ADR AND SOCIO ECONOMIC POWER IMBALANCE – THE MAN OF STRAW IN COMMERCIAL DISPUTES

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'Perhaps the most significant legal development in the past 25 years has been the acceptance, both as a practical matter and as a matter of legal theory, that formal or formalistic equality is not true equality. Rather, more recent legal analysis accepts that, where differences exist, identical treatment compounds underlying inequality and produces further injustice'[1]

1. INTRODUCTION

1.1 It is clearly the case, although some would disagree[2], that the predominant view amongst the legal profession is that society is becoming more and more litigious[3]. Although in the early years many viewed Alternative Dispute Resolution ('ADR') as a waste of time[4] it is now widely considered as the panacea for a court system in crisis.

1.2 One of the key advantages of ADR is time and cost effectiveness. For this reason ADR is now widely used as an adjunct as well as an alternative to the Court system. In the commercial context, ADR also has a role in dispute prevention, management and resolution and in this way it is perhaps more than an a mere alternative.

1.3 One of the key criticisms of ADR to date however is whether it produces a fair and just outcome for certain user groups predominantly: women, minority groups, the aged, the disabled, the poor and the disadvantaged.

1.4 This paper will focus on the position of the poor[5] man and whether ADR is a viable option for him as a disputant and the issues that can arise if either the poor man elects to adopt ADR procedures or they are forced upon him and his opponent by the

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1 Her Honour Justice Gaudron *'Equality Before the Law with Particular Reference to Aborigines'* (1993) 1 The Judicial Review 81.

2 See Astor H & Chinkin C M *'Dispute Resolution in Australia'* Butterworths 1992, at page 25 and following.

3 See the comments of the Chief Justice of the High Court, as he then was, Sir Gerard Brennan, in Innes, P *'Litigation Problems to Worsen – Chief Justice'* (1996) 31 Australian Lawyer 25

4 Griffin QC, J *'Is Mediation a Waste of Time'* (1993) Australian Legal Practice 17

5 'poor' in this context is intended to refer not only to the man of straw but to the true 'middle class' who have some albeit limited means to fund litigation by placing assets at risk but whose access to justice via the adversarial system is diminishing. It is recognised that 'poor' is a relative concept and a high net worth individual may be poor when their opponent is a corporate giant.

Courts. It will also consider the position of the poor man's comparatively wealthy opponent and whether mediation in such cases is likely to produce a fair and just outcome for both parties.

2. WHAT IS ADR? WHAT IS MEDIATION?

Definition of ADR

2.1 The term ADR is a somewhat nebulous concept. For some, it includes all forms of dispute resolution other than litigation including: problem-solving exercises, discussion, negotiation, mediation, conciliation, mini-trials, fact-finding (including expert determination) and arbitration. For others, the term applies to those processes which leave form and content of any settlement to the parties or to those processes which involve intervention by a neutral third party.

2.2 The position is made more difficult by the existence of sub-groups within each of the types of ADR referred to above and the fact that some of the terms referred to are used interchangeably. For example, the terms 'mediation' and 'conciliation' are often used to describe the same process and there are many different types of mediation including therapeutic mediation, community mediation, co-mediation etc.

2.3 For the purposes of this paper the term ADR will be used to refer to all non-litigious forms of third party intervention.

Definition of Mediation

2.4 The most discussed type of ADR is mediation. The most widely accepted definition of mediation is that proposed by Folberg & Taylor[6]:

'Mediation is a process by which the disputants, assisted by a mutually acceptable neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual agreement that will accommodate their needs.'

Key Elements of ADR

2.5 The key elements to ADR and particularly mediation[7] are:

(a) Entry into the process is voluntary.

(b) The mediator controls the process but has no decision making power.

(c) The mediator must be impartial and neutral.

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6 Folberg & Taylor *'Mediation: A Comprehensive Guide to Resolving Disputes Without Litigation'* Jossey-Bass 1984, pp 7-8 in Reikert J *'Alternative Dispute Resolution in Australian Commercial Disputes: Quo Vadis'* (1990) 1 ADRJ 31 at 33 and in Clarke GR & Davies IT *'ADR – Argument For and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes'* (1991) 7 QUTLJ 81 at 81

7 Clarke GR & Davies IT n 6 at 82

(d) If either or both parties become dissatisfied with the process they can terminate it. The mediator may also terminate the process in certain limited circumstances.[8]

(e) The process is private and the results are often confidential thereby avoiding public scrutiny.

