

A Vision for the Future of ADR in Australia and Our Region

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One futurist has remarked that when predicting the future it is best to make ‘long range’ predictions – at least 100 years in advance. This approach is arguably safest for the futurist – who is unlikely to be concerned if their predictions are not realised. In this paper I will try to be ‘less safe’ and suggest some possible future directions in relation to ADR within our region in the short term and the long term. In doing so, I hope that I can rely on your indulgence in the future if it transpires that the trends that I have predicted do not eventuate!

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INTRODUCTION

One thing that is always certain about the future is that it will involve change. In many ways ADR’s current success within Australia and other ADR developed countries, can be viewed as a response to rapid changes within our society over the past three decades. ADR processes have often been regarded as more ‘flexible’ than traditional court processes in terms of dealing with disputes and conflict. This is partly because ADR processes are often future focussed and can enable disputants to have tools to negotiate into the future thereby providing a dispute resolution forum which is supportive of change. In addition, unlike many traditional court processes, ADR processes and mediation are capable of rapid change with a capacity to alter process features to meet party needs. This paper considers some current trends within our region and comments on how ADR is likely to be affected by these changes. In addition the paper

considers how ADR can assist our region to manage change into the future and discusses long term changes. Clearly, our region has responded to change over the past few decades in different ways. Our region is diverse in terms of social economic and political features and plotting or predicting future trends is therefore a somewhat difficult task.

However, one trend that is unstoppable concerns continuing ADR growth across the region. Many factors support the expansion and extension of ADR processes across the region in future years. Globalisation and the difficulties faced by domestic legal systems and institutions in dealing with litigation and crime in the 21st century will be primary factors that will increase ADR take up. Preferences in the commercial sector will also promote forms of ADR across the region. Past experiments in developing local legal institutions and systems suggest that local capacity building requires an emphasis on a strong local legal system and also a strong ADR system. Changing patterns of disputing and an increase in values based conflicts and conflicts over water, land and environmental issues will lead to the emergence of more complex facilitative ADR processes.

ADR processes are also likely to change. For example, changing communication trends with the input of new and emerging technologies are likely to produce and encourage the adaptation of ADR processes – this may involve a reliance on forms of artificial intelligence into the future. An increased focus on the causes of conflict, its impact within the society, as well as the increased focus on conflict-avoidance approaches, will result in the continued expansion and use of ADR processes at all levels of Australian society. The extent that this will be reflected in ‘across the board’ regional take up is questionable – the individual rights based approach adopted in many western countries may result in higher take up in Western countries and undoubtedly cultural factors and views about decision making have impacted upon take up rates around the region in the past few decades. Within Australia, many ADR processes are now “mainstream” and a significant number of Australians have now been exposed to ADR processes. In the Australian culture there has been a “paradigm shift” in the way that dispute resolution processes are

viewed.¹ This change means that within Australia and other ADR developed nations many relevant future issues focus on the impact of the continuing institutionalisation and legitimisation of ADR processes.²

Within the region this paradigm shift is far less coherent and it is fair to say that it has not taken place in the absence of a strong civil law system. Many countries within the region do not have a developed civil (rather than criminal) legal system. In many places notions of consumer and civil rights are in their infancy. This is the primary reason why ADR take up and implementation is ‘patchy’ is likely to continue to be so – at least for the short term. Globalisation does however require the development of global and cultural models and systems to deal with disputes and this will exert pressure upon domestic systems of dispute management. ADR has a pivotal role to play in producing greater certainty and more collaborative arrangements in terms of regional and local alliances.

There are however many other important trends that will impact upon ADR use throughout our region into the future. As in the past these trends are likely to impact differently across the region – the major factors influencing the range of impacts relate to differing social patterns, cultural issues and ability of countries to take up new and emerging technology.

TECHNOLOGY

The technological revolution of the 20th century has led to massive changes in the way that people, work, live, socialise and has changed the way in which individuals and groups negotiate and deal with disputes. Disputes in the late 20th century have been characterised by increasing complexity, distance transactions and many features that were unknown 100 years ago. Changing communication trends will continue to have implications for our dispute resolution processes and may mean that mediation processes will change so that remote communication becomes more common. Technology also creates new types of disputes. With more than one

¹ L Fong, “New Paradigms in Mediation: Thinking about Our Thinking”, (1992) 10(2) *Mediation Quarterly*. In this context the paradigm was about how disputants perceived ways of resolving disputes and conflict.

trillion transactions carried out on line last year, domestic legal systems have not been able to deal with cross border transactions that involve contracts entered into in ‘cyberspace’ that can involve products and services provided by individuals and groups within a number of countries.

Technology has created new patterns of communication that have different characteristics. “Email rage” has, for example, become an identifiable problem particularly in the workplace. Software has been developed and has been implemented in most large organisations to assist in the prevention of abusive and spam “bomb” emails being sent.³ Technology can also impact upon the way that we deal with disputes. In patent or intellectual property disputes, ADR processes that involve computer-assisted conferencing can now occur. It is probable that these schemes will impact upon business dispute systems in the future.

