

ALTERNATIVE DISPUTE RESOLUTION –
A HARD-NOSED VIEW OF ITS
STRENGTHS AND LIMITATIONS

The Institute of Arbitrators & Mediators Australia
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**THE INSTITUTE OF ARBITRATORS & MEDIATORS
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The Hon. Michael Kirby AC CMG*

RETURN TO ADELAIDE

About this time each year the High Court of Australia comes to Adelaide on circuit. It is therapeutic of the South Australian Chapter of IAMA to arrange its annual general meeting so that I will not miss that rhythm of my former life. The Comcar was not at the airport to welcome me on this visit. However, many friends have solaced me on this occasion. I pay my respects to the Chapter and thank the South Australian participants in IAMA, especially Andrew Robertson (National Treasurer), Ian Nosworthy (President 2002-4) and Jon Clarke for hosting this event.

There were not many opportunities for ADR in the High Court of Australia. By the time matters had reached that level of the judicial hierarchy, the occasions for settlement were few and far between. In thirteen years of service, I believe that only four appeals were settled. Often, the costs have built up so far as to make amicable accommodation impossible.

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Yet the introduction of dispositions of special leave applications on the papers resulted in opportunities for *pro bono* lawyering where the Court spotted a point in an unrepresented litigant's case that needed expert legal assistance. Still, for the most part, the High Court was, and is, the very end of the judicial line. I am proud of having served for thirty-four years as a judge in Australia, twenty-five of them in appellate courts. I am an admirer of our uncorrupted courts. It is no part of my role as President of IAMA to denigrate or diminish their important functions that courts play in our society. And I never will.

My early professional and judicial career was in labour disputes. That was an area of practice where mediation (called "conciliation") played an important constitutional and practical role. My first judicial post was as a Deputy President of the Australian Conciliation & Arbitration Commission. In recent years, it was puzzling for me to watch the attempted dismantlement of the national procedures of conciliation and arbitration, coinciding with the growth, in the general court system, of parallel procedures of mediation and arbitration. Something seemed to be out of joint. Whether total harmony has been restored by the establishment of Fair Work Australia remains to be seen. In labour disputes, institutional arrangements to promote a neutral venue for the discussion of differences and procedures for informal conciliation and formal arbitration, reflected the deep-seated commitment of Australian industrial relations to methods that would promote a "fair go all round"¹.

¹ *Re Loty & Holloway v Australian Workers' Union* [1971] AR (NSW) 95 per Sheldon J; *Blackadder v Ramsey Butchering Services Pty. Ltd.* (2005) 221 CLR 539 at 548-9 [30]; *New South Wales v The Commonwealth* (Work Choices Case) (2006) 229 CLR 1 at 244 [609].

THE SEARCH FOR GREATER EFFICIENCY

I first met Ian Nosworthy in 1981 when we were both attending the Australian Legal Convention in Hobart, Tasmania. The most powerful paper at that conference was delivered by Dr. Wolfgang Zeidler, President of the German Constitutional Court². He essayed a comparison between the adversarial system of court trials, observed in Australia, and the inquisitorial procedures of Germany. He described the former as the *Rolls Royce* system of justice. The latter, he declared, was merely a *Volkswagen* system. But he confronted Australian judges and lawyers with a provocative question: ‘How many Australians could afford a *Rolls Royce*? And how many could afford a *Volkswagen*?’.

Our system of judging in the courts has very many strengths. However, access to justice remains a cardinal weakness of the system. It is a weakness occasioned by the highly expensive technique of interposing talented lawyers between the decision-maker and the disputants. For those who can afford it, it is a near perfect system for the administration of justice. But many cannot pay for the privilege.

A few years after the Hobart conference, I delivered my ABC Boyer Lectures on *The Judges*³. In the course of one lecture, I reflected on the foregoing difficulty. I suggested various means of encouraging earlier settlement of cases which, in 1984, typically tended to await the day of trial, when all the costs and delays had been incurred. I suggested that the delays were so great that, in the future, reforms would be introduced to oblige litigants to engage in conciliation and so to present their dispute to the judge that they would help the court to resolve the essential

² W. Zeidler, “Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure” (1981) 55 ALJ 392.

