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ADR in Australian legislatures: are there prospects?

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New frontiers for ADR

ADR in Australian legislatures: are there prospects?

Laurence Boulle

In the past decade all Australian legislatures have enthusiastically introduced alternative dispute resolution (ADR) into a wide range of courts, tribunals and other decision-making agencies. In that process, both the court procedures and legal systems have been modified from an adversarial perspective to alternative forms of decision-making.

To date, however, no Australian legislature has turned the searchlight of ADR onto its own decision-making processes.

This article raises some initial questions about the potential applicability of ADR principles to the processes of Australian legislatures.

Essentials of dispute resolution theory

In essence, modern dispute resolution theory and practice deal with two key issues in relation to conflict management. The first concerns the identification of barriers to efficient resolution of conflict and the second concerns the design of strategies to overcome those barriers.

In the context of the court system, a number of barriers to effective dispute resolution have been identified, most of which are associated with the 'adversarial' nature of litigation. These include exclusive party control over the conduct of proceedings, technical rules of procedure and evidence, the limited role of the 'umpire' judge, the necessity for litigants to make extreme claims to support their case, focus on past events and legal entitlements, and the limited nature of outcomes which can ensue.

In recent years, however, both case management practices and ADR procedures have produced strategies to overcome some of those barriers and have led to the modification of common law litigation referred to above. It is now something of a simplistic and misleading caricature to refer to court based litigation as adversarial — it has a broad range of features and practices and ADR has to be thanked for some of its innovations.

Style of parliamentary procedures

Most political systems that were inherited from Westminster also operate on an adversarial basis. This entails that the political party attaining a 50 per cent plus one majority in the dominant house can give effect to its policies through control of the decision-making process in the legislature. This is buttressed by an electoral system that allows a single party, or a coalition of parties, to obtain a clear majority of seats and thereby control the legislature, as opposed to a system of proportional representation. These structural arrangements essentially constitute a winner takes all system, allowing for domination of the government and other organs of state by the electorally successful political grouping, with no necessary collaboration in policy development and decision-

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making. In this context, parliaments can have a very limited role in affecting the policy of the government.

The adversarial nature of parliamentary politics is reinforced by the fact that much of it is conducted through the popular news media. Conflict, by definition, constitutes news. There is a tendency for the media to present politics in simplistic terms, for differences to be exaggerated and for the parties to be depicted in polarised terms. In this situation a premium is placed on consistency, and where a politician changes his or her mind, compromises or collaborates, this is dramatically presented as a sign of vacillation or weakness.

In referring to the potential applicability of ADR within parliaments, it is important to note that legislatures are not only law making institutions. They are, to varying degrees, forums for the accountability, scrutiny and control of government, and they are also national assemblies in which events of the day can be 'debated'. It is often these latter functions, combined with media complicity, which cause parliaments to provide what Mike Steketee referred to in the *Weekend Australian* of 16-17 February 2002 as 'the front bar brawling that passes for parliamentary debate, feeding Australians' disenchantment with politics'. It is arguable that on these matters parliaments are more adversarial than they are on legislative policy making and, while it is hard to disentangle one function from the other, it is in relation to the latter function that one might legitimately enquire whether ADR principles and processes have a place to play.

Existing parliamentary features which mitigate adversarialism

There are some traditional structural features of parliamentary politics that do mitigate some of the adversarial excesses and promote at least some degree of collaborative decision-making in modern legislatures. They do this by curbing 'majoritarianism' and the dominance of the government of the day through the institutions and procedures associated with constitutionalism and the rule of law.

The first feature is the bicameral nature of most Australian legislatures. This requires negotiation over policy between governments and upper houses over which they have no control — a celebrated example of this was the GST deal in the Commonwealth Parliament, and there are many other examples. A second feature is the committee system that, in most legislatures, introduces a degree of negotiation, give and take and compromise into the legislative process — to the extent that committees sometimes become a graveyard for government policy. A third feature occurs in those States in which independents hold the balance of power, forcing minority governments to consult, negotiate and compromise with them. A fourth feature is the informal backroom politics that brings some give and take into the policy making process. Regardless of the political parties' public posturing, even majority governments, like military generals, know that they have a vested interest in the survival of the opposition. Finally, parliaments sometimes delegate policy making and administration to outside bodies, often in a collaborative venture with other parliaments, such as the Murray River Ministerial Council and other institutions of co-operative federalism. As a result, not only is there not a system of unmitigated adversarialism in Australian legislatures but, as is pointed out later, there is also some change in the air.

