

**The Interaction Between the Courts and
Alternative (or Assisted) Dispute Resolution**

**Australian Disputes Centre Inaugural
Northern Territory ADR Address**

**Chief Justice Michael Grant
Supreme Court of the Northern Territory**

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It is an honour to have been invited to give this inaugural Northern Territory ADR address. I understand the intention is that it will be an annual event under the auspices of the Australian Disputes Centre. That will no doubt be a very positive contribution to public discourse in the Northern Territory. I thank Deborah Lockhart, the Chief Executive Officer of the Centre for organising the event.

The topic for this address is the interaction between the courts and ADR. In exploring that, you will no doubt be grateful to know that I have no intention of rolling out a lot of statistics, or taking you through the intricacies of Order 48 of the *Supreme Court Rules* or Part 6A of the *Return to Work Act*. Rather, my intention is to speak generally about the history and principles underlying the relationship between the courts and ADR, and where that relationship might be headed in the future.

When I first started out in the law a senior colleague – who shall remain nameless – said to me that practitioners who dabbled in ADR should be charged with professional misconduct, because it was taking business away from the courts and food from the mouths of lawyers. I think he was only half-joking. Even back then, it was a reactionary and antiquated view. But it still had some currency. As a former Chief Justice of Australia wrote in 1993:

In times not so far in the past the [ADR practitioner] was seen in some circles as a dubious, below stairs figure, requiring close curial supervision, a quasi-judicial equivalent of Uriah Heep. [They] operated what was regarded by legal elites as a second-rate system of backyard justice.¹

¹ Robert French, 'Arbitration – The Court's Perspective' (1993) *Australian Dispute Resolution Journal* 279.

That characterisation entirely failed to pay regard to the long history of ADR and what has always been a symbiotic relationship between the courts and ADR. The history of ADR in ancient and mediaeval times was explored by Sir Ninian Stephen in an article published in 1991, and in a later paper delivered by Justice McDougall of the New South Wales Supreme Court in 2015.² I am indebted to them for their research. In short, the ancient Greeks, the Hittites, the Persians, the Aztecs, and mediaeval Western Europe all had systems in which civil disputes were submitted to some form of alternative mechanism before they could be pursued in the courts. This was routinely done in markets and trading places, at which grievances between merchants would be settled promptly, if possible, by a panel of fellow merchants familiar with the marketplace. In similar fashion, trade guilds had internal dispute resolution processes which had to be followed before any suit could be commenced in the courts. Some commentators have suggested that this may have given rise to hostility because the courts considered their jurisdiction was being impaired by this type of private enterprise justice.³ Perhaps more significantly, for a long period leading up to the 19th century the level of judicial remuneration was directly linked to the fees received by the courts for the conduct of litigation. When seen in that light, successful ADR was certainly taking food from the mouths of judges.

Whatever hostility there may have been, the relationship between the courts and ADR was formalised in the common law world by a series of developments in England during the course of the 19th century. Arbitration processes were formalised and certain types of matter were made subject to compulsory reference to arbitration. Arbitration rulings were made binding on the parties unless the courts gave leave to a party to withdraw from the ruling. Courts were given express powers to enforce arbitration agreements. Perhaps most significantly, the landmark case of *Scott v Avery*⁴ found that contractual clauses making arbitration a condition precedent to a right of action were valid. Many of you here will know that these are still referred to today as *Scott v Avery* clauses. In that case, Lord Campbell also observed somewhat knowingly that by then judges had a fixed salary and the direct

2 R McDougall, *Courts and ADR: A Symbiotic Relationship*, Paper delivered at the LEADR and IAMA Conference, 7 September 2015.