³ M.D. Kirby *The Judges* (ABC Boyer Lectures, Sydney, 1984).

conflict in a limited grant of time. In a sense, the limits imposed by the High Court on the argument of special leave applications was an early illustration of the rationing of the time of decision-makers. It recognised the need to rein in the expansion of court time and cost which is such a feature of modern curial dispositions.

In the thirty years since my Boyer Lectures (for which I was attacked at the time) and the talk of Dr. Zeidler, there have been countless reports addressing the defects of judicial decision-making in Australia. Notable amongst these was the report of Professor (later Justice) Ronald Sackville, enquiring into access to justice⁴. Yet, despite so many reports, the endemic problems have remained. One judge has been foremost in addressing these problems. I refer to Chief Justice John Doyle of South Australia who is now the longest serving Chief Justice in the nation. Repeatedly, he has deplored the costs and delays involved in litigation; lamented that decades of attempted reform have not solved the basic problems of the court systems; urged greater judicial involvement in ADR; and confessed that a failure to tackle the basic difficulties rendered the present litigation system a “nightmare” process in this country⁵.

Chief Justice Doyle’s language, in this respect, is strong and insistent. It is natural that those who share his view, and those who respect it, should be looking with an increased sense of urgency for effective responses to the problems he has identified.

⁴ Australia, Royal Commission into Poverty. *Access to Justice – An Action Plan* (Ronald Sackville, Commissioner). (1994).

⁵ Chief Justice John Doyle variously reported, *The Adelaide Sunday Mail*, Adelaide, 3 June 2007, *The Advertiser*, Adelaide, 4 June 2007, the *Australian Financial Review*, 8 June 2007; *The Australian*, 8 June 2007. See also Chief Justice J.J. Spigelman, “Opening of Law Term Dinner”, NSW Bar Association, *Bar News*, Winter 2009, 49 at 52-3.

When, in the mid 1970s, the Federal Parliament created new federal courts (the Federal Court of Australia and the Family Court of Australia) the occasion was taken to tackle some of the procedural impediments to efficiency and to study innovations that had been considered in other countries. Thus, Professor Frank Sandor of the United States of America, reported on ways of adopting innovative procedures and court rules to make the courts more effective “dispute resolvers” and to promote “multi-door court houses” in which people with a dispute would be channelled to the decision-making process most appropriate to their type of case⁶. When, recently, I suffered an extreme pain in the lower back, I presented to the emergency department of Sydney Hospital. There the triage system worked perfectly. Within an hour I was receiving highly focused attention and within a day I was discharged with a correct diagnosis of renal colic caused by a kidney stone.

Is it possible for the law, and specifically court houses, to mimic the hospital triage system? Can we develop a system that, at the earliest phase of a contest, diagnoses the problem with high accuracy, channels the parties, and selects amongst a variety of procedures suitable to the resolution of the grievance?

In my address to the first annual dinner of IAMA in 1976, I suggested that such a mechanism might be possible. I called attention to remarks made by the then Chief Justice of the United States of America, Warren

⁶ Frank Sandor, *Varieties of Dispute Processing* (1976) Federal Rules Decisions, 79, 112, 131 and Linda J. Finkelstein, The DC Multi-door Court House, [1986] *Judicature*, 305 at 305.

Burger, encouraging more resort to ADR. In 1971, he had told *Forbes Magazine*⁷:

“There are a great many problems that should not come to judges at all and can be disposed of in other – better ways. I can suggest one basic way that must be developed more widely in this course, and that is the use of private arbitration ... Many lawyers, including the best lawyers in the country, press their clients in a great many lay business engagements between corporations to agree that all disputes between them will be resolved by private arbitration without any resort to courts and without any judicial review. This is one area we have to enlarge. The labor movement developed this technique more than a century ago and uses it constantly. We must use this highly acceptable device that, in the long run, is probably less expensive and at least as efficient as any judicial process”.

