

Book Reviews

ADR Principles and Practice

Henry J Brown and Arthur L Marriott

Sweet & Maxwell 1993

Hardback \$A185.00

410 pages plus tables, index, glossary and appendix

Distributed by the Law Book Company Limited

This book is proof positive, if proof were needed, that alternative dispute resolution (and particularly mediation) has become part of the mainstream of law practice in common law countries. As Sir Thomas Bingham, the Master of the Rolls, says in the foreword to this substantial work:

“To facilitate a just settlement between hostile parties is, as this book makes very clear, a highly professional task.”

The authors are respectively partners in Penningtons and Wilmer Cutler & Pickering (an international firm of high standing based in Washington DC). They, likewise, have approached their task of providing practitioners with a comprehensive and practical guide to alternative dispute resolution in a highly professional way. And, while it is refreshing to see an English text say:

“Various jurisdictions, particularly in Australia, are very considerably ahead of this country in introducing procedural change in litigation, particularly by using ADR procedures (p. xiii),”

there is no doubt, as Sir Thomas observes in the foreword, that this book will help the English catch up.

This is a work that sets out to discuss principles and also to provide a comprehensive guide to practice. The authors believe it to be the first work of its kind in England. There is as yet no Australian equivalent; one is badly needed.

Even given the lack of an Australian ADR practice book, can one justify spending \$A185 on an English text? That, of course, will depend to some extent on your library budget. Obviously, *ADR: Principles and Practice* will not guide Australian practitioners through the recent proliferation here of statutory provisions, practice directions, judicial decisions, articles and practical developments (and, indeed, the brief description at pp 47-48 of “the experience in Australia” is rather dated and somewhat inaccurate). What can be said, however, is that it provides, in one volume, an enormous amount of well-organised and useful information on the principles and the practice of ADR.

The book's primary focus is on mediation. It also has chapters on negotiation, arbitration, mini-trials and other forms of ADR. Mediation has eight chapters devoted to it, covering:

- . principles of mediation
- . mediation: the common core of practice
- . civil and commercial mediation
- . divorce and family mediation

- . labour mediation
- . mediation of community disputes and criminal reparation
- . mediation of public issues and social conflicts
- . function, role and skills of a mediator

In addition, there are chapters on the choice and timing of using ADR processes, and confidentiality and privilege as they apply to ADR.

There is also a useful chapter on how to represent parties in ADR processes. In it the authors (rightly, in this reviewer's view) advise:

“Lawyers should not assume that their knowledge and experience of traditional adversarial procedures will equip them to represent clients in the ADR mode. Once immersed in an ADR process they will no doubt be able to learn as they go along, and the neutral will invariably assist them in working within the new system; but if they wish to achieve the greatest benefits for their clients, it would be helpful for them to acquaint themselves with the procedural details and the philosophy of the process in which they will be working.” (at 300)

In a chapter headed “Jurisdiction, forum and law” the work includes a number of mediation agreements and discusses whether the courts would enforce them. The English law on point suggests that they would not because of a number of decisions, culminating in *Walford v Miles* [1992] 2 AC 128, in which agreements to negotiate were held to be without legal effect. Interestingly, the authors note:

“It remains unresolved whether an ADR clause would be enforced by the English courts if it were to specify a machinery for dispute resolution covering mediation in the first instance followed by arbitration if necessary thereafter. If the ADR provision is clear, certain and reasonably detailed in its terms, and especially if it is an inherent part of a process which involves a stipulation for an eventual determination if the negotiation and mediation phases do not resolve the issues, there would seem to be no reason why a court should not regard it as being enforceable as it would in relation to an arbitration clause.” (at 329)

In New South Wales, however, this question has been resolved by *Hooper Bailie Associated Limited v Natcon Group Limited* (1992) 28 NSWLR 194, where Giles J held that an agreement to conciliate or mediate would be given legal effect if it required sufficiently certain conduct of the parties.

What is important, however - and what is not recognised by *ADR: Principles and Practice* - is that because Equity will not order specific performance if continual supervision of the Court would be required, mediation agreements can probably only be enforced by ordering the cessation of other activities (such as arbitration or litigation) that the parties have promised to abstain from until they conclude their mediation. That fact renders it essential that mediation agreements make concluding

the mediation a condition precedent to commencing arbitration or litigation.

