Editor's Commentary

Russell Thirgood, Editor

We have 12 articles in this issue, and while they do not conform to a specific theme, together they tell the intriguing story of where ADR came from and where it's going.

The first of these themes is a subject of the opening article, in which the Hon Justice IDF Callinan AC discusses the role of alternative dispute resolution as both a complement and a foil to traditional litigation. His point is actually broader than that: he argues that, for the rule of law to be preserved, ADR must not displace litigation. Both judges and lawmakers have a role in ensuring that eventuality does not arise. His Honour also canvasses the possibility of state subsidisation of ADR – a revolutionary concept, even if his Honour holds out little hope that it will eventuate. We also learn from Justice Callinan's article that, in the Eighteenth Century, disputes were resolved by way of armed showdown, and duellists carried the relevant rules in their pistol cases with the object that 'ignorance might never be pleaded'. Certainly, after reading his Honour's article, you will have no grounds for pleading ignorance to rules 14, 15, 17, 21 or 25 of the duellists' law – nor, hopefully, the role of ADR in our legal system.

From ADR's origins and purpose to an issue central to that purpose: in our second article, Justice James Douglas explores the extent to which adjudicators under the *Building and Construction Industry Security of Payment Act 2004* (NSW) ('BCISPA') are required to adhere to procedural fairness. Traditionally, there has been tolerance of "trivial breaches" of natural justice as BCISPA only provides for interim payments that do not displace the parties' rights under the contract and which do not purport to finally settle the issue. However, there is reason to believe the pendulum may now be swinging the other way – and reason, as well, to believe that the High Court may take a greater interest in the issue going forward. The construction industry waits in anticipation of any further judicial developments with respect to this controversial legislation.

'Going forward', of course, is a major theme of President Laurie James's contribution to this issue. His article discusses new directions in arbitration – and these new directions are not possible to here recount, beyond the general comment that their name is Legion, for they are many. They have arisen, in the main, as a means of bolstering arbitration's still-impressive but diminishing status as a preferred means of ADR. President James has certainly succeeded in raising the profile of this trend and the developments it has spurred: his article was published in the *Australian Financial Review*.

Mediation, as well, is undergoing change, as outlined in 2 articles addressing that theme. Ian Hangar QC explores the forces driving the upsurge in mediation over the past decade-plus. With those forces now in retreat, or at least receding, he explores the possibility that mediation has reached its high water mark. The relative performance of the court system will be quite as important as the performance of mediation in determining what happens from here. Henry Jolson QC traces the growth of mediation from the 1980s, through to its recent peak, and identifies trends going forward. He illustrates his points with two case studies.

Sometimes change in the law creates new opportunities for ADR – and there has arguably been no more dramatic change in Australian law in the past 20 years than the advent of native title. In an analysis of the mechanisms provided by the *Native Title Act* for resolving native title disputes, Graeme Neate, President of the National Native Title Tribunal, and Graham Fletcher, a Member of the National Native Title Tribunal, explore the capacity of existing ADR procedures to achieve positive results for Indigenous Australians, though the authors also stress the need for greater creativity in fashioning ADR strategies in future native title disputes.

We finish by drawing together all the threads – mediation, conciliation and arbitration; past, present and future – in Micheline Dewdney's article on hybrid ADR processes. While the article ultimately concedes that more research is required before the comparative merits of different ADR models – much less hybrid models – can be assessed, this fact does not stop Ms Dewdney from delving into a rich discussion of several hybrid models. Her article eventually comes to the perhaps-reluctant, perhaps-reassuring conclusion that 'the more things change, the more they stay the same'.

I am certain that, after canvassing the history and future of alternative dispute resolution in the articles set out in this rich December issue, you will be in a good position to decide whether you agree with this conclusion.

Russell Thirgood is a Partner with McCullough Robertson in Brisbane and the Immediate Past President of Amnesty International Australia. He is the author of 'Alternative Dispute Resolution' in The Australian Encyclopaedia of Forms and Precedents, and holds a Masters of Laws with First Class Honours from the University of Sydney, majoring in dispute resolution.
