
Index

Aboriginal mediation

- appropriate model, 198-205, 223-230
 - AADRSWA service, 199, 200, 224-225, 229
 - CJCNSW, in, 200-204, 225, 227, 229
 - DRBQ program, 198-199, 201, 227
 - DSCV program, 228, 230
 - early and holistic intervention, 226-228
 - fairness rather than neutrality, 202-203
 - flexibility of stages, 224-226, 228
 - good practice, 198, 205, 225-226
 - specific Aboriginal program, 198-200
- crime prevention, 228
- cultural effectiveness, 223-224
- customary practice, 225-226
- discretionary private session, 225
- elders, involvement of, 224
- family violence issues, 227
- mediators, 201-205
 - access to, 201-202
 - appointment of, 202-204
 - control of process by, 204-205
 - trust and credibility, 203-204
- pre-meditation and post-meditation, 228-229

Administration of justice

- causes of dissatisfaction, 72-77
- individualised justice, 76-77, 81, 155
- traditional adjudicative process, substantial alteration, 77
- transformative mediation and social justice, 114-123

Admissibility of documents

- court-ordered mediation, at, 69, 139-140

Alternative dispute resolution (ADR)

- Australian legal framework, in, 42, 249, 254-258
 - court-annexed ADR, 43, 72, 78-82, 144-155, 221-222, 259-261, 264-265
- clinical legal education programs, 42
- common law jurisdiction, 17, 206-207
- community consciousness, 42
- design features, 95
- doctrine of precedent, and, 206-213
- family dispute resolution *see* **Family dispute resolution (FDR)**
- federal and state governments support, 43-44
- financial services consumers, for, 25-41

- franchise disputes *see* **Franchise mediation**
- Hong Kong mediation schemes, 17-24
- indigenous model *see* **Aboriginal mediation**
- individualisation and court-connected mediation, 259-265
- Land and Environment Court of NSW *see* **Land and Environment Court of New South Wales**
- local council disputes, in *see* **Local councillor conduct panels**
- law students, for, 42-48
 - case for teaching at law school, 43-44
 - La Trobe Law study and findings, 45-48
 - legal education, 44-45
- NADRAC *see* **National Alternative Dispute Resolution Advisory Council (NADRAC)**
- online *see* **Online dispute resolution (ODR)**
- owners corporations *see* **Owners corporations**
- program in New South Wales courts, 12
 - success of, 221-2
- public awareness and access issues in Victoria, 28-30, 33
- qualifications of practitioners, 29, 143
- referral loss, 30
- rule of law, 10-12, 16, 59, 207-208
- traditional arguments against, 206-211
 - implications, 211-213
- varieties of dispute processing, 75-76
- Australian Centre for International Commercial Arbitration (ACICA)**
 - arbitration rules, under, 257
- Australian Competition and Consumer Commission (ACCC)**
 - franchise disputes, 89-90, 94
- Australian Law Reform Commission (ALRC)**
 - contested disputes heard in court, estimates, 159
 - review of federal civil justice system, 43
- Collaborative law**
 - appeal to family lawyers, 179-180
 - collaborative practice, 179-188
 - framework of, 180
 - impact of, 181
 - principles, 180-183
 - process of engagement of allied professionals, 183
 - ethics, 180-181, 183-187
 - advantages of alternative ethical guidelines, 186-187
 - Australian guidelines, 184
 - current ethics rules and guidelines, 183-185
 - disadvantages of alternative ethical guidelines, 185-186
 - United States, in, 183-184

International Association for Collaborative Professionals (IACP), 184-185

lawyer, role of, 182-184

current ethics rules and guidelines, 183-184

professionals, allied, 182-183

current ethics rules and guidelines, 184-185

Community Justice Centres NSW (CJCNSW)

