DISPUTE RESOLUTION IN AUSTRALIA IN THE YEAR 2000

by

Justice Andrew Rogers

a Judge of the Supreme Court of New South Wales

In June 2000, a variety of claims, fairly representative of classes of disputes agitating members of the Australian community, are awaiting resolution:

Firstly, a claim for compensation by the dependants of travellers on a space shuttle to the Moon which had been lost en route;

secondly, an application for judicial review by the owner of an industrial establishment against a refusal to permit the installation of a nuclear furnace;

thirdly, a claim for relief against infringements of its multi-cultural heritage, guaranteed by the Australian Bill of Rights, by a group of persons, members of a small religious community from an Asian country;

fourthly, an application for judicial review by an elderly patient who had been refused a necessary but highly expensive organ transplant;

fifthly, a criminal charge against a rogue computer operator for manipulating a computer system in the course of which the inertial navigation systems of under

water passenger craft were dislocated resulting in heavy loss of life and property.

I have enumerated these examples, admittedly somewhat remote from our present everyday experience, simply in an endeavour to illustrate the theme which underlies the paper. Primarily, I suggest that the nature of disputes falling for consideration is bound to be substantially different from those making up the staple fare of the courts' business at present. No doubt by the year 2000 the claims for compensat on for injuries suffered in motor vehicle accidents will be resolved by agencies and means completely unlike the court proceedings of today. Similar change is bound to have come to claims arising out of industrial accidents and perhaps even in respect of injuries suffered from faults in products manufacture. I must admit that I threw in the first of the examples given primarily to raise the question of how far no fault accident compensation will have progressed. Will the inevitable no fault liability for accidents have extended yet to inter-planetary travel? Instead of the present day focus on claims for damages for personal injuries, disputes will concern more the social rights of the citizen vis a vis the State and the rights of members of the community to have their social and physical environment protected from the effects of detrimental action or inaction both by the State and other members of the community. Such disputes will involve the agency considering them in the evaluation and determination of

social issues which are to a large extent either expressly rejected by courts today as properly matters for determination or, if inescapable, determined without a full acknowledgement of their role in the decision-making process.

The fourth example in particular is intended to illustrate disputes which will throw up for consideration the kinds of issues with which Australian courts do not customarily grapple otherwise than perhaps in passing. The United States decisions that a patient in a hospital will not be permitted to reject the intake of food, that a child will be forced to submit to treatment which will prolong a life of agony and misery both for the child and the parents are forerunners of the range of issues which society will require the courts or like agencies to resolve. Even in the United States today most of the right-to-die cases have focused on technical definitions of death and failed to grapple with the social and religious concepts which are fundamental to the decision made. A judgement which undertakes the exercise of comparative evaluation may be seen in Superintendant of Belchertown State School v Saikewicz 370 NE 2d 417. Mr Saikewicz was a mentally retarded person suffering from leukemia. The question the Court was called upon to decide was whether he had to be given chemotherapy in an attempt to prolong his life or whether he would be allowed to die. In fact, the reasons for judgement were given after he was allowed to die

"without pain or discomfort" (ibid p 422). I intend later in the paper to make some reference to the changes in the structure and rules of ethics of the legal profession. In that context the appearances in the case are of some interest also. As well as two State Assistant Attorneys General and a Special Assistant to the Attorney General, two lawyers described as Legal Interns appeared for the plaintiffs. Three Federal Assistant Attorneys General appeared as amicus curiae for the Civil Rights and Liberties Division of the Department of Attorney General, as well as other lawyers as amicus curiae for the Mental Health Legal Advisors Committee, the Massachusetts Association for Retarded Citizens Inc and for the Developmental Disabilities Law Project of the University of Maryland Law School. In its unanimous judgement the Supreme Judicial Court of Massachusetts seemed to accept that "the law always lags behind the most advanced thinking in every area. It must wait until the theologians and the moral leaders and events have created some common ground, some consensus." (ibid p 423) The briefs filed by groups such as the amicus curiae must be instrumental in informing the Court of present day thinking and the extent of consensus. For immediate purposes I note the matters which the Court considered appropriate to weigh in the balance in coming to its conclusion. On the one hand a citizen is entitled to be free of non-consensual invasion of bodily integrity. The Bill of Rights protects the right to privacy against unwanted infringement of bodily integrity. On the other

side are the interests of the State. Firstly, there is the interest in the preservation of human life. The balancing exercise is that "the interest of the State in prolonging a life must be reconciled with the interest of an individual to reject the traumatic cost of that prolongation." (ibid p 425) The State has an interest in protecting third parties, particularly minor children. For this reason in Application of the President and Directors of Georgetown College Inc 331 F 2d 1000 the Court granted permission to perform a life-saving blood transfusion, which was contrary to the patient's wishes, by reason of religious beliefs, in order to avoid the effect of "abandonment" on the minor child of the patient. The State also has an interest in preventing suicide and in maintaining the ethical integrity of the medical profession. It was after balancing these competing interests and rights that the Court held that Mr Saikewicz should be allowed to die.

In vivid contrast with this careful delineation of competing considerations and their evaluation in reaching a conclusion was the treatment of the dispute between Mrs Del Zio and Columbia University Presbyterian Hospital. She wished to undergo voluntary in vitro fertilization procedure. Commenting on the ensuing legal proceedings a commentator in the American Bar Association Journal (1982) Vol 68 p 1094 at 1096 described the adjudicatory process thus:

> "During the trial the qualifications and scientific credentials of doctors who had agreed to perform the procedure became the subject of debate. Attention was focused not only on their past performance as

> researchers but also on particular technical decisions - the use of temperature charts to determine the time of ovulation and of test tubes rather than petri dishes for fertilization. Relatively little attention was paid to what some have seen as the basic issue of the case: the conflict between Mrs Del Zio's desire to have a baby, even with the aid of controversial scientific techniques, and Columbia University's prior agreement with the federal government not to permit human experimentation without adequate review. The litigation reduced the ethical issues involved in in vitro fertilization to a debate about what constitutes competent clinical work."