Although, at first, efforts were made in Australia to adopt legislation suitable to an efficient deployment of ADR, the uniform state commercial arbitration legislation soon fell behind. The federal law on international arbitrations was overtaken by the adoption of the UNCITRAL model provisions. Former Ministers did not regard the updating of our laws in this respect as a priority. Fortunately, the current federal Attorney-General (the Hon. Robert McClelland MP) has taken the opposite view. This year, in co-operation with colleagues in the Standing Committee of Attorneys-General, he has promoted the reform of both federal and State laws on commercial arbitration. Clearly, he appreciates both the arguments of efficiency and justice that demand the adoption of this course.

In recent days, Attorney-General McClelland has reverted to the multi-door court house idea and to the need to select institutions and

⁷ Vol 108, 1 July 1971, 21-23.

procedures that are apt to the particular problem⁸. To translate this idea into practical initiatives, he has not only helped initiate the reform of federal and State arbitration legislation but he has also:

- * Initiated a comprehensive report by the National Alternative Dispute Resolution Advisory Council (NADRAC) on the incentives necessary to encourage the greater use of ADR⁹;
- * Introduced a bill into the Federal Parliament to enhance the power of the Federal Court to control native title claims, including by procedures of mediation with mandatory obligations imposed by the law; and
- * Introduced the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, designed to “trigger something of a cultural shift in the way disputes are resolved” in federal courts¹⁰.

So what should be our response be to this time of rapid change in litigation and ADR? In earlier decades, we have seen the creation of new federal courts (in the 1970s), of new uniform State and Territories’ commercial arbitration laws (in the 1980s) and of specialised court lists for building and other disputes (in the 1990s). Now we face a new wave of legislation affecting ADR. How can we maximise the utility of ADR whilst addressing its problems and limitations?

PROBLEMS OF ADR

The Vanishing Trial: Although I have been elected President of IAMA, I do not come to the post with a ‘starry-eyed’ view about ADR. Like any

⁸ R. McClelland, speech to the Multi-door Court House symposium, Canberra, 27 July 2009, unpublished.

⁹ Justice Murray Kellam, “Resolution and Resilience: ADR in the Global Recession”, unpublished paper for IAMA 2009 Annual Conference, 2 [NADRAC].

¹⁰ McClelland, above n8, p7.

human invention ADR is only as good as its practitioners and as the rules that govern its conduct.

It is not true that every dispute is susceptible to ADR or that every ADR process should proceed in exactly the same way. In a rule of law society, the courts will continue to have an essential role to play. Indeed, it is important to preserve and improve the operation of the courts with their public manifestation of the community's will to solve important disputes in public, so that citizens can observe, and learn from, the peaceful resolution of conflict and the establishment of the fundamental principles of justice.

The "vanishing trial", as Professor Marc Galanter described it in the United States of America¹¹, can go too far. The trend away from public trials must have its limits. Trials may be expensive, slow and intrusive for the parties. But they display a crucial feature of a well organised community¹². Public courts play a role as educators of their community. It would be thoroughly undesirable if all disputes of high public interest and importance were committed to a private hearing controlled by the main disputants. I do not favour that development at all. Governing rules, for example, occasionally demand the reversal of earlier common law principles, such as those denying native title to the indigenous peoples of Australia. These were not susceptible to resolution by ADR. New principles had to be established which can then be applied by decision-makers, judicial and non-judicial alike. In short, some disputes are too important to be left to the parties.

¹¹ M. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1 *Journal Empirical Legal Studies* 459.

¹² Patrick E. Higginbotham, "So Why Do We Call The Trial Courts?" (2002) 55 *SMU Law Rev* 1404 at 1423; J. Resnik "Courts: In And Out Of Sight, Site and Cite" (2008) 53 *Vilanova Law Review* at 101 at 103.

Cost cutting: A frequent argument for ADR is the saving in costs, both to the parties and to the community. No doubt that is an important consideration. Nevertheless, the repeated demonstration of the integrity of the judicial branch of government has a value beyond economics. Governments naturally seek to cut costs, including those costs that must be paid to maintain court institutions and legal aid. Now, governments increasingly hope to divert disputes to private costs: either of *pro bono* legal assistance offered by members of the legal profession or ADR that shifts dispute resolution to private hearings at private cost. If governments want to encourage ADR, they must be prepared to fund training in its techniques; analysis and auditing of its processes; and the education of its practitioners. Bodies such as IAMA, which provide these facilities, receive little, if any, contribution from government, although government takes full advantage of the services that are offered.

