DOES AUSTRALIA NEED NEW ALTERNATIVES TO LITIGATION?

by Justice Andrew Rogers

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Does Australia need new alternatives to litigation? I suggest an affirmative answer. What is required to support such alternatives? I suggest that we need a national body which will provide for both domestic and international disputes.

I wish to make my position clear. I am proud to be the judge in charge of the commercial work of the Supreme Court of New South Wales. The service we provide to litigants in the disposition of commercial disputes is second to none. Whether or not alternatives to litigation are available, there will always be a call for the services of the Court and it will continue to be given, in accordance with law, as fairly, expeditiously and economically as is possible.

Whilst it is visually attractive to conjure up a picture of the directors of BHP and Bell Resources attempting to dispose of the differences between them by one of the many procedures alternative to litigation, it must be conceded that it lacks any close relationship to reality. There are disputes so fundamental to the continued existence of corporations or the financial viability of persons that they can be resolved only by the imposed, binding, enforceable court system. Again, it may be necessary to establish a new principle of law or a binding precedent for further disputes. Disadvantaged disputants often need the courts to

protect their rights. Again, courts provide the official recognition which may be necessary for a change of status, such as divorce or bankruptcy. Later I will identify some of the indicia which suggest a dispute as a candidate for disposition by an alternative to litigation.

I much prefer the expression "alternatives to litigation" to the one coined in the United States of "alternative dispute resolution". After all, litigation in court is itself an alternative dispute resolution mechanism - an alternative to self-help, to force, to violence, to anarchy. For uniformity I will nonetheless use the initials "ADR". What I do wish to emphasise is that any ADR machinery which may be put in place cannot and should not ever completely supplant the supervisory jurisdiction of the courts or the judicial process.

The first point usually made by opponents of ADR is that at present something over 90% of disputes are settled without actual adjudication by a court. Why, it is asked, are the existing methods of negotiation insufficient? The answer is twofold. First, even in relation to disputes which are settled, the methods are inefficient. As W Brazil in Settling Civil Suits says:

> "The process through which the parties eventually reach agreement often is difficult to launch, then can be awkward, expensive, time consuming and stressful. The route to resolution can be tortuously indirect and travel over it can be obstructed by emotion, posturing and interpersonal friction."

The United States experience is that ADR makes settlement easier and cheaper. Second, disputes which at present do not yield to settlement may often be resolved more satisfactorily through ADR than through the courts.

Although ADR in the United States is closely identified with disposition of commercial disputes, it is incorrect to suggest that its utility and advantages are restricted to disputes of that kind. ADR has been practised in the field of environmental disputes, family law, industrial disputes, toxic torts and, indeed, every aspect of life and conduct which may give rise to disputes. Thus, Massachusetts, New Jersey, Wisconsin and Alaska have established mediation programmes to provide forums for resolving a broad range of multiparty community, environmental, and other public policy disputes. In Columbus, Ohio, 3000 criminal misdemeanours are referred to mediation each month by the prosecutors' officers.

It is necessary to ask first, what is ADR? It is a generic term for methods of solving disputes less expensively, faster, in a manner less intimidating and more sensitive to disputants' concerns and more responsively to underlying problems than is possible in court proceedings. In given circumstances, they may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard and fulfil a need to retain control by not handing the dispute over to lawyers, judges and the

intricacies of the legal system ("Paths of Justice; Major Public Policy Issues of Dispute Resolution"). Does it work? In appropriate cases, definitely. In his 1984 Report, Chief Justice Burger of the United States Supreme Court mentioned two outstanding successes. A two hour mini trial resolved a dispute between a German and an American company involving $1.5million and another, lasting a few days, resolved an $800million contract dispute. ADR has to be more speedy and satisfactory than litigation because undoubtedly it suffers a great financial disincentive. A litigant receives the services of a judge, support staff, shorthand writers and courtroom free of charge. Payment has to be made for services provided for ADR. Nonetheless, in appropriate cases, the process should be cost effective.

It should be recognised that, as well as arbitration, there are other methods of ADR already in place in Australia. Community Justice Centres, conciliation services in the Family Court, conciliation in industrial disputes are some of them. (There is a helpful review of the Australian situation in "Participating Justice - An Emerging Concept" by Jenny David.)

It is useful to consider the advantages claimed for ADR in the context of some of the criticisms that are commonly levelled at both court conducted litigation and arbitration.