Adverting to the fourth of my hypothetical disputes, how will a decision-maker in Australia in the year 2000 deal with the moral question whether it is ever permissible that life prolonging treatment should be refused where the citizen desires it? Is the State obliged to supply hospitals, doctors and other facilities to prolong a citizen's life by a mere matter of years? Is it permissible to take into account the social usefulness of the citizen and draw different conclusions in the case of another Einstein as against a prisoner who spends his days watching TV? To what extent, if at all, is it permissible to take cost into account? If and when such questions are posed for decision, not only will it be necessary to identify the appropriate principles to guide the decision maker but the nature and composition of the decision-making body will be of crucial importance as will the means by which the decision maker will collect the material to guide its conclusions.

The nature of disputes will also call on the decision maker

to exercise judgement in respect of a wide range of technological questions of great complexity. Whilst no doubt the decision maker in the year 2000 will be much more literate in the working of computers than we, as a general body of judges, are today, a problem such as the fifth dispute I have posed should fully extend even such forward-looking, socially aware, technically proficient tribunal. It will be necessary to understand not merely the day to day mechanical application of computers but also their operation in submarine craft as well as the navigational devices. The example of the dispute secondly given neatly illustrates the interaction of social and technological disciplines in the resolution of disputes.

If the type of issues in the examples given will indeed prove representative of the disputes that will arise for determination in the year 2000, a number of questions are thrown up for consideration:

1 What methods of dispute resolution will need to be available?

2 What should be the composition and make-up of the dispute resolving authority?

3 What should be the general nature of the procedure practised by the dispute resolving authority?

4 What method should the dispute resolving authority follow for the purpose of eliciting information and determining the facts?

5 What role, if any, should legal representatives play in

the proceedings?

6 What should be the role of the State in the provision of financial assisistance to the parties to enable them to participate effectively in the resolution of the dispute?

The purpose of this paper will have been sufficiently served if the questions posed do correctly identify questions calling for consideration and engender discussion as to the appropriate answers. I will discuss possible answers but I do not wish to be thought dogmatic as to any of them. They are no more than starting points for discussion.

For a number of reasons the methods of dispute resolution practised in the year 2000 should represent an enlargement on the options presently available. The reasons include the ever-increasing number of disputes, the community requirement that disputes be resolved cheaply and expeditiously and the fact that much more sophisticated social and technical matters will be posed for determination.

The system of administration of justice presently in force will need to be re-orientated to a substantial extent to cope with the exigencies of the year 2000. I believe that it will need to be an integral part of the system of dispute resolution that any contest, in any matter, be preceded by an attempt at conciliation or mediation. Only disputes

which cannot be resolved by these means will then proceed to argument and so consume the scarce resources required by contentious dispute resolution. Furthermore, even after a tribunal embarks on the task of determining a dispute it should continue to search for settlement by mediation. As will appear, this is the touchstone guiding a number of developed systems of dispute resolution.

The facilities for conciliation and mediation will no doubt differ according to the nature and difficulty of the dispute. Some minor disputes could be sent to neighbourhood conciliation centres to be dealt with by well-meaning, part-time, volunteer, but nonetheless trained, conciliators and mediators. Although the discipline of the party machine no doubt played a draconian role in its effectiveness, one cannot disregard the Chinese experiment and its apparent success in this field. New South Wales has, of course, already embarked on a restricted scheme for settlement of minor disputes by mediation. After an exhaustive experiment, carried out pursuant to the provisions of the Community Justice Centres (Pilot Project) Act 1980, and a report on the experiment by the Law Foundation of NSW (Community Justice Centres - A Report on the New South Wales Pilot Project 1979-81) the Parliament enacted the Community Justice Centres Act 1983. The cornerstone of the Act is that mediation is voluntary and either party may withdraw at any time (Section 23). Mediators are accredited to Centres (Section 11). Courses for training mediators are conducted

by the Department of Technical and Further Education. At least initially the restriction which most generally limited the class of disputes going before such centres was that some ongoing relationship was required to exist between the parties. In practice, this meant that seven out of ten disputes dealt with involved neighbours. Most of the remaining cases involved a family or personal relationship of one sort or another. However, there were some between customer and trader. It is not apparent to me why this method of disposing of disputes should remain so restricted.

Any dispute of importance, considered beyond the capacity of a Community Justice Centre, should, in the first instance, go before a conciliation committee from which lawyers should be excluded. The committee should be staffed in every instance by at least one person trained in conciliation and mediation. Where the dispute is of any technical complexity the committee should in addition have on it a person acquainted with the technical subject. In a non-contentious and non-tendentious manner the committee should explore the possibilities of bringing about a settlement of the dispute. Two ancient civilizations, the Chinese and Japanese, have developed the art of dispute settlement by conciliation to a high degree of perfection. UNCITRAL has developed its own rules for conciliation of trans-national disputes. Article 7 provides, inter alia, that "the conciliator will be guided by principles of objectivity, fairness and justice, giving

consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties." Such a procedure will probably have to be incorporated in a domestic setting. (For an existing provision see the Anti-Discrimination Act 1977 Section 92 et seq.)

It is interesting to reflect that it is precisely disputes which engender the strongest feelings in the opposing parties that most appropriately demand an attempt at settlement by conciliation. This was indeed perceived by the draftsman of the Family Law Act 1974. Not only is conciliation a statutory duty imposed on the Court (Section 14) and counselling facilities provided under the aegis of the Family Court, but Section 62 makes further specific provision for counselling in relation to disputes concerning the future welfare of children of the marriage.

Both the state and federal legislation for resolution of industrial disputes call for attempts at conciliation. The frequency with which workers feel it necessary to withdraw their labour may suggest that conciliation is not a particularly efficient means of settlement of industrial disputes. I suggest that even disappointing experience in the field should not discourage the putting into place of systems of conciliation. The seemingly intractable

questions posed by different perceptions on social, moral and religious issues of the kind thrown up by the examples of pending disputes given should most appropriately be explored in the first instance by frank exposure of the different viewpoints under the guidance of and with the assistance of a trained conciliator.

I have not included either marriage, or industrial, disputes amongst the examples given at the commencement of my paper of disputes awaiting resolution in the year 2000. I do not suggest that disputes of such nature will not be a feature of those times. Rather it is because my experience in these fields is so limited that I have avoided any discussion of the changes that are likely in those fields. (But see, for example, in the industrial sphere Ludeke J "Is Now the Time for Radical Change?" 58 ALJ 157.)

