The Future of Dispute Resolution in Business - New rules

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In recent years, industry, government and the courts have developed dispute resolution processes to encourage the early and effective resolution of disputes by business organisations. There have also been a number of attempts to design better dispute avoidance or prevention processes and dispute management systems that can apply to business.

This paper examines current reforms in these areas and the recent growth in standards, benchmarks and mandatory processes that are directed at business organisations within Australia. In particular, recent developments such as the publication of the Standards Australia Association standard entitled - A Guide to the prevention, handling and resolution of disputes (AS 4608 - 1999) are explored.

The Australian Standard seeks to provide a framework for the prevention, handling and resolution of business disputes. The Standard is not a specification, but rather aims to encompass the best elements of systems widely used both in Australia and overseas. It is envisaged that a range of different entities will voluntarily adopt the Standard.

Introduction

The business sector is increasingly focussed on the reduction of risks that impact adversely upon the operation of businesses. Business continuity management approaches are founded on the notion that risk is an inevitable part of any business and that strategies can be employed that can accept, transfer or mitigate risk. Increasingly business is designing systems to reduce the harmful impact of disputes - an identified key risk area.

At the same time, government is increasingly concerned with the dispute resolution approaches taken by business. In an effort to support small business and encourage greater productivity a series of initiatives have been directed at dispute management approaches within the sector. Legislation has been developed that has specifically focussed on dispute resolution management and courts (in some jurisdictions) have assisted to change the dispute resolution environment.

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An increase in partnering, mandatory information sharing and an adherence to 'good faith' negotiations have been key elements in the dispute avoidance armoury.

The reasons for this focus seem obvious. Disputes are inevitable - the impact of disputes and appropriate handling processes (that can impact beyond the dispute resolution process) can have a profound impact upon the profitability and viability of business. It has long been accepted that competitive approaches to dispute management and resolution can be costly. It has been widely stated that: "...mediation is much cheaper than litigation" and "It has been said that the mediation of a commercial dispute by the Australian Commercial Disputes Centre costs 5% of the costs of litigating or arbitrating the same matter."[1]

The more nebulous advantages of "good" dispute resolution have also been emphasised. For example, Dr Ingleby has pointed to the perception concerning mediation's capacity "...to remove the sources rather than the symptoms of problems"[2] and other writers have commented upon this "warmer" way of dispute resolution.[3] The original hopes of the ADR movement were said to be that the:

"...expanded use of informal methods...would result in resolutions more suited to the parties needs, reduced reliance on laws and lawyers, rebirth of local communities, maintenance of long-term relationships, and relief for non-parties affected by conflict, such as the children of divorcing couples".[4]

In the business arena the aspirations have been somewhat different. However, the primary strategy has been directed at avoiding loss caused by deteriorating relationships. Other objectives have been related to benefits in terms of narrowing issues and discussions. Effective dispute management processes may also have an important "catalytic" effect in that the processes may not only prompt early settlement, but may also prompt early action and discourage "languishing" by ventilating issues and reducing the amount of destructive conflict.

In addition, business concerns have also focussed on the benefits of dispute resolution processes that promote compliance and more durable settlements. The empirical data produced by Goldberg *(et al)* strongly supports this hypothesis:

> *"...mediation is more likely than adjudication to lead to compliance with the resolution. [The data shows that] 70.6% of the mediation agreements with monetary settlement were reported to be paid in full, compared to 33.8% of*

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[1] Report of the Chief Justice's Policy and Planning Sub-committee on Court Annexed Mediation; p9, Nov 1991; NSW Supreme Court - referring to; Resolution of Disputes, ACDC (1987) Vol 1; No 2; at 1.

