ALTERNATIVE DISPUTE RESOLUTION AND THE ELUSIVE BUTTERFLY OF SOCIAL JUSTICE

AUSTRALIAN DISPUTE RESOLUTION ADDRESS AT THE
SUPREME COURT OF NEW SOUTH WALES 2022

The Hon Robert S French AC
Banco Court, Supreme Court of New South Wales
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1. I acknowledge the Gadigal People of the Eora Nation as the traditional owners of the land upon which we meet. I thank the Australian Dispute Centre, of which I have the honour to be Patron, for inviting me to deliver the 2022 ADR Address. I also thank Chief Justice Bell and the Supreme Court for agreeing to host the event. This is my first trip back to Sydney in over two years and it is good to come to the familiar space of the Banco Court where I have listened to a number of fine addresses over the years.

2. The invitation to deliver this address came not all that long ago and with it the need to formulate a title — typically, on my part, in advance of deep consideration of the content. The search for a title resulted, through a process of free association, in a link between alternative dispute resolution and social justice. And for some unknowable reason the words of Bob Lind's song came to mind, in which the singer tells his listeners that they might hear footsteps running through an open meadow but not to be concerned, it is only him chasing the bright elusive butterfly of love. Social justice being even harder to pin down in concept and realisation than love, the elusive butterfly metaphor slid into place. Of course no metaphor under the sun is new. A due diligence check of the internet disclosed the 100th issue of *Yes* magazine, published in November 2021. It referred to the butterfly model of social justice with four wings: protestors, reformers, builders and healers, and in that last category 'conflict mediators'.

3. This address reflects upon the interaction of alternative dispute resolution in its various manifestations with social justice in its various manifestations and the accompanying benefits and risks. Composing it has been something of a penance for choosing a title first and thinking about the content second. Neither ADR nor social justice is well defined and the content of the latter varies according to the world view of those who use it. Their diverse coverages interact in different ways on individual, societal,

transnational and global canvasses. However, some attempt at definitional landscapes if not boundaries must be made in the course of the presentation.

4. Laurence Boulle and Rachael Field, in their excellent book on *Mediation in Australia*, called the definition of 'alternative dispute resolution' an undertaking which "requires some stamina".[1] It is explained in summary terms in the Law Council of Australia's web page as:

> usually an umbrella term for processes, other than judicial determination, in which an impartial person … assists those in a dispute to resolve the issues between them.[2]

5. Well known species of the genus are mediation and arbitration. There are many others in between along with various hybrids. They are probably better thought of as segments along a taxonomical spectrum from negotiation to binding third party determination rather than as discrete points. The former National Alternative Dispute Resolution Advisory Council (NADRAC), which operated from the mid-1990s to 2013 when it was abolished, identified three classes of dispute resolution processes: facilitative, advisory and determinative. They were explained broadly as follows:

   (i) **Facilitative processes** — involving the use of facilitators to assist in the advancement and improvement of parties' dispute resolution, prevention, or management endeavours.[3] Mediation and facilitation both fall within this category.

   (ii) **Advisory processes** — involving an impartial third person investigating relevant facts and circumstances and providing advice to one or both parties in dispute, expressing opinions on the merits of the case and recommending options and outcomes. Evaluative mediation, early neutral evaluation, conciliation, case appraisal and non-binding expert determination all fall within this category.[4]

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[1] L Boulle and R Field, *Mediation in Australia* (LexisNexis, 2018) par 1.4.

[2] Lawcouncil.asn.au/policy-agenda/access-to-justice/alternative-dispute-resolution a definition formulated by the former NADRAC.

[3] Boulle and Field (n 1) par 1.13.

[4] Boulle and Field (n 1) par 1.15.

(iii) **Determinative dispute resolution** — involving impartial third parties investigating the law, facts and evidence, and making findings and furnishing determinations on the merits of cases. Such determinations are binding by virtue of contract or statute or perhaps both. Adjudication, arbitration, and binding expert determination all fall within this dispute resolution category.[5]

6. Boulle and Field add a fourth category which they call 'transformative processes' described thus:

> Transformative processes focus on the empowerment of all parties, mutual understanding and consensus building and recognition of each party's needs and interests by others.[6]

Intervenors in this category are said to require limited expertise in the substantive issues in dispute but have qualifications and skills in behavioural sciences, group dynamics and organisational behaviour. If any clarity emerges from the taxonomical overview, it is in the understanding that the boundaries between adjacent species or sub-species of ADR are not precisely defined. And anterior to all of them is simple negotiation.

7. ADR processes are generally consensual in design and practice, but not completely so. There are many jurisdictions in Australia which provide for court-ordered mediation or impose prior mediation as a requirement of those who seek to invoke the jurisdiction of the courts. Court mandated mediation will generally be accompanied by a requirement that the parties engage in the process in good faith.[7] Some regard compulsory mediation as a contradiction in terms but it is said that the Australian experience shows that so long as the outcome is voluntary, it does not matter that the process is mandatory. Alan Limbury, a pioneer in the ADR field, made that comment in 2018 and quoted Harvard Professor Frank Sander who distinguished between "coercion into mediation and coercion in mediation".[8] Former Chief Justice Spigelman described the compulsory referral power, which dates back to 2000 in New South Wales, as directed to parties "who are reluctant starters but may become willing participants".[9] Contractual arbitration is consensual in a formal sense in that the process

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5 Boulle and Field (n 1) par 1.16.