I am bound to emphasise that the training of members of the suggested conciliation committees for their task will be of crucial importance. In the Administrative Law Division of the Supreme Court we see regular examples of cases dealt with under the Consumer Claims Tribunals Act 1974 where the imperative of a speedy and inexpensive resolution of minor disputes results in injustice. In McClelland v Acmil Industries Pty Limited (1983) 1 NSWLR 615 at 618 Hutley JA said:

> "In my opinion the respondent Company has been subjected to a gross injustice which is founded upon the conduct of the referee; but which it is quite beyond this Court to rectify."

There the notice of hearing, although given in accordance with the provisions of the Act, arrived too late to allow the Company to appear at the hearing. An application for re-hearing was made after the claim was heard ex parte, but was refused by a no doubt well intentioned but, with respect, misguided referee. The only point I am seeking to make is that in excluding lawyers, in an effort to ensure an absence of legalism and secure an inexpensive and speedy resolution, steps need to be taken to ensure that the impartial third party, the conciliator, will have the training and experience to ensure that no injustice results.

Let it be assumed that the hypothetical disputes I have envisaged survive the efforts of a trained conciliation committee and the disputes continue. By the year 2000 we will have in place, as a tried and soundly working system, dispute resolution by arbitration of which the recently tabled Victorian Commercial Arbitration Bill will be the prototype. Although titled "Commercial Arbitration Bill" there is no essential reason why its provisions should not be equally apt for the resolution of other and non-commercial disputes. Once again, the United States offers interesting experience in the field of arbitration also. Not only are labour arbitrations the usual method of resolving industrial disputes but arbitrations have now entered the field of family disputes in quite an extensive fashion (see Coulson, "Fighting Fair, Family Mediation Will

Work for You"). Indeed the American Arbitration Association has laid down Family Mediation Rules and apparently there are hundreds of mediators in the field. In the light of subsequent discussion it is interesting to note that frequently the mediators are a lawyer and a person versed in the social sciences working as a team.

Because the new Commercial Arbitration Bill will undoubtedly be the basis of arbitral procedures in the year 2000, it is desirable that I explore the fundamental changes which it will bring to the system of arbitration as we presently know it. The hallmark of the Bill is the preparedness to leave to the parties to determine whether particular provisions should or should not apply to any arbitration that may ensue between them. Almost all crucial matters are confided to the agreement of the parties. In currently popular jargon it may perhaps be said that arbitration will be de-regulated. Thus the parties may determine the standard by which their dispute is to be judged. Clause 22(2) provides that, if the parties so agree in writing, the arbitrator may determine any question that arises for determination in the course of proceedings under the agreement "by reference to considerations of general justice and fairness". Quite obviously, this provision has a number of necessary consequences. In relation to any dispute to which it is applied, Lord Justice Scrutton's famous statement that "there will be no Alsatia in England where the King's Writ does not run" will no longer be appropriate with the

necessary transposition of Australia for England. It will be open to an arbitrator to measure the rights of parties by reference to standards of equity and good conscience rather than by strict application of settled principles of law. Of necessity this means that, at least for such arbitrations, appeals for judicial review are done away with. I will return to this topic shortly. Clause 20 provides that, unless otherwise agreed in writing by the parties, representation may be by leave of the arbitrator only. An arbitrator shall not grant leave "unless the arbitrator is satisfied that the applicant would otherwise be unfairly disadvantaged." The further matter confided to the consensual agreement of the parties is the finality of the award. Clause 28 provides that unless a contrary intention is expressed, subject to the Act, the award shall be final and binding on the parties.

The Bill allows for only a very restricted judicial review of arbitral procedures. Firstly the opportunity for a stated case will no longer exist. I think it is universally agreed by all those who know the area that applictions for stated cases have become instruments of abuse in the hands of parties and their advisors and have been the substantial cause of delay in arbitral decision making. Under the Bill, an appeal will lie to the Supreme Court on any question of law arising out of an award but only by consent of all parties or subject to the grant of leave. However, the Supreme Court shall not grant leave "unless it considers

that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement" [Clause 38(5)]. No further appeal will lie without leave and a certificate from the Supreme Court. That leave will be granted only if the question of law is either one of general public importance or one which for some other special reason should be considered by the appellate court [Clause 38(7)]. Even this very qualified right of appeal may be excluded by agreement of the parties (Clause 40). As I indicated earlier, there can be no room for any appeal from an award determined in accordance with the dictates of equity and good conscience because it is not capable of throwing up any question of law.

The Bill has a number of provisions which are calculated to enhance the effectiveness of arbitral agreements. Thus the Court has power to consolidate proceedings (Clause 26) so that no longer will it be necessary to have separate arbitral hearings of the same facts giving rise to a dispute between owner and contractor on the one hand and contractor and subcontractor on the other hand. The Court has a general jurisdiction to grant extensions of time. I should also mention that the absolute effect of a Scott v Avery clause is modified so that, notwithstanding its provisions, legal proceedings may, in appropriate cases, be instituted. However, the rule remains that, prima facie, in the presence

of an arbitration clause, a stay will be granted (Clauses 53 and 55).

Arbitrators have important new powers and duties. In the context of what I have been saying earlier concerning conciliation, I should draw attention to the provisions of Clause 27. That provides as follows:

> "Unless otherwise agreed in writing by the parties to an arbitration agreement the arbitrator or umpire shall have power to order the parties to a dispute which has arisen and to which that agreement applies to take such steps as the arbitrator or umpire thinks fit to achieve a settlement of the dispute (including attendance at a conference to be conducted by the arbitrator or umpire) without proceeding to arbitration or (as the case requires) continuing with the arbitration."

In other words, even if the suggestion for compulsory conciliation preceding arbitration is implemented, the mere failure of the initial attempts at conciliation will not spell the end of all opportunity to bring the dispute to an end by means of conciliation or mediation. Another beneficial provision in my view is that Clause 29(1)(c) will require the arbitrator to give in writing his statement of reasons for the award. Surely it is a well-known and accepted facet of dispute determination that the discipline of setting out reasons for the conclusion to which the tribunal has arrived is salutory in safe-guarding the tribunal from falling into error.

Finally, there is a provision in the Act which I should mention. Clause 37 bears the side note "Duties of Parties".