[2] Ingleby, R; "Why not toss a coin? Issues of Quality and Efficiency in Alternative Dispute Resoultion", *op cit* 23

[3] Goldberg, S, Sander, F and Rogers N; *"Dispute Resolution: Negotiation, Mediation and Other Processes"*; 2nd ed (1992) Little Brown & Co (U.S.A.) at 8

[4] Ibid

the adjudications. Another 16.5% of the mediated settlements, and 21.1% of the adjudicated judgments were partially paid. In other words, it was more than three times as likely after an adjudicated case as after a mediated case that no payment had been made by the defendant. This pattern of findings suggests that there is something about both the mediation process and the kinds of settlements it achieves that leads to higher compliance rates.[5]"

The context

Initially many industry-based schemes were directed at disputes in respect of consumer relationships rather that general business relationships. In the financial sector for example, it has been estimated that more than 130,000 consumers per year will rely upon industry based ADR schemes.[6] Most schemes have also been directed at 'resolution' rather than prevention or handling (system design). Since the beginning of the 1990s dispute resolution schemes have been set up in various industries to provide low cost (or free), effective and relatively quick means of resolving complaints about products and services. Such schemes can benefit both parties to the dispute. They save consumers the expense of legal action while helping industry members to improve business practices and the quality of their goods and services without government intervention.[7]

These schemes are often funded by industry members but operate independently of them and are intended to cater for disputes that cannot be resolved at the company level.[8]

Examples include the Telecommunications Industry Ombudsman, the Life Insurance Complaints Service, the General Insurance Enquiries and Complaints Scheme and the Australian Banking Industry Ombudsman. The Australian Banking Industry Ombudsman Scheme was set up in 1990 to help individual customers resolve complaints with their banks, usually through processes of investigation, discussions with the bank and conciliation.[9]

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[5] Ibid

[6] B Slade and C Mikula 'The use of industry based consumer dispute resolution schemes' *Paper* NSW Legal Aid Sydney November 1997, 2. the schemes include:

- Australian Banking Industry Ombudsman (ABIO);
- Telecommunications Industry Ombudsman (TIO);
- General Insurance Enquiries and Complaints Scheme;
- Life Insurance Complaints Services (LICS);
- Credit Union Dispute Reference Centre;
- Financial Planning Association complaints Resolution scheme;
- Insurance Brokers' Association Dispute Facility; and
- Complaint Resolution Committee established by the Australian Timeshare and Holiday Ownership Council Limited.

[7] See Department of Industry, Science and Tourism *Benchmarks for industry-based customer dispute resolution schemes* Dept of Industry, Science and Tourism Canberra 1997, 1.

[8] The Standards Australia *Standard on Complaints handling AS 4269-1995* is a good starting point for bodies wishing to establish internal complaints mechanisms.

The Wallis Inquiry into the Australian financial system commented on the benefits of industry-based schemes.

> *The Inquiry recognises the value of effective industry self-regulation in reducing the need for government intervention. Dispute resolution schemes enable industry to ascertain the problems faced by their customers and to take steps to rectify them.*[10]

The Inquiry recommended the creation of a new agency, the Australian Corporations and Financial Services Commission (CFSC), to provide federal regulation of the finance sector including consumer protection.[11] The Inquiry further recommended that the CFSC facilitate the creation of a central complaints referral service for all consumers of retail financial products and services, funded by service providers on a cost recovery basis.[12] Recent government reports have acknowledged the need for industry funded dispute resolution schemes.[13] In addition, in the commercial area, more formal models of dispute resolution operate in different states and territories under legislation such as Commercial Arbitration Acts.[14] The models of arbitration used under this legislation are increasingly being adapted, modified and at times transformed, into processes that incorporate mediation elements.

There is also evidence that dispute management is now considered at least in some parts of the business sector in a more wholistic fashion.[15] The concept in its expanded form represents a shift away from a focus on resolution processes towards communication management. This shift is evidenced in part by industry codes of conduct such as the Franchising Industry Code, Oil Code and benchmarks for dispute avoidance and resolution that are increasingly focussed upon the resolution of disputes prior to the commencement of litigation as well as dispute prevention.