(f) The agreement reached is not legally enforceable unless the parties choose to make it contractually binding.

2.6 There are also considered to be 3 identifiable differences between ADR and adjudication and hence mediators and adjudicators.[9] Firstly, adjudicators impose decisions upon disputants whereas mediators do not. Secondly, a mediator is not concerned with who is right or wrong whereas an adjudicator is and thirdly, adjudicators are concerned with the past whilst mediators are concerned only with the future.

2.7 It is important to bear these factors in mind when considering ADR and its suitability to a particular dispute. It is also important to bear in mind the advantages and disadvantages of ADR.

Advantages of ADR

2.8 There are a number of disadvantages to the adversarial system. By far the biggest is cost both in time and money. Conversely, this is ADR's biggest advantage.[10] The savings to be made are not solely to the benefit of the parties they are also to the benefit of the general community and the government in the form of savings on the general cost of the Court system. As His Honour Justice French[11] points out: *'All the money in Australia would be insufficient to pay the bill if all...claims were litigating in the courts.'*

2.9 Whilst costs savings are generally appealing to all, savings in time are slightly more difficult to quantify but still not to be undervalued. 'Time is money' as they say and for many large organisations the cost of their executives' time is valuable. It is time that could be employed in other profitable ventures for the company.

2.10 For a defendant who is likely to lose the case however, a long delay is no disadvantage and may even be functional. For example, an impecunious plaintiff may give up the chase or an impecunious defendant might secure finance to enable it to pay the plaintiff's claim.

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8 For a summary on when a mediator should terminate a mediation see Clarke GR & Davies IT *'Mediation – When is it not an Appropriate Dispute Resolution Process?'* (1992) 3 ADRJ 70 at 79 and Clarke GR & Davies IT n 6 at 93

9 Fulton M *'Mediation'* in Commercial Alternative Dispute Resolution, Law Book Company 1989, Chapter 10 at 78-80.

10 Some writers put caveats on this 'advantage'; for a good example see Hilder J 'Compulsory Mediation' (1998) 62 ACLN 11

11 See Dodson M *'Power and Cultural Difference in Native Title Mediation'* (1996) 3 Aboriginal Law Bulletin 8 at 8. His Honour was referring solely to Native Title claims but in the writer's view the reference is equally applicable to all claims.

2.11 The advantage of ADR, which is considered by the purists[12] to be the most important advantage, is that mediation is an informal self-empowering process. As most litigators will tell you the primary complaint of most disputants is that they did not get an opportunity to 'tell their story' or to tell the other party how they feel (or how the other party has made them feel) because of the dispute. The rules of evidence adopted in adversarial proceedings often prevent parties from speaking freely or at all about certain matters. ADR gives the parties every opportunity to say what they like (unless it is disparaging in which case it will infringe even the rules of ADR).

2.12 In ADR because parties control the outcome they maintain control of the dispute and it is in this sense 'empowering'. In this way, it is believed that parties are more likely to be satisfied with the outcome and less likely to breach whatever agreement is reached[13]. It is said *'that by actively involving the disputants in shaping the agreement and binding them personally to make the agreement work, the parties become psychologically bound to respect the terms of their resolution.'*[14]

2.13 The last recognised advantage of ADR is that it is not bound to seek a remedy which falls within a recognised legal category. In this way ADR can address the issues of the disputants personally and find the 'right' solution for them even though it may not be legally enforceable by the Courts.

2.14 Ironically, it is these very factors which lead to ADR's deficiencies in justice and fairness referred to below.

Disadvantages of ADR – When is Mediation not Appropriate?

2.15 The disadvantages of ADR are few but persuasive. In essence they all centre around issues of fairness and equity. It is said[15] that the very informality of ADR does away with procedural safeguards developed over the course of many centuries for the protection of the people. Those safeguards, it is said, have been designed to protect people from themselves and their own inequities. An inability to address power imbalance between disputants is therefore one of the key criticisms of ADR. This issue will be discussed in greater detail below.

2.16 Deemed no less important is the perceived impact of ADR on adjudication as a form of social ordering. The confidentiality of ADR means that settlements achieved by ADR have no precedential value. In this way, it is believed that ADR has a negative impact on society in that public knowledge and understanding of important issues is prevented and reform which may be needed may be delayed by lack of information[16].