Variable competence: When a dispute is submitted to a judicial officer in a court, the competence and interests of the office-holder will sometimes vary according to ability and past experience. Generally, however, the variation is relatively confined. The persons appointed must attain minimum qualifications fixed by statute. Normally, they have many years of demonstrated experience. This is not necessarily so with practitioners of ADR. That is why systems of accreditation have lately been introduced to endeavour to improve the competence and skill of practitioners. The systems of accreditation must themselves be accredited and constantly audited. Otherwise, remission of cases to such services will condemn participants to the involvement of people with unknown qualities of ability and competence.

A further potential problem can arise in ADR where parties are of seriously unequal bargaining power; where their representatives are not of equal skills; where those representatives treat the process as a second-class trial; and where the neutral third party is not concerned with the substance of justice but primarily with procedural rules. In court, a judge with protected tenure will properly and publicly castigate poor professional preparation, inadequate representation and inattention to important issues. In ADR, the external third party may sometimes hesitate to upbraid disputants or their representatives for fear of retaliation or exclusion from participation in future cases. Retaliation or personal gain is, and should, never be an issue on the minds of judges.

Justice and market power. Although it is said that ADR commits the ultimate decision to the control of parties (which is true), the whole truth is frequently somewhat different. Where a matter is decided by a court, the presiding judge(s) will normally (and should always) have a *will* to resolve the dispute justly and in accordance with the law. In some ADR situations, the ultimately deciding factor is market power and the possession of the funds to buy the complainant out. Party autonomy in ADR should not therefore be exaggerated. Some participants in the process will be relatively powerless unless the facilitator has both the will and talents to endeavour to secure a just outcome. For truly powerless disputants in disagreement with powerful and opinionated opponents, resort to the courts may sometimes be their only hope for just redress.

Cultural impediments: In our legal system, it seems unlikely that a triage, akin to that of a hospital, could ever be introduced to create a truly “multi-door court house”. The fact is that most disputants normally first consult a lawyer. Australian lawyers often share an attitude

inculcated by the adversarial system. That system generally teaches the advantages of non-co-operation, trial by ambush and settlement at the very last minute. Getting lawyers out of these habits is difficult and sometimes impossible. In a country like Australia, ADR must usually operate in a *milieu* in which the players are heavily influenced by the traditions of adversarial justice.

Confidentiality and public interest: Quite apart from the general consideration of the public interest in important dispute resolution, one of the objectives of ADR will sometimes clash with the advantage of public resolution of conflict. Many large and important commercial arbitrations involve significant public interest considerations. This is especially so in the determination of commercial disputes involving government action, political decisions and the use of public moneys. In such cases, the prohibition on disclosure, invoked by the admonition of 'commercial-in-confidence', is as objectionable as the invocation of legal professional privilege can sometimes be to cloak questionable dealings with an excessive blanket of obligatory secrecy.

Variable experts: One suggested advantage of ADR is the inclusion of expertise in the neutral participation of an expert decision-maker. Doubtless this can save time otherwise spent in acquainting another decision-maker with technological or other knowledge essential to a correct factual decisions. As well, the so-called 'hot tub' process of interchange between experts can undoubtedly refine differences and present them for accurate decision-making. On the other hand, experience in dealing with experts in adversarial trials teaches lawyers how opinionated experts can sometimes be about matters that are a proper subject for differing views. In my youth, I knew how identified

medical experts would sometimes approach particular questions from an unbending point of view. Thus, chosen experts would favour an opinion that coronary occlusion was always/never related to physical effort. Depending on the expert designated as a decision-maker, a process of ADR might be already decided before any evidence was given. The adversarial trial allows such considerations to be exposed, tested publicly, and given proper weight.