The clause requires the parties, at all times, to do all things which the arbitrator requires to enable a just award to be made and "no party shall wilfully do or cause to be done any act to delay or prevent an award being made". No specific sanction is nominated for a breach of this provision. It will be fascinating to see what meaning is given to the word "wilfully" and whether it includes a failure to attend to obligations as a party to the dispute. In any event, how is the provision to be enforced? Whatever be the answer to this question, the Bill is lying on the table of the Victorian Parliament so that submissions may be made for suggested improvements to it. In its final form the Act will serve as a model for the other Australian States and will, in my respectful view, be a powerful agent in achieving a more efficient system of delivering justice.

No doubt there will be further fine tuning of the system of arbitration between the passing of the Bill and the year 2000. Hopefully, panels of trained arbitrators will be available whose names will be entered on a central register after examination. The Australian Institute of Arbitrators is doing yeoman work in educating arbitrators in the performance of their duties. Recently, they brought Lord Roskill, one of the Lords of Appeal, to Australia and he helpfully participated in a number of the training exercises.

The discussion of the new Commercial Arbitration Bill

conveniently leads me to make some comments on the second question I have formulated as to the composition and make-up of the dispute resolving authority. So far as arbitrators are concerned, the crucial matter which will determine the composition of the tribunal will be the nature of the dispute. If the dispute concerns the quality of goods, it can best be resolved by what has been termed a "sniff and smell" arbitration in which a person versed in the particular trade will look at the goods and be able quite readily to determine the matter one way or the other. Again, if the dispute be entirely of a technical nature, it is far better that the single arbitrator be a technical person. This approach is lent emphasis by the provisions of the Commercial Arbitration Bill which allow the parties to dispense with the rules of evidence and indeed with the application of relevant principles of law. It may be thought that a knowledge of relevant principles of law and of the rules of evidence by the arbitrator in those circumstances will no longer be a requirement or an advantage but may be a positive handicap in that traditional legal approach may prevail in circumstances where the parties have expressed their desire otherwise.

In other cases the lawyer still has his skill as a fact-finder to offer as, or as one of the members of, the tribunal. This ability is of unquestioned value where there are disputed questions of fact arising for determination. Some lawyers are better than others at determining, in the

circumstances of a conflict of evidence, where the truth lies. Whether a given lawyer does possess great insight or not it is almost inevitable that through years of practical application he should develop some facility for assessment of competing claims for veracity.

I would suggest that in cases of arbitration the questions which the appointor of the tribunal should ask in the first instance include the following:

1 Is the tribunal to apply principles of the general law?

2 Are the applicable principles of law well settled or susceptible to considerable argument?

3 Is the arbitrator required to apply the rules of evidence?

4 Is there likely to be any contest of fact in relation to which questions of evidence could be important?

5 Is there likely to be any evidentiary contest in relation to which assessments of credibility will be required to be made?

If the answer to all the foregoing questions is in the affirmative, then one needs to enquire into the extent to which the arbitrator will be called upon to determine questions calling for technical expertise. However, generally speaking, in these circumstances an arbitrator with legal experience is called for. His lack of expertise in the technical field will have to be compensated for by one of the means I will mention later. No doubt, if one

were to conduct what might be termed a "Rolls Royce" type of arbitration, one would appoint two arbitrators, one of whom would possess the necessary legal qualification, the other the necessary technical expertise. Quite apart from the large additional expense which would thus be incurred, there may be difficulties arising from the call of the arbitration agreement for the appointment of a single arbitrator. Again, what if the two were to disagree? What qualifications in those circumstances would the umpire be called upon to have?

The same problem arises, albeit in a somewhat different guise, in curial proceedings. There is no question but that the judge will be a lawyer. The problem is how best to make known the necessary technical data to a judge required to resolve the complex technical problems to which disputes such as the the hypothetical examples I have earlier given will inevitably give rise. In other words, if the arbitrator or umpire are lawyers, they and in the case of curial proceedings, the lawyer judge all have to be tutored in involved technical subjects in the most effective way. For centuries, courts have been content to proceed in the determination of disputes of a technical nature by calling experts on each side who would then tutor the tribunal in the particular field of their expertise and eventually and hopefully enable the tribunal to make an informed decision as to which side is to prevail. In any dispute which involves matters of considerable complexity the time taken

to bring the judge to a suitable level of understanding must be considerable. The exercise which has customarily been conducted is for the experts on each side to tutor the lawyers, both by written reports and in conference, and then for the lawyers to guide the experts in tutoring the judge. That seems to me to be an expensive and inappropriate method where the grounding which is required is detailed and lengthy.

Even with such help it seems to me that judges will be placed in great difficulty in attempting to adjudicate on competing views on highly complex technical questions advanced by undoubted experts perhaps of international renown. In this respect, I do not wish to do more than make a fleeting reference to a recent and celebrated instance of scientific dispute. If the Chamberlain trial had been tried before a judge sitting alone, would he have been much better equiped than the jury to determine the disputed scientific issues thrown up for consideration?

We are in good company in being troubled by the mode of resolution of complex technical issues. In the United States in particular, extensive consideration has been given to the problem in the literature. Judge Leventhal, for example, writing in the University of Pennsylvania Law Review (1974) Vol 122 p 509 proposed setting up a cadre of scientific experts who would act as aides to judges, helping them to understand problems. The problem must be

particularly acute for appellate judges who have not even the expert witnesses to whom they can put their questions during a hearing.

In the Supreme Court of New South Wales, we are currently considering two alternative approaches to seek to cope with problems of cases involving advanced technological issues. One is the appointment of an expert to assist the judge. The other is to appoint an assessor who would, in effect, be a me ber of the tribunal although not necessarily with a vote in the decision making process. The advantage of the latter course is that the role of the expert is displayed more publicly and gives the parties a better opportunity to influence the views of the Court's expert and satisfy that expert's doubts and concerns directly rather than through the medium of the judge. We recognise the great care that would have to be taken to ensure that the decision which ultimately is given is not in fact, nor is it conceived to be, that of the expert rather than that of the Judge. A delicate balance will have to be preserved in seeking the assistance of the expert or assessor on matters of technical difficulty and, in a sense, even deferring to the expert's assistance and guidance but at all times reserving to the tribunal the obligation of making the ultimate choice between the competing views and therefore the task of the ultimate decision making. Another problem which intrudes in the employment of assessors or experts is the need to keep the parties abreast of the information which is provided by

this person to the Judge in private so that parties may meet the objections and difficulties which may be propounded by the expert for the Judge's consideration. Notwithstanding the difficulties which are posed by the problems I have mentioned, I think that there is a great deal of advantage to the Court in having its own expert or assessor. Firstly, there is no doubt about the loyalty of the expert. Barring cases where the expert may be inclined to one view or the other simply as a matter of preconditioned scholarship, about which I will say something in a moment, the expert will not be partisan. The Judge may expect an unbiased view. The Judge can obtain guidance from the expert from the very early stages of the dispute and therefore be in a substantially stronger position when making interlocutory orders for clarification of points of issue and the route to be followed. Again the Judge can be tutored in the state of the art in the privacy of his chambers at a pace which is adjusted to his level of knowledge of the topic and in a way which will best ensure that his field of knowledge is enlarged, not necessarily in the way envisaged by or wished by the legal representatives or experts from one side or the other.

