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Book Review

PRINCIPLES OF DISPUTE RESOLUTION

Reviewed by Geoff Charlton *

Principles of Dispute Resolution (3rd ed), by David Spencer, Lawbook Co, Sydney, 2020, 364 pages + tables: ISBN 9780455244167. Softcover $86

The back cover proclaims that this is "(a) great authoritative text on the law and practice of dispute resolution in Australia". And that, in a nutshell, sums up what this book represents.

The back cover further says that this third edition has been updated by the latest amended legislation and case law. In the nine years since the first edition was published, the list of cases has grown by two whole pages. Moreover, the text has grown by over 40 pages.

With this third edition, there is new material on the theory of conflict; the value of conflict and the State's role in appropriating conflict for its own benefit; and on disruptive technologies. Overall, each chapter has been reviewed and updated where appropriate to include the latest developments in the theory, philosophy and practice of dispute resolution in Australia.

It is a complete treatise on dispute resolution and a valuable guidebook for teachers, students and practitioners alike. Furthermore, the book is written in simple English and throughout, the written text is supported by case notes explaining how the law has moulded dispute resolution. The text also contains the author's controversial views on State legislated ADR programs which the writer found challenging – of more later.

Chapter 1 covers a wide area of general background information underpinning dispute resolution. It begins with an in-depth discussion on the latest theories on conflict and the understanding of how it arises. I was immediately drawn to the statement: "(n)early all disputes have an emotional element to them. Even commercial disputes exhibit such attributes where a person's ability to run a business may be dependent on the outcome of a dispute." [1] [1] Addressing these emotions explains why interest-based mediation has a higher satisfaction rating than other forms of resolving disputes, even where agreement was not reached. The Chapter contains handy tables on negotiating roles and styles and the problems they cause. This is an introduction to the section on what is dispute resolution and its evolution. There is then a handy section on the development of ADR organisations with a table of key developments in Australia, commencing in 1892. The Chapter concludes with a discussion on the Legal Profession and Dispute Resolution.

Chapter 2 entitled “Negotiation”, begins “(m)any people struggle to negotiate effectively. This is because negotiation, like any other skill, is something that needs to be learned and practiced”.[2] There then follows a coverage of negotiation skills which many training courses confusingly class as mediation skills rather than a separate skill set having a wider use than simply in mediations. This distinction is particularly important as it has been found that up to 97% of disputes are solved by negotiation before getting to the stage of mediation, arbitration or litigation. It also clearly classifies mediation as a process. The Chapter begins with a discussion on the fundamentals and advantages of negotiation. Then follows an extended discussion on communication skills: reframing, open and closed questions, silence, active listening, body language and “sponging”. The last expression was something with which I was not familiar until it was described: “(s)ponging means that the negotiator will need to sponge, or absorb, some of the emotion”[3] whether latent or patent, involved in a dispute. Experienced negotiators and mediators do this subconsciously, having learned not to be afraid of the expression of emotions. The

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Chapter compares adversarial negotiation with principled negotiation. This is followed by a discussion of seven elements of negotiation identified by Professor Roger Fisher:[4] interests, options, alternatives, legitimacy, communication, relationship and commitment. There is then a section on “Principled Negotiation – How To Do It?”, with the chapter concluding with “Selecting a Model of Negotiation”. Chapter 2 contains all you need to know about negotiation, the foundation of all dispute resolution processes.

Chapter 3 deals solely with the process of Mediation. Four models of mediation are identified based on Professor Laurence Boule's text,[5] being settlement, facilitative, transformative and evaluative mediation. “These four hybrids are divergent in that they adopt most of the basic procedural steps of classical mediation. Where they differ is in the emphasis the mediator and the participants place on how they arrive at an outcome and the actual outcome of the mediation”.[6] The next 17 pages describe the process involved, starting with preparing for mediation and concluding with “What If the People Do Not Settle”. The Chapter then discusses the “Hallmarks of Mediation”, being confidentiality, voluntariness, empowerment, neutrality and “the peoples' own solution”. The text discusses how what began as absolute hallmarks or principles supporting the concept of mediation have been diluted, as questions have arisen from the manner in which mediation has been practised or modified by actions of the State. The author's views on the intervention of the State are quite challenging, which views are repeated later. I will discuss this issue further when reviewing Chapter 7.

