Australian Disputes Centre

ADR Awards

The Hon Robert French AC

10 August 2017, Sydney

Thank you for inviting me to speak at this dinner and to participate in the presentation of the Dispute Resolution Awards.

Alternative dispute resolution has come a long way in the last 30 years. The term is now something of an anachronism. What used to be 'alternative' is mainstream.

As a Judge of the Federal Court in 1990 I was interested in the use of court-annexed mediation as a way of encouraging more and earlier settlements or at least narrowing the issues in dispute. I was interested also in the use of serving judges as mediators in proceedings in the Court on the basis that a mediating judge would not have anything to do with hearing the case if mediation did not effect a settlement.

The legal profession at the time was sceptical about alternative dispute resolution in general and mediation in particular. There was also considerable controversy about the use of serving judges as mediators. There was, however, political support for increasing judicial involvement in alternative dispute resolution (ADR) in connection with pending court proceedings. In 1990, I was sent to the United States by the Federal Court to participate in the Harvard Negotiation Course run by Professor Roger Fisher, one of the co-authors of the well-known book entitled *Getting to Yes: Negotiating Without Giving In*. That book proposed a system of principled interests-based negotiation which was adaptable to mediation. It formed the basis of the initial mediation processes used by the National Native Title Tribunal, to which I was appointed in 1994. I wrote an article for the *Australian Dispute Resolution Journal* at the time entitled 'Hands on Judges, User Friendly Justice'.

On my return from the United States we experimented with court-annexed mediation in the Federal Court. I undertook one such exercise in a multi-issue dispute between a video game arcade operator and the Commissioner of Taxation. It evolved into my first and only

attempt at early neutral evaluation (ENE). After adjourning the mediation I heard argument from the parties on a number of issues relating to the interaction of pricing clauses in contracts for the importation of CD-ROMs for the video games with the relevant provisions of the sales tax legislation as it then stood. I gave provisional, non-binding assessments of the strengths and weaknesses of the respective contentions in relation to each of a number of classes of the contracts. The parties then went away and six weeks later the matter had settled. They advised that the ENE process had fed into their subsequent negotiations. I was, of course, careful in undertaking the ENE to point out that my views were provisional and would not necessarily reflect the opinion of a judge after a trial of the action.

Subsequently, we set up a pilot program in Perth using the services of local senior counsel as early neutral evaluators for a modest, fixed fee. However there were only a few uptakes. The profession was uneasy about the additional time and cost involved in the process if it did not lead to a settlement and the case went ahead anyway. It still seems to be ahead of its time. That does not mean, however, that ADR has been standing still.

Back in the 1990s the legal profession tended to regard mediation as an exotic activity for non-lawyers — not a significant source of billable hours for lawyers. That attitude has changed considerably; there are many lawyers who offer mediation services around Australia today. I adopted the techniques of principled negotiation which I had absorbed at the Harvard Summer School to the initial processes of the National Native Title Tribunal in 1994, a body which exercised an important role as a mediator of native title claims — claims of unusual complexity involving indigenous parties, government parties and industry parties, including pastoral, mining, fisheries and other groups. Necessarily, the techniques which were initially applied had to be adapted in the light of experience of that complex and developing field.

ADR today continues to be a moving wave-front of new development. That is demonstrated by the existence of the Australian Disputes Centre and its activities and by the awards which are given tonight to recognise and encourage excellence in the practice of ADR in a variety of fields.

Nowhere is the potential for change more dramatic than in the use of technology and, in particular, artificial intelligence. An immediate application is online dispute resolution using what has been described as ‘a virtual space in which disputants have a variety of dispute

resolution tools at their disposal.' Two authors, Arno Lodder and John Zeleznikow[1] have proposed a three-step model using what they called a 'negotiation support tool' which can:

1. provide feedback on likely outcomes if the negotiation fails – BATNA;
2. attempt to resolve existing conflicts using argumentation or dialogue techniques;
3. employ decision analysis techniques and compensation/trade-off strategies to facilitate resolution.