3 Citing Sir Ninian Stephen, 'Yf by Theyr Good Dyscretions' (1991) 26(7) *Australian Law News* 42.

4 *Scott v Avery* [1856] 5 HL Cas 811.

relationship between the volume of litigation and judicial remuneration no longer existed.⁵

By those developments, ADR was recognised as an alternative and complement to litigation, rather than a rival. However, ADR as we now know it did not assume any real significance or prominence in the Australian legal landscape until the late 1980s and early 1990s. By that time mediation was being taught and practised, and lawyers had become more conscious of the obligation to advise clients as to the best processes for dealing with the particular case.⁶ That followed developments in the United States, where as early as 1971 the Chief Justice of the United States Supreme Court had urged the enlarged use of private mediation and arbitration.⁷ The first court-referred mediation in Australia took place in 1992.⁸ From that time, ADR grew exponentially and became institutionalised as a feature of the justice system.⁹ That recognition was given its most authoritative voice in 1999, when the Australasian Council of Chief Justices declared that mediation was an integral part of the courts' adjudicative processes. Its central value was that it encouraged parties to resolve cases early in a cooperative environment to enable them to be removed from the court process as soon as possible.¹⁰ That statement recognised that the delay, uncertainty and expense associated with litigation meant that it should be regarded as a last resort to be utilised only when all other means of dispute resolution have failed, or when the case is not by its nature amenable to ADR.

What that statement also implicitly recognises is that the courts do not undertake their own investigations to arrive at some notion of absolute or independent truth. The courts must determine matters before them on the basis of the evidence and issues presented by the parties. The outcome will follow from the application of the

5 *Scott v Avery* [1856] 5 HL Cas 811, 853.

6 Sir Laurence Street, 'Editorial: The Courts and Mediation – A Warning' (1991) 2 *Australian Dispute Resolution Journal* 203.

7 Chief Justice Warren Burger, *Forbes Magazine*, vol 108, 1 July 1971, at 21–23.

8 Angela Bowne, 'Reforms to Civil Justice: Alternative Dispute Resolution and the Courts' (2015) 39 *Australian Bar Review* 275, citing *AWA Ltd v Daniels* (unreported, NSW SC, 24 February 1992, Rogers CJ Comm Div).

9 R McDougall, *Courts and ADR: A Symbiotic Relationship*, Paper delivered at the LEADR and IAMA Conference, 7 September 2015.

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

law to the facts established by the evidence. Courts are limited to granting remedies and making orders within relatively restricted forms. That process will generally result in a “winner takes all” situation. Courts do not fashion compromises which give effect to the uncertainties, or to the fact that there might be legitimacy in the positions adopted by both parties in the dealings which are the subject of the litigation.

As a practising barrister, you only need to experience one matter in which a client has lost a case with disastrous consequences in order to realise that all avenues for some mutually acceptable compromise should be explored and exhausted before proceeding to trial and judicial adjudication. In fact, it is the fear of disaster which drives most commercial settlements. One of the great attractions of a mediated settlement is that the parties own the result rather than having it imposed on them.

However, it has always been the case that resort must be made to the civil courts for certain categories of case. That will remain the position. Not all disputes are amenable to ADR. Some intractable commercial disputes will never settle without a binding determination by a court. ADR has limited scope in criminal matters for a range of reasons involving the privilege against self-incrimination, the need to vindicate victims’ rights, and the purposes of punishment and denunciation. Some types of matter involving the public interest are unsuitable for ADR. These include administration and probate, the adoption of children, corporate winding-up and the recovery of proceeds of crime. In the administrative law field, there will be decisions made by the executive government which are only capable of resolution by a court in striking a balance between the legitimate functions of government and the interests, rights and liberties of the governed. The courts are the only forum in which the government and an individual can present arguments in public as equals and have the dispute adjudicated by an institutionally independent body.¹¹

These matters draw attention to the fact that courts are not service providers as are privately funded conciliators, arbitrators and mediators. The courts form the arm of government which has responsibility for determining and enforcing legal rights and obligations in the exercise of the power of the state. As a former Chief Justice of New South Wales observed, “[t]he judgments of courts are part of a broader public

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

discourse by which a society ... affirms its core values, applies them and adapts them to changing circumstances".¹² That is a governmental function of a similar character to the parliamentary function. The rulings of a court have a public value and purpose which goes beyond the private interests of the parties.¹³ On some occasions there will be a very real public purpose in proclaiming that one party was right and another party was wrong. For those reasons, comparisons between the court process and ADR in terms of costings and performance measurements have limited application and utility. For those same reasons, there will always be a need and a place for both the courts and ADR.

