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THE CENTRE FOR CONFLICT RESOLUTION

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MEDIATION: CURRENT CONTROVERSIES AND FUTURE DIRECTIONS

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OF ROLLS ROYCE AND VOLKSWAGEN

At a recent session with the future corporate and public service leaders of Australia at the Australian Management College in Mount Eliza, Victoria I was tackled about the defects of the legal system of this country and its institutions. With numerous references to experiences they had severally had, the participants regaled me with the difficulties which even well advised parties have with the courts and tribunals. The problems were familiar: cost, delay, technicality, insensitivity, inefficiency and so on.

I tackled my interrogators head-on. I reminded them of the precious features of our legal system. The independence of judicial officers from external manipulation. The public way in which matters are resolved in the open. The great body of statute and common law to which reference can be had for the ascertainment of rights and duties. The conventions

of obedience to and compliance with the orders of the court or tribunal. The generally peaceful and ordered way in which our community lives together. The institutional means for the orderly reform of the law. The democratic legislature which can respond to the pressures of particular interest groups. The legitimate rôle of the decision-maker in advancing legal principle and in adopting innovations of procedure which will promote the cause of justice. The universities and other institutions in which the decisions are analysed. The free media which may roundly criticise individuals and institutions. The principle of the rule of law. When one lists these feature of the 800 year old legal tradition which we have inherited from England, we have much to be thankful for.

And yet, as I heard myself recounting these precious characteristics of our system, my mind went back to the decade I served as Chairman of the Australian Law Reform Commission. As I talked of the democratic Parliament, I remembered the great difficulty of securing attention to urgent proposals for reform. As I praised the independent judiciary, I recalled the many judicial decisions which cried out for reform and modernisation and which frequently exhibited the capture of judicial minds by the values reflected in earlier decisions written far away. As I promoted the free press, I recalled the work of the Commission to reform the law of defamation and contempt, which to this day remain substantially unreformed. And above all, I recalled the skilful resistance to the reform of legal procedures involved in the resolution of disputes.

At the Australian Legal Convention in 1981, the

President of the Federal Constitutional Court of Germany, Professor Wolfgang Zeidler, addressed Australian lawyers on an "Evaluation of the adversary system: a comparison".[1] He offered some remarks on the "investigatory system of procedure". He recounted the different features of the investigatory (or inquisitorial) system, emphasising its more cost-effective procedures, its dependance upon a substantially written rather than oral form of trial and argumentation and its reliance on the expert decision-maker rather than the amateur juror, lay magistrate or generalist judge. Professor Zeidler, from a detailed knowledge of the English adversary system, acknowledged its superiority in many respects. Cross-examination, after all, has been described as the "greatest engine for truth".[2] The oral trial unlimited as to time was more likely to elicit the facts, as they were, than a hearing where much of the evidence is reduced to writing and many of the questions are asked not by advocates determined to win for their client but by the tribunal itself striving for the truth. The adversary system with continuous oral trial and without formal time limitation was, Professor Zeidler conceded, an infinitely preferable system of justice to that offered in most of the countries of Europe. Indeed, it was Rolls Royce system of justice, he declared. By way of contrast Germany's system of justice could be described only as a "Volkswagen" system of justice. But he asked the telling question: how many ordinary citizens can afford a Rolls Royce? How many can afford a Volkswagen?

These questions, asked exactly a decade ago, have now begun to elicit serious answers in Australia. The search for

new and supplementary methods of dispute resolution is now before our community in earnest. The justifications for the search are to be found in many of the complaints to which voice was given by my interlocutors at Mount Eliza. There has been, in every jurisdiction of Australia, a flowering of innovations - both official and unofficial - to supplement the court system and to provide alternative or additional means of resolving disputes and conflict. Amongst the innovations which have attracted attention, mediation and conciliation are obviously amongst the most important. As it happens, there have been a number of significant developments in recent times to which attention must be called. But attending to them draws to our notice a number of problems and legitimate concerns which must be kept in mind as mediation is developed to bring more of our fellow citizens to a just and efficient resolution of their conflicts and disputes.

