

ADR in Australia – Without Fear or Favour

Institute of Arbitrators and Mediators Australia
Annual Conference, Melbourne, Australia
30 May 2009
Annual Dinner Address

INSTITUTE OF ARBITRATORS AND MEDIATORS AUSTRALIA

ANNUAL CONFERENCE, MELBOURNE

30 MAY 2009

ANNUAL DINNER ADDRESS

ADR IN AUSTRALIA – WITHOUT FEAR OR FAVOUR*

The Hon. Michael Kirby AC CMG FIAMA**

President of the Institute

BACKWARDS INTO THE FUTURE

Life has a curious way of going around in circles. Not long after my appointment to the Australian Conciliation & Arbitration Commission in 1975 (and before many participants in this conference were even born) I was invited to address this Institute, in its then name, at its first annual conference in Canberra, on 25 June 1976¹.

I declared that my purpose was to look at the history of arbitration and its relationship with the courts of law; to advocate in favour of lawyers' participation in arbitration; to review developments in law reform in the field; and to do all this in a way that made my subjects "scintillating". I admitted that my ambition presented me with an "extraordinarily difficult task". The subjects of this address, thirty-three years later, are much the same. The challenge of scintillation is still pretty hard. As my earlier

* Text of an address to the IAMA Annual Dinner 30 May 2009. Some material has been added to the text to cover contributions in later sessions of the conference.

** President of the Institute of Arbitrators and Mediators Australia (2009-10). Former Justice of the High Court of Australia (1996-2009).

¹ M.D. Kirby, "The Law and Commercial Arbitration", address to the inaugural dinner of the Institute held in Canberra on 25 June 1976.

address has been published in a recent issue of the *IAMA News*², it can be left to present members to judge whether I have made any progress in my efforts over the intervening 33 years.

I am greatly honoured to have been elected to the Council of IAMA, as a Fellow and, earlier today, as President of IAMA. This is a large challenge because I am aware that many changes have happened whilst I was interrupting our relationship, during my successive sojourns in the Federal Court of Australia, the New South Wales Court of Appeal and the High Court of Australia.

It has been a special pleasure for me to learn at this conference (as I will in my future work in the practice of alternative dispute resolution - ADR), from my much respected former judicial colleague the Hon. Sir Laurence Street AC KCMG. When we served together in the New South Wales Court of Appeal, he participated in the most complex, testing and demanding appeals where he showed his great gifts of decision-making and exposition of the law. Before his time, it was usual for distinguished chief justices in Australia to retire into respectable inactivity. However, Sir Laurence Street, ever the innovator, has carved out a new life, especially in the field of mediation. I am sure that I will continue to learn from him as I have already done at this conference.

² Re-published in the *IAMA News*, December 2005, 32.

In 1976, I identified the advantages of arbitration over the judicial disposition of disputes. It was speedy. It involved the deployment of appropriate expertise agreed by the parties. It was less costly. And it was normally conducted with respect for the parties' privacy and confidences. I suggested in 1976 that the law had lost its suspicion and hostility towards arbitration, realising that the two techniques of dispute resolution were basically complementary. I recounted the then efforts before a number of Australian law reform agencies to address technical legal questions that had arisen out of the practice of commercial arbitration.

Nothing much changes. As the Attorney-General of the Commonwealth (the Hon. Robert McClelland MP) told us in his opening keynote address at this conference, important proposals for the reform of Australia's law on international and domestic arbitrations are under consideration both by his office and by the Standing Committee of State, Territory and Commonwealth Attorneys-General (SCAG). Such is the expansion and alteration of the techniques of ADR that it is hardly surprising that there is a constant need to review and update the applicable law.

Mediation, in particular, as now practised, is a relatively new art (as is informal adjudication). These were not common in practice in 1976. Today they are established features of dispute resolution in Australia. Their future is assured. The reform of the law to take their arrival into account, is now a necessity. Some impediments to reform exist today: from those who believe that ADR should generally "mimic" the judicial resolution of disputes to those who call for law reform to

protect mediators in the often challenging and innovative activities in which they are engaged³.

