

# ADR, PUBLIC INTEREST LAW AND ACCESS TO JUSTICE: THE NEED FOR VIGILANCE

MARY ANNE NOONE\*

*The increased use of non-adversarial or alternative dispute resolution ('ADR') processes, including mediation, creates tension for public interest lawyers. Certain groups in society suffer more than others from inequality before the law. The challenge for public interest lawyers is to ensure that the increased reliance on ADR by governments does not perpetuate or exacerbate existing inequalities before the law.*

*Through an examination of Victorian research on mediation in consumer credit issues, this article highlights aspects of expanding ADR processes that warrant vigilant attention if those concerned with access to justice, both proponents of alternative dispute resolution and public interest lawyers, wish to further their objectives. It concludes by calling for ongoing evaluation and review of new processes. Most importantly, in recognition of the complex and paradoxical nature of access to justice developments, these evaluations must be rigorous and contextualised.*

## I INTRODUCTION

[A]n insistence on rights and the importance of the struggle to consolidate and extend those rights for oppressed groups means that a reliance on informal justice must be carefully considered. ... [W]e must be aware of the consequences of informal justice for those that lack legal rights.<sup>1</sup>

Whilst mediation is undoubtedly a valuable mechanism for facilitating access to justice, its value in the context of public interest litigation is diluted if important public interests are privatised with a consequent reduction in access and equity.<sup>2</sup>

Proponents of access to justice often share the twin commitments of improved dispute resolution forums and enhancing or defending individuals' rights in order to further the public interest. However, the above statements highlight the tension faced by public interest lawyers regarding the use of alternative dispute

\* Associate Professor, School of Law, Latrobe University.

1 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2002) 42.

2 Andrea Durbach, 'Test Case Mediation — Privatising the Public Interest' (1995) 6 *Australian Dispute Resolution Journal* 233, 242.

resolution ('ADR') processes, particularly mediation.<sup>3</sup> The challenge is how to ensure the rights of the disadvantaged and vulnerable are enhanced and protected in the context of increasing use of ADR processes that are often mandated by courts and tribunals. Continued awareness of and engagement with this tension is critical for those concerned, in order to advance access to justice for the poor and disadvantaged. There is significant evidence that particular groups of people suffer more than others from inequality before the law.<sup>4</sup> The challenge for both ADR practitioners and public interest lawyers is to ensure that the increased reliance on ADR by governments does not perpetuate or exacerbate existing inequalities before the law.

In this article, in the context of the access to justice movement, I briefly detail the origins of ADR and public interest law. I then examine the tension between the pursuit of legal rights within formal public legal settings and the resolution of individual disputes through a variety of private informal dispute resolution mechanisms, particularly mediation. Although there is a body of North American academic critique of the increasing use of ADR,<sup>5</sup> there has been little critical evaluation of the impact of ADR on public interest law in Australia.<sup>6</sup> The implications for public interest law practitioners, who often pursue rights within formal public legal settings, of increasing reliance on informal privatised dispute resolution mechanisms in a widening range of legal arenas, is examined with a particular focus on Victorian research on consumer credit issues.

I conclude with some observations about matters that require research and ongoing evaluation if those concerned with access to justice, both proponents of ADR and public interest lawyers, wish to further their objectives.

The arguments of public interest lawyers were outlined in a recent submission to a public inquiry:<sup>7</sup>

3 Alternative (more recently the A is said to stand for Appropriate) Dispute Resolution refers to a wide range of processes including arbitration, conciliation, mediation, negotiation and expert appraisal. In this paper, the focus is on mediation, which can be facilitative, advisory, evaluative or settlement focused. See Astor and Chinkin, above n 1, 5–20; Michael King et al, *Non-Adversarial Justice* (The Federation Press, 2009) 100–18.

4 Ronald Sackville, 'Law and Poverty in Australia' (Parliamentary Paper No 294, Parliamentary Library, Parliament of Australia, 1975); Australian Law Reform Commission, *Equality before the Law*, Report No 69 (1994); Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Access to Justice Advisory Committee, *Access to Justice — An Action Plan* (1994); Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (2004).

5 See, eg, Richard Abel, *The Politics of Informal Justice* (Academic Press, 1982) vol 1; Richard Delgado et al, 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution' (1985) 6 *Wisconsin Law Review* 1359; Isabelle Gunning, 'Know Justice, Know Peace: Further Reflections on Justice, Equality and Impartiality in Settlement Oriented and Transformative Mediations' (2004) 5 *Cardozo Journal of Conflict Resolution* 87; Isabelle R Gunning, 'Diversity Issues in Mediation: Controlling Negative Cultural Myths' (1995) 1995 *Journal of Dispute Resolution* 55.

6 In contrast, ADR in family law has been the focus of much critical commentary and evaluation. For a summary see Astor and Chinkin, above n 1, 342–58; King et al, above n 3, 124–37.

7 The inquiry was conducted by the Law Reform Committee of Victorian Parliament: Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009).

ADR is inappropriate if it fails to address power disparities between the disputants. The resolution of civil disputes through ADR may be problematic if the matter involved a claim by a consumer against a large corporation such as a bank (or the reverse), especially if the consumer is not legally represented. This type of dispute is often characterised by unequal bargaining power and a lack of ability of consumers to negotiate any terms of their contract of relationship. It may follow that consumers accept a negotiated settlement in order to avoid the risk of adverse costs orders and the stress of litigation, yet through doing so do not have their rights fully realised or the merits of their case properly assessed. It may also be in the interests of the corporation to pay or forego a comparatively small individual and confidential settlement rather than risk having a test case judgment made against them that would be costly if applied to a large volume of consumers.<sup>8</sup>

Continued awareness of and engagement with these tensions is critical for those concerned, in order to advance the interests of both ADR and public interest law, so as to ensure that the adoption of non-adversarial processes is not at the expense of the ability to assert and defend legal rights that can protect the poor, disadvantaged and vulnerable. Although it is clear that the formal justice system does not necessarily provide justice for oppressed or minority groups, and that rights are often contingent, unreliable and fragile, it must be acknowledged, as Williams, an Afro-American legal theorist, argues, that ‘rights are easier to abandon for members of dominant groups, who have been able to depend for centuries on being the bearers of rights’.<sup>9</sup>

## II BARRIERS TO ACCESS TO JUSTICE

In Australia, a wide range of inquiries and reports has identified inequality in the justice system. As early as 1975, Sackville identified that the law treated some groups of people less favourably than others and substantive areas of law, such as residential tenancy, consumer credit and social security, were denied to the poor and vulnerable.<sup>10</sup> More recent inquiries have identified that the way legal services are delivered by the legal profession, the nature of court proceedings, including procedural requirements and the adversarial basis, and the language used, act as barriers limiting peoples’ opportunity to obtain justice.<sup>11</sup> For instance, the

8 Federation of Community Legal Centres (Vic), Submission to Parliament of Victoria Law Reform Committee, *Inquiry into Alternative Dispute Resolution*, 31 March 2008, 2.

