ALTERNATIVE DISPUTE RESOLUTION (ADR): MERE GIMMICKRY?

The Hon. Mr Justice de Jersey, Supreme Court of Queensland.

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The mechanisms of so-called alternative dispute resolution, or ADR as it is often termed, have excited great interest in this country in recent times. The commercial community is inspired by the promise of quicker, cheaper dispute resolution; the legal profession is anxious as to its role in any non-adjudicative processes; and courts wonder as to possible diminution in the significance of the trial with its virtual guarantee of justice.

Such methods have taken at least a foothold here. In New South Wales in particular, we saw the establishments in 1981 of Community Justice Centres, in which lay mediators, in the absence of legal representatives, endeavour to steer conflicting parties towards a compromise. Then two years later, a system of reference to arbitration was introduced in the New South Wales District and Local Courts. In Queensland, the Supreme Court introduced last year a facility for the compulsory mediation of commercial causes. The Queensland Attorney-General has recently expressed interest in the establishment of Community Mediation Centres.

What are these methods of ADR? Some facilities are private, and others may be publicly offered.

MEDIATION

Of the private facilities, mediation is probably the most important, designed to expedite the settlement which ultimately concludes most disputes, although frequently at the court door. Such mediation is conducted by neutral third parties, trained in the art, drawn from panels maintained by private dispute resolution centres. An alternative is an abbreviated trial, again conducted by a neutral third party, sometimes a retired judge, who pronounces a binding result, binding because of the parties' agreement. The "mini-trial" is yet another mechanism offered by these private centres. It is a structured settlement technique. Discovery is limited, and followed by a hearing at which a neutral adviser presides. In the usual case, he will express views on the merits, and then help the parties to fashion a settlement.

The publicly offered facilities include the neighbourhood disputes centres, such as have been established in New South Wales. Centres like these were first established, it seems, in Atlanta, Georgia, in 1977. The

Atlanta Centres have since successfully managed thousands of both civil and criminal cases. These centres may deal with a great variety of cases, ranging from fencing disputes and arguments about barking dogs to matrimonial conflict. Interestingly, more than 600,000 centres like this operate in the People's Republic of China, where they are termed "People's Mediation Committees". The other major publicly offered facility is what is termed "court-annexed arbitration", to which I revert below.

The trend towards ADR has been a most significant development over the last decade in the United States. Sixty per cent of law schools there are now teaching the subject. Its literature proliferates. Bar Associations are giving it unprecedented attention, through committees and programmes. Approximately 20 State legislatures have enacted legislation on the subject. There are more than 200 court-annexed ADR programmes operating. More than 200 leading corporations have pledged to consider ADR in respect of any dispute with other signatories to the pledge. Legal firms are establishing separate ADR departments. The number of private ADR firms is increasing.

In November 1988, I was privileged to attend, in Baltimore, Maryland, a "National Conference on Dispute Resolution and the State Courts", conducted by the National Center for State Courts, the State Justice Institute, and the National Institute for Dispute Resolution. The nature of the Conference itself illustrates the importance of this topic in that country. More than 300 delegates attended, including judges, court administrators, academics, corporate counsel, other members of the legal profession and the business community, and international visitors. The debate was lively. The bibliography attached to the Conference papers included more than 500 separate publications on the subject, itself an indication of the current importance of the subject in the United States.

Of course, the reason for the immense interest in this matter there is the necessity for alternatives to court resolution because of court congestion. The notion of speedy civil justice is an oxymoron in most American States. Since the influential Pound Conference in 1976, the court system has been criticised widely, not only for delay, but also for being too adversarial. In 1984, Chief Justice Warren Burger described court-annexed arbitration, currently one of the major ADR techniques, as "a program whose time has come", and added that "experimentation and practical implementation in this area are sorely needed".

In Australia, there is no comparable congestion in the courts. Yet interest in the mechanisms of ADR is lively. Why is this so?

Only a small percentage of civil disputes run to trial—probably less than 5 per cent—but although most are settled, they are often settled far too late, after costs have been unnecessarily incurred and commercial relationships irreparably fractured. The sensible use of these alternative mechanisms may reduce delay and expense, achieve better resolutions, preserve continuing business relationships, allow the choice of an

adjudicator particularly qualified in the area of the dispute if complex, and incidentally, relieve court congestion and leave the courts more free to dispense justice in the cases which really must or should go to trial.

Such considerations, as well as the minimisation of delay, have contributed to a sophisticated system of additional such facilities in the United States. In that country, there are now ADR programmes operating in 44 States and in the District of Columbia. There are more than 450 separate programmes, half of them court-annexed. Federal judges are obliged to consider settlement and the possibility of extra-judicial resolution at early "status conferences". There are many private dispute resolution centres, some of which receive State, Country or municipal funding.

COURT ANNEXED ARBITRATION

Court-annexed arbitration systems operate in about half the States. In Hawaii, for example, all claims in respect of personal injury and property damage torts, where the amount at issue does not exceed $150,000, are automatically referred for mediation and arbitration. In California, the monetary limit is $50,000. All such programmes authorise trial courts to require the arbitration of civil suits falling within certain jurisdictional limits. The arbitration results in an award which has the force of a judgement. The arbitrtor is drawn from a panel of attorneys or retired judges, who are paid moderate fees. A party dissatisfied with the result, following the abbreviated arbitation hering, may request a hearing de novo before the court. He may have it, but with sanctions in costs should he not subsequently improve his position. The "appeal" rate has reportedly not been high.

Are these new procedures inherently worthwhile? Are they merely convenient responses to court congestion in the United States which finds no parallel here? Or are they mere gimmickry which should best be ignored?

One must at once acknowledge a lack of data on cases handled by these alternative means as against cases handled traditionally. One must also be careful about too readily accepting the high enthusiasm of those who offer these alternative services privately for reward.

It does seem, however, that ADR fulfils an important role in the United States which might be translated to Australia. ADR is achieving this very significane goal: it is diverting attention away from the inevitability of trials following exhaustive and expensive interlocutory procedures, back to the obvious desirability of early, negotiated settlement. While ever it promotes that object, it must be seen as having a worthwhile role to play.

The legal profession and the courts would be foolish to ignore this phenomenon. It is still new here, and a continuing exuberant scepticism

may not be a bad thing. But the phenomenon should be promoting the profession to earlier active attention to negotiation, and the courts to more streamlined case management.

How should the courts be responding to these developments? The courts, and the governments which fund them, must be astute to preserve the institution which provides the best guarantee of a just adjudication, and that is the court system. But obviously the courts must look to better case management, wherever possible taking early control of cases, maintaining regular supervision of them, exploring the prospect of mediation, scheduling steps within short but realistic time limits, and avoiding adjournment, all with a view to securing an early trial only where necessary and then confined to points truly in issue and of significance. It is my own view that judges should these days also be prepared to act as catalysts in the settlement of civil litigation, and that courts should consider—as we have done in Queensland—introducing machinery for compulsory mediation in appropriate cases. Finally, the courts (and governments) should keep in mind the possibility of the future introduction of court-annexed arbitration facilities such as have worked with apparent success in the United States, although such a development would seem premature at this stage of our development.

I certainly do not think that ADR should be dismissed as mere gimmickry. Its designation as "alternative" may be unfortunate, in suggesting a species of dispute resolution mechanisms necessarily separate from the court. The American experience suggests rather that it may work very effectively in a manner complementary to traditional litigation, indeed enhancing the effectiveness of the latter and the prospect of ultimate justice.

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