



Australian Disputes Centre

ADR Address 2018

Alternative Dispute Resolution - A Misnomer?

Address

by

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Introduction

I am greatly honoured to have been invited to give the inaugural annual ADR address, which I understand is to be presented annually by the Australian Disputes Centre. I thank Deborah Lockhart, the CEO of the Centre, and her team, for the considerable effort that they have put into the organisation of this event. The national approach and operation of the Centre is evident in its choice of Perth as the venue for this address. At the risk of sounding parochial, the fact that ADR programmes have been an integrated component of all Western Australia's civil courts for decades, and that the national award was presented to the Supreme Court of Western Australia last year for its ADR programme, may have influenced this selection.

The Traditional Owners

Before going any further, I acknowledge the traditional owners of the lands on which we meet, the Whadjuk people who form part of the great Noongar clan of south-western Australia, and pay my respects to their Elders past and present and acknowledge their continuing stewardship of these lands.

Alternative Dispute Resolution - A Misnomer

The expression 'alternative dispute resolution' and its associated acronym ADR are now too well established to be changed. This is unfortunate. The terminology appears to have been adopted by those who saw the various techniques and processes collected under this heading as being in competition with curial adjudication, with curial adjudication being considered the mainstream or conventional method of dispute resolution, and ADR as the alternative or less conventional or side stream method.

There is a real risk that this implicit view of the relative use of dispute resolution processes perpetuates a myth.

The Endurance of Consensus

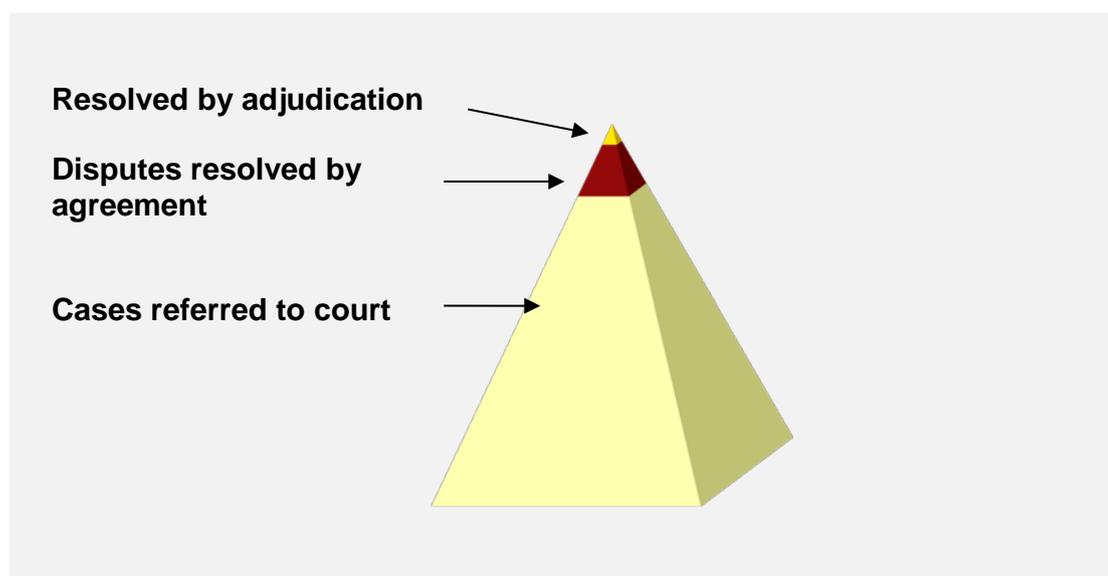
Achievement of a consensus has always been, and remains by far, the most common means of resolving disputes in most, if not all, societies. In primitive societies, operating without the rule of law or courts to enforce laws or customs, intractable disputes would commonly be resolved by self-help or the use of force. However, the use of force has its risks for all participants in the dispute. In *D v NSPCC*,¹ Lord Simon of Glaisdale observed that the use of force in a primitive society carried with it the risk of counterforce and ultimately the risk of enduring vendetta. Generally speaking, those risks would only be taken if the dispute was serious and there was no other practical alternative. The risks for all associated with the use of force provided a strong incentive for consensual resolution in accordance with established customs and mores.

As civilisation progressed and societies became more sophisticated, systems of law evolved together with courts capable of enforcing those laws, which enabled disputes to be resolved without resort to force, other than the coercive powers of the courts. However, while enthusiasm for litigation has waxed and waned in different societies at different times, the delay, uncertainty and expense associated with litigation has meant that, generally speaking, it has been regarded as a last resort to be utilised only when all other means of dispute resolution have failed. So, if one were to imagine all the disputes in a society as taking the metaphorical form of a pyramid, those disputes which are referred to a court might comprise only the uppermost layer of blocks on that pyramid.

¹ *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 230.

The Vanishing Trial

Of those disputes which are referred to a court, only a very small portion are resolved by adjudication. In the Supreme Court of Western Australia, less than 2% of the cases initiated in our court are resolved by adjudication.² This is fairly typical of Australian courts. Professor Peter Murray estimates that in the United States the percentage of civil disputes commenced that are actually decided by adjudication by a court is probably less than 2%.³ A table provided by Dame Professor Hazel Genn QC in her Hamlyn Lectures 2008⁴ shows that between 1990 and 2000, trials as a percentage of proceedings initiated in the Queen's Bench Division of the High Court of England and Wales hovered at around 0.5%. So, returning to the metaphor of the pyramid, the civil disputes within a society resolved by adjudication by a court could be regarded as comprising the smallest stone or pebble at the apex of the pyramid.



² Supreme Court of Western Australia, *Annual Review 2016* <http://www.supremecourt.wa.gov.au/_files/Supreme%20Court%20AR2016.pdf> (accessed 16 February 2018) 11.

³ Murray, PL, *The Privatisation of Civil Justice* (2011) 85(8) *ALJ* 490, 494.

⁴ Genn, HG, *Judging Civil Justice* (2010) <https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/hamlyntrust/Genn_judging_civil_justice.pdf> (accessed 15 February 2018) 35.

Civil disputes which are resolved by curial adjudication are a minute fraction of the civil disputes which arise in our (or any) society. The cases that come within that minute fraction are not selected either by society or by the courts, but by the parties, who in the exercise of their autonomy, have decided not to resolve their dispute another way. It cannot therefore be assumed that the minute fraction of disputes which are resolved by adjudication are representative of either civil disputes as a whole, or any particular group of disputes, or that they necessarily give rise to complex issues of fact or law or issues of general principle. These considerations should be borne in mind when we come to assess the assertion that ADR may be undermining the fabric of our justice system and the rule of law.

What is Meant by ADR?

The exhaustive identification of the various processes and techniques that could fall under the heading of ADR is a daunting task. For the purposes of this address, I will adopt a simpler approach, and use the expression to include any form of dispute resolution which does not involve adjudication by a court. Accordingly, ADR includes mediation, conciliation, early neutral evaluation, case appraisal, mini trial/case presentation, the use of referees, case conferencing, arbitration and hybrids of these various techniques and processes. Arbitration and the use of referees can be regarded as distinct from the other processes or techniques, all of which ultimately rely upon the consensus of the parties for the resolution of the dispute. By contrast, the determination of an issue by a referee, or the determination of a dispute by an arbitrator or panel of arbitrators is much more akin to the process of curial adjudication. These processes fall under the heading of ADR in my lexicon because they do not involve adjudication by a court.

The Relationship between ADR and the Courts

The definition of ADR which I have adopted necessarily means that ADR and curial adjudication are mutually exclusive. What then are the respective roles played by ADR and curial adjudication in the resolution of civil disputes?

The Role of the Civil Courts

It is reasonable to suppose that systems of law, and courts capable of enforcing those laws evolved at least in part to provide an alternative to self-help and the use of force, and the adverse consequences associated with the use of force.⁵ Civil justice systems in civilised societies have evolved to the point where they perform more important functions than reducing the risk of the use of private force and consequent vendettas. These functions have been stated more eloquently than I ever could by Professor Genn:⁶

... the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies. Bargains between strangers are possible because rights and responsibilities are determined by a settled legal framework and are enforceable by the courts if promises are not kept. Under the rule of law, government is accountable for its actions and will be checked if it exceeds its powers. The courts are not the only vehicle for sending these messages, but they contribute quietly and significantly to social and economic wellbeing. They play a part in the sense that we live in an orderly society

⁵ Jalowicz, JA, *Civil Litigation: What is it for?* in Dwyer, DM (ed.), *The Civil Procedure Rules 10 years on* (Oxford University Press, 2009) 51.

⁶ Genn, HG, *Judging Civil Justice* (2010)

<https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/hamlyntrust/Genn_judging_civil_justice.pdf> (accessed 15 February 2018) 3-4.

where there are rights and protections, and that these rights and protections can be made good. If the law is the skeleton that supports liberal democracies, then the machinery of civil justice is some of the muscle and ligaments that make the skeleton work.

Normative Values

So, while resolution of a dispute serves the private interests of the parties to the dispute, adjudication has a public value which goes beyond the private interests of the parties.⁷ That value lies in an authoritative statement of the law, of the rights of the parties to the dispute, and as to the manner in which those rights are to be vindicated. As Professor Marc Galanter has observed, these public pronouncements affect norms and standards of behaviour pertaining to the community generally, and not just the parties to the particular dispute giving rise to the pronouncements.⁸ Public adjudication in the courts, as the third branch of government, has an important constitutional dimension. And, of course, the common law depends upon iterative development through the body of precedent being enlarged and modified to suit changing circumstances by public pronouncements made by courts in the adjudication of cases.

Grease in the Wheels of Commerce

Heydon J has also noted the economic significance of an efficient system of civil courts.⁹ In *Aon Risk Services* he cited with approval the following passage from the judgment of Rogers J in *Collins v Mead*:¹⁰

For example, if banks are unable to collect overdue loans from borrowers speedily, if small traders cannot recover monies owed to them speedily the commercial life of the [c]ommunity is detrimentally [a]ffected. The

⁷ Ibid 17-20.