9 Patricia J Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991), quoted in Astor and Chinkin, above n 1, 40–1.

10 Sackville, above n 4; More recently see Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (2004).

11 Senate Standing Committee on Legal and Constitutional Affairs, ‘Cost of Legal Services and Litigation’ (Discussion Papers No 1–7 Final Reports 1 and 2 (1991–1994); Trade Practices Commission, *Study of the Professions — Legal — Final Report* (Australian Government Publishing Service, 1994); Access to Justice Advisory Committee, above n 4; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).

injustice resulting from the impact of language and culture on communication issues between indigenous Australians and the legal system is well documented.<sup>12</sup>

Additionally, there is now recognition that equality before the law may be restricted by a range of factors including geographic or institutional limitations, race, class or gender biases and cultural differences, as well as economic factors. The legal system does not offer substantive equality to all. Aboriginal and Torres Strait Islander people, women, people of non-English speaking backgrounds and the disabled have been the subject of discrimination by the law.<sup>13</sup> The 1994 Access to Justice Report found that ‘the law has been more than inaccessible and unfair to some groups, it has been an active agent of oppression and discrimination’.<sup>14</sup>

Most recently, socio-legal research in the United Kingdom, New Zealand, Netherlands, Northern Ireland, Canada, Australia and Japan has revealed that justiciable events (problems for which there is a potential legal remedy)<sup>15</sup> are a part of everyday life for a significant section of the population.<sup>16</sup> This body of research confirms the day-to-day experience of many of those involved in public interest law work. People often experience problems in clusters, there can be a ‘trigger’ event that causes a cascading of events that leads to further problems, most people do not seek or receive legal advice and individuals suffer from ‘referral fatigue’. This research reveals that justiciable events are part of everyday life for one-third to one-half of the population. The events range across issues such as children, clinical negligence, consumer problems, mental health problems, discrimination, divorce, domestic violence, money or debt problems, rented housing, relationship background, owned housing, neighbours, unfair police treatment and welfare benefits.<sup>17</sup>

These studies identified ‘how different characteristics of disadvantage, such as low income and long-term illness and disability are frequently experienced together and are frequently exacerbated by the experience of civil justice problems’.<sup>18</sup>

The UK research found that people with a long-term illness or disability, lone parents, people who are unemployed or on a low income and people living in

12 See, eg, Roland Sussex, ‘Intercultural Communication and the Language of Law’ (2004) 78 *Australian Law Journal* 530.

13 For a summary of research and reports detailing discrimination within the justice system, see Access to Justice Advisory Committee, above n 4, ch 2; Australian Law Reform Commission, *Equality before the Law*, Report No 69 (1994); Commonwealth, above n 4.

14 Access to Justice Advisory Committee, above n 4, [2.4].

15 ‘Justiciable Event’ is a term which was pioneered by Hazel Genn in 1999 when she shifted the focus of survey work to assessing ‘problems that are legal in nature but for which a legal service is only one and perhaps not the best remedy for resolving it’. See Hazel G Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart Publishing, 1999) 12.

16 Christine Coumarelos, Zhigang Wei and Albert Z Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Law and Justice Foundation, 2006) 3; Albert Currie, ‘Legal Problems of Everyday Life — The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians’ (Report, Department of Justice Canada, 2009).

17 Pascoe Pleasence, Nigel Balmer and Alexy Buck, *Causes of Action: Civil Law and Social Justice* (Legal Services Commission, 2nd ed, 2006) ch 2, 15–78.

18 Alexy Buck, Nigel Balmer and Pascoe Pleasence, ‘Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups’ (2005) 39(3) *Social Policy and Administration* 302, 318.

temporary accommodation are most likely to experience justiciable events. The researchers concluded that ‘justiciable problems appear to be an integral aspect of patterns of disadvantage, alternatively described as social exclusion’.<sup>19</sup>

It is in the context of this body of research that the tension between increased use of mediation and the work of public interest lawyers is discussed.

### III THE ACCESS TO JUSTICE MOVEMENT

The growth of ADR mechanisms and the increased focus on public interest law share common origins in the ‘access to justice’ movement. This movement arose from a realisation by both legal practitioners and academics, that the liberal claim of a justice system that ensured ‘equality before the law’ was a formal right with little substance or practical effect. Few people engage with the legal system and those that do are often denied access to representation and advice because of financial reasons. It was not sufficient to have a formal right. There needed to be affirmative action to ensure the right was put into effect.<sup>20</sup>

During the 1970s, 1980s and early 1990s, the focus on improving access to justice included a growth in ‘public interest law’ and an increasing use of ADR mechanisms. Concern to ensure substantive equality before the law and access to ADR processes is at the heart of both developments.<sup>21</sup> In 1978, Cappelletti and Garth produced a four-volume collection which surveyed the access to justice developments across western industrialised countries. They identified three waves in access to justice. The first addressed economic matters and sought to provide citizens with the legal means to seek justice through legal aid schemes.<sup>22</sup> The second wave focused on organisational matters that facilitated standing in a representative capacity and class actions. The third wave was procedural and included the development of a range of ADR processes.<sup>23</sup> More recently, Parker identified a fourth wave: competition policy reform of legal service provision.<sup>24</sup> The focus of this article relates to the tension between the second and third waves.

19 Ibid; Currie, above n 16.

20 Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Worldwide Movement to Make Rights Effective’ in Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey* (Sitjoff and Noordhoff, 1978) 5.

21 Astor and Chinkin, above n 1, 3; For a short summary of access to justice developments see Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 3<sup>rd</sup> ed, 2006) ch 4, 80–115.

22 For a discussion of the Australian legal aid system from the 1970s to date, see Mary Anne Noone and Stephen A Tomsen, *Lawyers in Conflict: Australian Lawyers and Legal Aid* (The Federation Press, 2007).

23 Cappelletti and Garth, above n 20; Mauro Cappelletti, ‘Alternative Dispute Resolution Processes within the Framework of the Worldwide Access-to-Justice Movement’ (1993) 56(3) *The Modern Law Review* 282; Geraint Howells and Rhoda James, ‘Litigation in the Consumer Interest’ (2002) 9 *ILSA Journal of International and Comparative Law* 1, 3–4.

24 Christine Parker, *Just Lawyers* (Oxford University Press, 1999) 32.

## **A Access to Justice Second Wave — Organisational Matters**

Cappelletti identifies several aspects to the ‘organisational obstacle’ to accessing justice: the transformation in the economy from individual relationships to the mass phenomena where production, distribution and consumption are done on a large scale and the development of ‘social rights’ that bring benefits to the ‘formerly discriminated or weak persons’.<sup>25</sup> He posits that individuals have difficulty in vindicating the rights involved and that the only ‘really effective protection is one which reflects the ‘collective’ or ‘class’ character of the right’.<sup>26</sup> He uses the examples of a consumer with a defective mass produced product and a victim of mass pollution, who are unlikely to have the motivation, information or power to pursue litigation against the producer or polluter. Additionally, the result is unlikely to discourage the wrongful action, as the worst outcome for the offender is one-off individual compensation. Cappelletti describes this situation as ‘organisational poverty’.<sup>27</sup>

Various reforms have addressed this ‘organisational poverty’, including representative/class actions and changes to the rules of standing to enable specialised government agencies and interested citizens to take matters to court.<sup>28</sup> Many of these techniques were embraced by those interested in using legal methods to bring about social and structural change, often described as public interest law.<sup>29</sup>

## **B Public Interest Law**

Public Interest Law is part of the struggle by, and on behalf of, the disadvantaged to use ‘law’ to solve social and economic problems arising out of a differential and unequal distribution of opportunities and entitlements in society.<sup>30</sup>

Public interest law has its origins in the United States of America and was associated with those who worked for and with the disadvantaged, usually in legal aid services (first wave of access to justice). Neighbourhood law centres and national specialist law centres utilised new legal techniques to claim and enforce ‘new rights’<sup>31</sup> so as to test new entitlements of the welfare state and

<sup>25</sup> Cappelletti, above n 23, 284.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 284–6. For discussion of developments in Australia, see Peter Cashman, *Class Action Law and Practice* (Federation Press, 2007); and for discussion of ongoing issues, see Anne Kallies and Lee Godden, ‘What Price Democracy? Blue Wedges and the Hurdles to Public Interest Environmental Litigation’ (2008) 33(4) *Alternative Law Journal* 194.

<sup>29</sup> Parker, above n 24, 35–6.

<sup>30</sup> Rajeev Dhavan, ‘Whose Law? Whose Interest?’ in Jeremy Cooper and Rajeev Dhavan (eds), *Public Interest Law* (Basil Blackwell, 1986) 21; Dhavan’s definition of public interest law is grounded in the historical origins of the United States of America.

