

# AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

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## CASENOTES

- Can a non-attending party be bound to a mediated settlement? “Is a court order for mediation a substantive” or “procedural” determination? And mediation media watch** – *David Spencer* ..... 199

## ARTICLES

**Evaluating collaborative law in Australia: A case study of family lawyers in the ACT** – *Anne Ardagh*

Collaborative law is a new form of lawyering being used in several jurisdictions overseas as well as in Australia. No empirical studies have been undertaken in Australia to test how well it is working, although a number of questions have been raised about its suitability for Australian practices, particularly within family law. This article is the result of research and analysis of a case study which investigated the use of collaborative law in the Australian Capital Territory. Further investigation is needed regarding collaborative law experiences in other jurisdictions in Australia to guide public policy. .... 204

**Legal ethics in ADR practice: Has coercion become the norm?** – *Judy Gutman*

Lawyers are the gatekeepers of alternative dispute resolution (ADR) practice both when they act as third-party neutrals, and in their capacity as advocates when representing their clients. The interface between ADR practice and legal practice raises many and varied ethical issues for lawyers. This article discusses one of these issues: lawyers’ coercive practices in ADR practice. The discussion is based on the premise that the aim of most ADR processes is to seek to settle disputes and thereby avoid litigation – a characteristic much favoured by governments and policy makers who perceive ADR as an efficient and cost-effective managerial tool to deal with disputes. .... 218

**Making an attempt to resolve disputes before using courts: We all have obligations** – *Tania Sourdin*

The Civil Dispute Resolution Bill 2010 (Cth) proposed by the federal government, Victoria’s Civil Procedure Act 2010 (Vic) and foreshadowed legislation in New South Wales will have a significant impact on potential litigants, alternative dispute resolution (ADR) professionals and lawyers. Essentially, these legislative reforms are part of an ongoing shift from courts providing or referring litigants to dispute resolution processes, to disputants being required to use dispute resolution processes before court entry is possible. As a result, ADR is more likely to be provided at a range of levels and at different times both outside and within the courts. The legislation has also coincided with significant shifts in terms of judicial understanding of ADR processes and increased requirements to act in a “reasonable manner” that have been imposed upon those engaged in litigation. Increasingly, policy makers and courts are setting new behavioural standards for litigants, would-be litigants and their representatives and are requiring disputants to meet obligations to resolve disputes before accessing courts. .... 225

**A new playing field: Hong Kong's civil procedure practice directions and mediation** – *Guy Lipert*

In the wake of the civil justice reforms in Hong Kong, a new civil dispute resolution landscape has come into being, which provides for the use of mediation to resolve civil disputes. The courts more readily scrutinise such disputes through the litigation process to determine whether disputants have considered mediation. Instrumental to those reforms focused on mediation has been the Judiciary's introduction of a mediation framework through court practice directions with which the disputants and their legal representatives must comply when embarking on litigation. Altogether, it represents a more interventionist approach of the courts to the use of mediation; figuratively speaking, a carrot and stick approach. .... 234

**Calderbank letters and formal settlement offers: Is the Calderbank offer a dead letter?** – *Mark J Rankin*

The article discusses the procedure for making both formal rule-based offers, and informal Calderbank offers, and highlights the potential costs consequences attached to both types of settlement offers. The article contends that the formal mode of making offers is far less onerous in terms of both essential criteria and burden of proof, and far more certain in terms of potential beneficial outcome for the party making the offer. As a consequence, it is postulated that the impact of the current rule-based regimes for making formal settlement offers is such that the Calderbank letter is of negligible relevance in contemporary civil litigation. .... 242

**Court-annexed and judge-led mediation in civil cases: The Malaysian experience** – *Alwi Abdul Wahab and Bernadine Van Gramberg*

The rising backlog of civil court cases in Malaysia has led to calls for court-connected mediation and the development of a draft mediation Bill. In the absence of a national stance on the issue, regional courts have progressed their own solutions with some implementing court-annexed mediation and others utilising judge mediators. Reactions to court-connected mediation have been mixed in the country. This article examines the current challenges to mediation as an alternative to litigation in Malaysia. .... 251

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