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## Recent developments— local and abroad

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## Topical ADR

## Recent developments — local and abroad

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### New ADR text

Australia has a new text on ADR entitled, appropriately, *Alternative Dispute Resolution*. It has been written by well known ADR academic and practitioner Tania Sourdin and is published by the Law Book Company Sydney 2002.

### Online ADR

It has not taken long for a book dedicated to online ADR (ODR) to appear. This text is by Katsh and Rifkin and is entitled, predictably, *Online Dispute Resolution*. It has been published by Jossey-Bass in the US (see <[www.josseybass.com](http://www.josseybass.com)>). The book provides a history of the topic, theoretical and practical introductions to the field, and a number of predominantly American case studies. There is also an

interesting theoretical framework in which technology is regarded as a 'fourth party' at the dispute resolution table, operating in support of the 'third party' mediator, case appraiser or the like. The authors have also assembled an extensive list of online literature on ODR and this can be consulted at <[www.umass.edu/dispute/bib.htm](http://www.umass.edu/dispute/bib.htm)>.

### Integrating technology

Closer to home, the integration of technology into ADR continues. In 2001, the Commonwealth Treasury's Group on Electronic Commerce developed a discussion paper on ADR in e-commerce and the National Alternative Dispute Resolution Advisory Council (NADRAC) placed a background paper on ODR on its website. NADRAC is also developing a ➤

'Closer to home, the integration of technology into ADR continues. In 2001, the Commonwealth Treasury's Group on Electronic Commerce developed a discussion paper on ADR in e-commerce and NADRAC placed a background paper on online ADR on its website. NADRAC is also developing a paper on "Principles for Good Practice" in this area.'

A V A I L A B L E F R O M P R O S P E C T

### Current Issues in Film Law



The enactment of the *Copyright Amendment (Moral Rights) Act 2000* (Cth) and the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) has prompted a great deal of discussion and comment, as they attempt to fill the gaps and alter the injustices of the past, in addition to keeping in step with emerging technologies.

For this work, editor Mathew Alderson has assembled a superb cast of contributors who examine these changes and the necessity of constant review of the legislation as it affects the film industry in its creative, broadcasting and distribution processes.

*Current Issues in Film Law* will prove an invaluable and authoritative work to those within the industry and to their legal and business advisers. It is the single source of contemporary comment on both the effects of the recent legislative changes upon the film industry today and their application in to the future.

To purchase or inquire about *Current Issues in Film Law* please contact contact us on ☎ 1800 772 772 fax: 1800 800 122 or by email to:

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➤ paper on 'Principles for Good Practice' in this area. This issue of the Bulletin contains an article on the first Australian online dispute resolution service, Settlement Online Systems (see p 89). The University of Canberra is currently involved in a \$3 million partnership with institutions in the UK, Hong Kong and the US, focusing on ODR with empirical and experimental research into the effectiveness of various approaches. The University of Canberra also runs a 'Courtroom of the Future' project, which explores the use of technology in courts and tribunals.

### Dispute resolution in the UK courts

After a late start, dispute resolution in the court context is developing at a rapid pace in the UK. A recent topical issue arose in the case of *Tarajan Overseas Ltd v Kaye* (unreported, Court of Appeal 22 January 2002). The trial court had agreed to adjourn civil proceedings and had ordered the board of directors of one of the parties to attend the next hearing. This order was appealed by Tarajan Overseas Ltd. The Court of Appeal held that there was no doubt that in exercising its case management powers, the court could order the attendance of a party — this is explicitly provided for in the *Civil Procedure Rules*. One objective for such an order would be to facilitate settlement where the court felt that one of the parties should make greater attempts to reach a resolution. However, case management proceedings should not be used to order a party to attend in person with a view to putting pressure on that party to drop the proceedings. In the light of this principle, the trial court order was amended so as to require only representatives from Tarajan's UK agents to attend court, instead of its board of directors as previously ordered.