⁸ Galanter, M, *The Radiating Effects of Courts* in Boyum and Mather (eds.) *Empirical Theories About Courts* (1983) 117; Hulls, R, *New Directions for the Victorian Justice System 2004 - 2014* (Department of Justice, Victoria, 2004) Chapter 2.

⁹ *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27 [137]; (2009) 239 CLR 175, 223.

¹⁰ (Unreported, NSWSC, 7 March 1990).

consequences of delay in the hearing of a commercial dispute ... will impact not just on the two or three persons or companies who are the immediate parties, but may have an effect on the creditors of the business, on employees, and perhaps on other traders unrelated to the immediate dispute.

Heydon J went on to observe:¹¹

Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

Powerful though these observations are, it is important to assess the economic significance of the courts bearing in mind the extent to which adjudication is in fact responsible for the resolution of civil disputes. Business enterprises more commonly and more quickly obtain financial certainty by consensually resolving disputes than by adjudication. This is, of course, not to deny the significance which the availability of courts ready and able to quickly and efficiently adjudicate upon civil disputes has upon the encouragement of consensus. Every judge and litigator knows that nothing focuses the attention of litigants upon the resolution of their dispute by agreement like the allocation of a trial date.

Transparency and Equality of Access

A prominent author in this field, Professor Judith Resnik, suggests that the civil courts provide a fundamental element of a democratic society, by

¹¹ *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27 [137]; (2009) 239 CLR 175, 223.

providing a forum in which individuals and the State can present arguments in public as equals, and have those arguments adjudicated by an independent arbiter.¹² It is undoubtedly true in theory that in a liberal democracy like ours, all individuals and the State have equal access to the courts. However, practical access is somewhat different, given the knowledge and financial resources required to participate effectively in the court process.

The Constraints upon Adjudicated Outcomes

The normative and constitutional values of public adjudication must be assessed in the context of the significant constraints upon the adjudication process.

It is important to remember that the issues of fact resolved by a court are only those which the parties choose to present, and that they must be resolved on the basis of the evidence presented by the parties. In the adversarial system there is no practical capacity for a court to conduct its own investigations to establish the truth, nor is there any obligation upon the court to arrive at some notion of absolute or independent truth.¹³ Australian courts are not commissions of inquiry, and can only view the facts through the prism of the evidence presented by the parties, which may or may not give a true view.

Similarly, courts are generally constrained to adjudicate only upon the legal issues presented by the parties, and have very little capacity to take the law in a direction not proposed by at least one party. The constraints imposed upon a court by the way in which the parties choose to present their case somewhat diminish the normative value of public adjudication. We should remember that the incentive of each party is to win, not to establish the truth or develop legal principles.

¹² Resnik, J, *Courts: In and Out of Sight, Site and Cite* (2008) 53 *Vill L Rev* 771, 806.

¹³ *Air Canada v Secretary of State for Trade* [1983] 2 AC 394.

The point earlier made concerning the lack of any deliberative process or policies for the selection of the small fraction of civil disputes that will be adjudicated is also relevant. The curial evaluation of rights and behavioural standards occurs only in the context of a small subset of all civil disputes, which may not be representative of the entire set.

Further, courts are duty bound to provide the outcome which follows from the application of the law to the facts established by the evidence adduced by the parties. Often this means that one party will receive all that they want, and the other nothing. There is no capacity for a court to fashion a result 'somewhere in the middle'. In a number of major commercial cases in which I was engaged as a lawyer, an outcome which was going to mean a bonanza for one party and ruin for the other was a major factor driving settlement, because an outcome at the extremes was too horrible for the parties to contemplate. The risks were simply too great. ADR provides the parties with the opportunity to mitigate their risks.

Courts can only provide the remedies which the law permits. They cannot rewrite a contract or restructure a joint venture or provide many of the commercial solutions which will provide enduring benefits for the parties. In a number of respects, ADR provides the parties with much more flexible outcomes and opportunities for resolution than can ever be provided by a court.

The Incremental Development of the Common Law - What if Mrs Donoghue had settled?

Unlike systems of civil law, where the decisions of the courts have no value as precedents, public adjudication is the life blood of the common law, without which it will wither and die. Those who extol the virtues of adjudication might rhetorically ask, 'What if Mrs Donoghue had settled her

case?'.¹⁴ Would the neighbour principle governing the duty of care in negligence ever have evolved?

There are a number of ways in which this rhetorical question might be answered. First, as Professor Genn points out, Mrs Donoghue was very fortunate to get her case to the House of Lords at all, she having been lucky enough to find a solicitor and counsel who would act for her on a pro bono basis. In order to get the case to the House of Lords, it was also necessary for Mrs Donoghue to declare herself to be a pauper.¹⁵ Had she not been prepared to take that step, the case would not have got there. The point is that it is largely chance and circumstance which brings cases before the courts for adjudication, rather than some masterful design intended to secure the orderly development of the common law.

The second point to be made is the obvious proposition that if the neighbour principle had not been enunciated in Mrs Donoghue's case, there is no reason to suppose that it would not have been enunciated in some similar case shortly thereafter. The neighbour principle is of such general application that it did not require a case involving a snail in a bottle of ginger beer for its enunciation.

The third point to be made is that the influence of the common law is every day eroded by the increasing influence of statute law. One of the bastions of the common law, the law of tort, is now subject to significant statutory incursion in all States and Territories of Australia.¹⁶

This is, of course, not to suggest that the courts do not have an important role to play in construing statutes. However, the enthusiasm of our legislatures for repealing and amending statutes necessarily means that a

¹⁴ *Donoghue v Stevenson* [1932] All ER 1; [1932] AC 562.

¹⁵ Genn, HG, *Judging Civil Justice* (2010) 22, 75

<https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/hamlyntrust/Genn_judging_civil_justice.pdf> (accessed 15 February 2018) 22, 75.

¹⁶ For example, in this State, the *Civil Liability Act 2002* (WA).

decision of a court based upon a construction of a statute is unlikely to have as enduring an impact as a decision of a court in the development of the common law.

Criticisms common to both ADR and the civil courts

Inequality of Bargaining Power

The criticism that inequality of bargaining power of the parties can produce injustice has been levelled at both the civil courts and ADR processes. In relation to ADR, that criticism was enunciated by Professor Fiss of Yale Law School over 30 years ago in an influential paper entitled *Against Settlement*.¹⁷ However, as the Hon Geoff Davies AO has pointed out many times,¹⁸ parties with lesser economic resources are at a very significant disadvantage during the trial process. The economic reality in contemporary Australia is that legal aid is of very limited availability in civil disputes outside the area of family law (and even within that area is very limited)¹⁹ with the result that unless the case comes within that small category which will attract the interest of commercial litigation funders, a party without substantial economic resources must represent themselves, and take the risk of a ruinous costs order against them. It is difficult to see how such persons could be at any greater disadvantage in settlement negotiations.

Authoritative Consent

Another criticism advanced by Professor Fiss was that settlement may lack what he called, 'authoritative consent',²⁰ in the sense that settlements may be

¹⁷ Fiss, OM, *Against Settlement* (1984) 93 *Yale LJ* 1073, 1076-1078.

¹⁸ See, for example, Davies GL, *Can Dispute Resolution be made Generally Available?* (2010) 12 *Otago L Rev* 305.

¹⁹ Australian Government Productivity Commission, *Access to Justice Arrangements – Productivity Commission Inquiry Report Overview* (No 72, September 2014) <<https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>> (accessed 16 February 2018) 24-27.

²⁰ Fiss, OM, *Against Settlement* (1984) 93 *Yale LJ* 1073, 1078-1082.

motivated by the personal interests of the representatives of the parties (their lawyers or insurance companies) rather than the parties themselves. A related criticism is that advanced by Professor Murray, based on the absence of any meaningful external or independent scrutiny of the settlement outcome, which leaves the parties at the mercy of their own devices - unlike curial adjudication.²¹ Again, it is difficult for me to see how these aspects of the settlement process are materially different to the adjudication process. Generally speaking, parties surrender the conduct of a trial to their legal advisers, or their insurers, who may have their own motivations and interests. And, as I have noted, Australian courts have no role of independent inquiry; they can only adjudicate upon the factual and legal issues presented by the parties who are therefore as much at the mercy of their own devices in the trial process as in the settlement process.

Judicial Review of ADR

The concerns underpinning these criticisms of the settlement process have led Professor Murray to recommend a form of judicial oversight and review of results and processes of mediation and arbitration.²² However, one of the great attractions of arbitration is the very limited scope for judicial review, increasing certainty and reducing cost and delay. In the absence of evidence of duress or coercion, it can reasonably be assumed that parties who have agreed to resolve their differences following mediation have chosen that course, at least in part, so as to avoid further litigation. Any system of judicial review of outcomes or processes of mediation would be antithetical to the inferred objective of the parties.

²¹ Murray, PL, *The Privatisation of Civil Justice* (2011) 85(8) *ALJ* 490, 500.

²² Murray, PL, *The Privatisation of Civil Justice* (2011) 85(8) *ALJ* 490, 502.

Popular Dissatisfaction

Those of us who work in the justice system and who might be tempted to bask in the reflected glory created by lofty pronouncements on the virtue of adjudication can be brought back to reality by a reminder of the apparently inexhaustible supply of critics of that system. I have no difficulty remembering that the system has its critics, as many of them write to me regularly. Few of those correspondents have the eloquence of Dean Roscoe Pound who famously published a paper entitled *The Causes of Popular Dissatisfaction with the Administration of Justice* in 1906.²³ More recently, the inquiry undertaken by Lord Woolf prior to his recommendation of the various reforms embodied in the *Civil Procedure Rules 1998* led him to conclude that the popular dissatisfaction and many of the causes of that dissatisfaction identified by Pound continued.²⁴ The most pernicious aspects of the civil justice system identified by Lord Woolf, and relied upon to justify substantial reform of that system, include a commitment to ADR as a more desirable means of dispute resolution than adjudication, were complexity, cost, delay and uncertainty.

