ADRA Conference Report

*By Susan Lee and Edward Basha**

The dynamic and quickly evolving nature of dispute resolution in Australia was explored in detail at the ADRA State of Dispute Resolution Conference and Workshop at Clayton Utz, Sydney on 22 August 2017. The day, introduced by Mary Walker on behalf of ADRA, saw keynote addresses from two senior members of the judiciary – the Honourable Patricia Bergin and the Honourable Thomas Bathurst AC. The Keynote speakers, together with specialist ADR presenters explored topical issues affecting the ADR industry. Notable issues discussed were the growth of ADR and the comprehensive and cohesive relationship it has formed with the court system, and the effect of technology on dispute resolution.

The View of ADR From The Judiciary

The Honourable Patricia Bergin

The first keynote speech was presented by the Honourable Patricia Bergin. Justice Bergin spoke of her experiences with commercial cases as the Chief Judge of the Equity Division of the NSW Supreme Court. She noted that Dispute Resolution has grown exponentially in Australia, in part because of its connection with the judicial process. Justice Bergin sees that the two approaches – commercial dispute resolution and commercial litigation – have a cohesive relationship within the NSW Court system. The Courts have responded to the needs of commercial parties and moved to bring about speedier resolution of matters, including adopting a case management approach to its list. Part of that approach is selecting the right time for sending parties to mediate, in her experience, later mediation is better in achieving settlement. Justice Bergin also referenced the use of technology and the way that Technology Assisted Review of documents will reduce the cost of litigation.

Justice Bergin is currently serving on the Singapore International Commercial Court, established as a regional forum for the resolution of international disputes, with judges drawn from both Civil Law and Common Law jurisdictions. Interestingly, Justice Bergin identified an opportunity in Australia for the establishment of an International Tribunal or International Commercial Court, as proposed by Chief Justice Thomas Bathurst. Currently commercial dispute resolution in Australia is solely arbitral. She sees a court of this type would not replace arbitration – it would only touch arbitration where a question within an arbitration was referred to it for consideration. While there are issues between the states that would need to be resolved, Justice Bergin sees the establishment of such a system as highly advantageous to Australia, and notes that there is support for the idea from both Victoria and NSW. Justice Bergin was of the opinion that if Australia does not move in this direction it would be 'a great shame and certainly a missed opportunity.'

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The Honourable Thomas Bathurst AC

The second keynote speech of the day was presented by the Chief Justice of New South Wales, the Honourable Thomas Bathurst AC. The Chief Justice expanded on a speech he presented at the ADC in March 2017, discussing the duties of lawyers in non-curial settings. The Chief Justice commenced his address by discussing the fast-growing nature of ADR in Australia; noting that there has been exponential growth in out of court mediation and arbitration over the past twenty (20) years. Whilst there are undeniable benefits associated with this growth, he believes that the fast-growing nature of ADR – and mediation in particular – has also led to confusion amongst legal professionals as to their role in this process.

Whilst noting that the informal, commercial and confidential nature of ADR are integral to its success as a dispute resolution process, these same factors present ethical dilemmas. Chief Justice Bathurst observed that the informal nature of ADR can give some lawyers the impression that the strict ethical duties of lawyers are less applicable. He also noted that the more commercial nature of ADR and its ability to allow parties to negotiate on non-legal grounds has the potential to create confusion as to whether the role of the lawyer is to be a court advocate or a business negotiator. Finally, he noted how the private nature of ADR leaves it less open to judicial scrutiny – the privileged nature of mediations has the potential to shield concerning misconduct from curial examination.

Considering the conflicts that these issues present, the Chief Justice offered advice on how solicitors should act as representatives in ADR settings and the obstacles to policing that behaviour – particularly in relation to the privileged nature of the process. In terms of advocacy style, it was noted that lawyers engaging in mediation should generally resist the urge to use legalese and legal arguments and instead, use more 'user-friendly' terminology that encourages the understanding and engagement of the opposing party. It follows that parties should be encouraged to look beyond legal rights and instead, focus on the underlying interests.

The Chief Justice then discussed the ethical duties owed by lawyers in mediations – firstly discussing the Duty of Honesty. He noted that the duty of honesty owed by a lawyer prohibits a lawyer from knowingly making false statements to an opponent in relation to a case. Whilst the duty does not ordinarily require positive disclosure, there are exceptions. These include situations where a failure to disclose constitutes taking advantage of an obvious error to secure a benefit with no supportable foundation in fact or law, where a disclosure is required to qualify a statement or avoid a partial truth and where disclosure is necessary to correct a statement previously made where the practitioner knows the statement to be false.