6 Boulle and Field (n 1) par 1.17.

7 See e.g. *Civil Procedure Act 2005* (NSW) ss 26 and 27.

8 A Limbury, *Compulsory Mediation: The Australian Experience* Kluwer Mediation Blog, 27 October 2018 – noting the different view in the UK in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

9 JJ Spigelman, 'Mediation and the Court' (2000) 39(2) *Law Society Journal* 63, 65.

itself is the product of an agreement, even though it is an agreement which, once made, is legally enforceable. And the outcome of the arbitration is not an agreed outcome. It is an award enforceable by contract and by statute through the court system.

8. The word 'alternative' invites the question 'Alternative' to what? It is used to designate dispute resolution processes other than the judicial. In the setting of transnational trade and commerce, it may refer to alternatives to determination by international or domestic commercial courts. It can encompass international commercial arbitration and investor state arbitration.

9. Species of the genus non-judicial alternative dispute resolution considerably predate the development of judicial systems. Their history dates from at least 1800BC in the Mari Kingdom (currently Syria) where arbitration and mediation were used in disputes between kingdoms. Solomon's offer to cut a baby in half to resolve a maternity dispute between two women — a species of coercive facilitation — is said to have dated from about 960BC. There are many examples of traditional societies using mediation and arbitral processes to resolve disputes.[10] In China, the Western Zhou Dynasty created the official public post of mediator. Mediation is very widespread in the People's Republic of China today as a dispute resolution mechanism. A People's Mediation Law was enacted in 2011 under which People's Mediator Services are provided free of charge through People's Mediation Committees across the country.[11] There is much literature about the topic. The late Professor Derek Roebuck wrote a multi-volume history of arbitration and mediation. In one interesting example of the use of those mechanisms he pointed to papers of the Privy Council in 16th century England, recording the commissioning of arbitrators to determine disputes but on the basis that their first task was to mediate between the disputants "[t]o bring them to some good composition with the consent of both parties."[12]

10. One successful outcome about a marriage contract in 1583, read as follows:

> Agreement. William Farington … and Thomas, his son and heir, and Elizabeth Benson and Mabel, her daughter, by the mediation of Thomas

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10 See generally Jerome T Barrett, *A History of Alternative Dispute Resolution* (Jossey-Bass, 2004).

11 Ting-Kwok IU, 'The People's Mediation Law of China has been in force for 19 years' (Kluwer Mediation Blog, 2 February 2021).

12 D Roebuck, *The Golden Age of Arbitration: Dispute Resolution under Elizabeth I* (HOLO Books: The Arbitration Press, 2015) 5 citing JR Dasent (ed) *Acts of the Privy Council of England* vol 9, 251. See also the National Archives UK 'The Lancashire Archives'.

> Talbot, James Braithwaite, Thomas Briggs and Gawen Braithwaite, arbitrators indifferently elected by every of the parties. Thomas to marry Mabel … William to pay annuity of £50 a year to Elizabeth.[13]

11. Mediators were not universally admired. In the 16th century, Francios Rabelais, in his social satire Gargantua and Pantagruel, mounted a blistering attack on the civil justice system. He invented the character of a successful mediator named Peter Nitwit. Nitwit's technique was to focus upon litigants drifting unaided to the end of their disputes because then their pockets were empty and "all they wanted was someone to act as sponsor and mediator to make the first mention of settlement to save each party from the awful shame of having said of him – It was he who gave in first …"

12. The term 'alternative dispute resolution' is a relative newcomer in the history of the field of non-judicial dispute resolution. Professor Owen Fiss in his often cited paper 'Against Settlement' in the *Yale Law Journal* in May 1984, referred to the call by Professor Derek Bok, then President of Harvard University and former Dean of Harvard Law School, for law schools, rather than emphasising legal combat, to train their students "for the gentler arts of reconciliation and accommodation". These themes had been associated with the Chief Justice of the day and had become what Fiss called "the source of a new movement in the law". This movement, he said, had even received its own acronym, ADR (Alternative Dispute Resolution).[14]

13. The 'D' in ADR refers to 'disputes'. Lawyers will tend to think of that term as denoting arguments about rights, duties, powers and privileges between persons, natural and corporate, and governments and their various emanations — public authorities and public officials. That idea of 'dispute' is connected to the constitutional character of courts. That character is reflected in their functions, broadly defined by the High Court of Australia in *Fencott v Muller* as:

> the quelling of … controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.[15]

14. Professor Fiss, in his 1984 paper, said of judicial determinations:

> Adjudication uses public resources, and employs not strangers chosen by the parties but public officers chosen by a process in which the public participates. … Their job is not to maximize the ends of private parties, nor

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13 Roebuck (n 12) 5.

14 O Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073.

15 (1983) 152 CLR 570, 608.

> simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.[16]

15. He made the important point that resolution of a dispute does not necessarily yield a just result. There may be imbalance of power and resources and information asymmetry driving a settlement. Judges, he suggested, perhaps somewhat optimistically, can lessen the impact of "distributional inequalities". He argued that:

> There is, moreover, a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities.[17]

That might be thought a contestable proposition. Courts must apply the law but cannot always, to the eye of all beholders, deliver justice.