Benchmarks

Clear evidence in relation to this shift arose when the Minister for Customs and Consumer Affairs released benchmarks for industry-based customer dispute resolution schemes to guide industry in developing and improving dispute resolution

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[9] The Ombudsman can help if the problem occurred or first came to the consumer's attention, after May 1989 and the maximum financial loss is less than $100,000. Credit unions and building societies are not dealt with by the Banking Industry Ombudsman but have developed their own industry schemes. For example, the Credit Union Dispute Reference Centre has 201 of the 268 credit unions signed up to it.

[10] Financial System Inquiry *Final Report* AGPS Canberra March 1997, 288. (Wallis Report)

[11] Financial System Inquiry *Final Report* AGPS Canberra March 1997, 31. The Australian Corporations and Financial Services Commission will combine roles currently performed by the Australian Securities Commission, the Insurance and Superannuation Commission and the Australian Payments System Council.

[12] Financial System Inquiry *Final Report* AGPS Canberra March 1997, 288.

[13] B Slade and C Mikula "The use of industry based consumer dispute resolution schemes' *Paper* NSW Legal Aid Sydney November 1997, 4 referring to Financial System Inquiry *Final Report* AGPS Canberra March 1997, 288 (Wallis Report).

[14] Eg *Commercial Arbitration Act 1986* (ACT) and the *Commercial Arbitration Act 1984* (NSW).

[15] See discussion relating to the Standards Project - ASA 4608 - 1999.

schemes.[16] The benchmarks suggest key practices that should be adopted by an industry when developing a dispute resolution scheme such as observing the principles of procedural fairness and ensuring accountability through the publication of determinations. The benchmarks are intended as a flexible source of guidance and should not be approached legalistically.

> *The benchmarks should be approached in a spirit of seeking resolution by consensus as far as possible at an early stage to reduce costs, increase productivity and build better relationships between the parties. This is the essence of alternative dispute resolution.*[17]

From November 1996 to September 1997 the Australian Competition and Consumer Commission convened a series of round table discussions on small and large business disputes in an attempt to find a better way for small businesses to resolve disputes in the market place. The round table resulted in the publication of guidelines intended to assist the business community to adopt benchmarks for avoiding and resolving disputes.[18] The guidelines aim to add value to and enhance commercial relationships, thereby avoiding many disputes arising and minimise the costs, inefficiencies and damage that is often incurred through conventional and/or adversarial processes.[19]

For dispute avoidance, the round table suggested benchmarks in the areas of disclosure culturally appropriate practices, recognition of mutual interests and conflict avoidance practices at the company level.[20] Benchmarks for resolving disputes agreed to by the round table include:

- use of in-house disputes managers to settle disputes;
- a dispute resolution clause in contracts/codes/disclosure statements;
- recognition/use of a small business negotiator;
- having the right negotiators;
- setting out clear and simple dispute handling policies and procedures;
- commitment and coverage;
- early intervention by a neutral third party;
- establishing panels of appropriately trained and appropriately oriented dispute solvers;
- industry awareness, endorsement and active support of the scheme;
- accountability;
- administration.[21]

More recently, Standards Australia formulated standards for use in the prevention, handling and resolution of disputes.[22] The Standard is of particular interest as it

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[16] Department of Industry, Science and Tourism *Benchmarks for industry-based customer dispute resolution schemes* Dept of Industry, Science and Tourism Canberra 1997.

[17] Ibid, 2.

[18] ACCC *Benchmarks for dispute avoidance and resolution - A guide* ACCC Sydney 1997, 7.

[19] Ibid, v.

[20] ACCC *Benchmarks for dispute avoidance and resolution - A guide* ACCC Sydney 1997, 3.

[21] ACCC *Benchmarks for dispute avoidance and resolution - A guide* ACCC Sydney 1997, 3.

examines not only processes that can be used to resolve disputes but also processes that can prevent and manage damaging forms of conflict. In addition it is directed at improving existing approaches and practices. The Scope of the Standard is noted as follows;

> *These guidelines provide a framework for the prevention, handling and resolution of business disputes between parties in a business relationship. The prime focus of this Standard is upon disputes that are external to an organisation.*[23]

In the Standard, dispute prevention describes measures used to build and maintain relationships in order to prevent problems from developing into disputes. They include contractual arrangements, cultural changes, negotiations and partnering arrangements. Section two of the Standard outlines the essential principles for good working relationships - effective processes, open and effective communication and good faith. Key elements of these principles are explored in some detail.

