National Spring Conference on
Arbitration and Mediation

Cultural dynamics in dispute resolution

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Introduction

In his original invitation to me Philip Fargher suggested that I produce a paper which focused on the rules of Australian courts as they allow for the use of arbitration, mediation or other alternative dispute resolution strategies as an adjunct to the disposal of litigation.

Whilst I will certainly discuss recent trends in that area, I propose, initially, to invite your attention to some relevant dynamics and their significance. It is, of course, not unimportant to keep in mind what brings us to our present situation, what problems we now face and, therefore, what solutions are both feasible and necessary.

Some of what I have to say in my introductory remarks will come as no surprise to those of you who were present at the 1997 AGM of the local chapter. However, it is necessary that I lay a basic foundation for this paper.

Problems of culture

In a paper which I presented to an interstate conference some time ago, I made the point that, somewhere along the way, we seem to have lost sight of the ball.

It was said many decades ago that the true function of the legal profession, in relation to contentious matters, should be to gain an acceptable result, with the smallest possible cost to the client, in the shortest possible time; and that the role of the lawyer, in seeking to achieve those aims, ought to be to persuade clients to settle disputes by means other than adversary litigation.

Unfortunately, it must be said that, generally speaking, not only is that not the current culture of the legal profession, but also, it does not seem to be the expectation of the community at large.

I have expressed the view that, at the present time, both the courts and the legal profession have either painted themselves, or been painted into, a cultural corner

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from which there is an imperative need to escape. Any escape will, however, require radical surgery on both current professional and community mores.

What have been the factors which have led to this situation?

So far as the profession is concerned they have essentially been trained and have, over the years, also traditionally practised in the context of a professional culture in which the 'normal' mode of dispute resolution has been the traditional process of adversary litigation.

At the same time there has, by and large, been an ingrained expectation on the part of the community, that, when a dispute arises, adversary litigation is the normal method of resolving it. It is fair to say that there has been a widespread community ignorance of what alternative dispute resolution mechanisms are available and how they can be accessed.

The practical end result has tended to be that, when a party in dispute seeks legal advice, any immediate suggestion of the desirability of settlement or compromise is likely to arouse in the client a strong doubt as to whether the correct lawyer has been consulted. Moreover, if that type of approach is adopted, the natural reaction of the legal representative of the other party is likely to be that there cannot be much merit in the claim made. That will immediately tend to evoke a reaction counter productive to the claimant.

So it is that our present culture is not attuned to finding the fairest and most productive solution to a matter in dispute, but to win a contest at all costs and vanquish the opponent.

These difficulties are compounded by the fact that, alas, our community seems to be following the path navigated by our American cousins some time ago. As we know, their credo seems to be 'sue the bastard', in relation to almost anything. These days the concept of disgruntled clients also suing their professional advisors of all disciplines at the drop of a hat seems to be spreading like a contagious disease. In the result, the litigation lawyer is, perhaps unconsciously, motivated to pursue every possible legal procedure and process to the full, because of the lurking spectre of a possible professional negligence claim.

This scenario has led us to a situation in which, to put it bluntly, our cherished system of common law and process lies in something of a shambles around us. (See Brennan C.J. *Key Issues in Judicial Administration* (1996) 6 JJA 138 at 139.)

Such a statement sounds overly dramatic, but, if we are honest with ourselves, it is little less than a realistic appraisal of where we now stand.

It is undeniable that the average citizen of this country has effectively been disenfranchised from pursuing legitimate civil rights. The truth of the matter is that only the very poor or the wealthy are, in most instances, able to pursue their rights before the courts. The costs of such an exercise have become prohibitive. I pose the rhetorical question – How many of you would seriously contemplate

engaging in civil litigation unless you had some form of insurance to cover the cost involved? The answer is, I think, obvious.

Against that background the holding of a conference such as this is, to say the least, timely.