Online dispute resolution (ODR) has the capacity to shift disputant perceptions by using different techniques to many conventional facilitative processes.⁴ In addition, online processes may assist in addressing issues that can arise from cultural differences and power imbalances by promoting the more flexible delivery of ADR. Online systems also enable disputants to access information about ADR processes and practitioners that assist in the promotion of ADR options. ODR is sometimes referred to as the fourth party (as distinct from the third party in most ADR schemes). This approach recognises that emergent technology can play the role of a “practitioner” – as distinct from technology merely supporting an ADR process.

Increasingly, dispute resolution schemes are emerging in response to technological developments. Artificial Legal Intelligence (ALI) can be viewed as a form of dispute resolution or a system that has the capacity to render expert advice or decision-making. Artificial Intelligence (AI) refers to computer systems which perform tasks and/or solve problems that usually require

² S Press, “International Trends in Dispute Resolution – A US Perspective” (2000) 3(2) *ADR Bulletin* 23.

³ See, eg, https://www.icaughtyou.com/wicu_latestnews.dcw (accessed 14 December 2004).

⁴ See <http://www.disputes.net/cyberweek2001/announce.htm> (accessed 14 December 2004). See also T Sourdin, *Alternative Dispute Resolution*, 2nd ed (2005) Law Book – Chapter 9.

human intelligence.⁵ As with many other forms of ADR this system has the capacity to be blended with determinative and advisory, as well as non-adjudicatory, processes.

AI processes have the potential to provide intelligent ADR services within the next decade. Within the next twenty years it is likely that human intelligence and creativity will be replicated at a far more sophisticated level by technological devices. Australia is a world leader in the development of technologically aided negotiation support systems.⁶

Some technologists have suggested that:

“If you draw the timelines, realistically by 2050 we would expect to be able to download your mind into a machine, so when you die it’s not a major career problem,” Pearson told The Observer. ‘If you’re rich enough then by 2050 it’s feasible. If you’re poor you’ll probably have to wait until 2075 or 2080 when it’s routine. We are very serious about it. That’s how fast this technology is moving: 45 years is a hell of a long time in IT.’⁷

Others have noted that:

“The workplace, family life, education and many other foundations of society will undergo fundamental changes due to advances in Internet technology over the next decade (2004-2014). That is the forecast of nearly 1,300 leading technology experts and scholars who responded to a survey by the Pew Internet & American Life Project and Elon University. The survey results, released Jan. 9, 2005, provide a vision of a networked, digital future that enhances many peoples’ lives, but also has some distressing implications.

- *Two-thirds of the experts predict at least one devastating attack on network information infrastructure or the USA’s power grid in the next 10 years. Some experts believe serious attacks will become a regular part of life.*
- *59 percent of these experts predict increased government and business surveillance as computing devices are embedded in appliances, cars, phones and even clothing.”⁸*

What does this mean for mediation? There are likely to be different types of disputes. There are more likely to be more sophisticated advisory processes available to participants and mediators – some of which will be implanted (rather than separate). Processes may be adjusted to reflect the

⁵ R Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Clarendon Press, Oxford, 1998) p 120. See also R Susskind (ed), *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace* (Oxford University Press, 2004).

⁶ See J Lodder and J Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems*, 10 *Harvard Negotiation Law Review* (2005) at 287.

⁷ David Smith, technology correspondent, Sunday May 22, 2005 - [The Observer](#) See also Joel Garreau, *"Radical Evolution : The Promise and Peril of Enhancing Our Minds, Our Bodies -- and What It Means to Be Human"* (2005).

increasing recall facilities that will be available. Mediation is more likely to be conducted remotely – particularly as transactions increasingly take place at a distance.

Technology can be used to facilitate dispute resolution or to avoid disputes by providing ADR services that are available through computer programs or the internet. Already there are many dispute resolution services available that are aimed at solving problems related to the use of the internet.⁹ While some websites act as referral and information points,¹⁰ others provide online service and suggest that online ADR may have many benefits, such as saving travel costs and keeping parties separate (particularly in domestic violence situations). There are real issues about whether technology-based services can replace “face-to-face” processes – the essence of many ADR processes is their capacity to open communication channels and there are questions about the effectiveness of technology-assisted conferencing.

In 2000, Singapore predicted that judges would appear by hologram within 10 years. Parties would also be able to appear and interact in this way. Another technology expert has noted:

“The world’s fastest computer, IBM’s BlueGene, can perform 70.72 trillion calculations per second (teraflops) and is accelerating all the time. But anyone who believes in the uniqueness of consciousness or the soul will find Pearson’s next suggestion hard to swallow. ‘We’re already looking at how you might structure a computer that could possibly become conscious. There are quite a lot of us now who believe it’s entirely feasible.