### UK statement of policy

In another UK case, *Cowl v Plymouth City Council* (unreported, Court of Appeal 14 December 2001) the English courts made a strong statement of policy in regard to the role of public authorities and their dispute resolution responsibilities. The Plymouth City Council had resolved to close a residential care home and various residents had sought

judicial review of the decision. In the course of hearing the appeal, the Lord Chief Justice made a strong statement about the need for public authorities to pay sufficient attention to the 'paramount importance of avoiding litigation whenever possible'. The availability of ADR processes accentuated this responsibility and the courts could facilitate

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resolution through their new civil procedure powers. In the *Cowl* case, the Court felt that there was no legal principle which divided the parties, but that failure by both sides to negotiate the matter and use other complaints procedures had led to unnecessary expense and delay. The Court also noted, in passing, that if litigation was necessary, the courts should deter the parties from adopting an 'unnecessarily confrontational approach to the litigation'.

### Deepening shadow: court overturns ADR agreement

In an earlier issue of the Bulletin, reference was made to the possible challenges to agreement reached through the process of mediation — see 'The dog that did not bark: mediation style' (2001) 4(2) *ADR Bulletin* 22. This is an inevitable consequence of the 'shadow of the law' which hangs over all forms of ADR. Recently, the shadow was

deepened when the unsuccessful applicant at trial in the case referred to took the matter on appeal to the Supreme Court of Queensland in *National Australia Bank Ltd v Freeman* [2001] QCA 473.

This is a case in which the bank was attempting to foreclose on a family business and the parties attended mediation, at the invitation of the bank, during the course of proceedings. A mediation agreement was reached but the appellant defaulted and the National Australia Bank (NAB) successfully sought enforcement of the agreement in the Queensland Supreme Court. On appeal, the appellant sought to have the Deed of Mediation (the Deed) set aside on the basis that his agreement had been obtained by economic duress and because he was suffering a special disadvantage because of his mental incapacity. If he were successful in setting the Deed aside, the appellant contended that the NAB could not enforce its rights under various mortgages and loans because of misrepresentations it had made to him. The appellant also alleged negligence by the NAB in failing to support his claim for a rural subsidy.

Much of the case on appeal revolved around the approach of the trial judge in determining whether the appellant was suffering from stress and anxiety at the time of mediation, and the appropriate test to be applied by a Court of Appeal. Inevitably in a case such as this, the trial judge's findings were based on detailed findings of credit in respect of which explicit findings had been made against the appellant. In these circumstances, the Court of Appeal found that the appellant had not discharged his difficult onus and upheld the validity of the Deed.

In terms of its legal doctrine, this case is of no great significance, but it is of some note in relation to the growing 'satellite litigation' revolving around ADR processes. In the pages of this and other ADR publications, there is increasing reference to the increasing number of cases in which courts are being invited to evaluate and adjudicate on some aspect of ADR. While a case such as the present makes no comment on ➤

➤ major policy issues relating to mediation, it does add to the burgeoning 'jurisprudence of ADR'. This was hardly contemplated in the pioneer days of the late 1980s.

The case also illustrates two other points. First, it shows the ease with which mediation is being opened to public judicial scrutiny, particularly through the eye witness evidence of mediators, lawyers and clients. This raises important issues of theory and practice which need attention from the ADR community. Second, the complaint by Freeman that the mediation process 'was more adversarial than he believed it would be' is revealing. This, if true, is an interesting reflection on the discrepancy between the popular vision of mediation in some quarters and its practice in certain legal circles. Merely changing process and structure does not necessarily lead to a change in attitude and behaviour, and mediation in practice can be tough, brutish and bloody.

**National Judicial College opens**

Finally, mention should be made of the long awaited National Judicial College of Australia whose establishment carries the support of all Attorneys-General in the country. Last year, the national press carried advertisements calling for expressions of interest from institutions to host the College. Its main role will be to provide professional development courses for judges, magistrates and other court officials. Some of the training will be provided on appointment to judicial office, other parts will be provided on a continuing basis, and it will focus on both the practical skills required in the judicial role, as well as broader social and legal issues. It is expected that judicial education on ADR in all its manifestations will be part of the College's functions. ●

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