<sup>31</sup> Ibid; Edgar S Cahn and John C Cahn, ‘The War on Poverty: A Civilian Perspective’ (1964) 73 *Yale Law Journal* 1317.

poverty programmes.<sup>32</sup> These organisations sought ‘to find new voices for new constituencies’.<sup>33</sup>

Australian public interest law also has its roots in the 1970s development of legal aid schemes and community legal centres. These organisations recognised that litigation and other forms of reform and campaigns could affect structural change and improve social justice.<sup>34</sup> In 1982, the Public Interest Advocacy Centre (‘PIAC’) was opened in NSW with a specific aim of pursuing legal matters of public interest. In other states, Public Interest Law Clearinghouses developed to assist in the coordination of pro bono work in the public interest.<sup>35</sup> As such, a common theme in public interest law is the pursuit of rights, often utilising litigation processes.<sup>36</sup>

### **C Access to Justice Third Wave — Procedural Matters**

Cappelletti and Garth argued that in certain areas or kinds of controversies, the normal solution, being traditional contentious litigation in court, might not be the best way to provide effective vindication of rights.<sup>37</sup> They described this as the ‘procedural obstacle’ to accessing justice.<sup>38</sup> In response, alternatives for dispute resolution were developed (the third wave). Although conciliation, arbitration and mediation were not new processes, a preference for these approaches grew amongst access to justice proponents. They wanted dispute resolution processes to be more accessible to the community and for more individuals to be able to engage their rights.<sup>39</sup>

## **IV GROWTH OF ADR**

As Cappelletti describes it, a ‘wave’ of enthusiasm and development of ADR was generated in the 1970s and 1980s in many western countries, including Australia, the USA and Canada.<sup>40</sup> Proponents of improved access to justice ‘constructed ADR in contradistinction to — sometimes in opposition to — litigation and the

32 One of the first examples was *Brown v Board of Education*, 347 US 483 (1954), which established that separate but equal educational facilities were not good enough for African Americans.

33 Dhavan, above n 30, 19.

34 See, eg, Noone and Tomsen, above n 22, ch 7; Mary Anne Noone, ‘The Activist Origins of Australian Community Legal Centres’ (2001) 19 *Law in Context* 128. One of the earliest Australian test cases was *Green v Daniels* (1977) 13 ALR 1, which involved the right of school leavers to income support.

35 Samantha Burchell and Emma Hunt, ‘From Conservatism to Activism: The Evolution of the Public Interest Law Clearing House’ (2003) 28(1) *Alternative Law Journal* 8.

36 Impact litigation has been co-opted by both sides of the political spectrum. See Timothy Foden, ‘The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement’ (2005) 4(2) *University of Connecticut Public Interest Law Journal* 184; Dhavan, above n 30, 20.

37 Cappelletti, above n 23, 287; Parker, above n 24, 36–8.

38 *Ibid.*

39 *Ibid.*

40 For a discussion of the history of ADR in Australia see Astor and Chinkin, above n 1, 11–22.

formal justice system'.<sup>41</sup> In the USA, there are multiple aspects to the origins of the modern use of ADR: there were projects on conflict resolution, aimed at finding ways of resolving complex public policy and social welfare disputes 'outside the formal system';<sup>42</sup> neighbourhood Justice Centres were seeking to transfer control over dispute resolution from the courts and lawyers to 'lay community leaders and to the disputants themselves, thereby broadening access to justice';<sup>43</sup> and the American Bar Association and the Supreme Court were pursuing alternatives to litigation.<sup>44</sup>

For many, the support of ADR and particularly mediation, stemmed from social justice roots, as exemplified by the community justice movement of the 1960s and 1970s.<sup>45</sup> This movement sought substantive justice and recognition that law and the legal system did not treat everyone equally; which was similar to the concern held by those involved in public interest law work. A catch cry of many developments of this time was 'empowerment', particularly of the clients of the services.<sup>46</sup>

In Australia, the 'third wave' involved developments dealing with neighbourhood disputes and family matters. Community Justice Centres were established in NSW in the early 1980s<sup>47</sup> and then replicated in other states. In 1985, two innovative Family Mediation Centres were established by the Commonwealth government to work with families.<sup>48</sup> Within a few years, interest in ADR was spreading to the corporate world, which was concerned about reducing litigation costs and asserting further control over the resolution of their disputes. The use of commercial arbitration was longstanding in certain areas of business, including shipping, international trade, construction and patenting.<sup>49</sup>

The common features of both community and commercial ADR was the appeal of

disputants taking control over their personal and business lives, becoming directly involved in the resolution of their disputes (rather than relying on lawyers and other representatives), and fashioning creative resolutions of

41 Ibid 3.

42 As discussed in Cappelletti, above n 23, 287, citing Sanford M Jaffe, *New Approaches to Conflict Resolution* (Ford Foundation, 1978).

43 Deborah R Hensler, 'A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation' (1995) 73 *Texas Law Review* 1587, 1590.

44 Ibid.

45 Gunning, 'Know Justice, Know Peace', above n 5. For Australian experience, see Noone, above n 34.

46 Parker, above n 24, 37. For a discussion of the importance of client participation and empowerment in the early Australian community legal centres, see John Chesterman, *Poverty Law and Social Change: The Story of the Fitzroy Legal Service* (Melbourne University Press, 1996) 36–7.

47 Brendan French, 'Dispute Resolution in Australia — The Movement from Litigation to Mediation' (2007) 18(4) *Australasian Dispute Resolution Journal* 213.

48 Astor and Chinkin, above n 1, 14–16. Both types of organisations still exist, for example, the Family Mediation Centre and the FMC Relationship Services.

49 Astor and Chinkin, above n 1, 235–82; King et al, above n 3, 111–16; Hensler, above n 43, 1591.



their problems, which may have little similarity to the outcomes available through the court-based dispute resolution system.<sup>50</sup>

By the late 1980s, in many countries, the courts had become interested in ADR in an effort to improve the efficiency of the court resources, improve timeliness of dispute resolution and address growing areas of disputes.<sup>51</sup>

In 1994, the Australian Access to Justice Committee endorsed the development of alternative dispute resolution but cautioned against wholesale acceptance. The committee detailed a range of concerns and concluded that:

mediation between commercial opponents is not likely to involve the same risks of power imbalance as mediation between domestic partners. We think it important, however, that the potential dangers be taken into account in framing of official programs intended to encourage resort to ADR. This can be achieved, at least to some extent, by encouraging appropriate training for mediators and establishing screening processes to identify parties whose disputes are unsuitable for mediation. In addition, we think that *it is critical that ADR programs, particularly those annexed to courts, be regularly evaluated in order to identify whether any of the potential risks have eventuated and to introduce measures to correct any identified problems.*<sup>52</sup>

## V CRITIQUE OF ADR

Since the 1980s, significant concerns have been raised relating to power imbalances, the privatised nature of ADR and the ensuing lack of precedent, particularly in the United States. In an early critique, Abel highlighted the contradictions in the development of ADR. Informalism could be ‘simultaneously more and less coercive than formal law, to represent both an expansion of the state apparatus and a contraction’.<sup>53</sup> He cautioned against the wholesale acceptance of the benefits of informal justice:

Informal institutions deprive grievants of substantive rights. They are antinormative and urge the parties to compromise; although this appears evenhanded, it works to the detriment of the party who is advancing a claim — typically the individual grievant.<sup>54</sup>

Nonetheless he gave support to the underlying ideals of harmony, equal access, cheap and quick operations, participatory and substantive justice.<sup>55</sup>

50 Hensler, above n 43, 1591.

51 Ibid; Astor and Chinkin, above n 1, 6–7, 15–17.

52 Access to Justice Advisory Committee, above n 4, 279 [11.5]–[11.6] (emphasis added). Pursuant to this report the National Alternative Dispute Resolution Advisory Council was established.

