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by **Tania Sourdin**

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David Bryson (*ADR Bulletin* vol 4.10 at 133) has contributed to the discussion about ADR in a way that reflects well upon the growing maturity of ADR processes and practices within Australia. At the heart of the discussion is a useful meander into the evolution of processes, and a view from the coalface of ADR practice. As a dispute resolver, I find this discussion useful and my comments are written to encourage further discussion. However, at the same time, it is apparent that some views that are attributed to me in respect of my book *Alternative Dispute Resolution*[1] require some clarification and amplification.

The 'capture' of ADR

Bryson suggests that I have formed a view that ADR has been adversely affected by its relationship to the litigation system. I have not formed this view — however, I have certainly raised this as an important issue for discussion and have noted that:

> One commentator has noted that in the US ADR has been 'captured' by the legal profession …

and

> ... ADR was just another stop in the 'litigation' game which provides an opportunity for the manipulation of rules, time, information and ultimately, money.
>
> ... ADR has become just another battleground for adversarial fighting rather than multi-dimensional problem solving.[2]

At the same time, I have noted 'many lawyers and others[3] have indicated that lawyers can play a very useful and constructive role in resolving disputes'.[4] Clearly many lawyers have become ADR practitioners and supporters and have played a key role in developing ADR practice and process.

In my book,[5] I noted that some have opposed the introduction of ADR processes and have viewed its relationship to courts and tribunals as a relationship that usurps traditional judicial activity and has the potential to conceal conflict. Others have labelled those who adopt this stance as 'litigation romanticists' who overestimate the 'accuracy, fairness and wisdom of traditional adjudication'.[6] It is overly simplistic to characterise the Australian developments in ADR as being a 'battle' (using an adversarial descriptor) between these views — rather, these developments can be described as an evolution or a discussion, with many shades of grey.

Bryson raises a number of issues that relate to the changing approaches to conflict and disputes, and is correct when he notes that changes have been most

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profound in the legal system. In this regard, I have also noted that ADR has a capacity to develop the role of legal professionals and enhance our legal system. The way in which this development takes place will also depend upon the continuing evolution of concepts such as 'good faith'.[7]

At present, the approaches taken by many lawyers to litigation and the opportunities provided by the emerging ADR system are helping to transform legal practice and the outcomes of conflict. The interplay between the processes and personalities of the litigation and the ADR systems has produced a constantly evolving approach to dispute and conflict resolution that now impacts upon all areas of society in Australia. Without question, over the past two decades there has been an enormous change in the way disputes are resolved and an increased awareness of facilitative processes (rather than evaluative and determinative processes).

This shift has impacted upon education and training, and upon our expectations about negotiation and what can occur if disputes and conflict arise. For lawyers, this shift has had profound implications. In my foreword, I note that for young lawyers a focus on ADR skills represents a change in the content and delivery of legal education. In the past, it had been said:

> Only after graduation do your attorneys come to the depressing realisation that 90 per cent of what they were taught in academia will never be used in practice; and, conversely, 90 per cent of what they need to know in practice was never taught to them at school.[8]

A greater focus on ADR skills — essentially advanced communication and thinking skills — will result in a more relevant law school (and university) education and, perhaps, an increase in different and more rewarding career opportunities for lawyers.

As I also noted in the preface to my book, my intention is to introduce concepts and skills and to map issues that are occurring within the ADR area. In doing so, I do not seek to suggest that ADR processes are a substitute for the judicial processes that are also evolving and adapting in response to a range of factors that include the emergence and increasing prevalence of ADR processes. Rather, the links and possible evolution of both systems is discussed in the context of a single dispute resolution system and the possible benefits of a strategic architectural approach. This, in turn, raises questions about the objectives of ADR processes, the role of ADR in our dispute resolution system and how ADR processes can relate to the conventional litigation system.[9]

The interesting issue — whether or not ADR has been 'captured' by the legal system (rather than legal professionals) — is an issue that can also be explored from the context of legal institutions. I note in my book that within the court system, although case management may initially have been a prime objective in the introduction of ADR processes, there has been an increasing recognition that

'A greater focus on ADR skills — essentially advanced communication and thinking skills — will result in a more relevant law school (and university) education and, perhaps, an increase in different and more rewarding career opportunities for lawyers.'

