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Commercial Alternative Dispute Resolution: by Maxwell J Fulton

Laurence Boulle
Bond University, lboulle@bond.edu.au

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Abstract
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Commercial Alternative Dispute Resolution: by Maxwell J Fulton, Law Book Company, 1989, 156 and xvii pages.

Laurence Boulle
Professor of Law
Director, Dispute Resolution Centre
Bond University

The subject of Mr Fulton's monograph is the disputing universe, in particular those parts of it concerned with the resolution of commercial disputes within the continent of Australia. The following inferences can be made from his text:

1. There is intense client dissatisfaction with litigation as a means of resolving business disputes;
2. Despite this dissatisfaction, Australia is, relatively-speaking, a highly litigious society;
3. There is now a range of developing processes, additional to litigation, which can be used to resolve commercial disputes in appropriate cases;
4. 'Alternative Dispute Resolution (ADR)' is here to stay, and it will increase the range of options available to informed commercial operators for the resolution of disputes.

None of these propositions is new, yet they are all controversial to some degree.

1. The broadly-held assumption about client disaffection with adjudication is substantiated by Fulton through an empirical survey of 200 top companies in Australia. There are several limitations in the statistical presentation of this empirical data, and in the absence of fuller disclosure it is difficult to evaluate the methodology. Thus no distinctions are made in the questionnaire between the different 'alternates', and it is not even indicated how many of the top 200 companies responded to the survey. The author does, however, promise further analysis of the data in due course.

Nevertheless even as crude indicators, these investigations serve to reinforce conventional wisdom: litigation is seen as too protracted (the prime fault), as too expensive (the second), and as too procedurally cumbersome for the efficient resolution of most commercial disputes. It

is not without its perceived virtues in terms of its effectiveness, predicability and enforcability, but the alternate processes are more attractive in terms of time and money. (Here it is unfortunate that the data did not indicate which of the alternative processes are evaluated in these approving terms.)

What is striking about these statistical indicators is that they reflect the contemporary views of what may be called the traditional, repeat-player litigators—large corporations who have the legal resources, financial muscle and social conversance with the processes to benefit most from adjudication. These are not the views of individuals, blacks, youth and minorities, who might be expected to be even more alienated from litigious procedures. What is here in point is the 'client expectation' dimension of ADR. While lawyers are not wont to hear social critics describe courtroom procedure as 'something between a Pontifical High Mass in the Tridentine Rite and a comic opera', they must ponder over the business view of a questionnaire respondent that 'legalistic ritual stifles practicality' (at 29). In the future development of ADR in Australia the needs and expectations of powerful, informed and experienced clients will be an important factor.

2. Disaffection notwithstanding, Australia is a 'relatively litigious society'. The author offers this conclusion as a compromise from what, in his own concession, is dated evidence. The data suggests that Australia has (had?) the highest rate of litigation in the world and a relatively high number of judges and lawyers per head of population. Not much store can be set on this brief treatment of a complex legal and sociological issue (though media reports recently suggested that Sydney had a vastly higher rate of defamation actions than the United States!), and, in fairness to the author, this is not a central theme of the work. It remains, however, a substantially interesting one. For if there is at one and the same time both serious disaffection with litigation and extensive operational use of the system, we would have, in social theory terms, an impending crisis.

Matters of quantification aside, two observations can be made on this subject. The first relates to the legal culture in which the ADR movement operates. On one hand there are impressive developments, with the formation of LEADR (Lawyers Engaged in Alternative Dispute Resolution), increasing lawyer attendance at mediation training courses, the Victorian Attorney-General's investigation into the alternates, the Queensland Bar's Mediation Scheme initiative, and the like. However, in the context of the dominant legal culture these tend to epiphenomena, explicable as much in terms of professional anxiety, ingenuity and opportunism, as in a paradigmatic shift in lawyerly orientation. The dominant legal culture remains adversarial, competitive and litigation-inclined. Whatever the actual rates of litigation we live in a society shadowed by litigiousness. The reality is that there are many trained commercial and family mediators but, in real terms, little private mediation work available. Now if one operates with a model of society in which deeper imperatives than social vision make things happen, this contradiction is explicable. Client dissatisfaction has yet to reach a critical mass, alternative systems are still too undeveloped, rival professions are still too unthreatening, and ancient lawyerly monopolies and privileges are still too intact, for a profound change in the legal culture to occur. After all if trial by ordeal