ADR

The Multi-Door Courthouse

By my definition of ADR, which includes any form of consensual dispute resolution, ADR is not new. What has emerged over the last 30 years or so, however, are techniques and processes specifically designed to encourage the achievement of consensus including, most significantly, mediation, and the last 20 years or so has seen much greater resort to those processes. It seems fairly clear that the impetus for the development of these techniques and processes was the dissatisfaction with the civil justice system to which I

²³ Presented at the annual convention of the American Bar Association in 1906.

²⁴ Woolf, MR, *Access to Justice Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996).

have referred. It is no coincidence that the expression 'multi-door courthouse' appears to have originated from a paper given by Professor Frank Sander of Harvard University in 1976 at a conference marking the 70th anniversary of the delivery of Roscoe Pound's paper on the causes of dissatisfaction with the justice system.²⁵ The expression 'multi-door courthouse' has, however, generated its own criticisms, to which I will return.

The ADR Zealots v The Adjudication Romantics

Some commentators argue that the development of ADR as a form of opposition to adjudication has infected the character of its adherents. Professor Genn has described the phenomenon in these terms:²⁶

Both the ideology and practice of mediation can encourage a zealot-like adherence among recent converts - perhaps people weary of adversarialism. New recruits to mediation often appear as shiny-eyed evangelists for whom litigation and adjudication are horrors not to be contemplated, while mediation offers a nirvana-like vision of the world rid of conflict, with only peace. For passionate adherents, there is no value in judicial determination, there are no legal rights, only clashing interests and problems to be solved.

Battle lines appear to have been drawn between those who regard ADR and adjudication as competing ideologies. Those who favour adjudication are disparaged as 'adjudication romantics'. Those wounded by this epithet counter with an assertion that the zealous proselytisation of ADR risks not only injustice, but the undermining of the courts and the rule of law. With some trepidation, I will now enter this fray.

²⁵ Sander, F, *Varieties of Dispute Processing* in Levin and Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future* (1979).

²⁶ Genn, HG, *Judging Civil Justice* (2010)
<https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/hamlyntrust/Genn_judging_civil_justice.pdf> (accessed 15 February 2018)
20.

One of the earliest critics of ADR was Professor Fiss in the 1984 article to which I have already referred.²⁷ One of the criticisms raised by Professor Fiss in that article was that the promotion of ADR at the expense of adjudication treats civil courts as if their prime, or perhaps only, function is to resolve the disputes that come before them, thereby ignoring or radically depreciating the many public values flowing from adjudication and to which I have already referred.

Courts are not Service Providers

This point was taken up by the Hon James Spigelman AC, during his term as Chief Justice of New South Wales. In a paper²⁸ in which he railed against the use of quantitative statistical performance indicators by executive government as a measure of the performance of courts, he disparaged the view that courts could be regarded as a service provider, providing services to litigants, in the same way as other agencies of government provide services to the public. In that context he wrote:

A court is not simply a publicly funded dispute resolution centre. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes - these are all public purposes served by the courts, even in the resolution of private disputes. An economist might call them 'externalities' They constitute, collectively, a core function of government.

The broader role of the courts is obviously true of the criminal law. But similar objectives, such as deterring conduct through a public process, are often served by civil justice. The constitutional role of the courts, particularly in the supervision of the exercise of public power which occurs in both criminal and civil courts, is likewise incapable of reduction to quantitative measurement.

²⁷ Fiss, OM, *Against Settlement* (1984) 93 *Yale LJ* 1073, 1089.

²⁸ Spigelman, JJ, *Judicial Accountability and Performance Indicators* (Speech delivered to the 1701 Conference, Vancouver, 10 May 2001).

The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances. This is a governmental function of a similar character to that provided by legislatures but which has no relevant parallel in many other spheres of public expenditure. Managerial techniques appropriate for one part of the public sector are not necessarily applicable to another.

The characteristic eloquence and vigour of these words would incline one to place the Hon Jim Spigelman AC within the leadership ranks of the 'adjudication romantics', a grouping in which he might well take some pride. However, it would be a mistake to infer that his endorsement of the important public values of adjudication supports an inference that he does not support the prolific use of ADR. It should be noted that former Chief Justice Spigelman was a member of the Council of Chief Justices of Australasia when, in April 1999, the Council approved a declaration of principles relating to court-annexed mediation.²⁹ The first two principles are in the following terms:

1. Mediation is an integral part of the court's adjudicative processes and the shadow of the court promotes resolution.
2. Mediation enables the parties to discuss their differences in a co-operative environment where they are encouraged but not pressured to settle so that cases that are likely to be resolved early in the process can be removed from the process as soon as possible.

No Real Dichotomy

Further, in 2007 then Chief Justice Spigelman AC observed:³⁰

Increasingly, in-house counsel in commercial firms and the clients themselves are conscious of the cost and time benefits of successful

²⁹ Council of Chief Justices of Australia and New Zealand, *Position Paper and Declaration of Principle on Court-Annexed Mediation* (1999).

³⁰ Spigelman, JJ, *Commercial Litigation and Arbitration: New Challenges* (Speech delivered to the Indo Australian Legal Forum, New Delhi, 9 October 2007) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2007.pdf> (accessed 16 February 2018).

mediation. The universal approach of commercial judges who case manage such litigation is to encourage mediation.

This leads me to my point (at last, I hear you say). There is no dichotomy of even tension between the endorsement of the public, democratic and constitutional values of adjudication and the endorsement of ADR as a mechanism for the private resolution of disputes. Adjudication has only ever applied to a minute fraction of civil disputes, selected by the parties for their own reasons in the exercise of their autonomy. Nothing has changed. Those parties who cannot, or choose not to resolve their dispute any other way can and do resolve those disputes by obtaining a curial determination which carries all the public and normative values and virtues which have been identified. Effectively what ADR has done over the last 20 years or so is to provide much more sophisticated mechanisms, and more focused opportunities whereby parties can resolve their dispute other than by public adjudication if they choose to do so.

Court-Annexed ADR

My point is illustrated by a paper given by former Chief Justice French AC in which he joined with former Chief Justice Spigelman AC in rejecting the proposition that the court should be treated as simply one of a number of alternative dispute resolution techniques, thereby ignoring the distinctive character of judicial function. He wrote:³¹

The concept of court-annexed ADR is well established and worthy of development in a way that better integrates the various options and provides a principled basis for their connection to the judicial process. I must, however, express a reservation about the use of the 'multi-door courthouse'. It is the courts and only the courts which carry out the adjudication function involving the exercise of judicial power. Their special position as the third branch of government is made explicit in the

³¹ French, RS, *Perspectives on Court Annexed Alternative Dispute Resolution* (Speech delivered to the Law Council of Australia Multi-Door Symposium, Canberra, 27 July 2009) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchej/frenchej27july09.pdf>> (accessed 16 February 2018) 5.

Commonwealth Constitution and is a matter of convention in the States. Importantly, the courts are not to be seen simply as one species of provider among a number of providers of ADR services.

It is clear that the issue for his Honour was one of focus and definition. That is apparent from the balance of his Honour's paper, in which the virtues of various forms of ADR, including court-annexed ADR and specifically court-annexed mediation were extolled, and in which reference is made to his Honour's personal experiences of ADR while a judge of the Federal Court, including his participation in mediation (including ex-parte meetings with the parties) and early neutral evaluation. His Honour concluded:³²

In my opinion, the term 'multi-door courthouse' may have the connotation that behind each door is a different mechanism for achieving the same or similar outcomes. But there is no doubt that the door into a courtroom is rather unique.

In the Commonwealth Constitution it is the courts of the Commonwealth, including the High Court, and the courts of the States invested with federal jurisdiction which exercise federal judicial power. It is the third branch of government of which we speak. This is not just another provider of dispute resolution services in a market of different providers. The courthouse door is not just one door among many.

I support, and have long supported, the provision of court-annexed ADR services. It is not only an aid to the earlier resolution of litigation, but can also be used as a case management tool to help the parties reduce the matters in issue between them. Nevertheless, it is in the public interest that the constitutional function of the judiciary is not compromised in fact or as a matter of perception by blurring its boundaries with non-judicial services. So long as the clarity of the distinction is maintained, and appropriate quality controls, including evaluative and cost-benefit assessments undertaken, then ADR has much to offer in connection with the judicial process.

³² Ibid 19-20.

Chapter III of the Commonwealth Constitution

The High Court has repeatedly emphasised the implied separation of the judicial branch of government from the other branches of government under the Constitution of Australia, and the importance of maintaining the integrity of the judicial branch of government. These considerations invalidate any attempt by either the Commonwealth or State legislatures to confer upon the courts of the Commonwealth or the States or Territories a function which is inconsistent with their integrity as a repository of the judicial power of the Commonwealth. In this constitutional context, it might be asked whether the annexation of ADR to a court, or participation in ADR by a judge, is inconsistent with the judicial character of the court. Plainly, participation in a mediation would not involve the exercise of judicial power, but is it antithetical to the integrity of the court? As far as I am aware, this question has never been litigated. However, former Justice Michael Moore addressed this question extra-curially and concluded that there is no constitutional impediment to judges acting as mediators.³³ In a later paper, Iain Field came to a similar conclusion.³⁴

There is no practical difficulty in providing court-annexed ADR whilst maintaining the complete integrity of the important public adjudicative function of the court. Many courts in Australia and elsewhere have combined these functions for years without impinging upon the quality or integrity of the adjudicative function of the court. While constitutional principle requires us to steadfastly bear in mind the fundamentally different character of the adjudicative function, there is no practical reason why that function cannot co-exist with the provision of ADR facilities.

³³ Moore, MF, *Judges as Mediators: A Chapter III Prohibition on Accommodation?* (2003) 14 *ADRJ* 188.

³⁴ Field, I, *Judicial Mediation, the Judicial Process and Chapter 3 of the Constitution* (2011) 22 *ADR J* 72.

