

DISPUTE RESOLUTION IN THE NEXT 40 YEARS:

REPERTOIRE OR REVOLUTION

ADDRESS TO THE

UNSW LAW 40TH ANNIVERSARY CONFERENCE

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Thank you Lord Justice Jackson for your very interesting remarks. It is invaluable to hear from you about the developments in your jurisdictions, as well as the developments in countries such as New Zealand, Hong Kong and Singapore. These are countries with whom we presently have a close connection, one which is likely to increase over the next 40 years. Your remarks provide a good foundation for what I would like to say in my part of this morning's seminar, particularly about costs and access to justice.

I would like to begin, though, by congratulating UNSW's Faculty of Law on its many accomplishments over the past 40 years. In that time, the law school has grown to be one of Australia's finest law schools. I say 'one of' because I am a graduate of Sydney University and my impartiality as a judge can

only extend so far. Over the past 40 years, UNSW has produced at least 12 judges and magistrates, including Australia's first Indigenous judge. Quite unusually, over half of the 12 UNSW alumni who have been appointed to the bench are women. I think these statistics reflect the commitment to equality of opportunity that has guided this law school over the past 40 years.

It is difficult for the modern law student to imagine that when UNSW law school first opened its doors cases were found in books, not on computer screens; lists of authority were created by leafing through textbooks, not through LexisNexis searches; and dispute resolution was an area over which courts had almost exclusive domain. For the modern student, it might seem like the last 40 years have seen the legal system undergo a revolution. In my view, that is not so. The past 40 years has changed the way in which lawyers and judges do things, but the past 40 years has not fundamentally altered the nature of the things we do. That is to say, although we find new and innovative ways to meet the goals of the justice system, those goals – being equality before the law; the right to a fair trial; and a commitment to the fair and efficient resolution of disputes – have remained steadfast.

It is perhaps because of the trends we have seen over the past 40 years that I feel confident in saying that over the next 40 years, no matter how many revolutions occur in the repertoire of dispute resolution mechanisms we utilise, the fundamental values of our legal system and the objectives it seeks to embody will remain unchanged.

I wish to address three things today. First I would like to discuss access to justice and the future of ADR. Secondly, I will look at the future of the courts, which is in many ways intertwined with the future of ADR. Finally, I will address the impact of internationalisation on our legal processes, particularly the future options for international dispute resolution and the reforms of civil procedure that I envisage occurring as a result of international influences.

In each of these areas, I think that the way we do things over the next 40 years undoubtedly will change, but our commitment to the core values of the legal system and the integrity of our institutions must not change. Our repertoire may expand and adapt, our way of doing business may be modified, but our

fundamental commitment to access to justice, equality before the law and the separation of powers should remain paramount.

Access to Justice

If I may first turn to the issue of access to justice. Access to justice remains at the top of the agenda of most legal professional bodies. It is important that we achieve significant improvements in this area. The most significant barrier to justice in Australia involves legal costs. This barrier is slowly being removed through greater efficiency and case management by courts, increased and (importantly) more appropriate use of alternative dispute resolution and an acknowledgement that pro bono work and publicly funded legal services are crucial to many citizens being able to access and effectively utilise the justice system. No doubt further progress will, and must, be made to this area over the next 40 years.

I see the crucial access to justice issues for the next 40 years lying in three areas. The first is keeping the costs of all forms of dispute resolution low; the second is ensuring that the dispute resolution process is not unnecessarily drawn out or delayed because the incorrect dispute resolution technique was employed; and the third is adapting dispute resolution processes to make them

accessible and comprehensible to members of society without a legal background (and also to members of society such as indigenous people with a different cultural background).

Lord Justice Jackson's comments about the Costs Review he undertook have significant relevance for our jurisdiction. It is encouraging that in some areas we seem to be leading the way. Of course, more still needs to be done to manage the costs associated with unwieldy discovery. Further thought needs to be directed towards managing the risks associated with litigation funders.