STATUTES AND REPORTS

The encouragement of the mediation of disputes is not something recently invented. For centuries, priests, lawyers and other citizens have helped to mediate disputes and even to reconcile those in conflict.

Conciliation, which is the brother of mediation, is actually mentioned in the Australian Constitution.[3] The new province of law in the field of industrial disputes saw a bold idea enshrined in the constitutional charter and reflected in the institutions of industrial relations ever since. My own background in the law included a period in the field of industrial relations. As one new to the field, it was extremely interesting to observe the way in which the

member of the industrial tribunal, federal or state, would "adjourn" the arbitration proceedings and proceed to private conciliation proceedings. The whole procedure was performed with a comparatively high degree of formality. Usually the same person performed the differing functions successively. As a conciliator, he or she would see the parties together, separately and together again seeking to explore the elements of give and take and to bring the industrial dispute to a close. This was a form of official mediation, sanctioned by the law and long accepted (in successive manifestations) in the vital machinery of industrial relations in Australia. But it remained exceptional. And it was controversial. Many considered that it inappropriate to involve judges or even non-judge decision-makers in the candid disclosure of positions often raised by the conciliation procedures. The perceived need to separate judicial activities (on the one hand) from arbitral and conciliation activities (on the other) led to an important decision of the High Court of Australia which resulted in the restructuring of the national industrial relations institutions.[4] It also led to artificialities and rigidities which have been repaired, in part, during the ensuing thirty years.

Although it is important to remember this very Australian contribution to the development of institutional mediation, it is appropriate to say that the true flowering of institutional mediation has only occurred in this country in the past decade. It has occurred under the stimulus of developments at home and overseas. The developments at home have included the publicly expressed concerns about the failings of existing institutions and the heightened

consciousness of a community, better educated as to its rights, and less likely to accept the deprivation of them. Overseas, the expansion of new methods of dispute resolution provided the models which local commentators (and ultimately lawmakers) used in developing their own suggestions for various forms of arbitration and mediation, alternative to the courts. In the United States of America, the features of the failings of the court system and the heightened expectation of a right-asserting community led to various forms of court annexed arbitration and community based procedures for mediation, such as neighbourhood justice centres. The variety of the United States innovations, and the various models which have been developed to meet particular and different needs, has been the subject of much writing.[5] These United States innovations spread first to Canada[6] and only later to Australia.

In response to such developments to meet perceived needs, legislators in Australia, federal and state, have enacted laws designed to facilitate and support procedures of arbitration and conciliation ancillary to court hearings. In New South Wales, the *Arbitration (Civil Actions) Act* 1983 provides for the arbitration of certain disputes, notably claims for damages for personal injury. The Act requires such arbitrators to attempt conciliation between the parties.[7] This is not the only form of mediation enjoined by statute in New South Wales. The Ombudsman, for example, proceeds by informal means to explore the complaints made against administrators. He is empowered to explore consensual resolution of differences and enjoys a high degree of success, accomplished in a cost-effective manner which is

much more accessible to ordinary citizens than are most courts and tribunals. Similarly, the Anti-Discrimination Board has procedures for conciliation and so do the Community Justice Centres.[8] A procedure to facilitate mediation by consent of the parties is available in the Land and Environment Court pursuant to a Practice Direction of that Court of April 1991.[9]

In the federal sphere, the Family Court of Australia led the way in attempts to institutionalise procedures for conciliation amongst disputants. In some registries, joint conferences are conducted by a registrar and a counsellor. These are aimed at resolving disputes as to property or custody questions in a way respectful of the past affection of the parties and attentive to the likelihood (particularly if there are children) that the parties will need to maintain some future association with each other.[10].