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12 See Astor H & Chinkin CM n 2 at 37

13 Many writers also caveat this aspect of ADR. The most common caveat is referred to the 'shadow of the law' within which parties bargain. For an explanation of this see Astor H & Chinkin CM n 2 at 49.

14 Finding of an American Study known as the 'Vern Study' in Cooke in Fulton M n 9 at 94.

15 See Fiss O 'Against Settlement' (1984) 93 Yale Law Journal 1073

16 See Maute J *'Mediator Accountability: Responding to Fairness Concerns'* (1990) 2 Journal of Dispute Resolution 347.

2.17 It has been said that mediation is most effective *'in situations...where there is a long-standing relationship between the parties and an intermeshing of interests sufficient to make the disputants willing to co-operate in an effort to find a business solution to the dispute.'*[17] When mediation is least effective or not appropriate is a little more controversial.

2.18 It has been conceded by many, though not all[18], that ADR is not appropriate to every dispute. Some even believe that ADR is never appropriate[19].

2.19 A number of writers[20] have identified characteristics which render a dispute ill-suited to ADR:

(a) Disputes which involve power imbalance between the disputants, although some hold the view that any power imbalance can be addressed during the mediation.

(b) Disputes where the parties are expecting to gain a tactical or other strategic advantage (eg fishing for information).

(c) Disputes where a party is attempting to delay proceedings.

(d) Disputes where there is more than one party involved.

(e) Disputes where the purpose of the claim is to establish a legal principle or precedent.

(f) Disputes where the parties need a binding determination or declaration which is enforceable as an order of the Court.

2.20 Fulton suggests[21] that ADR will not be appropriate unless the parties are prepared to put aside 'adversarial posturing' and total victory, the dispute is not totally one-sided, the parties are realistic about the possible outcomes and the parties act bona fide.

2.21 Of all of these characteristics power balance or imbalance is by far the most prevalent. In most cases the key to the appropriateness of ADR is therefore the level of power balance or imbalance, as the case may be, between the parties. It is in this context that the balance of this paper will consider the position of the poor man versus the rich man in commercial disputes and the appropriateness and timing of ADR.

3. ADR AND COMMERCIAL DISPUTES

3.1 There is not much written on the benefits of ADR in commercial disputes in comparison to the use and benefits of ADR in the Family Law arena. There is no doubt that the most difficult questions facing commercial disputants and their lawyers is whether ADR is appropriate for their particular commercial dispute and if so, when it should be used.

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17 Fulton M n 9 at 80

18 For an example of those who believe that mediation is always appropriate see Davies A & Salem R *'Dealing with Power Imbalance in the Mediation of Interpersonal Disputes'* (1984) 6 Mediation Quarterly 17

19 See Fiss O n 15

20 See Hilder J n 10 at 17 and Maute J n 16 at 354

21 Fulton M n 9 at 80-83.

3.2 These are not easy questions to answer. These days, particularly in large commercial cases, the Court usually will take the decision out of at least one of the parties' hands by ordering the parties to participate in a mediation either of its own accord or at the suggestion of one of the parties[22]. The legislature is also taking steps to force ADR upon parties by imposing legislative impediments to adversarial litigation either at all or where ADR has not first been utilised. Examples here include the *Native Title Act 1993*[23], the Franchising Code of Conduct in the *Trade Practices (Industry Codes — Franchising) Regulations 1998*[24] and the *Farm Debt Mediation Act (NSW) 1994*.

3.3 The advent of ADR in the commercial context is not entirely the product of Court and legislative intervention. It has long been accepted that the adversarial nature of the Court system is the least effective where there has been a long standing relationship between the disputants and it was in this arena that mediation first found favour. Further, the increasing cost and time associated with the adversarial Court system in the 1990s has led to a strong movement amongst business towards ADR not just as an alternative to litigation, but as an integral part of legal and business planning in an ever widening range of industries[25].

3.4 ADR clauses although initially only used in construction contracts[26] are now experiencing wider application in commercial contracts such that parties are more and more opting to apply ADR processes before turning to the Courts. ADR clauses are now commonly found in shareholder agreements, partnership deeds, joint venture deeds and in other contexts in which the ongoing commercial relationship between the parties is important[27]. A number of studies have been conducted into the use of ADR by small business and in the commercial context generally[28].