Recent developments within the courts

Most court systems in Australia have, for some time, been acutely aware of the situation, as I have attempted to portray it. Over a period of several years there has been a great deal of discussion of it, mainly catalysed by the Australian Institute of Judicial Administration (AIJA).

The discussion which has taken place has had as its focus two specific facets, namely:

1. reviewing court processes and procedures in an attempt to render them more efficient and less costly; and
2. the need to take steps to ensure that parties explore appropriate ADR strategies at the earliest possible time, before substantial legal costs have been incurred.

Changing the legal culture

It is stating the obvious to say that, in the civil courts across the nation, the usual experience has been that something in excess of 90% of all actions commenced ultimately do not come to trial. The vast bulk of them settle, or are resolved in some fashion, short of a formal court adjudication.

However, the sad historical facts have been that, many of those cases do not settle until trial is imminent – at point when great legal costs have been incurred and considerable time has passed by. Others proceed to a full traditional trial, at enormous expense, when some different form of simpler and cheaper adjudication may well have been equally effective and less traumatic on the participants.

Two broad strategies have been attempted over recent years.

There has been an almost universal attempt by the courts to introduce case flow management processes, which have as their aim not only the establishment of more efficient pre-trial and listing processes generally, but also the catalysing of situations designed to encourage parties to consider ADR options at the earliest possible manner.

It is fair to say that such strategies have, in practice, met with far less success than was hoped for.

The greatest impediments have been the cultural perceptions of lawyer and client alike. They have simply not been orientated to thinking in those terms. Often there has been a marked reluctance to give truly serious and bona fide attention to ADR possibilities until far too late, if at all. I fear that habits die hard, with lawyers being generally unwilling to seriously consider ADR until full

processes of pleading and discovery have been exhausted. This, of course, defeats the core object of the exercise. That thinking has, of course, washed off onto their clients.

In South Australia, when we made major case flow management changes in July 1993, the rules of court created a series of options, all available in the early stages of an action. Provision was made for diversion for conciliation or mediation, as well as a truncated form of arbitration. Parties could elect for those options on the basis of resort either to suitably qualified 'outside' persons or, if they preferred to do so, appropriate judicial officers.

I think that we were more than a little naïve at that time. In the end actual participation in ADR activity was voluntary. We soon came to appreciate the old adage that you can take a horse to water, but you cannot make it drink! Despite supportive statements from the then President of the Law Society, enthusiasm from the profession was practically non existent. Selling the concept was akin to flogging a dead horse. Some success was experienced, but an unacceptably high rate of late settlements remained the norm. There was a generally lukewarm reaction to suggested early resort to ADR processes.

I think that this was not unique to South Australia at the time, although the sheer problem of massive delays due to congested cause lists in the major eastern States led them to mount, with some success, a series of so-called 'offensives', which involved bringing considerable pressure on parties, *inter alia*, to submit certain classes of case – notably personal injury claims – to mediation, almost as a prerequisite to a trial.

The lukewarm embrace of the legal profession has, more recently, led to the enactment in some jurisdictions – certainly in all South Australian civil jurisdictions – of specific statutory provisions which enable the court to mandate a range of ADR diversions, as an integral part of the case flow management system. Thus, in this State, the court now has power, at any stage of an action, to:

- appoint a mediator and refer the case, or specific issues in it, to that person for mediation;
- refer a case, or issues arising in it, for a special type of arbitration pursuant to the court rules. (This can, by order, be tailored in its scope and procedure, to meet the requirements of the individual action);
- refer any question to a duly qualified expert referee for investigation and report; and
- call in aid expert assessors to sit with and assist the Judge in trying appropriate types of case.

Complementary rules of court are designed to ensure that these avenues are explored at the earliest possible stage. Suitable conference venues have now been

established to facilitate the activities envisaged.

These recent rules of court render it quite clear that, whilst parties may seek the services of a judicial or other officer of the court (a substantial number of whom have now had formal training in ADR techniques), the intention is to encourage parties to avail themselves of the services of outside qualified persons, as part of the mandated procedures.

