ADR Bulletin
ADR Bulletin

Volume 8 | Number 10 Article 5

7-1-2006

The fog has not lifted – section 198J of the NSW Legal Profession Act in light of acceptable negotiation theory and principles — Part 2

Avnita Lakhani

Recommended Citation
Lakhani, Avnita (2006) "The fog has not lifted – section 198J of the NSW Legal Profession Act in light of acceptable negotiation theory and principles — Part 2," *ADR Bulletin*: Vol. 8: No. 10, Article 5.
Available at: http://epublications.bond.edu.au/adr/vol8/iss10/5

This Article is brought to you by ePublications@bond. It has been accepted for inclusion in ADR Bulletin by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

ADR Bulletin

Regulating negotiation

The fog has not lifted – section 198J of the NSW Legal Profession Act in light of acceptable negotiation theory and principles — Part 2

Avnita Lakhani*

This is Part 2 of a two-part article. Part 1 appeared in the previous issue of ADR Bulletin ((2006) 8(9) ADR 175).

Legislative controls in light of acceptable negotiation theory and principles

This Part of 'The fog[1] has not lifted' discusses the application of certain theories and principles regarding alleged litigant and non-litigant behaviour as developed and analysed in a US or European context. Such models may not exactly correspond to the behaviour of legal professionals or litigants in Australia. This article does not attempt to advocate for a specific approach, but rather presents one possible option of addressing the issue of a lack of objective, empirical methods and data when enacting legislation that inevitably affects a large constituency and key stakeholders such as the legal profession. To the extent that a given theory or principle may possibly be relevant, it is arguably more useful to the presumed alternative of 'shooting in the dark'.

It has been previously established that controlling the behaviour of legal professionals is akin to controlling their negotiation behaviour. This section attempts to address the potential success of the controls by s 198J of the *Legal Profession Act 1987* (NSW) (the LPA 1987)[2] and its related provisions as against negotiation theory and principles to determine whether Div 5C, Pt 11 of the LPA 1987 has 'reasonable prospects of success' for the future.

Understanding the context and content of the Division 5C, Part 11

Controlling frivolous or vexatious litigation[3] was obviously a concern of the NSW parliament when it enacted s 198J, as it has been for many political, legal, academic and public constituents,[4] despite the fact that is it is not very clear that there is a frivolous litigation 'problem'.[5] Nevertheless, it is common ground that unmeritorious claims and defences (frivolous claims) are a cause of concern and should be controlled and minimised[6] to the extent that they represent the alleged 'waste' of judicial and administrative resources, which would be better utilised in resolving non-frivolous, meritorious claims.

As a working definition for this section 'frivolous litigation' in the civil justice system is defined as 'a case in which the plaintiff has a [very] low probability of prevailing[7] at trial'.[8] This is to be distinguished from 'ordinary litigation' in which the plaintiff, as compared with the defendant, may have an equal or better chance of prevailing at trial.[9]

Typical behaviour patterns of legal professionals in ordinary versus frivolous litigation under negotiation theory

Legal professionals appear to have different patterns of behaviour when they are litigants in a potentially *frivolous* litigation where there is a low probability of obtaining a positive monetary return as opposed to *ordinary* litigation where there is a high probability of obtaining a positive monetary return. The basic theories and principles underlying the behaviour in *ordinary* litigation are summarised in Table 1.

Framing Theory, a non-rational account view, is based on 'prospect theory' as formalised by Kahneman and Tversky. Framing Theory is of primary importance to understanding litigant behaviour in *ordinary litigation*.[19] Prospect Theory holds that individuals do *not* make 'rational' decisions

Table 1. Ordinary Litigation — Two Main Categories of Litigation Behaviour

Category 1 — Rational Actor Accounts	*Category 2 — Non-Rational Accounts*
Definition: • assumes that litigants are rational actors who will make decisions that will maximize the value of their outcomes in the litigation system (outcome-maximisers);[11] • individual will weigh multiple options, determine which gives them the greatest benefit or value, and select that option.	Definition: • foundations on psychology-based theories and relies on empirical evidence of predictable patterns of mental behaviour; [12] • litigants in this second category want to maximise their outcomes in the litigation system but have trouble doing so because of non-rational factors, such as emotions, the current state of affairs, and settlement factors like anchoring and reciprocity.[13]
Primary rational account views	**Common non-rational account views**
1. Economic Theory of Suit and Settlement.[14] 2. Strategic Bargaining Theory.[15]	1. Framing Theory.[16] 2. Regret Aversion Theory.[17] Settlement Factors.[18]