indigenous mediators, 200-204, 225, 229

mediation model, 225

domestic violence, where, 227

Confidentiality

dispute resolution, in, 7-8, 93

franchise mediation, breach where, 93

Conflict resolution behaviour

aggression and violence, 239-242, 247-248

media violence, 239-240, 248

peaceful conflict resolution strategies, 242, 246

video games *see* **Video games**

Conflict resolution practitioners

communication and cross-cultural conflicts, 193

competency training, 196-197

cultural awareness and conflict resolution, 193-195

mindfulness, 195

recognition and respect, 195-196

cross-cultural communication, 189

ethnocentrism, 192-193

issues, 190-193

prejudice, 191-192

stereotypes, 190-191

Construction industry

mediation agreement in *Hughes v Yates*, 219-220

mediation in Hong Kong, 17-18, 20, 24

nursing home dispute over allegedly defective

product, 5-6

Consumer credit disputes

access for credit consumers to dispute resolution

process, 25-41

availability, 26-27, 29, 36

demographic barriers, 33-35

external disputes resolution (EDR) schemes, 25-26, 28,

30, 33, 37, 39-41

geographical barriers, 30-33

legal needs and issues, 35-39

- public awareness, 28-30, 34
- Victorian research findings, 29-34, 36, 38-39
- vulnerable consumers, 33-39
- adequate advice/information for consumers, 28-30, 37-39
 - additional advisory services, 39
 - awareness campaigns and further education, 37, 40
 - jurisdictional information, 41
- Banking and Financial Services Ombudsman, 26
- complaints-handling, 25-27, 28
 - best practice, 27-28, 39
 - characteristic of effective scheme, 27-28
- Consumer Action Law Centre, 26
 - consumer representation, 38-39
- Consumers Affairs Victoria (CAV), 25-26, 29-33, 38
- Financial Industry Complaints Service (FICS), 26, 28, 29, 34
 - review findings, 34
- Law and Justice Foundation research, 35-36
- Consumer, Trader and Tenancy Tribunal of New South Wales**
- civil jurisdiction, 12-13
- conduct of proceedings, 14-15
- Costs**
- excessive, 12
- Hong Kong, consequences of mediation, 23
- litigation, of, 8-9, 156-157
- parties not mediating in good faith, where, 5-9
- “thrown away”, whether, 5-8
- Courts**
- characteristics of, 10-12
- disputes, role in, 10
 - concept of multi-door courthouse, 72, 78-82, 144-155
 - court annexed mediation, success of, 221-222
 - dispute resolution processes, 78-82, 152-155
 - judicial power, 11-16
 - tribunals, distinguished, 12-16
 - use of, 154
- formality and legalism of adversarial system, 12, 43, 75
 - background issues, 72-75, 206-207
- Land and Environment Court *see* **Land and Environment Court of New South Wales**
- New South Wales Supreme Court decisions
 - Al Mousawy v JA Byatt Pty Ltd*, 139-140
 - National Australia Bank v Landy-Chen-Conway*, 140-142
- rule of law, 10-12, 16, 59, 209

rules of evidence, 12

Victorian decisions

Guss v Aldy Corp, 220-221

Louis v Galbally & O'Bryan, 69-70

Dawkins Report

reforms, 158

Divorce recovery workshop *see* **St Ives Divorce Recovery Workshop**

Doctrine of precedent

concept of, 206-207

access to justice, 211

dispute resolution processes, in, 206-213

conceptual arguments, 209

hard cases, 207-209

hard v easy cases, 209-211

implications, 211-213

specific argument, 209-211

Family dispute resolution (FDR)