‘We don’t know how to do it yet but we’ve begun looking in the same directions, for example at the techniques we think that consciousness is based on: information comes in from the outside world but also from other parts of your brain and each part processes it on an internal sensing basis. Consciousness is just another sense, effectively, and that’s what we’re trying to design in a computer. Not everyone agrees, but it’s my conclusion that it is possible to make a conscious computer with superhuman levels of intelligence before 2020.’

He continued: ‘It would definitely have emotions - that’s one of the primary reasons for doing it. If I’m on an aeroplane I want the computer to be more terrified of crashing than I am so it does everything to stay in the air until it’s supposed to be on the ground.

‘You can also start automating an awful lot of jobs. Instead of phoning up a call centre and getting a machine that says, “Type 1 for this and 2 for that and 3 for the other,” if you had

⁸ Pew Internet & American Life Project and Elon University. Jan. 9, 2005. See also R Kurzeeil, *“The Age of Spiritual Machines: When Computers Exceed Human Intelligence”* (2005).

⁹ A C Tidwell, *“Handling Disputes in Cyberspace”* (1996) 7 *Australian Dispute Resolution Journal* 245. For an example of a website offering dispute resolution services, see the Virtual Magistrate at <http://vmag.vcilp.org/>, which provides arbitration and fact-finding services for disputes involving users of online systems, people harmed by wrongful messages and system operators.

¹⁰ For example, <http://www.mediate.com> (accessed 12 December 2004).

machine personalities you could have any number of call staff, so you can be dealt with without ever waiting in a queue at a call centre again.'

Pearson, from Whitehaven in Cumbria, collaborates on technology with some developers and keeps a watching brief on advances around the world. He concedes the need to debate the implications of progress. 'You need a completely global debate. Whether we should be building machines as smart as people is a really big one. Whether we should be allowed to modify bacteria to assemble electronic circuitry and make themselves smart is already being researched.

'We can already use DNA, for example, to make electronic circuits so it's possible to think of a smart yoghurt some time after 2020 or 2025, where the yoghurt has got a whole stack of electronics in every single bacterium. You could have a conversation with your strawberry yogurt before you eat it.'

In the shorter term, Pearson identifies the next phase of progress as 'ambient intelligence': chips with everything. He explained: 'For example, if you have a pollen count sensor in your car you take some antihistamine before you get out. Chips will come small enough that you can start impregnating them into the skin. We're talking about video tattoos as very, very thin sheets of polymer that you just literally stick on to the skin and they stay there for several days. You could even build in cellphones and connect it to the network, use it as a video phone and download videos or receive emails.'

The next age, he predicts, will be that of 'simplicity' in around 2013-2015. 'This is where the IT has actually become mature enough that people will be able to drive it without having to go on a training course.

'Forget this notion that you have to have one single chip in the computer which does everything. Why not just get a stack of little self-organising chips in a box and they'll hook up and do it themselves. It won't be able to get any viruses because most of the operating system will be stored in hardware which the hackers can't write to. If your machine starts going wrong, you just push a button and it's reset to the factory setting.'

*Pearson's third age is 'virtual worlds' in around 2020. 'We will spend a lot of time in virtual space, using high quality, 3D, immersive, computer generated environments to socialise and do business in. When technology gives you a life-size 3D image and the links to your nervous system allow you to shake hands, it's like being in the other person's office. It's impossible to believe that won't be the normal way of communicating.'*¹¹

Clearly technology also has the capacity to provide different ADR processes and globalised dispute resolution services. This is particularly important as business is increasingly being conducted across borders and with little reference to domestic dispute resolution systems. The lack of existing internet and global dispute resolution systems means that e-business disputes

¹¹ David Smith, technology correspondent, Sunday May 22, 2005 - [The Observer](#) - Reporting on Ian Pearson Head of Futurology at BT.

and other disputes (political and social) are more likely to be resolved outside traditional court and litigation systems.

AI will also be associated with biological developments in respect of nanotechnology, smart drugs and implants - these changes have the capacity to change the dispute resolution landscape even more profoundly over the next twenty to fifty years. What might these developments mean for practitioners and parties? There are already working computer models that assist parties to predict their BATNA and WATNA.¹² One of the most salient questions is whether these developments will produce more rational negotiations or a greater willingness to accept other perspectives. What will certainly occur is a greater focus on how people negotiate and communicate. To model intelligent life and to enhance it – a far greater emphasis upon the analysis of existing processes is required. This in turn will impact upon our understanding of what takes place in mediation and ultimately may improve our interactions and the interactions of disputants.