The formalisation of these innovations is reflected in the *Courts (Mediation and Arbitration) Act* 1991 (Cth) to which the Royal Assent was given on 27 June 1991. By force of s 2(3) of the Act, if it is not earlier proclaimed to commence, it will commence at the end of six months.

The Act introduces amendments to the *Family Law Act* 1975 (Cth) and to the *Federal Court of Australia Act* 1976 (Cth). Under the amending Act, each of these courts is empowered, subject to the Rules of Court and with the consent of the parties to proceedings before it, to make an order referring matters in dispute in the proceedings to mediation by an "approved mediator". Provision is also made for reference of certain matters under the conditions specified, to arbitrators. An "approved mediator" is defined in s 4 of

the Act to mean a mediator approved under the regulations. The delay in the immediate commencement of the federal Act is explained by the need to provide regulations which will cover the conditions for the approval of mediators (and arbitrators). Specific provision is made to prevent admissions made during a conference conducted by a mediator from being admitted in subsequent legal proceedings.[11] And to afford a mediator (or arbitrator) performing the assigned tasks the same protection and immunities as a judge has in performing the functions of a judge. Such immunities extend to an immunity from being sued in respect of performed actions as a judge, immunity from the law of defamation for things said in the proceedings and from being compelled to give evidence in relation to judicial activities.

There is something of a controversy as to whether these large immunities, reserved by the common law to a very small class of person who are highly trained and performing public tasks, should (at least without authority of Parliament) be extended to private mediators, who may not have that training and who are performing their functions for reward to themselves.[12]

The statutes which have been enacted are obviously important. They signal the kinds of developments which are likely to occur in the future. Two recent publications of federal and state advisory bodies also have importance. They provide hints of likely future developments in respect of mediation in Australia. The first is a Discussion Paper issued in September 1991 by the Senate Standing Committee on Legal and Constitutional Affairs. The paper is Discussion Paper No 4 in the Inquiry of that Committee into the cost of

legal services and litigation. That inquiry undoubtedly arises out of the same concerns as were expressed to me at Mount Eliza, mentioned at the beginning of this paper.[13]

The Senate Committee lists a number of what are described as "issues and concerns" affecting any strategy for reform which involves the use of (relevantly) mediation. These include:

(a) The need to evaluate the cost of various methods of providing alternatives to the courts;

(b) The need to avoid the institutionalisation of a "second-class justice" for some groups in the community: conserving the courts only to the wealthy and powerful, to those accused of crimes or those who qualify for legal aid;

(c) The extent to which courts, under the pressure of their busy lists, should be able to refer matters to other means of dispute resolution (including mediation) even though the parties do not themselves consent to that course;

(d) The assurance of the confidentiality of the information provided during the course of the dispute resolution procedure, in case the matter must later advance to a full hearing in court;

(e) Providing, to the extent strictly necessary, immunity to dispute resolvers and considering whether, and if so when, they should enjoy the same immunities as judges do in the performance of their functions;

(f) Providing for the training, regulation and, possibly, accreditation of dispute resolvers; and

(g) Facilitating and encouraging, where appropriate, non-judicial methods of dispute resolution.

This Discussion Paper is obviously important. It is, of course, easier to pose questions than to provide a coherent set of answers.

Published at about the same time as the Federal Parliament's Discussion Paper is the report of the New South Wales Law Reform Commission on *Training and Accreditation of Mediators.*[14] In 1988 the Commission was asked to inquire into and report on the need for training and accreditation of mediators. A discussion paper was issued. The report is the product of the Commission's deliberations. It is a most valuable document. It recounts the history of the development of mediation (in its various forms) both overseas and in Australia. It details the numerous courses which have been established to examine the theory and practice of mediation in Australia and to train mediators. Notable amongst these endeavours is the work of the Centre for Conflict Resolution at Macquarie University.

