# MEDIATION AND ADJUDICATION: FRIENDS OR FOES AT THE ADMINISTRATIVE APPEALS TRIBUNAL

WILLIAM DE MARIA*

The crucial problem arises when we ask, not what role mediation should pla in creating law, but how far and in what respects should it enter into th administration of laws.

Leon Fuller, Carter Professiona General Jurisprudence, Harvar University.[1]

Over the next generation, I predict that society's greatest opportunities will li in tapping human inclinations towards collaboration and compromise rather tha stirring our proclivities for competition and rivalry.

Dr Derek Bok, President, Harvar University, 1982 Cardozo Lecture.[2]

## 1 COLLISION CONCEPTS: INTRODUCTION

Fuller and Bok raise issues that lead to the matter addressed in this article the problem of the relationship between mediation and adjudicatio (determination). Despite the burgeoning literature in the alternative disput resolution area (ADR), only a few works co-jointly examine mediation an determination.[3] Galanter is one of these. He sees mediation and adjudication as part of the same process, and has coined the inelegant word "litigotiation" t indicate such.[4] Resnick sees mediation and adjudication sharing the view th case disposition based on consent is superior to judicial decision making.[5]

There is a dichotomous feeling in the literature, as if one should choos between mediation (and the other ADR mechanisms) and adjudication. conference organised by the Australian Institute of Judicial Administration, i conjunction with the Australian Commercial Disputes Centre, seemed t conclude that mediation and other alternative dispute resolution procedures wer apart from the judicial process.[6] Resnick sees the American alternative disput resolution package as an attack on adjudication.[7] She is joined here by othe

* Dr De Maria was appointed to the Administrative Appeals Tribunal in 1983. He is also on th staff of the Department of Social Work and Social Policy, University of Queensland. Th author acknowledges the feedback of Loula Rodopolous, Graeme Brewer, Associat Professor Terry Carney, and Mr Bill Lane, on an earlier draft, and conscientious work by a anonymous referee. Responsibility for the final paper rests of course with the author.

1 L Fuller, "Mediation, Its Forms and Functions", (1971) 44 Southern Calif L Rev 305, 328.

2 Quoted by Sir Laurence Street, Chief Justice of New South Wales (as he then was) in h address at the conferring of degrees in the Faculty of Law, Sydney University, 25 Februa 1986. Reported in (1987) 11 Syd L Rev 189, 190.

3 This conclusion has been reached after numerous indexes were searched including th Current Law Index for 1986-89, and a check of a 1990 bibliography on alternative dispu resolution compiled by Lorna Mathie of the Lionel Murphy Library at the Attorney-General Department.

4 M Galanter, "'...A Settlement Judge, Not a Trial Judge': Judicial Mediation in the Unite States", (1985) 12 Journal of Law and Society 1. See also M Galanter, "Reading th Landscape of Disputes", (1983) 31 UCLA L Rev 4.

5 J Resnick, "Failing Faith - Adjudicative Procedure in Decline", (1986) 53 U Chicago L Re 494, 537.

6 Seminar on 3 June 1989. Reported in Reform, 1989, 145-148.

7 J Resnick, *supra* n 5, 536, 538.

ımmentators like Rubenstein, Tomasic, and Abel.[8] Fiss sees ADR's de-emphasis adjudication as robbing the community "...of authoritative interpretation[s] of e law".[9] Trubek sees in ADR a turning away from the law.[10] Edwards asserts at mediated settlements between the two parties could be contrary to public ılues as encapsulated in the rule of law. A toxic waste dispute, he says, could ttle with strict environmental protection protocols being seriously ımpromised.

> It is a fact of political life that many disputes reflect sharply contrasting views about fundamental public values that can never be eliminated by techniques that encourage disputants to 'understand' each other. Indeed many disputants understand their opponents all too well.[11]

Susskind replies by advocating the mediation of environmental disputes in hich the mediator takes responsibility for the outcome.[12] Stulberg counters by iticising Susskind for diminishing the importance of the neutral intervener.[13] 'ith a wider brief one could follow this and kindred conflicts through the erature.[14] My intention is to focus the debate onto the Administrative Appeals ibunal (AAT). The AAT is a fitting place to examine the largely unchartered lationship between mediation and adjudication because its distinctive place in e Australian legal system is attributable to the fact that both mediation and termination are two of its officially prescribed roles.[15] The paper will examine e concepts of mediation and determination as they are relevant to the AAT. fter the central arguments of the paper are presented, the article ends with a scussion on possible avenues of reform.

If should be said at the outset that in terms of the lawyer monopolised AAT erature, little or no interest is expressed about the mediation and determination

---

L Rubenstein, "Procedural Due Process and the Limits of the Adversary System", (1976) Harvard Civil Rights - Civil Liberties L Rev 48; R Tomasic, "Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighbourhood Justice Movement", in R Tomasic and Feeley (eds), *Neighbourhood Justice - Assessment of an Emerging Idea*, (1982) 215-248; R Abel, "The Contradiction of Informal Justice" in R Abel (ed), *The Politics of Informal Justice*, (1982) Vol 1, 267-320.

O Fiss, "Against Settlement", (1983) 93 Yale L J 1073, 1087.

D Trubek, "Turning away from Law", (1984) 82 Mich L Rev 824.

H T Edwards, "Commentary. Alternative Dispute Resolution: Panacea or Anathema?", (1986) 99 Harv L Rev 668, 676.

Susskind, "Environmental Mediation and the Accountability Problem", (1981) 6 Vermont L Rev 1.

J Stulberg, "The Theory and Practice of Mediation: A Reply to Professor Susskind", (1985) 6 Vermont L Rev 85.

For example the well known disagreement in the literature between Fuller and Fiss, with McThernia and Shaffer joining the fray. See O. Fiss, *supra* n 9; L Fuller, *supra* n 1; L Fuller, "The Forms and Limitations of Adjudication", (1978) 92 Harv L Rev 353; A McTheria and T Shaffer, "For Reconciliation", (1985) 97 Yale L J 1660.