However, one of the major issues to confront our region relates to the digital divide that exists intra region. For example, at one extreme, developed countries such as Australia, New Zealand and Singapore are likely to embrace incredible technological advances within the next few decades. For example -

“From Jim Gray of Microsoft Research: It will soon be possible - in terms of cost and size - to store a complete digital video record of your life. We will figure out how to digest, analyze, organize, and retrieve this information. See someone on the street but can’t remember the name? Not a problem! How will this information be presented to you? The advances in user interfaces that we have promised for years will finally be realized in the next decade - acceptable speech input and output, gesture recognition, retinal projection, convincing artificial intelligence. But consider this:

From Bran Ferren of Walt Disney Imagineering (in The New York Times Magazine): The technology needed for an early Internet-connection implant is no more than 25 years off. Imagine

¹² See M Hall, D Calabro, T Sourdin, A Stranieri, and J Zeleznikow, Supporting Discretionary Decision Making with Information Technology: A Case Study in the Criminal Sentencing Jurisdiction, (2005) Volume 2, issue 1, *University of Ottawa Law & Technology Journal*.

that you could understand any language, remember every joke, solve any equation, get the latest news, balance your checkbook, communicate with others, and have near-instant access to any book ever published, without ever having to leave the privacy of yourself.”¹³

More developed and wealthier countries are also likely to be able to extend individuals lifetimes (this may be limited to wealthier members of the society) and enhance existing individuals using nanotechnology as well as advances in other scientific areas. We may also within the next 100 years “...understand more about consciousness and the way the mind works. But will we be happy?--[Human Interface Technology Lab](#)¹⁴. This greater understanding may significantly change the way that we conduct ADR processes with a much greater focus on communication skills and conscious states - however the uneven take up of technology is likely to promote even greater regional differences.

SOCIAL TRENDS

Some factors that will impact upon the future of ADR processes relate to general social trends and the way that communication takes place. Already most Australians are net-aware and a preferred method of communicating in the business setting (and increasingly in the social setting) is through the computer. These and other communication trends will have implications for our dispute resolution processes and may mean that ADR processes are adapted so that remote ADR communication (by net-based activity) becomes more common.

Difficulties in communication within our society mean that the focus on communication skills will continue and expand. As work practices change, violence within society increases (as measured by domestic violence and suicide) and depression continues to emerge as a major illness affecting Australian society. It is therefore to be expected that alternative ways of addressing many social problems will be expanded. Processes such as incarceration, medication and isolation, which do not appear to have prevented spiralling problems associated with health and contentment, are likely to be challenged further. Changing trends to adopt “facilitative”

¹³ <http://www.washington.edu/alumni/columns/june98/2088.html> (accessed 22 August 2005)

¹⁴ <http://www.washington.edu/alumni/columns/june98/2088.html> (accessed 22 August 2005)

dispute resolution processes that impact upon the use of communication skills can be viewed as one response to these issues.

Cultural conflict causes our society to consider not only internal social conflict but also external global conflicts that are characterised by cultural misunderstandings. The growing divide between Muslim and western communities has led to power- and rights-based responses as well as communities attempting to bridge this divide through more productive and engaged discussion (for example through inter-faith dialogue) and a renewed called for more effective and culturally responsive conflict resolution processes.¹⁵

The media will also continue to impact upon the way that complex disputes are perceived. Multi-party, multi-dimensional disputes continue to be portrayed on television with simple, condensed “sitcom” resolutions or with actual violence as a primary strategy in conflict. Media and government reporting of wars and terrorist acts depict power, rather than rights- or interest-based approaches to conflict.¹⁶ However, the trend towards reality television may impact upon the way that negotiation is conducted and provide some opportunities to explore continuing relationships and negotiation processes.

Other trends that are relevant include those that promote individual negotiation processes. In the workplace, for example, increasingly workers, rather than bodies that traditionally operated as advocates (such as unions), are involved in direct negotiation processes. Systemic and structural changes to workplaces also mean that hierarchical patterns, as well as workplace expectations, are undergoing revision. Shifts in expectations and workplace changes can often promote conflict.

¹⁵ See M Le Baron, *Bridging Cultural Conflicts* (John Wiley and Sons, San Francisco, 2003).

¹⁶ See B Mayer, *Beyond Neutrality* (Jossey Bass, San Francisco, 2004) pp 41–81: Mayer also notes that in recent conflict situations there has been marked ambivalence towards consensus-focused conflict resolution techniques.

How will individuals respond to these societal changes? On the one hand, there is an increased emphasis upon communication, negotiation and dispute resolution in schools and in youth-oriented programs. Interest in conflict resolution and enhanced communication skills continue to increase across society. On the other hand, there are increasing opportunities for conflict as workers increasingly have little “down time”, operate in isolation and with email and “remote” forms of communication. Changes in family units, such as the increase in blended step-families, can also provide greater opportunities for conflict and older families (with grandparents and great-grandparents) may highlight inter-generational conflict issues. One-child families are increasing and, despite increased formal training mechanisms, there may be less opportunity for children to develop and practise communication and dispute resolution skills in the home environment. Technology increasingly offers children and young people opportunities to “do battle” in simulated war zones while, at the same time, many net-based games rely on enhanced negotiation and collaborative team work amongst players.

