Alternative Dispute Resolution and Adjudication: Reconciling Power with Principle

The Hon I D F Callinan AC[1]

In 1777, a group of men devised rules for duelling and settling points of honour.[2] Gentlemen throughout the Kingdom were instructed to keep a copy of the rules in their pistol cases, so "that ignorance might never be pleaded." The rules promoted confrontation. Each combatant had an assistant, known as a "second".[3] Under Rule 17, "[t]he challenged chooses his ground; the challenger chooses his distance; the seconds fix the time and terms of firing."

Interestingly, the seconds had a duty, only perfunctorily observed, to try to reconcile the parties. The rules stated that "it is desirable to avoid all hot-headed proceedings."[4] The seconds had a choice, to intervene either before the principals took their ground, or after a sufficient amount of firing or hits.[5] Under Rule 25, the seconds, if they disagreed, were entitled "... to exchange shots themselves".

Some who have suffered the abrasions and uncertainties of our adversarial system might suggest that apart from the absence of flying bullets and clashing swords, litigation is little different from duelling. One difference is that the opponents do not directly confront each other but are represented by their proxies: their barristers. The instructing solicitors might not inaptly be described as the seconds. One memorable experience that I had some years ago was of the opposing solicitors actually coming to blows in the courtroom shortly before the Judge entered. There was however no rule of court like Rule 25 of the duelling rules which allowed the solicitors, if they disagreed, to exchange shots themselves.

Litigation is expensive. It imposes not only financial, but also emotional and sometimes even physical costs. It can affect families, local communities, industries, and countries. When unnecessary litigation is avoided, when the parties to a dispute are able to reach a private compromise or settlement, there can be benefits for everyone. Alternative dispute resolution operates in that context. It serves a high public purpose.

Mention of the courtroom brings me to the theme of this paper which is the relationship between the courts and alternative dispute resolution.

No one has put the pains of litigation better than Charles Dickens in *Bleak House*, writing of the scandalous case *Jarndyce v Jarndyce*:

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2 The rules were agreed at the Clonmell Summer Assizes, and are summarized in Schott, *Schott's Original Miscellany*, (2002) at 79.

3 Rule 14.

4 Rule 15.

5 Rule 21.

> *"[The case] drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless. ... Jarndyce and Jarndyce has passed into a joke."*

Alternative dispute resolution, especially I think, mediation, can in truth be a very attractive alternative. That this is so raises a question as to the extent to which parliaments and courts may or should intervene to require disputants at least to try mediation before trial. That question gives rise to a further question: to what extent should the courts have and exercise coercive powers to compel the parties to negotiate, mediate or arbitrate their differences rather than to have them tried by a Judge or a Judge and jury? These questions are better answered after a consideration of some of the particular advantages and disadvantages of alternative dispute resolution.

Most of these would be too well known to an informed group of people such as you to need detailed repetition by me. I will therefore merely touch upon them as necessary.

Not all mediations succeed, but if they do they have a finality that a trial does not.

To say that the law is a lottery may be an exaggeration. But certain it too infrequently is. Some High Court statistics from 2005 are revealing.

Last year, there were 83 reported cases.[6] Out of the 20 occasions when all seven Justices sat, there was never a single judgment. There were nine unanimous decisions that is, all seven Justices agreed on the result, but multiple judgments were delivered. On eight out of the 20 cases that all seven Justices sat, the Court split either 5:2 or 4:3. This was said to be, nonetheless, a year of a singularly large measure of decisional harmony on the High Court.[7]

There were 51 cases last year in which five Justices sat, instead of seven. Of those, there were 21 unanimous decisions; seven cases were decided 4:1; and nine cases were decided 3:2. Of the 21 unanimous decisions, on 10 occasions there were two separate judgments; on six occasions there were three separate judgments; and on five occasions there were four separate judgments.

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6 Lynch and Williams, "The High Court on Constitutional Law: The 2005 Statistics", available at http://www.gtcentre.unsw.edu.au. All 2005 High Court statistics are taken from Lynch and Williams' paper, unless indicated otherwise.