Whilst the choice of expert may no doubt be safely made by obtaining a panel of names from the appropriate professional association, the Judge may not be aware whether or not the expert he chooses holds some preconceived views one way or another on a matter vital to the matters in issue. To take

an instance from a field with which we are all reasonably familiar, many medical practitioners hold preconceived views concerning traumatic injuries to backs as against degenerative changes. There are doctors to whom all back pains are attributable to an early onset of a degenerative change. There are doctors who have a view as to a uniform cause for a heart attack. Another more seldom encountered difficulty is that the recognised world experts in the particular field may number few, each of whom may have a precommitment to one side of the dispute or the other. However, I think that all these problems are capable of solution and, if properly approached, may be a powerful weapon in the Court's armoury for achieving a speedy and, dare I say, correct solution. I might add that these ideas are by no means novel. For centuries the Admiralty Judges in England have sat in shipping cases with Elder Brethren of Trinity House assisting them as assessors.

Occasionally, in patent cases, courts have appointed their own experts to advise them. I understand that in the United States, in a celebrated instance, in an anti-trust case of great complexity the Judge appointed a professor of economics as his law clerk for the duration of the case. I would be quite fascinated to know how the parties felt about the Judge receiving technical information the nature of which was not disclosed to them. (cf An Economist as the Judge's Clerk in Sherman Act Cases (1958) 12 ABA - Section on Anti-Trust Law Proceedings p 43; Judge Wyzanski The Law

of Change (1968) 38 New Mexico Quarterly 5)

The consideration of the work of expert advisors, in reported judgements, is not extensive but it is of great interest. In Adhesives Pty Limited v Aktieselskabet Dansk Gaerings Industri (1936) 55 CLR 523 at 559 Evatt J said:

> "There are some additional observations which I wish to make. In order to deal with the technical aspect of many of the questions, the parties have provided me with two very skilled assessors, and much of what I have said and am about to say is based upon their expert knowledge of scientific processes, and their opinion and explanation of the results of the experiments actually carried out during the course of the case." See also pages 571-572.

This case went on appeal and Rich J at page 580 said:

> "His Honour at the conclusion of his judgement acknowledges his indebtedness to the scientific assessors. There can be no doubt that the decision of this case must be largely affected by the degree of comprehension of the scientific and industrial information and practice the existence of which was assumed by the draftsman of the specification. Courts cannot hope to obtain the necessary standpoint in matters of this description. This fact has been emphasised in a recent case discussed in "Industrial and Engineering Chemistry", vol 26, No 11, November 1934, Editor's page, 1125, 1126. It is there said that, 'if full justice is to be done in the adjudication of patents, the judges should have associated with them in a confidential and intimate capacity unbiased, thoroughly competent, scientific aides. It is becoming more and more apparent that the Courts as now constituted can rarely reach just conclusions in matters where new and complicated scientific truths must be interpreted and serve as the only guide posts. In the past we believe there have occasionally been competent judges wise enough to realise this situation. They have known intimately scientists who were qualified and who could be called privately to their assistance to help interpret the mass of highly scientific data recorded by experts in the course of a trial. Such judges have been able to reach the right decisions, for they understood the law and they found a proper way to have the science interpreted to them....Apparently the protection of both science and the public interests requires that provision

be made so that authoritative, capable and unbiased scientific aid may be available to the courts in all patent litigation. Such a plan is not untried, for it is practised with success elsewhere and with modifications could be adopted with safety and advantage in the United States.'" (my emphasis)

In Cement Linings Limited v Rocla Limited (1940) 40 SR(NSW) 491 at 494 Nicholas J said:

"Both the plaintiff and defendant conducted a series of experiments, the defendant for the purpose of showing that the Rocla tool did not remove moisture or slurry in any way comparable to the Tate tool, and the plaintiff for the purpose of showing that each tool removed moisture or slurry approximately to the same extent, and each party then argued that the experiment of the other was vitiated in such a way that it threw no light on this litigation.

In view of these results, I requested the Dean of the Faculty of Engineering in the University of Sydney to arrange for experiments to be carried out at the University. Experiments were carried out by Sir Henry Barraclough and Mr Wilkins and I am much indebted to these gentlemen for their trouble. Their report was forwarded to me but was not disclosed to the parties and is annexed with the relevant correspondence to this judgement. I arranged for these experiments in accordance with the advice of Rich J in Adhesives Pty Limited v Aktieselskabet Dansk Gaerings Industri 55 CLR 523 at 580, and the action of Evatt J referred to in that case 55 CLR 523 at 565: see also Halsbury, 2nd ed, Vol 24 at pp 685 and 688." (my emphasis)

The Law Reform Commission for England and Wales in its 17th Report (Command 4489) said:

"Consultation between the Judge and the nautical assessor is continual and informal, both in Court and in the Judge's room. The advice which the Judge receives from the assessor is not normally disclosed to Counsel during the course of the hearing, although the Judge may do so if he thinks fit. In his judgement he does usually state what advice he has received on particular matters and whether he has accepted it or not. But he is under no obligation to do so and the practice is not uniform among all judges."

Indeed in Admiralty matters there is a rule that expert evidence is inadmissible on matters within the special skill or experience of the assessors.