application in family law system, 105-113, 170-179

assessment for mediation, 107-109

bypassing FDR, 171

capacity to participate in FDR, 172-173

certificates, 104-105, 109-11, 113, 170

court requirements, 105-106

types issued, 105

child inclusive mediation practice, 111-113

choice for clients, 104

family violence, 122, 171, 176

advantages of FDR in, 171

appropriate response, to, 172-173, 178

children, adverse effects on, 173

domestic violence in Aboriginal communities, 227

ensuring effective responses to, 173-176

identifying, 171-172

safety, exacerbation of risks to, 172

family violence cases, 170-171

information that clients can prepare for mediation, 111

practitioners, 104-113, 170-172, 177

collaborative practice, 179-188

determining whether to proceed or screen out, 107-109, 176

developing effective policies and procedures, 173-176

procedural information for clients, 109-110

referral of clients to family relationship centre, 107-109, 113

- responding to family violence during dispute resolution, 176-178
- role prior to referral of clients, 109-111
- safety planning, 175
- screening and risk assessment, 107-109, 111-113, 173-175
- specialised FDR formats, 177
- support and advocacy, 177
- training for dispute resolution providers, 177-178
- Family Relationship Centres (FRCs)**
 - focus, 44
 - non-adversarial mode, 43-44
 - recovery workshop after divorce and separation *see* **St Ives Divorce Recovery Workshop**
- Financial services**
 - alternative dispute resolution (ADR) services, 25, 28-30, 33, 35, 37
 - systemic issues, 25-26, 29, 36
 - complaints-handling, 25-26, 39-41
 - Australian Standards, 27-28
 - International Standard, 27
 - credit consumers *see* **Consumer credit disputes**
 - external disputes resolution (EDR) schemes, 25-26, 37, 39
 - ASIC approved EDR schemes, 26
 - compliance and best practice standards, 28, 39
 - limitations, 26, 28, 30, 33, 40-41
 - Financial Industry Complaints Service (FICS), 26, 28-29
 - complaints, 34
 - review findings, 34
 - internal disputes resolution (IDR) schemes, 25-26, 34
 - international arbitration
 - bilateral investment agreements (BITs), 258
 - International Convention of the Settlement of Investment Disputes (ICSID), 258
- Franchise agreement**
 - aspects of, 83-85
 - definition, 84
 - obligations of parties, 83-84
 - regulation under *Trade Practices Act*, 84, 90
 - typical contractual clause, 85-86
 - dispute resolution, 86
 - law and jurisdiction, 86
- Franchise Code of Conduct**
 - application to parties, 83-85, 91-94
 - commencement date, 83
 - complaints handling procedure under, 84-85, 91-94
 - mandatory code, 84

post-mediation process, 94

Franchise mediation

advantages of, 88, 94

complaints, 83, 89-94

 ACCC records, 89-90

 handling procedure under Code, 84-85

 issues, 90

compulsory, 84, 86-87

court rules, 86-87

deficiencies and problems, 91-94

 breach of confidentiality, 93

 franchisor without independent advice, 93

 inadequate preparation, 94

 inequality of negotiating power, 93

 limited authority of representatives, 92-93

 refusal to compromise, 94

 unrepresented franchisees, 93

documents used for mediation, 87-88

form of agreement for appointment of mediator, 87

franchise disputes, 83, 89-94

 advantages of mediation, in, 88

 background issues, 83-89

 default notice, 85, 91

 issue of default notice prior to mediation, 91

 legal proceedings, 85

good faith obligations of parties, 83, 91-92, 94

objectives, 83

Office of Mediation Adviser (OMA)

 aspects of role, 83, 85, 87-89

 number of mediators on national panel, 90

 pro bono scheme, proposed establishment of, 93

OMA mediation agreement, 92

post-mediation process, 94

Franchising systems

Australian statistics, 88-89

 United Kingdom, compared, 89

 United States, compared, 88-89

Hong Kong

alternative dispute resolution, 18-19, 21, 23

civil justice reform, 18-19

conciliation and mediation in statutory scenarios, 21-22

 Labour Department, regarding, 18, 21

mediation practice, in, 17-24

case law, 22-23

construction industry, in, 17-18, 20, 24

family disputes, in, 17-20

matrimonial disputes, in, 18, 20-21, 24

mediator accreditation, 23-24

pilot mediation schemes, 19-22, 24

promoters and practitioners, 23-24

UNCITRAL Model Law, in, 253, 255

voluntary mediation, 19, 20-23

judicial support, 22-23

Working Party on Civil Justice Reform,
recommendations, 18-20

Hong Kong International Arbitration Centre (HKIAC)

role, 18, 23

standards and accreditation, 18

ICSID

International Convention of the Settlement of Investment Disputes, 258

Individualisation

court-connected mediation, and, 259-265

establishing issues, 263-265

litigant's opening statements, 261-263

setting agenda, 263-265

Insurance

decision in *HIH Casualty & General Insurance Ltd*

(*in liq*) v *Wallace*, 129, 132-133

Insurance Act 1902 (NSW) relevance, 129, 132

International arbitration

confidentiality and privacy in, 257-258

International Arbitration Act (IAA), 132-133, 249, 251-252, 256-257

amendment by UNCITRAL Model Law, 253-254

choice of parties, under, 255-257

other important provisions, 257

International Convention of the Settlement of Investment Disputes (ICSID), 258

McCarran-Ferguson Act, 130-132

Murphy Oil USA Inc v SR International, 129-130

New York Convention, 129-133, 249, 251-252, 257

enforcement of arbitration awards, 251-253

enforcement of arbitration clauses, 249-251

Federal Court decision in *Comandate Marine Corp v Pan Australia Shipping*, 250-251, 258