There is also social change being experienced in every sector of our community – these changes impact upon how ADR is perceived and how conflict is experienced. Into the future as remote village hubs develop and the population increases, these changes are likely to produce more opportunities for conflict and therefore mediation.

Changes in the business sector

The business sector is increasingly focused on the reduction of risks that impact adversely upon the operation of businesses. This approach means that businesses are designing systems to reduce the harmful impact of disputes – an identified key risk area. Government concern with business/industry dispute resolution processes is evidenced by a series of initiatives in the following areas:

- benchmarks (such as the Benchmarks for Industry Based Dispute Resolution Schemes);
- guidelines;
- standards;
- codes;

- supportive legislation (such as the *Trade Practices Act 1974* (Cth), the *Farm Debt Mediation Act 1994* (NSW) and the *Retail Leases Act 1994* (NSW)); and
- government contractual requirements and systems.

An increased interest in ADR by the business sector has also been driven by changing business management approaches and the employment of strategies that foster relationship-based dispute resolution processes. Conflict is increasingly viewed as “destructive” and capable of diverting time and attention away from opportunities and profit. The increased management time is also seen as an attractive feature of internal and external dispute resolution processes.

There are issues about the impact that these factors will have upon business dispute processes. To a large extent this will depend on business attitudes and cultures (which, in turn, are being informed by business continuity approaches and attitudes to negotiation). However, there is evidence that there are changing norms of operation – this means that the expected responses to a dispute include cooperative responses (not necessarily a positional negotiation response or even compromisory or submissive patterns) and will often not include reference to the litigation system.¹⁷ The elaborate and comprehensive nature of many developing complaints schemes support these changes although the motivation – often linked to risk management, assessment, reporting and quality – is markedly different from the motivators that drove change in the litigation arena (where initially the motivation for introducing ADR was primarily the cost and delays in litigation).

Changes in the litigation area

At present courts and tribunals offer very different ADR processes and referral options.¹⁸ There is an uneven spread across Australia in terms of State and regional use of ADR processes. In Victoria there is much greater use made of mediation as mandatory mediation has widely been used at the County Court level. In New South Wales in the past mandatory court-annexed arbitration has been used, mostly in personal injury disputes at the District Court and Supreme

¹⁷ See David’s work referred to in P Fritz, A Parker and S Stumm, *Beyond Yes* (Harper Collins, Sydney, 1998).

¹⁸ See Australian Law Reform Commission, *Alternative or Assisted Dispute Resolution*, Background Paper 2 (Sydney, December 1996).

Court levels. In Queensland and New South Wales there has been a greater use of mediation at the community level.

The rapid expansion of ADR use within Australia is likely to be mirrored in other countries within our region. There is no suggestion that this will involve a greater focus on advisory and determinative processes. Indeed trends within Australia suggest that many ADR systems initially promote advisory or quasi determinative processes before developing more comprehensive systems that have a strong facilitative component.

There are also likely to be other changes in terms of how ADR processes are linked to the Courts. One vision for the future of civil justice sees ADR and the courts in an increasingly interdependent partnership.¹⁹ To be successful in increasing access to dispute resolution, the courts may need to continue to articulate and enforce the substantive law and to set appropriate legal parameters for ADR, for example in relation to the finality of private dispute resolution and the confidentiality and admissibility of mediation communications.²⁰ This is an increasingly difficult task in a global environment. In addition there is also the possibility of adopting “blended” dispute resolution processes incorporating elements of ADR within conventional adjudication. In the changing litigation system, judges may actively facilitate certain aspects of a dispute and adjudicate other aspects. This approach recognises that although there are important differences between them, some aspects of ADR can be compatible with adjudication. Developments in the Family Court of Australia support this approach as do recent developments in Victoria.

However, there are other possible options that will impact upon ADR use in the existing litigation area. One possible future builds upon the substantive shift away from the multi door court referral and ‘triage’ models articulated in the 1970’s. The multi door court option focuses on ‘in court’ referral and attracted a great deal of interest in the United States and arose after

¹⁹ K Werdegar, “The Courts and Private ADR: Partners in Serving Justice” (1996) 51 *Dispute Resolution Journal* 52.

discussions in the 1970s and '80s. Professor Sander²¹ suggested that cases could be referred to appropriate forums (or 'doors') for resolution or determination after entry into the court system. However this vision has not materialised. Also arguably, in the future Courts are less likely to be dealing with referral issues or 'doors' as a result of an increased requirement to use ADR prior to entry into a Court and Tribunal.

This trend will impact upon the professionalisation of ADR and impact upon 'who' conducts ADR processes. At its crudest, these changes may mean that fewer part time practitioners will be involved in conducting ADR processes, as ADR 'agencies' compete for triage opportunities and may also mean that fewer lawyers are likely to be involved as ADR practitioners in growing pre litigation arrangements. This shift may signal a more "viable and private market"²² for ADR processes such as mediation however the majority of providers in that market are unlikely to be lawyers.