It must be acknowledged nonetheless that even in jurisdictions which make express provision for the appointment of assessors no great use has been made of the power. In Queensland, O 39 R 7 permits the appointment of an assessor in any case. The Full Court (Stable SPJ W B Campbell and Andrews JJ) expressed the view in Peters Slip Pty Limited v Commonwealth of Australia 1979 QdR 123 at 130 that whilst a judge has a discretion in the appointment of assessors "the attitude of the parties is a factor to be taken into account in exercising the discretion". That much indeed may be accepted without qualification. However, in my respectful view at the end of the day the question which must be asked is whether the interests of justice would be advanced by the appointment of one or more assessors.

There is an interesting discussion of the topic in 1976 Crim LR 110. Under the heading "Cases in which assessors are summoned" the author says:

> These generally fall into two categories; first, those where the issues require a detailed knowledge of matters beyond the reach of the ordinary judge, such as medicine, engineering or accountancy and, secondly, capital cases.
>
> In regard to the first category, little use appears to have been made of 'expert' assessors since they were first permitted in 1935. In the ordinary company fraud or theft case, the tendency is for the judge to sit alone, but where the issues are of some complexity an assessor may be engaged. For example, Milne & Erleigh

> 1951 (1) SA 791, where the accused were charged with sixty-three counts of theft, fraud and contraventions of the Companies Act, one of the two assessors was a chartered accountant. In Heller 1970 (4) SA 679, an equally complex case of fraud and theft, which lasted twenty months, an accountant likewise sat. Occasionally, too, scientific assessors are summoned. In Preston (unreported Durban Supreme Court, August-September 1970), where the accused was charged with fraud arising out of engineering projects undertaken for a city council, a quantity surveyor sat and in the recent case of Hartmann 1975 (3) SA 532, where the accused was a doctor charged with the murder of his chronically ill father, one of the assessors was a professor of anaesthetics. Although it has never been expressly decided, it seems clear that the purpose of such assessors is to explain the evidence led to the other members of the court, and not themselves to act as a source of evidence."

Some years ago at a meeting of the IBA, on the subject of international arbitration, the question arose of the course that ought to be followed when a judge was required to determine an action involving complex technical issues. Goff LJ (then Goff J) expressed the traditional English view that the technical aspects of the dispute ought to be sent to the Official Referee. Lord Diplock, however, put the view which I suggest is preferable. If confronted with a case involving computer technology he would sit with an Assessor. At that point, Lord Justice Donaldson said this: "Mr Justice Goff lent across me just now and said, 'Has it ever happened that we have sat with an Assessor?' I have never known it, and the reason is this, that the Bar do not like Assessors. They would much rather know what advice the Judge is being given. The Admiralty Bar are special, they have been brought up and got used to it. But, so far as the rest are concerned, the Bar do not like Assessors because

they cannot cross-examine them and they do not know what poison they are pouring in the Judge's ear. In theory, and in practice, if you can get rid of the Bar, Lord Diplock must be right".

With respect, I think that the present Master of the Rolls was being entirely too negative in his approach. However, the Bar should be entitled to be told, in substance, of any advice which has been given to the Judge by an Assessor and which needs to be canvassed in evidence. In other words, a party should be able to convince the tribunal that a view on a particular point ought to prevail. No doubt a judge will be alive to the fact that the expert who has given evidence has been tested in cross examination. If the assessor is used only as an interpreter of evidence the fear underlying the comment by Sir John Donaldson should not preclude the employment of an assessor. The comment that Lord Diplock "is right" needs no qualification. In fact the recollection of both Donaldson LJ and Goff J failed them. Lord Devlin, when a trial judge, sat with an assessor in Southport Corporation v Esso Petroleum Co Limited (1933) 2 AER 1204. Although the assessor was one of the Elder Brethren of Trinity House, the action was for trespass, nuisance and negligence in the Queens Bench Division.

In any event, as I will show later in the paper, the New South Wales Parliament has accepted the use of assessors in the important areas of adoption and mental health. If they

can operate in those areas and in Admiralty, why not in other cases?

Another method of dealing with complex technical matters might be to sever that aspect of the dispute from other issues before the Court and remit it to a master or arbitrator for determination. However, in such event the Judge would need to retain careful control of the proceedings and be ready to assist the arbitrator on short notice. If I may quote from a judgement I gave:

> "If the technical expert feels it appropriate, I will be ready to assist at each stage of the hearing before him, including the formulation of the issues. If the technical expert feels it would be of assistance there can be periods where the hearing can be conducted before us jointly, and I can and will make such rulings on evidence or questions of law as may arise and as will facilitate a speedy resolution. I have all the necessary powers to give directions by virtue of Section 16(1) of the Act."

The reference is to a section of the NSW Arbitration Act presently in force. It provides that where there is a reference from the Court, the referee or arbitrator shall be deemed to be an officer of the Court and shall have such authority and shall conduct the reference in such manner as the Judge may direct. An equivalent provision in the present Victorian Arbitration Act 1958 (Section 15) has not been included in the Commercial Arbitration Bill. The procedure under Section 14 of the present Victorian Act whereunder a judge may refer a question to a special referee for enquiry and report will be available when rules are made pursuant to Section 25(1) of the Victorian Supreme Court

Act, a provision provided for by Clause 65 of the Bill. The present provisions have been the subject of an interesting note by Murphy J in 56 ALJ 673. It is regrettable that the provision enabling remission of all or part of a dispute to arbitration is not to be retained. As the High Court has had ocasion to remark in Buckley v Bennell Design & Construction Pty Limited 140 CLR 1, it is a most valuable provision and I for one would be most anxious to have such a provision continue in existence. That is not to say that there is not room for debate on the question whether such an order should ever be made by the Court in the face of opposition by either or both parties. The question was recently examined by Beach J in AT & NT Taylor & Sons Pty Limited v Brival Pty Limited 1982 VR 762 where His Honour reviewed some of the authorities on the topic (also see An Adjudicative Role for Federal Magistrates in Civil Cases 40 Uni of Chicago LR 584 esp at 587-8).

The composition of the tribunal will be important where difficult social issues arise for consideration. Again, I draw attention to the fourth of the hypothetical disputes I have mentioned. Assuming that an Australian Court was faced with the questions I have referred to at the start of this paper, surely the tribunal would be advantaged in having a social scientist as an assessor or aide. Mr Justice Sheppard in a paper given to the University of Sydney Law Graduates' Association, "New Roles for Commercial

Judges", referred to the great assistance derived from talking to an economist who sat with him as a member of the Trade Practices Tribunal. It seems to me that quite apart from cases involving complex technological facts there will be other cases where the tribunal will need to be made up of a judge together with a multi-disciplinary team of experts.