In saying this, I am not suggesting that litigation funding does not have a useful role to play in providing access to justice. Litigation funding, in one form or another, has been used by insolvency administrators for many years in seeking to recover funds owed to the company under their administration. More recently, following the decision of the High Court in *Campbell's Cash & Carry v Fostif Pty Ltd*¹ and the introduction of rules providing for class actions both in the Federal Court of Australia and in many of the Supreme courts including NSW there has been a rapid escalation of litigation-funded actions, particularly in the

¹ (2006) 229 CLR 386; [2006] HCA 41.

product liability and securities field. I anticipate that these actions will continue to expand.

Whilst these actions do have the advantage of enabling people who could not otherwise afford to do so to obtain redress in respect of their claims, there is still a need for funded actions, and indeed any class action, to be closely monitored. This is to prevent vexatious claims or claims framed so widely that they pose an intolerable burden on defendants.

Further, without disparaging any litigation funders, it must be remembered that they are in the business of funding to make a profit. In these circumstances, it is important that their activities be regulated both to ensure that those who enter into funding agreements are aware of their rights and liabilities and that the funder has the capacity to meet costs in the event that the funded action is unsuccessful.

The cost of litigation is not only financial – it can also be emotional. Ensuring access to justice means providing flexible options to those who want to avoid confrontation. The criminal system has been particularly apt at modifying its practices so as to

ensure that sensitive victims of crime are not overly harmed by the confrontational nature of the adversarial system. For example, witnesses who allege to be victims of sexual assault are able to provide evidence via Closed Circuit Television rather than confront the accused in the courtroom. Likewise, suppression orders have made justice more private for individuals who might not otherwise seek a legal remedy. In the future I envisage the caretakers of the Australian dispute resolution system remaining aware of barriers to justice that exist now, and being keenly conscious of those that might arise in the future. The growing social awareness of minority groups will be reflected in scrutiny of dispute resolution methods that do not appropriately serve their users. Some of the techniques implemented in the criminal justice system to remove barriers to people testifying might be implemented, where appropriate, in civil cases.

Alternative Dispute Resolution

This leads me to the future of alternative dispute resolution. Over the past 40 years an entirely new arm of dispute resolution has emerged to meet the changed understanding of disputes that legal analysis, social science and psychology provided. Given that the financial and emotional costs of litigation were high, and some

clients were reporting low satisfaction, the legal profession began to focus on resolving disputes through techniques of dispute resolution other than litigation. There is no doubt in my mind that alternative dispute resolution will continue to play a dominant role in Australian dispute resolution over the next 40 years. This presents both challenges and opportunities.

Alternative dispute resolution challenges lawyers to integrate and navigate the smorgasbord of dispute resolution methods so that clients are presented with a cohesive and appropriate road map for the resolution of their individual disputes. As I explained at a recent ADR Workshop, mediation at the wrong time or in the wrong type of case will only extend the stress and financial pressure for clients.² The mistakes that are made in referring the wrong cases to alternative dispute resolution or entering alternative dispute resolution at the wrong time are largely a product of this being a relatively new form of dispute resolution and one that was not taught to the vast majority of practitioners as a major part of their legal education. As alternative dispute resolution becomes an older fixture on the dispute resolution scene it is inevitable that we

² See [http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst130811.pdf/\\$file/Bathurst130811.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst130811.pdf/$file/Bathurst130811.pdf).

will get better at embracing its use while recognising its limitations. The fact that law students are now taught alternative dispute resolution methods, and encouraged to identify the appropriate circumstances for their use, suggests that this is an area which will expand and prosper over the next 40 years. The challenge for lawyers is to properly understand its role and match their clients' legal problems with not only the appropriate remedy but also the appropriate method for achieving that remedy.