53 Abel, above n 5, 307.

54 Ibid 298.

55 Ibid 310.

Abel raised the concern about how the privatised nature of ADR processes inhibits the identification and scrutiny of systemic issues.<sup>56</sup> Additionally he argued that ADR could increase the capacity of those already advantaged (socially and legally), to enforce their rights, ‘while denying disadvantaged defendants an equivalent shield’.<sup>57</sup> The use of Australian tribunals certainly reinforces Abel’s point that those who ‘mobilize a legal institution often begin with a significant advantage over their adversaries’. For instance, studies that looked at the Victorian Residential Tenancies Tribunal clearly showed that tenants rarely bring their own actions and most applications are initiated by landlords or their agents.<sup>58</sup>

Research has also indicated that ADR may actually foster racial and ethnic prejudice. Factors that increase the possibility of prejudice include:

when a member of an in-group confronts a member of an out-group; when that confrontation is direct ... ; when there are few rules to [restrain] conduct; when the setting is [private and there are no guidelines that] “public” values are ... preponderate; and when the controversy concerns an intimate, personal matter ...<sup>59</sup>

Menkel-Meadow addresses the polarised debate around ADR developments by discussing the complexity involved in deciding what disputes need formal legal adjudication and when respective interests can be served by settlement, ‘whether public or private’.<sup>60</sup> In particular, she addresses a range of criticisms made by Luban (and others, like Abel), that settlement leads to an ‘erosion of the public realm’.<sup>61</sup>

Menkel-Meadow posits that negotiated settlement does not always mean compromise, but can facilitate outcomes that maximise party goals that may be more ‘just’.<sup>62</sup> She points out that in the critique of settlement approaches there is an ‘underlying assumption that the law is just or fair and is the appropriate measure by which all disputes should be resolved’.<sup>63</sup> She argues, however, that ‘through individually adaptive solutions in settlement we may see the limits of law and explore avenues for law reform’.<sup>64</sup> Delgado, in his exploration of informalism and prejudice, also makes the point that advice to rely on the formal

56 Ibid 280.

57 Ibid 295–7.

58 Ruth Alder, ‘In Whose Interest’ (1989) 14(5) *Legal Service Bulletin* 209; Andrea Treble and Lynda White ‘Victoria’s Residential Tenancies Tribunal — Renovate or Demolish’ (1993) 18(4) *Alternative Law Journal* 163; Frances Gibson, ‘Alternative Dispute Resolution in Residential Tenancies Cases’ (2007) 18(2) *Australasian Dispute Resolution Journal* 101.

59 Delgado et al, above n 5, 1402.

60 Carrie Menkel-Meadow, ‘Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)’ (1995) 83 *Georgetown Law Journal* 2663, 2665; this article focuses on encouragement of early settlement in litigation, but it is relevant to ADR developments more generally.

61 David Luban, ‘Settlements and the Erosion of the Public Realm’ (1995) 83 *Georgetown Law Journal* 2619.

62 Menkel-Meadow, above n 60, 2673–4.

63 Ibid 2676.

64 Ibid.

justice system is contingent on that system being more reliably free of prejudice than the informal.<sup>65</sup>

One argument mounted against settlement processes and ADR is the loss of precedent, particularly in mass torts and consumer class actions.<sup>66</sup> Menkel-Meadow asks: Who ‘owns’ the dispute and is it the parties or the public ‘who needs guidance from enunciated rules’?<sup>67</sup> Her answer to the various criticisms is ‘a set of standards for scrutinizing both the settlement process and the settlement outcome.’<sup>68</sup> She explains:

For me, the key in evaluating when and how settlement should occur is not a question of publicity or confidentiality, but one of appropriate substantive and process “justice” standards, taking account of the interests of both the parties-disputants and others who are likely to be affected by the outcome, including in some cases, the whole polity.<sup>69</sup>

## VI ADR AND PUBLIC INTEREST LAW LITIGATION

The tensions and complexity of ADR issues discussed above,<sup>70</sup> are highlighted in the practice of ‘public interest law’. The courts’ desire to encourage settlement of disputes through mediation can run counter to the interests of the public interest lawyer. These lawyers are often intent on using litigation to raise public awareness about an issue, to set a precedent concerning unjust laws or procedures and to get a determination of ‘rights’, either new or defended.<sup>71</sup> They desire the empowerment of their individual client(s) but also have a concern for an outcome that can affect individuals who have suffered similar loss but are unlikely or unable to assert their legal rights.<sup>72</sup>

65 Delgado et al, above n 5, 1359; Astor and Chinkin, above n 1, 42.

66 For recent Australian comment on this, see Julian Gruin, ‘The Rule of Law, Adjudication and Hard Cases: The Effect of Alternative Dispute Resolution on the Doctrine of Precedent’ (2008) 19 *Australasian Dispute Resolution Journal* 206.

67 Menkel-Meadow, above n 60, 2679.

68 Ibid 2686.

69 Ibid.

70 For a recent Australian exploration of these issues see Mark J Rankin, ‘Settlement at All Cost: The High Price of an Inexpensive Resolution?’ (2009) 20 *Australasian Dispute Resolution Journal* 153. For a short summary, see King et al, above n 3, 94–6.

71 Scott L Cummings and Deborah L Rhode, ‘Public Interest Litigation: Insights from Theory and Practice’ (2009) 36 *Fordham Urban Law Journal* 603; Jahid Hossain Bhuiyan, ‘Access to Justice for the Impoverished and Downtrodden Segments of the People through Public Interest Litigation: A Bangladesh, India and Pakistan Perspective’ (2007) 2007 *Lawasia Journal* 1; Mamta Rao, *Public Interest Litigation: Legal Aid and Lok Adalats* (Eastern Book Company, 2<sup>nd</sup> ed, 2004); Edwin Rekosh, Kyra A Buchko and Vessela Terzieva, *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists* (Public Interest Law Initiative Columbia Law School, 2001).

72 Denis Nelthorpe, ‘Consumer Law — Class Actions: The Real Solution’ (1988) 13(1) *Legal Service Bulletin* 26. For a discussion of the ethical dilemmas for public interest lawyers see Shauna I Marshall, ‘Mission Impossible?: Ethical Community Lawyering’ (2000) 7(1) *Clinical Law Review* 147; Christine Parker, ‘A Critical Morality for Lawyers: Four Approaches to Lawyers’ Ethics’ (2004) 30(1) *Monash University Law Review* 49.

Concerns about the appropriateness of ADR for some matters, loss of precedent, power imbalances and the privatised nature of ADR, have been raised in Australia by the Access to Justice Committee, the Australian Law Reform Commission, the Victorian Law Reform Commission, the Victorian Parliament Law Reform Committee and the National Alternative Dispute Resolution Advisory Council ('NADRAC').<sup>73</sup> The 2009 NADRAC report noted that there may be some matters not suitable for ADR or pre-action requirements.<sup>74</sup> *Recommendation 2.3 Exceptions* states:

Legislation set out factors that may be taken into account by prospective litigants in determining the application of the [pre-action] guidelines including urgency, undue prejudice, safety, security, the subject matter of the dispute, public interest factors and whether the dispute is essentially the same as has been previously before the same court or tribunal.<sup>75</sup>

However, the report does not detail what is meant by 'subject matter of the dispute or public interest factors'. Until there is clarity about the type of matters that should not go to mediation, protocols for identification of systemic issues and procedures enabling the adjudication of important legal issues (impact litigation), the concerns of public interest lawyers will remain.

### **A A Case Study — BHP Discrimination Case**

One of the earliest Australian cases run by PIAC illustrates the tensions involved in using mediation to settle public interest litigation involving large numbers of claimants. The BHP discrimination case,<sup>76</sup> 'the largest and longest-running sex discrimination case in Australian legal history', provides a good example of the various arguments relating to the 'privatisation' of disputes, but also challenges the assumption that ADR processes necessarily involve greater party participation and control of outcomes.<sup>77</sup> The initial court decision is hailed as a landmark in Australian legal and industrial history and the case tested the scope of the New South Wales Anti-Discrimination legislation. It also secured individual compensation for over 700 women. After 14 years of litigation and campaigning, the matter was resolved by a two week mediation process.