See s 43(1) and s 34(1) of the Administrative Appeals Tribunal Act 1975 (Cth) (henceforth AAT Act) for powers of determination and mediation respectively. While the AAT is distinctive in this regard, it is by no means unique. A conferencing structure is built into the Family Law Act 1975 (Cth); see P Theobald, "Alternative Dispute Resolution - Its Future in Family Law", (1988) 2 Australian J of Fam L 164, and Family Law Act 1975 (Cth) ss 16A, 64(1)(b), 79(9). Under the Retail Shop Leases Act 1984 (Qld) a mediator hears disputes between landlords and tenants but has no determinative powers (ss 17-27). Similarly, an arbitrator operating within the context of the Arbitration (Civil Actions) Act 1983 (Qld) must attempt mediation before making an award (s 9). In the Queensland Supreme Court parties may be told to put their case before a mediator (Practice Direction 4/87). For more examples see NSW Law Reform Commission, *Training and Accreditation of Mediators*, (1989), 9-14. For a note on the American situation see D Riggs and E Dorminey, "Federal Agencies' Use of Alternative Means of Dispute Resolution" (1987) 1 Admin L J 136.

functions of the AAT per se. Academic interest focuses on such things as th AAT in the context of the "new" administrative law,[16] the examination c specific AAT jurisdictions,[17] and practice procedures in the AAT.[18] In oth words there is a very real knowledge gap here about basic Tribunal functions.

On the basis of the forthcoming arguments, the paper concludes th mediation is a word too loosely used to describe AAT pre-hearing operations. AAT mediation (as an ideal) is overshadowed by AAT adjudication. AA mediation (henceforth in inverted commas to signal that while the word is powerful symbol in AAT discourse, it does not reflect the reality of AA practice) suffers from being conceptualised and practised in a framework heavi nuanced by legalistic values.[20] Adding to the encapsulation of AAT "mediatio is the fact that the statutes that produce the appellant situations for the AAT a usually rule-bound with very little opportunity for the exercise of discretio This means reduced opportunities for mediated outcomes. This difficulty further considered when we get to the case material. Additionally, AAT membe responsible for the bulk of pre-hearing work (including, or shall I sa particularly, the legal members) are generally untrained in mediation, ar therefore sceptical about its possibilities. Party representatives are equal untrained and lack an appreciation of the social significance of effecti

---

16 J M Sharpe, *The Administrative Appeals Tribunal and Policy Review*, (1986); D G Gardin "Policy Review Reviewed: The Pubescent State of the 'New' Administrative Law" (1988) Queensland U Technology LJ, 123; G Peiris, "The Administrative Appeals Tribunal Australia: The First Decade", (1986) 6 Legal Studies 303; D McGann, "Snakes and Ladde and the Administrative Appeals Tribunal", (1989) 19 Queensland L Soc J 37; R Layton, "T Administrative Appeals Tribunal: A Nuts and Bolts Account", (1989) 24 L Soc J 38; Aronson and N Franklin, *Review of Administrative Action* (1987) ch 10; G A Flick, *Feder Administrative Law* (1984); The Hon Mr Justice Brennan, "The Future of Public Law - T Australian Administrative Appeals Tribunal", (1979) 4 Otago L Rev 286; J Goldring, (ed) *T Workings of the Administrative Appeals Tribunal* (1980); J Goldring, "The Foundations of t 'New Administrative Law' in Australia", (1981) 40 Australian J Pub Admin 79; J Goldrin "Responsible Government and the Administrative Appeals Tribunal", (1982) 13 F L Rev 90; Hotop, *Principles of Australian Administrative Law*, (6th ed, 1985); M Kirby, "Administrati Law Reform in Action" (1978) 2 UNSW LJ 203; M Kirby, "Administrative Review on t Merits: The Right or Preferable Decision", (1979) 6 Monash U L Rev 171; M Kirb "Administrative Review: Beyond the Frontier Marked 'Policy - Lawyers Keep Out!'", (198 12 F L Rev 121; D Pearce, *Commonwealth Administrative Law* (1986); M Taggart (e *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (1987); A Ha "Aspects of Federal Jurisdiction: The Administrative Appeals Tribunal (Cth)" (1983) 57 A 389.

17 M Clothier, "Howizat! Appeals and migration practice are not all Cricket", (1987) 61 La Institute J 186; E Kyrou, "AAT and the Federal Court Review in Customs Matters", (1988) Law Institute J 1228; E Kennon, "Taxation Appeals and Reviews", (1987) 16 Australian T Rev 10; M Partington, "The Impact of the Administrative Appeals Tribunal on Soci Security", nd.; M Sassella, "Administrative Law in the Welfare State: Impact on t Department of Social Security", (1989) Canberra Bulletin of Pub Admin No 58, 116; Woellner, "An Analysis of the New Taxation Appeal Process", (1987) 4 Australian T Forum 241; G Warburton, "The Rights of Non-Citizens in Australia: Modes of Reviewi Exercises of Discretionary Power under the Migration Act 1958 (Cth)", (1986) 9 UNSW 90.

18 R D Nicholson, "Practice Procedures and Evidence in the Administrative Appeals Tribun Part 1", (1988) 4 Australian Bar Rev 85; R D Nicholson, "Practice Procedures and Evidence the Administrative Appeals Tribunal Part 2", (1988) 4 Australian Bar Rev 128; G Osborr "Inquisitional Procedure in the Administrative Appeals Tribunal: A Comparative Perspectiv (1982) 13 FL Rev 150.

19 A problem not specific to Australia. See J Cooley, (1986) 69 Judicature 263.

20 An interesting development given that mediation and negotiation pre-dated adjudication forms of conflict resolution. See D Riggs and E Dorminey, *supra* n 15, 126.

mediation; their appreciation usually going no further than acknowledging the important administrative and financial savings that mediation offers.

The failure by the AAT to offer an effective mediation service to the community, while being a failure not solely of its own invention, does point to a serious attack on the original commitment whereby the community was promised an appeal service that was quick, cheap, informal, and user-helpful, if not user-friendly. Today's non-departmental applicant faces a legal bureaucracy at the AAT. Applicants may have to wait 12 months for a hearing, and a further six months to twelve months written decision (with some cases taking over a year to be determined).

The paper reaches these conclusions in the following way. A background section describes the statutory functions of the AAT. This is followed by an examination of the concept of mediation and how easy it is for that concept to be adulterated within a legalistic framework. Three case studies are then used to illustrate and elaborate the arguments presented.