16. That said, the significance of the rule declaring and rule changing powers of the courts cannot be understated. *Mabo (No 2)*[18] yielded a principle applicable across the whole of Australia, that native title could be recognised at common law, that would not have come into existence when it did had the Murray Islanders not taken Queensland to court. How might history have been different if Queensland had made a settlement with the Murray Islanders? The First Nations of Australia owe a debt of gratitude to the former Premier of Queensland. The historical intransigence of his government also led to the precursor decision of the High Court in *Koowarta v Bjelke-Petersen*[19] that upheld the validity of the *Racial Discrimination Act 1975* (Cth) and provided an interpretation of the external affairs power supporting the constitutional authority of the Commonwealth Parliament to legislate to give effect to a range of important international treaties and conventions concerned with human rights and social justice. And in *Mabo (No 1)*[20] Queensland's unsuccessful legislative attempt to extinguish all native title in the Torres Strait Islands, and so cut the ground out from under the Murray Islanders' claim, yielded a decision of the High Court that entrenched the protection of native title against discriminatory extinguishment. It gave recognition of native title constitutional teeth via a combination of s 109 of the *Constitution* and the *Racial Discrimination Act* upheld

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16 Fiss (n 14) 1085.
17 Fiss (n 14) 1078.
18 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
19 (1982) 153 CLR 168.
20 *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

in *Koowarta*. That combination is the foundation for the entitlements of First Nations people to compensation for extinguishment of their native title, since 1975, by State legislative or executive actions. *Koowarta*, *Mabo (No 1)* and *Mabo (No 2)* converged in a perfect storm of social justice.

17. Beyond Owen Fiss' oft quoted concerns there have been important questions raised over the poor visibility of ADR processes and their lack of accountability in terms of the justice of the outcomes which they yield. American academics, Robert Bush and Joseph Folger, writing in 2012, discussed the efficacy of the mediation of litigious disputes in improving social justice. They took that term to refer to "a state of affairs in which inequalities of wealth, power, access, and privilege—inequalities that affect not merely individuals but entire classes of people—are eliminated or greatly decreased."[21] Such inequalities, they pointed out, are often viewed, and rightly, as structural or systemic. But injustice done separately to individuals can accumulate particularly where the individuals are members of a certain group and thus produce social injustice. Micro-level effects on justice for individuals, if recurrent or systemic, can produce macro-level changes in social justice. They argued that social justice can be affected for better or for worse by the choices between different dispute resolution processes. Mediation treats each case individually, seeking a bespoke solution not constrained by any general rule. That is a virtue. However, if a disputant comes from a disadvantaged group the solution may be unjust. And if just it will not have effect beyond the individual case.

18. Of course that concern may not be shared by people in dispute who are wanting to get their dispute resolved, rather than contribute to the greater good. And there may be a risk to their legitimate aspirations if a mediator is concerned with his or her own vision of social justice norms which might constrain adoption of a solution acceptable to the parties.

19. Mediation has many benefits. However, Bush and Folger, in the context of mediation in the United States, pointed out that there was no rule promoting equality as between groups of different power and status. They observed:

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[21] Robert A Baruch Bush and Joseph P Folger, 'Mediation and Social Justice: Risk and Opportunities' (2012) 27 *Ohio State Journal on Dispute Resolution* 3 (footnote omitted).

> All the impact on fairness or justice is private rather than public, particular rather than aggregate.[22]

20. One answer was to make the substantive fairness of the mediated outcome a key responsibility of the mediator. This may require redefining the objective of mediation not in terms of settlement per se but a win-win agreement that meets the needs of all parties to the greatest extent. This is reflected in what is called facilitative or problem solving mediation. The rationale for that approach is "strongly related to concerns for micro-level social justice".[23] It suggests a role for the mediator in power balancing to minimise the negative effects of unequal power. How that responsibility was to be imposed and how mediators were to be accountable for failures of fairness was not spelt out.

21. The Practice Standards under the National Mediator Accreditation System in Australia make reference to the need for mediators to be alert to changing balances of power.[24] They require the mediator to encourage participants to consider the interests of vulnerable stakeholders.[25] They also require mediators to have the ability to manage power imbalances. On the other hand, while procedural fairness is mandated, fair outcomes are not expressly required.

22. There is an obvious tension between the depiction of the mediator as independent and a requirement for pro-active power balancing. This could all too readily be viewed by the party whose power is being rebalanced as displaying lack of neutrality. The difficulty may be mitigated by modification of the mediation model such that the mediator exercises a combined role of neutral evaluator and proponent of solutions based on evaluation. As long as the parties are clear about their expectations and agreed about the mediator's function, concerns about apparent lack of impartiality should be mitigated. Such a process does not however eliminate power imbalances. It perhaps offers support for application by the mediator of the Fisher/Ury model of principled negotiations where parties identify their respective interests and the interests of the other party, the strength of their case and that of the other party and in the light of that, ask what is their best alternative to a negotiated agreement. The role of the mediator in

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[22] Bush and Folger (n 21) 5.
[23] Ibid 13.
[24] Mediator Standards Board, National Mediator Accreditation System, Standard 6.1.
[25] Mediator Standards Board, National Mediator Accreditation System, Standard 8.4.

such a case extends to assisting the parties in assessing their case to formulate options for resolution and testing them against criteria of legitimacy such as fairness without which the solutions may not be durable.