ADR processes exist as a separate and interlinked system of dispute resolution.[10] In this context, ADR is often seen as an important way of enhancing access, participation and satisfaction in court proceedings. There is now some referral to ADR processes by every court and tribunal in Australia. In this context the development of two separate streams of ADR can be mapped — those ADR processes that 'mime' adjudication[11] and those that are not quasiadjudicatory in nature.

In my analysis, legal institutions are not the 'wicked witch' — far from it. These institutions have embraced many forms of ADR and have been proactive in its application and development. Indeed, the involvement of many courts and key judicial figures has undoubtedly led to the continuing development of ADR within, as well as outside, the legal system.

A 'catholic' definition

Definitions of ADR have long been the subject of discussion within the ADR community. The National Alternative Dispute Resolution Advisory Council (NADRAC) definition permits facilitative, advisory and determinative processes to be referred to as ADR. Is this definition too wide? Should ADR be limited to those processes where 'resolution' (rather than determination) takes place? Sir Laurence Street considers that this should be the case and Bryson considers that many ADR practitioners would agree.

I must confess to some reservations about the breadth of the NADRAC definition. However, the NADRAC definition may assist to benchmark part of a more sophisticated approach to ADR and this approach may stem from a recognition that a 'blending' in ADR skills can and does take place. I suspect that this 'blending' occurs to a different degree in different jurisdictions, but it is an increasingly salient feature of our dispute resolution system — and one that it is useful to discuss, as it marks a change from the view of ADR from a facilitative paradigm only.

Facilitative and evaluative skills

David Bryson's comments about the relationship between facilitative and determinative skills are also interesting. In this regard, I have attempted to articulate a 'blended model' — I consider that there are basic communication skills that can be used across the breadth of ADR processes. For example, communication skills — including active listening, paraphrasing, summarising and reframing — can be used in facilitative, advisory and determinative processes.

What is different about advisory and determinative models is that these processes will often involve a narrowing of issues (rather than a wider exploration) and an important focus upon analysis and reasoning (Chapter 4). Throughout Chapter 3 of *Alternative Dispute Resolution* the focus is upon key communication skills, and the variation of approaches to skills in facilitative and determinative processes is the subject of much comment.

Children playing

Finally, some comments in relation to 'children playing'. Perhaps Bryson is raising an interesting 'nature and nurture' discussion about conflict? I must say I have a rather (overly?) optimistic view in relation to this — that our children will be second generation mediators. I am also encouraged that the school my three year old attends promotes a conflict resolution approach for all children and adults that includes skills based workshops and a peer mediation approach. My experiences of watching children play are therefore a little coloured (not least by maternal pride, a parental prerogative) because my two children's comments are more likely to include '… not option generation again,' than positional demands (although there will, always be some of that)! ●

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Endnotes

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

2. See Australian Law Reform Commission *Issues Paper 25: Review of the Adversarial System of Litigation. ADR — Its Role in Federal Dispute Resolution* (ALRC, Canberra, June 1998 referring to Menkel Meadow C 'Pursuing settlement in an adversary culture: a tale of innovation co-opted or "the law of ADR"' (1991) 19 *Florida State University Law Review* 17.

3. Wade J 'In search of new conflict management processes — the lawyer as macro and micro diagnostic problem solver, Part I' (1995) 10 *Australian Family Lawyer* 23.

4. Gilson R J and Mnookin R H 'Disputing through agents: co-operation and conflict between lawyers in litigation' (1994) 94 *Columbia Law Review* 509. Also Law Council of Australia submission to LRC on Issues Paper 20, 'Reflections on judicial ADR and the multi-door courthouse at twenty: *fait accompli*, failed overture, or fledgling adulthood?' November 1997.

5. See Sourdin above note 1 chapter 1.

6. Stempel J (1997) 11 *Ohio State Journal on Dispute Resolution*, 2, 1996 referring to Menkel Meadow C 'Narrowing the gap by narrowing the field: what's missing from the Maccrate Report — of skills, legal science and being a human being' 69 (1994) Washington L Rev 593, 604.

7. Sourdin above note 1 p 130.

8. McCormack M H *What They Didn't Teach Me at Yale Law School* William Collins and Sons Great Britain 1987 p 10.

9. This issue was raised by the Australian Law Reform Commission in the context of the Federal civil litigation system. See Sourdin above note 1 chapter 4.

10. Spigelman J 'Mediation and the court' (2001) 39(2) March *Law Society Journal*.

11. Stempel above note 6.