The Australian constitutional structure precludes the erosion of the boundaries between the exercise of judicial power and non-judicial services. Chapter III of the *Constitution* demands the exercise of the binding adjudicative function by the courts alone. That has led to some semantic debate over the years as to whether "alternative dispute resolution" is an appropriate description for the provision of non-judicial services in the resolution of disputes. It has been said by some that the use of the term suggests a misconception of the constitutional role of the courts. Judges *decide* disputes or *adjudicate* on them. On that argument, resolution through consensual interaction is not an "alternative" to resolution by the courts because judges do not resolve disputes in that sense.¹⁴ I think that concern is largely sophistic, but whatever one's view might be on that matter it is clear that the courts have embraced ADR. A research study published in 2017 involving interviews with more than 100 judges across five jurisdictions concluded that by and large judges recognise the advantages of ADR. They also acknowledge that the statutory empowerment to refer parties to ADR plays a role in delivering justice that is impartial and discharged with due process, but also is efficient and affordable.¹⁵

In the Northern Territory, for example, the Civil Procedure Reforms require the parties to give active consideration to whether some form of ADR procedure would

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

13 Genn, HG, *Judging Civil Justice* (2010) 17-20.

14 Sir Laurence Street, *Evolution of Commercial ADR in Australia* (2005) 79 ALJ 765.

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

be more suitable than litigation, and to reach agreement as to the appropriate process. The Court can require the parties to provide evidence that consideration has been given to that matter. The parties are compelled to conduct genuine and reasonable negotiations in good faith with a view to settling the claim without court proceedings. If parties do not do so, they run the risk of being deprived of their legal costs. Litigation is expressed in the reforms to be a matter of “last resort”. All of these requirements encourage the parties to have recourse to private dispute resolution services before the commencement of proceedings. After proceedings have been commenced, the *Supreme Court Rules* empower the court to refer proceedings or parts of proceedings to mediation. A party who fails to participate in mediation will be ordered to pay costs.

The former Chief Justice of Western Australia has recently spoken in great detail about the place of ADR in the Australian system and likely future developments.¹⁶ Across Australia, the proportion of civil cases which are commenced in the superior courts and actually run to trial and decision sits at about 2%. What that means is that for every 50 cases commenced, 49 of them will resolve one way or another before trial. Most will be resolved by some form of ADR. Many of those processes will be court-ordered or court-annexed. The notion of court-ordered or compulsory mediation might seem to be a contradiction in terms. The concept of mediation ultimately relies on the consensus of the parties for the resolution of the dispute. However, all of the research on this matter suggest that even where mediation is ordered by court over strong objection from the parties it still carries reasonable prospects of success. As a former Chief Justice of New South Wales observed, the data show that “reluctant starters may become willing participants” once they are removed from the courtroom environment and the parties and their barristers can stop posturing about how strong their case is.¹⁷

A question often raised in the context of court-ordered mediation is whether judges should act as mediators. Quite obviously, a judge cannot purport to mediate and then hear the trial if that mediation is unsuccessful. That is because the judge would become privy to communications subject to a “without prejudice” privilege in the

16 Wayne Martin AC, *Alternative Dispute Resolution – A Misnomer?*, Australian Dispute Centre ADR Address 2018, Perth, 6 March 2018.

17 James Spigelman, ‘Mediation and the Court’ (2001) 39(2) *Law Society Journal* 63, 65.

course of mediation. The question is whether judges should involve themselves in mediation at all. There are powerful arguments made by eminently qualified people on both sides of the issue. The “no” case is based largely on the argument that judges acting as mediators might be seen to diminish, dilute or confuse the constitutional role of the judiciary.