It is true to say that the new powers have not yet been fully exercised, pending completion of physical preparation of some venues required, but we are now rapidly moving towards flexing our new muscles.

I assess that it is only by use of this type of pressure that we are likely to bring about a significant short term change in culture.

Where to now?

I would suggest to you that, whilst these initiatives will give some renewed impetus towards an acceptance of the need for a desirability of early ADR in cases which are potentially susceptible of such treatment, there remains a massive amount of work still to be done.

I am particularly gratified to note the interface between the tertiary institutions and the Institute of Arbitrators in mounting this conference.

It appears to me that the tertiary institutions have two major roles to play in pushing the frontiers forward.

First, of course, there is the challenge to train an adequate number of qualified persons who can perform ADR functions efficiently and at reasonable cost. We cannot move forward too rapidly until this resource is established.

However, of equal importance is the infusing into the law courses of subject content which not only breeds an awareness in students of what range of dispute resolution options exists, but also imbues them with an appreciation and understanding that resort to the full processes of traditional litigation ought to be considered the last – not the first – resort. They need to be made aware that it is not in the community interest that we continue to promote the confrontationist adversary system as the preferred paradigm; and that there is a duty to lead clients – where possible – along paths which are better calculated to serve their interests.

Massive changes still need to be wrought in the culture of the legal profession. Where better to commence than with the fostering of appropriate perceptions and expectations of our new graduates?

I digress to comment that there is plainly a parallel, pressing need to mount an aggressive campaign to 'educate' those already in practice. As to this what is needed is a joint effort by the Courts, the Law Societies, the tertiary institutions and organisations such as your Institute. Certainly the AIJA has already stood up and been counted. It will continue to air these needs whenever possible.

I recall that, at the 1997 AGM of the local chapter of your Institute, I made some

of these points to your members. I went on to suggest that a particular challenge for your Institute is to take up an active marketing role.

One facet of catalysing culture change is to ensure that those persons likely to have a potential involvement in dispute resolution are truly aware of what services are on offer to them and at what cost. A great deal still needs to be done in that regard.

Perhaps one aspect which does require particular attention is the evolution of initiatives to ensure that venues and logistic support can be provided for ADR activities on an affordable basis. ADR will never achieve other than limited success in areas such as the commercial environment, if it simply becomes another process which is little less expensive and is otherwise no more attractive to the community than the traditional litigation process. There are a number of existing ADR centres which have been developed, but I suspect that the expense associated with using and providing support staff in them is not inconsiderable.

From the perspective of the Courts, what we badly need, are ADR facilities which are of Ford Falcon or Holden Commodore rather than Rolls-Royce, status and which are realistically accessible to average Australia. Unless we achieve that situation we will not attract much buyer support.

Finally, I would seek to turn to the other side of the culture coin.

Although catalysing change in the legal profession is very important, an equally vital consideration is the need for effective public education. There can be no doubt that, at present, the public perception is very much attuned to the well known adversary process, despite the frustration and dissolutionment that is often seen to flow from it. It is fair comment to say that potential clients of lawyers may not be impressed by initial advice urging them to go into (say) a mediation process, rather than 'suing the bastard'. It is probable that, with our current community mores, that would be perceived as very negative advice.

Once again a two-level strategy is patently called for.

It is pleasing to note that some forms of legal studies are now quite widespread in the school systems. However, this tends to focus on the legal processes as they currently exist, rather than as they ought to be.

There is, I contend, a requirement to urge those responsible for curriculum development in this area to infuse into such courses a better understanding of the issues involved in dispute resolution and the benefits flowing from initial resort to ADR processes, rather than adversary litigation.

I venture to opine that, in the community at large, the core concepts of what the processes of mediation or arbitration are all about and the benefits of resort to them are not well known or understood.

As with the legal profession the place to start is in the basic education process related to our students.

But what of the existing adult community?

There is no simple formula to effect change of attitude. What is required is a well orchestrated and continuing public education programme involving the Government, the Courts, the tertiary institutions and relevant Institutes and other organisations. Ideally, it needs to be mounted on a national level.