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22 An example of the Court's focus on ADR in Queensland is the inclusion of a pamphlet on the Court's ADR processes in the information sent to litigants in matters being listed on the Supervised Case List. Whether a matter is suitable for mediation is also routinely canvassed at the first directions hearing and if parties have not voluntarily utilised ADR already or at least explored the possibilities then the Court will ordinarily order them to. There has been some criticism of the way in which the Court is utilising ADR. For an example of this see Hider J n 10.

23 For an explanation of the role of mediation in Native Title see Dodson M n 11 and Bartlett R *'Native Title: From Pragmatism to Equality Before the Law'* [1995] 20 Melbourne University Law Review 282

24 Mediation is not compulsory in this context but it goes without saying that a Court would hold a dim view of any franchisor who institutes proceedings without first having availed themselves of the opportunity to mediate under the Code.

25 David J *'ADR and Small Business'* (1996-7) 3 Commercial Dispute Resolution Journal 231 at 231

26 Most ADR clauses in the construction context are arbitration clauses. Arbitration has more in common with the adversarial court system than mediation but it is commonly regarded as a form of ADR.

27 For a discussion of the use of ADR in particular commercial disputes see for example Harris R *'The Mediation of Testamentary Disputes'* (1994) 5 (3) ADRJ 222 and Prindable P *'Is mediation an alternative in commercial lease dispute resolution'* (1994) 5 ADRJ 99

28 The Ahrens Report conducted by the Attorney-General of New South Wales, the report entitled *'Does ADR work in Commercial Disputes'* conducted by the Monash University Centre of Commercial Law and the Applied Legal Research Centre in 1990 as referred to in Rieckert J n 6 and the report entitled *'Migrated ADR to Small and Medium Sized Enterprises'* conducted by the Department of Industry Science and Technology as referred to in David J n 25.

3.5 Accurate statistics in this area however are hard to come by. ADR as discussed above is often conducted in private and the outcomes are often confidential. It is virtually impossible therefore to determine exactly how much ADR is going on in the commercial world. What the research conducted to date has revealed is that ADR is being used predominantly by 'big business' to renegotiate commercial relationships to take into account matters not within the contemplation of the parties at the time the commercial relationship was entered into[29].

3.6 In the case of the small to medium enterprise ('SME') however, over three quarters of their disputes are resolved by direct negotiation. Although they are aware of ADR, the remaining SME disputes are abandoned (in the case of international disputes) or almost always resolved via adversarial proceedings[30]. It seems that although ADR is known to the SME they are still reluctant to use it. In this regard perhaps ADR in the commercial context is not as widespread as first thought and there is still scope for its application to be increased.

4. FAIRNESS AND JUSTICE IN ADR

4.1 As discussed briefly above, the major criticism of ADR is that it produces 'secondary justice'[31]. What justice means in this context is anyone's guess. Many argue in defence of ADR that 'theoretical justice' and 'practical justice' in the adversarial system are entirely different and it is inappropriate to judge ADR by theoretical standards when they simply do not exist in real life[32]. Further, it is argued that only about 5 – 10% of cases in the adversarial system ever make it to trial and thereby receive the benefits of adversarial justice[33]. In this way, it is argued that society must in any event make choices, because of the limitations of funding, about which disputes require court sanction and which do not.

4.2 There are a number of important topics up for analysis when the issue of fairness in ADR is considered. The most relevant of these are identity, public accountability, equality, bias and power imbalance. It is beyond the scope of this paper to properly consider all of these topics in detail[34]. It is important however to distinguish a 'fair process' from a 'fair outcome' in this context. In the writer's view a fair outcome is by definition an outcome achieved by virtue of a fair process.

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29 Rieckert J n 6 at 37

30 Department of Industry Science and Technology *'Migrated ADR to Small and Medium Sized Enterprises' Final Research Report'*, University of Technology Sydney, Centre for Dispute Resolution, February 1996

31 Fulton M n 9 at 99

32 See Astor H & Chinkin CM n 2 at 29 and Davies & Salem n 18.

33 See Astor H & Chinkin CM n 2 at 29

34 For a detailed discussion of these issues see National Alternative Dispute Resolution Advisory Council, 'Issues of Fairness and Justice in Alternative Dispute Resolution' Discussion Paper, Canberra 1997.

4.3 The factors which have been identified as defining a 'fair process' are:

(a) The parties make a free and informed choice to enter the process.

(b) All parties have the capacity to participate effectively in the process.

(c) The parties are able to raise all of the issues which are important to them and to put their point of view fully.