Judges as Mediators

There does not appear to have been any substantial opposition to court-annexed ADR in Australia. However, judicial involvement in ADR, particularly the question of judges acting as mediators has been more contentious. As the major issues in contention have been identified and developed in a number of published papers,³⁵ I propose only to refer to those papers and the major issues identified therein, and express some personal views on the subject.

The Protagonists

The former Chief Justice of New South Wales, Sir Laurence Street,³⁶ former Chief Justice Warren³⁷, Justice Andrew Greenwood³⁸ and the National Alternative Dispute Resolution Advisory Council (NADRAC)³⁹ have all published papers opposing the proposition that judges should act as mediators. On the other hand, the Victorian Department of Justice,⁴⁰ Justices Bruce DeBelle⁴¹ and Nicholas Hasluck⁴² and Professor Tania Sourdin⁴³ have all written in favour of judges participating as mediators. In the paper to which I have referred, and elsewhere, former Chief Justice

³⁵ See Brown, H, and Marriott, A, *ADR Principles and Practice* (3rd ed) 81 for a review of the issues and analysis of practices in Europe and Canada.

³⁶ Street, LW, *The Courts and Mediation: A Warning* (1991) 2 *ADRJ* 203; (1997) 71 *ALJ* 794.

³⁷ Warren, ML, *Should judges be mediators?* (2010) 21 *ADRJ* 77.

³⁸ Greenwood, AP, *ADR Processes and Their Role in Consensus Building* (2010) 21 *ADRJ* 11.

³⁹ NADRAC, *The Resolve to Resolve - Embracing ADR to Improve Access to Justice in the Federal Jurisdiction: A Report to the Attorney-General* (2009) <<https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/the-resolve-to-resolve-embracing-adr-improve-access-to-justice-september2009.pdf>> (accessed 3 March 2018).

NADRAC was the ADR advisor to the Attorney-General from 1995-2011 and published extensively during that time. NADRAC has since been abolished, and has been largely replaced by the Australian Dispute Resolution Advisory Service.

⁴⁰ Victorian Department of Justice, *Attorney-General's Justice Statement 2: The Next Chapter* (2008).

⁴¹ DeBelle, BM, *Should Judges act as Mediators?* (Speech delivered to the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1-3 June 2007).

⁴² Hasluck, NP, *Should Judges be Mediators?* (Speech delivered to the Supreme and Federal Court Judges' Conference, Canberra, 27 January 2010).

⁴³ Sourdin, T, *Five Reasons why Judges Should Conduct Settlement Conferences* (2011) 137 *Monash UL Rev* 145.

French AC has emphasised the importance of clearly maintaining the constitutional role of the judiciary. However, it is also clear from that paper that while on the Federal Court, his Honour participated in various forms of ADR and the judges of that court have from time to time acted as mediators. Given the different practices of different Australian courts, the Council of Chief Justices of Australia and New Zealand has had an 'each way' bet. In the *Guide to Judicial Conduct* (3rd ed, November 2017) published by the AIJA, reference is made to the possible incompatibility between the judicial role and service as a mediator, while at the same time reference is made to the practices adopted in a number of Australian courts which 'should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary'.⁴⁴

The Arguments Against Judge Mediators

The arguments advanced against judges acting as mediators include the risk of confusion to, and dilution of, the judicial role, which is said to be quintessentially the role of adjudication. It is also argued that the judicial resources available to any court are limited, and should be preserved for adjudication, by allocating mediation to be performed by registrars or associate judges. Reference is also made to the ready availability of mediators in the private market, from the bar and the ranks of the retired judiciary.

The Arguments in Favour of Judge Mediators

The main arguments advanced in favour of judges acting as mediators include the increased likelihood of settlement because of the beneficial effect of the gravitas of the judge in dealing not only with the parties but also with their lawyers. It is also suggested that judges as mediators have a

⁴⁴ Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (3rd ed, AIJA, November 2017) [4.9].

greater capacity to reduce the likelihood of inequality in the bargaining position of the parties resulting in an oppressive or unfair settlement, and can ensure that any settlement arrived at is the product of informed consent freely given - thus addressing some of the concerns enunciated by Professor Murray and to which I have earlier referred. More practical arguments include the capacity of a judge to immediately make binding orders giving effect to the settlement, at the conclusion of the mediation, reducing the risk that one or other of the parties might change their mind before orders are made. Proponents of judges acting as mediators point to the practices relating to recusal adopted by those courts in which judges act in this capacity, and the fact that judges acting in this capacity in a number of significant Australian courts over many years now does not appear to have led to any apparent dilution in the judicial role, or disrespect for the judicial function or the judiciary generally.

A Personal View

For what it is worth, I find the arguments in favour of judges acting as mediators more persuasive. Perhaps that view is influenced by practical experience in our court in which judges (including me) have acted in this capacity for many years now, without any apparent detriment, and with evident benefit. The vast majority of our mediations are conducted by experienced and well qualified registrars who are highly respected as mediators within the legal profession. Because of the value which we place upon limited judicial resources, judges only act as mediators in exceptional cases - perhaps 10 to 20 cases each year. They are the cases in which the benefits to the parties and the court from a settlement are likely to be the greatest because of the length and complexity of the case. Experience has shown that deployment of our judicial resources in this way has increased the prospects of those cases settling, providing substantial dividends for the parties and the court. Our experience has been such that we have decided to

increase the number of judges trained as mediators to improve our capacity to provide this service.

Trial Facilitation

It should also be remembered that settlement is not the only objective of mediation. If a settlement cannot be reached, mediation can play an important role in facilitating and expediting a trial by narrowing the contentious issues of fact and law, and by achieving agreement on the procedures to be followed at trial. On these issues, the forensic skill and experience of a judge is invaluable.

Arbitrators as Mediators

Similar issues arise when consideration is given to an arbitrator or arbitrators who have been appointed to adjudicate upon a dispute performing a mediation role during the course of the reference. One difference arises from the fact that in the event of recusal, another arbitrator or arbitral panel is not so easily found as in a court with many alternative judges. Nevertheless, it will be apparent from the views I have already expressed in relation to judges acting as mediators that I share the view expressed by a number of others, including Arthur Marriott QC,⁴⁵ that arbitrators should be encouraged to perform this role, ideally in such a way as to enable the arbitrator to continue to serve if the mediation does not bring about a settlement. In my view, it is unfortunate that the uniform legislation which governs international and domestic commercial arbitration in Australia does not strengthen the capacity of arbitrators to remain on the reference notwithstanding their participation in mediation or other forms of ADR.

⁴⁵ Marriott, AL, *Breaking the Dispute Resolution Deadlock: Civil Litigation and ADR in the United Kingdom and Beyond* (2006) 17 ADRJ 157.

Peaceful Co-Existence

The public utility of the peaceful co-existence of curial adjudication and ADR is pithily expressed in the following passage from an article by Mr Les Arthur:⁴⁶

Notwithstanding improvements to the delivery of adjudication, the outcome of litigation in many cases will be uncertain, more time consuming and more expensive than settlement. For this reason, judicial emphasis on early settlement simply reflects party aversion to litigation risk while at the same time preserving judicial resources for cases which require intensive pre-trial judicial management.

To the same effect is the following observation by Justice Andrew Greenwood:⁴⁷

My own view is that there is a natural balance between the role of the courts, the 'institution' of litigation and the many structured ADR paths to resolving a conflict between citizens which might be elevated to a dispute or, ultimately, to an actual piece of litigation.

There is a natural progression in the evolution of disputes. Many disputes can and should be settled early, quickly and efficiently without recourse to court processes. Other disputes may commence their lives with a formal application to the court and a statement of the material facts supporting a particular claim. Steps can be taken to ensure that the issues in such matters are properly framed and key documents exchanged so that the ADR process has the best chance of bringing about a solution.

The Hon Geoff Davies AO has provided valuable insight into these issues in a number of papers. He proposes that while we should not abandon attempts to make court adjudication simpler, quicker and cheaper subject, of course, to the process providing a just outcome, we should also provide, alongside the existing system of adjudication, an alternative and simpler system by which parties may reach an informed early resolution of their

⁴⁶ Arthur, L, *Does Case Management Undermine the Rule of Law in the Pursuit of Access to Justice?* (2011) 20(4) *JJA* 240, 241.

⁴⁷ Greenwood, AP, *ADR Processes and Their Role in Consensus Building* (2010) 21 *ADRJ* 11, 15.

dispute. He has made a number of recommendations as to the way in which such a system can be provided.⁴⁸

The Symbiosis of ADR and Adjudication

The dichotomisation of the world into ADR zealots and adjudication romantics ignores the symbiosis of ADR and adjudication. Each depends on the other to a significant extent. Parties agree to settle their disputes, or submit to arbitration because any agreement which they reach, or the arbitral award which they receive can be enforced using the coercive powers of the courts. Courts increasingly rely upon ADR processes not only to resolve disputes entirely, but also to narrow the issues which require adjudication. The prospect of an expensive, time-consuming and uncertain adjudicative process provides a substantial incentive for consensual resolution through ADR.

Management Challenges

It is clear that ADR and adjudication are both here to stay. What are the management challenges which we must address if they are to co-exist harmoniously and provide an effective and economically efficient scheme for the resolution of civil disputes?

Maintaining the Integrity of Each

The Integrity of Curial Adjudication

I have already referred to a number of observations by eminent authors which address the need to maintain the integrity of curial adjudication because of its constitutional dimension. However, neither former Chief Justice French AC, nor the Hon Jim Spigelman AC propose that this means that curial adjudication has to be kept entirely separate from court-annexed ADR processes. The problem which I have with the metaphor of the 'multi-

⁴⁸ Davies, GL, *Can Dispute Resolution be Made Generally Available?* (2010) 12 *Otago L Rev* 305.

door courthouse' is that it connotes that the parties to a dispute have to choose which of a number of alternative doors they will go through. The metaphor carries the connotation that they can only choose one door, whereas the reality is that most parties want a combination of approaches - a blend of mediation and adjudication, for example, or perhaps a blend of mediation and arbitration. This is why I prefer the terminology suggested by Professor Sourdin, of a 'multi-option courthouse'.⁴⁹

The management issues arising from the provision of a blended or hybrid approach to dispute resolution are, I suggest, quite easily resolved. Many Australian courts have considerable practical experience of providing court-annexed ADR. Tensions are easily managed by any judicial officer who has participated in ADR recusing himself or herself from any future role in the adjudicative process.