This is a useful overview and analysis of the principles and practice of ADR in general and of mediation in particular. It is not cheap. But there is as yet no Australian equivalent. And it has brought together within its covers a great deal of analytical and practical material for the practitioner who wants to know how to integrate ADR into his or her practice.

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Robert Angyal

Constructive Trusts

M Cope

Law Book Company 1992

Hard Cover RRP \$175.00

The imposition of a constructive trust as a remedy is an increasingly popular form of relief for litigants seeking to recover assets in the wake of the recent corporate collapses. Creditors have the potential to recover the full amount outstanding rather than being restricted to an often very small dividend payable to unsecured creditors in a liquidation. Liquidators have also sought relief by way of the imposition of a constructive trust when the usual armoury of remedies is circumscribed by, for example, the expiry of relevant time periods or when the proof of insolvency is difficult.

Not only is the conduct of the directors of an insolvent company now rigorously scrutinised by liquidators and creditors, but also that of parties who may have assisted or induced a director to have breached his or her fiduciary duties. The imposition of a constructive trust is a much more flexible remedy than seeking to trace in equity or to recover funds as preferences or voidable dispositions. Proof of the "receipt of the funds" is not essential as a stranger may be liable to compensate a principal if the stranger has induced or participated in a director's breach of fiduciary duty, irrespectively of whether the stranger has received any funds of the company by reason of that breach.

The stated objective of Professor Cope's recent text "Constructive Trusts" is to focus on the constructive trust as a proprietary remedy to give effect to obligations and liabilities enforceable in equity. He commences by examining the nature of a constructive trust and in particular the remedial theory of the constructive trust. Much of the book is concerned with an analysis of the relationship between the constructive trust and the acquisition of property by fiduciaries, through mistake, fraud and duress, on death and by law under an oral agreement. Professor Cope also examines in detail the extent to which constructive trusts can be employed to do justice and to prevent unjust enrichment and unconscionable conduct. The book also includes a useful theoretical analysis of promissory and proprietary estoppel.

Perhaps the most significant aspect of "Constructive Trusts" is Professor Cope's analysis of a stranger's personal liability for a trustee's disposition of trust property in breach of trust and a stranger's liability to account for profits and benefits acquired as a result of a breach of a fiduciary obligation. He carefully reviews the extent to which the second limb of *Barnes v Addy* has now been extended to participation in a breach of fiduciary duty, quite independently of the existence of any express trust, by the High Court in cases such as *Consul Developments and Hospital Products*.

Despite the breadth of the author's analysis, "Constructive Trusts" is ultimate disappointing. Too much of the text is occupied with a review of other relevant texts rather than with an original analysis of the authorities. Conflicting theories and the facts of cases are set forth in great detail in the body of the text rather than being identified and then referred to in footnotes. The text is unduly lengthy and at times it is difficult to identify the propositions which are being propounded by Professor Cope.

The subject matter may be difficult and the authorities often contradictory, but a more robust and concise analysis would have been preferable for practitioners. On a practical level practitioners will find the frequent citations of High Court judgments in unauthorised reports rather than in the Commonwealth Law Reports irritating.

On balance "Constructive Trusts" would be a useful but certainly not an essential addition to a commercial/equity lawyer's library. □

John Halley

Environmental Law and Local Government in New South Wales (1991)

Zada Lipman (ed)

Federation Press - RRP \$35.00

Environmental Law and Local Government in New South Wales, edited by Zada Lipman, lecturer in Law at Macquarie University, is not, as the title may suggest, a comprehensive treatise on the role of local government in environmental control in NSW. It is a collection of chapters by various authors originally delivered at a seminar on Local Government and Environmental Control at Macquarie University in September 1990. Topics covered are Heritage Law (Ben Boer), Social Planning (Donna Craig), Urban Consolidation (Patricia Ryan), Pollution Control (Zada Lipman), Resident Participation in Appeals (Justice Paul Stein) and Land Use Control (Linda Pearson).

According to Lipman in her Introduction, the book has a number of purposes, but in particular it seeks to clarify and explain the role of local government in environmental control. Whether these purposes are achieved is discussed below.