because they have not kept pace with the introduction of the new technology used in modern banking.

constructive trusts. The courts have developed the law of constructive trusts in ways which cause problems for banks. The Committee acknowledges the existence of these problems, but because they are complex and not confined to banking recommended that the law of constructive trusts be referred to the Law Commission for review.

implications for Australia. Much of the law and practice of British banking applies in Australia. Apart from the Cheques and Payments Orders Act 1986 (Cth), the Bills of Exchange Act 1909 (Cth) reproduces most of the English 1882 Act. The common law applies equally to banking in Australia. In Australia, recent legislation relating to tax file numbers, disclosure of material relating to drug trafficking and other crimes, and possibly the Privacy Act 1988 relate directly to banking. Section 52A of the Trade Practices Act 1974 (Cth), which allows courts to give relief to victims of 'unconscionable' contracts, may affect banking contracts. The Commonwealth Minister for Consumer Affairs, Senator Nick Bolkus, has recently announced planned legislation relating to the activities of credit reference agencies — a matter which the Jack Committee considered very carefully. Banks in Australia have recently established a scheme for a banking Ombudsman. Many of the recommendations of the Jack Committee may be as relevant in Australia as they are in the UK.

* * *

another way

> Positive, adj. Mistaken at the top of one's voice.
>
> Ambrose Bierce, *The Devil's Dictionary*

On 3 June 1989 the Australian Institute of Judicial Administration held a Seminar on Aspects of Alternative Dispute Resolution in conjunction with the Australian Commercial Disputes Centre Ltd. The meeting was well attended by the judiciary and the profession, and by academic, administration and government lawyers. The Attorney-General Lionel Bowen was present.

The stated purpose of the day was to explore how much common ground there might be between the traditional court system of settling disputes and 'alternative' approaches, which emphasise consensual or informal dispute resolution, and how much can be learned from one by the other and used for the general benefit of the community.

The AIJA also hoped to define some useful areas for possible future research.

adr in hawaii. In the first session Dr Peter Adler, Director of the Program on Alternative Dispute Resolution for the Supreme court of Hawaii spoke on 'Alternative Dispute Resolution in American Courts: Recent Developments'. In the United States 60,000 lawsuits are filed each day; less than 10% go into Court, less than 5% to a jury. There are 900,000 lawyers and they are paid $(US)35 billion per annum, representing 1.5% of the GNP.

There is, in the US, dissatisfaction with civil justice because of its high cost and a demand for new and more satisfying ways of resolving disputes. This

has contributed to a social movement which manifests itself in the development of new methods of dispute resolution. Dr Adler described 10 identifiable techniques or procedures for dispute resolution: these were not necessarily mutually exclusive, but formed a continuum:

- two party negotiation
- conciliation — a third party brings the parties together to create an opportunity for resolution
- voluntary mediation — the mediator is actively involved in the negotiation and development of a solution, but has no authority
- mandatory mediation
- formal fact finding — a third party investigates and reports on the facts
- arbitration — the parties voluntarily choose a private arbitrator
- mandatory arbitration, court annexed and non-binding (see below)
- summary jury trials, where the parties' cases are presented in summary form to a mock jury whose conclusion then forms the basis of negotiation
- rent-a-judge — parties choose a private judge
- full State adjudication;

Within this framework or continuum each approach can be assessed as more or less:

- coercive
- adjudicative
- formal, or
- protective of due process.

court-annexed arbitration. Dr Adler spoke of the experiences of the Supreme Court of Hawaii in introducing, on an experimental basis, a system of court-annexed arbitration. This procedure, which is mandatory but non-binding, was introduced as a pilot program in personal injury litigation involving claims up to $50 000.

- Within a few weeks of filing the claim in Court, an arbitrator would be selected.
- Within 9 months of the filing, the arbitrator would hold a prehearing conference and a hearing, and would give the award.
- If the award was not accepted by a party, the pre-trial would be held by the Court within 12 months of filing the suit.
- The arbitrators are trained senior members of the bar acting on a 'pro-bono' unpaid basis.
- Discovery cannot be sought without leave of the arbitrator.
- The hearing is similar to a court hearing, but there is no transcript and less documentation.
- An 'arbitration' judge is available in the Court to hear applications and review directions of the arbitrator. The judge's decision is not reviewable.
- If the arbitration award is not objected to, judgment is entered 20 days after it is filed.
- If the award *is* objected to, the whole arbitration proceedings are sealed up and the case continues
- At the conclusion of the case a party who does not improve his or her position by 15% may incur cost penalties.

fewer trials. The program has seen researched in a study comparing arbitrated cases with a cohort of cases which were

not dealt with under the arbitration procedure. The arbitration procedure is regarded as fair, having regard to speed of settlement and cost. Most arbitration matters settle before they are heard. While 4% of arbitrated results are objected to, very few go to trial.

public-spirited lawyers. One reason for the success of this program is the commitment and public spirit of the lawyers, who act as arbitrators without fees. Later they will get $100 out of pocket expenses.

