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Building bridges

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Book review

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Dispute Resolution in Australia (2nd ed)

Hilary Astor and Christine Chinkin

LexisNexis Butterworths
Sydney 2002

Grace Cossington Smith's inspirational tempera on cardboard (circa 1930) of a view of the Sydney Harbour Bridge nearing completion adorns the second edition of this overdue book. The same metaphor adorns the 1992 edition, although that was an anonymous black and white photograph. In some ways the images illustrate the differences between the two books and they are also an apt metaphor for ADR in this country.

Unfortunately, the Cossington Smith image seems to depict a bridge less complete to my eye than the dull grey one of the earlier edition. It is as if knowing more the second time around reveals the idea that we may have further to go than we thought. It is a metaphor of hope, but it is also a metaphor for incompleteness. The book, an icon in Australian ADR, is also incomplete, as it must be, even though it has grown from 338 pages in the first edition to 462 pages in the second. The content of this type of textbook is usually incomplete as soon as it leaves the authors' hands. The rapidly accelerating pace of change in the ADR field only emphasises this fact.

Those extra 124 pages follow generally the same pattern as the much quoted first edition, but in generally expanded format. I especially like the enhanced section on legal issues in ADR. Strangely however, the second edition has done away with some useful appendices that were there in the first — dispute clauses, rules for expert determination and guidelines for solicitors — perhaps they are not necessary these days as such resources are now much more visible and readily available to the average ADR practitioner.

Style and approach

The style between the two editions has not changed much. As Voltaire said: 'All styles are good except the boring'. These authors do not appear to like dichotomies and so Voltaire's comment may not apply to their work. Their style is one which was perhaps not as well developed in Voltaire's day — the textbook style. It is distinctly academic and conjures the image of two successful academics as they sit on top of a vast outpouring of undergraduate and graduate papers feeding them with all sorts of information about ADR from which they glean some tender and useful morsels and which lead them to new and interesting directions. There is a myriad of 'facts', citations and quotes, befitting the product of two such energetic scholars.

The book is overall very good, but sometimes boring within the meaning of the Voltaire framework. It is one you should have on your shelf but not one you would keep by your bed or next to your favourite armchair. It could not be anything else, I do not think, because of the audience at which it is aimed. However, it is something that you can pick up, rather like a dictionary, find what you want, get an overview and then move on to another work containing more detail or reflect airily on the issue at hand after having found some ideas that make great logical sense.

It is a book that demands to be within eyesight of the working desk awaiting the call of duty. It is a terrific undergraduate and practitioner's resource. Although there are few new directions taken and it has a rather conservative outline, it is comprehensive and covers most of the issues you would want to look at in an undergraduate course on the subject.

What makes Astor and Chinkin a little different, in the legal sphere, is the authors' willingness to take a critical and (as they call it) 'evaluative approach' to their subject. If anything, in my view they do not do this enough and there is plenty in their subject matter which can be critiqued quite heavily. Many times I think they pull back from a full critique because of the nature of the work and perhaps they confine this to some of their other and more adventurous academic writings.

Story telling in mediation

One of the more interesting trends in recent scholarly research has been an upsurge of interest in the use of story telling (otherwise known as 'narrative') as a means both to explain and research our social interactions. The relevance of this to our understanding of conflict is that it is the stories that people tell about themselves and others which join the particular aspects of their conflict to the larger social structures that those people inhabit. In other words, it is the way in which we give meaning to events in our lives within a larger social whole.

For example, a young aboriginal boy once told me, in mediation, how he had done many wrong things against the larger (white) community in which he lived. He explained that it was because 'there was no meaning anymore'. All he saw around him were lost and forgotten people — his people. He was connecting his story to the sense of disadvantage and anomie that his people often feel in Australian society. As in all contexts, in a conflict situation, stories are told with particular purposes in mind. Usually, in a conflict situation, they are told with the purpose of convincing the listener of their validity and their inherent power. It may also be that some participants in conflict are at a disadvantage when telling their stories, particularly children, women and those from certain ethnic groups. (There is a terrific section in the book on the topic of Conciliation of Discrimination Disputes.)

It is the coming together of a number of different and competing stories which makes conflicts both fascinating and often frustrating. Further, because stories are interactive rather than just individual productions, they will change according to the context in which they occur. This has definite implications for the would-be conflict manager and for the disputants themselves because disputes, and the stories that define and constitute them, transform themselves through a range of different contexts and processes. I would have enjoyed some more analysis along these lines.

Modernism and hermeneutics

The book (perhaps like the legal culture from which it emerges) is distinctly modernist in its approach, although there is the odd reference to 'discourse' and 'narrative'. This is most evident in its treatment of the 'models' of mediation. There is very little to glean here from the post modernist literature that has emerged in the last five years in this field. The charge from the human services (especially the psychologists) has had little impact. It is like being on the wrong side (or the right, depending on your perspective) of the Balaclava hills when the charge of the Light Brigade was underway and missing the whole thing. Or perhaps they saw the charge coming and just wanted to get out of the way in this edition and wait until the smoke clears. Perhaps they felt sorry for all those narrative soldiers being mowed down by emerging and often confused discourses. Perhaps, like Lord Cardigan (the regimental leader of the charge), they retired to the yacht in the harbour to sip champagne and wait to see what would happen on the morrow. Whatever the reason, the reader will have to go elsewhere for a post modernist perspective.

It is a strange omission because the legal academy has a rich tradition in hermeneutics and the study of languages, particularly in legal anthropology and critical legal studies. There is, for example, a real need for some more conversational analysis of mediation and for it to be incorporated into texts such as this.