Another challenge that we face is how to ensure consistency between cases resolved according to alternative dispute resolution techniques. While consistency and fairness are not the only goals of the justice system, they are important indicators of whether the law applies to all citizens equally, which is one of the paramount principles of the rule of law. The privacy of alternative dispute resolution makes it difficult to assess whether processes like mediation and negotiation favour parties with particular characteristics or, alternatively, disadvantage a particular section of the community.

Thus far, our assessment of alternative methods of dispute resolution has been based primarily on client satisfaction or, more

accurately, on whether or not they achieve an outcome. We have also benefited from the logic of academics, who have suggested that where there is a significant power imbalance between the parties negotiated outcomes will rarely work. Over the next 40 years, I have no doubt that increased empirical research into this area will not only alter our assessment of existing techniques but also lead to the development of new processes for resolving disputes that better suit the interests of justice as well as the interests of the parties. An example of this type of change over the past decade involves the use of internet conferencing in family law. Technology can shield the parties from severe confrontation during a mediation or negotiation. It can also provide a record of what has occurred and allow parties to reflect on what has transpired after the event. While recording a mediation poses some privacy issues that would need to be properly managed, it creates an opportunity for an independent party to review a mediation or negotiation and ensure that proper processes were followed.

I predict that over the next 40 years the political momentum towards making pre-trial mediation compulsory in every case will be arrested and a more balanced perspective will be taken to mediation. I have serious reservations about any legislation

requiring parties to take ‘genuine steps’ to resolve a dispute before commencing litigation, as they are required to do under the Commonwealth’s *Civil Dispute Resolution Act 2011* before commencing proceedings in the Federal Magistrates Court and the Federal Court of Australia. At the most basic level, I do not believe that such legislation is necessary. Given the expansion of alternative dispute resolution services, and the extent to which parties and lawyers now consider alternative dispute resolution methods as their primary means of dispute resolution, I think it is difficult to accept that parties would not be aware of ADR or would be discouraged from using it were it to remain optional.

More fundamentally, I believe that forcing parties to alternative dispute resolution will undermine the justice system’s goals of justice and fairness. In more complex cases, it is not unusual for parties to lack a clear understanding of the strength and merits of both their own case and the opponent’s case. In circumstances where parties do not yet possess sufficient information to make a rational determination about whether to compromise proceedings, compulsory mediation is likely to either fail or to produce results that do not accurately reflect the legal position of the parties. There is a danger that pre-trial mediation

will be misused to frustrate a plaintiff in pursuing a legitimate claim. Moreover, compulsory pre-trial mediation may paradoxically result in the courts being burdened by satellite litigation in which the court investigates what occurred or should have occurred during mediation before being able to determine the merits of each party's case. This would undermine the goal of improving access to justice and would instead impose significant costs and delay on the parties. It is for this reason that I believe moves towards insisting upon compulsory mediation in almost every case will be wound back in the future.

In the meantime, academics and practitioners will need to grapple with a number of questions posed by compulsory pre-trial settlement attempts. First, how is a court to determine whether an attempt to resolve a matter has been sincere or genuine? Are parties entitled or compelled to waive their rights over communications made on a without prejudice or privileged basis in order for a court to determine whether sincere or genuine steps have been taken? Who bears the cost for unsuccessful mediation? Will costs be imposed on a party who ultimately loses in court even where that party would have preferred not to engage in mediation? Over the next few years the answers to these questions will need to

be elucidated so that there is greater certainty for potential litigants. In the process of finding these answers it is important not to lose sight of the fundamental reason for alternative dispute resolution: to make dispute resolution easier for parties.

Underlying all that I have said about alternative dispute resolution is my belief that it is fundamental to our system of justice that parties *ultimately* have access to the courts to resolve their dispute and anything that impedes access to courts is to be viewed with considerable caution. This is not to say that litigation is the only, or even the best, way to resolve a dispute. An ideal position, which I am optimistic will emerge over the next 40 years, is one where parties are encouraged to take genuine steps to resolve a dispute before entering a courtroom if that course is appropriate in the circumstances, but one where parties are not deterred from access to a court as an independent arbiter of disputes according to law where alternative dispute resolution is inappropriate or unsuccessful.