However, in terms of 'in court' processes it seems likely that lawyer ADR practitioners will often be preferred to non lawyer practitioners. This reflects the current need for some content based ADR approaches and this preference may not be as apparent when AI processes can better support parties in terms of advice and information retrieval (see further discussion regarding this). Mandatory ADR referral schemes are likely to operate across the region within and outside court and tribunal systems within the next two decades. The reasons for this relate to budgetary concerns as well as continuing interest and requests for ADR processes (community, government and industry). These are areas of potential and continuing change into the future. The expansion of mandatory referral approaches has the capacity to create new norms in communications and disputing patterns.

²⁰ C McCarthy, "Can Leopards Change Their Spots? Litigation and its Interface with Alternative Dispute Resolution" (2001) 12 *Australasian Dispute Resolution Journal* 35.

²¹ Address by F Sander, Bussey Professor of Law at Harvard University, *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (7–9 April 1976), reprinted in the Pound Conference 70 FRD 79, 111 (1976).

²² R Chernick, "ADR Comes of Age: What can we expect in the Future?" (2003 – 2004) 4 *Pepperdine Dispute Resolution Journal*, 187 at 189.

In terms of future developments it is likely that the current range of referral options will continue to expand. For example, current court-connected legislative requirements can foster notification processes while others focus on ADR attendance. Further, at one level, some legislation requires that parties notify one another of a claim before process is filed. Other legislation requires mandatory attendance at some form of ADR as a precondition to litigation.²³ This is particularly relevant in the family law area where mandatory pre-litigation ADR is now used extensively. The ADR forms which are most likely to be expanded will be determined in part by the evaluation of current approaches taken by parties, lawyers and courts.

The incorporation of ADR into the mainstream justice system could be regarded as transforming forms of ADR, such as mediation, into a “discipline” or a means of organisation that “contributes to the insertion of disciplined, orderly individuals into the machineries of production and the dominant economic, political, and legal relations of power”.²⁴ This incorporation, which may reinforce existing power relationships, may indirectly lead to the growth of newer ADR processes – such as transformative mediation – as well as technologically supported ADR.

The role of lawyers

Lawyer-led negotiation has always played a part in resolving many disputes and lawyers have a key role to play in educating clients about avoiding disputes and about alternatives to litigation. Lawyers and other experts can also ensure that “informed” decisions are made about resolving disputes.

However, there are also issues about the role of lawyers in dispute resolution processes. In the United States the following question has been asked:

²³ For example, *Family Law Act 1975* (Cth.), s 79(9); *Retail Leases Act 1994* (NSW), Pt 8; *Farm Debt Mediation Act 1994* (NSW); Supreme Court Practice Direction No 4 (Qld).

²⁴ L Pinzon, “The Production of Power and Knowledge in Mediation” (1996) 14(1) *Mediation Quarterly*, 3.

Do lawyers facilitate dispute resolution or do they instead exacerbate conflict and pose a barrier to the efficient resolution of disputes?²⁵

These concerns have been raised with respect to ADR processes and the more widespread involvement of lawyers in those processes. In facilitative processes, lawyers negotiate and act as facilitators. It has been said that, at times, ADR processes can be adversely affected by lawyer involvement. Menkel-Meadow has noted that in the United States ADR has been “captured” by the legal profession:

ADR was just another stop in the “litigotiation” game which provides an opportunity for the manipulation of rules, time, information and ultimately, money. ... ADR has become just another battleground for adversarial fighting rather than multi-dimensional problem solving.²⁶

Other commentators have noted that there has been little focus upon the role that lawyers can play. Instead, a “dominant popular view” has emerged that “lawyers magnify the inherent divisiveness of dispute resolution”.²⁷ These views have also found favour in some parts of Australia as legislators seek to minimise the role of lawyers in some types of disputes. However, such views are not the only views of the role of lawyers. Many lawyers and others²⁸ have indicated that lawyers can play a very useful and constructive role in resolving disputes.²⁹

At present however lawyers are not viewed by many policy makers within Australia as having the most appropriate professional qualifications to conduct ADR processes. For lawyers to be involved as practitioners of ADR they need to promote what it is that lawyers do in this field. There is also a greater need for professionalism. In the past some lawyers became ADR

²⁵ R J Gilson and R H Mnookin, “Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation” (1994) 94 *Columbia Law Review* 509.

²⁶ See Australian Law Reform Commission, *Review of the Adversarial System of Litigation. ADR – Its Role in Federal Dispute Resolution*, Issues Paper 25, (ALRC, Sydney, 1998), referring to C 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.

²⁷ R J Gilson and R H Mnookin, “Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation” (1994) 94 *Columbia Law Review* 509 at 511.

²⁸ J Wade, “In Search of New Conflict Management Processes – The Lawyer as Macro and Micro Diagnostic Problem Solver” (1995) 10 *Australian Family Lawyer* 23, Part I.