The Integrity of ADR

As we have seen, much has been said by those in high authority about the need to preserve the integrity of the adjudication process. Outside the realm inhabited by ADR practitioners, much less has been said about the need to protect the integrity of ADR procedures from the detrimental impact of the adjudicative process. Any engagement in an adversarial process is fundamentally antithetical to the consensus which most ADR processes (other than arbitration) try to build. Adjudicative processes usually encourage the making of allegations and counter-allegations which are inherently more likely to have the effect of pushing parties further apart than closer together. The resources which the parties dissipate in curial processes such as pleading, disclosure of documents, etc, are resources which are not available to be brought to the table during settlement

⁴⁹ Sourdin, T, *Five Reasons why Judges Should Conduct Settlement Conferences* (2011) 137 *Monash UL Rev* 145, 147; Sourdin, T, *The Role of Courts in the New Justice System* (2015) 7(11) *Arbitration Law Review Yearbook on Arbitration and Mediation*, 15.

discussions. Rather, they are sunk costs which the parties may seek to recover as part of their settlement, making settlement more difficult. In a context in which the overwhelming majority of civil cases commenced in our courts will be resolved by ADR rather than adjudication, it seems to me that processing all cases down an adjudicative track poses a much greater threat to the integrity and efficacy of ADR than ADR has ever posed to the integrity and efficacy of adjudication.

Mediation-Only Programmes Offered by Courts

As far as I am aware, no Australian court has yet gone so far as the Delaware Court of Chancery, which offers a mediation-only programme.⁵⁰ Under that programme, the parties to a dispute may lodge a petition seeking mediation only, paying the requisite fee. They may request a particular member of the Court to act as mediator. The programme contains provisions with respect to confidentiality, and prohibits any member of the court participating in the mediation from any subsequent role in adjudication of the dispute. All parties must consent, and at least one party must be a business entity, and the dispute must be a business or technology dispute with an amount in controversy exceeding \$1,000,000. As I have noted earlier, the Hon Geoff Davies AO has proposed that we should offer alongside curial adjudication, an alternative simpler system by which parties may reach an informed early resolution of their disputes.⁵¹

On the face of it, a policy of only providing publicly-funded ADR processes to those who have initiated the process of adjudication seems a little strange, because of the tension between ADR and adversarial adjudication

⁵⁰ Court of Chancery of the State of Delaware, *Mediation Guideline Pamphlet* (Rev 4, 2011) <<https://courts.delaware.gov/forms/download.aspx?id=15478>> (accessed 16 February 2018). The programme is also described in Legg, M, *Mediation of Complex Commercial Disputes Prior to Litigation: The Delaware Court of Chancery Approach* (2010) 21 *ADRJ* 44.

⁵¹ Davies GL, *Can Dispute Resolution be made Generally Available?* (2010) 12 *Otago L Rev* 305, 306.

which I will shortly address.⁵² While it is conceivable that issues might arise under Chapter III of the Constitution of Australia if courts were to offer mediation only programmes, the possibility of offering such programmes appears to me to merit further consideration.

Management of the Hybrid

Most cases in Australia's civil courts will not be managed exclusively on the basis that they will be adjudicated or on the basis of ADR only, but will be managed as hybrids. We know that only a tiny fraction of these cases will proceed to contested adjudication. The statistical reality is that a civil trial is a last resort, only to be undertaken if all else has failed. Many Australian courts recognise this reality, by requiring all cases to undergo mediation before they will be offered a trial. This has been the practice in the Supreme Court of Western Australia for more than 20 years. However, notwithstanding the implicit acknowledgement of this statistical reality, most courts operate on the basis that all cases will be prepared on the assumption that they are proceeding to trial, when in fact only a tiny fraction will. This seems to me to pose perhaps the greatest management challenge for the hybrid system of civil dispute resolution which has evolved over the last 20 years or so. How do we better identify the 2% of cases that are likely to require adjudication, so that the parties to the 98% of cases that do not require adjudication do not spend unnecessary time or resources in an adversarial environment which is antithetical to the consensus which will provide the most common means for the resolution of their dispute? How do we effectively manage cases in which we are encouraging parties to make the concessions which are an essential component of the ADR process in a context in which they wish to maintain a strong forensic posture against the contingency that they might eventually

⁵² I do not overlook the fact that many neighbourhood law centres and legal aid authorities offer publicly-funded mediation services. However, they are generally only available to those whose means are so limited as to preclude access to the court-based systems.

participate in an adversarial trial? What is the proper sequence of procedures - should the early focus be entirely upon ADR with adversarial processes only being employed after ADR has been exhausted, or are there some adversarial processes, such as those associated with issue identification, disclosure of documents and the exchange of expert evidence that are conducive to, and should ordinarily precede, ADR?

Bespoke Solutions

These are difficult questions, but their successful resolution is critical to the efficiency of the civil work of contemporary Australian courts. Perhaps the only thing that can confidently be said in answer to these questions is that the most appropriate approach in any particular case will depend critically upon the particular circumstances of that case, and the circumstances of the parties to the case. Civil litigation has now evolved to the point where mechanical procedures and processes are undertaken in a sequence, and according to a timetable prescribed in rules of court of the kind reflected in the White Book - writ followed by pleadings, followed by particulars of pleadings, followed by disclosure of documents etc - are well past their use-by date. In today's hybrid environment, one size does not fit all and a bespoke solution is required for virtually every case.

Timing is Everything

This is not to say that lessons learnt in dealing with particular categories of case cannot be applied to cases coming within that category. For example, in our Court we have learnt that in cases involving a claim that a testator has made inadequate provision for a member or members of his or her family, it is highly desirable to invoke ADR processes sooner rather than later. There are only three real issues in those cases - the size of the estate, the financial needs of the claimant, and the financial needs of other members of the family with a legitimate claim to the testator's bounty. However, if allowed,

the parties will inevitably file lengthy affidavits airing long smouldering family grievances which have little or nothing to do with the case, but which make settlement difficult because the case is then seen as an opportunity for public vindication. So in those cases, our general approach is to endeavour to establish the financial position of the estate and of the various claimants on the estate, and then send the matter straight to mediation.

Another example is provided by defamation cases. At least in cases of defamation in the public media, prompt retraction and apology is very often a critical factor in achieving settlement. Retraction and apology months or years after the insult is of little interest or value to a wounded plaintiff. If retraction and apology does not happen quickly, the case is very likely to turn into a long drawn out battle over damages. So, generally speaking, these cases are suitable for very prompt ADR - ideally within weeks, better still days, of proceedings being commenced.

ADR is a Process not an Event

ADR should be seen as a process, not an event. Decisions with respect to the timing of that process can have a profound effect upon the costs borne by the parties and the resources deployed by the court. Starting ADR too soon may mean that costs are incurred at a time when there is little prospect of consensual resolution. But starting ADR later carries the risk that the parties may incur substantial costs preparing for a trial, which could have been avoided by starting ADR earlier. The challenge lies in assessing just when a case is 'ripe' for ADR.

Striking the right sequence and balance of ADR and adjudicative processes is difficult. It is not a topic upon which legal practitioners or judicial officers have received any training other than that derived from their experience. Because of the importance of these issues to the efficiency of

the civil justice system, they seem to me to be issues ripe for scientific study and evaluation, from which principles may emerge which can be the subject of training for lawyers and judges. I will return to the issue of the need for greater information about why and when cases settle shortly.

The Views of the Parties

In the absence of 'mediation-only' programmes of the kind offered in Delaware, parties who want access to publicly-funded mediation services in Australia must, generally speaking, invoke the jurisdiction of the court. So, it seems likely that within the civil cases pending in any court there will be a group in which the primary motivation of the parties is to obtain the benefit of court-annexed mediation, and another group in which neither party has that objective, and both want their day in court. The management issue which this raises is the question of the weight which courts should give to the views of the parties in making case management decisions with respect to ADR and adjudication.

As I have already noted, many courts, including the Court on which I serve, have long-established policies of requiring parties to go to mediation whatever be their view on the subject. That is because experience tends to show that settlement rates in mediation are not significantly lower in cases in which parties volubly assert prior to mediation that they have no wish to engage in the process because it is futile. However, given the fundamental principle of autonomy which underpins the entire structure of the system, do practical considerations of this kind justify a court in overriding the stated position of the parties? Alternatively, are the courts justified in this practical approach given that no settlement can occur without the consent of all parties - so that it remains open to any party to insist upon his or her day in court? At a more detailed level, to what extent should a court give weight to the views of one party as to the most propitious time for ADR, or

the essential procedural steps which must be taken before ADR is likely to be successful?

None of these questions is easily resolved. However, it seems clear that their resolution would be enhanced by greater information and learning on the factors that contribute to a successful mediation, which is the next issue I wish to address.

Why and When Do Cases Settle?

In the hybrid system which now exists in most Australian civil courts, in order to make informed and effective case management decisions, it is essential for the case manager to have a good understanding of the factors and considerations that induce parties to settle their differences, and as to the time at which parties are most likely to resolve their differences. There are other good reasons for knowing these things, not least in importance being that without knowing why parties settle, we are unable to make an assessment of whether our systems are working effectively. Professor Murray has put this well:⁵³

Mediated settlements may also reflect the realities of unequal economic bargaining power and the cost and time burdens of litigation rather than the parties' mutual evaluation of the merits of their respective positions and interests. The increasing proportion of cases that settle, often facilitated by mediation, says little about the objective quality of the settlements. Resolutions embodied in agreements based on economic exhaustion, inability reasonably to predict or reach a judicial outcome, or risk aversion are not economically efficient and do not foster confidence in the norms or processes of law.