KEEPING PACE WITH CHANGE

Keeping pace with change is an urgent necessity of every professional body and its members. Two engagements that I fulfilled earlier this week demonstrated this truth to me:

- On 26 May, I addressed the dinner of the International Association of Law Schools. Present were a great number of law deans from schools of law around the world. They were addressing the never-ending controversies over the contents of the law course. To secure agreement on such a subject, it was obviously necessary to peer into the future and to attempt to predict what the lawyer, and legal practice, will look like in decades hence. Some law schools have dropped the compulsory instruction in jurisprudence, or legal values. This seems undesirable to me, given that somewhere in a law course students and teachers should pause to consider together the fundamental purposes of the entire legal exercise. As well, legal history, which was a compulsory subject in my day, is now taught as a specific topic in comparatively few Australian law schools⁴. This is so despite the warning that those who do not learn the lessons of history are bound to repeat its mistakes. The modern flood of legislation has promoted statutory interpretation to primacy in many law courses. Rightly so. The demands of new technology

³ See, e.g. R. Charlton, "Let's Have A Charter of Rights for Mediators", *Law Society Journal (NSW)* April 2009, 40; R. Charlton, "Mediation Practices Under the Spotlight", *Law Society Journal (NSW)*, May 2009, 42.

⁴ M.D. Kirby, "Is Legal History Now Ancient History", (2009) 83 ALJ 31 at 35-36.

and new laws place great pressures on the curriculum. The advances of ADR in Australian society is not always reflected in formal curricula, whether in law schools or in other disciplines. Obviously, there is an urgent need to update clinical instruction in the practice of law to take into account the many advances that have taken place in recent decades, including in the techniques of ADR. An important function of IAMA will be to make representations so that every law school in Australia provides courses in ADR. Happily, a number already do this, mostly notably La Trobe University, Deakin Law School and Victoria University, represented at this conference. I congratulate the mooting team from La Trobe University which recently won the international competition as the best mooters in an arbitration moot.

- On 27 May, I participated in another conference in Canberra under the auspices of the Queensland University of Technology. This involved the examination of the law of copyright. As with arbitration law, copyright law is greatly influenced today by international law and practice just as now the UNCITRAL Model Law on Commercial Arbitration (UNCITRAL Model Law) influences our thinking about domestic arbitration. In his challenging keynote address to this conference, the Deputy Premier and Attorney-General for Victoria, the Hon. Rob Hulls MP, questioned whether the resistance of legal traditionalists to proposals for changes to relevant laws and practices, would defeat the attempt of reformers to shake off the chains of the past. Mr. Hulls asked whether the love of “ego, drama and horse hair” would defeat the urgent need for reform. We must ensure that the answer to that question is resoundingly in the negative.

This was exactly the question presented to the copyright conference by the noted international expert, Professor Lawrence Lessig, now of Harvard University. Lessig explained the urgent need for reform of copyright law so as to avoid the unwarranted criminalisation of large numbers of persons, mainly children and young persons, who engage in activities such as “re-mixing”, which the technology facilitates but the law, on one view, forbids.

Lessig explained two special difficulties of securing reform in this area: the fact that the technology now often embeds effective rules into the computer programme itself so that they are substantially determined by multi-national corporations outside the decisions of nation states. And the fact that many politicians are hostage to the commercial and funding powers of large corporate donors with copyright interests to protect.

When we compare the impediments to change in intellectual property law and the law of ADR, there are some similarities. Each body of law today is influenced and affected by international treaties and global practice. However, Lessig’s injunction to the Canberra conference is one I must share with everyone here. Australia is one of the oldest and most stable of the world’s electoral democracies. It therefore tends to enjoy a legal influence above its economic weight. Where necessary, it should give leadership upon the directions of desirable changes. Many of those changes derive from technology and the challenges and opportunities that new technology presents to the old way of doing things. In ADR, Australia must become a constructive and

effective world player to improve the efficiency of international arbitration and mediation. We should not lag behind.

WE CAN CHANGE

President Obama was elected as President of the United States on a mantra of change. “Yes We Can” was his battle-cry. The audacity of hope was his aspiration. Well, we in Australia we too can change. In our lifetimes, we have seen that happen.

Growing up in this country in the 1950s, I recall how complacent and insular Australian often was.

