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## Fishing for ADR

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## Book review

# Fishing for ADR

David Bryson and Nadja Alexander

**David Spencer and Tom Altobelli,**  
*Dispute Resolution in Australia:*  
*Cases, Commentary and Materials,*  
Lawbook Co, 2005, 496 pp.

As the mediation field in Australia and abroad flourishes, so too do publications on the topic. However a plethora of publications has consequences for any academic and professional field. On one hand it means that readers are indulged with a rich array of information, views and opinions; on the other it requires readers to be much more sophisticated and discriminatory in their choice of reading.

*Dispute Resolution in Australia* is a welcome addition to the ADR library. Its 500 pages of text brings together much

of the significant material produced on dispute resolution in the past decade or so, and demonstrates the breadth and complexity of the field in Australia.

The book comprises 13 chapters covering topics such as the origins of dispute resolution, the nature of conflict, culture, and various dispute resolution processes — including negotiation, mediation, conciliation, neutral evaluation, partnering and arbitration. It deals with legal issues and ethical and value considerations. Specific chapters are also dedicated to the role of the state in dispute resolution, to family law and to online dispute resolution.

The authors tell us that this book was an amalgam that came together over a nice lunch, a conference, and a spot of

barramundi fishing. As such, the running commentary throughout the book has the advantages for the reader of their listening in to a good yarn between two knowledgeable mates. The casebook format adds to this fresh and accessible style. It comprises extracts from journal articles, reports, book chapters, cases and legislation, interspersed with commentary and questions to guide readers through the material.

There are some important themes included in the book that add to its value:

- 'Understanding Disputes' is dealt with in chapter 2. The authors argue that understanding the origins of a dispute is necessary before designing an

appropriate form of intervention. The qualification might be that the third party often doesn't know what the dispute is about until getting in there. Redesigning the dispute resolution approach, and being flexible enough to alter one's hypothesis and intervention, calls for a non-linear sense of a dispute and the role of the person intervening.

- Chapter 3, 'Negotiation', covers the informative and fascinating debate around the seminal *Getting to Yes* text by Roger Fisher et al. However, what is missing from this chapter is an exploration of the conditions that affect a party's decision to take a consensual or interest-based, rather than positional, approach to negotiation. The work of Axelrod and others on game theory and the prisoner's dilemma would have been a helpful addition.
- Chapter 8 covers legal issues in dispute resolution and does so comprehensively. Critical issues are covered — confidentiality, privilege, legal professional privilege, liability and immunity, enforceability of settlement contracts, good faith negotiations and remedies — and reference is made to relevant case law. David Spencer has played an invaluable role for Australian dispute resolution practitioners over the years through his contributions in this area in the *Australasian Dispute Resolution Journal*, and this chapter provides an excellent summary of the current state of play. The commentary throughout this chapter is taut and insightful.
- Chapter 13 on ethics and values highlights how the issues of ADR standards and accountability ensnare practitioners and regulators alike. The field is provocatively described by the author of an extract cited as having 'no centre, no boundary, no gate'. Spencer and Altobelli rightly argue that this is one of the key debates that must occupy our attention and the authors thoughtfully suggest that 'good faith' (meaning, in essence, honesty) may be a commonly acceptable starting place for our thinking on this issue. Honesty, they write, is as relevant for defining the practitioner's behaviour, as it is an

expectation we have of the parties.

In presenting the breadth of the field in an amalgam, the authors have faced the challenge of how to represent the depth of literature and academic and judicial comment across all themes. In this regard some chapters have not fared as well as others, either in selection of material or because the commentary is superficial.

Chapter 6 has an odd collection of dispute resolution forms — review boards, advisers, appraisals, early neutral evaluation, panels and so on — introduced by the claim that they somehow represent examples of *avoidance* of disputes rather the resolution of them. Are these not further examples of what the authors emphasise as being the eminently creative and adaptable nature of dispute resolution practitioners in Australia to respond to conflict and disputes?

While it was pleasing to see chapter 9 entitled 'The State and Dispute Resolution', it was disappointing not to find some of the major authors who have influenced this discourse such as Cappelletti, Auerbach, Abel and Galanter. Chapter 12 on culture provides a very pragmatic and arguably Western modernist approach to cross-cultural issues in dispute resolution. It would have been helpful to at least introduce students to other approaches such as the post-modern cultural perspective that has been the subject of publications by a number of Australian authors. Unfortunately, chapter 10 on online dispute resolution fails to acknowledge the plethora of publications since 2001, many of which were available online when the book went to press.

Other 'picky' points of criticism are:

- In chapter 2 the authors comment that

the eminent political scientist John Burton is British. He is in fact Australian and lives in Canberra.

- Chapter 9 lists the statutory dispute resolution schemes in Australia, but fails to be comprehensive (for example, the conciliation of up to 20,000 cases per year under the Victorian Accident Compensation Act is not mentioned).
- The use of questions at the end of each chapter is an attractive idea for student and teachers to consolidate and extend their thinking, but many of the questions in this book fail this test. For example, at the conclusion of the chapter on dispute review boards, advisers and early neutral evaluation, etc, some of the questions are hardly searching — 'Are appraisals binding or non-binding?' and 'Describe the operation of early neutral evaluation'.

*Dispute Resolution in Australia* will quickly become an essential text for students and teachers of ADR in Australia. It should also occupy a place in every practitioner's collection. The expectation of readers will be that the authors provide us all with regular, high quality editions into the future to guide us through the many emerging complexities and challenges of dispute resolution.

To the authors then — 'Keep dining, talking and fishing!' ♦

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## contributions

Contributions to the **ADR Bulletin** for 2006 are welcome

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