Limitations in arbitration: In a recent letter to the *Law Society Journal*¹³ in New South Wales, Toni de Fina, an experienced international commercial arbitrator, has gone so far as to suggest that domestic commercial arbitration “is presently almost non-existent in Australia”. This he ascribes to political antagonism; the creation of substitute statutory tribunals; the “poor performance of arbitrators”; time charging for arbitrations; the timidity of arbitrators for fear of being accused of ‘misconduct’; and the abiding “lack of competent, knowledgeable and decisive arbitrators”. Certainly, the formalism of some arbitrations in Australia can be contrasted with the more flexible, informal procedures adopted elsewhere. So how can such procedures be embraced in a comparatively new activity of practitioners with variable experience and expertise? This is the fundamental question that Mr. de Fina poses.

Improving courts: Finally, some observers suggest that, whilst a particular role may exist for ADR, especially mediation, governments should be concentrating their efforts upon improving the speed and efficiency of the courts. If an easy solution exists of effectively transferring all technical, complex, uninteresting disputes to ADR, the result may be the ‘vanishing trial’ spoken of in the United States. At the

¹³ *Law Society Journal* (NSW), Letters, July 2009.

very least, there is a clear need to improve *both* ADR *and* judicial decision-making. The two processes complement each other. ADR will never wholly replace the courts for it is the courts that set the parameters of law and the principles of justice within which ADR itself must be carried out.

THE ADVANTAGES OF ADR

Cost saving: Whilst recognising all of the foregoing limitations and problems inherent in ADR, there are undoubted advantages that need to be weighed in deciding the correct mixture of dispute resolution appropriate to a given problem in a given society at a particular time. Cost saving involves not only the costs of litigants, but also of communities involved in lengthy trials.

Thirty years ago, a five-day trial was considered long. Now a long trial is one that last five months. Somehow, there is a need to return to the more modest approach to dispute resolution that existed in earlier times. Yet, in the age of the photocopier and the internet, with the virtual abolition of civil jury trials and enhanced concepts of appellate intervention, the imperative of cost saving plays an influential role both in public and individual decision-making. The fact is that most ordinary citizens cannot afford to litigate a civil case in court today. Becoming involved in such litigation is, as Chief Justice Doyle described it, a “nightmare”. ADR often provides the only practical available alternative to such ordeals.

Limits of privacy: Whilst parties may actually wish their dispute to be resolved with complete respect for their privacy, public interest considerations may sometimes, objectively, argue for openness.

Debates about this subject have surfaced in international arbitral bodies such as ICSID. It has been suggested that, at least in some cases, it should be open to arbitrators to provide relevant information to the affected public, including by the release of whole or part of arbitral awards. Like the question of appeals on the merits or contested facts against particular arbitral decisions, this is a developing field where it is important to watch this space.

Ongoing relations: In certain circumstances, the handing down of a binding decision by an external third party, best serves the interests of justice and finality. On the other hand, there are other circumstances where ADR has a special merit. These include, but are not confined to, cases where the disputants cannot avoid, or positively desire, an ongoing relationship. Such non-avoidance arises where parties are linked by blood or other long-term relationships. Desirable preservation of association arises where, despite a particular conflict, the parties see merit in ongoing business or other associations. In such cases, ADR will generally lay emphasis upon practical solution.

By avoiding publicity and adverse commentary, ADR can render restoration of the parties' long term association possible whilst affording a solution limited to the immediate conflict.

Expressing feelings: Repeated reports from mediation proceedings, in particular, illustrate a special advantage that such procedures may enjoy over court hearings. Many mediators report how, once a complaining party has expressed its viewpoint and 'let off steam', the path to resolution of the conflict is easier to discover. Similarly, the presentation

of an apology, or even an expression of regret, may ease the path to resolution.

In courts, litigants sometimes jump up and express a desire to speak directly to a judge. Generally, they cannot be allowed to do so and submissions and evidence must be mediated through the lawyers. In ADR, much more may be in the hands of the parties. It is in this sense that the parties have greater control of the proceedings than will often be the case in court. Where parties come away from a resolution of their dispute believing that their views have actually been heard and weighed, it may be more likely that they will accept an outcome, even if it is one adverse to their economic interests.

Practical common sense: Few disputants are as intensely interested in the elaboration of the law or the principles of justice as some lawyers are. Few find the intricacies of the law as fascinating as lawyers do. Most simply want a resolution of their dispute, particularly if they are commercial people deriving income for shareholders or ordinary citizens of limited means.