It is also inevitable that the form that alternative dispute resolution takes will evolve further. I believe that particularly in the commercial area there will be an increasing focus on arbitration as

a means of resolving disputes. It has the clear advantage of providing relative informality and, dare I say it, it gives the parties the ability to choose their own judge and system of law, something of considerable importance in international arbitration. I am not yet entirely convinced it provides a saving in costs for the parties but that is a matter for their own determinations. When parties choose to arbitrate rather than litigate their dispute the courts in my opinion should do all they can to facilitate that choice.

Another form of alternative dispute resolution which will gain currency in the years to come, in my opinion, is expert determination. Expert determination provisions are increasingly written into contracts, particularly government contracts and large commercial contracts. Such provisions are particularly apposite when there are few contested factual matters and where the issues are of a complex technical, legal, or accounting nature.

The current somewhat inflexible mediation model involving position papers and parties assembling in a room before a retired judge or a so-called specialist mediator to thrash out their arguments will, I think, evolve into a more flexible process designed to suit the individual needs of the particular case. This is already

occurring. In one case of which I am aware a very difficult commercial dispute was resolved by an extremely well-respected company director with extensive legal qualifications who acted as a go-between between the parties, negotiating with each Chief Executive on an informal basis. Because of the undercover nature of what he was doing, he was described as the 'submarine'. The case, which involved a very large amount of money and the reputation of a number of prominent people, would not have settled without this approach. I cannot identify the submarine, except to say that he is very closely connected to this university. However, I do believe that this approach will become increasingly common in the future.

The role of courts and judges

The next theme I would like to discuss, which ties into alternative dispute resolution, is the role of courts in the next 40 years. The cost of litigation has changed the role of courts in Australia, making them more interventionist than they once were. Justice Sackville wrote in 2002 that courts' acceptance of case management represented: 'a transformation of the judicial role from the traditional model of a passive decision-maker, little concerned with public perceptions of the judicial systems, to one in which

courts actively revise procedures and administrative processes in order to achieve defined objectives.’³ There is a fine line between maintaining our adversarial tradition, which bestows upon parties autonomy and control over the conduct of their proceedings, and maintaining the integrity of courts as public institutions, funded by taxpayers, accessible to all and able to make decisions without lengthy delays. Over the next 40 years, I envisage that the line between a judge engaging in case management and a judge becoming so interventionist that parties no longer control the proceedings will be tested. I am confident, though, that the fundamental values of our system will be upheld.

Case management

If I could begin with case management. Given that many cases now settle through ADR processes before going to court, those cases that come before courts are often complex and time intensive. The increasing complexity and length of trials is caused by a number of things. Criminal trials have increased in length as the number of protections built into the criminal system increase. For example, as additional directions to the jury become standard in order to protect the rights of the accused the time spent in court

³ The Hon R Sackville, ‘From Access to Justice to Managing Justice: The Transformation of the Judicial Role’ (2002) 12 *journal of Judicial Administration* 5 at 13.

increases. In commercial matters, cases have become more complex and prolonged as a result of increased legislation. As the law changes or becomes more detailed, the time spent unravelling and applying legal principles in court increases. Discovery has also added huge expenses and delays to litigation. Now that email is increasingly preferred over use of the telephone – and in the era in which documents are almost never destroyed and almost everything is stored electronically – there is far more material subject to discovery than there once was. Many of these trends will continue over the next 40 years, which is why the suggestions made by Lord Justice Jackson are so valuable.

