Collaborative Law - An Australian Experience
By Robert Lopich - February 2008

Introduction
Collaborative Practice has spread well beyond the United States and Canada with enthusiastic groups of Collaborative Practitioners in countries as diverse as England, Australia, New Zealand, and parts of Europe and Africa and Ireland. While Collaborative Practice is still principally the realm of family law practitioners, its application in non-family law dispute resolution is gaining recognition.

Stu Webb[1] the founder of the Collaborative Law movement in the United States and Canadian trainer, Marion Korn conducted the first Collaborative Law training in Australia in the second half of 2005.

A group of some 25 lawyers, mediators, therapists and others attended the training which was conducted in Sydney in August 2005.

The Collaborative movement has grown significantly in Australia since that small beginning, with practice groups now established in New South Wales, Queensland, Victoria, Western Australia and the Australian Capital Territory. There are currently some 500 trained Collaborative Professionals (lawyers, mediators, therapists, financial advisors and others) in Australia.

The Dichotomy
The development of Collaborative Law in Australia has, to a significant degree, mirrored that in the United States and elsewhere.

This is particularly true of the way in which Collaborative Family Law was accepted as a natural and desirable fit for the resolution of family disputes in the difficult and complex areas of property and children's issues.

The family law system in Australia falls within the jurisdiction of the federal government and is administered under the Family Law Act, 1974 (Cth). The then Attorney General, The Hon Philip Ruddock MP actively encouraged the use of Collaborative Law as a means of dispute resolution in that jurisdiction.

Not surprisingly, the vast majority of Collaborative Professionals in Australia therefore, are family law practitioners. Importantly, reports of family disputes being successfully resolved using the Collaborative Process, have been circulating for some time.

The practitioners working outside of the family law arena (non-family lawyers) are fewer in number and find themselves faced with a skeptical civil and commercial[2] sector of the legal profession where commercial and non-family

mediation is a recognized and accepted method of dispute resolution which enjoys a success rate above 80%.

Getting the "runs on the board" in relation to civil and commercial disputes has been a much slower process particularly as it is necessary to convince civil and commercial practitioners of the benefits of the Collaborative Process.

A Civil/Commercial Dispute

It was against this background then that in the final quarter of 2007 one of the earliest civil and commercial disputes using the Collaborative Process took place in Australia.

The facts of the matter were a classic fit for Collaborative Law.

Albert the uncle of nephew Ben conducted a wholesale and retail hardware business in partnership in the outer metropolitan area of Sydney.

A dispute arose between Albert and Ben. In issue was Ben's unauthorized use of certain partnership plant and equipment. This in turn gave rise to allegations that Ben was not conducting the partnership business in best interests of the partners. The relationship between Albert and Ben deteriorated and became hostile.

Albert and Ben had not entered into a partnership agreement and accordingly, the provisions of the Partnership Act, 1892 (NSW) applied.[3] Ben's father, Charlie was the brother of Albert. Neither Albert nor Ben wanted the dispute to spill over into the broader family and more particularly, neither party wanted the matter to be litigated.

The Preliminary Issues

Albert's lawyer, David is a trained civil and commercial Collaborative Lawyer who recognized the potential for the dispute to quickly spread beyond Albert and Ben. George, Charlie's lawyer had acted for Charlie for many years in relation to Charlie's business undertakings. George was asked to act for Ben in dealing with the partnership dispute.

George had no training in the Collaborative Process however he had undertaken some training as a mediator many years earlier.

David discussed the options available for dealing with the dispute with Albert. Albert stressed that he was anxious not to litigate with his nephew. ADR techniques including mediation and Collaborative Law were discussed between David with Albert and considered by Albert, Ben and Charlie separately.

It was agreed that the parties would attempt to resolve their dispute using the Collaborative Process provided that George was willing to undertake the matter

on that basis. The fall back position being that Albert and Ben would attempt to mediate their dispute if George was not willing to engage in the Collaborative Process.

David and George had a number of meetings and discussed Collaborative Law and the process. David also provided George with literature and directed him to a number of websites which contained helpful information on the process. After some discussion George agreed to advise his client to engage in the Collaborative Process.

The parties agreed to adopt the "pure" collaborative model and each signed a Participation Agreement that required the lawyers to withdraw from the matter if the parties were not able to negotiate a resolution of the dispute between them.

David and George agreed that they were able to diligently represent their respective client's interests but that their respective retainers were be limited to the Collaborative settlement negotiations between the parties.

The Process
After the preliminary discussions the Collaborative Process proceeded with surprisingly few "bumps".

The Participation Agreement was signed at the first 4 way meeting. After opening statements were made and preliminary issues were addressed, it was decided by the parties to jointly engage an independent financial expert to value the partnership assets.

The business of the first 4 way meeting was concluded in just 2 hours. The parties decided to convene the next 4 way meeting as soon the financial expert's valuation had been prepared.

The second 4 way took place 10 days after the first meeting. The parties were noticeably more relaxed and comfortable with the process than they had appeared to be during the first 4 way. In a little less than 4 hours the parties had reached an agreement that was commercially sound and acceptable to them.

Throughout, the lawyers advocated their respective client's interests in a strong but non-adversarial manner.

David and George reduced the agreement reached between Albert and Ben to writing which Albert and Ben then signed later that day before leaving George's office.

The Close
At the conclusion of the matter Albert and Ben shook hands and wished each other well. They both acknowledged that although litigation had been ruled out as

an alternative early in their discussions, they were concerned that if an outcome was not reached the dispute was likely to spread to the family at large.

In the debriefing between David and Albert, Albert expressed the view that he had at all times felt that he was "safe" and that his interests were being looked after but importantly for him, he was given an opportunity to "have his say."

The debriefing between David and George was cordial and ended with George agreeing to attend the next Collaborative Law training that he could fit into his schedule.

A small but none the less, significant start to civil and commercial collaborative dispute resolution in Australia.

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Robert has extensive experience in the presentation of legal educational seminars and conference papers to professional bodies including the College of Law (NSW), The New South Wales State Legal Conference, Key Media Pty Ltd, ADRA and LEADR.

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[2] For the purposes of this article I will refer to all non-family law disputes as "civil and commercial" disputes.
[3] section 24 of the Partnership Act, 1892 (NSW).