

AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

Volume 20, Number 2

May 2009

CASENOTES

- Costs of mediation v costs of proceedings, costs arguments as a qualified exception to confidentiality, and mediation media watch** – *David Spencer* 71
- The calamitous case of the cobbled courtyard** – *Lise Barry* 75

ARTICLES

Medical negligence dispute resolution: A role for facilitative mediation and principled negotiation? – *Tony Bogdanoski*

This article critically examines the potential of using facilitative mediation and principled negotiation to resolve medical negligence disputes. It argues that such methods of dispute resolution are a better means of resolving these complex disputes, in contrast to the conventional use of settlement negotiations, positional bargaining and litigation, since they are inherently capable of addressing the non-financial needs and interests of the parties directly involved in the dispute. However, the article also recognises there can be problems with using these methods of dispute resolution due to the complex power relations between the parties involved. Nevertheless, it ultimately concludes that the benefits of using facilitative mediation and principled negotiation outweigh their possible limitations in the medical negligence arena. 77

No longer neutral: Practitioner power in compulsory (family) dispute resolution – *Nigel W Polak*

This article explores the ethics of power in compulsory dispute resolution. Recent changes to the *Family Law Act 1975* (Cth) mean that the traditional ethical bastions of voluntary participation and mediator neutrality are no longer applicable to contemporary family dispute resolution. In addition, practitioners are required legally to assert expert power in relation to the “best interests” principle and make decisions as to the “genuine effort” made by participants. While “child-focused” and “child-inclusive” practices are current trends towards establishing ethical practice, it is argued that an ongoing stance of reflexivity towards individual and collective practice is required. 88

Humour in mediation: Sparking laughter through improvisation – *Kathy Douglas and Andrew Bayly*

In mediation practice mediators develop interventions to assist parties in the exploration of their conflict. Humour is one method of attempting to ease tension between parties and engender positive emotions in the mediation. However, not all mediators are comfortable using humour in the mediation setting. Dramatic improvisation, the art of creating stories without preparation, can incorporate comic elements. Arguably, learning about improvisation can assist mediators to trust their comic instincts and include humour in the interventions that they use in mediation. This article suggests various improvisation games to assist mediators to develop the intervention of humour in their practice. 96

Mediation and facilitation – commonalities and differences – Robin Saunders

Experience with mediation and facilitation is used to draw together common threads and to examine some areas of significant differences. Facilitation is broadly viewed as including traditional facilitation of groups wishing to explore issues of concern, as well as chairing consultative committees and public meetings, where there is often significant controversy. While the process and management of different forums take quite different forms, the importance of the principles of conflict management, seen through the lens of empowerment, are drawn out in examples. Perhaps the key difference between mediation and facilitation arises through the presence of the client, the client's understanding of the purpose of consultation, and the way the facilitator's duty to the client is perceived by all parties. 104

Not happy and letting you know it – Michelle Brenner

This article explores some of the issues that relate to complaint handling. Using a broad lens that catches the complex human experience of complaining, as well as the more strategically designed systemic approach to complaint handling, the reader is left with a comprehensive perspective. The personal and the professional come together to take society a little further down the road of peace-making. 112

Mediation in the amended civil justice reform of Hong Kong – Sarah E Hilmer

Hong Kong has just enforced its new Civil Procedure Rules on 2 April 2009. The Working Party of the Civil Justice Reform put forward a number of mediation-related recommendations in its Interim Report in 2001. The Final Report of 2004 put forward six proposals, including mandatory mediation. However, out of these six proposals, only three have been accepted. Mandatory mediation has not been supported at this stage. This article discusses the initial six proposals as well as the final recommendations and provisions. 120

BOOK REVIEWS

Conflict and Dispute Resolution: A Guide for Practice by Mieke Brandon and Leigh Robertson 129
The Family Law Handbook by Maree Livermore 130

Submission requirements

All contributions to the journal are welcome and should be emailed to the Production Editor, *Australasian Dispute Resolution Journal*, at LTA.adrj@thomsonreuters.com for forwarding to the Editor.

Licences

- It is a condition of publication in the journal that contributors complete a licence agreement. Licence agreements can be downloaded at http://www.thomsonreuters.com.au/support/as_contributors.asp and emailed with the submission or mailed separately to the Production Editor, *Australasian Dispute Resolution Journal*, Thomson Reuters (Professional) Australia Limited, PO Box 3502, Rozelle, NSW 2039.

Letters to the Editor

- By submitting a letter to the Editor of this journal for publication, you agree that Thomson Reuters, 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 or accepted for publication elsewhere, including for online publication.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript on a separate page.
- Manuscript must be submitted electronically via email in Microsoft Word format.
- Manuscript should not exceed 4,000 words for articles or 1,500-2,000 words for section commentary or book reviews.
- An abstract of 100-150 words must be included at the head of articles.
- Authors are responsible for the accuracy of case names, citations and other references. Proof pages will be emailed to contributors but excessive changes cannot be accommodated.
- **Graphics** (diagrams and graphs) to be grayscale; in .jpeg format; no more than 12 cm in width; within a box; of high resolution (at least 300 dpi); font is to be Times New Roman, no more than 10pt. The heading for a graphic should be placed outside the box.

Peer review

- This journal complies with the Higher Education Research Data Collection (HERDC) Specifications for peer review. Each article is, prior to acceptance, reviewed in its entirety by a suitably qualified expert who is independent of the author.

Style

1. **Levels of headings** must be clearly indicated (no more than four levels).
2. **Unpointed style** is to be used – there are no full stops after any abbreviation or contraction.
3. **Cases:**
 - Where a case is cited in the text, the citation follows immediately after the case name, not as a footnote.
 - Authorised reports must be cited where published, and one other reference can be used in addition.
 - For “at” references use media-neutral paragraph numbers within square brackets whenever available.
 - For international cases best references only should be used.
4. **Legislation** is cited as follows:
 - *Trade Practices Act 1974* (Cth), s 51AC (including in full within footnotes).
5. **Books** are cited as follows:
 - Ross D, *Ross on Crime* (3rd ed, Lawbook Co, Sydney, 2006) pp 100-101.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ¹ Hayton D, “Unique Rules for the Unique Institution, The Trust” in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) p 284.
 - ² Hayton, n 1, p 286.
6. **Journals** are cited as follows:
 - Kirby M, “The Urgent Need for Forensic Excellence” (2008) 32 Crim LJ 205.
 - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
 - ³ Trindade R and Smith R, “Modernising Australian Merger Analysis” (2007) 35 ABLR 358.
 - ⁴ Trindade and Smith, n 3 at 358-359.
 - Wherever possible use official journal title abbreviations.
7. **Internet references** are cited as follows:
 - Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, subscription service) at [16.340], <http://www.thomsonreuters.com.au/default.asp> viewed 25 June 2007. Underline the URL and include the date the document was viewed.

SUBSCRIPTION INFORMATION

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

Customer service and sales inquiries:
Tel: 1300 304 195 Fax: 1300 304 196
Web: www.thomsonreuters.com.au
Email: LTA.Service@thomsonreuters.com

Editorial inquiries:
Tel: (02) 8587 7000

HEAD OFFICE
100 Harris Street PYRMONT NSW 2009
Tel: (02) 8587 7000 Fax: (02) 8587 7100



THOMSON REUTERS

© 2009 Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 1441-7847

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW