

**THE HON T F BATHURST AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**PERSPECTIVES ON ADR AND FUTURE TRENDS**  
**ADR MASTERCLASS 2018: MAKING ADR WORK IN A #FAKENEWS**  
**WORLD**  
**11 AUGUST 2018\***

**Introduction**

1. When I was first provided with the programme for today's events, I have to confess I was perplexed. What does "fake news" have to do with ADR? Why didn't they put a space between "fake" and "news"? What does the hash mean? The last one was a joke, since I'm sure you all know that the Supreme Court is extremely tech-savvy. Much more tech-savvy than the Federal Court. We even have Twitter.<sup>1</sup>
2. I eventually worked it out – I think – and as a result I want to discuss this morning the challenge of maintaining legitimacy in ADR in this "post truth", "fake news", brave new world. These phenomena both stem from, and are contributing to, a crisis of trust in institutions which have traditionally enjoyed that trust as a matter of course. This has consequences for ADR, because the extent to which disputants have trust in ADR, or view it as a legitimate means of resolving their disputes, is critical to its continued viability.
3. I intend to touch on the legitimacy challenges that more traditional forms of ADR like mediation have encountered, before moving on to the similar discussions being had in the international arbitration and online dispute resolution fields at the moment. However, let me begin with why I think these issues matter to your practice – and this is not merely to prove why you can claim your CPD points for this session. Rather, it is because when a particular regime is not trusted, or is not viewed as legitimate from the perspective of actors with change-making

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\* I express thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

<sup>1</sup> The NSW Supreme Court's Twitter "handle" is @NSWSupCt: <<https://twitter.com/NSWSupCt>>.

power, it is likely to change.<sup>2</sup> It is important that practitioners are able to anticipate such changes, contribute to the discussions about what changes are necessary and unnecessary, and ultimately ensure that your practices are adequately placed to evolve and adapt into the future.

### **The problem of trust and the importance of legitimacy**

4. The impetus for this topic was a publication I read earlier this year, which recorded this year's results of something called the "Edelman Trust Barometer". This is an annual global survey on institutional trust by a communications company, which this year recorded declines in Australia in public confidence in government, the media, business and even non-governmental organisations. All were at five year lows, and all were below 50% trust – that is, more people distrusted them than trusted them.<sup>3</sup>
5. ADR is a process that depends in large part on it being a trusted means of resolving disputes and of it being viewed as legitimate from the perspective of its users. Party autonomy is central to most forms of ADR, and legitimacy is "what stimulates complainants to bring their disputes before a particular dispute resolution mechanism, and what makes the parties accept and respect resolutions" reached through that mechanism.<sup>4</sup> Put simply, if ADR is not seen as legitimate from the perspective of disputants, where they have a choice, they are unlikely to surrender their disputes to it.
6. Of course, in some cases, parties do not have that choice – under the *Civil Procedure Act*, for example, the Court can refer civil proceedings to mediation without party consent.<sup>5</sup> However even where ADR is mandatory, legitimacy is not irrelevant. Provisions such as section 27 of the Act, which impose a duty on the parties to participate in good faith in any such

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<sup>2</sup> I owe this approach to legitimacy to a presentation from Thomas Schultz at the 2018 ICCA Congress: Thomas Schultz, 'Law-Making in International Arbitration: What Legitimacy Challenges Lie Ahead' (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

<sup>3</sup> KPMG, 'Maintaining the Social Licence to Operate' (2018 Australian Institute of Company Directors Trust Survey) 4.

<sup>4</sup> Oma Rabinovich-Einy, 'The Legitimacy Crisis and the Future of Courts' (2015) 17 *Cardozo Journal of Conflict Resolution* 23, 24.

<sup>5</sup> *Civil Procedure Act 2005* (NSW) s 26(1).

mediation, can only go so far in altering human behaviour.<sup>6</sup> I'm sure you are all well acquainted with the difficulty, or perhaps futility, of trying to force behaviours central to good faith like co-operation, honesty and reasonableness.<sup>7</sup> I would suggest that the success of any form of ADR will ultimately come back to whether the process is trusted to resolve the dispute, and the parties have some level of trust in each other.

### **Legitimacy issues in traditional forms of ADR**

7. Now, over the past two decades ADR has undergone a rapid expansion. A report by industry analyst IBIS World projects revenue growth within Australia at 3.7% annually, to reach \$1.8 billion in 2020.<sup>8</sup> I suspect that is why you are all here... It is undoubtable that ADR enjoys competitive advantages over litigation, including greater control, direct participation, procedural flexibility, confidentiality, creative solutions, and efficiency. As its use has expanded, however, I think three significant legitimacy challenges have emerged: first, its co-optation into the judicial system, which is said to undermine party autonomy; second, its increasing regulation which has the potential to undermine flexibility; and third, as Owen Fiss famously argued,<sup>9</sup> its private and confidential nature, which is considered to undermine the public interest served by the public resolution of disputes.
8. Let me expand first on co-optation. Courts and tribunals have increasingly adopted ADR into their processes, initially as a voluntary option, but now in many instances a mandated pre-litigation step.<sup>10</sup> This removal of consent meant that in

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<sup>6</sup> Ibid s 27.

<sup>7</sup> This view of the content of the obligation to act in good faith was articulated in Sir Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66, 69-70 and has been adopted by the courts: see, eg, *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184, [145] and *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, [146].

<sup>8</sup> See IBIS World, 'Alternative Dispute Resolution Services in Australia' (February 2015) <<https://www.resolution.institute/documents/item/1857>> 4.

<sup>9</sup> See Owen M Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073, 1085-7. See also David Luban, 'Settlements and the Erosion of the Public Realm' (1994) 83 *The Georgetown Law Journal* 2619, 2626-31; Stephanie Brenowitz, 'Deadly Secrecy: The Erosion of Public Information under Private Justice' (2004) 19(2) *Ohio State Journal on Dispute Resolution* 679.

<sup>10</sup> For example, in NSW, see: *Aboriginal Land Rights Act 1983* (NSW) s 239A; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65; *Dust Diseases Tribunal*

such cases, the process lost the elements of party control and autonomy, potentially to its detriment.<sup>11</sup> In the United States, Professor Menkel-Meadow expressed the view that ADR has become “just another stop in the ‘litigotiation’ game which provides an opportunity for the manipulation of rules, time, information and ultimately, money” and just “another battleground for adversarial fighting rather than multi-dimensional problem solving”.<sup>12</sup> In the Australian context both Tania Sourdin<sup>13</sup> and Laurence Boulle<sup>14</sup> have made similar observations in their respective texts.

9. Professor Sourdin has noted that the emphasis on settlement rather than resolution that results from institutionalisation may also have an impact on the way people participate in ADR – that they simply “go through the motions”.<sup>15</sup> Institutionalisation necessarily comes at a cost to flexibility, as the “ad hoc” aspect is lost in favour of consistency. In addition, there is a concern that the immunity offered within court-referral frameworks for advocates could provide disincentives to recommend pre-litigation ADR.<sup>16</sup> This concern has probably been tempered in recent years by the High Court’s decisions in *Atwells*<sup>17</sup> and *Kendirjian v Lepore*<sup>18</sup> which make clear that the giving of advice to cease or to continue litigation does not attract advocates’ immunity<sup>19</sup> – though they have no doubt increased the concern of advocates as to their scope of liability.<sup>20</sup>

10. I think in relation to co-optation, we are at a point where it has been recognised that there needs to be a balance between enthusiastically embracing court-

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*Regulation 2013* (NSW) cl 34; *Land and Environment Court Act 1979* (NSW) s 34AA; *Privacy and Personal Information Protection Act 1998* (NSW) s 49; *Strata Schemes Management Act 2015* (NSW) s 218; *Succession Act 2006* (NSW) s 98.

<sup>11</sup> See, eg, R Ingleby, ‘Compulsion is not the answer’ (1992) 27(4) *Australian Law News* 17, 18. See also the discussion in *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427, [24] (Einstein J).

<sup>12</sup> Carrie Menkel-Meadow, ‘Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or ‘The Law of ADR’’ (1991) 19 *Florida State University Law Review* 17 quoted in Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 5<sup>th</sup> ed, 2016) 616.

<sup>13</sup> Sourdin, above n 12, 645-6.

<sup>14</sup> Laurence Boulle, *Mediation: Principles, Process Practice* (LexisNexis, 3<sup>rd</sup> ed, 2011) 99.

