AUSTRALASIAN DISPUTE RESOLUTION JOURNAL

Volume 30, Number 2

2020

EDITORIAL – *General Editor: Ruth Charlton* 87

CASENOTES – *David Spencer*

Lack of Capacity to Enter a Mediated Settlement Agreement; and Good Faith & Satisfactory Mediation under the Farm Debt Mediation Act 89

Mediation Media Watch 94

ARTICLES

Re-appraising Mediation's Value of Self-determination – *Laurence Boulle and Rachael Field*

Party self-determination remains a core legitimising value proposition of contemporary mediation and is central to how the process is defined. However, realising party self-determination in practice is challenging across the diverse range of mediation models and approaches. In this article we seek to reconcile our aspirational and pragmatic selves in awareness of the fact that the pluralistic circumstances of mediation practice provide challenges to the postulation of self-determination as a consistent value in all mediation's manifestations. The article explores contemporary conceptualisations of party self-determination in the context of mediation; interrogates the limitations of self-determination; and considers what safeguards might be necessary to ensure that self-determination continues to remain an important and viable foundational value of mediation into the future. 96

Issues of Justice in Mediated Outcomes for Survivors of Sexual Abuse in State Care? – *Louise Marie Mc Donald and Patrick O'Leary*

The findings of the Royal Commission into Institutional Responses to Child Sexual Abuse, and the subsequent amendment of state legislation have reduced barriers to civil actions for compensation for harm done to children in state institutional care. Mediation will be a common forum for the resolution of these disputes. Survivors of sexual abuse in state care have specific vulnerabilities in these mediations. Without mediators having adequate training, skills and knowledge in dealing with complex trauma and sensitivities to power imbalance among the parties caused by cumulative disadvantage, outcomes may be compromised. This article explores the literature and research into the unique profile of this cohort of plaintiffs and the uniqueness of these mediations, and concludes that they have special needs. Questions of justice and fairness are raised, together with ethical, regulatory and future research considerations. 105

The Danger in Prescribing the Publication of International Commercial Arbitration Awards in Order to Cure a Stagnating Common Law – *Michael Elliott*

This article examines the merit in prescribing the publication of international commercial arbitration awards in order to further develop the common law. It analyses the precedential

value of a body of arbitral jurisprudence from practical and ethical perspectives and compares the efficacy of award publication with other means of developing the law through arbitration. 113

Bringing Children Metaphorically into the Room: Strategies FDRPs can Use to Focus Parents on their Children's Best Interests – *Donna Cooper*

When assisting parents to have discussions, family dispute resolution practitioners (FDRPs) have obligations to encourage them to focus on parenting arrangements that will be in the best interests of their children. This can present challenges, particularly due to widely held misconceptions in the community about the law, as some parents come to family dispute resolution with preconceived ideas about their rights to certain time arrangements, particularly equal time. This article examines what the "best interests of children" actually means from both a legal and social science perspective. It offers a range of strategies that FDRPs can use to bring the children's needs into the mediation room and assist parents to develop child-focused parenting plans. 126

Client Case Management: Does It Compromise the FDR Practitioner? – *Mieke Brandon and Linda Kochanski*

This article explores the relatively new role of Family Dispute Resolution Practitioners (FDRPs) in Family Relationships Centres (FRCs) as "case managers". The authors describe how this additional task of case management impacts the FDRPs providing this service from first contact to post the mediation session(s) itself. While there may be some benefits, many practitioners experience challenges and stresses in their role as case managers in contrast with their previous role in their work as independent assessors about whether mediation is suitable and as impartial facilitators of a Family Dispute Resolution mediation process. For the purpose of this article we address some of the similarities and the differences for practitioners in FRCs and sole private mediators in their own practice. 133

Expert Determination as Dispute Resolution in New Zealand – *Shane Campbell*

This article essays expert determination as dispute resolution from a New Zealand perspective. It summarises what expert determination is as a procedure, before providing an overview of how expert determination arose and came to be increasingly utilised in New Zealand. The article then provides an overview of how New Zealand courts approach expert determination clauses in general terms. It then moves to highlight matters to be wary of when both drafting expert determination clauses and reviewing them after a dispute has arisen. These include carefully defining the expert's role, the importance of carefully prescribing procedure, and how an expert's determination can be challenged. The penultimate section then considers how expert determinations can be enforced in New Zealand. The article then concludes with the author's views on expert determination that courts should take a more liberal approach to expert determination and respect the freedom and contractual intent of the parties. 142

Silent Parties in Arbitration: Does Rinehart v Hancock Prospecting Pty Ltd Open the Door for Increased Third-party Participation in Arbitral Proceedings? – *Andrew L Mason*

Ordinarily, arbitration agreements only bind the parties to the agreement. However, a third party may be bound by, or have recourse to, an arbitration agreement when exercising the right of a party pursuant to a principle of agency, assignment or novation. The High Court of Australia in Rinehart v Hancock Prospecting Pty Ltd has expanded the circumstances in which third parties may have recourse to an arbitration agreement. The Court's decision

is inconsistent with the approach adopted in some prominent arbitration jurisdictions and fundamental principles of international commercial arbitration. This results in uncertainty for persons arbitrating in Australia as to who may be a party to arbitral proceedings and the scope of disputes captured by an arbitration agreement. 154

Nation Building through Mediation: The Mongolia Experience – *Katherine Johnson*

At the grass-roots level, dispute resolution, namely mediation, can be used as an agent for social change. The project in Mongolia is an example where the mediation process is designed to strengthen Mongolian families and build a nation with more tolerance by understanding the psychology behind conflict, thereby enabling individual needs to be better addressed within the framework of the law. By addressing the source of problems that lead to social ills, such as domestic violence, the individual needs of the parties can be respectively better managed in a preventive capacity. Although we appreciate that mediation is not a cure-all for all social ills, it goes a long way to assisting most parties to make considered decisions that they can live with and to be better informed about their legal rights and entitlements, thereby improving not just their own lives but also that of the society in which they live. 167

BOOK REVIEW

Dispute Resolution: A practitioner's guide to successful alternative Dispute Resolution, by Michael Mills – *Reviewed by Mieke Brandon and Elizabeth Rosa* 173