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Mirror on the wall: reflections on Tania Sourdin's Alternative Dispute Resolution

David Bryson

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Bryson: Mirror on the wall

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General Editor



Laurence Boulle
*Professor of Law,
Bond University, Queensland*

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Defining ADR

Mirror on the wall: reflections on Tania Sourdin's *Alternative Dispute Resolution*

David Bryson

ADR as a concept holds some peril for those who would try and define it accurately and concisely. When 95 per cent of court matters are resolved in some way prior to formal adjudication, the label 'alternative' is misleading and confusing. It defines ADR in terms of what it is not — judicial determination — not what it is, and disregards the fact that ADR processes are now mainstream, not countercultural. 'Assisted', 'appropriate' or 'additional' dispute resolution are probably more accurate, but A(Iternative)DR remains solidly in common usage and so carries meaning and significance.

In this article I discuss the power of the idea that ADR is an alternative, and its parallel ideas; that ADR has been compromised by its close alliance with legal structures. I suggest that this approach underestimates the achievements of ADR inside and outside legal institutions and that it is a hangover of a dominant mediation paradigm. More fundamentally, it reflects a misunderstanding of the nature of co-operation. Indicators of a new distinctive ADR are proposed.

The article suggests a way forward for the philosophical development of ADR arising from observations of how children and adults play.

Snow White

Tania Sourdin, in her new book *Alternative Dispute Resolution*,¹ portrays her understanding of the breadth of ADR when she defines ADR processes as non-adjudicatory as well as adjudicatory, producing binding or non-binding decisions and capable of resolving or determining disputes. However, I suspect this catholic definition of ADR, which includes ADR taking on the guise of the very processes to which it has sought to be alternative, may not be shared by all ADR practitioners.

In the preface to the book Sir Laurence Street attempts to define ADR in its own right, apart from the judicial system. He writes that ADR is 'an holistic concept of a consensus-oriented approach to dealing with disputes or conflict', a concept that includes conflict avoidance, management and resolution; ADR as consensus, not decision-making.

Sourdin's approach never makes this kind of clear break from legal structures and culture. For Sourdin, ADR has suffered a kind of tragic fate. Based on ancient skills and processes, Sourdin describes the evolution of ADR in its modern manifestation as a new paradigm of collaboration and communication. It arose as a grassroots, organic movement that sought to address the ineffectiveness of ➤



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➤ informal conflict resolution structures outside the courts, an increasingly atomised society, and a general paucity of negotiation skills in the community.

ADR also developed as a response to the demonstrable failure of formal dispute resolution institutions (such as the courts) to resolve matters, rather than just decide or determine them. Sourdin argues, however, that over time courts and tribunals have 'captured' ADR for their own purposes — the elimination of court backlogs — and thus diminished the capacity of ADR to meet the needs of parties for dispute resolution and the enhancement of harmonious relationships.

Legal institutions have also ensnared the agenda for the development of the ADR profession. With their need for definitions, categorisations, standards and qualifications, legal institutions have reduced the creative flexibility of ADR to respond to the particularities of a dispute and the needs of the disputing parties. Even the fundamental objectives of ADR are obscured by the shadow of the courts.²

It is clear from Sourdin's book that she believes the institutionalisation of ADR is not a good thing. She is not alone in this belief. The myth of ADR's loss of innocence has been told in one form or another over the years. Many such stories portray ADR as 'Snow White', who inspires the jealousy of the legal institution (the 'Wicked Witch'):

'Mirror, mirror on the wall, who is the fairest of them all?'

'Institutional justice thou art fair, but ADR is fairer still.'

Wicked Witch

I have some problems with this analysis and, particularly, the depiction of legal institutions as the 'wicked witch'. My reasons are based on the material that Sourdin presents so clearly in her book.

First, Sourdin highlights the emergence of a new paradigm of co-operative and collaborative behaviours outside legal institutions in the business sector. When only an estimated 5.7 per cent of all commercial disputes end up within the court system, clearly something remarkable is happening in dispute prevention and risk management, skills training and design of systems to

manage the impact of dispute. Industry based schemes have sprung up at the consumer level and represent a significant shift from rights based grievance mechanisms to a more integrated interests/rights approach.³ Within corporations and businesses there has been a flourishing of dispute resolution skills development to meet the requirements of business.