²⁹ R J Gilson and R H Mnookin, “Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation” (1994) 94 *Columbia Law Review* 509, See also Law Council of Australia submission to ALRC on Issues Paper 20 (November 1997).

practitioners because they were interested or had effective personal skills. They may have become ‘mediators’ with little formal training or supervision. There were few requirements in relation to accreditation or ongoing accreditation. This development has been paralleled by the development of ADR processes that are largely conducted by non lawyers. Such practitioners may face far complex regulatory and accreditation requirements (for example practitioners working for family organisations that are federally funded and are required to comply with Quality and other frameworks).³⁰ Into the future the increased regulation of the profession will mean that mediators will be required to have competencies and developed skills – untrained mediators will not meet new professional requirements.

Unrepresented parties in litigation – the role of ADR?

It is said that the number of unrepresented parties in the litigation system is increasing.³¹ The presence of unrepresented parties may affect ADR process development as well as the development of ADR referral processes. Decisions about screening cases into ADR processes at the court and tribunal level have often referred to legal representation as a determinative referral factor.³² Some court-connected ADR programs include or exclude unrepresented parties.³³ Initially many program developers raised concerns that unrepresented parties could suffer as a result of a detrimental power imbalance where they face represented parties at the negotiating table.

Some Standards that have been developed for dispute resolution practitioners provide specific guidance for situations of power imbalance. For example, the Association for Conflict Resolution specifies that a family mediator “shall recognise a family situation involving domestic abuse and

³⁰ See T Sourdin, L Moloney and T Fisher, *Research Report – Family Dispute Resolution Practitioner Standards* (La Trobe University, Melbourne, 2004): see http://www.latrobe.edu.au/law/dr_quality/Quality%20Standards%20RR_070504.pdf (accessed 22 august 2005 2004).

³¹ Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System* (ALRC, Sydney, 2000).

³² See Australian Law Reform Commission, *Review of the Adversarial System of Litigation. ADR – Its Role in Federal Dispute Resolution*, Issues Paper 25, (ALRC, Sydney, 1998).

³³ Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System* (ALRC, Sydney, 2000) at 161.

take appropriate steps to shape the mediation process accordingly”.³⁴ The Family Mediation Canada competencies also sit at this end of the spectrum, including not just the ability to assess the degree of power imbalance, but also the “ability to use techniques to redress power imbalances”.³⁵ However, a particular issue where unrepresented parties are concerned relates to the tension between preserving party self-determination and attending to power imbalances.³⁶

More recently, the participation of unrepresented parties in ADR programs has been encouraged on the basis that they may benefit from ADR’s flexible processes and outcomes.³⁷ It can be argued that it is unfair to exclude unrepresented parties from ADR processes as these are the very dispute resolution processes which are likely to be cost- and time-effective, and which they are most likely to be able to comprehend and effectively participate in. ADR processes can also enable unrepresented parties to access information in an informal way and reality test possible hearing outcomes. As the parties define the dispute, interests and needs that cannot be defined within the context of a legal action (and which may be driving the dispute) can be explored. The increasing cost of representation in the legal system and attendance in legal hearings will mean that ADR processes will be more readily adopted in respect of unrepresented parties. Trends in relation to unrepresented parties may encourage growth in advisory ADR processes – or blended processes.

Newer ADR processes such as e democracy and dialogue are likely to further spread democratisation and an increased focus of dispute management and using facilitative processes to manage complex negotiations in relation to the massive environmental issues facing the region. Individuals increasingly consider that they should be consulted in relation to government and other decisions that impact upon their lives. E democracy and dialog projects that focus on facilitating inputs by individuals – rather than interest groups and advocates have the potential to create more democratic approaches to community and government decision making.

³⁴ See <http://www.acresolution.org> (accessed 12 December 2004).

³⁵ See <http://www.fmc.ca> (accessed 12 December 2004).

³⁶ T Fisher, “Advice by Any Other Name ...” (2001) 19(2) *Mediation Quarterly* 197.

³⁷ Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System* (ALRC, Sydney, 2000). Australian Law Reform Commission, at 161.

EVALUATING ADR PROCESSES

In recent years there has been an increasing focus on how dispute resolution processes work, how participants within the broader dispute resolution system regard outcomes and processes, and how effective these processes are. In particular, with the introduction of ADR into the litigation system there have been calls for a greater evaluation of these processes and a call for “proof” that they are quicker, cheaper or more satisfying. Such “proof” has been difficult to obtain, partly because there has been little empirical evidence about how the traditional system works and the costs and benefits of more traditional adjudicatory processes. However evaluation work conducted to date in Australia indicates that litigants, when made aware of ADR, may have a preference for ADR processes over traditional litigation and it also shows that a high degree of litigant satisfaction is often achieved in the use of ADR.³⁸

Outside the litigation system there has been little focus on how disputes are resolved. Every day, decisions are made in business environments which can impact upon business, employees, and external parties in a number of direct and indirect ways. These are often measured by cost-benefit analyses. However, cost-benefit analyses of these decisions may not necessarily address issues about compliance or satisfaction with the decisions made. Further, it is not clear how disputes are resolved outside the litigation system. Anecdotally, it has been suggested that there has been a decline in litigation and that more disputants are now accessing ADR processes before commencing litigation.

