

# The Future of Dispute Resolution

## First Edition

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# The Future of Dispute Resolution

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Michael Legg

LexisNexis Butterworths  
Australia  
2012

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SWITZERLAND	Staempfli Verlag AG, BERNE
TAIWAN	LexisNexis, TAIWAN
UNITED KINGDOM	LexisNexis UK, LONDON, EDINBURGH
USA	LexisNexis Group, New York, NEW YORK LexisNexis, Miamisburg, OHIO

National Library of Australia Cataloguing-in-Publication entry

Author: Michael Legg.  
 Title: The Future of Dispute Resolution.  
 Edition: 1st edition.  
 ISBN: 9780409332766 (pbk).  
 ..... (ebk).  
 Notes: Includes index.  
 Subjects: .....  
 Dewey Number: .....

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Typeset in Myriad Pro and Minion Pro.

Printed in China.

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# Foreword

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The main theme of this collection of essays, reflected in the title of the book, is identifying the future lines of development of the various forms of dispute resolution which are now so familiar to us. Whether the authors' predictions prove to be correct or not, their essays provide us with much valuable information. This information demonstrates that ADR, particularly mediation, has grown in popularity and is making a big impact on the volume of work dealt with by the courts. It is a remarkable irony that mediation, a form of dispute resolution, which is in one sense a competitor of the litigation process, has become, along with case management, a savior of the litigation process which was at risk of collapse due to its high cost and to its inevitable delays.

The essays deal also with some of the more contentious issues arising in litigation and ADR, e.g. discovery, expert evidence, class actions, litigation funding and the future of pro bono work. Pro bono lawyers in law firms, working with counsel, activist groups such as get-up and law students, have recently scored some notable successes.

I particularly commend to readers Wayne Attrill's "The future of litigation funding in Australia". The essay records the development of litigation funding in Australia, its acceptance by the High Court of Australia in *Canvells Cash and Petty cash Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386, the benefits which it confers by way of access to justice and the need for regulation. The author sets out the matters that should be regulated, as indeed they should be.

The publication of these essays is timely for they explain the ways in which dispute resolution is continuing to develop. The book will appeal to a broad readership, including lawyers, ADR practitioners and students. The book also has potential as a text book because it contains materials useful for teaching purposes.

23 August 2012



Anthony Mason

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# Contributors

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**Robert Angyal SC** is a Senior Counsel in Sydney. He has a general commercial practice that covers areas as diverse as company, contract and banking disputes; wills, conveyancing and trade practices; intellectual property; medical negligence; retail leases; franchising; and disputes about natural gas and electricity. As well as practising as a barrister, Robert has been a pioneer since 1991 in mediating legal disputes. He helped found the New South Wales Bar Association's Mediation Committee in 1991, served on the Committee until 2008 and chaired it from 2000 to 2007. He was a director of LEADR from 1991 to 1998.

**Wayne J Attrill** is an Investment Manager in the Sydney office of IMF (Australia) Limited, Australian largest litigation funder. He holds the degrees of Bachelor of Science and Bachelor of Laws from Victoria University of Wellington in New Zealand and Master of Laws from Harvard Law School where he was a Frank Knox scholar in 1988–1989. At IMF, Wayne is responsible for conducting due diligence on potential funded cases and for obtaining cost-effective and successful outcomes for IMF and its clients in major litigation, including class actions and representative proceedings.

**The Hon Chief Justice T F Bathurst** was appointed Chief Justice of New South Wales on 1 June 2011. Graduating with degrees in Arts and Law from the University of Sydney in 1971, he went on to practise as a solicitor in 1972. He was admitted as a barrister in 1977, specialising in corporate law and litigation and was appointed Queen's Counsel in 1987. His considerable experience in corporate law saw his appointment as a member of the Australian Government's Takeovers Panel (2006–2011). Prior to his appointment to the bench, the Chief Justice served as President of both the Australian Bar Association (2008–2010) and the New South Wales Bar Association (2009–2011), the Executive Committee of which he has been a member since 2002.

**The Hon Michael Black AC, QC** was Chief Justice of the Federal Court of Australia from 1991 until March 2010. He was appointed to the Court from the Bar, at which he had practised since 1964. As Chief Justice he was closely involved in the development of the Federal Court's self-governance, the development of the Court's work in assisted dispute resolution and in its procedural reforms. He is presently the Chair of the Attorney-General's Steering Committee for a Courts Administration Service in Victoria and a member of the Dispute Resolution Panel, National Gas Market Rules. He is a graduate of Melbourne University, LLB and LLD (honoris causa).