The Standard in focussing on system design and dispute avoidance represents a departure from a previous focus on dispute resolution processes. It also defines necessary strategies for prevention procedures, communication and monitoring and review.

Dispute Handling describes 'do-it-yourself' processes to deal with problems, complaints and conflicts being dealt with by an organisation. Dispute Resolution processes are also explored.

The benefits of using mandatory and non-mandatory frameworks (such as the Standard) are however questionable and there are key questions that can be raised, such as - what impact will the Standard have? To a large extent the answer to the question will depend on business attitudes (that in turn are being informed by business continuity approaches and attitudes to negotiation - see below). The Standard may however, as in the case of other standards, inform courts and tribunals (as well as the business community) about norms of operation and expected responses as well as informing the sector about negotiation processes. The main role of the standard may therefore involve education about ethical communication and negotiation rather than ADR processes. In relation to ADR processes there is already clear evidence that the business sector is using ADR processes in preference to traditional litigation processes[24] - in this respect Professor Wade has noted that there is 'a world of conflict outside lawyer's offices'.[25]

More negotiation in the business setting? - What type of negotiation?

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[23] AS 4608 - 1999, Standards Australia, October 1999

[23] Section One - Scope and Purpose

[24] T Sourdin, *An Empirical Study of Commercial Disputes* (1996) PhD thesis, UTS

[25] J Wade 'In search of new conflict management processes - The lawyer as macro and micro diagnostic problem solver' (1995) 10 Australian Family Lawyer 23, 24.

Negotiation is clearly responsible for the resolution and perhaps prevention of a large number of disputes. In 1989, it was estimated that only 5.7% of all commercial disputes end up within the court system[26] and there has recently been a greater focus on the way that negotiation takes place within the business setting. This is not a new phenomenon - *Getting to Yes,* (and the other key self help, negotiation strategy books) the Harvard phenomena and the business management industry throughout the 1970's, 80's and 90's spawned an industry that informed business about negotiation.

At the same time the greater use of ADR processes have meant that expectations of a 'day in court' as the way to resolve legal disputes are changing. Negotiation theory and dispute resolution processes have therefore become more closely related. However this relationship is not without difficulties. These difficulties arise partly because of a focus on negotiation strategies that may be completely opposed to mediation outcomes and processes. In some senses, negotiation can be more 'adversarial' than litigation processes (ADR processes for this reason are perhaps primarily an alternative to negotiation). For example, it has been suggested that lawyers negotiate in a way that contemplates litigation.[27] The ethical requirements may also not be as onerous as would be the case in litigation (or mediation)[28].

In the United States a two part ethical standard has been proposed for lawyers in negotiation:

- the lawyer must act honestly and in good faith; and
- the lawyer may not accept a result that is unconscionably unfair to the other party.[29]

Aside from ethical concerns there are broader issues about lawyers' cultures and behaviours[30] that could be considered to determine whether lawyers negotiate from a positional and adversarial perspective. It has been said that some lawyers negotiate while wearing their 'adversarial suits'[31] and that this approach promotes the risk of stalemate and hostility and because extreme positions 'most often produce unprincipled compromise even if a settlement is reached'.[32] At the same time, clearly the styles adopted in some parts of the business sector could be regarded (at times) as 'adversarial'.

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[26] M Fulton Commercial alternative dispute resolution Law Book Company Brisbane 1989.

[27] R Gordon 'Private settlement as alternative adjudication: A rationale for negotiation ethics' (1985) 18(2) University of Michigan Journal of Law Reform 503, 514.

[28] For example the draft 'Lets Talk' standard contemplates a greater focus on good faith issues.

[29] R Gordon 'Private settlement as alternative adjudication: A rationale for negotiation ethics' (1985) 18(2) Universtiy of Michigan Journal of Law Reform 503, 514. It has been argued that such a rule is unhelpful as the definition of good faith is so uncertain.