7 Id at 3.

On five occasions last year, five Justices of the High Court heard a case, agreed with one other as to the disposition of the case, but published four separate judgments. Each, no doubt, offered a slightly different perspective of the dispute and the relevant law. I am not critical of this – a High Court Justice has a duty to interpret the law as he or she thinks fit, to be independent, to provide his or her own conscientious, and, it may be hoped, learned view of the law, and not to compromise – but the result is that litigation outcomes are far from easy to predict. A caution should however be offered in relation to High Court statistics. The Court, as a general rule, entertains only those cases in which there is room for more than one opinion. It may be hoped that at other levels of the judiciary there is more unanimity.

Mediation should be, and often is, in the parties' financial interest. In one of the more comprehensive empirical analyses of alternative dispute resolution, the authors found that approximately 40 per cent of parties, who participated in a Californian programme, reported costs savings.[8] The savings per case averaged US$45,000.[9] The authors added that "[t]he reported net[t] savings (the savings minus the actual cost of the session) for those who believed they saved money was about ten times the size of the average cost for [a] session."[10] For those surveyed who thought the alternative dispute resolution programme led to a nett increase in costs, the increased costs were generally less than the full cost of a session:[11] that is, the parties initially made a saving, but then the fees for participating in the programme were greater than the initial saving.

I do not know what the Australian financial experience is. There seems to be little published data on it. It would be unfortunate if mediation did not almost universally result in savings for participants in it. In those cases in which mediation fails, and a trial proceeds the costs self-evidently to the parties will be significantly greater than if there had been a trial only. In this respect mediation may itself be something of a lottery.

One very important advantage of alternative dispute resolution lies in the opportunity that a mediator or arbitrator has of becoming much more involved, positively interventionist in telling the parties what he or she actually thinks, without compromising the role, than a judge is able to do. A judge must be, and be seen to be, impartial. Often parties, and unfortunately their counsel, will overestimate the strength of a position, or insist on arguing points which have little to no bearing on the case. It may be inappropriate for a judge to point this out too forcefully (however tempting it might be). A mediator or an arbitrator is not so restrained. He or she is able, indeed obliged, to make candid assessments and recommendations, that a judge is unable to make, and that may prove to be the very thing that the parties need to hear. Since 1987, in the Federal Court of Australia, 55 per cent of all matters referred to mediation have settled.[12] In the Californian survey I mentioned a moment ago, a similar proportion of participants said that the alternative dispute resolution programme "increased the

8 Rosenberg and Folberg, "Alternative Dispute Resolution: An Empirical Analysis", 46 *Stanford Law Review* 1487 at 1500 (1994).

9 Ibid.

10 Id at 1500-1501 (original emphasis).

11 Id at 1501.

12 National Alternative Dispute Resolution Advisory Council, *ADR Statistics: Published Statistics on Alternative Dispute Resolution in Australia*, (2003) at 8.

prospects for early settlement of their cases".[13] Some 60 per cent of those surveyed found the programme helpful in identifying and clarifying issues,[14] so that, even if the matter did end up in court, the time spent and the costs incurred should have been less.

Alternative dispute resolution also has the advantage, from the parties' point of view, of ensuring privacy and confidentiality, as well as a potential for the preservation of future relationships.[15] From the general public's point of view, an advantage may be a reduction in court backlogs,[16] and of course the costs savings of not having to provide a court, judge or judges and court staff that make a trial possible.

I have heard it suggested that the fact that a mediator's or an arbitrator's decision cannot provide a legal precedent is an argument against alternative dispute resolution. The argument so far as I am concerned has no validity. The state purpose of providing a means of resolving disputes is essentially to prevent parties from taking the law into their own hands. Disputes between parties are, generally speaking, not the business of others. The reason why democratic justice is open justice, is not to satisfy the prurient or other interests of the general public, but to ensure that justice is transparent. In any event, practitioners and courts below the High Court striving to make sense out of the great mass of precedent that already exists, might think that the less there is of it the better.