First is cost. Dispute resolution cannot be made inexpensive. On the other hand, litigation in court tends to be very expensive. The reason is partly in the training received by lawyers and partly in the very nature of the adversary process. The trial process is inherently wasteful. As a commentator remarked, "One secret to good practice is to reduce the unexpected to the absolute minimum through good preparation. Perhaps only 5% or less of the preparation will be used, but the balance is necessary and economically justified because the identity of the precise 5% cannot be determined." ADR is calculated to eliminate, or at least substantially reduce, wastage.

Second, litigation tends to remove the handling of the dispute from the actual disputants and places it into the hands of experts with the consequence that often the points argued appear artificial and the disputants have the feeling of having lost all control over the proceedings. In the absence of settlement, the proceedings grind to a conclusion with the parties feeling that they are unable to make an effective input or otherwise influence the outcome. A good, if incorrectly perceived, example is a dispute I heard some years ago. Residents of properties adjoining the Sydney Showground protested at a proposal to allow the use of the grounds by a rock band on a particular night. Numerous affidavits were filed on behalf of the objectors. They were all read. Counsel did not cross examine and, accordingly, none of them went into the witness box. I understand that

there was considerable dissatisfaction amongst the objectors based on their feeling that they did not get a chance to put their case in court. The fact that their affidavits had been read was insufficient to satisfy the felt need for making their grievance known from the witness box. Because ADR aims at arriving at a consensual agreement, the involvement of the parties is close and determinative of the disposition of the dispute.

Third, a court is unable to deal with the matters which may be the underlying and fundamental causes of the dispute between the parties. At times, lawyers may have to reframe the issues separating the parties to fit a particular legal doctrine and, thus, may change the nature of the dispute. The court is not permitted to endeavour to identify or implement solutions which involve matters outside the strict confines of the contest. In ADR the parties are restricted in the range of remedies only by their own creativity.

Fourth, the bitterness of formal adversarial contest may be finally destructive of the existing relationship between the parties. Be they engaged in a business relationship, a family relationship, in an industrial relationship, generally speaking litigation tends to engender bitterness. Consensual resolution should preserve the relationship and, in many cases, engender new elements of trust and confidence.

Fifth, litigation in court is usually technical. The wearing of wigs and gowns aside, the laws of evidence often lend an air of artificiality to the presentation of competing cases. In the field of expert or technical evidence, nothwithstanding that the parties, counsel and the judge may all be quite familiar with a particular facet of business practice or trade custom, in proper obedience to the requirements of the laws of evidence and against the possibility that an appeal court may not have the same familiarity with the particular field, matters which the parties think are elementary need to be proved through the mouths of experts. There are of course, cases where the court does need educating. However, if the dispute were to be considered by the parties themselves in an endeavor to arrive at consensual resolution, the need for such evidence would disappear.

There are other criticisms levelled at the litigious process which some consider are met and disposed of by ADR processes. It is sufficient for the moment to have, as a background to the consideration of the questions posed, some of the perceived defects of the litigious process.

It should be mentioned at this point that some of the very advantages of the ADR process may argue for its rejection in particular cases. Judge Edwards in Alternative Dispute Resolution; Panacea or Anathema 99 Harv L Rev 668 suggested that:

> "environmental mediation and negotiation present the danger that environmental standards will be set by private groups without the democratic checks of governmental institutions. Professor Schoenbrod recently has written of an impressive environmental mediation involving the settlement of disputes concerning the Hudson River. According to Schoenbrod, in that case private parties bypassed federal and state agencies, reached an accommodation on environmental issues, and then presented the settlement to governmental regulators. The alternative to approval of the settlement was continued litigation, which was already in its seventeenth year, with no end in sight.
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> The resulting agreement may have been laudable in bringing an end to protracted litigation. But surely the mere resolution of a dispute is not proof that the public interest has been served. This is not to say that private settlements can never produce results that are consistent with the public interest; rather, it is to say that private settlements are troubling when we have no assurance that the legislative- or agency-mandated standards have been followed, and when we have no satisfactory explanation as to why there may have been a variance from the rule of law".

Some of the criticism goes further. It is put that in mediation disadvantaged persons or groups may be coerced into an infavourable settlement by more powerful opponents (Fiss, "Against Settlement" (1984) 93 Yale L J 1987). Another criticism is that lower income users of alternatives are relegated to "second class" justice. These criticisms are examined and rejected in an article in (1986) 69 Judicature p 293. Nonetheless they point to the fact that there can be no uncritical acceptance of ADR.