NSW Supreme Court decision, 129, 132-133

prohibitive US state laws, 131-133

- slip is not an agreement, under, 133
- North American Free Trade Agreement (NAFTA), 255, 258
- UNCITRAL Model Law, 253-254, 256-257
 - Commercial Arbitration Act* (CAA) and, 249, 255-257
 - international commercial arbitration, 254-255
 - scope of application, 254-257
- International Association for Collaborative Professionals (IACP)**
- role, 184-185
- La Trobe Law**
- alternative dispute resolution, student study, 45-48
 - background, 42, 45
 - findings, 47-48
 - future direction, 48
 - method, 46
 - results of demographic survey, 46
 - results of questionnaire, 46-47
 - validation of, 48
- elective conflict resolution subjects, 45
- Land and Environment Court of New South Wales**
- Commissioners, appointment of, 153
- court jurisdiction, 144-145
- court personnel, 145, 153
- dispute resolution processes, 78-82, 144-152, 155
 - administrative merits review, 78, 146
 - available processes, 75-76, 78, 145-147, 155
 - concept of multi-door courthouse, 72, 78, 82
 - conciliation, 75, 78, 145-146, 149-150, 153
 - criteria for screening and referral, 79-82, 148-150
 - diagram of operation, 82
 - evaluation of, 78-82, 152-155
 - intake process, 79
 - intake screening, diagnosis and referral, 79-82, 147-148
 - litigation, 78, 147, 153
 - mediation, 75-76, 78, 146, 149, 154
 - neural evaluation, 78, 146, 149
 - reference to external referee, 147
 - referral process, 82
 - screening, 79, 148-150
 - support for, 154-155
 - timing of referral, 150-152
 - use of, 154
- dissatisfaction with administration of justice, 72-77