The Commission endorses the view that formal training of mediators is desirable. However, it holds back from making any recommendation to implement a legal requirement for training at this stage. Similarly, the Commission does not recommend a statutory scheme of accreditation at this time. But it does propose the establishment of a Dispute Resolution Advisory Council to advise the government and Parliament about dispute resolution practice. It also suggests the establishment of a Dispute Resolution Data Base to provide information on the personnel involved, relevantly, in mediation: their training, experience and specialisation,

if any, together with data on various courses for and means of accreditation of mediators.[15]

The response to each of these publications, federal and state, cannot yet be gauged. However, the coincidence of these two documents indicates the high attention being paid by governments, federal and state, to the issues of alternatives to the court system for the resolution of disputes. In much of the literature, a distinction is drawn between the settling of *disputes* and the resolution of *conflict*. The dispute may be but the latest manifestation of an underlying difference between parties. If those parties part and no longer have a continuing relationship, the resolution of the dispute may leave a deep feeling of resentment. This may be of emotional rather than practical significance. But where parties are bound by blood or affection (as in family disputes, disputes over custody of children, contests of *de facto* spouses or about family provision made in a will) the settlement of a particular dispute may leave the underlying conflict unresolved, to fester for many years - manifesting itself in other disputes. Similarly, where parties are thrown together by geographical proximity (as in the case of neighbours) the desirability of mediation has been noted, not only to save the costs and disappointments of litigation but also out of recognition of the inescapable frictions which may otherwise exist in consequence of continuing physical proximity.[16]

These characteristics of disputes between parties having ongoing relationships may render them particularly appropriate for mediation which addresses the underlying

problem and seeks to bring the parties, if not to reconciliation, then at least to an understanding of the position of the other and a minimisation of the area of contest. Such understanding and minimisation is not always achievable in the court resolution of a contest. Court orders tend to see the winner take all. That was, doubtless, a reason why it was considered appropriate to single out the Family Court for particular attention in the recent federal legislation. But every court and tribunal will see cases where mediation is appropriate. It is plain that the trend of official reports and of legislation is towards the provision of recognition of mediation as an adjunct to court proceedings. Where this leads in respect of the various issues of controversy identified by the Federal Parliamentary report remains a question for the future.

PARTICULAR QUESTIONS

There are four particular issues which I would add to the list for the public and professional agenda of those identified by the Federal Parliamentary Committee.

Needs for a theory of mediation: The first is the imperative need to found the future development of mediation (and of arbitration and ADR generally) upon a sound theoretical basis. This is a point repeatedly made by Dr Greg Tillett of the Macquarie Centre.[17] I strongly support him in that regard. The need for theory derives not only from the fact that a Conflict Resolution Centre in a university would have no legitimacy if it were purely "hands on" and did not concern itself in an appropriate reflection upon its theoretical underpinnings. It is also important for practitioners of mediation and arbitration to be confronted

with the serious questions about what takes them into such activity, what are the legitimate opportunities and limitations involved and what lessons can be derived from a thorough study of the empirical data secured from experience.

It is natural that practitioners of the mediating art will lay emphasis upon the practical skills involved in bringing disputes and conflict to a close. But it is important that they should ground their conclusions in sound data, not upon hunch, guess-work or unscientific extrapolation from anecdotal experience. In an early publication of the Australian Commercial Disputes Centre, a list of cases was annexed giving short examples of instances mediated by the Centre's Secretary General. Six cases are mentioned with a startling epitome of the modest time taken to achieve substantial settlements. Also listed are the fees involved (usually contrasted with the staggering fees that weeks in court would otherwise have entailed). It is natural that instances of this kind should be given in the promotion of the Centre and of the facilities of mediation. A much bigger sample, over a much wider range of cases would be needed to support a truly scientific analysis of dispute resolution and to identify the problems, opportunities and differential techniques appropriate for different problems.