Second, while the influence of the courts and tribunals on the development of ADR over the last 20 years in Australia has been substantial, it could be argued that this has led to a creative proliferation of ADR processes that may not otherwise have occurred. I refer to Sourdin's material once again, where she details a 'vast array' of hybrid processes or 'blendings', such as expert appraisal, conciliation, evaluation, conferencing, various forms of arbitration, and adjudication:

... practice and procedure issues that govern interlocutory processes may be interlinked with case management and dispute resolution schemes.

Agencies working within a statutory framework have also amalgamated mediation with decision-making and administrative review to produce blendings that are meeting the needs of a complexity of parties.⁴ Sourdin even admits that in the future the courts may need to set legal parameters on ADR so that the substantive law is understood and enforced, while at the same time there are institutional features that can promote a culture of co-operation. ADR can, in return, influence the culture of the courts and actually assist the litigation process.

Third, Sourdin documents the gathering pace of technical and legal change that will demand that institutions and ADR alike continue to adapt in order to remain relevant and effective. For example, multimedia and information technology are producing innovative ways in which information can be gathered, accessed and utilised during the dispute resolution process. The benefits are applicable to workplace negotiations between workers and management, and facilitators of health care arrangements. Sourdin's survey of the inter-relationship ➤



➤ between the evolution of the lawyer's role and dispute resolution in our society highlights the blurring of the boundaries between ADR and legal practice, even though it is not clear from the research whether lawyers generally assist or inhibit the outcomes achieved by ADR. For most people, lawyers remain the first port of call and in some fields appear to be settling most of their cases, perhaps due to the improvement of their advisory and negotiating skills.⁵

ADR = mediation

It is curious, therefore, that in the face of this evidence, 'institutionalisation' retains a repressive connotation or that the flowering of ADR in the broader community is not sufficiently recognised. Could it be that ADR's ambivalence toward legal institutions arises from an understandable tension between spontaneity and structure that occurs in the development of any emergent profession?

Categorisations and differentiations arise as much from the needs of a new professional elite to establish themselves as distinct and marketable, as they do from a structure's tendency to control. Those of us in the ADR field are as unseemly in our territoriality and aggrandisement of ideas and the truth as any profession before us; an irony not lost on many internal and external observers. Sourdin's book would have benefited from an analysis of the development of ADR qua profession.

Mediation practitioners are particularly prone to this trend, as they have experienced the shift from mediation as the core of the ADR movement to mediation as a subset. The recent growth of fundamentalist (transformative) mediation reflects a need to return to literalism in the face of relativism. The desire to rediscover 'pure' mediation is genuine. Anyone who experiences, even once, restorative outcomes through mediation becomes concerned that mediation can be reduced by lawyer driven clients or the court's sponsorship of heavy handed, evaluative processes.

The definition of ADR as mediation remains a persistent theme generally, and

exists in Sourdin's book. For example, in the chapter on ADR skills the reader would expect, as an exposition of skills appropriate to the 'vast array' of ADR processes, a more sophisticated blending of third party interventions which are principled and adaptive to a situation. A skills section would include fact finding, investigation, use of discretionary powers, recommendations, advising, referrals, compliance with natural justice and decision-making.

Such a section could also unpack the situational demands that might elicit particular interventions and the risks and possibilities involved. Instead, the focus of Sourdin's skills chapter is on facilitative (recognisably mediation) skills, with processes and skills associated with advisory or determinative ADR placed awkwardly at the end of the next chapter entitled 'ADR Objectives'. There is an important need for an understanding of ADR skills that combine consensual with other more intrusive interventions, without relegation of the latter to the 'B Team'.

Toward a distinctive ADR

Perhaps a more fundamental reason for the suspicion of institutions is that ADR as a diverse practice is facing a significant philosophical challenge. While Sourdin notes that there are litigation romantics who overestimate traditional adjudication,⁶ I think there are ADR romantics who overestimate the value of consensus or co-operation.