[30] C Menkel-Meadow 'Pursuing settlement in an adversary culture: A tale of innovation co-opted or "The law of ADR"' (1991) 19(1) *Florida State University Law Review* 1, 33.

[31] Ibid.

[32] Ibid 36.

In this regard, business may employ lawyers to 'do battle'. For some lawyers the goal of winning means that aggressive legal tactics may be encouraged.[33] For others, assisting clients to resolve disputes out of court is an essential part of the lawyers' role.[34] A growing body of writers[35] have suggested that there are a number of different negotiation strategies and approaches. One approach has been defined as an adversarial approach and involves competitive negotiation that results in confrontational and compromisory negotiation patterns.[36] In this approach 'what one party gains the other must lose'.[37] It has been noted that this approach is based upon the assumption that 'the parties desire the same goals, items, or values.'[38]

Other approaches that underpin most mediation processes include co-operative, principled or problem solving negotiation where:

- a focus on interests, needs and objectives rather than positions is encouraged;
- a range of options are generated before an outcome is determined;
- the issues rather than the people involved in the dispute remain the focus.[39]

The different negotiation approaches underpin some of the difficulties that arise if the focus in the business setting switches from an ADR to a "self - help" approach. For example, mediation may involve a focus upon principled negotiation while unassisted negotiation may rely upon positional negotiation strategies. The lack of general ethical requirements in negotiation make this more likely although the Australian Standard does define the negotiation process to be used and the key principles to be adopted. The newer concepts assume that the role of third party neutrals is likely to be reduced as parties are empowered.

Future trends

A variety of other trends are likely to impact upon the way in which business deals with disputes and the associated risks of ineffective or bad faith communication. One trend that is referred to above can be categorised as an increasing emphasis on 'self help' rather than the use of third party neutrals. This trend is allied to the growth in standards and benchmarks. Other trends have developed as a result of changes to the litigation 'shadow' or the technological revolution.

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[33] P Killingsworth "Winning" refined: A positive approach to the practice of law' (1996) 12 *Georgia State University Law Review* 653, 654.

[34] B Sordo 'The lawyer's role in mediation'(1996) 7 *Australian Dispute Resolution Journal* 20.

[35] H Astor and C Chinkin *Dispute resolution in Australia* Butterworths Sydney 1992, 82-87.

[36] Ibid

[37] C Menkel-Meadow 'Toward another view of legal negotiation: The structure of problem solving' (1984) 31 *UCLA LAw Review* 754, 755.

[38] Ibid

[39] H Astor and C Chinkin *Dispute resolution in Australia* Butterworths Sydney 1992 referring to R Fisher and W Ury *Getting to yes: Negotiating agreement without giving in* Houghton Mifflin Boston 1981, 83. See also C Mekel-Meadow 'Pursuing settlement in an adversary culture: A tale of innovation co-opted or "The law of ADR" (1991) 19(1) *Florida State Universtiy Law Review* 1.

AI and Internet based schemes

Increasingly, dispute resolution schemes are emerging in response to technological developments. Artificial Legal Intelligence (ALI) can be viewed as a form of dispute resolution or a system that has the capacity to render expert advice or decision making. Artificial Intelligence (AI) refers to computer systems which perform tasks and/or solve problems that usually require human intelligence.[40] As with many other forms of ADR this process has the capacity to be blended with existing adjudicatory or non adjudicatory processes.

Technology can be used to facilitate dispute resolution, or to avoid disputes by providing dispute resolution services that are available through computer programs or the Internet. There are already dispute resolution services available on the Internet, aimed at solving problems related to the use of the Internet.[41] Whilst many net sites act as referral and information points[42], others provide online service and suggest that online ADR can have many benefits such as saving travel costs and keeping parties separate (particularly in domestic violence situations).