(d) The parties hear the other side and can question and challenge what the other party say if they need to do so.

(e) All the parties have access to all relevant information.

(f) All the parties have access to support and advice needed from third parties.

(g) Any third party involved in the process is unbiased and that lack of bias is apparent.

(h) The process achieves an outcome determined by the parties themselves.

(i) The parties are referred to other resources if the process cannot provide a fair or just outcome or does not in fact do so.

(j) A balance of power exists between the parties.

4.4 There is no doubt that the subjective element of 'fairness' is inescapable whether in terms of process or outcome. What one party considers fair the other will not. An objectively fair process is much easier to agree upon and identify and in the writer's view is all that a dispute resolution system can hope to achieve. Whether a fair outcome is achieved is invariably up to the parties.

4.5 To achieve a fair process may require treating the parties unequally. Not all parties are 'equal' before the law. Sometimes even then the system will fail because the inequalities between the parties are insurmountable. A system's inability to deal with inequalities between the parties does not however necessarily detract from the fairness of its process provided the inequality is recognised and the disadvantaged party knowingly agrees to the process.

4.6 In reality, ADR as a process is no more vulnerable to 'secondary justice' than the adversarial system. Many of the inequalities insurmountable in ADR are also insurmountable in the adversarial system such that the outcome of one is no 'fairer' than the other. Access to the adversarial system and its justice no doubt plays a big part in this.

4.7 It is in this context that this paper will now focus on power imbalance, in particular socio-economic power imbalance, and its impact upon fairness in the ADR process.

5. POWER IMBALANCE AND FAIRNESS IN ADR

5.1 The general view is that if an ADR process and outcome is to be fair all parties must have the willingness and capacity to negotiate and there must be a rough parity of power between the parties. Where power imbalance is gross and unlikely to be overcome, nonadjudicatory processes such as ADR are most likely to be inappropriate. Lack of power and assertiveness, it is argued, will totally undermine the process and the outcome will be distorted[35] in the sense that the party with the power will dominate the outcome so that only their needs and interests are met. It is for this reason that ADR commentators have been most concerned about power and its effect on ADR.

5.2 There is a view that disparity of power or 'intelligence, articulateness and ingenuity' is of little concern in commercial disputes[36]. It is believed that commercial disputants because of their business background, acumen and experience are likely to have developed strong negotiating skills. 'Whilst in theory this view may have some merit, with respect it in no way reflects reality.' Many commercial disputes involve issues of power imbalance, particularly socio-economic power imbalance. Brief examples include landlord/tenant disputes, franchisor/franchisee disputes and employer/employee disputes. Whilst the imbalance may be more marked in other areas[37], to ignore power issues in the commercial context is ridiculous in the extreme.

What is Power?

5.3 Power takes all forms. In general it has been defined to mean the 'actual or perceived ability of one person to exert influence upon another person's behaviour or thoughts.'[38] It can result from discrepancies in tangible resources such as education and income and discrepancies in intangible forms such as personal characteristics. It can arise from social status, gender, age, cultural, emotional and psychological factors.

5.4 Sources of power will not always be visible and making assumptions about where the balance of power lies can therefore be dangerous for parties, lawyers and mediators alike. Power is a complex shifting phenomenon which cannot be taken into account by making simple assumptions. The source of power can change during the course of litigation or the ADR process and not everyone who has power is willing or able to use it.

5.5 There may be very cogent reasons why a person's potential power never transforms into actual power. For example, a large corporation may be unwilling or unprepared to exert power over a consumer for marketing reasons. It is therefore important to distinguish between potential power (which when exercised becomes actual power) and actual power.

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35 Field R 'Mediation and the Art of Power (Im)Balancing' (1996) 12 QUTLJ 364 at 364.

36 See Fulton M n 9 at 104

37 For example issues of domestic violence in Family Law.

38 Wade JH *'Forms of Power in Family Mediation and Negotiation'* (1994) 8 AJFL 40 at 41 in Guthrie R *'Power Issues in Compensation Claims'* (2001) 12 ADRJ 225 at 225.

Types of Power Imbalance

5.6 Mayer[39] in his seminal article on power recognised 10 different sources or forms of power being: formal power, expert/information power, associational power, resource power, procedural power, sanction power, nuisance power, habitual power, moral power and personal power.

5.7 Any one or a combination of these various sources or types of power may be present in any one dispute. More recently therefore power has been identified by reference to various user groups such as women, the aged, the disabled, rural and remote communities (geographical power), minority sexual preferences, minority cultural groups[40] and lower socio-economic users.