Legal practice

argument for incorporating personal morality, 49-50, 54

benefits to legal negotiator, 50-52

better relationships with clients, 51-53

community expectations, 53

job satisfaction, 50-51

lack of social skills, concerns, 53

more effective negotiation techniques, 52-53

partisanship concerns, 53

recognition of client's needs, 51-52

billable hours, 50

decision in *Louis v Galbally & O'Bryan*, 69-70

family dispute resolution role *see* **Family dispute resolution (FDR)**

Litigation

Australian universities in court, 156-157, 163, 169

changing culture, 167-168

complexity of cases, 162-163

dispute handling options, 157

dissatisfied customers, 167

examples, 163

Federal Court, in, 165

increase in litigation, 156-157, 160-169, 168-169

parties and types of dispute, 161-163, 167, 169

reasons for, 165-168

regulation as reason for, 165

reporting practices, 164

costs of, 8-9, 156-157, 169

individualisation and court-connected mediation, 259-265

establishing issues, 263-265

litigant's opening statements, 261-263

setting agenda, 263-265

Land and Environment Court of New South Wales, in, 78-79, 147, 153

legal representatives, role, 261-262

recovery of borrowed money, 140-142

review by ALRC of federal civil justice system, 43

Local councillor conduct panels

aim of, 124

Codes of Conduct (CoC) for councillors, 124

dispute resolution framework, 124-125

establishment, 124

evaluation of, 126-127

proposed operation, 125-126

recommendations for enhancement, 127-128

Media violence

psychological effects of, 239-240

Mediation

Aboriginal mediation *see* **Aboriginal mediation**

admissibility of documents, at, 69, 139-140

alternative system, 75, 95

benefits, 9

breach of mediation agreement, 70-71

compulsory mediation or other ADR programs in NSW, 12

 court-ordered mediation, 139-140

 success of, 221-222

decision in *Guss v Aldy Corp*, 220-221

decision in *National Australia Bank v Landy-Chen-Conway*, 140-142

four paradigms of mediation practice, 95

franchise disputes *see* **Franchise mediation**

Hong Kong, in, 17-24

individualisation and court-connected mediation, 259-265

 establishing issues, 263-265

 litigant's opening statements, 261-263

 setting agenda, 263-265

Land and Environment Court of New South Wales, in, 78-82, 146, 149, 154

orders by Supreme Court for, 5-6

owners corporations *see* **Owners corporations**

parties mediating in good faith, 5-9

 obligations of parties in franchise dispute, 83, 91-92, 94

transformative mediation model, 114-115, 123

 concerns, 119-121, 123

 disconnect with social justice, 114-123

 owners corporation disputes, in, 101-103

 practice of, 118-119

 premise of, 117-118

 suggested ways forward, 121-123

VCAT orders for, 6-8

 decision in *Louis v Galbally & O'Bryan*, 69-70

Mediators

accreditation, of, 103, 143

indigenous mediator, 201-202

 AADRSWA, under, 199-200, 224-225, 229

 appointment, 202-204

 CJCNSW approach, 200-204, 225, 229

 control of process, 204-205

- cultural appropriateness, 223-227
- DRBQ program, 198-199, 201, 221
- DSCV program, 228, 230
- trust and credibility, 203-204
- National Mediator Accreditation System, 103
- National Alternative Dispute Resolution Advisory Council (NADRAC)**
- dispute resolution, 95, 102
- indigenous ADR services, 202, 223-226
- New South Wales**
- case management powers under *Civil Procedure Act 2005*, 12
- compulsory mediation or other ADR programs, 12
- dispute resolution processes in Land and Environment Court *see* **Land and Environment Court of New South Wales**
- Supreme Court decisions
 - Al Mousawy v JA Byatt Pty Ltd*, 139-140
 - HIH Casualty & General Insurance Ltd (in liq) v Wallace*, 129, 132-133
 - National Australia Bank v Landy-Chen-Conway*, 140-142
- New South Wales Law Reform Commission (NSWLRC)**
- consumer credit information, 29
- indigenous mediation management, approach to, 200
- New York Convention**
- international arbitration, role in, 129-133, 249
 - enforcement of arbitration awards, 251-253
 - enforcement of arbitration clauses, 249-251
 - Federal Court decision in *Comandate Marine Corp v Pan Australia Shipping*, 250-251, 258
 - recent case in NSW Supreme Court, 129, 132-133
 - recent decision of House of Lords, 250
 - slip is not an agreement, under, 133
- North American Free Trade Agreement (NAFTA)**
- Canadian case involving arbitration under, 255
- investor arbitrations under, 258
- Office of Mediation Adviser (OMA)**
- franchise disputes role, 83, 85, 87-89
- number of mediators on national panel, 90
- pro bono scheme, proposed establishment of, 93
- Online dispute resolution (ODR)**
- alternative dispute resolution, as, 55
- available systems, 55-56
- challenges for non-English speaking Asian internet users, 55
 - absence of non-verbal clues, 57-59
 - difficulties for non-English speakers, 56-58
 - homogenisation of culture and language, 56, 59

- language and internet translation services, 56
- level of disclosure, 60
- missing meaning, 57-59
- Chinese, Japanese and Korean symbols and characters, 57
- Chinese language, operation of, 57-58
- computerised third-person mediation model, 62
- countries using, 55
- cultural systems and theories, 59-60
 - collectivist and individualist tendencies, 62
 - cultural norms, 61
 - diffusion of English and ecology of languages paradigms, 63
 - enculturation, 61
 - language and, 56-56, 63
- development of, 59-63
 - barriers to, 60-62
 - new design, 62-63
- universal approach to, 62-63
- Owners corporations**
- apartment developments, 95, 97
 - increase in, 95-96
- community in, 98
- context of conflicts, 95
- design of dispute system, 97-99, 103
 - selected issues, 102-103
- dispute resolution under *Owners Corporation Act 2006* (Vic), 96-103
 - appropriate mechanisms, 96-97, 102
 - commencement date, 96
 - compulsory system, 102
 - informed choice of owners corporation committee, 102-103
 - three-tiered process, 97
- disputes arising, 96
- emotion in conflict, role of, 98-99, 103
- master planned estates (MPEs), 95, 97
 - common disputes, 96
 - definition, 96
 - increase in, 95-96
- medium density townhouses, 95, 97-8, 103
 - common disputes, 96
 - increase in, 95-96
- models of mediation, 96, 99-102
 - facilitative and evaluative mediation, 99-101
 - transformative mediation, 101-103