- *The Communists*: Our Federal Parliament tried to ban the Communist Party and to impose civil restriction on communists. This was brought home to me at the time because my grandmother had remarried and her new husband was a communist. Indeed, he was the National Treasurer of the Australian Communist Party. In the 1940s this was not, as they say, a good career move. But I witnessed the High Court of Australia, in one of its greatest decisions, striking down the *Communist Party Dissolution Act of 1950*⁵. It was the decision which the people of Australia confirmed when, by referendum in 1951, they refuse to change the Constitution.
- *Racism*: Racism was another frequent feature of life in Australia in those days. It has been back in the news in recent times because of the claim by the former Chief Executive of Telstra that Australians are racist and

⁵ *Australian Communist Party v. The Commonwealth* (1953) 83 CLR 1.

backwards. Those claims have gathered some support from the very large number of serious assaults upon students in Melbourne deriving from the Indian sub-continent. But are we racists? We certainly were before the 1950s and 1960s. Indeed, we were so officially until 1966 when the Holt government removed the last legal underpinnings of the White Australia policy. It was that government too that initiated the referendum on Aboriginals.

- *Aboriginal disadvantage:* We were racists when I was at university. One of the major themes of student activity in the 1960s was the need to address Aboriginal disadvantages in Australia, particularly in education. Chief Justice Spigelman of New South Wales, one of Sir Laurence Street's successors, led a "freedom ride" to Moree. Soon after, I took part as honorary solicitor for students who had engaged in a parallel protest about discrimination in the cinema in Walgett, also in outback New South Wales. At that time, Aboriginal patrons were not allowed upstairs. The students tried to force the issue. A number of them were arrested and charged with trespass. Many barristers offered to help. I went for the top and engaged Gordon Samuels QC *pro bono*, later my colleague in the Court of Appeal of New South Wales and subsequently Governor of the State. The Magistrate upheld the trespass but dismissed the charges because of the previous good record of the students. They were heady days.

After the referendum on Aboriginals in 1967, enhanced powers were given to parliament to enact special laws. Yet it was the High Court, again, that cut the

Gordian knot over the denial of land rights. In its decision in the *Mabo* case⁶, the Court upheld the entitlement of Aboriginal Australians to enjoy native title in their traditional lands. It removed the legal discrimination against them, based on their race. Of course, this was before my arrival in the High Court. But in the *Wik* case⁷, the principle was extended in my time to land the subject of pastoral leases. Now, many claims of native title are subject to negotiation and mediation. There are still wrongs to be righted: in Aboriginal health, housing, education and true equality⁸. But the law has changed substantially. And attitudes have changed. Australians are now much less racist. So change we can.

- *White Australia*: In White Australia, the barriers against migration from Asia, Africa and other non-Anglo-Celtic sources have been dismantled. Remnants of the old attitudes still sometimes appear in refugee cases and in occasional community attitudes to refugees⁹. But a great change has come about in my lifetime. Now, Australians, or most of them, realise how wrong the old policies were and how much more creative and interesting Australia is since White Australia was abandoned.
- *Women's rights*: In women's rights, it is true that our laws and practices earlier showed much discrimination against women. Looking at the composition of IAMA today, we can still see that there are difficulties in women advancing in ADR. It is not desirable that the Council of IAMA should have but one woman. We must make the face of our Institute more reflective

⁶ *Mabo v. Queensland (No.2)* (1992) 175 CLR 1 at 42.

⁷ *Wik Peoples v. Queensland* (1996) 187 CLR 1.

⁸ C.f. *Wurridjal v. The Commonwealth* (2009) 83 ALJR 339 at 445 [214].

⁹ Susan Kneebone, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (Cambridge Uni Press, 2009), 171 ff.

of the ethnic and gender diversity of positions of responsibility in contemporary Australia. In the High Court, under successive governments, the face of the Court has been changed. Now three of the seven Justices are women, and just this week President Obama nominated Sonia Sotomayer, a Latina judge, to fill the vacancy left by the resignation of Justice David Souter. So, once again, change is happening.

- *Gay rights and equality.* In a matter close to me, Australia has also changed. The laws of my youth which criminalised gay citizens have gradually been swept away or significantly changed. Full equality has not yet been attained. For example, for those gay citizens who are in committed relationships, the law still discriminates on the basis of sexuality. We do not even have the option of civil partnerships or unions in Australia. But we are on a path of reform as inexorable as that which led to the abolition of the earlier discrimination against miscegenation in the United States¹⁰. So change is in the air.