<sup>15</sup> Sourdin, above n 12, 646.

<sup>16</sup> *Ibid* 335.

<sup>17</sup> *Atwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1; [2016] HCA 16.

<sup>18</sup> (2017) 259 CLR 275; [2017] HCA 13.

<sup>19</sup> *Ibid* [32].

<sup>20</sup> See T F Bathurst AC, ‘Off with the wig: Issues that arise for advocates when switching from the courtroom to the negotiating table’ (Speech at the Australian Disputes Centre, Sydney, 30 March 2017).

annexed ADR, and the risk of undermining party autonomy and consent. The Supreme Court mediation practice note, for example, states that it is not the Court's intention that every matter will be referred for compulsory mediation.<sup>21</sup> In recognition that ADR should not just become another adversarial battleground, in March this year I re-issued that Practice Note, removing former paragraph 8, which had stipulated that where the parties were unable to agree that a matter was suitable for mediation, the matter could be referred to a registrar to meet with the parties and discuss mediation, with the registrar then reporting back to the Court with a recommendation as to whether the proceedings were suitable for mediation.<sup>22</sup> In practice it was rarely utilised and if it was, the Court was concerned it would merely increase the costs of litigation as it required both parties and their legal representatives to meet and discuss the issue with a registrar.

11. The second challenge for legitimacy is increasing regulation of ADR, and the extent to which this serves to undermine its flexibility and adaptability. One major advantage of ADR is its ability to meet the varying needs of different disputants, something that can inadvertently be stagnated by legislative intervention. The New South Wales Law Reform Commission is currently reviewing statutory provisions related to alternative dispute resolution, with a view to updating those provisions and, where appropriate, recommending a consistent model or models for dispute resolution in statutory contexts.<sup>23</sup> The Commission was tasked to have regard to the proper role for legislation, contract and other legal frameworks in establishing frameworks for dispute resolution.<sup>24</sup> The first consultation paper, released in 2014, asked whether model provisions should be developed which

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<sup>21</sup> Practice Note SC Gen 6 – Mediation (9 March 2018)  
<[http://www.practicenotes.justice.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/fc1007ce9d398164ca25824b00017416?OpenDocument](http://www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/fc1007ce9d398164ca25824b00017416?OpenDocument)>.

<sup>22</sup> See Practice Note SC Gen 6 – Mediation (15 March 2010)  
<[http://www.practicenotes.justice.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/8643b9dda76abe19ca2576e4001b8455?OpenDocument](http://www.practicenotes.justice.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/8643b9dda76abe19ca2576e4001b8455?OpenDocument)>.

<sup>23</sup> See New South Wales Law Reform Commission, 'Terms of Reference' (1 March 2013)  
<[http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc\\_current\\_projects/disputeresolution/Terms-of-reference.aspx](http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/disputeresolution/Terms-of-reference.aspx)>.

<sup>24</sup> Ibid.

apply by statute, across the board, to all ADR processes or on a case by case basis through a mix of statute and contract.<sup>25</sup>

12. The submissions received by the Commission on the whole, considered that a consistent model for dispute resolution in statutory contexts was inappropriate. The Bar Association, for example, noted that there is a vast difference between the types of disputes that are subject to ADR, and “one of the most important benefits of ADR that distinguishes it from litigation is that it is flexible, both in process and outcome” and that “over-prescription or overregulation of ADR processes will inhibit their use and make them more costly”.<sup>26</sup> The Commission noted these concerns in its second consultation paper which detailed proposed model provisions that would apply to mediations taking place outside any statutory or judicial context, unless their application was excluded by the parties.<sup>27</sup> The Commission came to the conclusion that “[d]espite the patchwork nature of the statutory provisions in NSW, we are not persuaded that there would be significant benefit in attempting to rationalise these provisions into one or a small number of models”<sup>28</sup> and that the submissions had “uniformly emphasise[d] the importance of maintaining flexibility in ADR”.<sup>29</sup> As a result, the Commission has proposed that parties be free to contract out of all or part of the model legislation.<sup>30</sup>

13. This echoed the findings of the National Alternative Dispute Resolution Advisory Council in 2011, when it was asked to advise on legislative changes required to protect the integrity of ADR.<sup>31</sup> It responded that its recommendations were premised on the notion that legislation was not a necessary or desirable

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<sup>25</sup> New South Wales Law Reform Commission, *Dispute Resolution Frameworks in New South Wales* (Consultation Paper 16, 23 April 2014) 84.