Put more bluntly, court administrators and policy makers generally tend to view high settlement rates following mediation as a measure of success. However, if those settlements are being achieved because the alternative of

⁵³ Murray, PL, *The Privatisation of Civil Justice* (2011) 85(8) *ALJ* 490, 496.

curial adjudication is too horrible to contemplate, it is a sign of failure rather than success.

The Need for Data

I would repeat the *cri de coeur* made by many others for greater data on the subject of the factors that induce a settlement, and which affect the timing of settlement. At present, the information available is essentially anecdotal or experiential. Efficient allocation of limited judicial resources necessarily means that even in those courts in which judges mediate, they will do so infrequently. It follows that judges as case managers will have little or no contemporary experience of the factors that will contribute to a settlement or influence its timing when making important case management decisions with respect to the sequence of ADR within the overall curial process. Uninformed decision-making is an anathema to the judicial process. However, our lack of knowledge of the factors that most significantly influence settlements, necessarily results in critical case management decisions being made based more on intuition than on knowledge.

The Spread of Arbitration

As Professor Murray points out, in the US arbitration clauses are included in a wide variety of consumer contracts which are presented to customers on a 'take it or leave it basis', with the result that arbitration has become the dominant means of dispute resolution in significant areas of commercial activity in that country, including disputes between securities broker dealers and their customers, employment disputes within the securities industry, disputes between credit card issuers and their customers and disputes between large utilities and their customers.⁵⁴ In these commercial areas, whatever might be said about the normative and constitutional dimension of public adjudication, the parties, or at least the dominant economic party has

⁵⁴ Murray, PL, *The Privatisation of Civil Justice* (2011) 85(8) ALJ 490, 493.

chosen to eschew those values in favour of informality and confidentiality. Although Australian data on this topic is hard to find, I get the strong sense that despite significant improvements in the efficiency of court procedures, many of which now closely resemble procedures adopted in commercial arbitration, commercial arbitration is becoming increasingly popular. This trend does not appear to be daunted by the fact that the parties to an arbitration have to pay all the costs of their arbitrator or arbitral panel, and all costs associated with the hearing and its infrastructure - costs which in a court would be partially subsidised by public funds.

Why Arbitrate?

Unlike other forms of ADR, arbitration is essentially private adjudication. It does not rely upon the consensus of the parties, and if not properly managed, can have some of the characteristics of curial adjudication, including expense, delay and uncertainty of outcome. Why then are parties increasingly moving towards arbitration and away from the court system?

In the absence of data on this important question, one can only speculate. In the area of international commercial arbitration, the greater enforceability of an arbitral award outside the jurisdiction in which the determination takes place is an obvious attraction. It seems likely that the confidentiality of arbitrations is seen as a significant benefit to both domestic and international arbitrations. If that is so, it shows that the parties to commercial disputes would not place the same value on the normative aspects of public adjudication as those who contemplate the theory of different systems of dispute resolution.

Court-referred Alternative Dispute Resolution

Late last year the Australasian Institute of Judicial Administration published the results of a study into judicial perceptions of court-referred alternative

dispute resolution in Australia.⁵⁵ The study is based on questionnaire and interview data provided by judges in various courts in New South Wales, the Federal Court and the Federal Circuit Court. Because the approaches taken to court-referred ADR in general, and the provision of court-based ADR in particular, vary as between the Australian jurisdictions, I do not suggest that the survey is representative of the attitudes of the Australian judiciary as a whole. Further, because the judges surveyed self-selected, there is likely to be a positive bias in their expressed attitude towards ADR. Nevertheless, the survey provides interesting insight into judicial attitudes towards ADR.

The overall result suggested that the judiciary has a positive view of court-referred ADR and actively engage with it, despite relatively low levels of formal ADR training. The survey also showed that the nature of ADR practice, and the procedures relating to the question of whether any particular matter would be referred to ADR, vary significantly as between courts and as between different judicial officers. The report also identified inconsistency in relation to the categories of case in which ADR was thought to be desirable - judges reported reluctance to consider ADR in appeals and criminal matters, whereas magistrates reported strong acceptance of ADR practices in criminal proceedings.

Types and Styles of Mediation

Clearly the dominant form of ADR in Australia is mediation. One of the great advantages of mediation is its procedural flexibility. Courts are doing their best to provide bespoke procedures for civil disputes - that is, tailor-made procedures fashioned to the needs and circumstances of the particular case, through case management. However, curial flexibility will always be

⁵⁵ McWilliam, N, Grey, A, Zhang, H, Yeung, T, and Padhi D, *Court-referred Alternative Dispute Resolution: Perceptions of Members of the Judiciary* (Australasian Institute of Judicial Administration, 2017).

restrained by fundamental obligations like procedural fairness, public access and transparency, and by rules of court. By contrast, mediation is not nearly so constrained and can be modified to suit the nature of the dispute, and the interests and personalities of the parties.

There is an almost infinite spectrum of styles of mediation and it would be fatuous to suggest that there are a limited number of categories of mediation process. However, there is regular debate among ADR practitioners as to styles and processes, often utilising some well-known categories, the virtue of which is debated.

So, at the less interventionist end of the spectrum there is the form of mediation often described as 'facilitative' where the focus is upon enabling the parties to arrive at their own consensus with respect to the most efficacious way of resolving their dispute. A little further up the spectrum is what I might describe as the 'guided expectation' style of mediation, in which the mediator endeavours to gently and subtly guide the expectations of the parties towards more moderate positions with a view to eventually arriving at a middle ground which is acceptable to all parties.

At the most interventionist end of the spectrum I have been describing is what I would describe as the 'quasi-adjudicative' style of mediation, in which the mediator invites the legal representatives of the parties to present arguments on the merits of their respective clients' cases, after which the mediator expresses a firm view with respect to the relative merits and demerits of each of those cases. This is, in effect, a much blunter way of altering party expectations.

Some mediators are, by reason of their personalities, more inclined to variants of one or other of these forms of mediation. Sometimes there is debate between practitioners engaged in mediation as to which of the range of forms to which I have referred is to be preferred. That debate seems to

me, with respect, to miss the point I have already made, which is that one of the great advantages of mediation is its capacity to flexibly adapt to the circumstances of the case, the personalities of the clients and their expectations. So, for me, the question is not which of these forms of mediation is preferable per se, but rather, which of these and other forms of mediation is preferable in the circumstances of the particular case.

Caucusing and Shuttle Diplomacy

There is also debate between mediation practitioners concerning the extent to which parties should be kept together during mediation, or alternatively allowed to separate with the mediator moving between them, exchanging views and perhaps offers in the style of shuttle diplomacy made famous by Secretary of State Kissinger during one of the many crises in the Middle East.

In the earlier days of mediation in Australia, usual practice involved the mediator inviting the legal representatives of each party to present their positions, after which the parties would move to their separate break-out rooms, perhaps never reconvening, with all future communications being conducted through the mediator. In some extreme cases, perhaps due to antipathy between the parties, they would never meet, and the entire mediation would be conducted with parties in their separate rooms.

More recently, at the other end of the spectrum is a school of thought to the effect that parties should never be allowed to separate, because separation is antithetical to the process of building consensus and encourages the adoption of partisan and parochial positions.

During a mediation programme which I undertook at Harvard some years ago, I was privileged to observe a vigorous debate between proponents of radically different approaches to this issue. Replication of the arguments presented is well beyond the scope of this paper. However, for what it is

worth, after hearing the debate, perhaps predictably, I concluded that neither of the extreme positions was universally appropriate, and that the proper balance between the maintenance of a meeting of the entire group, and departure into separate break-out rooms was to be struck by the mediator gauging the sensitivities of the parties in any particular case, and assessing the course that would best suit the advancement of the mediation. However, generally speaking, my default position, as a mediator, is that as much of the discussion as possible should take place in joint session, and that parties should only move into separate rooms once all avenues for joint discussion have been exhausted.

Training

Earlier in this paper I have addressed the significant differences between ADR and adjudication. In many respects those differences are fundamental. Although law schools now commonly offer courses in ADR, they are usually confined to one unit in a degree course which is predominantly focused upon adjudicative processes and outcomes. Similarly, although legal practitioners now have much greater experience of ADR processes, the focus of their daily work tends to be more upon preparation for trial rather than mediation. The skill sets required of a litigation lawyer, which involve enthusiastically and vigorously presenting his or her client's case in the most favourable possible light, taking any point which offers forensic advantage, are quite different in character to the consensus building skills required of a good mediation practitioner. Further, as judges are commonly selected from the ranks of experienced advocates, they may not be well suited, either by training or personality, to the different role of mediator.

Consistently with my theme of the ADR 'misnomer', the contemporary significance of ADR suggests the need for differing emphasis in the training of law students, the continuing professional development provided to legal practitioners, and to judicial officers. Even in courts in which judicial

officers do not perform any mediation role, they will usually be required to determine the time at which mediation should take place which is, as I have mentioned, a very important decision, which should ideally be informed by a sound knowledge of mediation practice and principle.

ADR and Information Technology

Information technology (IT) has transformed many aspects of our daily lives. Dispute resolution mechanisms have not been isolated from its impact or effects. Last week the Supreme Court of Western Australia introduced mandatory e-filing of documents,⁵⁶ which is a significant step down the path to a paperless court.

The impact of IT upon ADR has been, and will continue to be, no less profound. Professor Sourdin, who has written extensively in this area, has observed there are three ways in which IT is reshaping ADR, characterised by the role played by the technology.⁵⁷ First, 'supportive technologies' can assist to inform, support and advise people about ADR. Second, 'replacement technologies' can replace all or part of the activities in the ADR process that were previously undertaken by humans.⁵⁸ Third, 'disruptive technologies' can provide for new forms of ADR.⁵⁹

Supportive Technologies

Supportive technologies include the many websites that now exist which provide information with respect to ADR, or which enable people to locate an ADR practitioner. So, for example, before its abolition, NADRAC published on its website a document entitled *Your Guide to Dispute Resolution* which provided a range of information with respect to ADR

⁵⁶ The insertion of O 67A in *Rules of the Supreme Court 1971* (WA) on 1 March 2018, via the *Supreme Court Amendment Rules 2018* (WA), provides for mandatory e-filing.

