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Current developments in ADR

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The world of ADR

Current developments in ADR

Nicola Collingwood

Positions vacant: judicial function to be advertised

The media have reported recently on two parallel developments in the big world of dispute resolution, this time in relation to the courts.

The *Lawyers Weekly* of 19 April 2002 reports that the Tasmanian Government is soon to commence advertising for judges and will subject judicial candidates to a selection committee comprised of community representatives. While the selection committee will provide recommendations, the final decision on appointments will continue to rest with the Attorney General.

The Government has adopted this selection process in the face of increasingly suspicious community perceptions of judicial appointments. The *Lawyers Weekly* reports that the Tasmanian Attorney General, Peter Patmore, has acknowledged that broader community attitudes call for greater transparency between the two heads of power in order to combat the public misconception that judicial

appointments are made 'on a nod and a wink'.

Accordingly, the selection committee will be comprised of a judge or magistrate representative, the Department of Justice secretary, two senior lawyers and two members of the public from a non-legal background. The Attorney General's ongoing promotion of transparency in the appointment process began in 2000 when the Government commenced advertising for judicial appointments.

Similar moves are afoot in Victoria with the launch of Attorney General Rob Hulls' first judicial advertising scheme on the mainland. This has attracted criticism from the Opposition and in some legal circles. However, in some overseas countries there is perceived to be no incompatibility between judicial independence and expertise, on one hand, and appointment through public and transparent processes on the other hand.

Collaborative lawyering

'Collaborative Lawyering: a new development in conflict resolution' is the title of an article by James KL Lawrence in vol 17 of the *Ohio State Journal on Dispute Resolution*. The author introduces his article on the value of collaborative lawyering by making the initial, and what seems obvious though often ignored point, that for the litigating attorney 'fighting back is not always a sign of strength, that it can in fact be a sign of inflexibility and harm a client's interests'. Lawrence notes that a growing number of lawyers are taking mediation advocacy beyond traditionally accepted parameters and removing the need for a third party mediator through what he describes as an innovative dispute resolution method known as 'collaborative lawyering'.

Collaborative lawyering involves the coupling of problem solving and interest based negotiation with a commitment to settlement without, rather than in the shadow of,



litigation. Lawrence summarises this process as 'representation for settlement purposes only', with each party agreeing to engage new counsel should litigation eventuate. Lawrence analyses the 'nuts and bolts' of collaborative law, touching on various issues such as training and termination, ethical considerations and the future of collaborative law. In conclusion, the author advocates collaborative law and discusses the various factors necessary for success.

From the literature

In *Beyond Winning: negotiating to create value in deals and disputes* Massachusetts (2000), authors Robert H Mnookin, Scott R Peppet and Andrew S Tulumello make the case that a problem solving approach to negotiation provides the most promising means of creating value. The goal of this book is to enable negotiators to better understand the difficulties they will encounter and to assist lawyers and their clients to work together and to more effectively negotiate deals. In analysing the dynamics of negotiation the book provides anecdotal examples in demonstrating the tensions between creating and distributing value, empathy and assertiveness, and between principals and agents operating in the negotiation paradigm. Psychological and cultural barriers are discussed and the authors analyse strategies to enhance the effectiveness of negotiations and to overcome the challenges of dispute resolution. The book offers extensive analysis and substantive practical advice for resolving disputes and making deals.

Another recent publication titled *Alternative Dispute Resolution: the advocate's perspective, cases and materials* (2nd ed) is by Edward Brunet and Charles B Craver (Massachusetts (2001)). The authors provide an in-depth and thorough analysis of negotiation theory and practice against the backdrop of which the nuances of mediation and court annexed dispute resolution are discussed.

The authors make it clear that negotiation is the foundation of alternative dispute resolution and that none of the alternatives to litigation

may be fully understood in the absence of a sound working knowledge of negotiation practice and principles. The book places emphasis on the role of the advocate in negotiation, irrespective of the format of the resolution mechanism, and the continuing role of negotiation throughout the various dispute resolution methods. The book is extremely detailed and comprehensive in its analysis, from the basic factors affecting negotiation to non-verbal body language and the variant roles of mediation and arbitration.

Negotiation role-plays

Negotiation Training Through Gaming — strategies, tactics and manoeuvres by Elizabeth M Christopher and Larry E Smith (New York London (1991)). While this is not a new text it is worth drawing to the attention of trainers who need new role plays for everything from icebreakers to sophisticated negotiation simulations.

Children in focus

The Children in Focus programs are facilitated by leading Australian and international experts in child psychology, family law, mediation counseling and family therapy in collaboration with the Federal Attorney General's Department. The programs are designed to foster greater awareness of the centrality of children in family disputes, both legally and psychologically, and to promote methods of achieving child sensitive outcomes at various points of parental contact during separation, such as counselling and mediation.

The program, hosted in most major Australian cities, is comprised of three training segments, including a symposium for the identification and discussing of core issues, followed by two practice based intensive workshops.

For further details contact the Australian Institute for Primary Care, Health Sciences Building 2, La Trobe University, Victoria, 3086, tel: (03) 9479 3934, email cif@latrobe.edu.au. ●

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