23. The Standards while purporting to balance self-determination with mediator responsibility for substantive justice, do so in general language.[26] As Boulle and Field say:

> The notion of mediator responsibility for the substantive fairness of outcomes sits uneasily with their independence and impartiality in terms of which mediators are not protectors of the disadvantaged and saviours of the weak – these are responsibilities of supporters, advisors and state agencies and in some situations of courts enforcing formal procedures and legal rights and remedies.[27]

24. ADR processes may be designed or hybridised to assist in the promotion of substantive fairness of outcome, ADR mechanisms can also be weaponised to reflect and entrench inequality between contracting parties. The paradigm case appears to be compulsory arbitration clauses in employment or consumer contracts.

25. Professor Jean Sternlight wrote in the *Stanford Law Journal* in 2005[28] about what she called 'creeping mandatory arbitration'. There is a problem in permitting the powerful to craft a dispute resolution system best suited to them and not necessarily to their opponents or the public at large. Further, and perhaps channelling Owen Fiss, she said:

> justice requires that disputants have access to a dispute resolution process that is transparent and open to public scrutiny. While disputants may, in particular situations, choose private processes, it would be improper for a society to establish entirely private dispute resolution processes.[29]

26. The leading example of the problem from the United States is the inclusion of preclusive arbitration provisions in standard form consumer contracts. Such provisions prevent resort to the courts or to other forms of dispute resolution. An Alabama Court in 1999 stated its concern about such provisions rather colourfully thus:

> The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household

26 Boulle and Field (n 1) par 7.57.
27 Ibid.
28 Jean R Sternlight, 'Creeping Mandatory Arbitration: Is it Just?' (2005) 57 *Stanford Law Review* 1631.
29 Ibid 1635.

> appliance, insurance policy, receives medical attention or gets a job rises as a putrid odour which is overwhelming to the body politic.[30]

27. In the *AT&T v Concepcion* case in 2011,[31] the Supreme Court of the United States upheld by majority, a preclusive arbitration clause in a standard cellular phone contract. The clause provided for individual arbitration of all disputes and precluded resort to class-wide arbitration. A suit against AT&T for false advertising was consolidated with a class action. The arbitration clause was held to be unconscionable by a State Court, a decision upheld in the Ninth Circuit. In the Supreme Court it was held, by a five/four majority, that the *Federal Arbitration Act 1925* (USA) excluded the class action option. The majority decision was delivered by Justice Scalia. Breyer J, in dissent, observed:

> What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?[32]

28. There was evidence that in reliance upon *Concepcion* and other decisions firms in the US engaged in arbitration boot strapping. This involves including in arbitration clauses provisions shortening limitation periods, reducing recoverable damages and preventing recourse to injunctive relief.[33]

29. The *Federal Arbitration Act* does provide that agreements to arbitrate shall be valid save upon such grounds as exist in law or in equity for the revocation of any contract. The height of the bar may vary from State to State. In Virginia, for a contract to be unconscionable it must be one that "no man in his senses and not under a delusion would make, on the one hand and [that] no fair man could accept on the other."[34]

30. An unconscionability challenge to a mandatory arbitration clause succeeded in the Supreme Court of Canada in 2020 in *Uber Technologies Inc v Heller*.[35] The case concerned the standard form employment contract for Uber drivers which mandated dispute resolution by mediation and arbitration in the Netherlands. The arbitration process required administrative and filing fees of US$14,500 together with legal fees and other costs of participation. An employee commenced a class proceeding against

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30 *In Re Knepp v Credit Acceptance Corp* 299 BR 821, 827 (Bankr ND Ala 1999).

31 *AT&T Mobility LLC v Concepcion* 563 US 333 (2011); 131 S Ct 1740 (2011).

32 *AT&T Mobility LLC v Concepcion* 563 US 333 (2011) 9.

33 See R Leslie 'The Arbitration Bootstrap (2015) 94 *Texas Law Review* 266.

34 *Marroquin v Dan Ryan Builders Mid-Atlantic LLC* Civil Act No: 5:19-cv-00083 03.11.2020 (Western District of Virginia).

35 2020 SCC 16 (Can LII); 447 DLR (4th) 179 (Can).

Uber in Ontario for violation of employment standards legislation. On a motion to stay the proceeding in favour of arbitration, the employee argued that the arbitration clause was unconscionable and therefore invalid. The costs of arbitration represented most of the employee's annual income. The majority of the Court held that the arbitration clause was unconscionable and invalid. It observed:

> Respect for arbitration is based on its being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unobtainable, it amounts to no dispute resolution mechanism at all.

