

AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

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- Intervening in mediation; the right to public over private mediation; and mediation media watch** – *David Spencer* 187

ARTICLES

- International arbitration in Australia: 2014/2015 in review** – *Albert Monichino QC and Alex Fawke*

This annual article updates readers on the most important developments in international arbitration in Australia in the past year. It surveys legislative, case law and other developments since 1 September 2014. 192

- The (im)propriety of judicial mediation** – *David Kwok*

Judicial mediation is where a judge mediates a case. The use of this dispute resolution technique has been controversial especially in common law jurisdictions. This article examines judicial mediation from two very different legal traditions: the Chinese and the common law traditions. From the perspective of the former, a judge mediating during the course of a trial is common practice. This, however, when viewed from the perspective of the latter, puts core values including impartiality and the rules of natural justice at risk. Judicial mediation, as a dispute resolution method, has received both criticism and praise. The purpose of this article is to encourage the understanding of judicial mediation in the legal, cultural and societal contexts in which it is used. 210

- All the way with ADR: Further endorsement of ADR in litigation** – *Tina Popa*

In the preceding two decades, alternative dispute resolution (ADR) has increasingly been utilised in the civil justice system to assist in the resolution of disputes. The recent release of the Productivity Commission's inquiry report, Access to Justice Arrangements, has once again shone a light on the opportunities to further increase the use of ADR in civil litigation. This report endorses the trajectory of embedding ADR in the litigation process, particularly in pre-action protocols and case management and recommends additional ways to include ADR in the Australian justice system. This article will outline selected recommendations of the Access to Justice Arrangements report. It will argue that the report shows the need to further privilege ADR in the litigation process. 218

- Religious tribunals and courts of law – are their decisions or procedural determinations subject to review by secular courts?** – *Nadav Praver*

The interaction of religious tribunals and civil courts is of increasing importance as the former gain in significance. However, existing regulatory mechanisms provide an uneven set of tools for providing either oversight or engagement with religious decision-making bodies. Courts have been uncertain as to how to treat such decisions in light of both the limitations of the Commercial Arbitration Act and principles of religious freedoms. This article explores, in light of existing case law, the limitations on court review of religious

decision-making and analyses the limitations on immunity and enforceability that results. Ultimately, it concludes that the courts' reluctance to interfere with matters of religion will not prevent them engaging with decisions made by religious tribunals or processes where those decisions may have a practical consequence. 226

Mediation of property division in late stage Family law matters: A procedural initiative – Marilyn Scott

This article examines the results of a 2013 survey of participants in the Sydney Family Law Settlement Service initiative – a hybrid mediation/conciliation service that was instigated to deal with a backlog of property division cases in Sydney during 2012 – in order to ascertain the suitability of such a service as a permanent option. The article examines the post-separation procedural histories of the client parties pertaining to the division of property, the expectations of the client parties prior to their participation in the mediation and their views on the timing of the mediation in their process histories, whether their expectations were met, and the factors that may have impacted on these process experiences. 232

Emotion in mediation – Ken Skinner

Emotion is thought to play a strong role in disputes, yet standard mediation processes are implicitly built on a model of rational bargaining and negotiation. This article argues that mediation follows a different dynamic than negotiation, namely one of construction and reinforcement through rehearsal. This dynamic, when added to strong emotion, impacts mediation processes negatively and suggestions are made to adjust the mediation process in situations where negative emotions and attitudes are being reinforced. 241

Applying findings from neuroscience to inform and enhance mediator skills – Craig Smith

Human beings often view reality with a perception created through individual learning and experience. As such we tend to develop strong, intractable personal beliefs and opinions that, when questioned or threatened during personal conflict, automatically give rise to a number of psychological defence mechanisms counterproductive to dispute resolution. This article examines human approach and avoidance behaviours and how they may be influenced by the psychological and neurobiological processes involved during decision-making, learning and subsequent memory generation from experience. It examines how explicit and implicit memories of experience are processed and stored in different regions of the human brain, giving rise to both conscious and subconscious behaviour during conflict. This article attempts to provide mediators with a greater understanding of the psychological and physiological elements in play for participants in conflict so they may be better managed during mediation. 249

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