Whilst the enforceability of the Duty of Honesty does not typically present issues in litigation, the less formal nature of ADR can lead some lawyers to believe that the duty of honesty does not apply in full force. The Chief Justice dismissed claims that the duty applies differently depending on the dispute resolution process engaged. In referring to the seminal case of *Legal Services Commissioner v Mullins,* the Chief Justice emphasised that the same duties of honesty apply in both a mediation and litigious setting, the justification being that the need for ethical decision-making transcends the curial process.

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Despite precedent setting out that the Duty of Honesty applies with equal force in ADR as it does in litigation, the privileged nature of mediations complicate the enforceability of these duties. Despite the general rule that 'without prejudice privilege' extends to all communications that are genuinely entered into for the purpose of trying to reach a compromise, the Chief Justice noted that under the exceptions to Without Prejudice Privilege, any serious misconduct by a lawyer should be caught. However, given the ambiguous application of the legislation and case law governing the area in Australia, Chief Justice Bathurst noted that there is certainly a need for development in the area.

State of the ADR Industry

Highlighting the way that ADR continues to develop in Australia, a panel discussion reflecting on the state of the ADR Industry in Australia. Dr Katherine Johnson considered the government treatment of the ADR industry in 2013 when NADRAC was dissolved and the way that the lack of a peak body for the industry had hampered its ability to consult on changes in the field. ADRA responded to this by inviting representatives of all the leading groups within the dispute resolution field to attend a meeting in May 2014. From that start, ADRA now is able to present a voice for the industry and is working to continue in developing Australia's competence and global reputation as a leader in the dispute resolution field, through its online presence, conferences and dialogue with members of the dispute resolution field.

Deborah Lockhart from the Australian Disputes Centre (ADC) reflected on the way that dispute resolution has developed since the inauguration of the centre in 1986. ADC was established as a not-for-profit organisation to promote ADR services including mediation, conciliation, and arbitration. The ADC now offers a range of foundation courses and professional development and skills workshops for those already in the ADR field. The ADC also offers high quality facilities for mediations and arbitrations.

Reflecting the maturity of the ADR Industry, in 2016, the ADC launched annual ADR awards to recognise excellence in the field and to promote best practice. All revenue from the awards is directed towards the provision of scholarships for the National Aboriginal & Torres Strait Islander (ATSI) Mediation Training Scholarship Program. Recognizing the need for dispute resolution within the Aboriginal community, the program has impacted communities directly through facilitating and understanding the importance of peaceful avenues of resolving disputes, all while appreciative of cultural differences. Robert Angyal SC called on greater emphasis to be placed on ADR in both law school and in the Bar Admission course. He observed that far from being alternate, ADR is now a central role for barristers, and it requires a different set of skills than those required in court advocacy.

Advocacy and ADR

Deborah Lockhart, CEO of the ADC facilitated a panel discussion to consider the implications of Chief Justice Bathurst's comments on the challenge facing advocates. The Panel consisted of the Honourable Kevin Lindgren AM QC, previously a Judge of the Federal Court of Australia, Ian Davidson SC, Georgia Quick – a partner of Ashurst and Ian Bloemendal - Head of Commercial Litigation in Brisbane for Clayton Utz. The diverse experience and expertise of the panel led to an informed and stimulating discussion of the role of the Advocate in ADR processes.

A notable topic was the relevance of opening statements in ADR – the general consensus was that there could not be a blanket generalisation as to whether opening statements were appropriate,

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their appropriateness is dependent on the parties to the dispute. Some parties may utilise this stage as a means to 'vent' frustrations, whilst in other instances it may be seen as inefficient. Other topics explored were the role of the client in ADR as well as the management of client expectations. Ian Bloemendal succinctly summarised the approach to be taken as 'horses for courses'; different parties are suited to different approaches. Lawyers must be receptive to the needs of different clients.

Online Dispute Resolution

A key topic of discussion for the day was the effect of technology on dispute resolution with Sian Leathem of the Administrative Appeals Tribunal and Candace Barron from the NSW Small Business Commissioner sharing their experiences. Both the AAT and the Office of Small Business are introducing online options for consumer dispute resolution, largely targeted at small value disputes. Candace Barron highlighted the impact that Artificial Intelligence (AI) is having on dispute resolution. The Small Business Commission has developed a program called 'We Agree', due to be launched later this year. It provides an online dispute process in which parties identify the issues in dispute, propose solutions and compromises and ideally reach resolution. Safeguards are built into the system to ensure a respectful process and a focus on the interests of both parties. Ms Barron noted that initial feedback has been very positive.