⁵⁷ Sourdin, T, *Alternative Dispute Resolution* (5th ed, Thomson Reuters, 2016) 383.

⁵⁸ *Ibid* 391.

⁵⁹ *Ibid* 399.

processes. The website of the Mediator Standards Board⁶⁰ provides information with respect to mediator accreditation, and the Family Relationships⁶¹ website provides information for those seeking information and support managing relationship issues and family breakdowns.

Smartphones and tablets are increasingly the medium of choice for internet users, replacing desktops and laptops, particularly in the cohort of younger internet users. Apps suited for smartphones and tablets have emerged with a variety of legal applications,⁶² and can no doubt be developed to support ADR.⁶³ Public expectations, especially amongst younger people, have developed to the point where people expect to be able to access current information and services through the use of apps on mobile phones and tablets, and ADR providers will be increasingly required to fulfil those expectations.⁶⁴

Replacement Technologies

'Replacement technologies' which can replace all or part of the activities previously undertaken by humans in connection with ADR processes, and are often referred to as 'online dispute resolution' (**ODR**) processes.

There are many examples of ODR, and systems proliferate at a rate generally consistent with the proliferation of IT generally. ODR can be found in a variety of different sectors, including both government and private sectors utilising different ADR mechanisms, such as Ombudsmen.

⁶⁰ Mediator Standards Board, <<https://msb.org.au/>> (accessed 2 March 2018).

⁶¹ Australian Government, *Family Relationships Online – Helping Families Build Better Relationships* (2018) <<http://www.familyrelationships.gov.au/Pages/default.aspx>> (accessed 2 March 2018).

⁶² For example, Legal Aid in both Victoria and South Australia have apps.

⁶³ Sourdin, T, *Alternative Dispute Resolution* (5th ed, Thomson Reuters, 2016) 391.

⁶⁴ As noted in Standing Council on Law and Justice, *Harnessing the Benefits of Technology to Improve Access to Justice* (Analysis paper, 2013); Sourdin, T, *Alternative Dispute Resolution* (5th ed, Thomson Reuters, 2016) 390.

The Telecommunication Industry Ombudsman and the Financial Ombudsman Service both actively employ ODR.⁶⁵

ODR Providers

Perhaps predictably, online service providers have been prominent in the development of online ODR systems. eBay and PayPal online systems deal with approximately 60,000,000 matters per year.⁶⁶

There are also dedicated ODR providers. Modria.com, which is tailored to the facilitation of online commercial dispute resolutions claims to have dealt with over 400,000,000 consumer disputes.⁶⁷ Another provider, Mediate.com, claims an average of 23,000 daily visitor sessions. It was recognised by the American Bar Association as the winner of the 2010 Institutional Problem Solver of the Year Award.⁶⁸ Other sites include OnlineDisputeResolution.com which enables participants to 'move their resolution forward on any day, at any time'.⁶⁹ Other service providers, such as Smartsettle, operate as a hybrid form of ODR, using visual double blind bidding processes to deal with disputes, utilising systems described as 'optimisation algorithms' that 'create a representation of party preferences that can be used to generate packages (bundled positions on issues)'.⁷⁰

Cybersettle utilises similar processes, augmented by a telephone facilitation service. The algorithms which are utilised develop rounds of settlement offers from each party which might result in their 'blind' bids coinciding, in which case the system will advise the parties they have agreed.⁷¹

⁶⁵ Lancy, S, *ADR and Technology* (2016) 27 *ADRJ* 168, 170.

⁶⁶ Sourdin, T, *Alternative Dispute Resolution* (5th ed, Thomson Reuters, 2016) 393.

⁶⁷ Lancy, S, *ADR and Technology* (2016) 27 *ADRJ* 168, 170.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* 170.

⁷⁰ Sourdin, T, *Alternative Dispute Resolution* (5th ed, Thomson Reuters, 2016) 409.

⁷¹ *Ibid* 410.

ODR in International Retail Trade

Recent years have seen the prolific development of ODR platforms, spanning countries and legal systems, intended for the resolution of consumer disputes arising from the growth of international retail trade, fuelled by the internet. In February 2016, the European Commission announced an online platform to help consumers and traders solve online disputes in respect of purchases made online. The system has four steps. Firstly, the consumer fills out an online complaint and submits it. The second step involves the trader proposing a specific ADR provider to the consumer. Once the ADR provider has been agreed, the third step involves the ODR platform automatically transferring the complaint to that provider, who then undertakes the fourth step of attempting to resolve the dispute within the target time of 90 days.⁷² As at February 2016, approximately 117 ADR bodies from 17 European Union (EU) member states were connected to the new online platform.⁷³ The EU has also published regulations relating to consumer online dispute resolution systems which member states are obliged to transpose into domestic law.⁷⁴

UNCITRAL Notes on ODR

The development of ODR encouraged the United Nations Commission on International Trade Law (UNCITRAL) to establish a working group which published *Technical Notes on Online Dispute Resolution* (UNCITRAL Notes) in April 2017. The UNCITRAL Notes are intended to foster the development of ODR and assist ODR administrators, ODR platform providers, neutrals and parties to ODR proceedings.⁷⁵ The UNCITRAL

⁷² Lancy, S, *ADR and Technology* (2016) 27 *ADRJ* 168, 176.

⁷³ *Ibid.*

⁷⁴ See the discussion in Sourdin, T, *Alternative Dispute Resolution* (5th ed, Thomson Reuters, 2016) 393-394.

⁷⁵ United Nations Commission on International Trade Law, *UNCITRAL Technical Notes on Online Dispute Resolution* (April 2017) <http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf> (accessed 2 March 2018) [3]-[4].

Notes are only intended for disputes relating to cross-border low-value sales or service contracts concluded using electronic communications.⁷⁶ The UNCITRAL Notes include aspirational standards - for example, paragraph 52 states that it is desirable that ODR be subject to the same confidentiality and due process standards as apply to offline dispute resolution. However, the UNCITRAL Notes are not binding and, as I have already observed, only apply to a limited range of low-value cross-border internet transactions. Given the likely development of ODR systems in Australia, a question arises as to whether it is desirable to promulgate minimum standards or regulations relating to the operation of such systems.

Court and Tribunal Annexed ODR

ODR systems have been developed for application in court and tribunal annexed ADR systems in other jurisdictions. For example, in Canada, the Civil Resolution Tribunal (CRT) uses a four-stage process to resolve low value claims and strata title disputes. The first stage employs a 'Solution Explorer' system which uses interactive questions and answers to provide tailored legal information as well as tools (such as template letters) to facilitate consensual resolution of the dispute. If resolution is not achieved, the second stage of the process involves the 'Solution Explorer' providing the documents needed to commence a claim. The third stage involves another attempt at consensual resolution utilising facilitators for either online or in person ADR. If no agreement is reached, the fourth stage involves adjudication by a tribunal member based on documents submitted electronically or through a hearing via telephone or video conference.⁷⁷

⁷⁶ Ibid [5].

⁷⁷ Civil Resolution Tribunal < <https://civilresolutionbc.ca/about-the-crt/the-crt-team/> > (accessed 2 March 2018); see also Sir Terence Etherton, Master of the Rolls, *Lord Slynn Memorial Lecture* (14 June 2017) <<http://www.chba.org.uk/news/lord-slynn-memorial-lecture-2017>> (accessed 2 March 2018) 8-10.

The world's first online court has been proposed in the United Kingdom (UK). Following an extensive review of the structure of the civil courts of the UK, Lord Justice Briggs recommended the creation of what is currently styled as an 'Online Solutions Court' for claims up to £25,000.⁷⁸ As with the CRT system in Canada, the proposals involve processes which have a series of stages, which involve hybrid systems providing parties with information which they may need, case management, ODR, and in default of agreement, adjudication.

In the UK proposal, the first stage will be a largely automated interactive online process identifying the issues and guiding the litigant through an analysis of the grievance, producing a document which is, in effect, a simplified pleading or claim. The second stage of the process will involve case management by case officers, using either ODR or ADR utilising telephone or video processes. In default of agreement, the third phase will be adjudication by the court, either by video-link, telephone or on the electronically lodged papers.⁷⁹

Disruptive Technologies

To date, the greatest technological impact upon ADR has been in areas which Professor Sourdin described as supportive and replacement technologies. However, the development of artificial intelligence (AI) can be expected to introduce 'disruptive technologies' in the area of ADR, using algorithms, 'branching' and data searching technologies to create 'decision trees' thus emulating human intelligence.⁸⁰

⁷⁸ Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (27 July 2016) <<https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/>> (accessed 26 February 2018) 36-64.

⁷⁹ Sir Terence Etherton, Master of the Rolls, *Lord Slynn Memorial Lecture* (14 June 2017) <<http://www.chba.org.uk/news/lord-slynn-memorial-lecture-2017>> (accessed 2 March 2018) 8-10.

⁸⁰ Sourdin, T, *Alternative Dispute Resolution* (5th ed, Thomson Reuters, 2016) 399; Lancy, S, *ADR and Technology* (2016) 27 *ADRJ* 168, 177.

The development of AI within a legal framework has the capacity to provide significant information to parties for use in an ADR context very simply, cheaply and quickly. For example, a project conducted at La Trobe University by Professor Zeleznikow determined 94 factors relevant to the percentage allocation of property between former matrimonial partners and applied AI to assist in calculating the likely percentage division. A rule-based system known as 'Split-Up' developed from this research which has been trialled by judges and others in the Family Court of Australia.⁸¹ A more advanced approach, oriented at supporting negotiation in circumstances of family breakdown, is called 'Family Winner'.⁸²

It is easy to envisage AI systems being used to quickly identify a party's BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement) to enable faster negotiations and quicker resolutions in a conventional ADR setting.