ADR to the rescue?

The question remains as to whether ADR principles and procedures might be also deployed to shift parliamentary procedures out of the majority based adversarial paradigm, as they have with court based litigation.

One way would be to alter the constitutional fundamentals of legislative institutions. This could be achieved by changing the electoral systems to ones that allow small parties more easily to gain representation through a system of proportional representation. This generally leads to the proliferation of parties represented in the legislature, and the need for more coalition building and compromise in order to get legislative policy approved. That sort of change is beyond the scope of this article.

Some of the institutions in other

jurisdictions that mitigate `adversarialism' and facilitate some degree of collaborative decision-making in legislative policy are as follows.[1]

- A rule requiring unanimity, or near unanimity, for the making of legislative decisions — where an important piece of legislation requires unanimity, collaborative negotiation is required for any decision making. This principle is found in many constitutions throughout the world, has an ancient pedigree in political theory,[2] and operates to some extent in Australian constitutions in relation to constitutional amendments and legislative deadlocks. It clearly has drawbacks in terms of the potential for gridlock, and in according to minority groups a veto power out of proportion to their size.
- Isolating parts of the legislative process from the political process and allowing more roundtable negotiation behind closed doors — this has the advantage of allowing leaders to make concessions and to engage in negotiation trade offs and compromise without being called to account for their 'apostasy'. It has an obvious drawback in terms of accountability and public transparency in the legislative process.
- Intervention of neutral politicians or outside parties in the decision-making process, particularly in legislative committees — here the third party can have a mediating function by facilitating communications, acting as an agent of reality, promoting trade offs and encouraging the parties to continue with their discussions in the face of conflicting positions.
- Use of joint fact finding exercises as a basis for legislative debate and policy making — this is akin to negotiating the facts that occur in many mediations and other ADR processes.
- Delegation of subsidiary policy making functions to outside bodies that can use negotiation and other ADR procedures in developing rules, standards and regulations — this is referred to as 'reg neg' in some countries.
- Rotation of the office of speaker among various political parties instead of having the office constituting one of the spoils of office — this creates more independence and authority attached to that position.

This is not, of course, a very extensive list. Nor does it follow that all policy making should be subject to political bargaining and compromise — if that were the case, real advances in civil rights and access to information and reform areas would probably never have materialised. There are, however, signs of changes in the wind. In the current session of the Commonwealth Parliament both sides of politics have talked about ways of improving parliamentary procedures. There is also discussion over structural ways to increase the independence of the speaker so that this person becomes more of an 'outside neutral' in parliamentary deliberations. In SA there are currently efforts to institute a program of parliamentary reform, partly initiated by an independent holding the balance of power, including some effort to reform 'question time' and turn it into 'answer time'. In the first week of the Commonwealth Parliament's 2002 sitting both sides of politics made references to the need for reform of the way in which the institution operates.

The point is that ADR principles and processes are not necessarily restricted to dispute resolution settings. They are used in the private sphere not only on the dispute resolution side, but also on the transactional side in facilitating mergers, joint ventures and wage negotiations. Legislative processes have in common with other areas in which ADR is practised the fact that a number of parties are involved in decision making for the future. While the political culture is as powerful as the legal culture, the latter has become considerably more modern over the past decade.

Should those who fund the legislative decision makers not enquire as to whether they are using appropriate decision making processes? Your views would be welcome. ●

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Endnotes

1. Tom Melling 'Dispute resolution within legislative institutions' (1994) 46 *Stanford Law Review* 1677.

2. From the earliest forms of democracy to modern power sharing arrangements, there are traditions of associating democratic theory with power sharing as opposed to 'majoritarianism'.