I have said nothing so far about negotiation as an alternative means of dispute resolution. In truth it is unlikely to be a satisfactory alternative in many cases because it too is uncertain of outcome, and is liable to be influenced by power imbalances between the parties. One form of negotiation, although not identified in terms as such is the process to which a party fearing infringement of the *Trade Practices Act 1974* (Cth) may be subjected upon seeking an authorisation for a course of action from the Australian Competition and Consumer Commission. That is a process that can be prolonged and is likely to involve the applicant in delay and expense. The process will be one of negotiation and very often of compromise. It is for that reason no doubt that the Australian Gas Light Company resolved to go directly to the court to seek declarations in *AGL v ACCC*.[17] The applicant was a major retailer in the national electricity market. It wished to buy a share in a large power generator. It knew that its competitors would contend, and that the Australian Competition and Consumer Commission might think it a possibility, that a successful acquisition would have the effect of substantially lessening competition in the national electricity market. In the circumstances the applicant made the decision to by-pass both the Commission and the Australian Competition Tribunal, and accordingly the lengthy negotiation process that would have ensued, and apply directly to the Federal Court for declarations which it substantially succeeded in obtaining.

I mentioned power imbalances. Other forms of alternative dispute resolution need to be wary of these. There is some debate about whether Wall Street investment houses, between the early 1970s and

13 Rosenberg and Folberg, "Alternative Dispute Resolution: An Empirical Analysis", 46 *Stanford Law Review* 1487 at 1510 (1994).

14 Id at 1511.

15 Clarke and Davies, "Mediation – When is it not an Appropriate Dispute Resolution Process?", (1992) 3 *Australian Dispute Resolution Journal* 70 at 70.

16 Ibid.

17 (2003) 137 FCR 317.

the late 1990s, used arbitration clauses oppressively in employment contracts.[18] The allegation was that employees were forced to have their complaints heard before arbitrators, who, by the terms of the employment contracts, were chosen by, and were sympathetic to, the relevant employer. I do not know if the allegation was well-founded, but it may be said, I think, that where there are significant power imbalances between parties to a dispute, there may be, if not invariably so, protections in courts of law that are not to be found in alternative dispute resolution, for example, the protections given by the rules of evidence and the rules of procedure, and the judge's status and different role. On the other hand, disparities in the abilities of the parties' advocates are likely to be less significant in alternative dispute resolution because of the latitude allowed the mediator or umpire for intervention.

It might be argued that in the example above, weaker parties are protected by the laws of contract, as the basis of the common law doctrines of duress, mistake and misrepresentation, and equitable doctrines such as undue influence and unconscionability. That is undoubtedly correct. But, as I observed in a recent case,[19] legal protections do not always affect people's behaviour, and policymakers, that is to say, lawmakers, may wish to take that into account.

Another possible concern, not I think a problem in this country so far, is that if in legislation there is a heavy emphasis on the importance of alternative dispute resolution, and if courts adopt a sufficiently purposive approach to interpreting that legislation, an emphasis may be given to alternative dispute resolution which cannot easily be reconciled with the initial intentions of parties to a contract. *Gilmer v Interstate/Johnson Lane Corp*,[20] a case heard in the United States Supreme Court, provides an example of this. Having recognized in earlier cases that the US Federal Arbitration Act established a "federal policy favouring arbitration",[21] requiring that the Court "vigorously enforce agreements to arbitrate,"[22] the Supreme Court held in *Gilmer* that an employee was required to pursue his age discrimination claim in arbitration, because, in 1981 he had signed a standard industry registration form, by which he "agree[d] to arbitrate any dispute, claim or controversy ... that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which [he] register[ed]."[23] New York Stock Exchange Rule 347 provided for arbitration of all employment disputes.[24] Mr Gilmer was forced to arbitrate his claim in circumstances in which he might not have intended to bind himself in 1981.

It is against the background of these matters that I come to make some points about the relationship between the courts and mediators. I focus on mediation because of its quite distinctive

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18 See Landsman, "ADR and the Cost of Compulsion", 57 *Stanford Law Review* 1593 at 1594-1599 (2005). Professor Landsman cites (fn 32) the following article, which may be of interest: McGeehan, "The Women of Wall Street Get Their Day in Court", *New York Times*, 11 July 2004.

