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The binding nature of an expert determination – *David Spencer* 3

ARTICLES

Should pre-litigation mediation be mandated? – *Michael Redfern*

This article looks at the views of those who favour pre-litigation mediation and those opposed to it and asks the question whether the legal profession should look to their own procedures, techniques and practices before too readily supporting the retention of the traditional processes. 6

The arbitrability of CCA claims: The Australian approach to enforcing arbitration (or exclusive jurisdiction) agreements – *Mia Louise Livingstone*

Two key challenges to the enforcement of arbitration or exclusive jurisdiction agreements in Australia have exposed a raft of competing public policy tensions: first, whether or not claims made under the Competition and Consumer Act 2010 (Cth) (CCA) fall within the scope of arbitration agreements; and, secondly, if they do, whether or not those claims are arbitrable. This article investigates two different and inconsistent approaches that have been adopted by the Full Court of the Federal Court of Australia to resolve these issues. By examining the shift in public policy underpinning these different approaches, this article finds that a liberal approach to enforcing arbitration (or exclusive jurisdiction) agreements is preferred to, and has prevailed over, a restrictive approach in favour of enforcing arbitration agreements. However, the current Australian position on the arbitrability of CCA claims is not entirely clear. 14

Blended mediation: Using facilitative and evaluative approaches to commercial disputes – *Troy Peisley*

This article examines the commonly used mediation methods: the facilitative process and the evaluative process, and suggests that, particularly in the context of commercial disputes, a mediation approach that blends these two processes is the preferred model. The author also presents the Mediation Matrix, a tool for use by mediators and parties to identify and track the issues, costs and risks in a dispute. By using the matrix in a blended mediation process, parties can be better informed as to the merits of their dispute when deciding whether to make an agreement, or proceed to litigation. 26

Intimate partner violence and family dispute resolution: Some reflections from practice – *Rebecca Burnett-Smith*

This article sets out to ask three main questions: (1) Do family dispute resolution practitioners (FDRPs) need more training in the full range of intimate partner violence (IPV) so that they are better able to identify and address its more subtle forms; (2) do we need more classification in the middle range of IPV so that emotional abuse and mutually

aggressive conflict can be better categorised?; and (3) do we need more reflection on the role of FDRPs to develop better ways of working with the "aggressor" of IPV and better ways of promoting developmentally appropriate parenting plans? 36

A comparison of conflict coaching and mediation as conflict resolution processes in the workplace – *Judith Herrmann*

Mediation and conflict coaching are both dispute support services to assist people in dealing with conflict. Each process is characterised by factors determining whether mediation or conflict coaching may constitute the more appropriate mechanism to help people with their particular conflict. For example, the number of disputing parties, preferences regarding confidentiality and formality, as well as the objectives and expectation of participants seeking assistance with a conflict support service may influence the selection of a process. This article compares conflict coaching and mediation as independent approaches to conflict resolution from the perspective of parties seeking assistance with the aim to identify the most suitable service in a given conflict situation. 43

Mentalising in mediation: Towards an understanding of the "mediation shift" – *Jill Howieson* and *Lynn Priddis*

Mentalising refers to the capacity to attend to and seek to understand behaviour based on the mental states in the self and the other, and is a capacity that can influence our ability to communicate clearly, be flexible and remain calm in interpersonal situations. This article presents several hypotheses about the ways in which the mentalising construct might apply in the mediation context. Broadly, it proposes that the mediation process provides the opportunity for the parties to engage their mentalising capacities and that this in turn helps the parties to shift from their entrenched positions towards negotiating constructive solutions to their disputes. The article also considers how opening up this research area could assist in obtaining a greater understanding of mediation both in terms of scholarship and practice. 52

Mediation "made in Germany" – a quality product – *Professor Thomas Trenczek* and *Serge Loode*

This article describes the development and range of mediation services offered in Germany today, and provides an overview of their practical use and the current issues that are part of the professional debate. It also provides a brief insight into the German legal culture which does not operate under the same constraints of long court delays and high costs like many common law jurisdictions. Recently the German federal government introduced legislation to promote the use of mediation in Germany and to ensure that parties having recourse to mediation can rely on a predictable legal framework. Beyond this, in some areas of practice, de facto regulation already exists in the form of professional standards and accreditation programs provided by alternative dispute resolution associations, particularly relating to professional conduct and standards of care. 61

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