CAMBRIDGE

MEDIATION LAW AND PRACTICE

David Spencer
Michael Brogan

Mediation Law and Practice

David Spencer
Michael Brogan

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
477 Williamstown Road, Port Melbourne, VIC 3207, Australia

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521676946

First published by Cambridge University Press 2006

Printed in China by Everbest

A catalogue record for this book is available from the British Library

National Library of Australia Cataloguing in Publication data
Spencer, David, 1961–.
Mediation law and practice.
Bibliography.
Includes index.
ISBN-13 978-0-52167-694-6 paperback
ISBN-10 0-52167-694-0 paperback
1. Dispute resolution (Law) – Australia. 2. Mediation – Australia. 3. Mediators – Professional ethics – Australia. I. Brogan, Michael C., 1966-. II. Title.
347.9409

ISBN-13 978-0-52167-694-6 paperback
ISBN-10 0-52167-694-0 paperback

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.

Michael Brogan is Senior Lecturer in the School of Law and University Teaching Fellow at the University of Western Sydney. He was the recipient of the College of Law and Business Individual Teaching Excellence Award in 2003. Michael is also Visiting Fellow in the Division of Law at Macquarie University.

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 irreemplazable y apasionado. And to Brandon for sharing his life with me. MB

Acknowledgements

The authors and publishers wish to thank the following for permission to reprint copyright material:

'Schmediation and the dimensions of definition' (M. Moffitt), reproduced from (2005) 10 *Harvard Negotiation Law Review*. With permission.

'Toward another view of legal negotiation: the structure of problem solving' (C. Menkel-Meadow), originally published in 31 *University of California Los Angeles Law Review* 755 (1984). With permission.

'Analytical Table of Contents' from R. Fisher, W. Ury & B. Patton, *Getting to Yes* (2nd edn). Copyright © 1981, 1991, by Roger Fisher and William Ury. Reprinted by permission of Houghton Mifflin Company. All rights reserved.

'How mediations are negotiated', 'The opening statement', 'The parties' opening statements', 'Identifying issues and interests', 'Identifying common ground', 'Identifying early options for agreement', 'Separate sessions', and 'Writing up the settlement', reproduced from D. Spencer, *Essential Dispute Resolution* (2nd edn, 2005), Cavendish Australia. With permission of the author.

'Mediation in traditional societies', 'The co-mediation process', 'Models of mediation', 'Experience, expertise and professional background', reproduced from L. Boulle, *Mediation: Principles, Process, Practice* (2005), LexisNexis Butterworths, Chatswood. With permission.

'The path that brought America to uniform laws and mediation in cyberspace' (R. Birke & L. E. Teitz), reproduced from (2002) 50 *American Journal of Comparative Law Supplement* 181 at 181–95. With permission.

'Key developments in alternative dispute resolution in Australia' reproduced from P. Condliffe, *Conflict Management: A Practical Guide* (2003), LexisNexis Butterworths, Sydney, pp 34–8. With permission.

'IAMA Objectives', reproduced from the website of the Institute of Arbitrators and Mediators Australia. With permission.

'NADRAC's Charter', reproduced from the website of the National Alternative Dispute Resolution Advisory Council. With permission.

'Mediation Accreditation Assessment Guidelines' (2004), 'The Agreement to Mediate', 'The Law Society Guidelines for those involved in mediations', and 'Professional standards for legal representatives in a mediation'; reproduced from the website of the Law Society of New South Wales. With permission.

'LEADR Objectives', reproduced from the website of Leading Edge Association of Dispute Resolvers. With permission.

'Services', reproduced from the website of Community Justice Centres New South Wales. With permission.

'VADR Aims', reproduced from the website of the Victorian Association for Dispute Resolution. With permission.

'Bond University Dispute Resolution Centre: Objectives', reproduced from the website of Bond University. With permission.

'La Trobe Law: Conflict Resolution Research Centre Aims', reproduced from the website of La Trobe University. With permission.

'University of Queensland: The Australian Centre for Peace and Conflict Studies', reproduced from the website of the University of Queensland. With permission.

'University of South Australia: Conflict Management Research Group', reproduced from the website of the University of South Australia. With permission.

'University of Sydney: Centre for Peace and Conflict Studies', reproduced from the website of the University of Sydney. With permission.