Lawyers and other professionals in the field of ADR must embrace change with the same enthusiasm with which we all now embrace new technology. We must be leaders in change and always open to new ideas. ADR itself is an important new idea. It challenges old orthodoxies. It still has doubters and critics. But their attitudes too will change, as Mr. Hulls suggested. Change we can.

¹⁰ *Loving v. Virginia* 399 US 1 (1967) which overruled *Pace v. Alabama* 106 US 583 (1883).

LESSONS OF THE CONFERENCE

What have we learned at this IAMA conference in Melbourne? Our principal focus has been on the global economic crisis and its implications for ADR and its professionals. Many complain that the work of ADR has fallen off. Certainly, litigation has become quieter as economic hardship reduces the capacity and inclination of individuals and corporations to take their disputes to court¹¹. Yet this reality may ironically promise new opportunities. For example, corporations, anxious about their liquidity and its effect on viability, may have a special reason to prefer private and confidential determination of disputes, through arbitration or mediation. Those with liquidity difficulties may also have a special reason to avoid the delays and costs of court proceedings. Parties in a market that must, of necessity, continue to deal with each other, may have particular reasons for avoiding abrasive public litigation. In particular human relationships, such as in family and employment disputes, times of economic downturn may cause added stress. This will sometimes increase the need for non-confrontational solutions that courts cannot always offer.

This conference has extended far beyond the implications of the global economic crisis for ADR professionals in Australia. The Federal Attorney-General, in his opening address, has described the current revision of both the legislation governing international arbitrations and the uniform laws on commercial arbitration within Australia. His commitment to following through on the modernisation of Australia's laws in this respect is greatly to be welcomed. So is the enthusiasm of Mr. Rob Hulls

¹¹ See e.g. A. Priestley, "Quiet on the Litigation Front", *Lawyers Weekly (Aust)*, 13 March 2009, 24.S

in Victoria for alternative dispute mechanisms that are quick, cheap and enable people in potential conflict to go on living or working together.

The opening address by Mr. Michael Gill, CEO of Fairfax Business Media, examined how and why, with many clever people involved, the global crisis was largely undetected and inadequately resisted until it was too late. The obvious question presented to the publishing media by his remarks was the one he raised himself: where were the investigative journalists, who could analyse the coming crisis, when we needed them?

Dr. Chester Brown, stepping in for Mr. Gavan Griffith AO QC, examined contemporary developments in international arbitration. Dr. Brown suggested that some large arbitrations involved important issues of public interest which might occasionally justify a measure of openness to the society affected by their determinations, or at least the facility of *amicus* briefs, to allow public interest concerns to be expressed. The latter innovation has recently been the subject of experimentation within the International Centre for the Settlement of Investment Disputes (ICSID).

Describing the practical techniques that work in mediation, Harold Werksman explained what he called the “ah ha factor”: the realisation by the ADR practitioner of the true motives of contesting parties. Sometimes, as he pointed out, a party may wish to get its pent up anger or frustration off its chest before moving to resolution.

He urged that mediators should not ordinarily simply allow parties to agree to disagree.

Mr. Tony de Fina, drawing on his large experience in international arbitrations, urged consideration of lump sum arbitrator fees. These might encourage abbreviation of the proceedings and avoid the slavish imitation of dilatory court procedures. Ron Salter, also concerned about delay in modern arbitration, contrasted the old and new techniques that had evolved for maritime arbitrations. In the past, those procedures were generally swifter than they are now. So what could be done to go backwards into the future?

Beth Cubitt examined what, in her opinion, was wrong with contemporary arbitration. The bottom line in her remarks was her criticism of the tendency to replicate court procedures rather than to emphasise the novelty and flexibility of arbitration techniques. This assessment provoked the criticism by Professor Doug Jones of the engagement of retired judges as arbitrators. He suggested that, in many cases, this had brought about an inevitable tendency to follow curial ways. Peter Wood described excellent innovative techniques in mediation and arbitration and paid a tribute to IAMA Council member, Dr. Clyde Croft. Olivia Tan explained online mediation as it is practised in the ASEAN region and the significance of the occasional clash of cultural assumptions that can sometimes intrude on attempts to resolve differences without the need for litigation. Dale Bagshaw elaborated that issue with useful illustrations from her dealings with Australia's indigenous people. Cultural awareness was a lesson I also learned when I served as Special

Representative of the Secretary-General of the United Nations for Human Rights in Cambodia.