One of the advantages of commercial ADR is that it can cut through the legal niceties and go directly to the common sense or practical solution to the problem. In this respect, ADR has a greater liberty than courts, which must apply the law to the facts as found.

Saving public costs: In addition to costs savings for parties, very considerable public costs can be avoided by efficient procedures of

ADR. A recent item in the London *Times*¹⁴ reported that the former Lord Chief Justice, Lord Woolf, had joined the wife of the former Prime Minister, Mr. Tony Blair (Ms. Cherie Booth QC), in offering a new scheme aimed at saving big companies large amounts in legal costs by helping them to early settlement of disputes out of court.

The Institute of Chartered Accountants of England & Wales, the largest representative body of the accounting profession in the United Kingdom, recruited twenty senior accountants and lawyers to mediate high-value disputes involving major British companies. Both Lord Woolf and Ms. Booth are members of this mediation panel together with partners from the largest accounting firms. Describing the benefits of ADR for such corporations, horror instances were given of the blow out in time and costs of court proceedings. A fire in the oil refinery at Buncefield in England took years to resolve and cost more than £50 million before the litigation was concluded.

The combination of lawyers and accountants in the foregoing panel was described by the Institute as a “first of its kind”. Lord Woolf said it would place an emphasis on “achieving a commercial outcome rather than focusing on the legal merits”. He pointed out, that following reforms brought in as a consequence of his report proposing improvements in civil litigation in Britain, mediation had generally increased in popularity during the past decade. Thus, it had reduced the number of commercial proceedings in the English High Court from 109,444 in 1999 to 64,046 in 2007. Lord Woolf declared that this reduction, although significant, still did not go far enough.

¹⁴ 9 June 2009, p.43.

Some unnamed members of the English Bar questioned whether joint mediation would have any greater success than the access to skilled mediators already available in England. Nevertheless the injection of accounting and other skills and expertise might sometimes act as a corrective to the common lawyerly concerns with forms and procedures where other vocations are generally more likely to look to the substance and the bottom line.

CONCLUSIONS

Reflection upon the problems and limitations involved in ADR and the undoubted advantages that its techniques can offer indicate that ADR, in Australia, has a big future. Bigger even than I foretold in my address to the inaugural dinner of IAMA back in June 1976¹⁵.

I pay tribute to the federal Attorney-General, and State and Territory Ministers, for their initiatives towards updating the Australian legislation. I also applaud the action of the University of Adelaide in providing the national course on commercial arbitration, the first of its kind in Australia¹⁶. In this country, if we simply copy in arbitration the formal techniques of decision-making, as used by the courts, we will miss many of the advantages that this form of ADR presents. The Adelaide course is a step in the direction of alerting and instructing participants to the arbitral procedures used elsewhere in the world and in the options that are available in properly conducted and efficient arbitrations in this country.

¹⁵ M.D. Kirby, "The Law & Commercial Arbitration", unpublished address of 25 June 1976, Canberra, reproduced in the *IAMA News*, December 2005, 32.

¹⁶ University of Adelaide *News*, 30 March 1998, 1.

These are exciting and demanding times for ADR in Australia. IAMA, with its new Chief Executive Officer, Paul Crowley, and a Council that is addressing policy issues to improve the service of the Institute, will now tackle questions that have sometimes been neglected. These include co-operation between the several membership bodies engaged in ADR in Australia; the attraction of more women to the representative organs of IAMA; the utilisation of retired judges and lawyers, including in *pro bono* ADR to help meet the unmet needs for legal services in Australia; and the enhancement of initiatives for a regional dispute centre in Australia to rival others in our region that have been established in Singapore, Hong Kong and Kuala Lumpur.

I am convinced that ADR has a glowing future in Australia. That future will be assured if we are conscious of the abiding need for effective courts and judges, and of the concurrent provision of alternative ways of resolving disputes that help parties to a just outcome more quickly, more cheaply, by their own empowerment and without some of the downsides that court proceedings can entail. What is needed is not a 'starry-eyed' embrace of a new fad that will replace the courts, but the best utilisation of new techniques that will assist our society and those with disputes to lawful, just and economical solutions to the conflicts that inevitably arise.
