

AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

Volume 16, Number 1

February 2005

CASENOTES

David Spencer

COSTS SANCTIONS AGAINST PARTIES REFUSING TO
MEDIATE – THE ENGLISH PERSPECTIVE5

Paul O'Shea

A CONSTITUTIONAL CHALLENGE TO AN INDUSTRY
BASED CONSUMER DISPUTE RESOLUTION SCHEME13

ARTICLES

COSTS SANCTIONS AGAINST PARTIES REFUSING TO
MEDIATE

David Spencer

A recent decision heard in the England and Wales Court of Appeal, puts parties and their lawyers on notice that only in exceptional circumstances will costs not follow the cause where the successful party has failed to participate in mediation. It is only a matter of time before an Australian court is asked to consider the same issue.....15

SOME CONTEMPORARY THEORIES OF POWER IN
MEDIATION: A PRIMER FOR THE PUZZLED PRACTITIONER

Hilary Astor

Theories of power and the operation of power in mediation are very important for mediators. There is a growing literature on the subject,

but some of it is written in technical language that can make it hard to access. This article seeks to provide a bridge between theory and practice by examining, in an accessible fashion, some contemporary theories of power and their application in mediation.....30

APOLOGISING “SAFELY” IN MEDIATION

Robyn Carroll

Apologies are often given during mediation. Parties and mediators will benefit from understanding how the law and lawyers view apologies. What are the legal implications of making an apology? Why are parties sometimes advised by their lawyers not to apologise? What benefits are there from a legal perspective for a party to make an apology in mediation? Is it possible to apologise “safely”? This article explores the answers to these questions and the meaning of “apology” in the legal context.....40

CONFIDENTIALITY: IS INTERNATIONAL ARBITRATION LOSING ONE OF ITS MAJOR BENEFITS?

David J Walter

This article addresses the propriety of the reasoning of state courts that have addressed the question of an implied obligation of confidence, in the framework of the common law as it applies to the implication of terms into contracts by operation of law, through a discussion of decisions of state courts.....54

PATTERN IN THE USE OF DISPUTE RESOLUTION METHODS IN THE INTERNATIONAL CONSTRUCTION INDUSTRY

Dr Edwin HW Chan, Mr Christopher To, Dr Martyn J Hills and Mr Patrick TI Lam

This article analyses the characteristics of various dispute resolution methods with the aim of identifying a general pattern of use for resolving disputes arising from major international construction projects.....65

A PLACE FOR THE COURTS IN THE DISPUTE RESOLUTION PROCESS

Michael Redfern

This article looks at the role the courts might play in future dispute resolution systems where primary importance is placed upon mediation and alternative dispute resolution rather than litigation79

Guidelines for Contributors

Submission and licence agreement instructions

All contributions to the journal are welcome and should be sent, with a signed licence agreement, to the Production Editor, *Australasian Dispute Resolution Journal*, Lawbook Co., PO Box 3502, Rozelle, NSW 2039 (mail), 100 Harris St, Pyrmont, NSW 2009 (courier) or by email to adrj@thomson.com.au, for forwarding to the Editor. Licence agreements can be downloaded via the internet at http://www.lawbookco.com.au/authorsupport/d_authorJournals.asp. If you submit your contribution via email, please confirm that you have printed, signed and mailed the licence agreement to the attention of the Production Editor at the mailing address noted above.

Letters to the Editor

By submitting a letter to the editor of this journal for publication, you agree that Thomson Legal & Regulatory Limited, trading as Lawbook Co., may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

Manuscript

- Manuscript must be original, unpublished work that has not been submitted for publication elsewhere. Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript.
- Manuscript must be submitted electronically via email or on disk in Microsoft Word format.
- Manuscript should not exceed 4,500 words (including footnotes) for articles or 1,500-2,000 words for section commentary or book reviews. An abstract of 100-150 words is to be submitted with article manuscripts.
- Proofs pages will be sent to contributors. Authors are responsible for the accuracy of case names, citations and other references. Excessive changes cannot be accommodated at proof stage.
- Contributors of articles receive 25 free offprints of their article and a copy of the part in which the article is published. Other contributors receive a copy of the part to which they have contributed.
- Articles published are critically appraised or reviewed by an academic or professional peer of the author for the purposes of maintaining the standards of the journal.

Style

1. Levels of headings should be clearly indicated (no more than four levels).

2. Cases:

- Case citation follows case name. Where a case is cited in the text, the citation should follow immediately rather than as a footnote. Give at least two and preferably all available citations, the first being the authorised reference.
- Australian citations should appear in the following order: authorised series; Lawbook Co./ATP series; other company series (ie CCH, Butterworths); media neutral citation.
- “At” references should only refer to the best available citation, eg: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 34; 66 ALJR 408; 107 ALR 1.
- Where only a media neutral citation is available, “at” references should be to paragraph, eg: *YG v Minister for Community Services* [2002] NSWCA 247 at [19].
- For international cases best references only should be included.

3. Legislation should be cited as follows: *Trade Practices Act 1974* (Cth), s 51AC. The full citation should be repeated in footnotes.

4. Books should be cited as follows: Cairns B, *Australian Civil Procedure* (5th ed, Lawbook Co., 2002) p 52. In footnotes do not use *ibid* or *op cit*. The following style is preferred:

4. Austin RP, “Constructive Trusts” in Finn PD (ed), *Essays in Equity* (Law Book Co, 1985).
5. Austin, n 4, p 56.

5. Journal articles should be cited as follows: Odgers S, “Police Interrogation: A Decade of Legal Development” (1990) 14 Crim LJ 220. Wherever possible use official abbreviations not the full name for journal titles. In footnotes do not use *ibid* or *op cit*. The following style is preferred:

6. Sheehy EA, Stubbs J and Tolmie J, “Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations” (1992) 16 Crim LJ 220.
7. Sheehy et al, n 6 at 221.

6. Internet references should be cited as follows: Watson RS, *Federal Offences* (Lawbook Co., subscription service) at [5.11130], <http://subscriber.lawbookco.com.au> viewed 25 June 2002. Underline the URL and include the date the document was viewed. For further information visit <http://www.lawbookco.com.au> or contact the Production Editor.

SUBSCRIPTION INFORMATION

The *Australasian Dispute Resolution Journal* comprises four parts a year.

Customer Support Team and sales inquiries:

Tel: 1300 304 195

Fax: 1300 304 196

Web: www.lawbookco.com.au

Email: LRA.Service@thomson.com

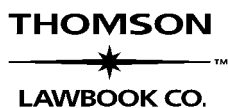
Editorial inquiries:

Tel: (02) 8587 7000

HEAD OFFICE

100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100



© Thomson Legal & Regulatory Limited ABN 64 058 914 668 trading as Lawbook Co.

ISSN 1441-7847

Typeset by Lawbook Co., Pyrmont, NSW
Printed by Ligare Pty Ltd, Riverwood, NSW