Unscientific examination of the results of mediation is one of the problems of extracting good theory from day to day experience. For example, a recent report by the Canadian Judicial Centre on appellate mediation in Florida recorded the way in which every third civil appeal was assigned to a programme involving a settlement conference using retired judges trained in techniques of mediation. The chief judge

in charge of this programme asserted that this random technique involved a:

> *"... rigorous basis of comparison between appeals referred to the conference (experimental group) and those not referred to the programme (control group)."*

However, a statistically valid report on the success of mediation would require details of the duration of the study, an examination of the varying skills and experience of the mediators and a whole range of additional data beyond that adopted in Florida. Good theory is based on sound empirical information. That is why the explosion of mediation in Australia must be accompanied by continuous and rigorous monitoring of the experience involved.

The myths of mediation: Secondly, (and here too I agree with Dr Tillett) it is important, without dampening the fires of enthusiasm, to avoid the mythology of mediation. In an important paper, *The Myths of Mediation*, Dr Tillett has collected the eighteen myths of mediation and mediators. His myths include:

(i) Mediation is value free. It is a practical technique independent of any specific ideology;

(ii) Mediation is culturally neutral;

(iii) Mediators require only basic practical training;

(iv) If the practice of mediation is effective, ethical questions take care of themselves;

(v) Private justice behind closed doors is an appropriate way of dealing with problems provided the parties want it that way; and

(vi) The mediation process as such ensures a balance of

power between the parties.

painstakingly and, in my view convincingly, Dr Tillett takes these myths apart. Mediators are inextricably affected by their view about conflict itself. Sometimes, in a free society, conflict is healthy and even desirable. Buckling under to authority or private monetary power may not necessarily be a good thing. Basic civil liberties have been won and secured by people who sometimes stand up for their rights and assert them. Negotiation and temporisation to achieve agreement may put undue pressure upon parties with *legitimate* grievances. Some cultures are better at the oral expression of interests than others. Some cultures (such as the Aboriginal culture in Australia) are less right-asserting and less inclined to deny authority. Many of the newcomers to Australia may not have the articulate skills to express and uphold their interests and may grasp at settlements offered by mediation, however unjust they are. Sometimes nothing less than court orders are needed to protect minorities, stigmatized groups and people who suffer from discrimination. Settling disputes behind closed doors involving those who repeat harassment or discrimination may not serve the purpose of preventing breach of the law, redressing legitimate grievances and educating the offender and the community.

Appointment of mediators: Thirdly, it will be important, as mediation is developed in Australia to avoid any overly rigid limitation of the kinds of people who are appointed and used as mediators. It is, for example, undesirable that such functions should be reserved to former judges or even lawyers. Within the legal profession, it

be undesirable if a cartel of repeat performer ...iators were established as between the large firms: ...ing the activity of mediation to themselves upon a "no ...ing" understanding for the protection of established ...ionships with clients.

The range and variety of issues susceptible to ...tion will call for a large measure of diversity in the ...ction of mediators suitable to the particular task in ... At the same time it will be necessary for such ...ators to observe rules of ethical conduct which restrain ... becoming too close to the parties and witnesses before ... The ethical codes which are appropriate will generally ...stinctual in a person who has served for many years as a ...ge. But good ethics are not confined to ex-judges. It ...d be a misfortune if the suggestions, current in some ...rters, that a cartel-like arrangement exists between large ...al firms for the appointment of mediators, became entitled ...redence. The issue is on the public agenda of ...ation. It needs to be watched.

International mediation: Finally, it is important to ... questions of mediation and conflict resolution in a ...spective wider than the provision of a practical adjunct ... the activities of courts in New South Wales or Australia. ...re is, for example, the international dimension of ...ation which is highly relevant to the issues of peace and ...urity in the world today following the end of the Cold ... If one were to identify the major threats to security ... the decades ahead, they would undoubtedly include those ...lving from the assertion by peoples of various ethnic, ...nguistic and cultural groups of their right to separate

identity and to self-determination.