Published by ePublications@bond, 2006

as argued by the economic models but that those individuals 'exhibit different risk preferences depending upon the characteristics of the decision problem'.[20] According to Kahneman and Tversky, the 'fourfold pattern of risk attitudes' when making risky decisions are:

(1) risk aversion for moderate-to-high probability gains;
(2) risk seeking for moderate-to-high probability losses;
(3) risk seeking for low-probability gains; and
(4) risk aversion for low-probability losses.[21]

It is argued that Framing Theory applies to *ordinary litigation* and corresponds to the first half of prospect theory's fourfold pattern of risk attitudes, namely risk attitudes (1) and (2) above.[22] When faced with a decision, such litigants will evaluate the decision options 'relative to the current state of affairs and make risk-averse decisions when choosing between gains and risk-seeking decisions when choosing between losses'.[23] Here is how Framing Theory would apply to an *ordinary* litigation scenario:

Scenario 1
When deciding whether to go to trial, choose a certain settlement amount ($200,000) OR an expected trial value of the case at the same amount ($200,000)

Plaintiffs

Will likely choose a *risk-averse* option (settlement) because they see settlement and trial as gains.[24]
Example — will prefer certain $1000 to a 50 per cent chance at winning $2000 (risk-averse choice between gains).

Defendants

Will likely choose to go to trial (a *risk-seeking* option) because they see both trial and settlement as losses.[25]
Example — rather take 50 per cent chance of paying (losing) $5000 fine than pay a $50 fine for certain (risk-seeking choice between loses).

Most of the attention regarding litigation behaviour has been concentrated on the first half of the prospect theory model to develop Framing Theory. This aspect of Framing Theory corresponds with studies on risk aversion and risk-seeking behaviour by plaintiffs. In *ordinary* personal injury litigation, for example, plaintiffs-victims battling with defendant-insurance companies generally settle 90 per cent of the time for a number of reasons, including lack of funds, reduced bargaining power when compared with insurers and poor legal counsel, despite evidence that plaintiffs will generally win at trial.[26] Similarly, defendant insurers who have little personal vested interest will make low-soft/insult offers, go to trial, and take their chances,[27] despite the high statistical probability that they will lose at trial.[28] Plaintiffs take the risk-averse choice while defendants generally pursue the risk-seeking path.

Controlling *frivolous* litigation, however, is another ballgame. Professor Chris Guthrie proposes that the second half of prospect theory's fourfold pattern of risk attitudes, namely (3) and (4) above, that deal with low-probability gains and losses, may offer some insight into controlling frivolous litigation. The risk attitudes associated with low-probability gains and losses posit that 'decision-makers faced with low-probability gains tend to make risk-seeking decisions, while decision-makers faced with low-probability losses tend to make risk-averse decisions'.[29] This behaviour is the opposite of the behaviour of litigants in ordinary litigation. Based on this second half of prospect theory, here is how Scenario 1 above would play out:

Scenario 1a
When deciding whether to go to trial, choose a certain settlement amount ($1.00) OR an expected trial value of the case at the same amount ($1.00)

Plaintiffs

Will likely choose a *risk-seeking* option (trial) because they see settlement and trial as gains.
Example — Rather take a 5 per cent chance at winning $1000 prize than getting a $50 prize for sure (risk-seeking in a low probability gain).[30]

Defendants

Will likely choose to settle (a *risk-averse* option) because they see both trial and settlement as losses.
Example — Rather pay a certain $50 fine than take a 5 per cent chance of paying a $1000 fine (risk averse in low probability loss).[31]

Guthrie argues that litigants who pursue potentially unmeritorious claims are essentially cases where the plaintiff has very low expectations of obtaining a positive financial settlement (low probability gain). Based on the understanding of rational actor accounts and the second half of prospect theory's fourfold pattern of risk attitudes, Guthrie proposes a Frivolous Framing Theory that explains how litigants are likely to behave in frivolous litigation.

