

AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

Volume 20, Number 4

November 2009

CASENOTES

- The ethics of mediation and mediation media watch** – *David Spencer* 201

ARTICLES

- The importance and challenge of active listening in mediation** – *Tony Bogdanoski*

Before mediators can effectively help the parties resolve their disputes, mediators themselves must first understand and recognise the different needs and interests of the disputing parties, which requires actively listening to the parties. However, active listening – arguably the purest form of listening – is not an easy skill to acquire and apply in practice. This article explores the importance and examines some of the inherent challenges associated with actively listening to the parties in mediation. 206

- An evaluation of non-adversarial models of negotiation** – *Mark Dickinson*

A distinction may be drawn between models of negotiation which are primarily adversarial and those which are primarily non-adversarial. This distinction provides a starting point for evaluating non-adversarial models of negotiation, including “integrative”, “principled”, “constructive” and “problem-solving” approaches. This article considers the work of several theorists including Mary Parker Follett, Fisher and Ury, and Carrie Menkel-Meadow. The question is asked: do non-adversarial models of negotiation merely reflect an aspiring ideal for negotiators or do they provide realistic models for practice, particularly for lawyers negotiating within the “shadow of the court”? 212

- A spectrum of contributions that lawyers can make to mediation** – *Olivia Rundle*

In a range of contexts, particularly in court-connected programs, lawyers are involved in the mediation process. There are multiple ways that lawyers can contribute to mediation. In their partisan, supportive role, they can contribute to mediation as experts, advisors, negotiators or advocates. This article elaborates upon the spectrum of lawyer contributions to mediation. Five models of lawyer participation are described and consideration is given to the advantages and disadvantages of each. They are called the “absent advisor”, “advisor observer”, “expert contributor”, “supportive professional participant” and “spokesperson.” These provide a framework for legal practitioners to decide, on a case by case basis, the appropriate role to take in mediation. 220

Limits to the quantitative data on court-connected mediation in Federal Courts of Australia – Dr Rhain Buth

This article explores three distinct areas on court-connected mediation in the Federal Courts of Australia: (a) the reporting of mediation; (b) the activity measure of court-connected mediation, which is its referral; and (c) the outcome measures, which are demonstrated in the recorded settlement rates. The analysis reveals certain limits, such as blurred reporting terms, contradictory definitions, irregularities in the settlement rates, and absence of registry-specific and case-specific data. It is argued that such limits cloud researchers’ abilities to analyse the efficacy and utility of mediation in Australia. 229

Workplace dispute resolution under the Fair Work Act: Is there a role for private alternative dispute resolution providers? – Joellen Riley

The Work Choices laws positively encouraged employers and employees to use private alternative dispute resolution providers to assist in the resolution of workplace grievances. The Fair Work Act 2009 (Cth) leaves room for private providers, although without the same robust encouragement of Work Choices. This article reflects upon the advantages and disadvantages of private mediation for workplace rights disputes, and proposes some measures that regulators should consider implementing to ensure that the privatisation of workplace dispute resolution does not compromise the recognition of important workplace rights. 236

The professionalisation of mediation: Elitism and ethics – Michelle Brenner

In the life of a human being, there is a time of distinction between youth and adult known as the “coming of age”. The age varies but the significance of a witness, and of a ceremony of symbology that speaks of meanings and knowledge, is present in all cultures. Within society we also have this passage of rights. For those in the mediation world we are living through this experience, our craft has turned into a profession with all the trimmings, restrictions, and image that goes with it. This article looks at this historic moment using post-modern ideas to deconstruct professionalism. Although this article specifically looks at the mediation world in Australia, it draws on the wider network of leaders and pioneers of the mediation world to reflect on what mattered in the beginning, what matters now, and what to think about in the future. 244

VOLUME 20 – 2009

Table of Authors 251
Index 253

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