<sup>26</sup> See NSW Bar Association, ‘Submission: Dispute Resolution Frameworks in NSW’ (1 July 2014) <<http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/ADR/Submissions/DR12.pdf>> 2.

<sup>27</sup> New South Wales Law Reform Commission, *Dispute Resolution: Model provisions* (Consultation Paper 18, December 2016) <<http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/ADR/Consulation-paper/CP18.pdf>>.

<sup>28</sup> *Ibid* 2.

<sup>29</sup> *Ibid* 20.

<sup>30</sup> *Ibid*.

<sup>31</sup> The Hon Robert McClelland, *Terms of Reference to the National Alternative Dispute Resolution Council* (1 December 2009).

response in most cases.<sup>32</sup> While the final New South Wales Report is yet to be released,<sup>33</sup> I think that its interim proposals signal recognition of this legitimacy issue – that the point of ADR is lost at the point of over-regulation.

14. The third challenge is the question of the public interest in disputants utilising public justice. I won't repeat what Professor Fiss said in his seminal article,<sup>34</sup> but this need for caution has also been echoed by former Chief Justice French, who noted that while the provision of court-annexed ADR services were an aid to early resolution and could help parties reduce the matters in issue, "it is in the public interest that the constitutional function of the judiciary is not compromised",<sup>35</sup> noting that the courts are "not just another provider of dispute resolution services in a market of different providers".<sup>36</sup> Courts have a role beyond simply resolving disputes between individual litigants in "articulating and enforcing social norms".<sup>37</sup>

15. One commentator has argued that there is currently an imbalance in Australia between the competing public interests in settlement and the courts performing this constitutional role, as it is given no consideration in a court's decision to refer to ADR.<sup>38</sup> While the issue does remain somewhat academic, it has emerged in public debate recently in relation to settlements between public regulators and private corporations. There has been public criticism of ASIC, for example, for negotiating settlements with corporate wrongdoers in recent years, with the

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<sup>32</sup> National Alternative Dispute Resolution Council (NADRAC), *Maintaining and Enhancing the Integrity of ADR Processes: From principles to practice through people* (February 2011) <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Maintaining%20and%20enhancing%20the%20integrity%20of%20ADR%20processes%20%20From%20principles%20to%20practice%20through%20people.PDF>> 19.

<sup>33</sup> See New South Wales Law Reform Commission, 'Current Projects' <[http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc\\_current\\_projects/lrc\\_current\\_projects.aspx](http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/lrc_current_projects.aspx)>.

<sup>34</sup> See Fiss, above n 9, and specifically at 1085: "Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private arrangement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle."

<sup>35</sup> Robert French, 'Perspectives on Court Annexed Alternative Dispute Resolution' (Speech delivered at the Law Council of Australia Multi-door Symposium, Canberra, 27 July 2009) 20.

<sup>36</sup> *Ibid.*

<sup>37</sup> Boule, above n 14, 205.

<sup>38</sup> Michael Windeyer, 'Settlement in Court-Connected ADR and the Constitutional Function of the Judiciary: An Imbalance between two Competing Public Interests' (2017) 28 *Australian Dispute Resolution Journal* 135, 141.

suggestion that such settlements mean that the corporation is never publically held to account.<sup>39</sup>

16. This criticism is rooted in the notion that there are certain matters that should be dealt with by a Court. Of course, it is probably indisputable that settlements are better value for money in terms of the impact on the public purse. However, I think the debate into the future is going to be centred on how and who should be making the choice to use ADR rather than the Courts in matters of public concern, and where the balance should be struck between the use of ADR and the courts performing their constitutional functions.<sup>40</sup> It may also be the case that there simply needs to be greater transparency around the use of negotiation and settlements in matters involving a public enforcement body. This issue leads into my next point, which is how these legitimacy challenges have emerged, with force, in the field of arbitration.