The following have been suggested as features and conditions which make a dispute a candidate for ADR:

1 There is "in principle" willingness of both parties to

compromise the dispute to some extent.

2 The various perceived "deterrent effects" of litigation or arbitration in the particular context are seen as outweighing the value of winning the case completely.

3 There is lack of clarity as to the facts and/or law relating to the dispute.

4 Either the parties have an ongoing relationship worth preserving or there is a basic degree of trust between them.

5 The parties can be assured that all efforts made to conciliate or settle will be kept on a "without prejudice" basis in the event they do not succeed. In particular, any neutral should be disqualified from acting as an arbitrator or as a witness or representative of either party.

6 The party against whom the claim is made should be seen as readily able to satisfy the claim. Hence, in cases of doubt, security for any settlement should be established.

7 There is a definite time limit set on the active process - it should not tend to drag on endlessly nor be protracted unduly. This criterion does not, of course, prejudice renewed efforts to settle before a court hearing if the initial effort fails.

8 The parties are willing to thoroughly prepare their respective cases at an early stage of the dispute.

9 Channels of communication are kept open.

10 Any third party neutral selected is seen by the parties

as:

(a) either experienced in the particular type of dispute or is accorded some equivalent respect;

(b) objective and fair in approach;

(c) having experience both in weighing the elements of the dispute and generally in the uses of negotiating techniques;

(d) accessible and willing and able to spend adequate time to handle the conciliation process;

(e) not too expensive.

Some commentators have suggested that in the ideal dispute resolution system there should be a Dispute Resolution Centre which seeks to provide a variety of processes according to the needs of the particular dispute. This suggestion was first made by Sander at the Pound Conference in 1976. Since then, US commentators have dubbed the concept "the multi-door courthouse". Three experimental projects have been mounted and are described by Finkelstein in (1986) Judicature Vol 69 p 305. A person involved in a dispute goes to an Intake Centre. There the disputant is made aware of options and a suggestion is made as to the best approach for the resolution of the particular dispute. Depending on the available mechanisms in the particular community, the possibilities for referral range from mediation through to litigation in court. When we were discussing the establishment of the Australian Commercial Disputes Centre (ACDC) in Sydney, the Chief Justice

suggested that it be such a facility. I take the responsibility for dissuading him. First, we do not have the superperson who would act as advisor or referral clerk. Second, I believe we need to establish adequate ADR facilities to ensure that proper alternatives are available before arousing inappropriate expectations. Third, there needs to be informed debate and an ultimate decision on whether the use of alternatives should be made mandatory and, if so, whether the facilities should be publicly funded. It is interesting to note that in Texas a surcharge may be added to the usual filing fee, the accumulated money to be used to fund alternatives. Then arise questions whether mediators etc should have minimum standards of qualifications and rules of ethics.

The forms which ADR may take are myriad, limited only by the parties' imagination and the needs of the particular dispute or industry or business involved. There are some basic forms.

Mini-Trial

This method of dispute resolution has yielded excellent results. It may best be described as a highly structured information exchange and settlement negotiation. Each of the disputants presents its best case to a negotiating panel representing it, generally assisted by a neutral advisor. Following the presentation, the negotiating panel meets to attempt to reach a pragmatic settlement. The rationale

which underlies the process is that a reasonable solution to most problems can be structured by the disputants themselves if they are in full possession of the facts. The method is speedy and cost effective. The savings in executive time and legal costs may be quite staggering. The business executives making up the negotiating panel will understand the technical issues without elaborate explanations. Austin Industries Inc, a Dallas based constructions company, has used the procedure to settle construction disputes and, according to its general counsel, claims savings of 97% of normal litigation costs. Avoiding the acrimony of litigation serves to preserve business and other relationships.

The process is completely flexible. It is entirely at the discretion of the parties what parameters they agree on for the conduct of the mini trial or what solution they devise for the disposition of the dispute.

An agreement for mini-trial will have to provide for a considerable number of matters. The parties are free to prescribe the rules they wish to adopt for the conduct of the mini trial but, once agreed on, are required to adhere to them. One provision is crucial. The parties need to ensure that the neutral advisor, if there is to be one, is disqualified as a future witness for either party, his advisory opinions are inadmissible and that the parties will treat the whole of the mini trial proceedings as

confidential. Even if the mini-trial is unsuccessful, much of the cost will not have been wasted because most of the work done in preparation will be required for the trial in any event.