'Mediation – when is it not an appropriate dispute resolution process?' (G. R. Clarke & I. T. Davies) May 1992; 'The Purpose of an Intake Process in Mediation' (R. Payget) August 1994; 'Can I sue my mediator?' (A. Lynch), vol 6 1995; 'The use of mediation in commercial and construction disputes' (G. H. Golvan) vol 7 1996; 'Impact of cultural differences on dispute resolution' (L. L. Yuan), August 1996; 'Aboriginal mediation: one step towards re-empowerment' (K. Pringle), November 1996; 'Preliminary Conferences: A Quality Tool for Mediators' (G. Charlton) May 1997; 'Community mediation: myth and reality' (W. Faulkes & R. Claremont), 'Conciliation of health care complaints' (A. Gurley), 'Mediation of family law disputes in Australia' (D. Bagshaw) vol 8 1997; 'Negotiating with gender' (J. O'Hare), August 1997; 'Family mediation: friend or foe for women?' (R. Alexander), November 1997; 'Cross-cultural negotiation in Australia: power, perspectives and comparative lessons' (S. Young), February 1998; 'Family mediation under the microscope' (R. Alexander), 'Alternative dispute processes for commercial disputes – quality and style: a survey' and 'Managing quality of ADR for commercial disputes' (M. Garwood) vol 10 1999; 'Ethical standards for mediation: embracing philosophical method' (S. Wellik), vol 10(4) 1999; 'Neutrality and the legitimacy of mediation' Pt I (H. Astor), May 2000; 'Maximising party control' Pt II (H. Astor), 'What is "transformative" mediation?' (M. Brenner, S. Sega, & N. Serventy) August 2000; 'Mandatory mediation and neutral evaluation: a reality in New South Wales' (D. Spencer), vol 11 2000; 'Changing assumptions about mediation in commercial matters: resolving disputes and (re)building relationships' (S. C. Sable), vol 12 2001; 'Remedies: a bar to the enforceability of dispute resolution clauses' (D. Spencer), vol 13 2002; 'NLP for mediators: understanding and influencing yourself and others' (N. Serventy), vol 13(4) 2002; 'Cross-cultural mediation and the multicultural/natural model' (J. Crockett), '"Healing through yarning": training issues in an indigenous family mediation program' (L. Fisher), 'To what degree of certainty must a dispute resolution clause be drafted?' (D. Spencer), vol 14 2003; 'Overcoming attribution bias in mediation: An NLP perspective' (J. Lee), vol 15 2004; 'Some contemporary theories of power in mediation' (H. Astor), vol 16 2005; reproduced from *Austral[as]ian Dispute Resolution Journal*, published by the © Lawbook Co, part of Thomson Legal & Regulatory Limited, http://www.thomson.com.au. With permission.

'The parties' opening statements: the mediator's role', 'Final negotiations', and 'Reframing', reproduced from R. Charlton & M. Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (1995), published by the © Lawbook Co, part of Thomson Legal & Regulatory Limited, http://www.thomson.com.au. With permission.

'Finding agreement' (2002), 'Listening skills' (2nd edn, 2005), reproduced from T. Sourdin, *Alternative Dispute Resolution*, published by the © Lawbook Co, part of

Thomson Legal & Regulatory Limited, http://www.thomson.com.au. With permission.

'Communication', reproduced from G. Tillett, *Resolving Conflict: A Practical Approach* (1991), pp 29–30, Oxford University Press. With permission.

'The five philosophies of mediation', reproduced from R. Charlton, *Dispute Resolution Guidebook* (2000), pp 14–15, published by the © Lawbook Co, part of Thomson Legal & Regulatory Limited, http://www.thomson.com.au. With permission.

'The evaluative-facilitative debate in mediation: applying the lens of therapeutic jurisprudence' (E. A., Waldman), vol 82 1998–99; 'The importance of confidentiality in mediation' (E. E. Deason), vol 85 2001–02; reproduced from *Marquette Law Review*. With permission.

'Transformative mediation's objectives: empowerment and recognition', 'More than settlement', 'The transformative orientation to conflict', reproduced from R. A. B. Bush & J. P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994), Jossey-Bass, San Francisco. With permission.

'Practice and paradox: deconstructing neutrality in mediation' (S. Cobb & J. Rifkin), reproduced from (1991) 16 *Law & Social Inquiry*. With permission.

'More models of mediation' (C. Menkel-Meadow), reproduced from 'The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices' (1995) *Negotiation Journal*. With permission.

'Facilitative mediation: the classic approach retains its appeal' (C. J. Brown), reproduced from (2003–04) 4 *Pepperdine Dispute Resolution Journal* 279, 280–3, 290–2. With permission.

'Effectiveness and appropriateness of mediation', 'Ineffectiveness and inappropriateness of mediation', 'Duties and liability of mediators', 'Ethics, values and professional responsibilities in negotiation and mediation', reproduced from B. Wolski, *Legal Skills: a Practical Guide for Students* (2006), published by the © Lawbook Co, part of Thomson Legal & Regulatory Limited, http://www.thomson.com.au. With permission.

'The mediation alternative: process dangers for women' (T. Grillo), vol 100 (1991) 1545, 1547–51, 1555–77, 1581–99; 'Against settlement' (O. M. Fiss), reproduced from (1984) 93(6) *Yale Law Journal* 1073–90. By permission of the Yale Law Journal Company and William S. Hein Company.

'Construction mediation really works' (G. Morgerman), reproduced from Mediate.com. With permission.

