

The Editorial Board gratefully acknowledges the kind support of



**Contact Details** Tel: +61 7 3135 0500 • Fax: +61 7 3135 0599 • Website <http://www.holdingredlich.com.au>  
Level 1 300 Queen Street Brisbane Qld 4000 • GPO Box 490 Brisbane Qld 4001



Queensland University of Technology

## **Law and Justice Journal**

**Volume 8 Number 1 • 2008**

### **Special Edition – Alternative Dispute Resolution**

---

#### **EDITORIAL BOARD**

General Editors: Professor Sharon Christensen LLB(Hons) LLM *QUT*  
Ms Amanda Stickley LLB GradDipLegPrac LLM *QUT*

Section Editors

Law: Ms Rachael Field BA/LLB(Hons) *ANU* LLM(Hons) *QUT*

Book Reviews: Ms Jennifer Yule BA LLB *UQ* GradDipLegalPrac LLM  
*QUT*

Production Editor: Ms Pernilla White LLB *QUT* GradDipLegPrac LLM *QUT*

#### **ADVISORY BOARD**

Justice Roslyn Atkinson  
Mr Dale Cliff  
Professor Mark Findlay  
Professor Mark Finnane  
Professor Arie Freiberg  
Dr Garry Hamilton  
Mr Lionel Hogg  
Professor Bryan Horrigan  
Mr Stephen Humphreys  
Professor Andrew Keay  
Professor Robert Kelly

Professor John Kleinig  
Dr Jacqueline Lipton  
Mr Phillip Lipton  
Mr Lex MacGillivray  
Mr Patrick Mead  
Justice Debra Mullins  
Judge Helen O'Sullivan  
Professor Barry Rider  
Professor Louise Shelley  
Ms Marianne Stowe-Smith  
Mr John Swinson

#### **BUSINESS MANAGER**

Ms Jane Malady BBus(Hons) *SCU*

This issue may be cited as (2008) 8(1) QUTLJJ

## **Process of Review of Articles Submitted to QUTLJJ**

The *Queensland University of Technology Law & Justice Journal* is a scholarly, refereed journal. Articles are refereed by at least one appropriate external referee who is independent of the editorial board.

The QUT Law & Justice Journal is also published online at <http://www.law.qut.edu.au/ljj/editions/>

QUT CRICOS Code: 00213J

ISSN 1445-6230

© Queensland University of Technology Law and Justice Journal 2008

October 2008 Published and printed in Queensland by:

QUT Publications  
130 Victoria Park Road  
Kelvin Grove  
Queensland 4059  
Australia

---

---

# Faculty of Law

---

## **Faculty Office**

*Dean:* Professor The Hon M Lavarch, LLB QIT

*Assistant Dean, Research:* Professor WD Duncan, LLB Qld LLM Lond

*Assistant Dean, International, Commercial & Community Engagement:* Ms Iyla Davies, LLB(Hons) GradDipLegalPrac LLM Qld

*Assistant Dean, Learning and Teaching:* Associate Professor Melinda Shirley, BA LLB(Hons) Qld GradDipLegalPrac LLM Bond

*Director, Graduate Programs:* Dr Ros Macdonald, LLB(Hons) Qld LLM Monash

*Director, Undergraduate Programs:* Dr W Dixon, BEcon LLB(Hons) UQ LLM QUT

## **Law Library**

*Law Library Manager:* CA Crawford, BA LLB Qld AALIA LLM QUT Cert IV TAA

*Deputy Law Library Manager:* SA Carter, BAppSc NSWIT BBus CSU GradDipInfMan UNSW