The information exchange requires the parties to present their best case because each has only a limited time. That limitation converts what had grown into a lawyers' dispute back into a businessmen's problem by removing many of the collateral legal issues.

The presentation by the parties of their respective cases and the challenges to the case of the other disputant serve to distinguish a mini trial from the usual negotiation which may take place between party and party or their lawyers. The disputants have a better opportunity to understand the strength of the opponent's arguments and the weaknesses of their own. This serves to counterbalance the natural and usual tendency to convince oneself of the absolute correctness of one's own views.

The neutral advisor may sum up at the conclusion of the presentation. Alternatively, or in addition, the neutral advisor may give his views and opinions as to the likely outcome of any particular issue to either of the parties which may call on him or to both the parties together if so desired.

In a settlement arrived at as an outcome of a mini trial the parties may resort to rearranging the entirety of their relationship and may seal the settlement of the particular dispute by restructuring some existing arrangement quite unrelated to the matter in dispute. For example, in the Texaco-Borden Mini Trial which involved a $200million anti-trust and breach of contract claim concerning a natural gas contract, the companies renegotiated a supply contract that had not been at issue in the case at all. They also created a new arrangement for transporting gas to Borden at prices favourable to it. The result made both sides feel that they had won a victory. Similarly, in a construction dispute, not only did the settlement involve payment of several million dollars to the owner, but the contractor and architect agreed to replace the outside of the building with a new technology over a period of three years at their own cost. Interestingly, an executive of the owner subsequently said that the company would consider using the same contractors and architect again.

Mediation

The mediator's role is purely facilitative. The mediator helps bring the parties together by listening, counselling, guiding, suggesting and persuading the parties to come to terms. The mediator is an agent for neither of the parties, a member of neither of the negotiating teams. He is an adjunct to negotiations that the parties might carry on directly.

The mediator contributes two principal gifts. One is to bring about communication and the other is to establish trust. The parties must trust the mediator sufficiently to communicate confidentially their real positions in the dispute. This is the crux of the process. The mediator obtains information which neither party would disclose in the presence of the other. A person who knows the facts and who also has intimate details of the position of both parties will be able to guage the difference that lies between them in a way that negotiators who know only their own side never can. With this knowledge a mediator employs two fundamental principles of effective mediation: creating doubt in the minds of the parties as to the validity of their positions on issues and suggesting alternative approaches which may facilitate agreement. The mediator should be able to advance options that the parties themselves might never have conceived. It is particularly this latter function which parties to a dispute are very often unable to perform by themselves. A mediator's patience, flexibility and creativity throughout the entire process are necessary keys to a successful resolution.

Trained mediators understand that part of their role is to diffuse the hostilities that have built up during the prior course of dealings between the parties. Mediation is preferable to adjudication or arbitration when the claim of legal entitlement is missing or weak, when a rational, controlling principle is absent or only dimly fits the

situation.

Conciliation

Conciliation is a weak form of mediation. Unlike the mediator, the conciliator has no authority to propose his own solutions or suggest new ideas. In essence, the conciliator is a facilitator of negotiation between the parties.

Negotiation

In negotiation, the parties dispense with a third party and seek to resolve the dispute themselves. Generally speaking, it is fair to say that a competent business man will be a generally skilfull negotiator. However, not many bring their negotiating skills to bear on ending disputes. Managers regularly hand over disputes lock, stock and barrel to their lawyers without staying to consider what and how they can contribute to the settlement. Adversary negotiation often results in no solution. It is true that over 90% of disputes are settled through negotiation, before a final court decision. Nonetheless, the lawyer has a difficulty. The pursuit of victory demands a fierceness of spirit and a conviction about the rightness of one's client's cause which conflicts substantially with the search for common ground which is at the heart of reaching a settlement. The concept is to concentrate on solving a problem rather than on winning. The negotiation at Camp David has often been used as an example. Egypt wanted its

territory returned; Israel refused to return to the previous position. Egypt wanted all the land; Israel declined to hand any of it back. An adversary approach might have resulted in a compromise in the sense of dividing the land. But neither side was agreeable to this. As you know, the matter was solved by having regard to the ultimate aims of the parties. Egypt wanted sovereignty, Israel wanted security from invasion. So Israel gave back full sovereignty over the land and Egypt agreed to demilitarise the region, keeping its tanks and military forces out.