### **The legitimacy challenge for International Arbitration**

17. It is probably trite to say that international commercial arbitration has been in recent times dealing with a crisis of legitimacy.<sup>41</sup> Until recently it was widely celebrated as the default mechanism for the resolution of transnational disputes. The *New York Times* report in 2015 best captures the change of heart – claiming arbitration was “stacking the deck of justice”, represented a “privatisation of the justice system” and deprived people “of one of their most fundamental

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<sup>39</sup> For example, in 2016, former Australian Competition and Consumer Commission chairman Professor Allan Fels stated that ASIC “lacks a strong culture of law enforcement” and needed “to be more courageous in pursuing litigation and had relied too heavily on negotiated settlements” quoted in Adele Ferguson, ‘ASIC needs more power over white-collar criminals, according to Senate’, *Australian Financial Review* (online), 26 March 2017 <<https://www.afr.com/business/banking-and-finance/financial-services/asic-needs-more-power-over-whitecollar-criminals-according-to-senate-20170326-gv6li2>>.

<sup>40</sup> See Robert French, ‘Arbitration and Public Policy’ (Speech delivered at the 2016 Goff Lecture, Hong Kong, 18 April 2016) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18Apr2016.pdf>>, noting in relation to arbitration that “the courts have a special and constitutional role in publicly maintaining and affirming the rule of law as they make their decisions. It is an aspect of that role that, in publishing their judgments, they facilitate the flow of information about legal questions and their resolution within their home jurisdictions”: at 3.

<sup>41</sup> I am grateful to the presenters at the 2018 ICCA Congress on the topic ‘Arbitration Challenged II: Reforming Commercial Arbitration in Response to Legitimacy Concerns’ (Panel Discussion, 16 April 2018) for their insights into these issues.



constitutional rights: their day in court”.<sup>42</sup> The debate has moved through the academy, the profession to the general public and the political sphere, with doubts expressed as to the fairness of the process, the integrity of decision-makers and ultimately, the legitimacy of awards.<sup>43</sup> At this point I should note that I am alive to the importance of distinguishing the issues affecting international investment arbitration to international commercial arbitration – they are different processes, one involving public law and arising under an investment treaty and the other being of a purely commercial nature.<sup>44</sup> I intend to focus on commercial arbitration, which I think is most likely to be relevant to your practices, with some comment on the issues in the investment sphere. Concerns in the commercial arena have centred on a lack of transparency and precedent, the independence or otherwise of arbitrators, and increasing costs and delays in what is supposed to offer a quick, cheap alternative to domestic courts.<sup>45</sup>

18. I'll deal with transparency first, and I think this is one area in which the line between investment and commercial arbitration has been most sharply drawn. Chief Justice Allsop, for example, in an address earlier this year noted the suggestion that the UNCITRAL Rules on Transparency in ISDS should apply to commercial arbitration on an opt-out basis. His Honour responded that “confidentiality in many cases is a critical demand of the parties”, a “feature of commercial arbitration that is a significant attraction” and its absence may “only drive parties to settle their difference outside arbitration”.<sup>46</sup> Indeed, most of the big transparency initiatives of late, such as the United Nations Convention on

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<sup>42</sup> Jessica Silver-Greenberg and Michael Corkery, ‘In Arbitration, a Privatisation of the Justice System’, *The New York Times* (online) 1 November 2015 <[https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?\\_sm\\_aui=iMVmPq5VMJp2J4I9](https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_sm_aui=iMVmPq5VMJp2J4I9)>. See also ‘The arbitration game: Investor-state dispute settlement’, *The Economist* (online), 11 October 2014 <<https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game>>.

<sup>43</sup> James Allsop, ‘Commercial and Investor-State Arbitration: The Importance of Recognising Their Differences’ (Opening Keynote Address delivered at the 24th ICCA Congress, Sydney, 16 April 2018) 9ff.

<sup>44</sup> *Ibid* 10.

<sup>45</sup> *Ibid* 9.

<sup>46</sup> *Ibid* 10.