'Health Conciliation Registry', reproduced from the website of the Health Care Complaints Commission. With permission.

'Restorative justice: some common themes' reproduced from G. Johnstone, *Restorative Justice: Ideas, Value, Debates* (2002), pp 11–15, Willan Publishing, Devon. With permission.

'The empowerment model', reproduced from C. K. B. Barton, *Restorative Justice: The Empowerment Model*, 2003, pp 67–9, Hawkins Press, Sydney. With permission.

'Mediation and the court' (Hon. J. J. Spigelman), vol 39 (2001); 'Mediation: how to resolve disputes online' (A. Limbury), vol 40(9) (2002); reproduced from *Law Society Journal*. With permission.

'Can mediation be your day job?' reproduced from Chapter 1 of F. S. Mosten, *Mediation Career Guide: A Strategic Approach to Building a Successful Practice*, 2001, Jossey-Bass. With permission.

'Assuring excellence, or merely reassuring?' (C. Pou), reproduced from 2004 *Journal of Dispute Resolution* 303, 306–9, 325–8. With permission.

'What skills and attributes do experienced mediators possess?' (J. Wade), reproduced from (1999) 5 *ADR Bulletin* 50. With permission.

'Mediating off the grid' (C. M. Currie), reproduced from (2004) 59(2) *Dispute Resolution Journal* 8, 9–14. With permission.

'Some ethical issues surrounding mediation' (R. P. Burns), reproduced from Northwestern University School of Law Public Law and Legal Theory Research Paper Series Research Paper No. 02–5 (2001) LXX *Fordham Law Review* 691–717. With permission.

'Ethics in ADR: The many "Cs" of professional responsibility and dispute resolution' (C. Menkel-Meadow), reproduced from Georgetown University Law Center 2001 Working Paper Series in Public Law and Legal Theory, Working Paper No. 288805. Originally published in (2001) 28 *Fordham Urban Law Journal* 979. With permission.

'New roles for lawyers need new ethical codes' and 'The ten commandments of appropriate dispute resolution: an aspirational code' (C. Menkel-Meadow), reproduced from 'Ethics and Professionalism in Non-adversarial Lawyering' 27 *Florida State University Law Review* 153 (1999). With permission of the original publisher/copyright holder.

'Ethical standards for mediators', reproduced from the website of the Law Council of Australia. With permission.

'Power issues in mediation', reproduced from C. Baylis & R. Carroll, 'The Nature and Importance of Mechanisms for Addressing Power Differences in Statutory Mediation' (2002) 14 *Bond Law Review* 285, 287–96. With permission.

'Forms of power in family mediation and negotiation' (J. H. Wade), reproduced from (1994) 8 *Australian Journal of Family Law* NEXIS 4. With permission.

'Compulsory mediation' (Hon. J J Spigelman AC, Chief Justice of New South Wales), reproduced from an address to the LEADR dinner at the University and Schools' Club, Sydney, 9 November 2000. With permission of the author.

'Designing a dispute resolution system' (J. David), vol 1 (1994); 'The changing role of the state in conflict resolution' (D. Spencer), vol 3 (1996); reproduced from *Commercial Dispute Resolution Journal*, published by LexisNexis. With permission.

'Mediation and the judicial institution' (Sir Laurence Street), reproduced from (1997) 71 *Australian Law Journal* 794, 795–6, published by the © Lawbook Co., part of Thomson Legal & Regulatory Limited, http://www.thomson.com.au. With permission.

'Submission in response to the "Issues Paper on the Review of the Legal Services Directions"', National Alternative Dispute Resolution Advisory Committee. With permission.

'Med-Arb, Arb-Med, Neg-Arb and ODR' (A. Limbury), reproduced from a paper presented to the Institute of Arbitrators and Mediators Australia, Sydney, 3 August 2005, at 1–12. With permission of the author.

'Vanishing trials: fact or fiction?' (D. Spencer), reproduced from a paper given to the Australasian Law Teachers Association Conference, University of Waikato, New Zealand, July 2005. With permission of the author.

'Judicial mediators: is the time right?' (D. Spencer), reproduced from a paper delivered to the Institute of Arbitrators & Mediators Australia, April 2006. With permission of the author.

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.

We would like to thank Jill Henry, the Academic Publisher of Cambridge University Press Australia, for her initial approach, wise counsel and continuing enthusiasm for this project. We would like to thank Kate Indigo, the Managing Editor, Academic, for her professional guidance, and Kath Harper, the copy editor, for her attention to detail which covered up our mistakes brilliantly. Further, we would like to thank our research assistants, Allanah Kjellgren and Sarah Prince, for their enthusiastic efforts in assisting us to bring a wide variety of material into consideration for the compilation of this book.

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

Table of statutes

Table of cases

List of tables and figures

List of tables

Supplementary list of tables and figures contained in text extracts