Chris Ronalds SC examined the special utility of mediation, and other useful techniques, in the context of employment disputes and discrimination claims. Sir Laurence Street, drawing on his great experience, articulated the essential moral foundation of ADR. The fundamental purpose of ADR is to bring peace between parties in conflict. Its methodology involves searching for resolution between the parties rather than the imposition of an outcome by an external force, typically the courts. In busy lives, it is sometimes easy to forget the basic concept and purpose that lies behind our endeavours in ADR.

Bruno Zeller and Kristy Haining examined the technical issue of whether an arbitration clause could still operate if it was part of an attempted agreement which itself had failed for want of a relevant meeting of the parties' minds. Dato' Kevin Woo updated the conference on the new forms of arbitration for building disputes provided by the law of Malaysia.

Sue Laver explained the practices of Telstra, as Australia's major telecommunications corporation, in dealing with the inevitable conflicts with customers. She emphasised the importance of speed, trust and recognition of the value of the brand name, and the necessity to discover the real motivations of complainants if ADR was to be successful. Contrary to some other views, she

suggested that occasionally it will become clear that the dispute has become the complainant's life. In such cases, the only way to achieve finality may indeed be by court orders, backed up by enforceable costs judgments.

Professor Ian Bailey SC described the critical phase reached in the review of Australia's domestic and international arbitration legislation. He urged IAMA to move swiftly to influence the development of the law currently before SCAG, before the changes were finally agreed, later in 2009.

Albert Monichino reinforced Ian Bailey's recommendation. He spoke strongly for a single national Australian law, with exclusive federal jurisdiction in arbitration matters given to the Federal Court of Australia. This proposal proved controversial. However, the need for IAMA to make quick decisions on the pending law reform was not in contest and this conference has added an impetus to the need for the prompt presentation of IAMA's views.

Bronwyn Lincoln described the operation of freezing orders, in aid of effective commercial arbitration, following the decision of the High Court in 1999 in the *Cardile* case¹². Anna Booth gave an excellent wrap up from the perspective of a life lived in trade unions, the law and commercial enterprises. Reinforcing procedures to secure co-operation when conflict arises was part of her message.

¹² *Cardile v. LED Builders Pty. Ltd.* (1999) 198 CLR 380.

Doubtless, there were many other sessions that I could not attend. However, the wealth and variety of the new information and candidly described experiences made the conference extremely valuable both for accomplished professionals and for those starting out. I congratulate all the participants, speakers and the staff of IAMA for assembling a challenging symposium. I especially thank Gianna Totaro for her central role in planning the conference and ensuring its smooth operation. The thoughts of all participants were with her because of a family tragedy that prevented her participation to see the fruits of her labour. The conference also affords the opportunity for IAMA to thank its Chapters, their members and staff. And to introduce the new Chief Executive Officer, Paul Crowley. He comes with high recommendations and with our hopes for great success in his new role. He will lead the IAMA Council in a one day policy review immediately following the conference.

FUTURE TOPICS

Drawing on the lessons of this conference, it is clear that a number of issues will need to be addressed by IAMA, institutionally, in the period immediately ahead:

- *International law*: All areas of institutional and business activity, or almost all, are now affected by the rapid advances of international law. We can see this most clearly in ADR in the moves to bring Australia's legislation on arbitration into line with the UNCITRAL Model Law. In a world of increasing global and regional trade and instantaneous communications, the provision of differing laws and practices in a single country of small population, like Australia, is increasingly viewed as an undesirable and expensive indulgence.

- *Technology*: Likewise, the impact of technology upon ADR techniques has to be given much more attention. The description of the use of information technology in ADR in South-East Asia, and the prospect of increased use of video-conferencing and telecommunications in aid of ADR need to be considered in an affirmative spirit. The informal procedures of ADR can offer to these techniques advantages not always enjoyed by the courts. Practitioners of ADR in Australia should constantly be open to technological innovation.
- *Unmet needs*: Concentration on commercial arbitration in the past has sometimes obscured to the unmet needs of poor and disadvantaged groups and individuals where they find themselves in conflict, particularly conflict with well resourced opponents. This is a problem endemic to the common law system. ADR should be developed with a view to cost effective solutions that bring justice to many more citizens than courts can do. Generally speaking, only the wealthy or foolhardy in Australia today can afford civil litigation in the courts. The availability of trained ADR practitioners who are not fully extended with present work, suggests a potential market to help meet some of the defects that the formal legal system presents. Maybe even some retired judges can be put to useful work in this regard without upsetting Professor Jones too much.
- *Institutional co-operation*: There are now many professional bodies working in the field of ADR, including IAMA, The Chartered Institute of Arbitrators (Australia), ACICA, LEADR, Adjudicate Today, ACDC, Endispute. As well, Bar Associations and Law Societies in Australia are moving into professional training in the field. Hubris on the part of IAMA or anyone else is out of place.