To head off criticism that I am painting a too glamorous picture of mediation, and am inclined to offer it as a new socio-legal panacea, it should be noted that I am in general accord with the critical evaluations now being made about mediation and the other mechanisms of "informal justice" by such people as Abel,[21] Hofrichter,[22] Harrington,[23] Santos,[24] Spitzer,[25] Henry,[26] and Degrado et al.[27] The general thrust of this new analysis is that mediation controls conflict, individualises public issues, enhances the legal network, extends State power, and generally benefits liberal-capitalism. Correct as it is, this analysis ought not to insinuate itself any further here because the paper has only one purpose, the examination within the AAT context of the relationship between mediation and determination.[28]

## 2 BACKGROUND

The Administrative Appeals Tribunal was established in 1975 by the Administrative Appeals Tribunal Act 1975 (Cth) (henceforth AAT Act). The Tribunal currently works through three divisions: Veterans, Taxation and General (social security, compensation, FOI, customs, etc). It is the final level of appeal

21 R Abel, "Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice", (1981) 9 Inter J Sociol of Law 245; R Abel, *The Politics of Informal Justice: The American Experience*, (1982); R Abel (ed) *The Politics of Informal Justice: Comparative Studies* (1982).

22 R Hofrichter, *Neighbourhood Justice in Capitalist Society: The Expansion of the Informal State*, (1987).

23 C Harrington, *Shadow Justice: The Ideology & Institutionalization of Alternatives to the Courts* (1985); "The Politics of Participation & Nonparticipation in Dispute Processes", (1984) 6 Law & Policy 203; C Harrington and S Merry, "The Ideology of Community Mediation", (1988) 22 Law and Soc Rev 709.

24 B Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism", (1980) 8 Inter J Sociol of Law 379.

25 S Spitzer, "The Dialectics of Formal and Informal Control", in R Abel (ed) *The Politics of Informal Justice* (1982).

26 S Henry, "Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative", (1985) 19 Law and Soc Rev 303.

27 R Delgrado, C Dunn, P Brown, H Lee, D Hubbert, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution", (1985) Wisconsin L Rev 1359.

28 I have addressed the critical socio-legal interpretation of mediation elsewhere: W De Maria, "Social Work & Mediation: Hemlock in the Flavour of the Month", Department of Social Work, University of Queensland, (1990) 45 Australian Social Work 17.

on matters of fact in disputes generated in administrative processes that involv Commonwealth decision-makers and citizens whose interests are affected by suc decisions. The Tribunal has a wide and increasing jurisdiction.[29] Sections 27(1 and (2) provide access to the Tribunal to persons and organisations (includin certain Commonwealth authorities) whose interests are affected by decisions.[30] I the year ended December 1989, 4,993 applications were so made.[31] Section 43(1 of the AAT Act authorises the Tribunal to exercise all the powers of the origin decision-maker when it reviews a matter. The subsection also defines th Tribunal's determinative powers. It can affirm a decision (s 43(1)(a)), vary (s 43(1)(b)), set the decision aside and in so doing either make a new decisio in substitution thereof (s 43(1)(c)(i)), or remit the matter back to the primar decision-maker with any direction or recommendation of the Tribun (s 43(1)(c)(ii)).[32] The tribunal can also determine not to determine, because lacks jurisdiction. Finally, it can dismiss an application, either by consent c parties, or through non-appearance of a party.

This in a nutshell is the legislative scheme underneath the Tribunal' determinative powers. Federal Court judgments have from time to time clarifie this legislative structure in decisions concerning the determinative practices an procedures of the Tribunal.[33] The administrative Review Council (ARC) ha also made inputs into Tribunal policy.[34]

---

29 At the time of writing there were 250 Commonwealth Acts and Regulations authorising th making of applications to the Tribunal for review of decisions made in the exercise of powe conferred by enactment. See Administrative Review Council, *Thirteenth Annual Report 198 89* (1989). Appendix 1 of that report lists 224 enactments that confer review powers on th AAT. From 1 July 1989 - 28 February 1990 that figure has risen by 26.

30 For a discussion on reviewability see D O'Brien, (1989) "Tribunals and Public Policy - Wh Decisions are Suitable for Review", Canberra Bulletin Pub Admin No 58, 86, 91.

31 AAT Case Statistics Report 23 March 1990, 2.

32 In the year ended 30 June 1989, the outcome figures for 1988/89 in non-tax jurisdictions ar set out below. 1986-87 and 1987-88 figures are included for comparison. Calendar ye statistics are added to bring the figures up to December 1989.

| Non taxation jurisdictions | 1986-87 | 1987-88 | 1988-89 | 1989 |
|---|---|---|---|---|
| Conceded by decision maker | 183 | 71 | 205 | 131 |
| set aside and new decision substituted | 252 | 253 | 418 | 493 |
| Varied | 47 | 58 | 63 | 70 |
| Remitted to decision maker | 65 | 85 | 45 | 56 |
| Parties reached agreement | | | | |
| Withdrawn by consent | 35 | 145 | 253 | 297 |
| (incl non-appearance) | 1021 | 1396 | 1244 | 1817 |
| Application withdrawn | 334 | 90 | 234 | |
| Decision affirmed | 424 | 500 | 436 | 434 |
| Decision that proceeding continue only if the parties request | 254 | 309 | 315 | 115 |
| Outside jurisdiction | 141 | 116 | 174 | 198 |
| Other | 69 | 84 | 82 | 90 |
| TOTAL | 2825 | 3107 | 3469 | 3701 |

33 See *eg*, *Politis v Federal Commissioner of Taxation* (1988) 16 ALD 707 (reasons of Tribunal *Statham v Federal Commissioner of Taxation* (1988) 16 ALD 723 (duty to reach adequat findings on the facts); *Fletcher v Federal Commissioner of Taxation* (1988) 16 ALD 280 (r confirmation of powers of Tribunal); *Bogaards v McMahon* (1988) 80 ALR 342 (estoppe jurisdiction). See also *Becker v Minister for Immigration & Ethnic Affairs* (1977) 15 ALR 69 and *Drake v Minister for Immigration & Ethnic Affairs* (1979) 2 ALD 60. For a gener comment see J Goldring, "Responsible Government and the Administrative Appeals Tribunal

The Tribunal's mediation practices and procedure are not so well explored. 'ribunal based "mediation" is encased within the inaptly called "preliminary onference" structure. The power for such is drawn from s 34(1) of the AAT Act:

> Where an application is made to the Tribunal for a review of a decision, the President may, if he thinks it desirable to do so after consideration of any material that has been lodged by the parties, direct the holding of a conference of the parties or their representatives presided over by the President or [her delegate].

