

AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

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CASE NOTES

- Admissibility of evidence created for dispute resolution; the timing of an order for mediation; and mediation media watch – David Spencer** 5

ARTICLES

ADR processes and their role in consensus building – Hon Justice Andrew Greenwood

This article was originally presented by Justice Greenwood as the opening address of the Alternative Dispute Resolution Conference in 2009. It shares some of his Honour's views about the critical role alternative dispute resolution processes play in building consensus, thus putting an end to disputes between citizens whether individuals, or corporate citizens engaged in business activities. 11

Why do students sue Australian universities? – Hilary Astor

Students are suing Australian universities in increasing numbers. Whilst the absolute numbers of cases are not high, the trend is disturbing and the cases are often complex and difficult to handle. This article presents the results of empirical research demonstrating that higher education involves protracted conflict for some students. This research also demonstrates that the reasons for student discontent do not concern the standard of university education, but are often about the fairness of the processes used by universities to make decisions about students. Students are seeking independent review of these university decisions, but are overwhelmingly not finding it from courts and tribunals, sometimes because they choose the wrong cause of action or because none is available. Suggestions are made to improve dispute-handling and to provide an inexpensive and accessible method of independent review of university decision-making. 20

Scope of the arbitration clause – recent developments – Peter Gillies

The interpretation of the arbitration clause is significant for a number of reasons. It confers and delimits the jurisdiction of the arbitrator. The award may be challenged on the basis that the arbitrator acted beyond jurisdiction. The clause may be construed in such a way as to defeat the parties' intention that the disputes arising from the underlying contract be resolved in a one-stop adjudication. Both of these considerations warrant drafting the clause broadly, and may warrant the courts construing arbitration clauses broadly. The trend of recent authority is for courts to construe clauses expansively, to the point where the historically narrower phrase "arising under" is to be viewed as being synonymous with the wider expression "arising out of"; and indeed that these two phrases are to be equated with the historically broad phrases "in connection with" and "in relation to". A proper view of contemporary authority may be that it is only where the parties have clearly set a limit on the arbitrator's jurisdiction that their clause should be construed more narrowly. 33

Mediation of complex commercial disputes prior to litigation: The Delaware Court of Chancery approach – *Michael Legg*

The Delaware Court of Chancery in the United States has adopted a novel Mediation Only Program for dealing with complex commercial disputes. The Mediation Only Program involves sitting judges mediating disputes prior to any litigation being commenced in the court. This article describes the operation of the Mediation Only Program and discusses whether it could be usefully adopted in Australia. 44

Mediation is good business practice – *Michael Redfern*

This article describes why, in the writer’s view, mediation should be adopted as a process of first choice in dealing with business disputes. 53

Lawyers acting as mediators: Ethical dilemmas in the shift from advocacy to impartiality – *Naomi Cukier*

Traditionally, a legal representative’s boundaries have been defined in one dimension, namely, acting in their clients’ best interests. The role of the third-party facilitator imposes a distinct set of ethical dilemmas and obligations requiring standards for impartiality, fee payment, conflict, confidentiality, professional conduct and fairness. Where lawyers act as mediators, challenges arise in the transition from an advocate for a single party to a neutral process manager (in facilitative mediation). It is clear that rules, guidelines and recommendations alone will only go so far in assisting the paradigm shift a lawyer must actuate when “changing hats”. Standardised training as well as diligent adherence to principles and guidelines must accompany this shift to ensure the ethical and practical competencies underpin consistent best practice and fulfilment of the parties’ process needs in alternative dispute resolution. 59

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