31. The utilisation of non-statutory unconscionability to achieve such a result in Australia has rather doubtful prospects. However, the fairness of such provisions at least in consumer and small business contracts is potentially examinable under the provisions of the Australian Consumer Law and particularly ss 23 to 25. Section 23(1)(a) provides that a term of a consumer contract or small business contract is unfair if it would cause a significant imbalance in the party's rights and obligations arising under the contract. Section 25 provides examples of the kinds of terms that may be unfair including:

> (k) a term that limits, or has the effect of limiting, one party's right to sue another party;

32. The application of those provisions to class action waivers in consumer contracts has recently been considered in the Federal Court, albeit not by reference to arbitration clauses. The outcomes do not suggest a low threshold for vitiating unfairness.[36]

33. The point to emerge from all of this is that while ADR has many benefits it will not deliver justice in all cases and can be misused. In this area of the law, as in most, there are no absolutes and risks can attach to ADR — particularly where there is a power imbalance reflected in such factors as economic bargaining power, repeat against single players, and differences in access to legal advice and presentation skills. Awareness of these things can inform design, techniques and processes and the selection of the most appropriate dispute resolution mechanism. It may also inspire some reflection upon the availability of generic statutory protections against the use of ADR in a way that takes unfair advantage of inequality.

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[36] *Carnival PLC v Karpik (The Ruby Princess)* [2022] FCAFC 149; *Dialogue Consulting Pty Ltd v Instagram Inc* [2020] FCA 1846.

34. The social justice benefits of ADR were recognised by the Law Council of Australia in the Final Report on its Justice Project, published in August 2018. The Report pointed to the increasingly important role of ADR in connection with judicial processes in achieving just outcomes. ADR in that context can present a more accessible, affordable and empowering avenue of dispute resolution for people experiencing disadvantage, including but not limited to financial hardship. The Law Council quoted a statement by the former NADRAC that:

> For non-dominant and marginalised peoples, the ability of a sensitive and skilled ADR provider to bend and shape ADR procedures to fit the particular needs of the participants is one of its greatest advantages. It is the feature of ADR which throws it into stark relief against the comparatively inflexible procedures of the formal justice system.[37]

ADR processes can be less intimidating and financially more affordable and can complement more formal forms of intervention in justiciable disputes.[38] These advantages have been recognised by National Legal Aid. All Legal Aid Commissions have established dispute resolution programs in relation to family law. Their more intensive services include grants of aid for dispute resolution for such matters. And beyond ADR another acronym has emerged: ODR — Online Dispute Resolution. This is ADR using online technologies. The 2017 Report of the New South Wales Law Society titled 'The Future of Law an Innovation in the Profession' observed that "ODR can be and is being presented as a way to bridge the justice gap. ODR has the potential to enhance access not just generally but for disadvantaged groups specifically."[39] That claim is, of course, subject to the development of an evidence-base about its efficacy.

35. To this point, the lecture has focussed on definitional aspects of alternative dispute resolution, its use as an alternative to litigation, its benefits and risks. Overall, ADR as a mechanism to enhance access to justice, reduce the cost of dispute resolution and enable courts to operate more efficiently has the potential for a systemic impact on the justice system and thus upon social justice within that framework. There is, however, a much wider application of non-judicial dispute resolution mechanisms in areas well beyond the constitutional competence of the courts. Here dispute resolution engages

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[37] National Alternative Dispute Resolution Advisory Council, *Issues of Fairness and Justice in Alternative Dispute Resolution Discussion Paper* (November 1997) 38.

[38] Law Council of Australia, *The Justice Project* (Final Report, August 2018) Pt 2 'Dispute Resolution Mechanism' 9.

[39] The Law Society of New South Wales, 'The Flip Report 2017' 73.

with larger manifestations of social justice than are associated with the legal and judicial system.

36. The variety and flexibility of non-judicial dispute resolution allows for its bespoke applications to complex conflicts between legitimate interests involving different societal groups and bespoke outcomes not limited to the determination of rights, liabilities or obligations. The resolution of such conflicts involving, but not limited to, legal issues may ultimately turn upon compromises and the application of normative principles which are in tension and in which no one protagonist can be said to be in the right from a legal or public policy perspective. Examples are conflicts involving land use between landowners, local communities, environmental advocates and the proponents of operations impacting on land. The resolution of disputes about these things does not necessarily involve the determination of existing rights and duties though their resolution may lead to the creation of rights or licences with the imposition of incidental duties by way of conditions.

37. A paradigm case is the use of mediation or assisted negotiation in relation to native title claims with which I was involved for five years in the 1990s. There were often in such claims a number of different interests in tension. There were the contending interests of different Indigenous groups or subgroups which had to be addressed as a threshold issue. Then there were the various non-Indigenous land users, pastoral lessees, mining companies who wanted to go on to pastoral land, local authorities with land development responsibilities and State governments with statutory powers over or in relation to the land and, to the extent that waters were concerned, the fishing industry. There was then, and continues to be, a very strong emphasis on negotiated and mediated agreement making in relation to native title claims and proposed uses of land which are the subject of native title claims or determinations. That said, the courts had a critical role to play in the development of the legal framework within which agreements are negotiated.

38. Native title issues are not simply about the use of land and waters. The normative underpinnings of the common law of native title as declared in *Mabo (No 2)* and the purposes of the *Native Title Act 1993* (Cth), indicated that their resolution was to be effected within a legal and normative framework serving what can be called a social justice purpose. That framework, however, had to accommodate the need to find ways,

not amenable to judicial determination, in which concurrent interests, those of the native title holders and those of other land users, could co-exist and cooperate. It reflected a fundamental shift from grace and favour discretions exercised by non-Indigenous landholders and, to a degree, discretionary grants under land rights legislation — to recognition and living with, co-existing Indigenous rights whose origins predated colonisation.