The power of this idea was brought home to me recently when I took part in a UNESCO meeting of experts on the ramifications in international law of the right of self-determination promised by the United Nations *Charter*.[19] The meeting took place in Budapest, but a few kilometres from the bitter conflicts in Yugoslavia between the Serbs and the Croations. The borders of the nations of Europe, but also of Africa and of other parts of the world, were drawn in earlier times. Often they had regard to natural boundaries such as high mountains or broad rivers, chosen for security or historical reasons but inappropriate to the linguistic, ethnic and cultural groups who were thereby divided. Sometimes, as in Africa, borders were drawn to settle the differences between the metropolitan powers of Europe and to avoid conflicts in the dark continent. But the result was the division of many tribes and the combination of many others.

There is clearly a need, on the international stage, and under the aegis of the United Nations, of a peaceful procedure for the settlement of disputed claims to self-determination. Already, tentatively and with much hesitation the international community is moving towards mediated referenda in disputed areas. Thus the longstanding battle of the Polasario rebels and the Kingdom of Morocco is to be resolved by a referendum. This is being mediated by the United Nations and will be supervised by an international force in which Australian troops will take part. There are similar moves for like mediated resolution of bitter conflicts in Cambodia, Eritrea and in Zanzibar. Thus,

...tion has a global dimension.

...OLOGIST & PHILOSOPHER - AS WELL AS LAWYER

This fact makes even more important the study of the ...cedures of conflict resolution and dispute mediation. On ... theoretical level, the study will involve examination of ... empirical cases by which disputes are settled. It will ...volve harnessing the skills of the sociologist, philosopher ...d psychologist as well as those of the lawyer. Much more ... involved than a dollop of charm and a coffee-table ...ot.[20] That is why mediation itself is a subject ...thy of serious examination at a university level. It is ... I have been such a strong supporter, within Macquarie ...iversity, of the activities of the Centre for Conflict ...olution.

FOOTNOTES

Chancellor of Macquarie University. President of the Court of Appeal, Supreme Court of New South Wales. Opening Speech for a seminar on 9 November 1991 conducted by the Centre at North Sydney.

(1981) 55 ALJ 390.

By Wigmore.

Australian Constitution, s 51(xxxv).

See *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

See Parliament of the Commonwealth of Australia, Senate Standing Committee on Constitutional and Legal Affairs, Cost of Legal Services and Litigation, Discussion Paper No 4, *Methods of Dispute Resolution* (hereafter

DP4), 33.

6. DP4, 34.

7. Section 9(1).

8. See *Anti-Discrimination Act* 1977, s 92 (resolution of compliant by conciliation); See also New South Wales Law Reform Commission, *Training and Accreditation of Mediators* (LRC 67), Report, 1991, 14 (hereafter LRC 67) Cf *Community Justice Centres Act* 1983, Part IV ("Mediation"), s 11 (Accreditation of mediators), s 21 (conduct of mediation sessions), s 28 (privilege), s 28 (secrecy).

9. LRC 67, 16.

10. *Id*, 14.

11. See eg s 11 (incorporating *Federal Court of Australia Act* 1976 (Cth), s 53B).

12. See *Najjar (trading as Cedar Management) v Haines & Anor*, Court of Appeal (NSW), unreported (forthcoming).

13. That this is so see DP4, 19 (para 3.2). ("A common complaint is that 'middle Australia' has been excluded from access to the law. That is, unless people are poor enough to qualify for legal aid, or very wealthy, access is restricted by the inability to afford the high cost of the traditional legal system").

14. LRC 67, (above, n 8).

15. *Ibid*, 86ff.

16. See eg *Hemmes Hermitage Pty Limited v Abdurahman & Anor* (1991) 22 NSWLR 343, 351 (CA).

17. LRC 67, 35 (para 3.42f) citing Tillett.

18. G Tillett, "The Myths of Mediation", unpublished

address to the Annual General Meeting of the Mediation Association of Victoria, Melbourne, 10 September 1990.

United Nations *Charter*, article 1(2).

See T Carney and K Akers, "A Coffee Table Chat or a Formal Hearing?" (1991) 2 *ADSJ*, 141.