In this jurisdiction the Associate Judge of the Supreme Court conducts settlement conferences as a matter of course. They are nothing more than a particular form of ADR. I cannot see that the constitutional standing of the Court is thereby diminished. In the past, Judges of this Supreme Court have acted as mediators. I remember one particularly intractable case involving allegations of assault by police in an Aboriginal community which was successfully resolved to the mutual satisfaction of both parties following a mediation conducted by Justice Thomas. I think it unlikely that the matter would have settled without both her Honour’s standing as a judge and her particular personal qualities. Without that involvement, the adjudication of the matter would have reduced to one of the “winner take all” scenarios I made reference to before.

The current last word on this matter is found in the *Guide to Judicial Conduct* published by the Australian Institute of Judicial Administration with the imprimatur of the Council of Chief Justices. While noting the potential dangers, the Guide concludes that practices may be adopted which allow a judge to act as mediator without detriment to public expectations of the judiciary. As a member of that Council, I obviously agree with that position. But this is not to say that judges here will commence or continue to play any significant or structural role as mediators. That is largely due to the fact that the pressure of judicial work is such as to preclude that involvement. The use of judges as mediators would also run against the “user pays” ethos which seems to have taken root in public administration principles.

The symbiosis between the business of the courts and the ADR system is now such that the courts could not function without it; at least not without a substantial injection of additional funding into judicial resources. Court lists would be quickly overrun if ADR was to cease. That symbiosis has also been cemented in the adoption by legal practitioners and the courts of what might be described as a more ADR-informed approach. As Sir Laurence Street observed at the start of the ADR boom, lawyers

had to start studying and practising ADR techniques if they were to comply fully with their obligations to the administration of justice.¹⁸ Those techniques include commercial awareness, speedy resolution, awareness of the importance of emotional and psychological factors, and early neutral evaluation.

But it has not been a one-way street in terms of the adoption of techniques and practices. I remember when I first started representing parties in mediation, they were frequently conducted by Stephen Walsh QC from the Adelaide bar. He was one of the bar's very early adapters to ADR. As I came to realise following observation over many mediations, his approach was to allow each of the parties to make an opening statement identifying what they saw as the crucial issues in the matter. He would then send the parties into separate breakout rooms. He would then go to the first party and indicate privately that he saw some very real weaknesses in its case – both legal and factual. He would then go to the other party and indicate privately what he considered to be the real and possibly insurmountable failings in its case. Both parties would return to the full session miserable and dispirited, and a settlement would almost invariably follow.

When I discussed my observations with ADR practitioners at that time, they often suggested that this approach was not in accordance with good mediation practice. The conventional approach was that mediation should structure a process and assist the parties to recognise the legitimacy of each other's viewpoints. That is, in the process of "facilitative mediation" or "transformative mediation", mediators should refrain from expressing any view as to the relative merits and prospects of a case. Of course, that was anathema to lawyers. All lawyers conventionally did was to express views about merits and prospects. I see now, however, that ADR practitioners have come to the view that this can be a successful and valid approach if undertaken within a proper framework. It was relatively quickly adapted to ADR practice as "evaluative mediation". Under that process, the mediator does assist the parties to reach a resolution by pointing out the strengths and weaknesses of the

18 Sir Laurence Street, 'The Court System and Alternative Dispute Resolution Procedures' (1990) 1 *Australian Dispute Resolution Journal* 5.

cases, and by making non-binding recommendations as to the outcome of various issues.¹⁹

Of course, ADR is no longer hidebound by a slavish adherence to one particular model. Many processes include elements from all of the earlier models. ADR in some fields is becoming more and more multidisciplinary and collaborative. The data indicate that the prospects of a successful resolution in matters such as family disputes is enhanced by a collaborative approach involving a “no litigation” promise during negotiations, and input from professionals such as psychologists and financial planners.

However, there are dangers in the institutionalisation of ADR. Kenneth Hayne, a former judge of the High Court and more recently of Banking Royal Commission fame, has recently written about this.²⁰ He makes the point that the adoption and purpose of ADR in the litigious context was to reduce cost and delay, and for a time those aims were achieved. There is now a danger that ADR has become an end in itself and lawyers see mediation, particularly court-ordered mediation, as another cost centre. Considerable time and resources can now be devoted to preparing for and participating in ADR as a step along the litigation path rather than a means to an end. That end, of course, is the resolution of the matter without litigation or further litigation.