39. Mediation in such cases does not determine or create rights. Determination of rights can only be done by a court and their creation by statutorily supported, legally binding agreements. The court may make a consent determination of native title, following mediation. Agreements as to the management of co-existing interests, indigenous and non-indigenous over the same land and waters do not ordinarily form part of a determination of native title. In cases where a native title claim has been registered but no determination made, claimants and other land users, including local authorities and State Governments, may nevertheless conclude extensive Indigenous Land Use Agreements which, once registered, are supported by the *Native Title Act*.

40. Such agreements about the use and management of areas of land and/or waters can be reached not only over areas where a native title claim has been made or determined, but also where no native title claim has been made. They can be reached over areas where:

- a native title claim has been determined;
- a native title claim has been made;
- no native title claim has been made.[40]

Assistance in their negotiation is provided by the National Native Title Tribunal (NNTT).

41. Some Indigenous Land Use Agreements may look for all the world like a regional treaty. The South West Native Title Settlement in Western Australia comprises six registered Indigenous Land Use Agreements. The parties were representatives of the various Noongar clans, the State Government and a range of public authorities. The

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[40] National Native Title Tribunal website: About Indigenous Land Use Agreements.

recital to the agreement with the Whadjuk clan (just to quote one example) recognised that it was unprecedented and:

> The Settlement provides a significant opportunity for the Noongar People to achieve sustainable economic, social and cultural outcomes.

42. A sequel to that Agreement was the enactment of the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA). The Act's stated purpose was "to recognise the Noongar People as the traditional owners of the Noongar lands.".[41]

43. The various techniques of non-judicial dispute resolution have a much larger field of operation than the field in which they are alternatives to judicial determination. They extend also to transnational and international disputes and conflicts. It has long been accepted that non-judicial mechanisms are important to the resolution of international commercial disputes "because [it] provides a neutral ground for parties of mixed nationalities, with different ethnic and legal systems, to resolve their controversies without fear of subjectivity by the court system of the forum state."[42]

44. There is a large scale mediation and arbitration industry devoted to the resolution of commercial disputes involving parties from different jurisdictions. Mediation is deployed frequently in relation to such disputes and is sometimes mandated by contract or by court order. There is an enormous amount of activity in this area and enormous costs incurred, particularly in high-end arbitrations. The social justice dimensions of resolution of disputes between well-resourced commercial entities may be difficult to discern. Of course, it can fairly be said that commercial dispute resolution involving mediation or arbitration or other elements of the dispute resolution toolbox, serves the maintenance of a rules-based domestic and international trade order. In that sense it may be thought to deliver an obvious benefit — although commercial arbitration and mediation being what they are, a lot of the activity is invisible as are the bases upon which agreements are reached or arbitral decisions made. Sometimes resolution of a dispute between two commercial entities may have wider implications for third parties, including workforces, consumers and perhaps the environment. Many examples can

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41 *Noongar (Koorah, Nitja, Boordahwan) Past, Present, Future) Recognition Act* 2016, Preamble, Recital E and Schedule 1.

42 MF Hoellering, 'Alternative Dispute Resolution and International Trade' (1986) 14(3) *New York University Review of Law and Social Change* 785, 785.

be imagined. There is undoubtedly a case that the orderly resolution of disputes has societal benefits. It is harder to make a case for social justice as a product of such processes.

45. Concerns about the invisibility of international commercial arbitration in particular, have no doubt informed the rise of international commercial courts and the creation of an association known as the Standing Forum of Commercial Courts. International commercial courts with suitably flexible procedures and experienced judges from a variety of jurisdictions can promote the growth of a rules-based approach to dispute resolution visible for all to see and, borrowing from each other's experiences, able to contribute to convergence of rules affecting transnational trade and commerce.

46. There is also a plethora of bilateral investment treaties and free trade agreements globally which incorporate investor-state settlement processes — generally providing for arbitration of disputes where an investor from one State party to the agreement claims to have been the subject of adverse action by another State party in breach of the agreement. Typically complaints by investors relate to alleged unfair discrimination or expropriation of property. The dispute settlement process enables investors to avoid engagement with the judicial system of the host state in favour of an arbitral process. There are obvious benefits for States seeking to attract capital investment but which lack sophisticated commercial courts or where the judicial system may not be seen as efficient or independent. To the extent that inflows of investor capital improve economic and general wellbeing, it might even be said that such provisions serve a generalised social justice purpose.

47. Critics of the investor-state arbitration system however point to the privileged position it gives to investors in disputes with the states compared to the position of other litigants. They also point to the chilling effect on regulatory action on the part of states which may be pursuing social justice purposes including climate change legislation, and environmental and health protection measures, which may impact adversely on the economic interests of a particular investor.

48. The leading Australian example was the claim brought by a Hong Kong-based member of the Philip Morris tobacco group that the tobacco plain packaging legislation enacted

by the Australian Government constituted an expropriation of the property of its Australian subsidiary in relation to registered trademarks and designs.[43]

49. The Notice of Claim in that case was delivered on 22 June 2011. The hearing of the preliminary objections made by Australia took place in Singapore in February 2015. Four Senior Counsel led by Justin Gleeson SC, represented Australia, with a supporting cast of 17. The Tribunal issued its award dismissing the claim on 17 December 2015 as 'inadmissible', finding that the commencement of the arbitration had constituted an abuse of process. In that case the claimant company in Hong Kong had changed its structure to gain the protection of the investment treaty when the dispute was foreseeable.[44] An award of costs in favour of Australia was made on 8 March 2017. The amount was not disclosed in the published version of the award.