First, it is important to note that the litigation process is filled with uncertainties. Because of uncertainties about the facts, actual evidence, actual value of the case, the application of law to the facts, attitudes and biases of the judge, and skills of the lawyers,[32] it may be argued that the plaintiff has a probability of recovering *some* damages, however nominal, and that this probability is a low-probability gain, however small. At the same time, because lawyers generally incur the costs up front for plaintiffs in personal injury and public liability claims,[33] the plaintiff is in a low-probability loss situation.

Guthrie, through his Frivolous Framing Theory for how litigants act in frivolous suits (that is, unmeritorious claims and spurious defences), makes two propositions:

(1) plaintiffs in frivolous litigation are likely to prefer trial (risk-seeking option) while defendants prefer settlement (risk-averse); and
(2) plaintiffs and defendants in frivolous litigation are 'likely to either settle on terms advantageous to the plaintiff or to reach bargaining impasse',[34] which will result in the case getting resolved through motions or a trial.

In frivolous cases, unlike ordinary litigation, the plaintiff has greater power in bargaining.[35] In other words, the plaintiff's power in a frivolous litigation is a greater tolerance for

risk than his or her adversary because, for example, the plaintiff has very little to lose by pursuing the case. The plaintiff may actually win some damages or the plaintiff may have a 'psychological leverage' in settlement negotiations even though they may have a very low probability of winning at trial.[36] Therefore, in *frivolous* litigation scenarios Guthrie's Frivolous Framing Theory would contend that because risk attitudes are reversed, the legal system reforms should focus on encouraging plaintiffs to settle (rather than defendants) because plaintiffs are risk-seeking in frivolous claims and defences and would prefer trial over settlement.[37]

Taking this understanding of theory and principle at face value, the next section is an attempt to assess whether the reasonable prospects legislation might succeed in achieving its goals in light of such negotiation theories and principles.

Assessing the reasonable prospects of success for Division 5C, Part 11 legislation against negotiation theory

The legislature sought to control frivolous litigation by preventing legal professionals from filing a case or giving legal advice to a client without first determining whether the case had reasonable prospects of success. Traditional meritorious personal injury and public liability claims would appear to be moderate-to-high probability gain scenarios because the plaintiff has a strong case and is pitted against a defendant insurer who has the financial means, authoritative advantage, and the bargaining advantage because of being a repeat player. The defendant-insurer will invariably start with a low-soft or insult offer. The plaintiff will counter with a high-soft offer in order to eventually get a fair settlement.[38] Both parties expect to engage in a 'negotiation dance' that includes these various, allegedly inefficient, tactics. Yet both parties seem to accept that such tactics are part of the negotiation dance and that such tactics are efficient and necessary in arriving at a fair resolution to the matter, at least a resolution that is acceptable to both parties.[39] Therefore, under the aforementioned discussion regarding *ordinary* litigation behaviour, if reformers want to discourage the filing of meritorious personal injury or public liability cases and encourage greater settlements, reforms should be directed at *defendant insurers*. Conversely, if reformers want to discourage filing of *frivolous* claims, reforms need to be directed at *plaintiffs* because in the context of frivolous litigation, plaintiffs are more risk-seeking than defendants.

It seems that s 198J and its related sections are targeted at plaintiffs. The approach under s 198J is a tactic that could be associated with what Guthrie referred to as 'combating plaintiffs' tendencies to overweight their low-probability of prevailing at trial'.[40] By requiring that the plaintiff prove reasonable prospects of success prior to filing, the legislators imposed a potentially expensive 'reality-check' on the plaintiff by putting a premium on effective case preparation, hoping that plaintiffs will realise that they have little chance of winning and will abandon the case. Meanwhile, defendant insurers are *not* forced to re-appraise their assessment of the case nor are they required to change their existing insult or low-soft offers to prevent the plaintiff from going to trial. They are not even required to push for settlement. Defendant insurers are playing the ordinary litigation game in a *frivolous* litigation scenario.

The idea was good on paper, but has proved an ineffective legislative strategy for several reasons. First, punishing the legal professional is not the answer. Legal professionals serve the courts and courts serve the hands of justice. Since access to justice is a major reform concern of the ALRC and the Senate in its 1999 study,[41] courts are not likely to take such a risk.