Technology has the capacity to globalise dispute resolution services. In patent or intellectual property disputes for example, ADR processes that can involve computer assisted conferencing can now occur. It is probable that these schemes will impact upon business dispute systems in the future. The lack of existing internet and global dispute resolution systems also means that e business disputes are more likely to be resolved outside traditional court and litigation systems.

The development of good faith concepts

The concept of good faith continues to be developed. The Australian Law Reform Commission has most recently recommended[43] that national model rules should be developed in relation to lawyer neutrals and lawyers participating in ADR processes that require practitioners to participate in 'good faith'.

The concept of good faith is also increasingly being examined by courts and legislators. The Australian Standard adopted a 'business' definition after some considerable debate amongst members of the Standards committee. That definition incorporated elements of commitment, trust, respect, flexibility and confidentiality and the notion that:

> *Parties should be confident that they can rely on the others in the relationship to do the right thing by each other*[44].

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[40] R Susskind *The future of law: Facing the challenges of information technology* Clarendon Press Oxford 1996, 120.

[41] Alan C Tidwell "Handling disputes in cyberspace' (1996) 7 *Australian Dispute Resolution Journal* 245. For an example of a web site offering dispute resolution services, see the Virtual Magistrate at http://vmag.vcilp.org/, which provides arbitration and fact-finding services for disputes, involving users of on-line systems, people harmed by wrongful messages and system operators.

[42] For example, <http://www.mediate.com> (10 October 2000) or <http: //www.fmcs.gov/ (10 October 2000).

[43] ALRC Report 89 Managing Justice - *a review of the federal civil justice system*, 2000.

The extent to which good faith can be determined has caused debate and some confusion within the courts. Uncertainty regarding dispute resolution clauses and the meaning of good faith was the subject of comment in *Elizabeth Bay Developments Pty Ltd v Boral Building Services*[45] and in *Hooper Bailie Associated v Natcon Group Pty Ltd.*[46] To date it has been determined that a lack of clarity may exist regarding the elements and definition of good faith however, in business circles and in the context of negotiation (rather than dispute resolution) there may be less confusion. It appears likely that the extension of this notion as a communication requirement has a capacity to profoundly influence negotiation and ADR.[47]

The expansion of mandatory processes - conversion of the standard

The status of the Standard and the capacity of the Standard to be converted into regulatory legislation are also areas of potential change. Should the Standard become mandatory in particular areas this has the capacity to create a new norm in respect of business communications and disputing patterns.

The impact of legislative schemes

Changes in legislation continue to impact upon patterns of business disputing. Some legislative requirements foster notification processes whilst others focus on ADR attendance. For example, at one level, some legislation requires that parties notify one another of a claim before process is filed.[48] Other legislation requires mandatory attendance at some form of ADR as a pre-condition to litigation.[49] The legislation often requires different reporting standards and notice periods. New South Wales has adopted legislation in a number of different areas to prevent court proceedings being commenced without mediation occurring.

The *Farm Debt Mediation Act 1994* (NSW) provides that a mediation must occur before a creditor can take possession of property or other action under a 'farm mortgage'. Similarly, the *Retail Leases Act 1994* (NSW) provides for the mediation of retail tenancy disputes. Under that legislation court proceedings cannot be taken until a certificate has been provided by the Registrar of the Retail Tenancy Disputes Unit or a court has satisfied itself that the dispute is unlikely to be resolved.[50]

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[45] ASA 4608 - 1999, Section Two.

[46] (Unreported) Supreme Court of NSW 28 March 1995.

[47] (1992) 28 NSWLR 194.

[48] Parties mediating in the Supreme Court of New South Wales are required to mediate in good faith see *Supreme Court Act 1970* (NSW), s110L.

[49] See South Australia Supreme Court Rule 101.01 Parties are required to serve unified process on another party 90 days before filing in a court.

[50] Eg *Family Law Act 1975* (Cth) s 79(9); *Retail Leases Act 1994* (NSW) Pt 8; *Farm Debt Mediation Act 1994* (NSW); *Supreme Court Practice Direction No 4* (Qld).