19 *Harriton v Stephens* [2006] HCA 15 at [205] (footnote 324). I should emphasize that my decision in *Harriton v Stephens* was not made on policy grounds, rather on grounds of logic: see [2006] HCA 15 at [206].

20 500 US 20 (1991). This, along with *Shearson/American Express Inc v McMahon* 482 US 220 (1986), is considered by Professor Landsman in "ADR and the Cost of Compulsion", 57 *Stanford Law Review* 1593 at 1595-1596 (2005).

21 *Shearson/American Express Inc v McMahon* 482 US 220 at 226 (1986), citing *Moses H Cone Memorial Hospital v Mercury Construction Corp* 460 US 1 at 24 (1983).

22 Ibid, citing *Dean Witter Reynolds Inc v Byrd* 470 US 213 at 221 (1985).

23 500 US 20 at 23 (1991).

24 Ibid.

character, unlike arbitration which has much in common with conventional litigation. In some respects, mediation has as much to offer the public in benefits as it has the parties. So far as I am aware, and subject to one qualification only, the State and the Commonwealth provide for litigants almost free of cost, the venue, the judge, the jury, if there is one, and the ancillary court staff free of charge to the parties. There are of course filing and other fees, but these would do little to defray the true cost. In my opinion this is how it should be. Impartial, accessible courts are essential for a democratic society. You can have democratically elected parliaments, ombudsmen, parliamentary sub-committees, and standing investigative bodies, but none of these will be fully effective, and may themselves become instruments of tyranny, unless there are independent courts with judges with security of tenure. The Australian Constitution recognizes this in Chapter III, and happily, so far, the States have, in the main, followed that lead. The qualification to which I refer is the charge by way of setting down and hearing fees payable in some courts. For example in the Federal Court the setting down fee for a corporation is $2,422, and for a natural person is $1,211.[25] Hearing fees are usually $969 per day for corporations, and $483 per day for natural persons.[26] While I readily accept that that amount would not cover, perhaps not nearly cover, the actual costs to the public purse, its imposition represents a highly undesirable trend. User pays is a concept alien to democratic justice.

The point of all of this is to show that a successful mediation is likely to result in a very large saving to the public purse. An unsuccessful mediation, as I have already observed, will often result in a very substantial additional cost to the parties, though the issues may have been on some occasions, better defined. A case can therefore be made for the subsidisation by the State of mediation. If the mediation succeeds the State should perhaps be obliged to pay to the parties, some proportion at least of the money saved from the averted trial. Even in those cases in which mediation has failed, it might not be inappropriate to provide some funding to the parties, if the mediator certifies that the parties have sincerely and conscientiously attempted to resolve their differences in the mediation. This is hardly an unreasonable suggestion. As everyone in this room knows, there are some disputes which are simply intractable. Somebody must have the power to decide them and there must exist a system of State backed sanctions to compel the obdurate to do what the law requires them to do.

Alternative dispute resolution complements litigation and the courts, but ultimately needs the courts for its effectiveness.

To adapt F W Maitland's observation about the relationship between law and equity:[27] "if parliament were to pass a short Act making illegal all forms of alternative dispute resolution, there would be increased costs, some absurdities, and many inefficiencies, but overall we would manage, as we did for hundreds of years";[28] if on the other hand, parliament were to abolish the courts, thereby

25 Federal Court of Australia Regulations 2004 (Cth), Sched 1, Item 13. Like charges are payable in some other courts including the Supreme Court of New South Wales and the High Court: see, for example High Court of Australia (Fees) Regulations 2004. These regulations are not made by the courts or the Judges.

26 Id, Items 14 and 15.

27 Maitland, *Equity: A Course of Lectures*, (1936) at 19.

28 Let us not forget "[t]he practical reality ... that, with or without ADR, most civil cases settle short of trial, through unassisted lawyer settlement negotiations": Mack, *Court Referral to ADR: Criteria and Research*, (2003) at 36.

removing the threat of enforcing a right, or being obliged to observe an obligation, there would be a real risk of anarchy. We prefer law to power.[29] Law insists upon principle, and uses it to adjudicate disputes. The rule of law means that everyone is entitled to principled adjudication. Alternative dispute resolution will not be inconsistent with the rule of law when there is recourse to the courts, but if it were insisted upon to the exclusion of all else, the consequences could be grave.