Second, discussions in *Momibo*[42] and *Lemoto*[43] in particular, serve as a reminder that the division of responsibilities between legal professionals and judges is essential to ensure efficient and fair administration of justice and avoid a potentially compromising position of having to make value and legal judgments that are presumably beyond the scope of their roles. Courts and legal professionals are required to avoid conflict of interest issues that may affect the sanctity of

Published by ePublications@bond, 2006

professional legal privilege. Therefore, courts are not likely to adopt measures which appear to be in contradiction with well-established principles.

Finally, the current legislative strategy is ineffective simply because despite enforcing a reality check, the plaintiff in a *frivolous* litigation is the power player and has the bargaining advantage. The plaintiff has something, however small, to gain and very little to loose. The plaintiff has low expectations, low costs outlays, and high bargaining advantage. Why shouldn't the plaintiff pursue the case, especially if the defendant-insurer continues to use low-soft and insult offers as a means to deny redress to the plaintiff's alleged injuries?

In sum, the current tactic of imposing an additional standard of proof in the preparatory stages before filing the case in an attempt to force the plaintiff in a *frivolous* litigation scenario to second guess the validity of their claim does not, as the aforementioned cases demonstrate, have reasonable prospects of success in terms of achieving legislative goals of reducing or eliminating such claims.

As suggested by Guthrie, an alternative approach to address the *frivolous* claims scenario is to amend the current ethics codes in a way that would put the plaintiffs in the position they would be in as if they were in ordinary litigation, thus inducing risk-averse behaviour instead of risk-seeking behaviour. The plaintiff must be faced with some prospect of loss so that there is some doubt as to the attractiveness of filing or pursuing a frivolous claim or defence.[44] Guthrie proposes that one way to amend the ethics codes is to require that plaintiffs advance the costs of filing fees, service fees and discovery costs if they wish to continue with a case that the legal professional has determined has little or no reasonable prospects of success.

Under the current costs regime, especially in the US, ethical codes prohibit lawyers from providing clients with litigation-related financial assistance.[45] However, lawyers are allowed to advance the client's litigation costs with the understanding that the advancement will be deducted and repaid lawyers from the final settlement.[46] The same scenario may not work so well where the legal professional has determined and advised the client that the case does not have reasonable prospects of success. A legal professional who agrees to pursue a potentially frivolous claim does so at his or her own expense and the litigation would essentially be a free ride for the plaintiff. The plaintiff has little to no costs so he or she is likely to file suit.[47]

If the ethical codes were changed and plaintiffs were required or asked to advance costs for cases where there is little prospects of success, then the plaintiff would immediately be faced with the risk of incurring a loss and might be more risk averse, thereby choosing to abandon or settle rather than risk losing at trial.[48]

However, requiring plaintiffs or defendants to advance costs in *frivolous* litigation may also have its disadvantages. First, in many personal injury cases, there is loss of limb, loss of income, or loss of a loved one that has already financially burdened the plaintiff. The plaintiff counts on the settlement of the case to help defray some of these unexpected expenses. Imposing even additional costs might have the adverse effect of driving away clients or impairing access to justice.

A second potential concern is that even if the plaintiff advances the costs, there is no guarantee that they will abandon the case or that lawyers will abandon the current practice of advancing litigation costs in order to keep or gain clients.

A third concern is that there is still a lack of control over the defendant-insurer negotiation behaviour in light of requiring plaintiffs to advance costs. If you ask one party to change their behaviour and you do not impose a complementary obligation on the other party, then there is no incentive to co-operate or change behaviour. As long as defendant-insurers continue to undervalue cases and make low-soft offers, plaintiffs will have to respond by exaggerating claims or opening high-soft in order eventually to come within the target zone of acceptable settlement offers.

In recent years Queensland has experimented with attempts at better modifying the behaviour of plaintiffs and defendants with regards to frivolous claims[49] through the introduction of the *Motor Accident Insurance Act*,[50] the *Workcover Act*[51] and the *Personal Injury Proceedings Act*.[52] Each of these Acts requires that all parties engage in a mandatory pre-trial conference before the plaintiff can initiate legal proceedings. If parties do not agree to a settlement, each side must exchange a Mandatory Final Offer (MFO). Each side must then decide whether to accept or reject this offer. If, during trial, the plaintiff recovers more than his or her MFO, the defendant must pay the plaintiff's full indemnity costs, which are usually higher than standard recoverable costs under Australia's 'loser pays' system.