Clearly, the evaluation of ADR processes will continue to play a major role in determining how ADR develops and expands. In the information-rich society that is developing it will be difficult to determine where evaluation has occurred and to consider the choices available to determine policy and funding. In terms of academic research, it is fair to say that ADR as a discipline is not yet fully developed. In terms of the future it is probable that the evaluation of ADR processes will be enhanced and will increase. At the same time underlying academic research has the capacity to inform and refine mediation practice far more than in the past.

Referral decisions may become more sophisticated – perhaps with greater attention given to the personal characteristics and ‘fit’ between disputants and mediators. Recent trends suggest that referral criteria will be further developed. For example, NADRAC and the Australian Institute of Judicial Administration commissioned a report on Court Referral to ADR which was published in 2003.³⁹ On the other hand, there is a continuing pressure to require disputants to mediate prior to litigation and such shifts may suggest that broad scale referral is also possible – at least in relation to some types of disputes.

Ongoing research and evaluation will also promote an understanding of ADR processes and will encourage experimental change, development, understanding and appropriate policy approaches that recognise the need for flexibility in this area. Good ADR practice is likely to remain undetected without a continuing focus on ADR research.

CONCLUSIONS

In our broad dispute “system” that is made up of elements of prevention, assessment, handling and resolution, it seems clear that there is little coherence. However, as usual, one thing is certain – this will all change into the future and given the pace of technological development we can expect significant changes within the next decade. There are also changes occurring in the way in which our structures, individuals and organisations communicate and deal with disputes. These changes are in response to external and internal stimuli but may also be a result of general societal trends and an increasing emphasis upon more relational communication approaches.⁴⁰

Burton has suggested that change is often perceived to be threatening and suggests that:

³⁸ See T Sourdin, “Alternative Dispute Resolution” 2nd Ed (2005) LawBook at Appendix F.

³⁹ K Mack, *Court Referral to ADR: Criteria and Research* (AIJA and NADRAC, Melbourne, 2003); see also <http://www.nadrac.gov.au> (accessed 12 December 2004).

⁴⁰ See, eg, S Caspi Sable and E Kornhauser, “Some Reflections on a Relational World View”, (1999) 2(7) *ADR Bulletin* 65. This development can also be linked to a greater focus on system design (see Chapter 8).

Interactive, analytical problem solving processes of conflict resolution may be the key to solving this problem of social evolution.⁴¹ [That is, by finding means of change that are continuous, non-threatening and generally beneficial.]

In this way conflict resolution processes can play a pivotal role in enabling social change. However, Burton and others have counselled that much ADR development and use remains focused on *settlement* rather than *resolution*.⁴² This approach means that the orientation of much ADR theory and practice is directed at maintaining social structures and “adding” or expanding these rather than developing and expanding different ideologies and paradigms.⁴³

The relationship between ADR and conventional processes can also be viewed as a relationship where processes exert change upon each other and develop and expand to reflect societal needs. However, concerns continue to be expressed about the legalisation and institutionalisation of ADR. Clearly, the recognition of ADR processes as valid options (rather than alternatives) and the increasing acceptance of ADR across all levels of our society raise issues about continuing flexibility. The increased focus on ADR standards has the capacity to create more rigid and more costly processes as ADR practitioners require professional indemnity protection and the legal system increasingly regulates ADR elements such as confidentiality, competency and good faith.

Boulle has noted that: “Instead of having an uncoordinated, organic development, mediation’s progress has been controlled and coordinated by a wide range of public and private institutions.”⁴⁴ This progress and development has the potential to stifle flexible development and promote rigidity with a continued focus on narrowly-defined outcomes (*settlement* rather than *resolution*, as noted above) that promote directive evaluative processes.⁴⁵ It may be, as David⁴⁶ has suggested that ongoing cycles of ADR will produce new empowering ADR processes in response to institutionalisation and that such cyclical behaviour will ensure that flexibility is maintained.

⁴¹ J Burton, *Conflict Resolution and Provention* (St Martins Press, USA, 1990) p 238.

⁴² J Burton, *Conflict Resolution and Provention* (St Martins Press, USA, 1990) Burton, at 269.

⁴³ J Burton, *Conflict Resolution and Provention* (St Martins Press, USA, 1990) at 277.

⁴⁴ L Boulle, *Mediation Principles, Process, Practice* (Butterworths, Sydney, 1996) p 303.

⁴⁵ L Boulle, *Mediation Principles, Process, Practice* (Butterworths, Sydney, 1996) p 303.

⁴⁶ Professor Jennifer David.