The *Legal Profession Act 1987* (NSW) specifically provides for referral to mediation or investigation in relation to disputes between clients and legal practitioners.[51] Other legislation such as the *Strata Schemes Management Act 1996* (NSW) provides for the mandatory mediation of strata scheme disputes prior to any application being made to the Registrar for an order concerning the dispute.

The Commonwealth has established statutory alternative dispute resolution schemes in a number of areas. For example, the Private Health Insurance Complaints Commissioner is empowered to resolve complaints about any matter arising out of or connected with a private health insurance arrangement.[52] Another program relates to superannuation. The Superannuation Complaints Tribunal resolves complaints about certain decisions made by the trustees of superannuation funds.[53] The Privacy Commissioner duties include investigating alleged breaches of the Information Privacy Principles contained in the Privacy Act 1988 (Cth).[54] The legislation provides that where the Commissioner considers it appropriate to do so he or she should 'endeavour, by conciliation, to effect a settlement of the matters that gave rise to the investigation'.[55]

The National Native Title Tribunal (NNTT) facilitates the making of agreements among Aboriginal and Torres Strait Islander people, governments, industry and others whose rights or interests may co-exist with native title rights and interests. The dispute resolution processes of the NNTT and their relationship with those of the Federal Court in native title matters have been recently changed by the *Native Title Amendment Act 1997* (Cth).

The NNTT is of particular interest in any consideration of processes that may divert cases away from litigation because it presents a distinct model, based on the mandatory mediation of complex, multi-party disputes. The Tribunal does not decide whether or not native title exists. The primary function of the NNTT is to mediate contested native title applications.[56] Mediation of contested native title determination and compensation applications is mandatory. Parties are not able to avoid mediation

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[50] Retail leases Act 1994 (NSW),s 68 (2)..
[51] Sl44.
[52] *National Health Act 1953* (Cth) Pt VIC.
[53] *Superannuation (Resolution of Complaints) Act 1993* (Cth).
[54] ss 14, 27(1)(a).
[55] Privacy Act 1988 (Cth) s 27(1)(a) See also s 28A(1)(b).

without leave of the Court. Once mediation has started, a party to a proceeding may apply to the Court for an order that mediation cease at any time after three months after the start of mediation.[57]

These schemes continue to divert business disputes away from the litigation system in a variety of areas (or at least impose additional 'entry' requirements). In terms of future trends it seems unlikely that there will be a reduction in such schemes and there continues to be evidence of a general decline in higher court litigation that involves business.

The response of the litigation system - Targeted ADR?

Where disputes do end up in the court system, there is evidence that they are increasingly subject to differing litigation arrangements. In the Federal Court for example, new rules in relation to expert issues have changed the way that litigation is conducted. The litigation system is also managing information in different ways and has the capacity to better target initiatives. For example, it may be that some types of cases or some types of plaintiffs or defendants should be targeted for inclusion in any mediation program in response to a burst or growth in litigiousness. In the commercial context for example, where a plaintiff may spawn a large number of similar actions, early targeting may reduce the burden upon the courts and the litigants. Also, the establishment of a mediation referral program which involves heavy and frequent users of the court system may result in the changed priority of alternatives for those frequent litigants and may result in a positive change in settlement behaviour.

Conclusions

In our business dispute 'system' that is made up of elements of prevention, handling and resolution it seems clear that there is little coherence. However, as usual, one thing is certain - change. There are changes occurring in the way in which business communicates and deals with disputes. These changes are in response to external and internal stimuli but may also be a result of general changes to business management structures and an emphasis upon more relational approaches in business.[58]

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[57] The NNTT may also assist or mediate, if requested to do so, in accordance with other provisions of the *Native Title Act*, for example to assist with a statutory access agreement or an indigenous land use agreement. NTA s 108(1B), for example under s 44B(4), s 24b F, s 24CF, s 24DG.

[58] *Native Title Act* (Cth) s 86B(1) (2), s 86C(2).

[59] S Caspi Sable and E Kornhauser, Some reflections on a Relational world view, *The ADR Bulletin*, (1999) 2 (7) at 65.