**Associate Professor Anna Cody** is Director of Kingsford Legal Centre, a community legal centre which is part of the University of New South Wales Law Faculty. She has taught at Kingsford Legal Centre for over 15 years. In 2007, Anna won the New South Wales Women Lawyers' achievement award in the government/community lawyer section and in 2009 the UNSW Vice-Chancellor's Award for Teaching Excellence. Anna is Chair of the Community Legal Centres New South Wales Board and Chair of the NSW Legal Assistance Forum. She is a graduate of UNSW and Harvard Law Schools.

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**The Hon Justice Arthur Emmett** is a justice of the Federal Court of Australia. He was a Deputy President of the Copyright Tribunal of Australia from April 2001 to October 2007, when he was appointed President of the Copyright Tribunal. He is a member of the corporations, patent, admiralty and taxation panels of the Federal Court's NSW registry. He has previously served as a part-time member of the Australian Law Reform Commission. Justice Emmett was appointed Queen's Counsel in New South Wales in 1985 and in other jurisdictions soon after. He appeared on many occasions in the High Court and also appeared in the last appeal from Australia to the Privy Council.

**Frances Gibson** is the Director of Experiential Studies at the Faculty of Law at UNSW. Fran has worked for the Aboriginal Legal Service, the Legal Aid Commission of New South Wales, Redfern Legal Centre (where she was Principal Solicitor) and Kingsford Legal Centre. Fran's expertise was recognised by the invitation in 1999 to be the first Visiting Clinical Scholar at New York University for six months. In 2000, she received the Vice-Chancellor's Award for Teaching Excellence at UNSW. In 2001, she was a recipient of a Quality Teaching Award from the New South Wales Minister for Education and Training and the Australian College of Education and the national 2001 Australian Universities Teaching Committee Award for University Teaching, Law and Legal Studies.

**Jeremy Gormly SC** chairs the National Alternative Dispute Resolution Advisory Council (NADRAC). He is a member of the New South Wales Legal Profession Admission Board. He chairs the Common Law Committee of the New South Wales Bar Council. His practice consists of mediation, professional negligence and acting as counsel assisting in inquiries. He was counsel assisting in the CAA Seaview Royal Commission, the Thredbo Landslide Inquiry, the New South Wales Grains Board Inquiry, the Andrew Mallard wrongful murder conviction (Western Australia), the ICAC Tripodi matter, the McGurk tapes inquiry and



## Contributors

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**Malcolm Holmes QC** is a senior counsel and chartered arbitrator based in Sydney and a chartered arbitrator member of chambers at 20 Essex Street, London, United Kingdom. He specialises in the area of international commercial arbitration both as counsel and as arbitrator. He has served as President of the Chartered Institute of Arbitrators, Australian Branch and is a co-author of *The International Arbitration Act: A Commentary* (LexisNexis, 2011). He is a member of the panels of international arbitrators maintained by several major arbitration institutions including the Singapore International Arbitration Centre (SIAC), the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC), the Korean Commercial Arbitration Board (KCAB) and the Badan Arbitrase Nasional Indonesia (BANI).

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**Lord Justice Sir Rupert Jackson** has been a Lord Justice of Appeal since 2008. He was called to the Bar (Middle Temple) in 1972. He was appointed a Queen's Counsel in 1987. In 1999, he was appointed as a High Court Judge in the Queen's Bench Division. He was the Judge in Charge of the Technology and Construction Court (TCC) between 2004 and 2007. He was co-author and general editor of *Jackson and Powell on Professional Negligence* from 1982 to 1999. Since then he has been consultant editor. He has been an editor of *The White Book* (the United Kingdom guide to the Civil Procedure Rules) since 2000 and editor-in-chief since 2010. In January 2009, he was asked by the Master of the Rolls to undertake a comprehensive review of civil litigation costs. In January 2010, the *Review of Civil Litigation Costs: Final Report* was published.

**The Hon Justice Anna Katzmann** was appointed to the Federal Court of Australia in October 2009 with effect from 1 February 2010. At the time of her appointment she was a practising Senior Counsel at the Sydney Bar and the President of the New South Wales Bar Association. She was admitted to the Bar in New South Wales in December 1979 and in 1997 she was appointed Senior Counsel. In 2002, she was named by the Women Lawyers' Association as a 'woman lawyer of achievement'. Justice Katzmann served on the Council of the New South Wales Bar Association for a continuous period of 15 years during which she held all executive positions culminating in her election as President in 2007 and 2008. Justice Katzmann is a graduate of UNSW.