Nowadays, courts are expected to not only manage individual cases but also to manage the caseload of the court as a whole. Like any business entity, courts need to be managed, their performance assessed and reviewed and underperformance identified for rectification. However, it is important that our dedication to serving the public interest by ensuring justice is served efficiently does not become an obsession with efficiency at the cost of the other values of justice. That is to say, over the next 40 years, the pressure on judges to manage high caseloads and immensely complex litigation and to do so efficiently cannot come

at the cost of the quality of justice that is being delivered. A balance must be struck between encouraging efficient work practices and ensuring that both judges and those appearing before them take the time to ensure that the facts presented to the court are correct, that the law being applied is the full gamut of relevant law, and that the application of the law to the facts is performed with precision and clarity.

Efficiency is not about doing things faster: it is about striking a balance between doing things well and doing them as quickly as is possible, without compromising our standards. This is an important distinction to make, as efficiency is often measured by statistics that account for time, or quantity, but do not account for quality. To create a system whereby trial judges are forced to bring matters to trial before parties are ready only results in a poor flow of substandard information between the bar and the bench. To force judges to produce judgments at a speed that denies them the opportunity to properly digest and consider the matters for determination will produce poor judgements. If this occurs, the best-case scenario involves more appeals being launched, heard and allowed. In this scenario, the quest for efficiency is utterly undermined by the extra work that is created at the backend of the

process. The worst scenario involves appeal judges being subject to the same time pressures and justice being denied in the name of efficiency. We are fortunate to live in a country with institutions that are trusted and respected by the community at large. The community's recognition of the integrity, fairness and accuracy of our justice system is the greatest asset any justice system can possess. We must not squander it in the name of efficiency.

As courts harness technological advancements and integrate appropriate use of technology into court processes there will undoubtedly be further improvements in case management, both by lawyers and the courts. The Federal Court of Australia has moved a number of its processes online and where appropriate the Supreme Courts in each state have as well. Over the past 40 years technology has proved both a blessing and a curse. Where it has been effectively managed, it has reduced waste (of a financial and environmental nature) by allowing paper-free processes, it has improved efficiency as communication has become easier, and it has enhanced citizen engagement with courts as information about court processes has been more readily communicated over the internet. It has likewise revolutionised the practice of law, whereby precedent can be found faster and authorities better understood.

However, where technology has been poorly managed it has resulted in delays in getting cases to trial, for example, because discovery of documents has become an unmanageable task. Programs such as Ringtail have made discovery easier, but data storage on computers has meant that there is significantly more to discover. Our experiences over the past 40 years provide a foundation for improving our use of technology over the next 40 years. Court administrators need to identify the ways in which technology can improve case management by individual judges and by the court as a whole, as well as identifying the negative side effects of technological advancements in order to ameliorate their harms. Lawyers also need to be aware of the opportunities that technology offers while remaining alert to its misuse or our over-reliance on imperfect systems. Case management is the responsibility of us all, and the impact of technology on our task is something we will continue to confront, monitor and modify over the next 40 years.

International influences on legal processes

I would finally like to turn my attention to the impact of international legal developments on the legal processes we employ

in Australia. There are two dominant ways in which what happens around the globe will affect the future of dispute resolution in Australia. First, the number of cases decided in Australia or subject to Australian law will depend greatly upon developments in international dispute resolution and particularly arbitration. Australian governments and legal practitioners are aware of the benefits of attracting international arbitration to Australia. I am optimistic about Australia's future in this field. I believe that we have world-class practitioners and arbitrators in this country and that we have the potential to become a centre for international commercial arbitration similar to London, New York and Singapore. However, practitioners will have to work actively to achieve that goal and courts will have to stand ready to deal quickly and consistently with disputes arising out of arbitration which are referred to them.