Victorian regulation, 96-103

VCAT role, 97, 102

Personal morality in legal practice

argument for, 49-50, 54

benefits to legal negotiator, 50-53

better relationships with clients, 51-53

concerns, 53

Queensland Commercial and Consumer Tribunal

mediation agreements

Dowell v Caruso decision, 70-71

Hughes v Yates decision, 219-220

Separation of powers doctrine

courts and tribunals, affecting, 10-16

St Ives Divorce Recovery Workshop

content of course, 231-232

establishment of, 231, 236

ethos of workshop, 235

evolution of, 233

facilitators, 234-238

selection of, 234

main issues, 236-238

domestic violence, 237

participants' expectations, 236

program structure, 232

stages of grief, 232-233

word of mouth contact, 236

Tribunals

categories of, 12-13

disputes, role in, 11, 12-16

courts, distinguished, 10-16

credit disputes, in *see* **Consumer credit disputes**

disadvantages for parties, 14

functional and operational characteristics, 14-15

informality of procedures, 13-15

members of, 13-15

non-adversarial system, 15

quasi-judicial role, 12-13

Queensland Commercial and Consumer Tribunal decisions

Dowell v Caruso, 70-71

Hughes v Yates, 219-220

review jurisdiction, where, 13

rules of evidence, 13

taking of evidence by telephone, 14

VCAT

Guss v Aldy Corp, 220-221

role in owners corporation disputes, 97, 102

UNCITRAL Model Law

Australian adoption of, 253-254, 256-257

scope of application, 254-257

Commercial Arbitration Act (CAA) and, 249, 255-257

international commercial arbitration, 254-255

United Nations Educational and Scientific Organization (UNESCO)

Director-General's comment on dialogue in globalising world, 62

Universities

disputes handling in, 156-157, 163, 169

options, 157

litigation, in, 160-169

aspects of research, 158-159

changing culture, 167-168

complexity of cases, 162-163

costs, 156-157, 169

dissatisfied customers, 167

examples, 163

Federal Court, in, 165

increase in, 156-157, 160-169, 168-169

parties, 161-162, 167, 169

reasons for, 165-168

regulation as reason for, 165

reporting practices, 164

strengths and limitations of data, 159-160

type of dispute, 161-162, 167, 169

teaching ADR at law schools, 42-48

case for, 43-44

La Trobe Law study and findings, 45-48

legal education, 44-45

Victoria

alternative dispute resolution, 44

consumer credit disputes, in, 25-41

jurisprudential approach, 44

Collingwood Neighbourhood Justice Centre, 44

Commercial Arbitration Act (CAA), 249, 255-257

Dandenong Drug Court, 44

Dispute Settlement Centre Victoria (DSCV) program, 228, 230

Heidelberg Family Violence Court, 44

Koori Court, 44, 228
local council disputes *see* **Local councillor conduct panels**
owners corporations *see* **Owners corporations**
Supreme Court decision in *Louis v Galbally & O'Bryan*, 69-70
VCAT decision in *Guss v Aldy Corp*, 220-221
Victorian Law Reform Commission
civil justice reform proposals, 44
Video games
children and young adults, 239-48
 aggression studies, 240-241
 attraction, 240-242
 catharsis view, 241
different purposes, 242-243
effects of violence, 239-242, 247-248
 media violence, 239-240, 248
genres of Next-Gen's top 50 games, 243-246
options provided by games, 241-242
peaceful conflict resolution strategies, 242, 246
psychologists' fears of long-term exposure, 240, 247
responsibilities of image makers, 242
simulation of impossible situation, 246-247
transfer of training, 242-243