'here is a minimum of guidance as to what should happen in these conferences nd what should be the proper expectations of the parties to them.[35] A sort of ;orking convention has grown up to fill this legislative vagueness. It is summed p in the words of Deputy President Nicholson:

> The purpose of [the] conference, not stated in the Act, is to explore whether settlement is possible and, if it is not, to ensure that the facts, matters and contentions in issue are clear to all parties and that proper thought and attention has been given to all other matters necessary to ensure an effective hearing.[36]

.dded to the paucity of statutory rules and administrative guidelines about AAT onferencing is an even more complex ignorance about the role they play in the ıediation of disputes. The seriousness in this deficit of knowledge is not abated 'hen we think that there were over 48,000 conferences at the AAT in 1989,[37] nd we know that 71% of non-taxation appeals are currently disposed of before earing.[38]

---

(1982) 13 F L Rev 90, 90-91. In 1978-79 there were six appeals to the Federal Court. By 1985-86 this number had increased to 44. By 1988-89 it was 143.

The Administrative Review Council was established under Part V of the AAT Act. Responsible not to the President of the AAT, but to the Commonwealth Attorney-General, the ARC functions as an administrative review advisory and policy research body.

From time to time accounts of what should be "correct" conferencing practice has been written. Ironically these accounts are from the pens of senior legal personnel of the Tribunal; until recently the least likely to be involved in conferencing. Having said that, there is another side to these accounts. They usually present strong if not condescending support for the part-time member; see The Hon Mr Justice Brennan, "The Role of the Part-Time Member", Canberra, 8 November 1979, 20; R Balmford, "The Administrative Appeals Tribunal in Practice", (1984) Law Institute J 807; A Hall, "Administrative Review Before the Administrative Appeals Tribunal - A Fresh Approach to Dispute Resolution?", (1981) 12 F L Rev 71.

R D Nicholson, "Practice Procedure and Evidence in the Administrative Appeals Tribunal, Part 2" (1988) 4 Australian Bar Rev 128, 130.

AAT Conferences 1988-89

| | 1988 | 1989 |
|---|---|---|
| General and Veterans | 4708 | -10576 |
| Tax | 18940 | 38005 |
| TOTAL | 23648 | 48581 |

The 1989 figures are preliminary only, and they will be a high water mark statistic, held up by the Tax Conference Statistics which are now declining. (Source: AAT Quarterly Statistical Summary).

I have arrived at this disposition figure by adding together all outcomes that do not involve a determination of the facts, (conceded by decision maker, parties reach s 34(2) agreement, withdrawn by consent, continue only at parties' request, outside jurisdiction and other) and subtracting this from the final outcome statistics.

AAT Outcomes 1988-89

| | 1988 | 1989 |
|---|---|---|
| Pre-Hearing Outcome (N) | 2007 | 2648 |
| Hearing Outcome (N) | 3061 | 3701 |
| Pre Hearing Disposition (%) | 65.5 | 71.5 |

One must be guarded against an interpretation of this disposition figure th: offers a strong correlation between outcome and conference practice. We simpl cannot account for the disposition in other than very general terms. Intuitivel one would, for instance, expect applicant fatigue (particularly in non-represente social security, veterans, and compensation matters) to be a strong reason for t exit of matters prior to the hearing.[39] There is also the undefined impact of par negotiation in this disposition rate. Whatever the true causes of this pre-hearir disposal are, it also remains a puzzle why it is lower than disposal rates for civ litigation, which run as high as 90-95%.[40] The vagueness about conferen impact is matched by our dilatory use of the word mediation.

## 3 MEDIATION: VINES THROUGH THE DETERMINATIVE FENCE?

Striving for a shared meaning of mediation and determination is importa prior to consideration of their relationship. It may help if we see these concep lying on five continua:

| | | |
|---|---|---|
| Private | __________ | Public |
| Informal | __________ | Formal |
| Party control | __________ | Judicial control |
| Consensual | __________ | Adversarial |
| Voluntary | __________ | Non voluntary |

Archetypal scenarios at both extremes would be respectively, the privat informal, and voluntary negotiation between parties which "nips in the bud" latent conflict with the minimum of fuss, and the public courtroom situatio where the frozen positions between parties can only be addressed judicially Mediation lies between these extremes.[42] A dispute is no longer "private" wher mediator, ostensibly neutral to the conflict, is brought into the situation. T presence of the mediator qualifies informality and party control. The conduct the dispute is somewhat formalised through mediation, but obviously not to t extent it is through the strict procedures of adjudication. However mediation st falls short of producing a public resolution of the dispute. It is probably bett to refer to mediation as semi-private conflict resolution. The parties and th dispute come to the notice of the mediating structure (usually public funded) t normally no publicly assessable records of the dispute and the mediation proce

(Source: AAT Quarterly Statistical Summary).

39 T Carney, "Cloaking the Bureaucratic Dagger? Administrative Law in the Welfare Stat (1989) Canberra Bulletin of Pub Admin No 58, 123, 125.

40 NSW Law Reform Commission, *supra* n 15, 1.

41 For informative analyses of negotiation see P H Gulliver, *Disputes and Negotiations: A Cr Cultural Perspective*, (1979); O Bartos, *Process and Outcome of Negotiations*, (1970); H Ross, *Settled out of Court*, (1970); J Rubin and B Brown, *The Social Psychology of Bargain and Negotiating*, (1975); W Zartman, "The Political Analysis of Negotiations", (1974) World Politics 385; W Zartman, "Negotiations: Theory and Reality", (1975) 9 J Internatio Affairs 69; W Zartman, *The 50% Solution*, (1976). Mediation references have already b offered. For adjudication, at the other end of the continuum, see the following works: O Fi "Against Settlement", *supra* n 9; O Fiss, "The Forms of Justice", (1979) 93 Harv L Rev 1 Fiss, "The Social and Political Foundations of Adjudication", (1982) 6 Law and Hu Behaviour 121.

42 S Goldberg, E Green and F Sander, *Dispute Resolution*, (1985), 91.

re generated or maintained. Finally, consensual conclusions to conflict still ɔmain a priority in mediation.[43]

On the basis of this reasoning we can venture some definitions. Determination ıeans the authoritative settlement of a dispute,[44] based on due process of law.[45] 1ediation, more process than product based, means to effect a settlement between arties through the informal intervention of a third party.[46] Given the ympathetic regard this paper discloses towards the abovementioned critical legal ıalysis of mediation,[47] it would be unsafe to press the difference between ıediation and determination out any further. With these broad meanings of ıediation and determination in place, we can proceed to examine some interfaces ɔtween them.