However, if the defendant loses but is required to pay less than his or her own MFO, the 'loser pays' rule is disregarded and the plaintiff must pay the defendant's costs on a standard basis. As observed by Mr Rob Davis, this legislation, in effect:

> … directly alters the payoff matrix … used [during] negotiations by tilting the win/lose odds to favour those who have the best case and the most reasonable negotiation posture with respect to their prospects of success.[53]

The result of the Queensland legislation appears to be that most cases are settled at or before the Compulsory Conference Stage rather than at the steps of the courthouse.[54] In sum, regardless of the proposed method, there must be changes and controls on *both* sides of the fence, especially when dealing with the enigmatic and elusive *frivolous* litigation 'problem'.

The insights into plaintiff and defendant litigation behaviours offer the opportunity for legislators and legal reformers to draft regulations that have some sound basis in objective, measurable evidence of how legal actors behave within the legal system. If nothing else, it may be used to draft effective legislation that might actually have the chance to achieve the desired effect.

Conclusion

As a result of Div 5C and s 198J of the LPA 1987, legal practitioners cannot provide legal advice or commence legal proceedings *prior to* their claim or defence having reasonable prospects

of success. The legislature's goal when enacting Div 5C was to reduce unmeritorious claims and spurious defences, more specifically as they relate to personal injury and public liability claims. The legislature imposed behavioural controls on negotiation tactics of legal professionals *before* considering the potential side effects of such behavioural controls.

Section 198J momentarily moved the 'solution' towards controlling the standard negotiation/litigation strategies of high-soft, low-soft, exaggerated offers, and wild claims. In practice, however, courts have diluted the force of s 198J and swung the pendulum back towards an objective test seen primarily through the subjective assessment of the lawyer, giving deference to the legal professional. While the legislature attempted to split the team between helper/client and even helper/courts, the courts have reaffirmed the judgment of the legal professional and well-established judicial principles.

This article has discussed one attempt among many legislative attempts designed to control the negotiation behaviours of legal professionals via regulatory measures and its relative success in light of negotiation theory and principles. If society is to benefit from such regulatory measures, these regulations must integrate theory and principle as well as attempt to predict side effects before they are put into practice.[55] This will ensure an objective, reliable foundation from which to evaluate its success as well as justification for the taxpayer expense in supporting such reform measures. ●

Avnita Lakhani is a PhD candidate at Bond University, Gold Coast, Queensland and holds an LLM in International Dispute Resolution.

Endnotes

* I am grateful to Professor John Wade, for his insightful comments on this article and to Professor Laurence Boulle for his helpful advice. Comments and questions are welcome via email to alakhani@student.bond.edu.au.

1. The reference to 'fog' is taken from the term 'fog of war', which is used to describe how difficult it is to determine what is really happening in the heat of battle, resulting in countless, costly errors of judgment. Undoubtedly s 198J was proposed as a result of the fog of war known as the alleged 'tort crisis' in 1990s Australia.

2. The LPA 1987 was repealed in 2004 and replaced by the *Legal Profession Act 2004* (NSW) (LPA 2004). Section 198J has been renamed s 345. This article uses s 198J for ease of reference when discussing case law and legislative history and purpose.

3. See, for example, the *Vexatious Litigants Act 1981* (Qld). Note: frivolous claims/litigation here is akin to 'unmeritorious claims' and 'spurious defences' as identified in the Second Reading Speech.

4. Chris Guthrie (2000) 'Framing Frivolous Litigation: A Psychological Theory' 67 U Chi L Rev 163 at 163 n1.

5. Above note 4 at 163 n2.

6. Above note 4 at 163 n3–6.

7. In this context, 'prevail' means '*any* gross or net financial return'.

8. Above note 4 at 186.

9. Above note 4. For simplicity's sake I am using definitions as presented by Guthrie. Obviously, there may be numerous discussions on what is 'ordinary' as opposed to 'non-ordinary' litigation.