There are obvious difficulties predicting the future evolution of ADR. However, we can make some educated guesses based on the application of new technologies and developments in other places.

Some courts in the United States are offering “mediation-only” services. The parties may lodge originating process seeking mediation. That process is confidential, is limited to business and technology disputes, and is limited to high-value claims. I consider that form of process unlikely to take root in Australia for the constitutional reasons I have already described, and because there is likely to be executive government resistance to the establishment of publicly funded mediation services for business.

19 National Alternative Dispute Resolution Advisory Council, ‘Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution’ (September 2003).

20 KM Hayne, *The Australian Judicial System: causes for dissatisfaction* (2018) 92 ALJ 32.

I think it likely that ADR clauses will increasingly be incorporated into consumer and employment contracts. The effect of that will be that parties to those forms of contract will mediate rather than litigate. That will be driven by the expense, delay and uncertainty of litigation, and an increasing preference for informality and confidentiality. There will be a strong move back to the mediaeval system of resolving these sorts of disputes in the marketplace rather than the courts.

Just as everything else is migrating online, so too will ADR increasingly go online. We have already seen that with eBay and PayPal dispute resolution mechanisms. In the United States there are already well-established online service providers whose sole business is mediation using a combination of online bids, algorithms and proposed settlement packages. Artificial intelligence programs are being developed to formulate a party's best and worst alternative to a negotiated agreement as an aide to ADR. That process will be accelerated by the fact that so much trade at every level has an international character, and in most cases online dispute resolution will be the only practical option. For that purpose, the European Commission maintains an online platform with a resolution target time of 90 days. One of the United Nations commissions has developed a protocol for online dispute resolution which is clearly intended as a precursor to some form of international agreement.

I want to finish with a particular observation about the Territory context. We are moving rapidly to a time at which the Northern Territory will have a majority Aboriginal population. Last time I looked, demographers and statisticians were predicting that will occur by about 2040. Most of that increase will be in remote and traditional communities. That will have a profound effect on the operation of the Territory's institutions. While Territory courts must and will retain their constitutional position, there will necessarily be a move away from the traditional Westminster legal system for the resolution of a range of categories of dispute. That will be driven by the adoption of processes which are more suited to Aboriginal communities than the Western adversarial system. We are seeing that already, in a limited fashion, by the increased use of pre-sentencing conferences in the youth justice context. There is now a facility for some issues arising in native title disputes to be referred to Elders' Councils. Victoria runs a successful Koori Court.

This recognition is not new. As long ago as 1991, the then Attorney-General made a reference to the Law Reform Committee which sought a model for ADR mechanisms in Aboriginal communities. After extensive consultation and deliberation, the Committee delivered a report in 1997 which made a recommendation for the establishment of an ADR program on Aboriginal communities with legislative underpinning. Subject to certain limitations in relation to physical sanctions and international human rights standards, each community would then have the facility to develop their own Community Justice Program. Those programs would extend to both civil and minor criminal matters. Within those communities, the local government authority would enact by-laws which recognised the application of Aboriginal customary laws. That power would be subject to the limitation that no by-law could make legal an act which would be illegal under the general law. Wardens appointed under the Community Justice Program would exercise the powers necessary to bring the matter before a community body for resolution in accordance with the relevant by-laws and program.

As we know sitting here 22 years later, that model was never implemented. What is I think certain, however, is that something like it will be implemented in the not too distant future. That is the inevitable consequence of the demographic factors I have mentioned. It is not entirely clear what that model will look like. It will need to be flexible. It will need to accommodate problem-solving and therapeutic based mediation. The processes will potentially need to accommodate co-mediation or parallel streams to take account of gender issues specific to Aboriginal culture. There will be uncertainties concerning the interaction between that model and the general law. But I don't think there is any doubt that it will happen.