



**PRINCIPLES OF
DISPUTE
RESOLUTION**

DAVID SPENCER

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PRINCIPLES OF DISPUTE RESOLUTION

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To Mary-Anne, Millie and Prue

*You are my North, my South, my East and West,
My working week and my Sunday rest,
My noon, my midnight, my talk, my book;
Our lives shaped these pages – so take a look.*

(With apologies to WH Auden)

Girls, I hope you will never need to use the contents of this book ... but I have a feeling you already have.

DS.

Preface

Principles of Dispute Resolution is a text designed to explain the ever increasing number of dispute resolution processes present and evolving in our legal, business and social settings. It discusses well known processes such as negotiation, mediation and arbitration and details more modern processes that have evolved such as dispute review boards, collaborative law and conflict coaching. These latter processes have developed from what is a dynamic desire of the community to move beyond dispute resolution to the management and coaching of conflict situations. In other words, while it used to be thought that litigation was the last resort for people in dispute, to a certain extent dispute resolution has now become that last resort as people and organisations move towards detecting and dealing with conflict and difference before it escalates into a dispute that needs the final process of resolution.

Given the rise of case management in the courts and the desire of parliament and the judiciary to deal with disputes in a just, quick and cheap manner, as well as the creation of specialist tribunals to divert jurisdictionally specific matters away from the courts, there are fewer traditional trials taking place. As the “vanishing trial phenomenon” takes hold, particularly in the United States, in Australia, States and Territories are looking to specialist tribunals, case management techniques that include dispute resolution as the dominant methods to deal with disputes, leaving only those matters worthy of a court’s time to the process of litigation. In the private sector conflict coaching and dispute management are on the rise as organisations seek to reduce the time, cost and loss of morale brought about through disputation.

Chapter 6 details the ever increasing court-annexed schemes emerging in legislation and compared to previous editions (see below) is larger and more difficult to write given the selective nature of what to and what not to include. It is a sign of how parliaments around Australia have embraced dispute resolution that such a chapter can now only touch on the key legislation in each State and Territory. It is also a sign of the rise of dispute resolution that blanket and uniform legislation, largely covering civil litigation and evidence, has emerged as the key pieces of legislation in many jurisdictions dealing with the practice and procedure of dispute resolution.

This text also deals with the legal issues arising from the practice of dispute resolution such as confidentiality, immunity and liability and the enforceability of dispute resolution clauses in contracts. It also deals with the more contemporary issue of ethics and standards pursuant to the new standards regime now in place in Australia. Further, this text also glances into the future to discuss what the face of dispute resolution could look like given the next generation of digital natives will be the future conflict managers, dispute resolvers and disputants. Fewer trials, different and wider roles for those trained in dispute resolution together with the on-going technological revolution all mean a very different future for dispute resolution. This text speculates on a future that could go well beyond on-line dispute resolution to second life dispute resolution where parties send their avatars to mediation in cyberspace only to be returned to the people themselves with the dispute fully resolved. In 2011 this sounds like a science fiction movie, but given the advances in technology and the take up rate of high-end portable technology by the digital natives, it is not an altogether unrealistic prediction.

Principles of Dispute Resolution has evolved from another book by the author, namely my 2005 second edition of *Essential Dispute Resolution*. The aforementioned series was sold by successive publishers and has all but disappeared with the copyright reverting to the authors. When Thomson Reuters approached me over this title we agreed that a book in the same style as the previous title but with more detail and addressing the developing issues of dispute resolution was called for. Therefore, some of the enduring content has been brought across from that book to this text with all such material being updated where appropriate. Chapter 7 on ethics and standards, and Chapter 9 on the future of dispute resolution are new additions and reflect the growth of dispute resolution since 2005.

Principles of Dispute Resolution is for students and practitioners of dispute resolution. It is a text that records the progress of dispute resolution to date and predicts a bright future for its practice and its practitioners. It is a testament to the ability of dispute resolution to re-invent itself according to the needs of its users while still maintaining its core theory, philosophy and practice.

I would like to thank my research assistants Adam Foster and Bobby Darooee for their work on chapters 4, 6 and 8. Best endeavours have been made to ensure that the law is current as of February 2011.

I hope you will find this text a valuable addition to your library.

PROFESSOR DAVID SPENCER

*Melbourne
April 2011*

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