survived religious piety and social reform, and was not disavowed until it became socially and economically dysfunctional to those who implemented it, so can one anticipate a continuation of trial by (simulated) unarmed combat for some time to come. In the meantime there are lessons for the ADR 'movement'. It should shift its focus from supply to demand side thinking, it should address the anxieties of highly skilled lawyers relating to budgets, professional identity and normative issues, and it should reveal and publicise the changing assumptions at local, national and international level about the resolution of social, political and economic disputes.

A second observation concerns the statistical evidence that a significant number of the top 200 companies (17.5%) make use of *neither* the legal system *nor* ADR for the resolution of their commercial disputes. It is not altogether clear where this piece of information takes us. The author's view is that bilateral negotiations, direct and unassisted, probably play a more important part in resolving commercial disputes than most commentators seem either to acknowledge or even recognise, particularly in view of the fact that smaller companies probably make more use of negotiation than larger ones. One might suspect, intuitively, that the 17.5% figure is rather low—Telecom commercials would have us believe that many 'disputes' are settled by a simple phone call. But if so, can one still say that we live in a litigious society? Or does one simply require considerably more understanding about the pathology of a conflict, and its metamorphosis into a dispute, before this matter can be taken much further?

A firm conclusion in this area would attempt to reconcile the apparent contradictions: The social culture of this country is highly litigious, yet within the national context of conflicts and disputes, litigation is not frequently used and court adjudication is a rare occurrence.

3. The author's descriptive survey of the 'alternates' is useful, though not comprehensive. He deals sequentially with arbitration, final-offer arbitration, mediation, mini-trials and rent-a-judge. Most attention is devoted to arbitration and mediation. There is a penetrating analysis of the former and the author contributes to the developing orthodoxy that, whatever its normative attractions, arbitration is now evaluated little differently, as regards delay and cost, to litigation. On the latter there is a perceptive contribution, though at times it tends to be overly conceptual, for example in referring to the mutual respect for mediated agreements (Does this occur in practice, or do they subsequently end up in court?) or in reaching the convenient conclusion that mediation is strongest where the adversarial process is weakest—plausible as this might sound, more analytical treatment is necessary to vindicate it.

There is a separate chapter on the Commercial Lists, with particular reference to New South Wales and Victoria. In one sense these processes are not 'alternatives' in that they are provided by traditional courts as opposed to private institutions; however, in another sense they are 'alternatives' in that they incorporate non-adjudicative procedures into the litigation process. Commercial Lists are not, in themselves, new but they have been adapted in modern times to shorten pre-trial procedures

and provide a fast track process with all the conventional benefits of adjudication. In effect the courts are providing competition for the private alternatives such as arbitration and mediation. In the case of arbitration, moreover, the judges are at a distinct advantage over arbitrators in respect of natural justice and case management, both of which provide grounds for arbitral review. Indeed one might see the court's development of the court-annexed procedures as contemporary manifestations of the kinds of competition which existed historically among the different jurisdictions of the English courts. Law's emperors strike back.

There is also a comparison of the various procedures. One reservation must be expressed about the comparisons made by the author. Orthodox legal ideology presents us with an 'impartial umpire' model of adjudication in the common law systems. This is a false stereotype, and there is a nice irony in the invocation of Lord Denning [!] in its support (at 31-32). As any advocate is aware, there are many ways in which judges influence court proceedings, and nudge, badger or threaten parties towards settlement. The American literature talks of scores of such devices, from the conventional to the crude, from the predictable to the ingenious. Indeed the author does refer to the phenomenon of 'managerial judging' in relation to the Commercial Lists (at 37). Nevertheless ADR proponents should operate with a more realist version of judicial practice. It would hardly undermine the case for alterative processes.