The second way in which developments overseas will affect the development of dispute resolution in Australia is through our imitation or adoption of projects that work in comparable jurisdictions and our reform of elements of dispute resolution that have failed overseas. Alternative dispute resolution is one field that has developed in a similar fashion throughout the common law

world. Reforms to civil procedure in comparable jurisdictions may inspire courts to change the way in which they operate, while new techniques for dispute resolution piloted overseas may form the basis for new initiatives in Australia. International agreements about the enforceability of judgments and Memoranda of Understanding between courts (such as those between the Supreme Court of NSW and courts in New York, Singapore and some Chinese provinces) bring our jurisdictions closer together. These agreements change the way in which disputes are resolved so that some uniformity in dispute resolution – based on our common understandings, mutual interests and shared goals – can be achieved. It is for that reason that I was so delighted to hear from Lord Justice Jackson this morning about his report and the progress the UK has made as a result of his findings.

The Adversarial Model

To conclude, I think it is appropriate to make some broader remarks about the adversarial model. The further changes to the procedure of courts that I envisage over the next 40 years beg the question: what will become of the adversarial model? Will it slowly be disintegrated and eventually abandoned? Or will it maintain its fundamental values but adapt to changing times?

In 2002, Justice Davies of the Queensland Court of Appeal speculated that future changes to the adversarial system would mark the end of the adversarial system. He stated:

Future change will more overtly challenge and, I believe, cause us to abandon what we have hitherto thought of as the essential elements of our system – orality, a single climactic trial and party control over the dispute resolution process – and to abandon also what we once thought was the basic tenet of our system, that the best and fairest way of resolving a dispute is by a contest between competing adversaries ... The speed with which those changes occur depends on the speed with which we rid ourselves of two related misapprehensions for these have so far caused us to concentrate, not, as I think we should, on changing the system, but on changing the way in which lawyers operate within that system ... The first of these is a belief that our traditional civil justice system has, over time, developed the best means of ascertaining the truth and of achieving fairness between the parties. And the second which, to some extent, follows from the first, is a perception that the civil systems of Europe are so different from

ours and so inferior to ours in each of those important respects that nothing can be gained by borrowing from them.⁴

With respect, I take a slightly different view.⁵ I see the growth of alternative dispute resolution as an indication that the adversarial model is not always appropriate, or not always the appropriate first step, rather than an indication that the adversarial model is never appropriate. Moreover, I believe we can adapt aspects of our system without abandoning the notion that the best outcome in dispute resolution is achieved when two parties, who have the best knowledge of their cases and the greatest appreciation of their interests, can each advocate for their own positions and an independent third party can determine the strength of their respective arguments.

This is not to say that the contest between ideas should be un-moderated. Indeed, the judge is an essential aspect of the adversarial system: often described as the umpire of the game. It has always been the role of the judge to moderate and qualify the contest between the parties so that the contest occurs within

⁴ The Hon G L Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential

⁵ Though it is fair to say that what I view to be the essential elements of the system may differ somewhat from the way in which Justice Davies defines those elements.

boundaries that are constructed to serve the public good. I believe that what Justice Davies describes as the essential elements of our system will be maintained, though perhaps in a modified form. The modifications made to the principles and practices of orality (for example, by allowing or encouraging the submission of a written summary before the trial, as is commonplace in all litigation), a single climactic trial (by introducing pre-hearing conferences to define and condense the issues in the dispute) and party control over the process (by regulating the way parties can behave in the interests of fairness and efficiency) do not undermine the essential basis of the adversarial system, which is steeped in a belief that the parties, rather than the state, are in the best position to investigate and advance their claims for justice.

Australia's legal institutions and traditions have served the country well for more than 200 years. I do not envisage the essential elements of the system – the faith we place in individual parties to advance their interests and the faith we place in courts to ensure that parties conduct themselves in a way that is compatible with notions of fairness and equality – being abandoned anytime in the next 40 years. What I do envisage, though, is a continued quest by all in the legal profession to improve dispute resolution

methods to make them more accessible to the public and more just in their results. It is this quest for improvement that has made our dispute resolution system as strong as it is today and it is this quest for improvement that provides me with the greatest confidence that over the next 40 years we will move from strength to strength.

I commend the organisers of this conference on their choice of a very thoughtful and topical theme and look forward to engaging in further discussion with many of you over the course of the morning.