Socio-Economic Power Imbalance and Commercial Disputes

5.8 There are marked disparities in our society between those of greater and lesser financial means. Socio-economic power imbalance is therefore the difference in power that arises by virtue of social and economic factors[41]. At a fundamental level money provides individuals and business corporations alike with the ability to purchase experienced advice and expert assistance in all things.

5.9 Like anything, socio-economic power is relative. A person may be financially powerful in one dispute but not in another simply because in the first case their opponent is of equal means whereas in the latter the means of their opponent are vastly superior. Further, some individuals may not be poor in an individual sense but against a corporate giant they will be at a significant socio-economic disadvantage.

5.10 Financial power imbalance is no less important in commercial disputes than in other areas and in fact socio-economic power imbalance will often be exacerbated in commercial disputes by the 'repeat player'[42] syndrome. This is particularly the case where you have a 'repeat player' against a 'one-shotter'[43]. For example, a corporate 'repeat player' such as a bank, will have many advantages over an individual 'one-shotter' consumer. These advantages include advance intelligence about what to do next and ready access to specialist advisers and experts. These advantages will only serve to heighten the 'repeat player's' financial advantage.

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39 Mayer B *'The Dynamics of Power in Mediation and Negotiation'*(1987) 16 Mediation Quarterly 75. Mayer's concepts of power have been widely adopted. See for example Guthrie n 38 at 228.

40 See the Discussion Paper n 34. In particular there has been much focus on ADR and feminist issues. For an example see Gee T *'Family Mediation: A Matter of Informed Personal Choice'*(1998) 9 (3) ADRJ 179, and Alexander R *'Family Mediation: friend or foe for women?'* (1997) 8 (4) ADRJ 255

41 See the Discussion Paper n 34 at 171

42 *'Repeat Player'* means a party who is engaged in many similar disputes over time. For a detailed explanation see Galanter M 'Why the *'Haves' come out ahead: Speculations on the Limits of Legal Change'* (1974) 9(2) Law & Society 95

43 *'One-shotter'* means those claimants who have only occasional or once-off disputes. Again see Galanter M n 42 for more detail.

5.11 To say that power imbalance, particularly socio-economic power imbalance, does not exist or is not important in commercial disputes is, in the writer's view, a fallacy.

6. STRATEGIES TO DEAL WITH SOCIO-ECONOMIC POWER IMBALANCE

6.1 There is a strongly held belief amongst ADR theorists that ADR is the best vehicle through which power imbalances can be addressed and it is regarded as 'fashionably endemic' to suggest that inequality of bargaining power renders ADR unsuitable.[44] Some writers[45] are critical of this theoretical approach regarding it as naïve and discriminatory particularly in the case of the gender-oriented power imbalance prevalent in Family Law disputes.

6.2 Others such as Mayer concede that ADR has its problems but say that *'when basic structural inequalities in power do exist, mediation may be the vehicle through which a weaker party has to choose between two unfavourable outcomes. Such a choice may be inevitable regardless of the conflict resolution process used. If mediation provides someone with the best (albeit still not entirely favourable) outcome, then this process may still be the preferable one. If, however, mediation increases the power differential, it should probably not be used'*[46].

6.3 There is something in the argument that it is naïve to suggest that ADR can achieve parity of power between the disputants. It is submitted, however, that this does not necessarily mean that ADR is inappropriate. Mayer has a point in the sense that removing ADR from the equation and choosing the adversarial path may not achieve a better outcome for the disputants.

Increased Mediator Accountability

6.4 In ADR, much reliance and therefore pressure is placed on the mediator[47] to redress power imbalance. Mediators are said to be neutral third parties who have excellent training and/or communication and interpersonal skills which allow them to redress power imbalances. The 'neutrality' of mediators has been much debated. It seems now that ADR commentators concede that this term is fraught with difficulty and that not all mediators are 'neutral' in all respects[48]. Neutrality is to be distinguished from impartiality and means at its most basic level that the mediator has no bias towards either of the parties to the dispute[49].