In a reflection on the case, the then director of PIAC wrote:

<sup>73</sup> Australian Law Reform Commission, above n 11; Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008); Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009); National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Commonwealth, 2009).

<sup>74</sup> National Alternative Dispute Resolution Advisory Council, above n 73.

<sup>75</sup> *Ibid* 8 [2.3].

<sup>76</sup> *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, as discussed in Durbach, above n 2.

<sup>77</sup> Durbach, above n 2, 235. For an examination of the barriers to accessing justice faced by women involved in this case, see Gordon Renouf, 'A Job of Anna' in Mark Herron (ed), *A Just Society? What Access to Justice Means to Twelve Australians* (Victoria Law Foundation, 1999). For a contemporary account of the campaign see Green Left, *Jobs for Women: How BHP Was Made to Change Its Tune* (9 March 1994) <<http://www.greenleft.org.au/1994/134/10223>>.

Central to our work on access to justice issues is an adherence to the view that the public interest demands that justice (in the form of a determination giving rise to effective remedies and redress) be provided expeditiously and with maximum conservation of cost ... [V]igilance is required to ensure that the attributes of public interest litigation — public exposure, accountability, the capacity to inform social progress — are not undermined by this pursuit ... The use of mediation poses the risk of invisibility and important community interests and tenuous rights hard won ‘could fade from the public agenda’.<sup>78</sup>

The case involved the right of women to be employed in the iron and steel industry. Women were refused employment on the basis of laws that placed restrictions on the weights women could lift. Despite thousands of women being on the waiting list for work, only a little over one per cent of the workforce were women. In 1980, complaints were lodged with the Anti-Discrimination Board and after a lengthy conciliation process, the company agreed to employ women. The women’s claims for compensation remained to be resolved.<sup>79</sup> Within a few years there was a downturn in steel industry and workers were laid off. By adopting the ‘last on, first off’ principle, the women claimed further indirect discrimination by the company. A group of 34 complaints litigated all the way to the High Court, which in 1989 found that the company employment practices did amount to unlawful direct and indirect discrimination. A damages award of \$1.4 million was made to the 34 women.<sup>80</sup>

Whilst this matter was proceeding, many other women made similar complaints to the Anti-Discrimination Board (‘ADB’). PIAC acted for a complainant representing all other women who had been discriminated against. In 1989 the Equal Opportunity Tribunal (‘EOT’) made orders, with the consent of the parties, that the company ‘had discriminated against all women who had applied or had applications pending for employment as ironworkers between the relevant period’.<sup>81</sup> Unfortunately, the Tribunal did not have power to order compensation on a representative basis. This meant that women seeking damages had to lodge individual complaints. Given that it took nine years to finalise 34 women’s cases, the prospect of handling 600 further complaints had the potential of ‘effectively bringing the ADB and EOT to a standstill’.<sup>82</sup> In the following three years, negotiations about damages were unproductive and the number of potential claimants had grown to over 700 women.

In 1993, a mediation agreement was signed by the company and PIAC. This was prompted by the ‘Jobs and Justice for Women Campaign’ and intervention by the State Attorney-General.<sup>83</sup> In a two week mediation, 321 offers of settlement were

78 Durbach, above n 2, 234–5.

79 Ibid 235.

80 *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

81 Durbach, above n 2, 236. Additionally, in retrenching workers, the Tribunal held that the company should have regard to when the women first applied for work.

82 Ibid.

83 Ibid 237.

made on the basis of principles set down in the initial decision of the Tribunal and confirmed by the High Court.<sup>84</sup> By January 1994, all 709 complaints were settled and the results ‘reflected a fair and equitable application of legal principle to each particular case’.<sup>85</sup>

However, there was significant ‘disquiet’ amongst the women after the mediation process was completed. The open process of the court and tribunal hearings had enabled the women’s participation in the process and the public airing of their claims of discrimination. In contrast, the parties to the mediation agreement (PIAC and the company) agreed that the process was totally confidential except for allowing PIAC to communicate with individuals to get their instructions. The global settlement figure and criteria for calculating damages was confidential.<sup>86</sup>

The women’s lack of confidence in the mediation process was related to the fact that the matter had run for 14 years, there had been a change in legal representatives and some women covered by the mediation had not been involved in the earlier litigation, while others who had, expected similar transparent processes. The decision to refuse the involvement of non-legal representatives in the mediation was a significant departure from mediation principles of parties owning the process and outcome. The difficulties in communicating with non-English speaking women added to their doubts. The demand for ‘expeditious’ settlement also reduced the opportunity to appropriately and fully explain matters to the women. Finally, the appointment of ‘a retired judge, white, male and Vice-Chancellor of Wollongong University, which receives substantial BHP funding’, fuelled concerns about the neutrality of the mediator.<sup>87</sup>

As Durbach notes:

The experience of the women throughout the case changed dramatically, from active involvement in high profile public interest litigation and campaigning to being marginalised from a process which envisaged an alternative to cumbersome duplicate litigation. ... As the women lost control of the dispute and its resolution, their capacity to advance the public interest diminished.<sup>88</sup>

This theme of loss of control is also explored in a study of the use of ADR in mass torts action in North American courts. ‘Mass torts involve a common set of injuries that occurred in the same or similar circumstances — for example, a hotel fire, a building collapse, or widespread product use — and that are allegedly linked to the actions of a single or smaller number of defendants’.<sup>89</sup> The outcome of one case within the litigation can be highly influential on the outcome of the other cases. The common features of mass personal injury torts are ‘numerosity,

84 Although the term mediation was used in this situation, the process might more appropriately be termed settlement conferencing; see Astor and Chinkin, above n 1.

85 Durbach, above n 2, 239.

86 *Ibid* 238–9.

87 *Ibid* 241.

88 *Ibid*.

89 Hensler, above n 43, 1596.

commonality, and interdependence of case values’ and ‘controversy over scientific evidence of causation, emotional or political heat, and higher than average potential for claiming by allegedly injured parties’.<sup>90</sup>

The assessment of the contribution of ADR to mass torts indicates that for plaintiff lawyers it is a positive experience to be involved in the imaginative resolution of their cases. From the lay plaintiffs’ perspective, it is negative that they are not present at the negotiating table, that they are often not fully informed of their options and that their voices are not heard.<sup>91</sup> This is similar to the women’s experience in the mass discrimination case, where they felt excluded and uncertain of outcomes.<sup>92</sup>

However, it is cautioned that there is little empirical data about the actual views of claimants and what they might want out of a mass tort action.<sup>93</sup> Similarly, there is a need for ‘rigorous examination’ of the outcomes between repeat player and ‘one-shotter’ ADR processes, particularly in consumer issues.<sup>94</sup> The following discussion illustrates why this is the case.

## VII PUBLIC INTEREST LAW AND ADR RESEARCH

In Australia, although there is a growing body of empirical research on ADR processes, there is still none that directly addresses the tensions between the need for precedent and the ability to affect systemic change and client empowerment.<sup>95</sup> Research often fails to adequately contextualise the data collected and address these broader issues. The following example illustrates the importance of understanding the nature of the disputes and parties involved, particularly in the context of research on social exclusion and legal issues.

### A *Dispute Resolution Processes for Credit Consumers*

This research project<sup>96</sup> looked at the dispute resolution processes offered by the Victorian Civil and Administrative Tribunal (‘VCAT’) and Consumer Affairs Victoria (‘CAV’) for credit consumers. Disputes about consumer credit are dealt with in a variety of forums; Magistrates’ Courts (often debt collection action initiated by credit providers) and industry External Dispute Resolution (‘EDR’)

90 Ibid.

91 Ibid 1623.

92 Durbach, above n 2.

93 Ibid 1626.

94 Carrie Menkel-Meadow, ‘Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR’ (1999) 15 *Ohio State Journal on Dispute Resolution* 19, 53.