The role of courts and alternative dispute practitioners should never be blurred. According to my observations the latter well understand this. There is a danger that the courts and some judges might understand it less well. I personally have serious reservations about the role of judges as intensive case managers and case administrators. In the Federal Court Judges now have their own dockets, as I understand has been the situation in the United States for some time. The cases on those dockets are managed by a Judge who has sole control over them from the institution of the proceedings to the giving of judgment. The advantage, that the Judge becomes very well educated about the case, by seeing all facets of it in the interlocutory stages, may be outweighed by a risk that by the time of trial, the Judge has either resolved it in his or her own mind, or almost equally undesirably, may give the impression that he or she has done so. I do not want to give the impression that I am opposed to case management. The opposite is the fact so long as the case manager not conduct the trial, and, so long as he or she holds the reins of management gently. It is easy to understand that Judges may become frustrated, very much so, by unreasonableness on the part of litigants or their legal advisors. But Judges have ways and means of dealing with this, and should not, simply on account of it, send the case away to be dealt with by somebody else and some other means. This gives rise to the question which I foreshadowed earlier: when and in what circumstances should a Judge be empowered to order, and should order, some other form of dispute resolution than a trial? I am inclined to think – I have no concluded view on this – that a Judge should not have power to compel alternative dispute resolution. My inclination is against it for these reasons. It is the duty of Judges to hear and decide cases. An apparent unwillingness to do so, for whatever reason, has the tendency to bring the courts and Judges into disrepute. If the Executive is unwilling to provide the necessary number of Judges to hear the cases, it is not for the Judges to repair the Executive's deficiencies by sending the parties away, at greater expense, to have their disputes resolved. Long delays in court lists are usually not the fault of the courts. The appointment of three or four new Judges will never garner the same number of votes as a shining new fire engine, or the repaving of a bumpy road. Another reason is one that I have already mentioned, that Judges will come to look more like case administrators, than adjudicators if they compel the parties to go elsewhere. Judges must be careful not to be seen as outsourcing agencies.

Nothing that I have said should be taken as meaning or even implying that Judges should not encourage mediation, particularly of cases that are likely to take a long time to try. The art of encouragement falling short of compulsion, is rather like the art of mediation itself. It requires subtlety, sensitivity, tact and intuition. Not all people have those qualities. There is, of course, much that can be done within the courts themselves to avoid prolonged litigation. In Queensland some years ago, the current Chief Justice, Paul de Jersey, was in charge of the commercial causes list. That meant in practice that he managed the cases on it. He did not sit on all of the cases himself, indeed he sat on few of the actual trials which were allocated among the other Judges of the Court. But a practice that he did

29 Heydon, "Judicial Activism and the Death of the Rule of Law", *Quadrant*, Vol 47, No 1 (2003) at 9.

adopt, was to offer the parties, and their advisors, an abbreviated form of case appraisal upon the basis that if it were ineffective he would have nothing further to do with the case. He was very effective. I can recall a number of cases in which my opponent and I accepted his offer, and a satisfactory settlement was achieved. Upon the conditions that his Honour undertook that course, it is one to be commended to the courts in my view.

What then from my position does the future of alternative dispute resolution appear to be? I do not doubt that in practice alternative dispute resolution will continue to expand. The harsh reality is that from time to time insufficient resources will be provided to the courts. The attractions of alternative dispute resolution are bound to become better known in the general community. The notion that you can choose your own mediator or arbitrator appeals the most. The privacy of alternative dispute resolution is also very attractive. The range of solutions, that cannot be described simply as remedies, available to mediators is more extensive than those available to the courts, even than to the Federal Court under, for example, s 87 of the *Trade Practices Act 1974* (Cth). I need not rehearse the other advantages. The only threat to alternative dispute resolution is duplication of cost should it fail. I would need to be far less experienced in public affairs, and much more of an optimist than I am, to believe that the panacea for that, of state subsidisation, is likely to come to pass.

I congratulate those responsible for the organisation of this important conference and wish the profession of alternative dispute resolvers well in their future endeavours.

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