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44 Wade JH n 38 in Field R n 35 at 32

45 Field R n 35

46 Mayer B n 39 at 78

47 For a good discussion of the power and role of a mediator see Fisher R *'Mediation and the Fiduciary Relationship'* (1997) 16 AustBarRev 25

48 Boulle L 'Mediation Principles Process and Practice' Butterworths, Sydney 1996 at 18, Astor H & Chinkin CM n 2 at 102 and Field R 'Neutrality and power: myths and reality' (2000) 3 The ADR Bulletin 16

49 For a broader definition see Field R n 48 at 16

6.5 The concerns which some writers[50] have in this regard and the risks associated with this aspect of ADR are genuine. The principle risk is, of course, that the mediator will not, in the first place, be aware of the power imbalance and therefore will not know to take action. In the case of socio-economic power imbalance it is submitted that this is extremely unlikely.

6.6 Socio-economic power imbalance unlike other forms of power imbalance is in almost every case readily apparent and tangible. That is not to say that it will be any less difficult for the mediator to deal with, but it will, particularly in commercial disputes, be identifiable by the mediator.

6.7 The next primary criticism is that it is left for the mediator to determine what intervention is necessary and appropriate in order to achieve a fair outcome. Whilst the interventions a mediator can use are clear[51], when and how often to use them is not so clear. It is obviously inappropriate for the mediator to coerce the parties into an agreement which they consider unfair. The mediator's role is to ensure a fair process which allows the parties to negotiate freely and use 'interest based bargaining'[52].

6.8 Commercial disputes are invariably determined within the 'shadow of the law' or in situations where social norms have been sharply defined. The emotional and psychological aspects to the dispute are less complex and more easily identifiable. They are often centred around loss of money, reputation or livelihood. For this reason the outcome of a commercial dispute is determined primarily by each of the parties' prospects of succeeding at trial and whether the party likely to be successful is likely to be paid the full amount of their judgment from the unsuccessful party. In this way it will, in the writer's view, be easier for the mediator to determine what intervention is fair and proper in order to achieve a fair outcome and the risks associated with ADR though not entirely extinguished will be diminished.

Public Checks on Private Justice: Screening and a Workable System of Public Review

6.9 Aside from a properly skilled and trained mediator other strategies have been suggested to deal with power imbalance. It is fair to say however that these strategies are to date largely theoretic with little or no practical application.

6.10 Suggestions include the establishment of a reviewing body whose role it will be to set aside agreements which are illegal or subvert public values, and screening principles to determine whether a dispute is appropriate for mediation[53].

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50 Field R n 35 at 369 and Field R n 48

51 For a good summary see Smart L 'Mediation Strategies for Dealing with Dirty Tricks' (1987) 16 Mediation Quarterly 58 and Powell C 'Power in Mediation' [2000] NZLJ 420

52 Powell C n 51 at 420

53 See Maute J n 16 at 368

6.11 It is beyond the scope of this paper to consider these strategies in any further detail[54].

Summary

6.12 The key to all this is obviously for mediators, the parties and their lawyers to be aware of the power imbalance in the first place so that it can be dealt with. In some contexts power imbalance will be hard if not impossible to detect. Some perpetrators of domestic violence for example, are well skilled in hiding their less than acceptable behaviours and hence their power over their victim.

6.13 In the writer's view the best result for all concerned can still be achieved by ADR provided the process itself is fair and some attempt is made to compensate for the imbalance of power between the disputants. Whilst it is important to recognise ADR's limitations in relation to power we must not be too sanguine about the adversarial system's ability to deal with it.

6.14 The effectiveness or fairness of ADR is, in the writer's view, best determined by whether it produces in a prompt, inexpensive and procedurally fair way an outcome that satisfies the parties. It is not for the mediator or for that matter the parties' lawyers to determine that outcome or its fairness.

7. ADR AND THE POOR MAN – THE ISSUES

The Poor Man

7.1 So what does all this mean for the poor man? For the small financially vulnerable businesses or the individuals with limited or no financial capacity ADR offers a number of 'user friendly' features including: a quicker and more cost effective result, a wider range of remedies, confidentiality, control and ownership of the dispute and the potential at least for the maintenance of commercial relationships and goodwill.

7.2 There is no doubt that the poor man is seriously disadvantaged when it comes to gaining access to legal services since it usually depends upon financial resources beyond his reach unless legal aid is attainable. The poor man will however not always be without power in commercial disputes. The power of the media, which is often vested in the financial underdog, is not be underestimated. Hence the banker who evicts the poor disadvantaged consumer from his home runs the risk of 'A Current Affair' being there when they do it. The bankrupt or totally impecunious disputant is also not without power in the sense that they often have 'nothing to lose'. This can be extremely powerful, particularly in credit cases or cases involving comparatively wealthy opponents who have to pay for legal representation and stand to lose much more if they are not successful at the end of the day.