10. Professor Chris Guthrie frequently distinguishes between 'litigants' and 'legal professional' and the extent to which 'framing' might be more influential as to non-lawyer litigants and less influential over lawyers. See for example, Russell Korobkin and Chris Guthrie, 'Psychology, Economics and Settlement: A New Look at the Role of the Lawyer' (1997) 76 *Texas Law Review* 77 at 79–83 and n 24; Chris Guthrie, Jeffrey J Rachlinski, Andrew J Wistrich, 'Inside the Judicial Mind' (2001) 86 *Cornell Law Review* 777 at 816–18.

11. Chris Guthrie, 'Understanding Settlement in Damages (and Beyond)' 2004 J Disp Resol 89 at 89–90.

12. Guthrie, above note 11 at 94.

13. Guthrie, above note 11 at 94, 100–101.

14. Guthrie, above note 11 at 90–91. For the leading work on the economic theory of suit and settlement, see George L Priest and Benjamin Klein 'The Selection of Disputes for Litigation' (1984) 13 J Legal Stud 1.

15. Guthrie, above note 11 at 91–92. Notable strategic bargaining theorists are Robert Mnookin and Lewis Kornhauser. Strategic Bargaining Theory states that rational litigants will attempt to bargain with one another to get a favourable settlement. Therefore, the negotiated settlements are the result of likely litigation outcomes as well as the strategic bargaining behaviour of litigants.

16. Guthrie, above note 11 at 94–95. This theory is discussed further as it is considered the more modern theory applicable to understanding litigation behaviour.

17. Guthrie, above note 11 at 96–98. Regret Aversion Theory basically means that litigants will select the decision that will minimise the likelihood of post-trial regret. Therefore, litigants are more likely to choose settlement over trial to 'avoid feelings of regret associated with learning after trial that they should have settled'.

18. Guthrie, above note 11 at 94 and 100–106 (discussing four major *settlement factors*: (1) anchoring; (2) reciprocity; (3) scarcity; and (4) vindication seeking as systematically affecting and influencing litigation behaviour).

19. Guthrie, above note 11 at 94; Guthrie, above note 4 at 167–168.

20. Guthrie, above note 4 at 176.

21. Guthrie, above note 4 at 166 (citing works of Kahneman and Tversky).

22. Guthrie, above note 4 at 167.

23. Guthrie, above note 11 at 94–95.

24. Guthrie, above note 4 at 167. The comparisons in the examples involve a settlement amount that is identical to the (expected) trial value of the same case.

25. Guthrie, above note 11 at 95. See also Robin M Hogarth, *Judgment and Choice* (2nd ed 1987) 105: '*Prospect theory* therefore predicts that whereas the plaintiff would settle out of court (that is, take the safe option), the defendant would prefer to go to court (that is, the risky alternative).'

26. Rob Davis, 'Negotiating personal injury cases: a survey of the attitudes and beliefs of personal injury lawyers' (1994) 68 ALJ 734 at 741 and following.

27. Davis, above note 26 at 744–745.

28. Davis, above note 26 at 742–743.

29. Guthrie, above note 4 at 183.

30. Guthrie, above note 4 at 167. The comparisons in the examples involve a settlement amount that is identical to the (expected) trial value of the same case.

31. Guthrie, above note 4 at 167. Many subsequent research projects have corroborated this decision-making pattern: see also above note 4 at 183–185.

32. Guthrie, above note 4 at 186–187. Each of the judicial decisions, *Momibo*, *Degiorgio* and *Lemoto*, fully recognized that it is because of the uncertainties and the fact that judges do not know the full breath of a lawyer's interactions with his client, that the plaintiff may *seem* to have a hopeless case,

Published by ePublications@bond, 2006

only to find that during the course of trial the case is a strong, meritorious case. Therefore, legal professionals are to be given the benefit of the doubt and nominal damages are still damages won at trial by the plaintiff.

33. This is assuming contingent fee or 'no win-no fee' arrangements, whereby the legal professional gets 30 to 33 per cent of the final judgment as fees if he wins.

34. Guthrie, above note 4 at 185–186.

35. Guthrie, above note 4 at 191–192 (quoting negotiation scholars Samuel Bacharach and Edward Lawler in defining power as 'the essence of bargaining'.)

36. Guthrie, above note 4 at 190–192 and 195–206 (providing four potential explanations of why plaintiffs are risk-seeking in frivolous litigation, including psychological, motivational, cognitive and rational). These are not discussed in this article, though they will be in future articles. It is worth noting that these are arguable factors.