**Shirli Kirschner** has been a qualified mediator since 1992 and the principal of Resolve Advisors Pty Ltd since August 1996. Resolve Advisors provides services resolving disputes, assisting group decision-making, training and dispute process design services to a wide client base. Prior to that Shirli had worked as a senior associate with Allen Allen & Hemsley and then at Gilbert + Tobin. Shirli is a nationally accredited mediator, the Dispute Resolution Adviser for the National Electricity Market Rules and the National Gas Rules. Shirli is also a sessional lecturer in the UNSW Masters of Law courses Foundations of Facilitation and Mastering Facilitation.

**Associate Professor Michael Legg** joined the Faculty of Law at UNSW in February 2009 after more than 10 years in practice with leading Australian and United States law firms. He specialises in civil procedure, class actions, and regulatory and commercial litigation. He is the author of *Case Management and Complex Civil Litigation* (Federation Press, 2011) and the editor of *Regulation, Litigation and Enforcement* (Thomson Reuters, 2011). Michael is active in the legal profession being a member of the Law Society of New South Wales's Litigation Law and Practice Committee and the Law Council of Australia's Class Actions Committee. He is a Board Member of the National Pro Bono Resource Centre. He holds law degrees from UNSW and the University of California, Berkeley.

**The Hon Kevin Lindgren AM, QC** was a Judge of the Federal Court of Australia from July 1994 until February 2010 and President of the Copyright Tribunal of Australia from 2000 to 2007. Dr Lindgren practised as a solicitor from 1962 to 1969; was Lecturer, Senior Lecturer then Professor of Law at the University of Newcastle from 1969 to 1984; and practised at the Bar in Sydney from 1984 to 1994, being appointed Queen's Counsel in 1991. Since his retirement Dr Lindgren has split his time between acting as a mediator and arbitrator and academic pursuits. Dr Lindgren is the General Editor and part author of LexisNexis's *Lahore Copyright and Designs, High Court and Federal Court Practice and Federal Civil Litigation Precedents*, and is the author of *Vermeesch and Lindgren, Business Law of Australia*.

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**The Hon Robert McClelland MP** is the Federal member for Barton (NSW). Robert served as the federal Attorney-General from 2007 to 2011. He also served as the Minister for Emergency Management, Housing and Homelessness. Before becoming Attorney-General he served on several parliamentary committees, including as Deputy Chair of the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Joint Standing Committee on Treaties and the Joint Select Committee on the Republic Referendum. Robert was elected to Parliament in 1996. Before entering Parliament, Robert practised as a lawyer for 14 years, specialising in industrial and sports law. He has a Bachelor of Law degree from the UNSW and a Master of Law from the University of Sydney.

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## Contributors

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papers on international commercial arbitration, and international trade and investment law. He is trained as an international commercial arbitrator and mediator. Professor Trakman chairs or serves on various panels, boards and associations devoted to arbitration and mediation, on four continents. Professor Trakman holds masters and doctorate degrees in Law from Harvard Law School.

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# Preface

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In 2011, the University of New South Wales Law School celebrated its 40th anniversary. Part of the celebrations was a conference entitled 'Dispute Resolution in the Next 40 Years: Repertoire or Revolution' that was held on 1 and 2 December 2011. The Law School was fortunate to have as speakers leading members of the judiciary, legal profession, ADR profession and academy, many of whom were alumni.

Such was the quality of the speeches and panel discussions that this text was devised as a way in which the ideas and issues from the conference could be disseminated to a larger audience.

The timing of the conference was also fortuitous as it coincided with the Law School's curriculum review and in particular the development of the new core course entitled 'Resolving Civil Disputes'. The course teaches civil procedure/litigation and alternatives to litigation, in particular, negotiation, mediation and arbitration with a view to students being able to consider what is the appropriate process(es) for different types of disputes. The course will also emphasise the ethical responsibilities of lawyers and debate the policy issues associated with dispute resolution, ADR and civil justice. Many of the chapters in this text assist in the accomplishment of the goals of the new course.

As editor of the text and convenor of the conference, I would like to thank:

- the Dean of the Law Faculty, David Dixon and Head of School, Brendan Edgeworth for encouraging and supporting the holding of the conference;
- Christopher Lemerrier and the Continuing Legal Education team, Angela Sutton, Hilary Blackman, Virginia Fox and the Faculty of Law's Marketing team, and UNSW's Media and Communications Office for their assistance in organising and promoting the conference;
- the major sponsors of the conference, IMF (Australia) Limited and Unisearch Expert Opinion Services;
- the conference participants — both speakers and attendees;
- each of the contributors who took time to turn speeches into chapters or to write a chapter especially for the text; and
- my research assistants Emily Rumble and Lara Dopson, final year UNSW Law students.



Michael Legg  
Sydney, Australia  
12 August 2012

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