties’ lawyers to assist during mandatory mediation	- Hold 3-year undergraduate degree or enrolled in professional society - Training > 54 hours - Assist experienced mediator in > 20 cases  - Mediation providers and mediators accredited by Italian Ministry of Justice	Family mediation – Law Decree no. 28/2010	Article: <a href="#">Mediation in Italy vs UK</a>  Article: <a href="#">The Italian Way of Mediation</a>  Article: <a href="#">Implementation of Family Mediation in Italy and Albania</a>  Article: <a href="#">Selecting Mediators in Italy</a>
UK	No central professional body or particular	<u>EU Code of Conduct</u> - Competence, independence and impartiality - Procedure	<i>CEDR, College of Mediators, UK Mediation, ADR Group, London School of Mediation, etc.</i>	- Family Mediation Council (non-profit organisation) maintains register of family mediators – UK	- CMC and FMC operate final stage complaints procedure for their members

	<p>accreditation for mediators.</p> <p><a href="#">Civil Mediation Council Mediator Registration Scheme</a> (private institution, voluntary training and practice standards) – adopts <a href="#">EU Code of Conduct for Mediators 2004</a> (very simple)</p> <p><a href="#">Family Mediation Council Code of Practice</a></p>	<ul style="list-style-type: none"> <li>- Confidentiality</li> </ul> <p><u>FMC Code of Practice</u></p> <ul style="list-style-type: none"> <li>- Aims and Objectives</li> <li>- Qualifications and Training</li> <li>- Scope of Mediation</li> <li>- General Principles re Information and Assessment Meetings and to Mediation (conflicts of interest, confidentiality, welfare of children, etc)</li> <li>- General Principles re Mediation (impartiality, confidentiality, voluntary, power imbalance)</li> </ul>		<p>government website points to FMC to find a mediator.</p> <ul style="list-style-type: none"> <li>- English law provides no definition of conciliation or mediation, although conciliation often used in employment disputes.</li> </ul>	<p>Flexible process, however, typically parties move into separate rooms after opening statements, then mediator <i>shuttles</i> between them.</p> <p>Article: <a href="#">Mediation in United Kingdom</a></p>
ODR	<p><a href="#">International Council for Online Dispute Resolution Standards + Ethical Principles for Online Dispute Resolution</a> (non-profit)</p>	<p><u>ICODR</u></p> <ul style="list-style-type: none"> <li>- Specific to online DR: accessible, accountable, confidentiality of data, equal, secure, transparent, honesty, informed participation</li> </ul> <p><u>CCODR</u></p> <ul style="list-style-type: none"> <li>- Refers to ICODR Standards</li> <li>- Processes include adjudication, arbitration, mediation</li> </ul>			<p>Article: <a href="#">Family ODR in Netherlands – new platform</a></p>

	<p>incorporated in the US)</p> <p><a href="#">EU Regulation on Online Dispute Resolution for Consumer Disputes</a> (provides European ODR platform; not specific to mediation)</p> <p><a href="#">Consumer Code for Online Dispute Resolution</a> (based in Ireland; facilitated self-regulation)</p> <p><a href="#">Condominium Authority Tribunal Rules of Practice / Member Code of Conduct</a> (fully online tribunal in Ontario, Canada)</p>	<p>- Practitioner requirements of competence, professional development, independence, process</p> <p>- Complaints procedure</p> <p><u>CAT Rules of Practice</u></p> <p>- Mostly procedural: stage 1 negotiation, stage 2 mediation, stage 3 tribunal decision</p> <p>- Mediation: “In this stage, the CAT assigns a Mediator to work with the Users to try to resolve the issues in dispute. If the Users agree to settle the issues in dispute in this stage, the CAT-ODR system will provide them with either a Settlement Agreement or a Consent Order that includes the terms they agreed upon.”</p> <p><u>CAT Member Code of Conduct</u></p> <p>- Fairness, independence, timeliness, quality, confidentiality, expertise, integrity, proactive approach, collegiality</p>			
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