With a major focus on the speedy resolution of disputes, Sian Leathem sees further opportunity to use online dispute resolution to help parties resolve disputes cheaply and quickly. Companies leading in this area include Modria. Modria provides dispute services to Ebay, and uses their platform to resolve 60 million disputes per year. NCAT is currently piloting an online dispute resolution process, targeting consumer to business claims of under $1000. The process is asynchronous and online, saving small businesses the time of attending hearings; 65% of those trialling it felt it was a satisfying process.

International Issues For Dispute Resolution

In a globalising market where cross-border transactions are growing in frequency, there is clearly a demand for effective cross-jurisdictional dispute resolution processes. Professor Nadja Alexander of the International Dispute Resolution Academy based in Singapore, proposed her 'Michelin' guide to cross-border mediations. In cross-border disputes, Professor Alexander noted that lawyers are often presented with the dilemma of choosing which is the most suitable venue for mediation. The issue is that there is currently no centralised assessment of the strengths and weaknesses of different venues, even though this is a potentially critical issue for parties to a dispute. Professor Alexander's guide is designed to rate the robustness of the regulatory framework of jurisdictions, with 12 dimensions selected to help practitioners select the best possible jurisdiction for their dispute. They include congruence of the domestic and international framework for mediation, the content of laws governing mediation, infrastructure and services, availability of skilled mediators, confidentiality, limitation periods, court attitudes and incentives to mediate.

Building on this consideration of the international dimensions of ADR practice, a panel session also considered International Arbitration and ADR. Damian Sturzaker of Marque Lawyers introduced the topic with a consideration of issues ranging from the need for courts to hear testimony from witnesses rather than simply receiving affidavits to the impact of China's One Belt One Road policy and the barriers to enforcement of arbitral awards. Deborah Tomkinson of the Australian Centre for

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International Commercial Arbitration (ACICA) talked about Australia's advantages as an arbitral venue. These include:

- The statutory framework for arbitration, which, through the International Arbitration Act amendments in 2010 is at the forefront of global best practice.
- Judicial support for arbitration that has been demonstrated at all levels.
- The Australian legal profession is highly competent and cost effective compared to other forums.
- Australia offers a right of choice of representation so parties have the option of choosing to use international lawyers.
- Political stability.

Ms Tomkinson sees a great opportunity to further increase the number of arbitrations being conducted in Australia, both domestic and international. The historic tyranny of distance is losing importance in the developing global economy. However compared to mediation, the Australian arbitration culture still has further to develop. There is an opportunity to increase client understanding of the benefits of arbitration, specifically time, cost, privacy and enforcement. Arbitration gives clients procedural flexibility, not simply to suit the parties, but also to suit the dispute in question. It deserves to be more heavily promoted to clients for appropriate dispute resolution.

Wolfgang Babeck of DibbsBarker suggested that dissatisfaction with the courts was the way that most cases were driven to arbitration. There is an opportunity in arbitration to draw on Civil Law approaches as well as common law, which should be encouraged. Nigel Cotman SC said that consideration of legal approaches to a dispute should begin with consideration of enforcement. Australia has no reciprocity of judgement with China, however because China is a signatory to the NY Convention, arbitral awards can get registered and enforced, although this requires separate litigation in China. By comparison, Hong Kong has reciprocity of judgements with China.

Concluding Remarks

The final event of the Conference involved a workshop hosted by the Law Council of Australia. Participants were divided into three even groups, where they were required to work through a series of hypothetical problems – all of which raised ethical dilemmas. Each group nominated one member to discuss their findings with the other groups and participants. This section of the conference was an engaging way to conclude the day.

The 2017 ADRA Conference was an informative, engaging and stimulating day. Attendees had the privilege of hearing from and engaging with some of the most revered legal minds in Australia. Discussions about the challenges and opportunities associated with the growth of ADR in Australia were informative but also raised many questions as to the most appropriate way of ensuring the benefits of ADR are maximised. Whichever direction the legal industry takes and whichever challenges are presented, the 2017 ADRA Conference confirmed that the ADR Industry is in very safe hands.

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