Commenting on the American judicial scene, Riskin has noted that "[i]n ɔcent years mediation as a means of dispute processing has sent vines through ıe adversarial fence."[48] He implies that this has come about, not by some ıassive ideological shift that declares a new priority for mediation as a social ılue, but rather as a result of deep-seated dissatisfactions with current ıstitutionalised modes of resolution, and the search for alternative processes that ɔ not suffer the sins of adversarialism. Australian commentators have made milar observations about the local scene.[49]

A major difficulty I have with mediation as a reformist response to lversarialism is that whatever the motivation for its sponsorship, mediation ɔntinues to grow in a legal womb. Galanter, commenting on ADR in general, ıs this to say.

> Most ADR is not located in autonomous institutions that operate independently of the norms and sanctions of the legal system. Instead most ADR is typically situated near legal institutions and dependent upon legal norms and sanctions. That ADR and adjudication reside in distinct worlds is a persistent element in the mythology of the partisans of each, in spite of the ample evidence of the pervasive continuities.[50]

---

Moore has produced a similar taxonomy. See C Moore, *The Mediation Process: Practice Strategies for Resolving Conflicts*, (1987), ch 2.

*Macquarie Dictionary*, (1981), 501.

Hoover trades critical evaluation for hagiography when he presses on to a comfortable liberal definition of determination, whereby "... judgement is rendered by a fair, objective and preferably pitiless evaluation of the facts...". M Hoover, "Dispute Resolutions: Comparisons", *Le Nouvelles*, September (1985), 111.

J Folberg and A Taylor, *A Comprehensive Guide to Resolving Conflict without Litigation*, (1984) 7. See also C Moore, *supra* n 43, 6. For other definitional works see J Cooley "Arbitration v Mediation -Explaining the Differences", (1986) 69 Judicature 263.

*Supra* nn 21-28.

L Riskin, "Mediation and Lawyers", (1982) 43 Ohio State LJ 29, 30.

Adversarialism is the target of various critiques. At the risk of appearing overly reductionist, they can be grouped together. Adversarialism is seen as - too formal, too expensive, too long and too conflictual. In May 1989 the Senate Standing Committee on Constitutional and Legal Affairs was given a reference to enquire into the cost of justice in Australia. This reference should be seen within the growing international context of disenchantment with current forms of dispute resolution. At the time of writing this paper, the Committee had not reported. Along similar lines the NSW Law Reform Commission received a reference from the then NSW Attorney-General to enquire into the need for training and accreditation of mediation because of continuing dissatisfaction with the court system. A discussion paper, "Alternative Dispute Resolution, Training and Accreditation of Mediators" has been published (October, 1989).

M Galanter "Compared to What? Assessing the Quality of Dispute Processing", 66, Denver Uni L Rev.

Some of the literature suggests that this context is an improper development context for mediation and will only lead to a weak hybridisation of th concept.[51] This reasoning has led Lowry to speak of the "perversion c mediation".[52] Lowry's view is that mediation constructed from the "genetic material of traditional adjudication is essentially a conservative proces conceived "as a cheaper way to accomplish the results of adjudication".[53] As th current debate about mediation is, to a great extent, set within an adjudicatoı context, our understanding of mediation is therefore driven by the service it ca provide to the judicial process in particular, not society in general.

Riskin sees mediation (free of legalistic connotations) offering "clea advantages over determinative based disputing. He sees it as a "cheaper, faste and potentially more hospitable to unique solutions."[54] By this he means th settlements responsive to the wishes of parties have more of a chance to flouris in the less rule-bound contexts of mediation. Riskin talks about how mediatic processes are not precedent bound. "Thus", he says, "all sorts of facts, needs, ar interests that would be excluded from consideration in an adversary, rule-orientc proceeding could become relevant in mediation."[55] Riskin makes good use of tl concept of "philosophical mapping" to tease out the disparate world-viev expressed in mediation and determination. In determination, the dispute is se as an irreconcilable difference between two parties; one of whom wins and tl other loses. In mediation the dispute is seen as arising because parties we insufficiently aware of the network of common interests and understandings th operate between them.

He is pessimistic about the contribution lawyers can make to the mediatic process.[56] Lowry,[57] Lowry and Haney,[58] and Bok[59] support Riskin by clarifyi how a real hurdle to mediation is the "culture of legalism". By this Lowry mea an approach to disputes that is governed by

* an adversary model of "truth";
* a cost/benefit analysis of the motive of dispute;

---

[51] Most of the orthodox legal literature is of course unconscious of this danger; see R Argy "Alternative Dispute Resolution", (1987) 3 Legal Issues 11; P Theobold, "How Family L Disputes could be solved by Alternative Means", (1987) 22(5) Australian Law News 24; I Justice C W Pincus, "Judge Asks Why Old Methods Are Still Used to Resolve Dispute", (19 23(10), Australian Law News 11; Mr Justice C W Pincus, "Mixture of Methods Better to Sol Complex Issues: Alternative Dispute Resolution" (1988) 23(11) Australian Law News, 19; Pickering, "Litigation Alternatives: Mediation and the Ministerial", (1986) 60 Law Institut 316; R Mitchell, "Conflict Resolution in our Society", (1989) 11 Law Society Bulletin 197; Kinsella, "Alternative Dispute Resolution: Long Court Lists Encouraging New Ways Settling Disputes, (1988) 1 Australian Construction Law Newsletter 5.

[52] M Lowry, "Law School Socialization and the Perversion of Mediation in the United State (1983) 3 Windsor Yearbook of Access to Justice 245, 252.

[53] *Id.*

[54] L Riskin, *supra* n 48.

[55] *Ibid.*

[56] This is a particularly apt observation for the current administration of the AAT. In a decisi that will be remembered more for its speed and caprice, the Acting President of the Tribur ruled against a 15 year practice when he determined that part-time members could no long conduct conferences. In future (post June 1990) AAT conferences will be conducted lawyers and public servants, both untrained and inexperienced in the mediation role. Foı particularly informative description of the complexities of mediation see J Cooley, *supra* n 1

[57] M Lowry, *supra* n 52.

[58] M Lowry and C Haney, "The Creation of Legal Dependency: Law School in a Nutshell", in Warner (ed) *The People's Law Review* (1980), 36.

[59] Quoted by Sir Laurence Street, *supra* n 2, 190.

* the idea that neutrality is "disinterested";
* a commitment to the individual "rights" of clients;
* a high regard for privacy;
* an individuation of solutions to disputes;
* a psychological reductionism to explain interpersonal problems;
* a reliance on legislative solutions to social problems; and
* a suspicion of "basic" social science research.