37. Guthrie, above note 4 at 169.

38. Davis, above note 26.

39. Lewicki, Saunders & Minton *Essentials of Negotiation* 2nd ed, 2001.

40. Guthrie, above note 4 at 210.

41. ALRC *Discussion Paper 62: Review of the Federal Civil Justice System* 1999.

42. *Momibo Pty Ltd & Barry Bryne v John Burnett Adam and John Robert trading as Marsdens Law Group* (unreported, NSW District Court, WL 2476453, 31 August 2004, Neilson DCJ).

43. *Lemoto v Able Technical Pty Ltd* [2005] NSWCA 153 (Hodgson, Ipp and McColl JJA).

44. Guthrie, above note 4 at 211. This suggestion primarily pertains to US ethics codes.

45. Guthrie, above note 4 at 211–212.

46. Above note 4.

47. Guthrie, above note 4 at 211–212 (stating that 'as a practical matter, frivolous litigation is costless for plaintiffs').

48. Above note 4.

49. Rob Davis (email conversation with Rob Davis on 13 March 2006 regarding the issue of ways in which legislation may be able to better modify the behaviour of plaintiffs and defendants). I am grateful to Rob Davis for this example. This email conversation is on file with the author.

50. *Motor Accident Insurance Amendment Act 1994* (Principal Act); *Motor Accident Insurance Amendment Act 2001* (Amending Act).

51 *Workcover Queensland Amendment Act 2001*.

52. *Personal Injuries Proceedings Act 2002*. An overview of the proposed changes can be found at <www.justice.qld.gov.au/ourlaws/pinjury.htm> (as of March 2006).

53. Davis, above note 49. Further formal studies on how effective the Queensland legislation has been to manage the behaviour of legal professionals from taking on frivolous claims would be useful.

54. Above note 49.

55. Teresa A Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (1989) at p 336: 'To advocate law reforms without a shred of evidence as to how the system currently works, who is likely to be affected, and how those effects may reverberate throughout the system is breathtakingly negligent'.

developments in ADR

- The Technology and Construction Solicitors Association (TeCSA) in the United Kingdom has recently introduced a new scheme that will allow judges to mediate amicable construction cases if the parties consent. The decision has been met with fierce opposition from lawyers, mediators, arbitrators and TeCSA members. The pilot follows an extensive consultation process that attracted comment from the Technology and Construction Court Bar Association (Tecbar), TeCSA and the Chartered Institute of Arbitrators, among other bodies. Participating judges will have extra training in dispute resolution and mediations may be handled by the judge in charge of the case or by another judge appointed specifically.
- Global Mediation Services Ltd has released a new mediation training DVD *Dooley v NIPEC*. The 'two-day' DVD illustrates the entire process of a complex commercial mediation from the introduction and background of the dispute to the final joint session. It is designed to be used for training purposes, as a tool for both mediation trainers and students. For more information or to purchase the DVD, visit <www.global-mediation.com>.
- The growth and success of mediation and other forms of ADR in India has resulted in the Indian Institute of Arbitration and Mediation (IIAM) developing new academic programs, most notably a 'Tri-Continental LL.M'. This joint venture with Hamline University Law School results in an LL.M as well as a Diploma in Dispute Resolution and a Certificate in Arbitration. The course work is split between Cochin, India; the School of International Arbitration at Queen Mary University, London; and St Paul, Minnesota.
- The game 'Rock, Paper, Scissors' has been described mockingly by a US District Court in Florida as 'a new form of alternative dispute resolution' after a motion to designate the location for a deposition was denied and the bickering parties were instead ordered to have the counsel and one paralegal meet at a specified time on the courthouse steps and play one game of 'rock, paper, scissors', with the winner selecting the deposition location. However, given the litigiousness of the parties, the Court went ahead and set a date for hearing any appeals resulting from the outcome of the game. Some online commentators have predicted that this may destroy the image of lawyers and 'give public confirmation that lawyers are useless at resolving disputes'.
- A World Directory of ADR Blogs, developed by the editor of the Online Guide to Mediation blog, is available at <www.adrblogs.com/>. Categories include general alternative dispute resolution, mediation, arbitration, negotiation, conflict resolution and peacemaking, as well as ADR marketing. There is also an 'ADR Friendly' category for blogs which are not ADR blogs per se but which frequently feature articles on ADR. Blogs can be searched alphabetically or by country. Recent additions to the website include a Spanish-based mediation site, Divorce Law Journal, two Portuguese ADR blogs and The Institute for International Mediation and Conflict Resolution Blog.