50. While it is pointed out by the proponents of investor-state arbitration that Australia won, the process costs tens of millions of dollars and, typically, takes years to resolve and, in that case, was resolved on the threshold question.

51. It will not have passed unnoticed that recent talk of a possible cap on gas prices in Australia has attracted suggestions of significant investor-state action by offshore holding companies claiming to be adversely affected by such action.[45] In October this year, *The West Australian* newspaper reported that Mr Clive Palmer's Singapore-based company, Zeph Investments Pte Ltd, gave notice to the Commonwealth of an alleged breach by Australia of the Singapore-Australia Free Trade Agreement. The allegation concerned a Western Australian law, unsuccessfully challenged in the High Court, which extinguished Mr Palmer's rights under an arbitral award made in his favour and against the State of Western Australia.[46]

52. There have been cases in which multinational companies have argued that a court decision constituted a breach of an investment treaty. Eli Lilly took Canada to

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43 The High Court rejected a challenge to the validity of the laws based on acquisition other than on just terms: *British American Tobacco Australasia Ltd & Ors v Commonwealth* (2012) 250 CLR 1.

44 *Philip Morris Asia Limited v Australia* (PCA Case No 2012-12) par 585.

45 See e.g. R Mizen, 'Huge lawsuits loom over gas market intervention', *Australian Financial Review* (10 November 2022).

46 Angie Raphael, 'Billionaire Clive Palmer plans to sue Commonwealth for damage over iron ore project', *The West Australian* (Perth, 28 October 2022) and see *Mineralogy Pty Ltd v Western Australia* [2021] HCA 31.

arbitration, ultimately unsuccessfully, over the Canadian courts' approach to the validity of patents held by it. There are other examples.

53. In Australia this was a matter of some concern to the Council of Chief Justices and, in November 2014, I wrote on their behalf to the Attorney-General requesting that officers of the Commonwealth negotiating investment agreements have regard to the risk that, absent suitable qualification, arbitral processes might be invoked to call into question the decisions of our Courts either by alleging that they constituted breaches of the agreement or alternatively seeking findings based on propositions inconsistent with such decisions.

54. For the time being this is not an issue for agreements currently under negotiation as the Government, echoing the policy of the Gillard government, eschews the inclusion of investor-state dispute settlement (ISDS) clauses in investment treaties or free trade agreements to which Australia is a party. Trade Minister Don Farrell in a speech given three days ago, announced that Australia will not include investor-state dispute settlement in any new trade agreement. He added:

> And when opportunities arise, we will actively engage in processes to reform existing ISDS mechanisms to enhance transparency, consistency and ensure adequate scope to allow the Government to regulate in the public interest.[47]

55. The story of ISDS and the controversy that has surrounded it over many years now is indicative of the ways in which ADR may manifest not always enhancing social justice and sometimes detracting from it.

56. It is sometimes said to be a feature of a judicial system that it is 'arbitration friendly'. That is generally taken to mean that the courts of the jurisdiction will be slow to set aside or fail to recognise and enforce arbitral awards.

57. Arbitration, like ADR generally right across the range of size and complexity of disputes, is an instrument which may be used to yield positive societal benefits. It may also have consequences that undermine social justice. What this requires from policy-makers and from courts and practitioners in the field is a clear eyed view of the upsides and downsides rather than a friendly one.

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47 Minister for Trade and Tourism, Senator the Hon D Farrell, 'Trading our way of greater prosperity and security', (Speech, Australian APEC Study Centre, Melbourne, 14 November 2022).

58. In finishing let me reach out briefly to the elusive butterfly of social justice of which there are many species and which embody different concepts of justice. Justice is a term with a long and evolving history in human thought. Plato's concept of 'dikaiosune' expounded in the 'Republic' and often translated as 'justice' embraced a broad ethical notion translated as 'right' or 'righteousness' in dealings with others. It was embedded in a hierachal social structure with the philosopher Kings on top and farmers and artisans on the bottom. It is perhaps indicative of the general proposition that justice is a term of societal or social content.

59. The term 'social justice' seems to have had its origin in the natural law philosophy in Thomas Aquinas and on one account emerged as a term in Italian 'La giustizia sociale', coined by two Catholic Priests of the 19th century, Antonio Rosmini Serbati and Taparelli D'Azeglio. Rosmini's book *The Constitution under Social Justice* was published in 1848.[48]

60. The constitution which Rosmini had in mind for Italy was informed by a particular vision of social justice. It proposed representation in the legislature be based on property — major property holders in the Upper House, and minor property holders in the Lower House. The un-propertied poor would not have a claim to social justice at all because they made no contribution — although still equal in dignity and natural rights between God and man.

61. John Stuart Mill in his essay on utilitarianism in 1861 wrote:

> society should treat equally well who have deserved equally well of it, that is, those who have deserved equally well absolutely. This is the highest abstract standard of social and distributive justice; towards which all institutions, and the efforts of all virtuous citizens, should be made in the utmost degree to converge.[49]

This statement of course begs the question: what does it mean to be deserving and who decides?