Usually a dispute within the determinative framework is resolved by a third arty authoritatively applying the law to the case material. The resolution is ;ilored to the law. In mediation, a wider view of the parties-in-dispute is taken y the "admissibility" of all material relevant to a settlement. The resolution is ıereby tailored to the parties. Menkel-Meadow argues that the quality of ıediation improves when the process can be adjusted to the parties' "polycentric eeds". By this she means when parties "see" more of each other than the ndimensionality adversarial conflict permits.[60] If Menkel-Meadow is correct, ıis represents a real limitation on the quality of AAT mediation. "Mediation" at ıe AAT is conditioned by the single issue dispute that comes before it, having isen in a prior department-citizen conflict, and does not take into account any ıatter not directly relevant to the legally-narrowed issue at conflict. Three xamples from recent AAT matters should elaborate this point. The first case lustrates the point just made about the circumscribed nature of the "mediation" rocess. The other two cases tease out additional issues that compromise ıediated outcomes at the AAT.

*xample 1*

Mr and Mrs A are low income farmers. So impoverished are their rcumstances that they would have no trouble establishing an entitlement to the amily Allowance Supplement (FAS) program operated by the Commonwealth epartment of Social Security. Mrs A had her unemployment benefit cancelled ecause she failed to lodge her continuation claim forms. She was advised by the epartment of Social Security that if she applied for FAS within six weeks of e date of cancellation of her unemployment benefit she could be paid FAS ıck to the date of unemployment benefit cancellation. Because of alleged egligence by Departmental staff, Mrs A did not submit her application within e abovementioned six week period. She started to receive FAS from a later ıte. Dissatisfied with the decision of the Department not to backdate her FAS ıyments to the date on which her unemployment benefit payments stopped (a eriod exceeding six weeks), she appealed to the Social Security Appeals ribunal. On losing that appeal she took the matter to the Administrative ppeals Tribunal.

The Tribunal listed the matter for a first preliminary conference, at which both ırties attended. The Department's attitude to the matter remained unchanged. It ıid it could not accede to Mrs A's request to backdate beyond a six week eriod. The Department argued that s 76(2)(b) of the Social Security Act 1947 ıly empowers the Department to backdate FAS a maximum of six weeks from a aim if the applicant ceases to receive a "periodic payment from the ommonwealth" (such as unemployment benefit). The Department argued that e Act does not provide any specific discretionary powers that could be used in

C Menkel-Meadow, "For and against Settlement: Uses and Abuses of the Mandatory Settlement Conference", (1985) 33 UCLA L Rev 485, 487.

Mrs A's favour. The Department's view was that there were no "speci circumstance" provisions that Mrs A could have used to demonstrate, f example, that the late lodgement of the FAS claim was caused by bureaucrat bungling.

*Discussion*

Given this scenario, what options are available? There seems to be only tw the applicant withdrawing, or the matter proceeding to a hearing (determinatio The option of the Department conceding seems out of the question because th is not available to the Department on its understanding of s 76. The other optio of mediation is probably not available either. Mediation implies negotiation a compromise. Without any access to discretion, how could one achieve negotiated settlement between Mrs A and the Department, and remain within t law?[61]

If one cannot achieve a mediated settlement because of the lack of discreti problem, perhaps the next best thing at the conference level is to attempt achieve a mediation of the Mrs A-Department conflict. This could be done broadening the base of understanding each has for the other's needs, obligatio and duties. The Department could better understand the appeal in the broad socio-economic context of Mr and Mrs A's poverty life-style. Similarly, the A could be led to an understanding that the Departmental actions were n malevolent, biased or arbitrary (if that was the case), but all that could be do within the current law. While this process is important, I suppose the bottc line for the A's is that their new insights into the Department's statuto responsibilities do not put bread on the table. Similarly, the rushed departmen delegate is probably not all that keen to hear what could be seen as a sociolo of poverty lecture.

Clearly Mr and Mrs A had many problems, financial and otherwise. Yet wh they met the Department at the AAT, everything became secondary to the prima issue of FAS backdate entitlement. Both parties, accepting the semi-ligitigio rules of the game, could only "see" a very small part of the other. Menk Meadow would see this tendency to undimensionally as contrary to the spirit mediation.[62] The conferencing was structured to this single issue. Parties kne that their meeting around the conference table would not be a final rendezvous. one could devise a separate mediation and determination track for conflicti parties, then it may be possible to raise the status and impact of A "mediation". More on this shortly.

This case raises a number of issues. Noteworthy amongst them is the proble of diminishing discretion and what conflict managment role the AAT shou have. One could make the observation that discretion based decision-maki appears to be becoming a thing of the past in Australian social secur administration.[63] A similar trend has been noted overseas.[64] Most welfa

---

61 The Administrative Conference of the United States has taken the inflexible view with resp to its recommendations about mandatory arbitration. It believes that "where a dispute may resolved through reference to an ascertainable norm, such as a statute, rule or custom, t arbitration is irrelevant" (Administrative Conference of the United States, Propo Recommendation "Assuming the Fairness and Acceptability of Arbitration in Fede Programs" (nd)).

62 C Menkel-Meadow, *supra* n 60.

63 T Carney, *supra* n 39.

64 A Scalia, "Vermont Yankee: The APA, the DC Circuit and the Supreme Court", [19 Supreme Court Rev 344; I McKenna, "The Legalization of Supplementary Benefits - M

ɔformers would argue that this is a good thing because it avoids bureaucrats eciding entitlements at whim or on moral,[65] racist[66] or sexist[67] grounds.

Carney has recently put the case for the re-installation of discretion in social ecurity administration. Not yearning for the return of the bad old days of rejudicial charity, he is convinced that "rule based remedies do more harm than ood".[68] Speaking about social security decision making he has commented:

> Personal judgments and individual assessments [by departmental staff] of circumstances are driven out in the rush to fashion legislation which can, in the main, be routinised (and 'run' on the [departmental] computer). To this end the search is for the least complex formulae, based on easily established non-subjective variable....[69]

'he reasons for the drift from discretion to rule are outside the ambit of this aper. Our only interest is on the effect this drift is having on the chances of stablishing sensitive and effective mediated conclusions to citizen-department isputes at the AAT.