ADR and Information Technology - Some Concerns

Concerns have been raised in relation to the development of ODR in a number of areas, including confidentiality, security, the expertise of those involved, and the accreditation of practitioners. These are areas in which the development of standards along the lines of those contained in the UNCITRAL Notes may be of assistance.

A number of criticisms and concerns have been expressly directed to court-annexed ODR, of the kind provided in the CRT or in the proposed Online Solutions Court in the UK. One such criticism is to the effect that court-annexed ODR will provide second-class justice to those wrongly

⁸¹ Sourdin, T, *Alternative Dispute Resolution* (5th ed, Thomson Reuters, 2016) 400.

⁸² Ibid.

viewed as having less important claims.⁸³ In response to that criticism, Lord Justice Briggs observed:⁸⁴

I suspect that the essence of the 'second class' criticism arises from a comparison between the Online Court and traditional litigation with lawyers engaged on both sides under a full retainer. But this ignores the harsh reality that such litigation is so expensive that it is either unaffordable or imprudent, where modest sums are at stake, save where Legal Aid or some special costs regime (such as protects personal injury claimants) provides otherwise.

Perhaps the most widespread concern with respect to court-annexed ODR (or digitalisation of any court process for that matter) is the concern that those who have issues with respect to computer access may be denied justice.⁸⁵ In preparing for the implementation of the Online Solution Court in the UK, the Civil Procedure Rule Committee (CPRC) estimated that 52% of both claimants and defendants would require assistance to use the online system, and that 17% of claimants and 23% of defendants would be 'digitally excluded' - that is, unable to use the online system even with assistance.⁸⁶ It seems fair to infer that the situation in Australia would probably be quite similar.⁸⁷

⁸³ Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (27 July 2016) <<https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/>> (accessed 26 February 2018) [6.5.1], [6.2] and [6.10].

⁸⁴ *Ibid* [6.10].

⁸⁵ *Ibid* [6.5.2], [6.11] – [6.21].

⁸⁶ Civil Procedure Rule Committee, *Minutes of Meeting 5 May 2017*, <[https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I1b4d13bf55bf11e79bef99c0ee06c731.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=de59719c-bcb9-4e6a-b886-97cfa0a303ff&contextData=\(sc.DocLink\)&comp=pluk](https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I1b4d13bf55bf11e79bef99c0ee06c731.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=de59719c-bcb9-4e6a-b886-97cfa0a303ff&contextData=(sc.DocLink)&comp=pluk)> (accessed 2 March 2018) Item 10 [26]-[27].

⁸⁷ Whilst it does not indicate how well the population could manage in online courts, the Australian Bureau of Statistics data for 2014-15, published in 2016, shows: In 2014–15, 85% of people were internet users (persons aged 15 years and over who accessed the internet for personal use in a typical week). Those people in the 15–17 years age group had the highest proportion of internet users (99%) compared with the older age group (65 years and over) which had the lowest proportion of internet users (51%). The proportions of males and females accessing the internet were almost the same, at 84% and 85% respectively: Australian Bureau of Statistics, *8146.0 - Household Use of Information Technology, Australia 2014-2015* (18 February 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0>> (accessed 26 February 2018).

Lord Justice Briggs rejected the suggestion that this problem should be addressed by the permanent retention of a parallel paper-based equivalent to online access.⁸⁸ Experience with a hybrid service of that kind suggests that it costs more than either a purely paper-based or purely online service. Lord Justice Briggs also observed that there is no conceivable form of litigation process which will not be a challenge to a significant class of litigants without lawyers.⁸⁹ Many unrepresented litigants find themselves tongue-tied when required to address the court orally and some struggle with the assembly of documents.⁹⁰ In his Lordship's view, the answer to this problem lies primarily in designing the IT for use on smartphones and tablets rather than simply desktops and laptops and in funding, developing and testing services to assist the 'computer challenged'.⁹¹ Since his Lordship's final report, the Civil Procedure Rule Committee has endorsed an approach by which the 'digital with assistance' population will be provided with telephone support, clear and concise guidance documentation, signposting to additional third party support bodies and, where required, face-to-face assistance.⁹²

Of course, an obvious concern with ODR is the loss of the elements of human contact, the possible development of a sense of warmth and empathy, and the inability to build rapport in an entirely digital environment.⁹³ ODR may also be asynchronous - that is to say, parties may communicate through the online platform sporadically, never being

⁸⁸ Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (27 July 2016) <<https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/>> (accessed 26 February 2018) [6.15].

⁸⁹ *Ibid* [6.12].

⁹⁰ *Ibid*.

⁹¹ *Ibid* [6.17].

⁹² Civil Procedure Rule Committee, *Minutes of Meeting 5 May 2017*, <[https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I1b4d13bf55bf11e79bef99c0ee06c731.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=de59719c-bcb9-4e6a-b886-97cfa0a303ff&contextData=\(sc.DocLink\)&comp=pluk](https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I1b4d13bf55bf11e79bef99c0ee06c731.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=de59719c-bcb9-4e6a-b886-97cfa0a303ff&contextData=(sc.DocLink)&comp=pluk)> (accessed 2 March 2018) Item 10 [29]-[30].

⁹³ Lancy, S, *ADR and Technology* (2016) 27 *ADRJ* 168, 173.

connected at the same time, leading to a real sense of disconnection and a lack of engagement. These very real limitations suggest to me that ODR will remain focused at lower value and higher volume areas of dispute, or perhaps trans-border disputes where face-to-face communication is impracticable.

A similar concern has been expressed in relation to online adjudication, which is, of course, a significant departure from the conventional assumption that adjudication involves a trial in the presence of the parties.⁹⁴ Lord Justice Briggs responded to that criticism by observing that although the default position in the UK proposal will not involve a face-to-face trial, it will be open to the parties to seek a conventional trial when that stage of the process is reached.⁹⁵ Further, he observes that digital technology including video-links may provide greater convenience to parties than a face-to-face trial.⁹⁶

The Future of ODR - Big Data

In summary, despite the limitations to which I have referred, ODR has the potential to significantly reduce delays and costs, and to provide a viable means of dispute resolution in low value, high volume and trans border disputes to which conventional systems of ADR are not well suited. Through data mining processes often perhaps pejoratively described as 'big data', ODR also offers the capacity to gather information with respect to the number and nature of disputes in any particular area or industry, thereby facilitating steps which might reduce the number of disputes in the future, and also enables the gathering of data with respect to the terms upon which

⁹⁴ Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (27 July 2016) [6.77] <<https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/>> (accessed 26 February 2018) Item 10 [29]-[30].

⁹⁵ Ibid [6.79].

⁹⁶ Ibid [6.80].

disputes are resolved, thereby facilitating the development of AI systems in these areas.

ADR in Criminal Cases

As I have mentioned, the recent survey of judicial attitudes undertaken by the AIJA revealed distinct differences in attitude with respect to the use of ADR in criminal cases. Clearly ADR is more commonly used in relation to civil disputes than in relation to criminal cases in Australia. No doubt there are a number of good reasons for the relatively modest use of ADR in criminal cases. Those reasons include the so-called right to silence, which could be infringed if a person accused of crime was expected to state a position in the course of ADR proceedings. Further, in most civil cases, no interests other than the interests of the parties are involved, whereas in most, if not all, criminal cases there is a significant element of public interest.⁹⁷

These important considerations suggest that ADR will always have a more limited scope in criminal cases than in relation to civil disputes. However, it would be wrong to conclude that there is no scope for ADR in criminal cases - a proposition which is negated by the fact that the Supreme Court of Western Australia has applied a form of ADR to cases in its criminal jurisdiction since 2007.

We have described the procedure which we follow as Voluntary Criminal Case Conferencing.⁹⁸ The word 'voluntary' is given prominence in order to emphasise, consistently with the so-called right to silence, that no accused can be required to participate in the process against his or her will. The process is described as 'conferencing' rather than ADR, in order to

⁹⁷ In this context I do not mean the prurient interest of the public - rather, the public interest in the proper administration of the criminal law.

⁹⁸ It is described more fully in Hanlon F, *Criminal Conferencing, Managing or Remanaging Criminal Proceedings* (AIJA, 2010) 37-47.

emphasise that its objectives are not limited to settlement of the case, and do not include plea bargaining of the kind utilised extensively in the United States, but include the collegiate discussion of issues related to the shortening of trials as a result of factual admissions or agreements with respect to the evidence that is or is not required (in relation to such things as continuity of possession, etc).

The procedure is utilised in the vast majority of criminal cases proceeding to trial in our court. Experience has shown that the benefits significantly outweigh the cost of the resources involved. Those benefits include not only the resolution of cases, but also the shortening of trials. Initially the procedures were exclusively conducted by senior retired lawyers or ex-judges because of perceived sensitivities in relation to confidentiality. However, as the process has become more commonplace and accepted within the profession, we have involved registrars in the conduct of conferences - especially those conferences which are focused more on case management than upon an agreed resolution of the case.

There is another form of ADR which has been utilised in a number of Australian criminal courts. In that procedure, a sentencing magistrate, or in some cases, judge, will provide an indication of the sentence that would be imposed if an offender were to plead guilty at that time. The process is described as a 'sentence indication' because the court is not bound to impose that sentence in the event that a plea is entered. However, the advantage of the process is that it provides to an offender an indication of the sentence likely to be imposed if a plea of guilty is entered. So, if the indication is to the effect that a custodial sentence is unlikely to be imposed, a plea of guilty is more likely to be entered.

Conclusion

This overly long paper has touched upon only some of the many interesting and complex issues which have arisen in the developing world of ADR. The rapid development and success of ADR belies any inference that it is some kind of lesser, or inferior, or less frequent system of dispute resolution. Its place as the primary means of dispute resolution is well established and it is inevitable that the role of ADR will be developed and expanded, particularly with developments in the area of IT to which I have referred.