If step three fails, the parties go back to step two and try again until resolution or stalemate. Even then blind bidding or arbitration can be used to narrow the issues. Systems available to support such negotiations include rule-based reasoning, case-based reasoning, machine learning and neural networks. There are challenges in connection with the use of artificial intelligence in this area, especially in relation to machine-based application of legal rules whether they be statutory or common law. Such rules are rarely unambiguous and generally offer constructional choices which don't readily translate into machine logic. An alternative approach is called a 'Data-centric approach'. The relevant computer is provided with data about the facts and outcomes of a large number of cases on the basis of which it is asked to estimate the probabilities of outcomes given a particular set of facts and relevant legal issues. Such a tool might be useful as a kind of surrogate early neutral evaluator.

I was interested to see some of the names given to the template-based software systems used to help lawyers negotiate — they include *Deus*, *Inspire, Adjusted Winner* and *Smartsettle*. In the field of family law there is a system called '*Family-Winner*' which includes techniques such as issue decomposition strategy, a compensation and trade-off strategy and an allocation strategy.

There are, of course, issues of justice which transcend the negotiating objectives of the parties, particularly in family law disputes where the law requires that the interests of affected children be treated as paramount. And in complex multi-party negotiations such as

---

[1] Arno R Lodder and John Zeleznikow, 'Artificial Intelligence and Online Dispute Resolution' in M Wahab, E Katsh and D Rainey D (eds) *Online Dispute Resolution: Theory and Practice, A Treatise on Technology and Dispute Resolution* (Eleven International Publishing, The Hague, 2012) 61–82.

environmental or native title disputes, the question of the public interest is a very large aspect of the context in which negotiations must be undertaken.

There is a related question of the use of technology and artificial intelligence in making the judicial dispute resolution process quicker and cheaper and less burdensome on the litigants and witnesses. In a research paper published in the *Australasian Dispute Resolution Journal*,[2] Michael Legg, an Associate Professor at the University of New South Wales, argued that technology can provide the capacity to reconfigure the historical conception of a court as located in a single physical space. The challenge is to take the benefits of technology without compromising the essential characteristics of courts in terms of independence, openness, fairness and accountability through the provision of reasoned decisions. Legg quoted from the American Bar Association Report on the Future of Legal Services in the United States:

> Courts also should consider whether the physical presence of litigants, witnesses, lawyers, experts, and jurors is necessary for hearings, trials, and other proceedings or whether remote participation through technology is feasible without jeopardizing litigant rights or the ability of lawyers to represent their clients.[3]

There is a kind of symbiosis between the court system and other means of dispute resolution. Those are the means which we still call 'alternative' and in fact provide the vast bulk of dispute resolution processes actually used if we include negotiation.

The courts deal with a very small proportion of disputes but their distinctive character and function is essential to the rule of law in our society — if we understand by that term that everybody, private citizen and public official is subject to the law.

In the public interpretation and application of statutes and the common law in the determination of disputed rights, liabilities and obligations, the courts affirm the rule of law — every time a judgment is published. In doing so they provide part of the societal infrastructure which parties to a dispute can use as reference points to assist them in finding their way to a non-judicial resolution. The body of cases decided by the courts at all levels are part of any

---

2 Michael Legg, 'The Future of Dispute Resolution: Online ADR and Online Courts' (2016) 27(4). *Australasian Dispute Resolution Journal* 227.

3 Ibid 229 citing the American Bar Association, Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States* (2016) 45–6.

negotiating environment — they inform the assessment of the best alternative to a negotiated agreement. The legal rules and patterns of decision in various classes of case set standards or criteria against which the legitimacy and fairness of negotiated resolutions can be judged and without which they will be unstable.

The development of dispute resolution today places great demands on those who are engaged in it. Its processes must be adapted to an enormous variety of cases. That is recognised in the variety of awards given tonight including the award for Aboriginal and Torres Strait Islander mediators, family law dispute resolution practitioners and international ADR practitioners.

Thank you for the opportunity of speaking to you tonight. It is a pleasure to support the important endeavours of the Australian Disputes Centre and those who aspire to excellence in the field of dispute resolution.