The composition of tribunals has engaged the attention of the New South Wales Parliament to quite a significant extent. Simply by way of example, I mention that in 1980, by the Adoption of Children (Amendment) Act, matters relating to adoption were confided to the newly created Adoption Tribunal. The Tribunal was to be constituted by the President, or a Deputy President, being either the Chief Justice or a judge of the Supreme Court, sitting with other members who were required to be medical practitioners or social workers or other persons having, in the opinion of the Governor, "other suitable qualifications or experience" [Section 6C(2)(b)]. Again, the task of reviewing decisions of the Mental Health Review Tribunal, under the Mental Health Act 1983, whilst remaining with the Supreme Court, will be heard by a Judge, who, when he considers it appropriate, may sit with two assessors (Section 137). The assessors shall have power to advise but not to adjudicate on any matter relating to the appeal. The assessors shall be drawn from a panel nominated by the Minister of Health who in his opinion "have appropriate qualifications and sufficient experience to act as assessors" (Section 135). I

would imagine that these legislative experiments in the use of technical experts as members of tribunals represent the forerunners of a very distinct trend in dispute resolution in the future.

The two examples I have given are of tribunals which are constituted in part by members of the Supreme Court Bench. However, one of the features of the evolving system of dispute resolution is the proliferation of specialised tribunals outside the established court structure. Again, the Consumer Claims Tribunals are an obvious example. Even where the entity established is a court, it is frequently taken out of the pre-existing structure. The Land and Environment Court stands independently of the judicial court structure. The Government and Related Employees Appeal Tribunal is another illustration. As the need for specialisation grows and Parliament responds by the creation of more and more specialised tribunals, it will be crucial that they be made subject to the supervisory jurisdiction of the Supreme Court. Otherwise, there is a real danger that two related, but in some respects distinct, systems of law will evolve.

Another major question that should be considered before the year 2000 will be the extent, if any, to which the present system of adversary procedure should yield to the inquisitorial, or less pejoratively, investigatory system of dispute resolution. The different features of the two

systems were treated in detail by Professor Zeidler in his paper "Evaluation of the Adversary System; As Comparison, Some Remarks on the Investigatory System of Procedure" 55 ALJ 390. It would be a work of supererogation in these circumstances to seek to cover the ground dealt with in that paper. There are, however, some comments in the Professor's paper which should not be allowed to pass. Firstly, he sought to illustrate the comparative advantages of the two systems by suggesting that, in the event of a freedom of choice between an English or West German Court, one should go to a German Court and try to choose the worst German lawyer to represent one. That lawyer will at once and automatically arouse the Court's utmost sympathy and compassion for the poor client who is bound to win. Undoubtedly the unstated corollary is that in a court practising the common law adversary system the client would be left to suffer for his mistake in choosing an incompetent lawyer. That might have been perfectly true even fifty years ago. I venture to suggest that today the advice suggested to the client could well elicit the same result in an Australian court. The laissez-faire attitude towards litigation ascribed to Australian courts by the comment is, with respect, considerably misconceived. In the same category comes the comment that in Australia it is largely left to the parties to determine the speed at which a matter moves ahead even though there are standard time limits set by the rules. In an unreported judgement, from which I ventured to quote on another occasion (Comercial Law

Association Bulletin Vol 13 No 2 Page 19), Mr Justice Wells in the Supreme Court of South Australia dispelled the suggestion that today parties are left to take procedural steps at their leisure. Nonetheless, a judge in a civil case in the common law adversary situation is constrained in the graphic way described in the quote from Lord Justice Kerr. He is a "prisoner of the adversary process at least so far as the evidence is concerned". At least Dawson J would extend the evidentiary fetter on the judge even to criminal cases (cf Whitehorn v The Queen 57 ALJR 809; but contra Street CJ R v Damic 1982 2 NSWLR 750). The ultimate difference is, as the Professor said, that in civil law countries "to allow the examination of the witnesses and experts to be placed in the hands of the attorneys has always been thought to be incompatible with the most important rule, namely that it is the chief function of a court of law to find out the truth and not merely to decide which party has adduced better evidence" (ibid p 395).

Putting my physical safety completely at hazzard, I suggest that by the year 2000 Australian courts will have moved considerably down the path to evolving procedures more closely attuned to the attainment of that ideal in the administration of justice, the determination of where the ultimate truth lies. I have earlier mentioned the dispute between Mrs Del Zio and the Columbia University Presbyterian Hosptial. That was a not bad manifestation of the defects of the adversary system. The parties focused on the issues

I have mentioned and neglected consideration of the social and scientific issues involved. As such issues will come to dominate the sphere of litigation, so will grow the interest of the State in the correct result being obtained. It has always been accepted that a judge has an independent duty where a case advanced may be against public policy or the public interest. As more and more disputes will involve the public interest the need for greater judicial control of litigation will become manifest. The social issues involved in the disputes will be too important to be left to be determined simply by the evidence the parties may choose to adduce or the way they may wish to fashion their case. As an obvious example, a judge will need to be able to call a witness (cf Sheppard J "Court Witnesses - A Desirable or Undesirable Encroachment on the Adversary System" 56 ALJ 234). I might mention that my confidence in the evolution of the present system to the state I have described is considerably diminished after reading the paper given by Sir Richard Eggleston in 1975 to the Eighteenth Australian Legal Convention and intituled "What is Wrong with the Adversary System?" 49 ALJ 428. No perceptible progress has been made in translating his proposals for reform (ibid p 436) into fact. In expressing my regret I am not to be taken as having overlooked the powerful dissent of Connolly J (then of Queen's Counsel) in "The Adversary System - Is It Any Longer Appropriate?" 49 ALJ 439. It certainly seems to have carried the day up to the present.