ADR diary

- **CEDR** is holding its 11th International Summer School in Barcelona, Spain from 20–26 August 2006. The course is focused on commercial disputes as well as providing training for those wanting to gain CEDR Mediation Accreditation. There are only 30 spaces available with half dedicated to international participants. For more information, visit <www.cedr.co.uk>.
- **ACDC** is holding several courses. A one-day course aimed at those who handle complaints in an organisation, entitled **Complaint handling — a complaint is a gift**. The course is being held in Sydney on 7 September. A one-day **Conflict resolution-dispute avoidance certificate** course is being held in Sydney on 6 September.
- **ACDC** is also conducting four-day **Mediation-conciliation accreditation — skills, techniques and practice** courses in Sydney on 12–15 September and Melbourne from 15–18 August. Optional Accreditation days will be held in Sydney on 22 August and 22 September. For more information on ACDC courses see <www.acdcltd.com.au>.
- **ACPACS** is holding a two-day **Advanced mediation** course from 2–3 September in Brisbane. For further information on courses and seminars see <www.uq.edu.au/acpacs>.
- The **Bond University Dispute Resolution Centre** in conjunction with the **Leo Cussen Institute** is holding a four-day **Basic mediation course** on 12–15 October in Melbourne. For more information, phone 03 9602 3111 or email <lpd@leocussen.vic.edu.au>.
- The **BUDRC** will also be conducting independent **Basic mediation courses** (30 November–3 December on the Gold Coast) and **Advanced mediation courses** (in Noosa on 21–24 September). The basic courses also have a foundation family mediation stream, run in conjunction with the Australian Institute of Family Law Arbitrators and Mediators. For further information email <drc@bond.edu.au> or visit <www.bond.edu.au/law/centres>.
- **LEADR** is holding several four-day **Introduction to mediation** workshops around the country: Brisbane from 18–21 October; Sydney from 23–26 August and 8–11 November; Canberra from 16–19 August; Adelaide from 6–9 September; Perth from 4–7 October; and Melbourne from 11–14 October. For registration forms and more information, visit <www.leadr.com.au/training.html>.
- The **Advanced course** for the **Professional certificate in arbitration** is being offered by the **Institute of Arbitrators and Mediators Australia** and the **University of Adelaide** from 15–16 September. For further information phone 08 8303 4777 or visit <www.adelaide.edu.au/arbitration/course>.
- **The Trillium Group** is conducting four-day **Negotiation and mediation workshops** in Sydney from 17–20 September and in Melbourne from 24–27 October. For further information visit <www.thetrilliumgroup.com.au> or phone 02 9036 0333 or 1 800 636869 toll free.
- **The Institute for the Study of Conflict Transformation** is holding **Purpose drives practice: an international conference on transformative mediation** in St Paul, Minnesota. Pre-Conference Workshops and Trainings will be held on 15–16 September with the main conference held on 17–18 September. For all conference information visit <http://transformativemediation.org>.

PUBLISHER: Oliver Freeman PUBLISHING EDITOR: Carolyn Schmidt PRODUCTION: Kylie Gillon SUBSCRIPTIONS: $495.00 per year including GST, handling and postage within Australia FREQUENCY: 10 issues per annum including storage binder SYDNEY OFFICE: 8 Ridge Street North Sydney NSW 2060 Australia TELEPHONE: (02) 9929 2488 FACSIMILE: (02) 9929 2499 adr@richmondventures.com.au

ISSN 1440-4540 Print Cite as (2006) 8(9) ADR

This newsletter is intended to keep readers abreast of current developments in alternative dispute resolution. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers. The publication is copyright. Other than for purposes and subject to the conditions prescribed under the *Copyright Act*, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission.

Inquiries should be addressed to the publishers. Printed in Australia
©2006 Richmond Ventures Pty Limited ABN: 91 003 316 201

Richmond
Challenging old ways; breaking new ground

Published by ePublications@bond, 2006