95 For an overview of current Australian research and papers from the ADR Research Forum held in July 2010, see National Alternative Dispute Resolution Advisory Council, *Summary Papers and Powerpoint Presentations from ADR Research Forum 2010* (2010) NADRAC <[http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/ADRRResearch\\_SummaryPapersfromADRRResearchForum2010](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/ADRRResearch_SummaryPapersfromADRRResearchForum2010)>.

96 See Tania Sourdin, *Dispute Resolution Processes for Credit Consumers* (La Trobe University, 2007).

schemes (particularly where the credit provider is a bank or established financial institution), as well as complaints to CAV and matters listed at VCAT.<sup>97</sup> The object of the Victorian research project was ‘to analyse and assess the effectiveness, accessibility and the procedural fairness’ of the CAV and VCAT processes.<sup>98</sup> As the CAV processes involve no determinative power, it is the material collected about VCAT that is pertinent to this article. VCAT has jurisdiction to hear matters arising under the *Credit Act 1984* (Vic) and the *Consumer Credit (Victoria) Act 1995* (Vic). The project gathered data from VCAT as well as seeking to interview a range of users.<sup>99</sup>

The VCAT sample drew on finalised consumer credit matters divided into two categories: credit disputes and repossession matters. Credit providers must apply to VCAT to exercise their repossession rights and 72 per cent of matters at VCAT dealt with repossession. The researchers decided that as most repossession matters were undefended (69 per cent) they did not fall into the category of a dispute<sup>100</sup> and so data was only coded from 251 out of 416 matters finalised by the credit list during 2003, 2004 and 2005. A dozen telephone interviews (response rate of 16.4 per cent) were conducted from 73 potential participants (consumers involved in repossession matters were not contacted).<sup>101</sup> The information provided on consumer perceptions cannot be regarded as representative, but the researchers still note that ‘many of those who used CAV and VCAT were generally pleased with the approach taken and thought that it was “fair”’.<sup>102</sup> The research found that VCAT met their time targets, often with time to spare. However, consumers were concerned by a lack of timeliness and ‘personal’ contact.<sup>103</sup>

The research noted that a large proportion (between 69 and 75 per cent) of consumers did not defend applications made by credit providers; in contrast to when the credit provider was the respondent — they defended matters most of the time (66–92 per cent).<sup>104</sup> The researchers did not seek to explore why this was so, nor what it might indicate about the nature of matters or the parties involved. This is despite a similar trend being recognised in the Residential Tenancies

97 Ibid 25–7. The researchers note that to get a complete picture of credit consumer dispute handling in Victoria, these schemes should each be surveyed, see *ibid* [2.27]. See also Tania Sourdin and Louise Thorpe, ‘How Do Financial Services Consumers Access Complaints and Dispute Resolution Processes?’ (2008) 19 *Australasian Dispute Resolution Journal* 25; Paul O’Shea, ‘Underneath the Radar: The Largely Unnoticed Phenomenon of Industry Based Consumer Dispute Resolution Schemes in Australia’ (2004) 15(3) *Australian Dispute Resolution Journal* 156.

98 Sourdin, above n 96, 1. Sourdin does recognise ‘that it is not possible to objectively assess whether an outcome is fair, particularly when outcomes are reached following negotiation processes. This is because settlements reached in such processes are often reached with incomplete information and ‘untested’ assertions as statements and comments are not sworn. In addition, resolutions reached as a result of negotiation may reflect interests rather than positions and may not reflect rights (and therefore enable more flexible outcomes)’: at 43.

99 Ibid 17–21 for a discussion of the methodology of the project.

100 The rationale for this categorisation was not explained in the report.

101 Sourdin, above n 96, 19–20.

102 Ibid 69 [3.101].

103 Ibid 99 [5.27]–[5.30].

104 Ibid 38 [2.69] table 2.3.



Tribunal.<sup>105</sup> Additionally, the researchers noted that ‘many credit consumers may struggle to find representation and may also have difficulty in obtaining advice’ while only ‘[14.3 per cent] of credit consumers who are respondents have legal representation’.<sup>106</sup>

## B VCAT Credit List Research in Context

The VCAT research report notes that:

At all stages of the process, Credit List Members actively encourage parties to settle cases by agreement. Such early settlement by agreement not only enables the List to handle cases more promptly and efficiently, but *also benefits creditors and debtors by providing them with a basis on which they can continue their relationship.*<sup>107</sup>

This statement is a classic recital of ADR rhetoric, but is made without any empirical support from the data collected. It illustrates the lack of contextual understanding or rigour in the empirical analysis of this data. Consequently, the findings of this research are problematic as they do not address the specific context of the disputes, consumer credit, and the subject of resolution. The nature of the matters being dealt with by the credit list and the capacity and situation of the parties must be considered. As early as 1975, the Law and Poverty Report (part of the Henderson Poverty Commission of Inquiry) identified consumer credit issues as an area of concern for the poor and disadvantaged.<sup>108</sup> It has remained so ever since.<sup>109</sup>

The Consumer Action Law Centre (‘CALC’) is a public interest law organisation dedicated to advancing the interests of low-income and vulnerable consumers through campaign-focused consumer advocacy, litigation and policy. It is the largest specialist consumer legal practice in Australia, providing free legal advice and representation to vulnerable and disadvantaged consumers across Victoria.<sup>110</sup>

Senior CALC staff were interviewed about their experiences of the Credit List at VCAT. The consumer advocates pointed out that almost all cases in the VCAT credit list involved non-bank lenders who had chosen not to join an industry dispute resolution scheme and many matters involved fringe lenders. These lenders generally have a less sophisticated approach to dispute resolution. Banks and credit unions on the other hand, are required to be members of industry based dispute schemes and some credit providers, such as GE, choose to join a scheme.

105 Alder, above n 58; Treble and White, above n 58. For a discussion of use of ADR in residential tenancy matters, see Gibson, above n 58.

106 Sourdin, above n 96, 90 [4.61], 87 table 4.12.

107 Ibid 35 [2.57] (emphasis added).

108 Sackville, above n 4, 104.

109 Louis Schetzer, *Courting Debt: The Legal Needs of People Facing Civil Consumer Debt Problems* (Department of Justice Victoria, 2008). See generally the publications of the Legal Services Research Centre (UK); Coumarelos, Wei and Zhou, above n 16. See also Abel, above n 5, 281, who uses the example of a consumer in his critique of ‘informalism’ to illustrate a significant power imbalance.

110 See Consumer Action Law Centre, *About Us* (July 2011) <<http://www.consumeraction.org.au/about-us/>>.

Disputes with these lenders are generally dealt with by the Financial Ombudsman Service.<sup>111</sup>

The consumers who use fringe lenders are most often those that have not been able to access credit from the banks and major providers. They are, on average, those with lower incomes and poorer credit records and are more vulnerable to unfair tactics such as pressure selling. The experience of CALC is that fringe lenders often use a range of 'unethical' practices in their dealings with consumers. For instance, they may take mortgages over household goods that would not otherwise be available for seizure in debt collection processes, or they may provide finance in relation to businesses that use manipulative tactics to obtain sales from consumers who may have minimal English and/or limited capacity.<sup>112</sup>

As an example, an area of significant complaint for CALC is the sale of educational mathematics software. This is sold 'door to door', with a sales pitch that involves 'testing' children and increasing parents' concerns about the child's future; often in cases where consumers have a low literacy in English and/or do not fully understand the commitment they are making. The cost of \$6000 (approximately) is usually beyond the means of these consumers and when they realise they are unable to make the relevant payments they feel guilty and embarrassed.<sup>113</sup>

CALC staff argue that when matters involving these lenders/traders are sent to mediation the consumers can be subject to similar psychological techniques. Often the creditor will be a repeat player and have little to lose in the process. The actual face value of software is minimal, whereas for the individual consumer, the cost is several thousand dollars.<sup>114</sup> CALC suspect that techniques used in the sale process are also used, subtly, in the mediation process. Feelings of guilt and embarrassment at making the wrong decision (often emphasised by a declaration signed with the contract about wanting their children to succeed) can lead a consumer to see the entire dispute as their fault, a view that is easily exploited by the other side.<sup>115</sup>

It was noted that even junior, inexperienced legal practitioners can feel pressured to settle meritorious claims. The pressure to settle can emanate from several

111 This service resulted from a recent merger of the Banking and Financial Services Ombudsman, Insurance Ombudsman Service and Financial Industry Complaints Service, see Financial Ombudsman Service Limited, *Home Page* (2011) Financial Ombudsman Service <[http://www.fos.org.au/centric/home\\_page.jsp](http://www.fos.org.au/centric/home_page.jsp)>.

