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MEDIATION LAW AND PRACTICE



David Spencer
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Mediation Law and Practice

Mediation Law and Practice is a comprehensive survey of the place of mediation in the expanding field of alternative dispute resolution. It draws on a rich stock of source materials to explain the philosophy underlying mediation, describe the step-by-step processes involved in its practical application and consider the developing law of mediation.

The book is divided into two parts. The first part focuses on what mediation is and how to run it. Touching on the theory and philosophy of mediation, it describes the differences between the emerging models of mediation, discusses the qualities required of a mediator and considers significant issues of gender, culture and power. Finally, this part looks at the importance of ethics and those matters that may be included in a code of ethics for mediators.

The second part of the book deals with the developing common and statute law surrounding the practice of mediation. Separate chapters cover mandatory mediation, confidentiality and the enforcement of mediated settlement agreements. There is detailed discussion of statutory schemes, as well as the state's role in mediation. Consideration of mediation clauses – increasingly frequent in contracts today – leads to further discussion of the potential liability of mediators in tort and contract as well as professional responsibility for lawyers acting as mediators. The final chapter looks at the future of mediation in light of the decline in litigation, the rise in regulatory constraints and the growing popularity of online mediation.

Providing comprehensive analysis supported by select commentary and materials, *Mediation Law and Practice* offers fresh perspectives on the practice of mediation for both the student and the experienced practitioner.

David Spencer is Senior Lecturer in the Department of Law at Macquarie University. He is the recipient of the 2005 Macquarie University Vice-Chancellors' Outstanding Teacher Award and the 2006 Carrick Institute Citation for Outstanding Contributions to Student Learning.

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To Mary-Anne – my north, south, east and west. And to Millicent and Prudence, in whose eyes I draw inspiration to accomplish anything. DS

To Georgia, my little bundle of joy. To Ana Milena, para compartir un amor irremplazable y apasionado. And to Brandon for sharing his life with me. MB

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Preface

When Cambridge University Press asked us to write an Australian title on dispute resolution we instantly agreed on 'Mediation Law and Practice'. Why? Because of all dispute resolution processes, both base and hybrid, mediation is the most sought after process. Why? Because, despite often being mandated by the courts, mediation offers people the opportunity to participate in a truly consensual process that allows them to control the process and the outcome. Many other processes using the descriptor 'dispute resolution' are adjudicative or quasi-adjudicative and therefore, arguably, are not rightfully methods of dispute resolution. Mediation is loyal to the philosophical notion that dispute resolution should empower its users – it does this by requiring participation in the process and agreement in any settlement reached between the parties.

In the past thirty years, with the rise in the formalisation of mediation, the classical model of mediation has adapted and morphed into hybrid models that serve its users efficiently. Today, dispute resolution commentators talk of mediation being classical, facilitative, therapeutic or evaluative. These hybrids highlight the versatility of mediation in adapting to the needs of its users. An example of such versatility is the fact that as this preface is being written, the New South Wales Court of Appeal is piloting a mediation scheme for its civil law appeals. As little as ten years ago mediation for appeal cases was thought to be inappropriate. Mediation morphing continues at a great pace!

As the title suggests, *Mediation Law and Practice* is divided into two sections. The first section, comprising seven chapters, deals with the theory, philosophy and practice of mediation. In particular, this section discusses the history of mediation and the various models of mediation derived from the central philosophies that underpin mediation. The role of the mediator is discussed here, as are some of the power issues that arise; most importantly, the ethics of mediation are discussed, with an attempt to identify the essential elements of a code of conduct for the practice of mediation.

The second section of the book deals with the developing law surrounding mediation, and looks in detail at mandatory mediation, confidentiality and the liability of mediators. Further, settlement agreements and their enforceability are discussed, along with the problems that arise with mediation clauses in contracts. Finally, the state's role in the provision of mediation services is considered, as well as the future of mediation in respect of on-line provision, the move towards dispute avoidance and management, and its role in a climate of declining litigation.

This book is written by two students, practitioners and teachers of mediation and, despite the common intellectual purpose underlying the content it reflects a range of perspectives on the theory, philosophy and practice of mediation. The fact that differing views can exist on these issues is evidence of the broad church of ideas within which mediation operates. In this respect difference is a very healthy condition. Given the range of views that exist, the various chapters in this book may at times disclose divergent views, both in the commentary and in the selection of supporting material. Again, this is healthy and to be encouraged.

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As far as we are aware, the law quoted in this book is correct at the time of publication. Any errors and omissions are ours to wear for eternity.

*David Spencer
Michael Brogan
Sydney
April 2006*

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