Added to these reservations about mediated conflict is a broader socio-legal uestion about whether the AAT should have a conflict resolution role. It has an nclarified mandate to bring parties to the conference table. But this, as already oted, is a mandate cast in expedient legalism - better the conference table than ıe Tribunal bar table. It also has a clear mandate to decide a conflict. But is uch a decision the resolution of a conflict? If the Tribunal affirms a primary eportation decision, can we say the conflict has been resolved? I suspect all we an say is the obvious - there has been one winner and one loser. If this ɜasoning is proper, and if the Tribunal has a conflict resolution role (two big if's!") then I suspect that the role can only be played within the conference ıructure of the AAT. It would have to be a conference structure independent 'om the determinative structure.

The A case has outlined the improbability of mediation where such is ampered by the unavailability of discretion in a relevant statute. The next xample indicates the improbability of mediation at the conference level where 'ust does not exist between the parties.

*'xample 2*

Mrs B, an ex-employee of the Australian Telecommunications Corporation, ›dged a compensation claim for regional pain syndrome. She alleged she was so ıjured working as a telephone operator. Liability was found and the applicant aid weekly compensation for four years. Telecom hired a firm of private ıvestigators who put the applicant's house under surveillance, followed her a umber of times, and produced a video which purported to show the applicant

---

Power to the Claimants?", [1985] Public Law 455; J Handler, *Protecting the Social Service Client: Legal and Structural Controls on Official Discretion*, (1979).

' Section 17(C) of the original Invalid and Old Age Pensions Act 1908 (Cth) gave the Commissioner of Pensions discretionary power to reject applications for old age and invalid pensioners if they were found to be of bad character.

' Full blood Aborigines were not entitled to Social Security payments until 1942. See W De Maria, "White Welfare, Black Entitlement - The Social Security Access Controversy, 1939-59", (1986) 10 Aboriginal History 25.

The "living together as man and wife" stipulations in the Social Security Act are still the subject of controversy.

T Carney, *supra* n 39, 130.

*Ibid.*

doing various activities that allegedly contradicted her declaration of continuii permanent incapacity. The applicant was sent to an orthopaedic specialist for r assessment. The doctor found that the applicant's complaints had no physic basis. The applicant obtained her own orthopaedic report which supported h view of her condition. A new determination was issued by Telecom stating had no further liability in her case from a certain date. At the first prelimina conference listed in this matter, the respondent outlined his case and t applicant explained her actions that were filmed on video. It was clear that t respondent's distrust of the applicant was met by the applicant's hostility to t respondent.

*Discussion*

Again we ask: is conference-based mediation possible in these circumstance Theoretically (and surprisingly) mediation is probably more possible in this ca than it was in the previous matter of A. At least the delegate here can reconsid the issue in the light of new facts. What new facts could lead to a mediat settlement? The furnishing of extra orthopaedic evidence could open up t process. Similarly, the presentation of evidence that corroborates E interpretation of her videoed activities could inject needed fluidity back into t conflict.

However, this is all well and good, but I suspect I am avoiding the decisi matter of attitudes. The respondent has a distrustful attitude of Mrs B and h injury which is in conflict with Mrs B's attitude of her injury and t respondent whom she sees among other things as having no respect for person privacy. Unless and until these attitudes change, then the matter is on a straig course to a hearing. The conference member would have to go much further th new evidence, and work on the abovementioned attitudes if she/he is to transfoi this Mexican stand off into a mediated settlement.

To be specific, new mediation-oriented conditions of interaction between t parties would guide the relationship. The first principle involves viewing t conference as a safe, confidential environment, where statements can be mac propositions may be put and ideas mulled over, without fear of recrimination, weakening one's case. Secondly, the interaction would actively respond expectations and values that obstruct mediation. Goldberg et al call th "deflating unreasonable claims and loosening commitments"[70], there encouraging parties to develop a more sophisticated view of each other. The no departmental applicant is coaxed to look behind whatever bureaucratic stereoty they may be operating with. Likewise the departmental respondent is encourag to relate to the anxiety of having to seek a review of a powerful departmen decision. Finally, the interaction would, in as non-threatening a way as possib encourage the applicant to start her own review of her injury. Maybe she c connect with the observation that she is achieving secondary gain from it. May other matters, other than work conditions, are now the cause or aggravation her injury. As one can probably see this is getting close to personal counsellin Which means that our mediator must be competent in this field. With t exception of social work few disciplines co-related mediation and counselling professional training and practice. That point aside, the question remains: mediation-counselling a proper function for the AAT? The short answer is that

---

70 S Goldberg et al, *supra* n 42, 91.

ıould be if mediation ever gets officially absorbed into AAT practice through e establishment of a separate mediation track.

The B case exemplifies the type of issue that could go on the "mediation" ack. Moore has focussed on this issue and says that disputes are ripe for such tervention when:

* the emotions of the parties are intense and are preventing a settlement;
* communication between the parties is poor in either quantity or quality and the parties cannot change the situation on their own;
* misperceptions or stereotypes are hindering productive exchanges;
* repetitive negative behaviours are creating barriers;
* there are serious disagreements over data - what information is important, how it is to be collected and how it will be evaluated;
* there are multiple issues in dispute and the parties disagree about the order and combination in which they should be addressed;
* there are perceived or actual incompatible interests that the parties are having difficulty reconciling;
* perceived or unnecessary value differences divide the parties; and
* the parties are having difficulties starting negotiations or have reached an impasse in their bargaining.[71]

*cample 3*

Recently a matter between Mr C and the Department of Social Security was ttled some minutes before the start of the hearing. While the tribunal was nded a signed order, the net effort of the inter-party negotiation was that the epartment conceded. One must ask; why did it take so long? A corollary estion is: why didn't the conference process have an impact on this conflict? r C appealed against a decision of the Department to garnishee a recent grant sickness benefit and to reduce all future payments of sickness benefit until Mr turned 65. Mr C had received a lump sum compensation payment and had paid a previous allocation of sickness benefit.

*scussion*

The facts of the case are peripheral to what went on in the five conferences ld in this matter. A conclusion here (when one reads the conference reports) is at nothing went on. This was because the respondent advised the presiding ember and the applicant that a similar matter was being heard at the Tribunal, d the preferred course was to adopt a wait and see approach. A decision in the elated" case was brought down half-way through the conference series. From at point the respondent's view was that nothing could be done in the instant se because a Federal Court appeal was pending on the "related" issue.

The presiding member ought to have made an independent evaluation of the spondent's submission. It turned out that the "related" matter was not nnected to the instant case. Among other things, the "related" matter involved e question as to whether the sickness benefit injury was the same as the mpensation injury. In the instant case, that was not in dispute. Further, no deral Court challenge to the "related" matter occurred. The conference process is effectively neutralised by the offer and acceptance of a false piece of ormation.