112 Paul Harrison et al, *Shutting the Gates: An Analysis of the Psychology of In-Home Sales of Educational Software* (Consumer Action Law Centre, 2010).

113 Interview with Carolyn Bond, Co-Chief Executive Officer, and Celia Tikotin, a principal of legal practice, at the Consumer Law Action Centre (Melbourne, 30 May 2008). See also Consumer Action Law Centre, 'Consumer Action Seeks Orders against Australian Institute of Mathematics and Lombard Finance' (Media Release, 29 May 2008) 1 <<http://www.consumeraction.org.au/downloads/MRAIMLombard290508.pdf>>.

114 For a classic discussion of repeat players versus 'one-shotters' in the court setting, see Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95. For a discussion of Galanter's approach and ADR see also Menkel-Meadow, above n 94.

115 Interview with Carolyn Bond, Co-Chief Executive Officer, and Celia Tikotin, a principal of legal practice, at the Consumer Law Action Centre (Melbourne, 30 May 2008).

sources: the mediator, who has a clear focus on settlement, the other party or their legal practitioner and also the physical surrounds and the duration of the mediation. It was noted that parties waiting for mediation at VCAT are often in the same waiting area and the vulnerable consumer can be exposed to the lender/trader. Sometimes parties have to wait all day whilst shuttle mediation takes place. The vulnerable defendant at VCAT is not supported in this unfamiliar and stressful environment. The debtor is under considerable pressure to make a decision, unlike in a tribunal hearing, where the tribunal member makes the decision. In mediation, the threat of having to go to a hearing has more impact for a consumer than the creditor company (who has little to lose). In the experience of the consumer advocates at CALC, overall, debtors do not get better outcomes from mediation.<sup>116</sup>

The VCAT research noted CALC's concerns about the large number of credit disputes that result in some form of settlement. It identified these concerns as twofold: the concern that precedent was not created and also the possibility that vulnerable consumers could be pressured into settlement. The research report stated that the data was not available to test these concerns, but noted that one third of consumer credit matters were determined of VCAT and that this was a 'relatively high proportion of matters proceeding to a hearing'.<sup>117</sup> Unfortunately, as the researchers did not correlate those matters that were determined with the 75 per cent of credit disputes that were undefended by credit consumers, it is not possible to draw any definitive conclusions from the data.<sup>118</sup>

In relation to the concern with precedent, CALC staff gave examples of having requests to list a consumer credit matter for hearing, because of its legal relevance, being refused by a VCAT member. The staff commented that when the client is keen to have their matter determined, the attitude of VCAT members that matters must go to mediation, adds another hurdle and pressure on the consumer. Clients are often reluctant to return for further hearings and so there is an indirect pressure to settle. An example is in 'hardship' applications (seeking to vary terms of a credit contract on the basis of hardship), where lawyers are rarely allowed to represent clients. In these matters, the credit provider has nothing to lose by participating in the mediation, whereas the consumer finds it stressful and often agrees to a settlement that they are unable to sustain. These mediations are settlement focused and not necessarily concerned with a just outcome.<sup>119</sup>

This view is reinforced in the Victorian research which, whilst recognising the small sample of VCAT interviewees, found that there were a number of credit consumers who 'indicated that they felt that they were powerless and did not consider that the process was respectful. ... [F]or consumers who may already be

116 Ibid.

117 Sourdin, above n 96, 60.

118 Ibid 60-2.

119 Interview with Carolyn Bond, Co-Chief Executive Officer, and Celia Tikotin, a principal of legal practice, at the Consumer Law Action Centre (Melbourne, 30 May 2008).

disempowered there is an even greater need for transparency and clear process explanation.<sup>120</sup>

Consumer advocates also argue that mediated settlements have a negative impact on the ability to achieve systemic change which could avoid the same detriment being suffered by other consumers.<sup>121</sup> Sourdin agrees that the lack of any reporting of systemic matters at VCAT 'may be particularly relevant where concerns raised by consumers are frequent but involve small monetary amounts'.<sup>122</sup> Mediation at VCAT is not set up to address systemic issues despite having repeat players in the credit list. In contrast, the industry schemes have a capacity to report systemic matters to the relevant bodies and to publish guidance on how particular disputes will be dealt with. This serves an educative and preventative function.

The concern about the privatisation of disputes is illustrated by the experience of legal practitioners at CALC. Some finance providers are so anxious to limit the public's knowledge, that they require negotiated settlements to contain a term that the parties will refrain from disclosing not only the details of the settlement, but also the fact that there even was a dispute. Although acknowledging that there may be benefits to some consumers to have a mediated settlement instead of going to a tribunal hearing, consumer advocates are concerned that this outcome usually has greater benefits for the lenders. They argue that it enables lenders to avoid scrutiny of their practices which may be impacting on a wide range of consumers.<sup>123</sup>

### VIII CURRENT ISSUES FOR ADR AND PUBLIC INTEREST LAW

In the 2008 State budget, the Victorian State Attorney-General allocated \$17.8 million over four years to improve access to ADR services. He stated:

We need a system where the courts become a last resort rather than a first resort. We should be diverting disputes away from the courts through a range of alternative dispute-resolution techniques or what I prefer to call appropriate dispute-resolution techniques. This is particularly relevant for the 250,000 Victorians every year who find themselves involved in civil disputes, including neighbourhood fence disputes, consumer complaints, personal injuries claims, disputes about wills and large contractual claims between businesses.<sup>124</sup>

120 Sourdin, above n 96, 61 [3.66].

121 Interview with Carolyn Bond, Co-Chief Executive Officer, and Celia Tikotin, a principal of legal practice, at the Consumer Law Action Centre (Melbourne, 30 May 2008).

122 Sourdin, above n 96, 61 [3.63].

123 Interview with Carolyn Bond, Co-Chief Executive Officer, and Celia Tikotin, a principal of legal practice, at the Consumer Law Action Centre (Melbourne, 30 May 2008). Similar comments are noted in Sourdin, above n 96, 60–1.

124 Rob Hulls, 'Our Courts Are for the People', *The Age* (Melbourne), 11 June 2008, 11.

Although concerns regarding the effect of ADR on those with the least access to justice have been articulated for over thirty years, there is little empirical evidence to either support or deny the claims. The above BHP case study and VCAT research illustrate some aspects of these concerns. However, in the context of recent empirical research on justiciable problems and research conducted by the Law and Justice Foundation of NSW that highlights the lack of access to justice for marginalised and disadvantaged groups,<sup>125</sup> there is an imperative to be vigilant in assessing what is ‘appropriate dispute resolution’.<sup>126</sup>

At the forefront of any discussion about the tensions between public interest ‘lawyering’ and ADR must be the rights and interests of the individual.<sup>127</sup> Consumer advocates reinforced that the instructions and interests of clients took precedence over their desire for precedent. However, evaluations of ADR should examine contextual issues to ensure that the processes are not perpetuating systemic bias or disadvantage.