Transparency in Treaty-based Investor State Dispute Resolution (or the Mauritius Convention) have been strictly limited to investment arbitration.<sup>47</sup>

19. While I don't dispute that confidentiality is important to commercial parties, I think it is important to note that transparency is not just being demanded by the public or politicians. The business community itself has long been calling for greater knowledge of arbitral jurisprudence, to enable greater predictability of the possible outcome of trade disputes and a clearer idea of the realities and advantages of arbitration.<sup>48</sup> This can be easily achieved by widespread acceptance of the publishing of redacted reasons for award, which will not only contribute to international commercial law but improve trust and confidence in arbitrators and the institutions that publish the awards.<sup>49</sup>

20. Secondly, it may also be important to recognise that certain disputes are of such a "public" nature that the distinction between the public interest in ISDS and the private right of confidentiality in commercial matters cannot be so sharply drawn. This might be the case in an arbitration that impacts a wide class of consumers, or a dispute involving a state party arising out of a commercial transaction which is nevertheless defended using public moneys, with a consequent public interest in the expenditure of those moneys.

21. Finally, there is the question of what the alternative to transparency is, in the era of "fake news". Accepting for the moment the proposition that commercial arbitration does have some impact on members of the public, whether in their capacity as consumers, taxpayers or shareholders, the absence of information in this era can simply mean that misinformation, alternative facts, "post-truths" and "fake news" abound. The next question

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<sup>47</sup> The Convention was opened for signature on 17 March 2015 and entered into force on 18 October 2017. The Mauritius Convention applies the UNCITRAL Rules on Transparency to investment treaties concluded before 1 April 2014. Australia signed the Convention on 18 July 2017 and ratification will be considered by the Australian Parliament through the Joint Standing Committee on Treaties.

<sup>48</sup> Alexis Mourre, 'The Case for Publication of Arbitral Awards' in Alberto Malatesta and Rinaldo Sali (eds), *The Rise of Transparency in International Arbitration — The Case for Anonymous Publication of Arbitral Awards* (Huntington, 2013).

<sup>49</sup> See Allsop, above n 43, 15 citing Doug Jones, 'Arbitrators as Law-Makers' (2018) 6 *Indian Journal of Arbitration Law* 19, 24.

might be, who cares? Thinking again about the importance of legitimacy from the perspective of those who have change-making power, it should be remembered that arbitration is ultimately dependant on the State, which facilitates enforcement. I think the question that needs to be addressed is how the commercial world can avoid replicating the investment arbitration crisis, which has ultimately led to a dramatic withdrawal of state support for the process.<sup>50</sup>

22. The second and most significant threat to legitimacy is the issue of cost and delay. The 2015 Queen Mary University survey confirms this – respondents perceived the worst characteristic of international arbitration to be “cost”.<sup>51</sup> Corporate decision makers historically selected international arbitration as their contractual dispute mechanism because it was a faster, more effective way of deciding disputes. Its continued popularity is dependent on maintaining this competitive advantage, or corporate users will simply vote with their feet.

23. One attempt to address this has been the inclusion of forms of ADR within arbitration itself. There has been an expansion in the use of hybrid processes to encourage settlement, such as mediation within arbitration in med-arb and arb-med-arb clauses. The attractiveness of such clauses for parties is that any monetary settlement reached by the parties in mediation would be enforceable under the New York Convention, as it is recorded as a consent award by the arbitral tribunal.

24. These clauses have, however, been subject to criticism in relation to procedural fairness. An arbitrator may have received private representations from each of the parties when acting as a mediator – creating “a dichotomy between the confidentiality of private disclosures made during caucusing against the

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<sup>50</sup> For example, India radically revised its model bilateral investment treaty in 2016, to significantly limit access to ISDS. Before an investor can bring an investor-state claim under the Indian Model, it must first seek to exhaust domestic remedies for a period of up to five years. It may then proceed to arbitration, subject to a six-month negotiation period, provided that it brings the claim within six years of knowing about the measure that it is complaining about. These tribunals are also not permitted to review the merits of a decision made by domestic courts: see generally Prabhash Ranjan and Pushkar Anand, ‘The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction’ (2017) 38(1) *Northwestern Journal of International Law & Business* 1.

<sup>51</sup> Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, 7.

transparency of arbitration”.<sup>52</sup> In relation to domestic arbitrations, the procedural steps set out in the *Commercial Arbitration Act* operate to alleviate such concerns and maintain integrity in the process. Section 27D provides that an arbitrator can act as a mediator, but this is predicated in sub-section (1)(b) on the condition that each party has consented to the arbitrator doing so.<sup>53</sup> Sub-section (4) then provides that an arbitrator that has done so cannot conduct subsequent arbitration proceedings in relation to the dispute without the written consent of all the parties to the arbitration.<sup>54</sup> That consent will be an informed one, as sub-section (6) provides that before continuing with arbitration, the arbitrator must disclose to all parties any confidential information which the arbitrator considers to be material to the arbitration.<sup>55</sup> To the extent that there are concerns about the integrity of the process from the parties’ perspective, the arbitrator’s continued involvement remains under party control.