Chapter 4 addresses the other main non-litigious dispute resolution process of arbitration. The relevant sections of the States' Uniform Commercial Arbitration Acts are discussed, extensively supported by Case Notes. The Chapter concludes with discussing the relationship between domestic and International arbitration, and the new (2014) set of arbitration rules issued by the Institute of Arbitrators and Mediators Australia (IAMA) designed to address the issues of timeliness and cost of arbitrations.

Chapter 5 then discusses and describes additional dispute resolution processes. Detailed sections describe conciliation, dispute resolution advisers, dispute review boards and partnering (the last three usually associated with building and construction projects), appraisals and determinations, mini-trial/neutral evaluation, referencing out by the courts, and statute based adjudication (building and construction).

Chapter 6 explores specialised dispute resolution, such as combined or hybrid dispute resolution, collaborative practice in family law, criminal law and restorative justice, workplace dispute resolution and finally an extensive section on online dispute resolution (ODR). Each section describes what process is involved as well as the advantages and disadvantages of each process. Of particular interest to the writer was the discussion on online dispute resolution. With this text written and published by early 2020, the section concluded with “ODR's time has yet to come and the combination of a technologically literate audience and the invention of time and cost-efficient and more portable technology, will secure the future of ODR”.[7] Little did we expect,

let alone the author, how ODR's time would come with a bang with COVID-19. [8] [8] Even the courts quickly embraced online technology.

Chapter 7 is entitled "The State and Dispute Resolution". When reading a textbook, one does not expect long-held views to be challenged in the way the author has done with his argument that there has been a "theft of conflict" primarily by the State. This was initially propounded by the author as far back as 1996. [9] [9] His thesis is that conflict has a value which has been stolen or appropriated, historically by the professional classes, primarily lawyers, but in recent times overtaken by the State in the provision of dispute resolution services through court-annexed schemes and the diversion of private disputes to statutory tribunals, commissions and agencies. As a mediation warrior of old, my initial reaction to

this argument was one of rejection as such diversion enabled me to turn a part-time mediation practice into a full-time one around 2000. In Chapter 3, the author cited the establishment of community justice centres (CJCs) by the States as an increase in the state control over social relations. He argues that as half to three-quarters of referrals to CJCs are from magistrates, lawyers and police, among others, the State under the guise of empowerment diverted the cost of adjudication to mediation and gave the State power and control over disputes in society. I found that, for once, I was in disagreement with the author as neighbourhood disputes often gave rise to violence between neighbours. So, the formation of CJCs had, in my opinion, a sound societal foundation for reducing heat in neighbourhood conflict.

Leaving aside CJCs, the author's basic argument concerning State intervention in private disputes began to register with me with at least two schemes. Rather than legislating for fairer commercial terms in retail leases, New South Wales (NSW) took the soft option of providing an agency to conduct mediations between lessors and lessees. Rather than empowerment of small entrepreneurs, the terms of the retail leases ensured that the power was overwhelmingly with the lessors. A similar situation occurred with the "voluntary" franchising scheme sponsored by the Australian Competition and Consumer Commission (ACCC). COVID-19 showed how governments could, when necessary, try to intervene to protect small business owners from powerful lessors and franchisors. So, thank you, author, for awakening my thought buds with this challenging argument.

The balance of Chapter 7 extensively discusses and evaluates various Commonwealth and individual State court and legislative schemes.

Chapter 8 deals with Legal Issues. Topics covered are confidentiality and without prejudice privilege, legal professional privilege, immunity, enforcement of settlement agreements, and enforcement of dispute resolution clauses and remedies if breached. The discussion of legal principles is supported by extensive use of case notes illustrating their application.

Chapter 9 discusses Ethics and Standards. As a base point, the author argues that "(i)t is important to develop ethical and practice standards that adequately deal with dispute resolution as a vocation and not to attach ethical standards to other existing professional codes of ethics and practice". [10] [10] The reason advanced being that dispute resolution is a vocation, not a profession. The initial discussion on ethics is followed by a review of the Law Council of Australia's *Ethical Guidelines for Mediators (2018)*, the American Arbitration Association's *Code of Ethics for Arbitrators in Commercial Disputes* and an article [11] [11] by a well-known dispute resolution academic, Professor Carrie Menkel-Meadow, who developed an aspirational code of conduct. The balance of the chapter discusses the Dispute Resolution Standards, including the role of the Mediators Standards Board, Family Dispute Resolution standards and accreditation, and Standards for Lawyers in Mediation. The Chapter concludes with "(m)easuring standards achieved in mediation is as hard as measuring success rates. … the (NMAS) standards are optimistic in their aims and objectives … However, it is a pity that mediators, who already struggle to secure paid work, will have to pay more to not only become trained but now to be accredited and to maintain their accreditation" [12] [12] (every two years).