For the same reasons the present rule against interveners, if correctly stated in Corporate Affairs Commission v Bradley; Commonwealth of Australia (intervener) 1974 1NSWLR 391, needs to be reconsidered. Hutley JA in delivering the judgement of the Court held that there was no power in the Supreme Court to allow intervention (p 398). More recently, in Rushby v Roberts 1983 1 NSWLR 350, Street CJ suggested that the decision in Bradley may require reconsideration (p 353). Hutley JA, who was also a member of the Court, stated firmly his continued adherence to the views earlier expressed by him on behalf of the Court of Appeal (ibid p 360). Whatever may be the correct jurisdictional limits at the present time, I suggest that the reasons advanced by the Chief Justice as supporting the need for power to allow interveners will operate with even greater force in the circumstances of the type of litigation envisaged for the year 2000. If the rule remains in its present form there will be difficulty in the Court obtaining the type of assistance provided by the amicus curiae in Saikewicz's case (supra). Under our present rules an amicus curiae cannot profer any factual material.

Whatever may be the fate of my suggestions, there is at least one provision of the German Code of Civil Procedure 1977 which should be borrowed. Section 279 states that it is the duty of the Judge to lead the parties to an agreement if that is possible. As has been seen, the duty proposed to be imposed on arbitrators by the Commercial Arbitration Bill

is much the same.

Another feature of overseas procedure which I would think will have been adopted by the year 2000 will be the practice of reducing much more of the material to be placed before the Court into a written form. An experience recently retailed by an American lawyer is interesting in this regard. In the well-known dispute between United States Surgical Company and Hospital Products proceedings were started, inter alia, in a Federal Court in the United States, in the Federal Court of Australia and in the Supreme Court of New South Wales. In each of these courts, an application for stay was made. In the United States everything was done in writing. Affidavits were put on and written submissions were made to the Judge by each party. The Judge dismissed the motion in a one paragraph judgement. In the Federal Court here there was an oral hearing which occupied two days. I do not know how long the judgement was. In the Supreme Court there was cross-examination on the affidavits, oral submissions and my colleague delivered a learned and full judgement covering some seventeen pages. Very simply, I question whether we will be able to give that sort of individual attention and that length of time to a basic interlocutory motion.

The reference to individual cases makes it appropriate to make a brief mention of the question whether class actions will have come to Australia by the year 2000. It is a

question which it is inappropriate to explore in this paper. It is, however, appropriate to mention that there is presently a wide-spread concern expressed in the United States as to whether class actions are merely a means of some lawyers enriching themselves at the expense of their clients. In one celebrated case there was a settlement for $50million. However, there were 160 lawyers with bills. The lawyers argued for about a year how the settlement should be split. Judge McGlynn in slashing the fees claimed by the lawyers delivered a 474 page judgement in which he found:

> "I regret to say my enquiry has given substance to the worst fears of the critics of the class action device - that it is being manipulated by lawyers to generate fees."

It was not so much that the lawyers tried to charge for work that they did not do but it was more that they were spending time on work which could have been done much more quickly. The lawyers submitted bills totalling $20.3million, 40% of the total recovery. The final award was $4.3million.

No doubt by the year 2000 the Courts will have advanced considerably in employing the technological and electronic aids available to them. Video taping of evidence from witnesses will be commonplace and it will avoid the need for witnesses to be kept waiting or perhaps to travel long distances from overseas. The cost of televiewing conferences will no doubt have been substantially reduced and it will be possible to have a witness attend a television studio in another city and be cross examined in

Sydney or Brisbane by counsel located in a television studio with the tribunal. Again, the increasing use of the American practice of having telephone conferences between judges and counsel may have been introduced or, alternatively perhaps, some other electronic means of exchange of information will be in place between court and counsel.

Perhaps most importantly judges and counsel will all have access to the same information retrieval system. The time spent in the search for precedents will be utilized in thinking about underlying principle. Again, in disputes of any length, the evidence will be computerized and be able to be recaptured at will by judge or counsel on VDUs on the bench or bar table.

The lawyers who will be servicing the system of dispute resolution in the year 2000 might need different educational preparation for the task in hand. If, indeed, the matters to be debated will be of the more wide-ranging nature that I have suggested, it will be insufficient that lawyers be sound legal technicians. It seems to me that we might have to introduce the system of a generalised undergraduate degree designed to allow the putative lawyer to be educated in the social sciences to be followed by a law course. This of course is the practice in the United States. Recently, I was talking to an American lawyer about foreign legal representation in Beijing. He mentioned that there were a

number of American legal firms represented and one British but the actual person who represented the British firm was an American. He suggested that the reason for this was simply that the American undergraduate degree allowed for the emergence of a considerable number of people who majored in Asian studies and then went on to a specialised degree. The same product has not readily emerged from our system of legal education.

I mentioned earlier the appearance in the case of Saikewicz of persons described as "legal interns". It seems to me that now that we have practical legal training courses for solicitors the time has come when the bar must devise really effective training programmes for aspiring advocates.

Disputes of the kind envisaged will cost a great deal of money. If the Federal Attorney General is successful in persuading his collegues in the Parliament to pass an Australian Bill of Rights the litigation that will come on stream is likely to be beyond most lawyers expectations or fears depending on the personal viewpoint. How is that to be funded? The deficiencies and difficulties of the legal aid system have been recently ventillated and need no re-iteration. Serious attention will have to be given to the introduction of a system of contingency fees which of course carry their own problems. The comments that I have earlier made with respect to class actions could well be even more strongly applied to the system of contingency fees. Yet it

seems unrealistic to expect the taxpayer to bear the burden of burgeoning litigation.

In what I have said I have endeavoured to highlight only a few of the problems which will emerge and which will have to be dealt with in and by the year 2000. The omissions are glaring. Due to deficiencies in my personal experience of the field I have not dealt with criminal law at all. It is interesting to note that the social questions I have referred to earlier in the paper can also emerge in the criminal field (cf 58 ALJ 291). The combination of a possible Bill of Rights, increasing crime rate and more sophisticated methods of criminals will combine to demand more effective ways of dealing with criminal cases. For how long will the community be able to accommodate the demand for the continuance of the jury system for difficult and important charges of white collar crime? For how long will the community be able to tolerate the demand that the Crown prove its case in relation to matters that must be beyond dispute?

Again, I have not dealt with the field of complex long trials and the steps to be taken in making them manageable. I have to some extent outlined my thoughts on this topic in "The Conduct of Lengthy and Complex Matters in the Commercial List" 56 ALJ 570.

In my belief, the next sixteen years will be an interesting

period in which we should consider and implement the many changes which are required to be effected in the system of dispute resolution so that it will meet the needs of the next century. It is an exciting and interesting challenge but one which if not met could give rise to serious social stresses in the community in which we live.

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