25. I do think, however, that there are parallels between these hybrid processes, and the co-optation process I described earlier. It will be important to ensure that arb-med and arb-med-arb doesn’t simply become, in the words of Professor Menkel-Meadow, part of a liti-gotiation, or arbi-gotiation game. In addition, what has been recognised in the legitimacy debate in traditional forms of ADR is that over-institutionalisation and over-regulation can deprive ADR of its benefits. Where legitimacy concerns in arbitration are addressed through legislation, it will always be a fine balance in ensuring autonomy is not undermined.

### **The legitimacy challenges for Online Dispute Resolution**

26. Finally, no discussion of “future trends” would be complete without mention of technology. Technology is impacting ADR, I think, in two ways: first, technology is being utilised in a facilitative manner to transform the way that existing processes are conducted, and second, it is being disruptive, in that online dispute resolution, or “ODR”, is replacing traditional forms of dispute resolution.

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<sup>52</sup> Clyde Croft, ‘Alternative Dispute Resolution in Arbitration: Is arb-med really an option?’ (Speech delivered at the International Arbitration Conference, Sydney, 2014) <<https://www.supremecourt.vic.gov.au/contact-us/speeches/alternative-dispute-resolution-in-arbitration-is-arb-med-really-an-option>> 3.

<sup>53</sup> *Commercial Arbitration Act 2010* (NSW) s 27D(1)(b).

<sup>54</sup> *Ibid* s 27D(4).

<sup>55</sup> *Ibid* s 27D(6).

27. The Supreme Court has adopted facilitative technologies such as e-filing and the use of video link technology, and has been trialling an online court system in the Corporations Registrar List. This was in recognition of the fact that in-person arrangements for case management are highly time and administration intensive. For each directions hearing, physical attendance is ordinarily required of practitioners for each represented party, as well as self-represented litigants. This creates a significant inconvenience and cost for matters that are typically uncontroversial which has, I think, successfully been minimised through the use of the online court.

28. Second, technology has a disruptive capacity, whereby ODR is replacing traditional processes. The dispute resolution services offered by Ebay and Paypal, for example, are said to handle 60 million disputes per year.<sup>56</sup> In February 2016 the European Commission launched an online platform for consumer disputes in relation to purchases made online.<sup>57</sup> Also in 2016, the Civil Resolution Tribunal was launched in Canada, as that country's first entirely online tribunal. The CRT resolves small claims disputes of \$5,000 and under, and strata property disputes of any amount, and involves a graduated process of fully integrated ADR going from negotiation, to facilitation, to an online tribunal process.<sup>58</sup> The United Kingdom is moving in this direction as well, with £1 billion being invested in court modernisation,<sup>59</sup> with New South Wales likely to follow in the near future.<sup>60</sup>

29. I think we can broadly say that one of the key "future trends" in ADR is going to be ODR, and while I'm certainly not qualified to speak about developments in technology, what I want to raise for your consideration is the legitimacy issues

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<sup>56</sup> Stefan RM Lancy, 'ADR and technology' (2016) 27 *Australasian Dispute Resolution Journal* 168.

<sup>57</sup> See European Commission, 'Online Dispute Resolution: Resolve your online consumer problem fairly and efficiently without going to court' <<https://ec.europa.eu/consumers/odr/main/?event=main.home.show>>.

<sup>58</sup> Civil Resolution Tribunal, 'How the CRT Works' <<https://civilresolutionbc.ca/how-the-crt-works/>>.

<sup>59</sup> See HM Courts and Tribunals Service, 'New legislation will modernise the courts' (Press Release, 23 May 2018) <<https://www.gov.uk/government/news/new-legislation-will-modernise-the-courts>>.