C Moore, *supra* n 43, 11-12.

The point from this case is the difficulty of achieving mediation agend when one party wishes to overlook the conferences and set their sights on determination from a hearing.

*Mediation Thresholds*

Perhaps it is possible to extrude from these examples a set of threshol which have to be reached if mediation is to be an effective vehicle of dispu resolution at the AAT.

* The dispute must be amenable to a non-determinative settlement. That i it can be achieved through compromise. No party achieves comple victory or complete failure.
* The compromise must be a resolution unique to both partie requirements.
* The dispute must have maximum personal relevance to the parties a minimal social relevance. If this is not the case, and the matters reveal issue of maladministration or the decision is likely to affect non-partie or some other form of injustice, then the dispute may require a judgme that will impact on the general public. The actions by the Tribunal addressing the awkward construction of the old handicapped childre provision of the Social Security Act,[72] the important definitional work did on the invalid pension sections of the same Act,[73] and the AA impact on deportation policy come to mind here.[74]
* The net effect of party orientation, member role and the particular fac should be such that the dispute contains positions that are capable softening, not hardening.
* The mediation process must proceed in a review culture sufficient separated from the relevant legislative framework.[75]

## 4 MEDIATION REFORM: STRENGTHENING THE VINE

One possible social reform that could raise the status of mediation at the AA involves a legislative block on certain disputes proceeding to a hearing. In ot words keep certain matters at the pre-adjudication stage. Section 27(1) allo access to the AAT when a decision has been made which affects the interests the applicant. O'Brien is of the view that section amendments are needed he One change would require the effect to the significant, another would be to ins that the applicant must be personally affected.[76]

Criteria could be established to work out personal, social and econom criteria to determine significance. It is not that unusual for the AAT to h matters of no legal consequence, where the dispute is over one or two wee unemployment benefit. In terms of the efficient use of AAT and other tax fun resources (such as departmental and legal aid costs) the decision to give or

---

72 See *Shingles v Department of Social Security*, (1984) 6 ALD 568; *Mrs M v Departmen Social Security* (1983) 5 ALN N 258, and *Seagar v Department of Social Security* (198 ALD 556.

73 *Panke v Department of Social Security* (1981) 4 ALD 179; *Sheely v Department of So Security* (1982) 4 ALN N 115; *Howard v Department of Social Security* (Federal Cour Australia, 13 December 1983, unreported) Q.G. 106 of 1983; *McDonald v Departmen Social Security*, Federal Court V.G. 196 of 1982. For a Department of Social Security vie AAT impact, see M Sassella, "Administrative Law in the Welfare State: Impact on Department of Social Security", (1989) Canberra Bulletin of Pub Admin No 58, 116, 119-1

74 D O'Brien, *supra* n 30, 90.

75 M Lowry, *supra* n 52, 248.

76 D Riggs, E Dorminey, *supra* n 15, 129.

give $300 worth of unemployment benefit being made through the mmitment of $3,000 in hearing expenses is clearly a cost-benefit disaster. stice has run amok. Admittedly this is a difficult proposition for the AAT to vallow. It insults the justifiably venerated concepts of fairness and due process. hile acknowledging the importance of these principles, Riggs and Dorminey in eir recent study of Federal agency use of alternative dispute resolution, have id that "[p]rocedural fairness is an important factor but we cannot afford not to iter transaction costs into the equation".[77]

Matters would proceed automatically to a first compulsory conference, where rough oral and documentary presentations a binding assessment would be made to "significance". Those matters that do not satisfy the criteria would be fered mediator based conferencing, with no option to proceed a hearing. In her words the adjudicatory jurisdictions of the AAT would be limited,[78] under e axiom "Let the Forum Fit the Fuss". Those above the significance standards ould also proceed through mediation and if unresolved, go on to hearing. If thing else, such a reform would reduce the number of outstanding matters.[79] iis would only create a problem if the waiting lists grew at the mediation point the process. Arguing against myself for the moment, the big flaw in this sition is that it seems to emphasise only the cost-savings function of ediation. If there were futher space for elaboration here, one would have to re-nphasise that the mediation concept proposed here has not been spawned in galistic culture, despite it offering real savings to the cost of administrative stice. Additionally with more space I would have addressed the training issue.

## CONCLUSION

Now in its fifteenth year, the AAT has had a dream run, untroubled by vernment review, (not to be confused with fiscal stringencies and increased ogram monitoring common across the Federal bureaucracy) and generally imune from critical academic, media, and consumer group attention. That it was dramatic reform in the administrative law is undeniable. The Kerr Committee, hich played an important "obstetric" function in the birth of the new ministrative law, made the point.

> The basic fault of the entire structure [of judicial review] is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained on the merits - and this is usually what the aggrieved citizen is seeking.[80]

ie AAT delivered, and in so doing exposed the antiquated prerogative writs[81] d the limitations of ministerial representation. At last there was going to be a ucture with the power to look over the shoulder of the bureaucrat decision aker and correct his or her mistakes when made.[82]

---

*Id.*

Edwards discusses this concept, see *supra* n 11, 671.

At the end of 1989 there were 13,907 matters outstanding from all divisions of the AAT. See AAT Quarterly Statistical Return, 23 March 1990.

Report of the Administrative Revison Committee (Kerr Committee) 1971. Commonwealth of Australia, Parliamentary Paper, No. 144 (1971), paragraph 58.

Specifically the writs of mandamus, prohibition, certiorari, and quo warranto. See I Thynne and J Goldring, *Accountability and Control: Government Officials and the Exercise of Power*, (1987), 95.

To this end I still cannot understand why the Commonwealth bureaucracy mounted so much opposition to the Freedom of Information Act 1983 (Cth), yet let the AAT legislation pass without real opposition.

Yes, they were good moves towards the democratic ideal of administrati justice. But lest the AAT remains cocooned in its heroic paradigm we shou remark that it was simply a rational, albeit overdue, solution to the post 197 growth in the power and pervasiveness of the (administrative) state. T problems were there - the citizen v gargantuan bureaucracy. The communi wanted greater accountability to greater quality in the decisions of its pub servants - thus the AAT.

As progress produces regress, the AAT is now faced with questions abc whether it is still part of the "new" administrative law, and whether procedures and practices are dated. Specific to the paper has been the issue of t AAT running against the new current of alternative dispute resolution by faili to give sufficient priority and attention to mediation through it's conferenci structure.