An appropriate institutional body is needed to provide an umbrella that brings together, in matters of mutual concern, all Australian players in the field of ADR. This is especially needed at times of rapid legislative change. In many professions there are such umbrella institutions. The Law Council of Australia is the best example. IAMA should explore the creation of a co-operative overarching institution. Whilst there is healthy competition between the service providers, there is room for sharing of knowledge and experience on many issues. Increasing numbers of ADR practitioners are members of several of the participating bodies. Without diminishing competition and innovation we need to find a common voice on matters of common concern.

- *Education in ADR*: The issue of clinical education in available courses in Australian law schools is a disputed one¹³. Such has been the rapid growth of ADR in Australia and elsewhere, that it is essential that young lawyers, being trained for life in contemporary legal practice, need to be informed about the basics of ADR. If there is a shift from litigation to ADR, a useful training in law will now prepare future practitioners to adjust to this shift. ADR involves both obligations and opportunities. Likewise, at least some information on ADR should be provided in other tertiary professional courses, including in the training of medical practitioners, engineers, industrial relations experts, educationalists etc. The positive features of ADR, and its essential moral foundation to which Sir Laurence Street adverted, need to be included in all appropriate tertiary courses. The initiatives of several Victorian universities whose teachers and students attended this conference, indicate what can be done.

¹³ J. Corker et. al, *Community Engagement in Australian Legal Education: Some Contemporary Issues* (2009) (forthcoming).

- *Gender and diversity:* Although Australia has developed in recent decades into a much more diverse and multicultural society than it was in my youth, IAMA, and ADR professionals in general, do not yet reflect fully these changes. The face of ADR needs to be more closely aligned with the changing face of Australia itself. We need more women in IAMA; more participants from minority groups; and younger members who will take up the lead in ADR in the years to come. I pay tribute to the leadership and example shown by the outgoing President, Associate Professor Angela O'Brien. She has succeeded in corralling her male colleagues and getting them to work together. She is right in her call for more women to offer themselves in leadership positions in ADR in Australia, and specifically in IAMA. I support that call. If we respond, we will ensure the development of policies and attitudes that strengthen the place of ADR in our national life. As an immediate measure, we also need to consider the introduction of junior membership of IAMA to which students, in tertiary education, can aspire. It has been a welcome development to have a cohort of university students attending this conference. We need to cast an even wider net in the future.
- *Membership retention:* For a long time IAMA, and other ADR bodies in Australia, have suffered a drift from membership. It is essential to explore ways in which this trend can be reversed, most especially by providing services and continuing professional education that are seen as useful to members and value for money. IAMA must, above all, be responsive to member opinions and suggestions. A recent survey of IAMA members in New South Wales revealed areas that need to be addressed. Only by retaining members will the income stream of a membership body such as

IAMA remain strong. Only with a strong income flow, will IAMA be able to introduce new and better services for its members. As it is, for the past two decades, IAMA has not made large profits. This has reduced its potential to be truly creative and experimental. We must explore ways in which these endemic problems can be overcome.