54 For more information see Maute J n 16

7.3 Generally speaking, however, the poor man's power deficiencies are evident in their economic power imbalance, their legal advice, their 'intelligence, articulateness and ingenuity' and their access to information and expert evidence. These deficiencies will be exaggerated when the poor man is pitted against a 'repeat player'.

The Poor Man's Wealthy Opponent

7.4 More often than not the parity of power in the poor man v wealthy man dispute will vest in the wealthy man. As set out above, the position is somewhat reversed in the bankrupt man v wealthy man scenario by virtue of the fact that the bankrupt man has nothing to lose. This does not mean however that the benefits of ADR are totally lost on the poor man's wealthy opponent.

7.5 Many of ADR's benefits make good business sense. In a time of economic recession the cost and time implications associated with the adversarial system may be as much an issue for the poor man's wealthy opponent as it is for the poor man. ADR may also be able to achieve a more valuable resolution for the wealthy opponent in the sense that via ADR the poor man's wealthy opponent may obtain something outside the legal remedies available in the adversarial system.

8. IS ADR A VIABLE OPTION FOR THE POOR MAN OR THE ONLY OPTION?

8.1 To say that financial power deficiencies can be remedied by the mediator in ADR is entirely mythical. The adversarial system however, in reality is no better equipped. Even if the adversarial system did live up to its exponents' judicial myths the poor man could not afford it.

8.2 As is ably pointed out by His Honour Justice Pincus *'there is nothing reasonably to be done to eliminate whatever advantage can be obtained by the richer litigant's access to the more expensive and therefore presumably more expert legal assistance.'*[55]

8.3 What this means in practice is that socio-economic power imbalance is as much an issue in adversarial proceedings as it is in ADR. In litigation a financially stronger party may force the weaker party to 'run up' costs defending a mirage of interlocutory proceedings and at trial can engage arguably superior lawyers and experts (at superior prices).

8.4 To say in these circumstances that ADR is not a viable option for the poor man is to deny the poor man processes which he may in fact prefer, which are more affordable and which may result in a faster more flexible outcome. It is not in the interest of the poor man or his opponent to deny them access to ADR where the parties make a free and informed choice to adopt ADR processes. The poor man's choice and the choice of his opponent to participate in ADR in this context must however be fully informed. Lawyers must advise the parties of the risks of an 'inequitable' outcome and not misguide them with theoretical assertions that power imbalance can be nullified by the mediator.

55 Clarke GR & Davies IT n 8 at 72.

9. CONCLUSION

9.1 Whether mediation produces a fair and just result probably depends on your point of view and in particular what you consider to be fair and just.

9.2 At the end of the day if equity is of concern to the poor man or indeed his wealthy opponent then it is a matter for that person to weigh up the all the advantages of ADR – the gains in time, money, privacy, flexibility, informality, preservation of relationship etc – against the perceived loss of justice. That person must consider whether litigation is likely to achieve a 'fairer' result at all and if so whether that degree of fairness negates the advantages of ADR.

9.3 Mediation and other forms of ADR are a viable option and not just an alternative for the poor man. They may in fact be the only option as the poor man struggles to afford access to adversarial justice whether theoretical or applied. For the poor man's wealthy opponent there might be every reason to consider mediation and other forms of ADR as a viable option not just an alternative. It may be the means by which he achieves the best result, particularly in the case of a poor man defendant.

9.4 What we as lawyers must remember is that our view of justice might not accord with the poor man's view (or the view of his wealthy opponent for that matter). As one legal journalist commented in the 19th century:

'The legal and commercial notions of justice are distinct, and the real complaint of the man of business against the lawyer proceeds upon a sense of this opposition. Justice in the lawyer's sense is adherence to a rule...justice in the sense of the man of business is the attainment of a result satisfactory to the feelings of a benevolent bystander who takes an interest in both parties.'[56]

9.5 At the end of the day we as lawyers have an obligation to recognise the inequality before the law between the poor man and his wealthy opponent, properly advise the poor man of the ADR alternatives and the advantages and disadvantages of those alternatives. It is for the poor man to decide whether the alternative and its outcome is just.

56 'Legal Topics of the Week' (1864-5) 40 Law Times 517 as quoted in Reikert J n 6 at 32