Neutral Fact Finding

A restricted function which may be allocated to a third party is that of fact finding. The function of the fact-finder is essentially to investigate and collect all relevant facts surrounding a dispute and submit a report outling recommendations concerning appropriate solutions.

Agreed Expert

Disputants may elect to avoid a battle of expert witnesses by agreeing upon a single expert to render an opinion. The disputants can agree to give the expert's opinion such weight as they choose, making it binding or, more usually, advisory, as a basis for negotiations. This procedure differs from neutral fact finding in that the expert is expected to draw upon his own specialised knowledge in evaluating or investigating the information submitted by the disputants. A valuer is a common place example.

Even in the Mecca of ADR, the United States, ADR has not lived up to the full expectations of its supporters. A number of reasons have been given. In spite of all the publicity, the procedures are not known, the facilities for them are not ready to hand, lawyers discourage the use of ADR, the knee jerk reaction to commence proceedings in court. If it is decided that ADR is indeed desirable it will be necessary to meet these obstacles.

On 1 March 1986, ACDC opened its doors in Oxford Street Sydney. In 1985, the Government of New South Wales established a Consultative Committee comprising a number of judges of the Supreme Court together with lawyers, businessmen and governmental representatives to advise on the establishment of an organisation designed to foster and assist in the disposition of commercial disputes by methods other than litigation in the court system. The Committee organised a considerable number of workshops, well attended by those whose commercial disputes the Centre is designed to service. It sent out questionnaires. By this consultative process, the Committee attempted to ascertain what were the needs of the commercial community and in what manner they could best be satisfied. The Centre as established has three principal functions. First, a party to a dispute may request the Centre to provide a list of available persons to assist in the resolution of the dispute, to hold hearings at the venue provided by the Centre and provide other necessary ancillary facilities. Second, the Centre will promote

within the commercial community and, indeed, the community generally the concept of ADR, particularly by making use of the facilities of the Centre. Third, the Centre will carry out research into developing methods of dispute resolution and train persons in various facets of the evolving art of alternative dispute resolution. To be successful, the Centre requires not only the patronage of the market it seeks to serve, but the informed and constructive assistance and criticism of the users. As well, it needs competent persons to serve as neutrals. In conjunction with the University of Sydney, it will provide training in ADR.

ADR is of relevance to Australia for two additional reasons unrelated to what I have been saying.

First, two of Australia's major trading partners, Japan and China, have a traditional and cultural dislike of court conducted litigation. It is, therefore, appropriate that Australia provide other means of dispute resolution to Chinese and Japanese traders who encounter difficulty in their trade with Australia. Second, in light of its geographical location, it would be advantageous for Australia, in its relations with its neighbours, to provide a neutral forum for resolution of disputes between residents or corporations located in countries in the region, or between residents of, or companies, in one country in the region, for example, China and those in another country outside the region, say the United States. If Australia

could fulfil in this region the function London had in the field of arbitration it can substantially improve its position.

The Center for Public Resources in New York could serve as a sound model for a national body. At the moment, ACDC serves only commercial disputants. Furthermore, it is confusing to people in other countries to have one centre in Sydney and one in Melbourne. The activities of the New York Center include an educational programme, task forces, a judicial panel and research and experimentation. The educational programme involves conferences, workshops and seminars. The Center produces a range of publications, including a monthly newsletter which reports on ADR activities across the country, and an annual volume detailing innovative ADR techniques. The task forces address specific problems and currently devote time to Government Contract, Transnational and Toxic Tort issues. The Centre provides dispute resolution services through the judicial panel which consists of twenty-eight attorneys who include former judges, academics, such an Dean Wellington and practising attorneys of considerable distinction. Members of the panel act as special masters, third party members and mini-trial advisers.

I trust that I have given some idea of the work that needs to be done to ensure that Australia provides the range of services in dispute resolution to which its citizens are

entitled. It is a badge of shame for any civilised society that any of its members be denied practical access to justice by its high cost. Beyond that, Master Jacob QC put it in terms which bear repetition:

> "Conciliation is a socially valuable process for adjusting relations between parties who are in controversy, even if the controversy concerns their legal rights and duties; it is a healing process, a method of producing greater social harmony and understanding, a process for bringing parties together rather than increasing the tension and estrangement between them. It will increase the quality of justice and the cultural level of the civilisation that adopts it as a method of resolving legal disputes."

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