The relationship between the expanding use of ADR processes and the pursuit of public interest law on behalf of the poor and disadvantaged is a complex one. There are distinct advantages in some areas of law and disputes.<sup>128</sup> However, the paradoxes outlined by Abel, Menkel-Meadow and others are also evident in areas that involve apparent power differentials, like indigenous land claims, environmental issues, discrimination in the workplace and violence against women.<sup>129</sup> It is argued that the possibility of conciliation of disputes in these areas ‘may have the effect of “cooling out” individual complainants and subverting needed systemic change’.<sup>130</sup>

In a thorough report on the Federal Civil Justice System, the Australian Law Reform Commission (‘ALRC’) noted several factors that may indicate when ADR processes are unsuitable for resolving a dispute and court adjudication is more suitable. They were:

- when a definitive or authoritative resolution of the matter is required for precedential value
- when the matter significantly affects persons or organisations who are not parties to the ADR process

125 For details of the Access to Justice and Legal Need Research Program, see Law and Justice Foundation, *Research Program: Access to Justice and Legal Needs Program* (16 June 2008) Law and Justice Foundation of New South Wales <<http://www.lawfoundation.net.au/ljf/app/&id=54A6A9F9FFD485F0CA25746400187A24>>.

126 The then Victorian Attorney-General was keen to use the term ‘appropriate’ rather than ‘alternative’. See Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2606–12 (Rob Hulls, Attorney-General). See also *Civil Procedure Act 2010* (Vic) s 3.

127 Menkel-Meadow, above n 60, 2696.

128 For examples, see Lucinda O’Brien, *Activist ADR: Community Lawyers and the New Civil Justice* (Federation of Community Legal Centres (Vic) Inc, 2010) 19–22.

129 See, eg, Simon Young, ‘Cross-Cultural Negotiation in Australia: Power, Perspectives and Comparative Lessons’ (1998) 9 *Australian Dispute Resolution Journal* 41. See also Laura Sandra Horn, ‘Mediation of Environmental Conflicts’ (2005) 22 *Environmental and Planning Journal* 369.

130 Astor and Chinkin, above n 1, 28–9.

- when there is a need for public sanctioning of conduct or where repetitive violations of statutes and regulations need to be dealt with collectively and uniformly
- when parties are unable to negotiate effectively themselves or with the assistance of a lawyer
- in family law matters, where there is a history of family violence.<sup>131</sup>

Unfortunately, the ALRC did not articulate how these principles may be put into effect. One approach might be that when mediators recognise that the agreement available to the parties is unfair, the mediators should have an ethical responsibility not to be complicit in the acceptance of the injustice without taking some action.<sup>132</sup>

There has been debate and concern about power imbalance in the family law area for many years.<sup>133</sup> Recognising the tensions between the pursuit of rights and ADR mechanisms, family law practitioners have developed preferred approaches in an attempt to negate issues of power. Perhaps this experience could be replicated in other forums where similar concerns arise. Factors such as the physical environment, availability of information, advice and support prior to mediation conferences have been addressed.<sup>134</sup>

It is argued that the quality of mediation depends in part on the resources at the disposal of the parties which allow them to make informed decisions about the law, their own needs and the extent to which they wish to depart from the law.<sup>135</sup> Despite the reduced formalities and greater flexibility of ADR processes, the process itself may still be unfamiliar to a party and therefore appear complex, the physical environment may still be intimidating and any cultural or language barriers will presumably still be present. However, increased access to information, legal advice and representation is one way of improving access to dispute processes.<sup>136</sup>

The comprehensive report of the Victorian Parliament Inquiry into Alternative Dispute Resolution made many recommendations aimed at improving the ‘appropriateness’ of ADR services. These included training for ADR practitioners on: cross-cultural differences and power imbalances, recognition of the difficulties of people with language difficulties and limited literacy, as well as the provision of information and legal advice prior to involvement in ADR.<sup>137</sup>

131 Australian Law Reform Commission, above n 11, [6.62].

132 Astor and Chinkin, above n 1, 230.

133 For a discussion of the literature and issues, see Astor and Chinkin, above n 1, 160–3, 342–58; Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2005) 332–48; Hilary Astor, ‘Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner’ (2005) 16(1) *Australian Dispute Resolution Journal* 30.

134 Dee DePorto and Jody B Miller, ‘Honoring the Victim’s Voice: The Domestic Violence and Mediation Safety Project’ [2005] (Summer) *ACResolution* 22.

135 Astor and Chinkin, above n 1, 27.

136 Sourdin and Thorpe, above n 97.

137 Law Reform Committee, above n 73.

For example, around 1.5 million English-speaking Australians may have very limited literacy and numeracy skills and an equivalent number may have skills that put them at risk in certain situations.<sup>138</sup> Many of these individuals become skilled in concealing their difficulties and seek to avoid the embarrassment of disclosure. Despite this fact, until recently, this barrier to access to justice has received scant attention. In Australia, limited literacy can act as a barrier to justice because individuals have imperfect knowledge of the system and their effective participation in the process is hindered.<sup>139</sup> A recent study found that: ADR processes present high literacy and numeracy demands for the involved parties; many ADR practitioners may not be aware of the limited literacy and numeracy skills of parties to disputes; ADR practitioners need specific training for dealing with the issue of limited literacy and numeracy of English-speaking Australians; and the literacy and numeracy demands of accessing ADR may prevent Australians from participating in the process.<sup>140</sup>

The concern with the privatisation of disputes was addressed by the Victorian Parliament Inquiry in the recommendation that:

The Victorian Government should require all government ADR providers, and encourage all other ADR providers, to publish — in a de-identified form — regular case studies and reports on systemic issues and any other issues of public interest that arise as part of their ADR processes.<sup>141</sup>

## IX CONCLUSION

Expanded dispute resolution and enhancing rights in the public interest are common concerns for those seeking to improve access justice. The three waves of the access to justice movement articulated by Cappelletti and Garth are interconnected. However, the organisational (public interest law) and procedural (ADR) waves give rise to significant tensions, as illustrated in this article. It is critical for those concerned with advancing both ADR and public interest law to remain aware of and engaged with these tensions. As Astor and Chinkin comment, ‘the refinement of society’s ideas about the appropriate use of different methods of ADR is clearly one of the most significant areas for future development of ADR’.<sup>142</sup>

In addressing these tensions, I suggest the following aspects need to be considered:

- Respect for the individual and their interests which recognises their capacity and situation.

<sup>138</sup> Joy Cumming and Janice M Wilson, *Literacy, Numeracy and Alternative Dispute Resolution* (National Centre for Vocational Education Research, 2005).

<sup>139</sup> *Ibid* — The equity issues for those who do not speak English as their first language have been recognised and the impact of poor literacy and numeracy is often discussed as a factor in the context of criminal history and recidivism.

<sup>140</sup> *Ibid* 6–7.

<sup>141</sup> Law Reform Committee, above n 73, 84.

<sup>142</sup> Astor and Chinkin, above n 1, 9.

- Parties involved in disputes with apparent power differentials must be fully informed and have access to appropriate advice (both legal and other) and support through the process.
- Guidelines for mediators' conduct when disputes involve repeat players and unjust outcomes.
- Ability and procedures for mediators to report systemic issues that arise from disputes.
- Need for ongoing quality research that is contextualised.

Despite 30 years of developments in access to justice, the challenge remains how best to ensure access to justice for the poor and disadvantaged. Progress has been made with each 'wave', including enhanced public interest law and expanded ADR processes. However, as the Access to Justice Committee, ALRC and NADRAC have stated, there is a critical need for ongoing empirical and in-depth research that not only provides data, but also looks at the quality of ADR processes and access to justice barriers. Evaluations of new developments must be regularly conducted and the processes reviewed. Most importantly, in recognition of the complex and paradoxical nature of access to justice developments, these evaluations must be rigorous and contextualised.