

# AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

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## ARTICLES

### **Investor-State Dispute Settlement Mechanism: The Trojan Horse of the Trans-Pacific Partnership and its Practical Implications – Muhammad Zaheer Abbas and Shamreeza Riaz**

The Trans-Pacific Partnership (TPP) is an ambitious free trade agreement that the United States initially negotiated with 11 other countries (New Zealand, Australia, Canada, Japan, Singapore, Brunei Darussalam, Chile, Malaysia, Mexico, Peru, and Vietnam). The Investor-State Dispute Settlement (ISDS) mechanism provided in the TPP is being criticised by public health activists as a pro-investor mechanism which empowers foreign corporations to sue governments for hundreds of millions of dollars in damages in a wide range of cases if they adopt any new law or regulation that negatively affects the profit rates of these corporations. This article seeks to answer the following questions related to the ISDS mechanism in the TPP. ....

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### **Managing the Inter-cultural Dimensions of a Mediation Effectively – A Proposed Pre-mediation Intake Instrument – Dorcas Quek Anderson and Diana Knight**

Being a culturally responsive mediator has become increasingly challenging amidst the growing cultural complexity within many societies. Drawing on the existing research on culture and the authors' experiences of mediating disputes amongst diverse disputants in Australia and Singapore, this article proposes an emic-constructivist approach for the mediator to understand the individual disputant's unique cultural preferences. It also recommends bringing forward the exercise of understanding cultural preferences through conducting pre-mediation intake interviews. It is argued that this approach enables the mediator to embrace the parties' cultural complexity and to design the mediation process based on their rich milieu of preferences. Finally, the article puts forward a framework for the pre-mediation intake instrument. ....

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### **Being the Ladle in the Soup Pot: Working with the Dichotomy of Neutrality and Empowerment in Mediation Practice – Bornali Borah**

Party autonomy and self-determination are features that give mediation its uniqueness as an alternative dispute resolution process. Mediation emphasises empowerment of the parties and its strength is based on this humanising quality. The mediator's role is to guide the parties through the process of defining issues, generating options and making informed decisions. The mediator has no advisory or determinative role. The mediator's allegiance is to the process; it is the parties that own the content and decision. The mediator's task is seemingly easy in concept but in reality problem-solving and maintaining neutrality can be dichotomous goals. This article explores three select techniques – informed consent, balanced narrative and impartial advocacy – to achieve these contradictory goals. ....

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**Mediation Confidentiality: Origins, Application and Exceptions and Practical Implications – Judge Joe Harman**

The utility of confidentiality (and subsequent inadmissibility) of that communicated in Family Dispute Resolution (FDR) has recently come into question at least in the family law jurisdiction. Further, criticism is raised as to an absence of research establishing the importance or value of confidentiality to the mediation process or to those who participate in mediation, suggesting that the importance of confidentiality is merely assumed. This article discusses the origins of mediation confidentiality and the exceptions which apply to limit that confidentiality. Implications for practice arising from limitations on mediation confidentiality will be explored as well as the advantages of mediation which might be impacted by interference with confidentiality. .... 106

**Design in Dispute Resolution Practice: Tips and Tools – Helen Shurven and Clair Berman-Robinson**

This article builds on a previous article by the same authors, ADR process design: Considerations for ADR practitioners and party advisors (2016) 27 ADRJ 133. That article examined the theory and research related to matching a dispute with the most effective kind of dispute resolution process, and then designing that process to suit the particular parties and dispute. This article goes further, with the authors providing tips for designing effective dispute resolution processes, based on their experience, aimed at both dispute resolution practitioners and party advisors. There is also a table of elements for process design, which can be used as a checklist of considerations for practitioners and advisors. .... 121

**Mediator's Proposal and Mediator's Neutrality: Finessing the Tension – Mohamed Sweify**

Despite the crucial role played by the mediator during the mediation process, there is a dearth of understanding regarding how mediators actually work. A mediator's individual experience is reflected in their style during the process. This article identifies areas of confusion in mediation practice among mediators. The mediator is obliged to be neutral to both parties. However, at some stages, a mediator may interfere by making a proposal to settle the dispute. This may be viewed as violating the neutrality duty of the mediator. This article concludes with reflections on some proposals that may finesse the tension between the mediator's ability to propose a settlement and their duty of neutrality. .... 129

**Settlement in Court-Connected ADR and the Constitutional Function of the Judiciary: An Imbalance between two Competing Public Interests – Michael Windeyer**

This article will identify two competing public interests that exist in Australia today; settlement in court-connected ADR and the constitutional function of the judiciary. It will suggest that there is an imbalance in the importance placed on these two competing public interests, to the detriment of the constitutional function of the judiciary. It argues that such an imbalance is problematic and requires concerted attention and action. .... 135