<sup>60</sup> Angus Thompson, 'Court fights go online in NSW trial', *The Sydney Morning Herald* (online) 12 June 2018 <<https://www.smh.com.au/national/nsw/court-fights-go-online-in-nsw-trial-20180611-p4zku4.html>>.

which might arise. Legitimacy will be critical to the success of ODR because of the suspicions that many people harbour towards online activity<sup>61</sup> – although I suspect these concerns weigh more heavily on the minds of digital immigrants such as me than the younger digital natives among us. Nevertheless, I think ODR and particularly the technology behind it must be constructed in such a way that it is trusted by the public as an efficient and effective way to resolve disputes.<sup>62</sup> Many of the legitimacy challenges that have been raised in the arbitration field have the potential to arise in ODR, including questions of equality of access, impartiality, and transparency.

30. The Supreme Court has been alive to the question of open justice and transparency. In most cases, the online court will deal with matters that are largely administrative and could have been dealt with by a judge in chambers, with the result that there will be no reason why the public would want or should have access. However, in certain high-profile cases it may be appropriate for the matter to be dealt with in open court. This is something that is left to the judge or registrar hearing the matter at present. It may be that the Court develops guidelines on this issue as the use of the online court expands to other lists.

31. The issue of bias in technology has, for example, arisen in the Ebay system, which has been accused of favouring buyers over sellers, as it adopted a “buyer is always right” policy – the system has a built-in bias that has undermined its legitimacy.<sup>63</sup> While technology and artificial intelligence has long been lauded as the impartial alternative to unpredictable and impressible judicial discretion, more recent experience has shown that programming and artificial intelligence is not bias free.

32. Algorithms can operate in a discriminatory and inconsistent fashion – relying on skewed databases, reflecting the programmer’s own biases in their design, and even operating unpredictably, which is a particular problem with learning

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<sup>61</sup> Noam Ebner and John Zeleznikow, ‘No Sheriff in Town: Governance for Online Dispute Resolution’ (2016) 32(4) *Negotiation Journal* 297, 313.

<sup>62</sup> Noam Ebner and John Zeleznikow, ‘Fairness, Trust and Security in Online Dispute Resolution’ (2015) 36(2) *Hamline University’s School of Law’s Journal of Public Law and Policy* 143, 155.

<sup>63</sup> Michael Legg, ‘The future of dispute resolution: Online ADR and online courts’ (2016) 27 *Australasian Dispute Resolution Journal* 227, 233.

algorithms.<sup>64</sup> Finally, while it has been suggested that the rise of low-cost internet access and smartphones means ODR can sidestep the issue of the “digital divide”,<sup>65</sup> it is undoubtedly true that for some people, digital communication is still unavailable and inaccessible – poor literacy, for example, doesn’t magically vanish because someone has a smartphone.<sup>66</sup>

33. Into the future, some form of governance is necessary to endow ODR with legitimacy, and that the time is ripe for consideration of what such governance might look like.<sup>67</sup> One concern is that the novelty and technological complexity of the field is likely to be, if considered judicially, a “hard case that makes bad law”.<sup>68</sup> As disputes about the ODR process itself start to arise, governance may then simply be imposed externally, resulting in institutionalisation to the detriment of its benefits.<sup>69</sup> ADR in this country has benefited from the willingness of its practitioners to self-govern, and contribute to the discussions around appropriate regulation. It is important the profession starts to conceive of and define its role within ODR – both in the design and the dispute stages.

## Conclusion

34. More so than ever, ADR must work to maintain public trust that it offers a legitimate means of resolving disputes. We live in a time when the absence of transparency and information is likely to result in misinformation, misconceptions and “fake news”. ADR faces challenges in dealing with this phenomenon, particularly due to its confidential nature. I hope that today will offer you the opportunity to consider and contribute to discussions around how we can build, rebuild and maintain trust in the process. Thank you.

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<sup>64</sup> Orna Rabinovich-Einy and Ethan Katsh, ‘The New New Courts’ (2017) *American University Law Review* 165, 210-211.

<sup>65</sup> Lancy, above n 56, 170.

<sup>66</sup> Rabinovich-Einy and Katsh, above n 64, 213.

<sup>67</sup> Ebner and Zeleznikow, ‘No Sheriff in Town: Governance for Online Dispute Resolution’, above n 61.

<sup>68</sup> *Ibid* 313.

<sup>69</sup> *Ibid*.