

# AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

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## CASENOTES

- Jurisdiction to make Tribunal Order from mediated agreement, the Wise Man clause and mediation media watch – David Spencer** ..... 5

## ARTICLES

**Practical realities in dispute resolution – Ruth Charlton**

This article considers the practical realities and challenges for dispute resolution practitioners, including power-balancing concepts, mandatory mediation and the effects of the National Accreditation and Practice Standards. Also discussed are some of the historical aspects of alternative dispute resolution, including the intense scrutiny of this activity and how legislative encroachments may have impacted on the original mediation rationales. Finally, the view is promoted that the responsibilities and performance tasks expected of dispute resolution practitioners need to be balanced with a Charter of Rights for Mediators and Dispute Resolution Practitioners. .... 10

**The partial loss of voluntariness and confidentiality in mediation – Micheline Dewdney**

When mediation was first applied in Australia three decades ago, voluntariness and confidentiality were considered to be vital features. Today, practicing mediators need to remind parties that there are exceptions to both these aspects of mediation. This article focuses more on confidentiality than voluntariness. Voluntariness is now affected by legislation which requires an attempt to try mediation before going to court. The article refers to many current statutes protecting the confidentiality of mediation due to legislative developments so that mediators now need to state that mediation is confidential “so far as the law allows”. The article also covers the advantages, disadvantages and limitations of confidentiality, statutory provisions and exceptions to confidentiality, cultural implications, the admissibility of mediated agreements, and mediators’ reporting obligations. The article concludes with the observation that, on the whole, mediators’ appear to be far more concerned than the parties themselves about confidentiality. .... 17

**Understanding the dynamics of conflict within business franchise systems – Jeff Giddings, Lorelle Frazer, Scott Weaven and Anthony Grace**

High levels of franchising density and impressive growth in both franchise units and sector turnover have seen Australia described as “the franchise capital of the world”. In the Australian Franchising 2006 survey, 35% of franchisors reported being involved in substantial disputes with franchisees, raising questions in relation to both the nature of power sharing within franchising relationships and the suitability of current sector regulation. This article reports on research on franchising conflict conducted by Griffith University academics in conjunction with the Australian Competition and Consumer Commission. Causes of franchising conflict include system compliance, communication issues, misrepresentation concerns, and intervention of third parties, as well as profitability

concerns. While mediation-type processes have generally been productive in managing franchising conflict, such processes will not always be suitable. A broader range of processes could be utilised, along with systems-based approaches. .... 24

**Dialogue and alignment in preparing families for family group conferences – Paul Ban**

The concepts of “dialogue” and “alignment” are promoted by Senge in *The Fifth Discipline* as ways of overcoming uneven growth when working with organisations to maximise their potential. These concepts can be applied to working with extended families in child protection matters where they are prepared for a family group conference by an independent facilitator. Principles from conflict coaching can be used by the facilitator to ensure extended family members are able to overcome intra- and inter-personal conflict in order to focus on the needs of their children. Family members have a greater potential to be able to engage in dialogue following alignment than staff working in organisations due to their long-standing invisible patterns of communication. .... 33

**ADRA’s process for handling complaints against mediators – Peter Irving**

National accreditation for mediators has impelled mediation organisations to consider a process for handling complaints against mediators. The Australian Dispute Resolution Association (ADRA) convened a forum in Sydney to devise a complaints process that would be appropriate for mediation. A group of some 33 people met over several months from September 2007. The result was a complaints handling process in two stages: Stage 1 for a mediation organisation; and Stage 2 for a national body. Any organisation is free to adopt Stage 1 as ADRA has done. Subsequently, Stage 1 was approved by the National Mediation Conference in Perth in September 2008. Stage 2 could not be approved because no entity yet exists to implement it. This article discusses features of ADRA’s system for dealing with complaints. .... 41

**Discussing metaphors in mediation and negotiation – Deanna Foong**

Metaphors are not merely practical verbal shortcuts, or decorative, figurative language. According to modern metaphor theory, metaphors structure our thoughts and, perhaps, are even what make our thoughts possible. This article explores why an understanding of metaphors is important for negotiators and mediators. It begins by defining a metaphor, and exploring its characteristics. It then explains how the negotiators’ and mediators’ own metaphors impact their attitudes to, and conduct of, negotiation and mediation, and how they may, by using their counterparts’ or their clients’ metaphors, generate rapport and enhance the negotiation and mediation process. .... 47

**Questions of mediator neutrality and researcher objectivity: Examining reflexivity as a response – Susan Douglas**

Mediator neutrality is both a central tenet of mediation practice and a highly critiqued concept; it is problematic in theory and elusive in practice. Researcher objectivity often creates similar dilemmas for research practice. One common theme in attempting to resolve such dilemmas has been to advocate reflexivity in the practice of mediation and in the practice of research. This article traces similarities in questions of mediator neutrality and researcher objectivity and explores the theoretical underpinnings of reflexivity in research in order to ground a consideration of its significance for mediation practice. .... 56

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    - <sup>2</sup> Hayton, n 1, p 286.
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