Standards and ethics

The section on standards, qualifications and ethics is a very succinct and useful treatment of this subject. The ability of the authors to encapsulate the key issues in this area is refreshing. Perhaps they spend less time on the perennial issue of establishing an ADR 'peak body' than it deserves, but perhaps the less said on that topic the better!

However, this is one issue which, if properly addressed, will undoubtedly close the gap between the two approaching sides of the bridge. I recently had cause to sit down with colleagues to discuss this issue yet again as we considered the possibility of raising the issue at an upcoming National ADR Advisory Council (NADRAC) meeting to be held in Melbourne.[1] It was NADRAC in its report of 2001, *A Framework for ADR Standards*, which noted that the 'need for infrastructure, such as a peak standards body, was mentioned repeatedly in responses to NADRAC's discussion paper'.[2] Furthermore, it was NADRAC's view that 'the primary impetus for a peak body should come from the ADR field itself'.

My colleagues and I envisaged the following possible process.

1. NADRAC to seek approval and funding from the Attorney-General's Department for NADRAC to undertake consultations with an independent facilitator, regarding the merits of establishing a national ADR industry body, for subsequent advice to the Attorney-General and to provide seed funding to the pilot 'ADR Victoria' and other state based equivalents as established.
2. NADRAC to consider undertaking such consultations, if approved, initially on a state by state basis.
3. Victoria to pilot the formation of a peak body for that State called ADR Victoria.
4. The content of the consultations to include consideration of the purpose of the body and its structure at State and national levels.

Purpose

The purpose or function of such a body would be to:

- maintain and enhance practice standards in ADR;
- represent the ADR industry to government in relation to planning, development, legislation and adequate resourcing;
- co-operate with NADRAC on other matters of common interest, including research; and
- provide a forum for building relationships, knowledge and understanding within the ADR field.

Structure

The structure would be two tiered, encompassing state and national levels.

State level

Using an example for Victoria ('ADR Victoria'), at the State level the membership of the body might consist of:

- service providers (agencies), such as Relationships Australia and the Dispute Resolution Centre;
- organisations representing individual service providers, such as the Victorian Association for Dispute Resolution (VADR) and Let's Talk; and
- professional associations such as the Institute of Arbitrators and Mediators (IAMA), LEADR, the Bar Association and the Law Institute.

Universities and training bodies would be asked to provide a representative for their sector and encouraged to establish either a parallel ADR Education Forum Victoria or a sub-committee attached to ADR Victoria.

A working group of key organisations will be established to develop the proposal. These will include the above named plus a representative from the education sector. The working group will consider as a priority membership criteria and establishing a statement of objectives and constitutional framework.

National level

At the national level, a body such as 'ADR Australia' might be comprised of the following members:

- four elected representatives from each State;
- members from specified spheres of interest, such as legal, commercial, family and community.

The Government will meet in mid-2004 chaired by a non-ADR independent facilitator to discuss the establishment of the national body.

Perhaps someone can offer better suggestions and some of the army of ADR students could devote their attention to peak body models and their applicability to the ADR scene; then in the next edition of this book we could have an explication of what may be possible or even what may have happened.

Metaphors and definitions

However, that's enough digression — back to the book. There are several things that are slightly irritating in the book besides the lack of a fuller treatment of the peak body issue. The first is the 'dispute pyramid' used to describe the responses to grievances. The authors describe, like a number of others, the base of pyramid as the vast bulk of matters which never result in legal claims while the top consists of the court system. Why couldn't they use the metaphor of a 'funnel', with the court system at the bottom and everything falling down into and through this hole, the other side of which we do not quite know?

The authors also talk about a false dichotomy between litigation and ADR, but I found their explanation not completely convincing, even while I agreed with them. I think this is because they do not give the reader any significant tools with which to analyse the similarities and the differences. For example, while they use Abel's research and theorising at some length, they do not use his analysis about disputant choice and structure to any good effect to round out the picture. They could also have examined such elements as dispute autonomy and third party use of prescribed rules to drive home their point.

The other slightly irritating thing here was that the term 'ADR' is not defined until page 77, even though two of the words appear in the title. I rather impatiently had gone searching for it after not finding it early on. Perhaps it is my teacher training which taught me to include definitions up front and tell people what you are actually talking about before you talk about it.

The second edition provides a useful summary of arbitration in Australia and in the international context. It also provides an introduction to the use of expert determination, although I found that the authors provided no real rationale for their assertions as to why expert determination had become so popular. The texts I have encountered in this area would suggest that it was because of the increasing expense and formality of arbitration, particularly in the 1980s. It would be interesting to know what the real story is in relation to the rise of this adaptation from the use of arbitration.

Also, their treatment of arbitration curiously lists a number of well known references but omits the most recent and (to students) most accessible textbook. This is that edited by Adelaide academic Vicki Waye and jointly published by the Institute of Arbitrators and Mediators of Australia and Adelaide University.[3]

There is much to celebrate and value in this book and I appreciate the fortune of having a tome of this quality in our little market on the edge of the world. Let us hope we do not have to wait as long for the next edition. ●

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Endnotes

1. My colleagues were: Vanessa Richardson, A Winning Way — Conflict Management Group; and Max Wright, Manager, Family Law (Moorabbin), Family Mediation Centre. The above views represent the preliminary views of the authors as individuals and do not represent the views of the organisations with which they are associated. The meeting occurred on 28 November 2002.

2. NADRAC *A Framework for ADR Standards* Canberra p 87.

3. Waye V (ed) *A Guide to Arbitration Practice in Australia* University of Adelaide and IAMA, Adelaide 2001.