I suspect that I am preaching to the converted when I seek to underscore the importance of this type of initiative to middle Australia. It is the only means which I can see of re-enfranchising it; and is a matter of the highest priority, in a well regulated democracy, that we proceed down such a track.

Perhaps a first step would be to mount national and regional workshops designed to address this problem.

Radical surgery?

I simply cannot resist the temptation to conclude this paper by reiterating the outline of a proposal which I advanced at an ALRC conference last year. It involves the need to adopt and implement some degree of lateral thinking.

It may well be that, if it was minded to do so, the legislature could give significant impetus to affecting a change of community culture by first bringing about a major legislative change in the court structures and the method by which they operate. The concept involved draws on the long and successful experience of the industrial tribunals in dispute resolution.

The model which I propose for consideration contemplates this approach:

- the amalgamation of the existing three-tiered court structure into one single entity, albeit staffed by various gradations of judicial officer;
- the organisation of the new structure into three groupings – a Disputes Division, an Adjudication Division and an Appellate Division;
- implementing a requirement that the first step in resolving a dispute is an informal notification of its existence to the Disputes Division;
- the front ending of the dispute resolution process with ADR activity, orchestrated by a judicial officer of status appropriate to the problem, prior to which the matter cannot proceed to any formal process of litigation;
- in the event of failure of initial mediation or reference to some referee, the matter then be referred, at the discretion of the assigned judicial officer of the Disputes Division, for either a specified form of arbitration, or reference or a more formal trial process, dependent on the nature of the matter. That judicial officer would, in concert with the parties, define and document the issues remaining in contention and stipulate what detailed pre-hearing processes were to be permitted. These processes would be kept to a minimum, consistent with the nature of the particular dispute.

I would propose that, at both the Dispute Division level and in relation to arbitrations or references, matters could be dealt with either by outside qualified persons or court officers, as the parties prefer.

The advantages of such an approach are obvious.

It would completely change the initial focus of dispute resolution away from headbutting confrontationism towards mediation, arbitration or special references, with adversary litigation being the final resort when all else fails. Equally importantly, it would ensure that there is a quite strict triage control over the type of hearing process made available to the parties and the pre-hearing procedures assessed as being appropriate and necessary. This would have a direct impact on the costs involved.

In this regard I would make the point that, in my experience, a significant number of matters go to a full traditional type trial, with relatively extensive and expensive pre-trial processes, which could, just as well, have been disposed of by a truncated form of arbitration as already provided for by the rules of court. The only thing which currently seems to stand in the way of such a process is the culture of the legal profession.

I suggest to you that the time when parties will be able, at will, to pursue the most costly and sophisticated remedy available – irrespective of whether it is really necessary for the proper resolution of a dispute – must, surely, be fast running out.

The point must be made that, although direct litigation costs to parties are already prohibitively high, the court fees charged to litigants represent but a fraction of the actual cost of the court process to the community.

The provision of court services is an enormously expensive activity. Court budgets are, from year to year, experiencing the same drastic Treasury surgery as are other public sector activities. The judiciary is increasingly being held to account for the efficient and economic utilisation of public resources entrusted to them. We are fast approaching the stage when it is becoming unacceptable that parties, by their unilateral acts, can be permitted to saddle the public purse with quite massive liabilities, regardless of whether or not the processes sought to be invoked are truly necessary for the efficacious resolution of a particular dispute.

In all fairness I do not think that the profession and, for that matter, the public at large, have, in the past, appreciated the luxury in which they have been permitted to indulge themselves, in what has been a relatively unrestrained manner. As economic stringency continues to exert an inevitable influence in an overall environment of economic rationalism it may well be that the day of realisation and reckoning may be much closer than many appreciate.

It is in such a scenario that your contribution to the evolution of an efficient and economic series of options in mediation, arbitration and references becomes of great importance. It is a great challenge to tackle such a task. I wish you well in it.