## **Law School**

*Head of School:* Professor R Mason BA LLB(Hons) Qld LLM Syd PhD Qld

*Professors:*

DA Butler, LLB(Hons) QIT PhD QUT

SA Christensen, LLB(Hons) LLM QUT, *Gadens Professor of Property Law*

M Cope, BA(Hons) LLM Qld

SG Corones, BCom LLB Qld LLM Lond PhD Qld

DE Fisher, MA LLB PhD Edin

BF Fitzgerald, BA GU LLB(Hons) QUT BCL OU LLM HU PhD GU

SM Kift, LLB(Hons) LLM

WB Lane, LLB Syd LLM Melb, *Clayton Utz Professor of Public Law*

K Puri, BA LLB LLM Del PhD ANU

C Sampford, BA(Hons) LLB(Hons) PhD

L Willmott, BCom LLB(Hons) UQ LLM Camb

*Associate Professors:*

CJ Anderson, BCom (Hons) LLB (Hons) DipEd Qld LLM QUT PhD Qld

SM Jackson, LLB(Hons) QIT LLM Qld

*Senior Lecturers:*

TLC Cockburn, BCom LLB(Hons) Qld LLM QUT GradCertEd(HigherEd) QUT

D Cooper, LLB QIT LLM QUT

L R de Plevitz, BA UNSW LLB(Hons) PhD QUT

GA Egert, BA LLB(Hons) LLM Qld

R Field, BA LLB(Hons) ANU LLM(Hons) GradCertEd(HigherEd) QUT

GE Fisher, BA(Hons) LLB(Hons) Qld BCL(Hons) OU

TCM Hutchinson, BA LLB Qld DipLib UNSW MLP QUT PhD GU

AI MacAdam, BCom LLB(Hons) Qld LLM(Hons) QUT

R Macdonald, BA LLB(Hons) Qld GradDipLegalPrac LLM PhD QUT

DP McGill, BA LLB(Hons) LLM Qld

B Mathews, LLB JCU BA(Hons) PhD QUT

A Stickley, LLB GradDipLegalPrac LLM QUT

I Wells, BA(Hons) PhD FUSA

B White, LLB(Hons) QUT PhD OU

*Lecturers:*

P Black, BA LLB(Hons) *Qld* LLM *Columbia*  
K Burton, BBus LLB(Hons) GradDipLegalPrac LLM *QUT*  
T Carver, BBus LLB(Hons) *QUT* LLM *Camb*  
N Cuffe, LLB(Hons) GradDipLib&InfoSt MIT(Res) *QUT*  
E Dickson, BA(Hons) LLB[Hons] *Qld* PhD *GU*  
B Hamilton, BA LLB(Hons) *Qld* LLM *Bond* LSDA *AMEB*  
B McEniery, BACompSc LLB(Hons) *Qld* LLM *QUT*  
J McNamara, BEcon LLB[Hons] *Qld* LLM *QUT*  
JR Pyke, BSc *Syd* LLB *UNSW* LLM *Syd*  
M Thomas, BA(Hons) *UQ* LLB(Hons) *QUT*  
SJ Traves, LLB(Hons) LLM  
N Stobbs, BA GradDipEd MA *Phil* LLB(Hons)

*Associate Lecturers:*

C Brown, BBus(Hons) LLB(Hons) *SCU*  
M Burns, BA/LLB(Hons) *SCU* GradDipLegPrac *COL*  
N Durrant, LLB(Hons) *GU* BSc *GU* GradDipLegPrac *ANU*  
N Howell, LLB(Hons) *Melb* BSc(Hons) *Melb* GradDipLegPrac *College of Law*  
B Lewis, BA/LLB(Hons) *UQ* LLM *UON*  
M Morison, BA(Hons) *Syd* LLB *UNSW* MIntSt *Syd* GradDipLegPrac  
J Yule, BA LLB *UQ* GradDipLegalPrac LLM *QUT*

**Legal Practice**

*Director:* AJ Chay, LLB LLM *Qld*

*Senior Lecturer:* J Pastellas, BA GradDipLegalPrac LLM *Qld*

*Lecturers:*

L Francis, BCom *UQ* LLB *QIT*  
R Neate, LLB(Hons) *QIT* GradDipLegalPrac *QUT*  
D Richards, LLB *Qld* GradDipLegalPrac *QUT*

**Justice**

*Head of School (Acting):* Associate Professor GJ Dean, MSocWk *UQ* PhD *QUT*

*Associate Professors:*

BJ Carpenter, BHMS(Hons) *Qld* PhD *GU*  
BA Hocking, BA LLB *MON* DipGradLegalStud *Sthlm* LLM *Lond* PhD *Qld*

*Lecturers:*

A Chantler, BSc *Qld* GradDip Teach *KGCAE* GradDip CH *NSW* PhD *Curtin*  
A Cherney, MA PhD *Melb*  
M Craig, BA(Jus) *QUT* MAIntSt *Griff* CertCrimJust Ed *UVA* PhD *UQ*  
C Dillon, DUniv *QUT*  
A Dwyer, BSocSc(Hons) PhD *QUT*  
S Hayes, MA *Tulane USA* BA[Hons]*UQ* PhD *QUT*  
S Jeffries, BA(Hons) PhD *UOC*  
M Lauchs, LLB PhD *QUT*  
T McGee, BA(Hons) *JCU*  
R Robertson, BABSc DipSocPl  
CS Thorne, BA *Qld* GradDipEdAdmin *BCAE* MEd *GU* PhD *QUT*

---

---

# Table of Contents

---

Volume 8 Number 1 • 2008

## Introduction

Alternative Dispute Resolution  
*Rachael Field* vii

## Articles

Mediation and the Art of Regulation  
*Nadja Alexander* 1

Fomenters of Strife, Gladiatorial Champions or Something  
Else Entirely? Lawyers and Family Dispute Resolution  
*Becky Batagol* 24

Workers' Compensation Dispute Resolution Procedures  
in Western Australia – The New Regime  
*Robert Guthrie, Lisa Goldacre and Warwick Claydon* 46

Barking Dogs: Lawyer Attitudes Towards Direct Disputant  
Participation in Court-Connected Mediation of General Civil  
Cases  
*Olivia Rundle* 77