Chapter 10 concludes the text with the subject, "The Future of Dispute Resolution". It begins with "(d)ispute resolution is a dynamic field of endeavour. Hybrid forms of traditional dispute resolution processes are constantly developing" as organisations "tailor processes to suit their own needs. Further the creation of tribunals and commissions in every jurisdiction of Australia … evidences the move to triage disputes away from the courts into bodies that can deal quickly and cost efficiently with specialist disputes by applying dispute resolution prior to adjudication". [13] [13] The author then discusses the phenomena of the "vanishing trial", first observed in the United States and lately in Australia. The other agent for change is identified as disruptive technologies. The author opines that "(a) full-service dispute resolution

practitioner … is nowadays better placed to assist disputants with the array of options available as compared to just a conciliator or mediator" (or a litigator). "A person who can assist a client in avoiding disputes is probably of more value than a person who can help resolve the dispute once it has arisen. A combination of both is worth even more in the marketplace". [14] [14] While the author felt that the future of dispute resolution was probably assured, he thought it would need to bend and adapt to disruptive technologies (and as it has turned out, disruptive epidemics). The Chapter expands on these themes.

Towards the end of the Chapter, the author discusses the question of so many trained mediators but with few or limited access to mediations. The author identified other opportunities arising from this training: assessing the real nature of a dispute; identifying appropriate processes; supporting clients in dispute resolution processes; and conflict coaching. Several academic papers on this topic are discussed. The writer can also vouch for wider opportunities to use mediation training. He has advised a major City law firm and client on strategy and tactics for a mediation over a large construction dispute. He has also been a non-voting Chair of a board comprised of divorcing directors in order to facilitate decisions that would preserve the family company asset. These wider activities link with the author's conclusion that "(t)he role of the dispute resolution practitioner will change" with an emphasis on dispute management and conflict coaching "and they will have advanced technology to effect that change. … The paradigm shift will be interesting and undoubtedly a bumpy ride but the future of dispute resolution will serve disputants particularly well as a just, quick, cheap and effective way to avoid and if needs be, resolve disputes". [15] [15]

The Appendices reproduce the Mediation Kit issued by The Law Society of NSW including Guidelines for Legal Practitioners Who Act as Mediators, and The Agreement to Mediate.

Overall, I found David Spencer's authoritative text to be readable, a thorough coverage of the field of dispute resolution, as well as providing an insightful, and at times challenging, perspective of the practice of dispute resolution in Australia. He is to be congratulated.

It is highly recommended and a MUST text for both teachers, students and practitioners of dispute resolution.

Footnotes

* LLB, a co-author of *The Mediators Handbook* (Lawbook, 3rd ed, 2014) $164 and who has mediated over 2,500 matters, having first mediated in 1992 and continues part time today.

1 David Spencer, *Principles of Dispute Resolution* (Lawbook, 3rd ed, 2020) 2.

2 Spencer, n 1, 31.

3 Spencer, n 1, 37.

4 Roger Fisher and Danny Ertel, Getting Ready to Negotiate (Penguin, 1995).

5 Laurence Boule, Mediation: Principles, Process, Practice (LexisNexis, 3rd ed, 2011) 43–49.

6 Spencer, n 1, 59.
7 Spencer, n 1, 193.
8 As discussed in the article in this Part by Tania Soudin et al, "COVID-19, Technology and Family Dispute Resolution" (2020) 30 ADRJ 270.
9 David L Spencer, "Exploding the Empowerment Myth of ADR" (1996) 3 Commercial Dispute Resolution Journal 13.
10 Spencer, n 1, 285.
11 Carrie Menkel-Meadow, "Ethics and Professionalism in Non-adversarial Lawyering" (1999) 27 Florida State University Law Review 153.
12 Spencer, n 1, 299.
13 Spencer, n 1, 301.
14 Spencer, n 1, 302.
15 Spencer, n 1, 319.

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