4. In making the case for the alternates' future tenure, the author refers to the economic efficiency of mediate solutions. This derives from the fact that mediation is consensus-based and the parties have, within the constraints of the process, followed principles of utility maximisation. At the micro level this thesis is plausible as the direct costs of mediation bear no comparison to those of litigation; the table of costs at 87-88 reveals the awesome expense of pursuing a matter to adjudication. In the case of relatively well-organised markets this may explain the behaviour of key actors: the insurance industry in Queensland, in particular FAI and Suncorp, were the motivators behind the Personal Injuries Mediation Program established in that State in 1989 under the aegis of the ACDC. (Though even there it would be instructive to investigate the real financial and social motivations for the scheme).

At the macro level, however, the thesis is less convincing. In an interesting opening chapter the author contrives to locate the development of ADR within the political economy of capitalist development. Here he operates with a model of the civil law whose primary purpose, in economic terms, is to facilitate the functioning of the market by resolving commercial disputes as they arise. Market imperatives and rational individual choices will therefore lead to a strengthening and entrenchment of ADR processes within the political economy. This is an interesting line of argument, but it relies on the 'efficiency hypothesis' of law, the spell of which has now been well and truly broken.[1] It also relies on the assumption that the quintessential function of law is 'as a resolver of disputes'. Law is certainly concerned with the resolution of disputes and with facilitating the market, but it is also concerned with system maintenance, with effecting social

1 See Owen Fiss 'The Law Regained' (1989) 74 *Cornell Law Review* 245, 246.

policy, and with the expression of public values[2]. Before a social theory of alternative dispute resolution can be constructed, it is necessary to posit a convincing theory of law and litigation. Market imperatives are not the only determinants of the utility of litigation; it, and the ADR processes, must be evaluated, and their prospects be predicted, in terms of a wider range of social concerns.

At a less grandiose level, there do seem to be other forces which will ensure the development of ADR processes in the future. These include increased competition for lawyers from other professionals, threats to well established legal monopolies and market controls, the developing client expectations referred to above, and changing criteria of social legitimacy. In relation to the latter, commentators point to the fundamental reorientations which have occurred at the local, national and international levels of conflict resolution. Worldwide one can witness new methods of looking at social conflicts and political problems. There are many motivating reasons for this phenomenon: shrinking resources, an increasing population, a new critical intensity in social and economic issues, and so on. There is a pervasive belief that if we are to influence and control our collective destiny, then new methods of resolving disputes will be necessary. This manifests itself at many levels: New expressions of international trust and mutual disarmament, national political renewals, local concern for the environment. Some even refer to this as an age of universal healing and reconciliation as evidenced by the ousting of dictatorships, the destruction of walls, and the release of political prisoners.

It may seem romantic indulgence to make these comparisons. They are a little removed from the exigencies of Part 72 of the New South Wales Supreme Court Rules. Nevertheless it is important to recall that courts, litigation, pleadings and interlocutories are not the only methods of resolving disputes. They were fashioned out of specific cultural and economic conditions, developed and refined over long periods of time, and practised to a high level of professional skill. But cultural assumptions can change, reducing the social support for litigation and adjudication. They run the risk of being left exposed and vulnerable. ADR can be seen as 'a symbolic harking back to a lost age when caring for others within a communal setting was of pre-eminent importance; it constitutes a reaction against the alienating and competitive style of dispute resolution fostered by an adversarial system'.[3] Those with a sense of poetic licence might suggest that ADR is the lawyers' equivalent of super-power disarmament.[4]

While Fulton's work has no specific professional audience in mind, it will be good companion for those interested in participating in the evolutionary creation of dispute settlement.

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2 Ibid.

3 See Margaret Thornton 'Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia' (1989) 52 *Modern Law Review* 733, 738.

4 See Peter Dwight 'Commercial Dispute Resolution in Australia: Some Trends and Misconceptions' (1989) 1 *Bond Law Review* 1, 25.