- *Future conferences:* At future IAMA conferences, it will be important, in my view, to include an interactive sessions with members in which they can “let off steam” and interact with each other upon matters of current debate. There needs to be more time for such interaction, with questioning and comments from the floor. It is hard to achieve this when so much is happening, explaining developments that need to be conveyed. The essence of ADR, as it is practised, should be horizontal interaction rather than vertical or “top down” instruction. Whilst the excellent venue in Melbourne worked faultlessly during the conference, we need to consider less expensive options for the next conference in Sydney. We need to encourage participation by ADR professionals who are not making a huge income of whom there are reportedly many. We need to increase the number of young participants or observers. We should explore the feasibility of invitations to overseas ADR professionals in our region to take a larger part in our conferences. We should continue to promote institutional co-operation between IAMA and overseas ADR peak bodies. The signature of the agreement between IAMA and our New Zealand counterpart (AMINZ), signified by the participation throughout our conference of AMINZ President David M. Carden, needs to be enhanced by more than execution of a memorandum of co-operation. We should be considering mutual recognition of accreditation and other modes of

securing practice co-operation in ADR, in the region and the world. This is an exciting moment for ADR in many countries, including Australia. Practitioners actually involved in ADR are in the best position to think conceptually and to see where the future lies.

Having praised ADR, all knowledgeable professionals will be aware that there are things that only the courts can do. No ADR technique could have defended diversity in Australia at the time of the *Communist Party Dissolution Act*. Only the High Court could have done this. Likewise, mediators could have attempted to resolve the legal wrongs to Aboriginal people until they had all reached exhaustion. But it took the ruling of the High Court in *Mabo* to radically change the legal paradigm. It is no part of the vision for ADR to replace the courts or to reduce their central importance as guardians of the rule of law, a principle that lies at the very heart of Australian democracy¹⁴.

Some writers are today expressing concern about the vanishing civil trial in the United States¹⁵; the particular utility of public court proceedings in cases in which large questions of public interest are raised by a dispute; and the occasional disinclination of a few judges to do what the courts do best: resolving acute conflict by authoritative and effective decision-making. Getting the relationship between courts and ADR right is itself an important challenge for us all. It is neither feasible

¹⁴ *Australian Communist Party Case* (1951) 83 CLR 1 at 193; *Plaintiff s157/2002 v. The Commonwealth* (2003) 211 CLR 476 at 513 [103]-[104].

¹⁵ J.. Resnik, "Courts: In and Out of Sight, Site and Cite" 53 *Villanova Law Review* 101 at 103 (2008) citing Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" 1 J. *Empirical Legal Studies* 459 (2004).

nor desirable for ADR to take over all the functions of courts any more than it is for ADR to imitate slavishly the procedures that courts observe. The great challenge that lies ahead is ensuring a correct and evolving relationship between ADR and the curial process. This is unlikely to be static. The success of ADR practices, like the success of the courts, will necessarily depend upon the integrity, skills and training of the personnel involved. It is here that accreditation bodies, such as IAMA, play an indispensable role in the future of ADR in Australia.

PEARLS OF WISDOM

Throughout this conference, verbal pearls have been scattered to stimulate and amuse us. I conclude by awarding a prize for the best of these.

Dale Bagshaw recounted a timely comment of African elders, increasingly brought into processes of mediation in post-apartheid Africa. One such elder was reported as saying that the hardest part of being an elder was that she had to “learn to shut up”. It is a lesson that I and maybe other too may need to learn.

Olivia Tan illustrated her talk on ADR in the ASEAN region with the story of the princess and the talking frog. Princesses, we were admonished are, “a dime a dozen”. If this is so, we can do with a few more of them in IAMA.

Doug Jones, most hurtfully, drew one of the largest acclamations of the conference when he denounced “retired judges”. He did allow for a few exceptions. I am praying that I will be one of them.

However, the prize for the best conference pearl goes to Michael Gill in his marvellous keynote address on exactly what went wrong to cause the present global financial crisis. Any senior executive in Australia who can begin a talk with a reference to Barbara Tuchmann and to the *New York Review of Books* is bound to have some wisdom to share. So it proved. The biggest response to Michael Gill’s shocking tale of avarice and incompetence was when he quoted Warren Buffett’s “sidekick” Charlie Munger telling shareholders at their 2002 annual meeting that “to say that derivative accounting in America is a sewer is an insult to sewage”¹⁶. Fortunately, there was not much sewerage in evidence in our deliberations.

Yet a true ADR professional will even think laterally, even about sewage. It has a value; it can be recycled; it is universal; and it is not going away any time soon. Likewise, thinking positively about conflict and its resolution is the essence of our art. There has been a lot of positive thinking in this conference. And that includes about the world, Australia and the place of ADR in the future of both.

¹⁶ M. Gill, Plenary Address, “Global Recession: Wisdom versus Process” IAMA Conference, 2009, 30 May 2009, unpublished, p.3.