Sourdin refers to the interest in games theory and the growing appreciation of the optimisation of interests through co-operation. My own understanding of the conclusions of games theory and conflict is less benign. Co-operation struggles out of the primeval swamp of biological and social necessities; it is not a given.

It is a lazy Sunday afternoon and I listen to my two pre-adolescent children play. What do I hear? Certainly, co-operation to a point, sometimes more an avoidance of unnecessary conflict. This lasts for a while until for some reason someone decisively breaks the pattern. After this defection the other side is quick to respond in kind and there is a period ➤

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'... it is ... important for ADR to broaden its thinking about conflict and the response to conflict, to embrace the blends and hybrids identified by Sourdin, rather than tut-tut them.'

➤ of escalation. Enter the parent. Attempts to gain mutual regrets, forgiveness and recognition of shared values are made. Clarity about behaviours, roles and reciprocity are discussed and commitment to them grudgingly proffered. The game goes forward ... for a while.

Axelrod's analysis of the Prisoner's Dilemma game points to this pattern as 'successful'. At the heart of successful, strategic decision-making is 'tit for tat', the strategy which co-operates on the first move and then does whatever the other player did on the previous move. Shrewdness and forgiveness are linked in this game. Co-operation is possible and can get started by even a small cluster of individuals, but there are two key prerequisites for it to thrive:

- co-operation must be based on reciprocity; and
- the shadow of the future must be important enough to make this reciprocity stable.⁷

In some ways this analysis is shocking, particularly to those of us with romantic dispositions. Taken seriously, however, it explains why it is so important for ADR to broaden its thinking about conflict and the response to conflict, to embrace the blends and hybrids identified by Sourdin, rather than tut-tut them. In the future 'we will need professionals and service providers who can design and deliver facilitative, advisory and hybrid ADR processes, which can be further tailored to meet the needs of [disputants]'.⁸ To create these ADR professionals there will, first of all, need to be a revolution in our skills training. For example, ADR practitioners may need to supplement their learning to keep up with the demanding complexities of changing 'hats'.

The analysis of games also explains why effective ADR has grown and will continue to grow productively in the shadow of institutional structures. It explains why ADR outside the legal institutions and in the business sector, where the real game is commercial, is less hung up about what you call 'it', and more down to earth and creative about what works.

Sourdin describes ADR as developing

with 'little coherence' — as if it should have developed in some other way. She quotes a view that 'ongoing cycles of ADR will produce new empowering ADR processes in response to institutionalisation'. I detect here a new romantic myth to salvage the old one (the young prince?). My own view is more mundane. 'Whatever is successful is likely to appear more often in the future.'⁹

Tania Sourdin's book is available from the LawBook Company, and is published in 2002. This article is not strictly a book review. It is, as described, reflections, after reading Tania Sourdin's text on ADR. I beg her indulgence with my approach and encourage provoked readers to read her excellent book. ●

David Bryson is a dispute resolution consultant at the Australian National Electricity Market and conciliator with the WorkCover Conciliation Service in Victoria. He can be contacted at dbrysonaus@hotmail.com.

Endnotes

1. Sourdin T *Alternative Dispute Resolution* LawBook Company Sydney 2002.

2. In Chapter 4 Sourdin details the attempts by NADRAC and the ALRC to define the objectives of ADR. She notes the contradictions of ADR with the objectives of the judicial system.

3. An example at the wholesale level occurs in the national electricity market in Australia. The National Electricity Code has 'institutionalised' ADR at the wholesale level in that direct negotiations between the parties — generators, distributors and retailers — must take place before any referral for determination (compare <www.neca.com.au>).

4. See (1997) 8 *Australian Dispute Resolution Journal* 245.

5. Gribben S 'Family mediation in England and Wales — some lessons for Australia' (2001) 4 *ADR Bulletin* 4(5) p 67.

6. Sourdin above note 1 p 14.

7. Axelrod R *The Evolution of Co-operation* Penguin 1990 p 169.

8. Gribben above note 5 p 67.

9. Axelrod above note 7 p 173.