Deal or no Deal: Teaching On-line Negotiation to Law  
Students  
*David Spencer and Samantha Hardy* 93

Shaping the Future: The Discourses of ADR and Legal  
Education  
*Kathy Douglas* 118

Neutrality in Mediation: A Study of Mediator Perceptions  
*Susan Douglas* 139

The Family Dispute Resolution of Parenting Matters in  
Australia: An Analysis of the Notion of an 'Independent'  
Practitioner  
*Donna Cooper and Rachael Field* 158

Political Competence and the Mediator: A New Strategy for  
Managing Complexity and Stress  
*Patricia Marshall* 176

|   |     |
|---|-----|
| A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution in Australia: How Practitioners Practice across both Processes<br><i>Mieke Brandon and Tom Stodulka</i> | 194 |
| Collaborative Law: Dispute Resolution Competencies for the 'New Advocacy'<br><i>Marilyn Scott</i>   | 213 |
| Repositioning the Legal Profession in ADR Services: The Place of Collaborative Law in the New Family Law System in Australia<br><i>Anne Ardagh</i>  | 238 |
| <b>Practice Notes</b>   |     |
| Persuasion in Negotiation and Mediation<br><i>John Wade</i>   | 253 |
| Fitting the Fuss to the 'Form': The Ethical Controversy over Collaborative Law Contracts<br><i>Marion Korn</i>  | 279 |
| <b>Book Review</b>  |     |
| Mieke Brandon and Leigh Robertson, <i>Conflict and Dispute Resolution – A Guide for Practice</i> (Oxford University Press 2007) 280 pp<br><i>Rachael Field</i>  | 282 |
| <b>Submission Guide</b>   | 285 |

# ALTERNATIVE DISPUTE RESOLUTION

## INTRODUCTION

This is the QUTLJJ's first special edition on alternative dispute resolution (ADR), and hopefully many more special editions focussed on this important area of legal and justice practice will follow. The idea for the special edition formed amongst a group of young Australian ADR researchers during a morning tea break at the Research Forum of the National Alternative Dispute Resolution Advisory Council in Melbourne, July 2007. The Forum, facilitated by Tania Sourdin and Samantha Hardy, was a rich discursive environment, and demonstrated the developing depth, breadth and sophistication of ADR research in Australia. Many of the 15 articles in this edition, or aspects of them, were the subject of presentations at the Forum. They all make an important contribution to the Australian ADR literature, spanning both theoretical and empirical methodologies, and covering a range of contemporary issues of significance in both the practice and theory of ADR.

Nadja Alexander contributes an article on the regulation of mediation—a contemporary issue of great significance in the field of ADR, both here in Australia and internationally. Becky Batagol's article considers the ongoing importance of the role of family lawyers, particularly for the protection of vulnerable participants, in the relatively new context of compulsory mediation in Family Law. Robert Guthrie, Lisa Goldacre and Warwick Claydon shift the focus to another context where lawyers play an important role in ADR practice. Their article examines the new approach to the resolution of workers' compensation disputes in Western Australia. An important perspective is then offered in the work of Olivia Rundle which considers lawyer attitudes about party participation in court-connected mediation in Tasmania. One of the conclusions of this piece is that there is a critical need for the teaching of ADR theory and practice in Australia's law schools. This issue is further developed in the contributions of David Spencer, Samantha Hardy, and Kathy Douglas—who write about effective teaching and learning of ADR in tertiary contexts.

Susan Douglas, Donna Cooper and myself offer articles relating to the persistently vexed issue of mediator neutrality and independence. Pat Marshall's piece complements this material developing the notion of political competence in the mediator's skill base and its importance in dealing with the stressors of practice. Maintaining the strong element of the real world and practical relevance of the articles in this edition, Mieke Brandon and Tom Stodulka provide an analysis of the practice issues facing mediators and conciliators in family law contexts. Marilyn Scott and Anne Ardagh conclude the article section of the special edition with some complementary as well as contrasting perspectives on the emerging practice of collaborative law in Australia.

Two practice notes and a book review complete the offerings of this special edition. We are fortunate to be able to include John Wade's piece on persuasion in negotiation and mediation, which was recently the subject of a very well received Keynote Address at the 9<sup>th</sup> National Mediation Conference in Perth in September of this year. We are also very pleased to include Marion Korn's practice note on a current ethical dilemma arising in the area of collaborative practice. Marion, who practices in Toronto Canada, is internationally known as an expert collaborative law practitioner and trainer.

I'd like to thank the many referees who so generously contributed their time and expertise to the development of the articles in this edition. Thanks also to the General Editors, Professor Sharon Christensen and Amanda Sticklely, for their initial support for the idea and for their ongoing editorial expertise and guidance. Thanks also to our production editor, Pernilla White, who has an amazing eye for detail. Special thanks to Jane Malady, the journal's business manager, who has worked collaboratively and patiently with me over the last six months.

We hope you enjoy this special edition.

Rachael Field  
Law Editor  
September 2008