AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

Volume 24, Number 1

February 2013

CASE NOTES

Negotiating in good faith in the national Native Title Tribunal and postponing mediation to wait for evidence – *David Spencer* 3

ARTICLES

Predictable irrationality in mediation: Insights from behavioural economics – *Laurence Boulle*

This article examines the potential relevance of developments in cognitive psychology and neuro-science for mediation and its practitioners. It begins by noting the linkages between mediation and micro-economic market theory and then illustrates the adoption within behavioural economics of key psychological insights, involving cognitive and social biases and heuristics, in human decision-making. Assuming the scientific validity of six potentially relevant biases, it examines how mediators might use this knowledge in the mediation room in assisting their clients, often unaware of their own biases, in making wise decisions. The article then relates the behaviourist principles to other supportive evidence on decision-making, some of which is already accommodated in the mediation literature and mediation training. It concludes by acknowledging the challenges for mediators, and mediation models and standards, in coming to terms with the sometimes indeterminate insights of "predictable irrationality". 8

How a dose of humour may help mediators and disputants in conflict – *Clare Coburn*, *Becky Batagol* and *Kathy Douglas*

The use of humour by mediators has been relatively little explored in empirical research yet it offers potential benefits for both disputants and mediators. This article investigates literature on the psychology of humour, and the possible encouragement of diverse perspectives and integration that may be fostered by the appropriate use of humour. The exploration of the topic is supported by empirical data on the use of humour from interviews with Australian mediators on a panel of the Victorian Civil and Administrative Tribunal. 18

Proportionality of sanctions under the WADA Code: CAS jurisprudence and the need for a strict approach – *James Duffy*

This article suggests that the issue of proportionality in anti-doping sanctions has been inconsistently dealt with by the Court of Arbitration for Sport (CAS). Given CAS's pre-eminent role in interpreting and applying the World Anti-Doping Code under the anti-doping policies of its signatories, an inconsistent approach to the application of the proportionality principle will cause difficulties for domestic anti-doping tribunals seeking guidance as to the appropriateness of their doping sanctions. 26

Developing ethical practice as a family dispute resolution practitioner – *Oyiela Litaba*

In the absence of a specific code of ethics for family dispute resolution practitioners (FDRPs), this article examines the codes and rules from a range of disciplines, and how they might apply to good ethical practice for FDRPs. It concludes that the consideration of an assortment of codes enhances scope for the development of ethical judgment. 36

A focus on process: Procedures to address disputes about end of life decisions – *Kate Curnow* and *Lisa Toohey*

Making decisions on behalf of another person about their end of life care is inherently complex and emotional. When disputes about end of life decision-making do arise, they can cause unsatisfactory patient outcomes, as well as distress and lasting damage to the parties involved. To date, insufficient attention has been paid to the processes by which end of life disputes can be effectively resolved. In this article, the authors advocate for reform based on therapeutic jurisprudence principles, specifically proposing the introduction in New South Wales of formal conciliation as a "middle step" between resolution at the health care provider level and adjudication by the Guardianship Tribunal. 45

The power of explanation in healthcare mediation – *Christian Behrenbruch* and *Grant Davies*

A consumer-centric practice of medicine combined with an increased appreciation of the power of apology when adverse events occur, has dramatically influenced medical litigation in the past two decades. However, apology is not the only way that may be significant in resolving complaints between patients and healthcare service providers. Facilitated explanation may be as effective as apology, particularly in situations where compensation is not the primary objective of the complainant. The authors examined 10 years of complainant data arising out of conciliation in the Office of the Health Services Commissioner in Victoria, Australia. Analysis suggests that healthcare service providers may resolve complaints effectively and at lower risk with an effective and timely explanation. 54

The mediator who has to pay the disputants: Conflict management in China – *Ting Ting Li*

Contrary to the Western understanding of mediation which emphasises autonomous decision-making by the parties, government mediators in China might even pay for some parties to settle disputes. The underlying reasons of this special phenomenon lie in three aspects: filling in gaps in the legal framework caused by earlier reforms; too much pressure put on civil servants and their leaders due to the cadre management system; and the people-based political values. Overall, Chinese government mediation takes its shape from the special path of social transformation currently underway in China and from historical relationships between government and the people. 61