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[48] Robert P Kraynak, 'The Origins of 'Social Justice' in the Natural Law Philosophy of Antonio Rosmini' (2018) 80(1) *The Review of Politics* 3–29 (Published online by Cambridge University Press, 31 January 2018).

[49] John Stuart Mill, *Utilitarianism* (1861) Ch 3.

62. A powerful voice from the 1960s was that of John Rawls who set out two principles reflecting the idea of fairness in a just society:

- the liberty principle – each person should have an equal right to the most extensive basic liberty compatible with a similar liberty for others;
- the difference principle – social and economic inequalities are to be arranged so that they are both:
  - (a) reasonably to be expected to be to everyone's advantage; and
  - (b) attached to positions and offices open to all.[50]

This can properly be called a 'social justice vision' not complete but relevant to our times. Its core principle of fairness has been a powerful emanation of his work although it has been criticised by others.[51] It informs many current concepts of social justice.

63. What our courts provide is not social justice according to the judges, but justice according to law. We expect procedural fairness from our courts and that is what they deliver. We also expect equal justice. As was said in the High Court in *Green v The Queen,* a case which concerned the sentencing of co-offenders:

> 'Equal justice' embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law … It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law.[52]

64. Substantive fairness, that is fairness in outcomes, extends beyond equality of treatment. The extent to which it can be delivered in a particular case depends upon the content of the law, which the courts must administer, be it the judge-made law which strives for fairness or statute law which may embody a variety of political conceptions of fair treatment. For most people the idea of justice is considerably larger than the fair determination of rights, duties, liabilities and punishments at law and the award of legal remedies. There is a story, which makes the point, of a prominent legal practitioner in

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50 John Rawls, *A Theory of Justice* (1999, Oxford University Press) 60.

51 See generally Clive Crook, 'John Rawls and the politics of social justice' *The Atlantic,* December 2002.

52 (2011) 244 CLR 462, 472–3 [28] (footnotes omitted) (French CJ, Crennan and Kiefel JJ).

the Northern Territory in about 1911 whose client said "I want justice". The lawyer responded "We can probably do better. I think we can win your case."[53]

65. It is for that reason perhaps that we do not often speak of the justice which courts deliver as social justice. Indeed the complexity of many of our laws makes it hard to discern a particular normative purpose — perhaps because many of them give effect to a political compromise seeking to strike a balance between conflicting interests.[54] They lack what might be called moral clarity and their application is not necessarily relatable to any common concept of justice. Indeed sometimes the law requires the courts to give decisions which many would think of as unjust even though according to law. ADR in the public sphere can address a wider range of issues about relationships and non-legal norms and perhaps even imbalances of power and in doing so may do better than 'justice according to law'.

66. There is a large number of definitions of social justice available. Some have a particular historical or ideological context. Some will be shaped to prioritise advocacy for particular causes. So it is necessary to look to who is offering any given definition. On 26 November 2007, the General Assembly of the United Nations adopted a resolution establishing a World Day of Social Justice to be held annually on 20 February. The recitals to the resolution referred to a commitment "[t]o promote national and global economic systems based on the principles of justice, equity, democracy, participation, transparency, accountability and inclusion."[55] It spoke of social development and social justice as indispensable to the achievement and maintenance of peace and security within and among nations. The content of social justice thus celebrated was expressed at what lawyers would call 'a high level of generality' but indicates a global conception.[56] The previous year the Department of Economic and Social Affairs of the United Nations under the aegis of the International Forum for Social Development, issued a publication entitled 'Social Justice in an Open World: The Role of the United Nations'. Part of the discussion was upon distributional equality and, in particular,

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53 Douglas Lockwood, *The Front Door*: *Darwin, 1869-1969* (Rigby Ltd, 1968) 234.

54 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 207–8 [32] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

55 A/Res/62/10, 62nd sess, 57th plen mtg, Agenda Item 48, (26 November 2007) World Day of Social Justice.

56 Ibid.

excessive income inequality. Acknowledging the complexity of the concept in different societal contexts, the authors prudently observed that:

> Present-day believers in an absolute truth identified with virtue and justice are neither willing nor desirable companions for the defenders of social justice.[57]

67. The authors proposed a larger vision: that social justice is broadly understood as the fair and compassionate distribution of the fruits of economic growth, subject to some important qualifiers. While maximising growth is the primary objective, growth must be sustainable — the integrity of the natural environment must be respected — the use of non-renewable resources rationalised and future generations able to enjoy a beautiful and hospitable earth:

> The conception of social justice must integrate these dimensions, starting with the right of all human beings to benefit from a safe and pleasant environment; this entrails the fair distribution among countries and social groups of the cost of protecting the environment and of developing safe technologies for production and safe products for consumption.[58]

68. The significance of alternative dispute resolution in the advancement of that definition of social justice may still be an open question. There is no doubt however that properly designed and selectively applied, it can make a substantial contribution at many levels within Australia society and beyond. Perhaps changing the metaphor in my title a little, we should think of ADR as a social justice butterfly, always on the move and capable of engendering, hopefully in unequal measures, approval and exasperation.

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57 Department of Economic and Social Affairs, The International Forum for Social Development: 'Social Justice in an Open World: The Role of the United Nations' (United Nations, New York, 2006) 2–3.

58 Ibid 7.