Other initiatives under way in Hawaii cover complex civil litigation, mandatory mediation in family law matter and juvenile matters.

adr in australia: outside the courts. In the second session there were presentations from representatives of three Australian organisations with expertise and experience in ADR. David Newton, Secretary General of the Australian Commercial Disputes Centre spoke of the its work. It offers to the commercial sector expert advice on the most effective way to resolve a particular dispute on a fee for service basis. The aim is to facilitate a solution by enabling the parties to get into a negotiating position and helping them to formulate a solution. The Centre trains and employs high quality mediators, mainly lawyers and former judges. It has a very high success rate.

community justice centre. Wendy Faulkes, Director of the *Community Justice Centre*, spoke of the work and philosophy of the Centre. The mediation process aims to bring the parties together on a voluntary basis to discuss and negotiate issues with the assistance and direction of the mediator. Mediators are trained for their role: they need no special expertise other than their personal qualities, and their ability to relate to people in a non-judgmental but assertive manner. The process aims to encourage self-determination and to acknowledge the right of individuals to give away strict legal rights.

Though operating in different environments, there appear to be parallels between ACDC and CJC. They operate within the voluntary mediation mode and seek to empower parties to achieve a solution which both will accept.

centre for dispute resolution. Jennifer David, Manager, Education and Research ACDC, spoke about the need to educate and train lawyers in methods of dispute resolution as well as in litigation.

Her analysis of the dispute resolution process ranged from informal consensual methods, in which control remained with the disputants, at one end of the continuum, to formal adversarial methods in which control lay with a third party at the other end.

The stages she described were similar to Dr Adler's continuum:

- negotiation
- mediation
- independent expert appraisal
- case presentation
- conciliation
- hybrid arbitration
- arbitration
- private judge
- adjudication

The importance of ADR is that it is flexible and responsive to the needs of the parties. This feature should be preserved even if ADR is institutionalised.

factors influencing outcome. Ms David asked for help in identifying factors which might affect the selection of cases suitable for ADR (or mediation), the most appropriate method to adopt for particular disputes and the likelihood of success. Some were:

- the powers of the intervenor
- the finality of the decision
- the relationship between the parties
- any power imbalance between the parties
- costs
- remedies
- confidentiality
- cultural differences
- desire to settle
- neutrality of the expert
- the time of intervention.

adr: perspective from within the judicial system. In the third Session attention was focussed on ways in which Courts could use ADR techniques to reduce delay and cost in litigation. Among the views taken by Judges were that the court system was and should be seen as a system of compulsion and not as a social agency. Any approach to ADR should be in that context. There could be benefits in directing a mini-trial where the cost of a full trial would exceed the amount at issue. Because some people with large resources might not want to settle, it might be necessary for mini-trials to be compulsory. Another view was that there was no point in ordering people to mediate if they did not want it; they would not be satisfied and may incur higher costs. Compulsory offers of settlement, which could be used in determining costs could be a means of encouraging a realistic approach to disputes.

conclusions. There was no formal contribution from the Family Court, which has incorporated ADR methods into its procedure by legislation and rules of Court. Nor from the Australian Industrial Relations Commission, which has expertise in dispute resolution by means of Conciliation & Arbitration. The overall impression from this session was that ADR was seen by the judiciary as something separate and apart from the judicial process.

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the cost of justice

> Yet we should also not lose sight of the fact that legal fees do more than put another BMW in the driveway. They are indeed a disincentive to litigation, as many are saying in the public debate over the Magistrate's Court Bill. This seems to me a most useful function. Far from denying a person's right to his day in court, high fees keep many time-wasting affairs out of a system already clogged with a plethora of vexatious claims.
>
> Noel Bushnell, *Australian Business*, 17 May 1989

The cost of legal services is an important issue in many countries. The previous article discussed alternative dispute resultion as one way of reducing the cost of justice. There is presently legislation before the Victorian Parliament providing that where the matter in dispute involves $5 000 or less, the litigants are not entitled to costs. Besides concern about the cost of litigation there has been much debate about the cost of non-litigious legal services such as conveyancing. Lawyers say that their overheads are high.

On 10 May 1989 the Australian Senate gave a reference on the cost of justice to the Senate Standing Committee on Constitutional and Legal Affairs.

The Committee has been asked to inquire and report on

- the cost of legal service and litigation in Australia today, including:
  - lawyers' fees, charges and overheads,