Introduction

This issue of the Bond Law Review is devoted to developments in alternative dispute resolution (ADR) in international perspective.

It is interesting to reflect on this occasion that the modern development of ADR in Australia coincided, loosely speaking, with the inception of this journal in1989. In fact the first article in the first issue was by Peter Dwight and was entitled 'Commercial Dispute Resolution in Australia: Some Trends and Misconceptions' (1989) *Bond L R* 1.

Inevitably, given the newness of ADR, many of the comments in that article seem to come from a bygone era. Others, however, were remarkably prescient, in particular in picking up on the very early inclination of courts to embody ADR within their own processes of case management and civil litigation. As Dwight observed in his conclusion, 'In addition to the advent of private ADR, there has been, and will continue to be, a substantial growth of ADR in the court system'. There could not have been a more prophetic observation. In the 21st century ADR is thriving, not only in Australia but in many other jurisdictions as well, largely because it has been incorporated into the procedures of all manner of courts, tribunals and government agencies. Of course the private developments have also been noticeable, albeit not as dramatic, and are best reflected in the ADR processes of professional associations, industry bodies, consumer protection arrangements and private contracts. In cumulative effect ADR has reached a stage of early maturity in Australia. This special issue bears testimony to that arrival, and also to wider developments abroad.

One of the pervasive themes of ADR development in the past 13 years has been the shadow of the law which overhangs it. As with the beaches of the Gold Coast, this overshadowing is becoming more and more extensive. Legislative innovation, new rules of civil procedure, satellite litigation on ADR issues, and a new range of relevant court decisions are seeing to that. Some of these developments are also described in the pages that follow. A few commentators have a doomsday attitude to them, arguing that they are depriving ADR of its voluntary, non-adversarial and alternative attributes. Others are more positive in accepting these realities, and argue that ADR continues to thrive in all its new situations, demonstrating variability and adaptability along the way. These debates will undoubtedly continue in the next decade of development.

It has been said of ADR that at this stage of its development it requires both 'scholar-practitioners' and 'practitioner-scholars', suggesting the close interplay between doctrinal development and practical reality. In this context it is worth observing that no fewer than nine of the contributors to this issue have extensive experience as practitioners of ADR as well as being contributors to the literature on the topic.

In keeping with the literature-practice theme it has also been decided to categorise the material in this issue into three parts. Part I deals in a traditional analytical way with international and comparative aspects of ADR. Part II is more descriptive in style, dealing with some recent developments in ADR practice in jurisdictions from three continents. Part III is aimed at the practitioner, whether a scholar or not, and deals

with some of the skills and techniques required to develop an ADR practice and to ply in that practice. While these three parts do not form a seamless web, they do have some strong correlations with one another.

It is significant that many of the contributions to this issue address common and recurring themes.

Several authors discuss developments in court-connected ADR. This is not surprising as courts, governments and administrative agencies are at the forefront of developments in ADR. Mediation, conciliation and arbitration schemes operate in almost every court and tribunal in Australia and other common law jurisdictions. As Altobelli notes, in some courts, such as the Family Court of Australia, litigation is considered the exception: mediation, counseling, conciliation and arbitration are the Primary Dispute Resolution processes. These initiatives are aimed at a range of policy and social objectives such as enhancing the responsiveness and accessibility of the justice system, reducing overload on the courts, and managing cases more efficiently. Some contributors question the legitimacy of these objectives. Mediation and other non-adversarial processes continue to be more popular and arguably more appropriate in some contexts than in others, such as in disputes between victim and offenders and in family disputes; less so in other contexts, such as in the resolution of personal injuries and employment disputes.

In addition to promoting and developing ADR by providing or funding ADR services in courts and tribunals, governments and government agencies promote ADR in a number of other significant respects, for example, by facilitating the development of industry-based dispute resolution schemes for effective handling of consumer complaints, and through representation in international forums such as UNCITRAL.

In this issue, Symes and Wolski examine developments aimed at enhancing legal certainty and predictability in the use of arbitration and mediation on an international level. Several articles examine the latest developments in arbitration of domestic commercial disputes. Both internationally and domestically, some issues pertaining to mediation and ADR remain uncertain. One such issue concerns the enforceability of mediation and ADR clauses. This issue is examined in several of the articles in this volume.

The latest developments in ADR on an international level have been fueled by the preference in some countries, particularly Asian countries, to resolve disputes through consensual processes of dispute resolution. There is no doubt that socio-cultural forces influence the dispute resolution preferences of parties in conflict and the way in which particular methods of dispute resolution are perceived and practiced. The comparative studies in this issue (including those of Black, Goh, and Alexander) reflect on the development of mediation from a number of perspectives: traditional Chinese and Brunei society and western society; and on common law and civil law cultural traditions.

While Goh examines the way in which culture shapes the dispute resolution remedies sought by parties in conflict, Boulle and Farrar examine remedies in a very specialized context, namely, those that are available to minority shareholders in respect of the conduct by the majority. The reforms in this area serve as testament to

the pervasiveness of ADR theory and specifically, interest-based approaches to dispute resolution.

Several authors argue persuasively that there is need for change in the prevailing culture of the legal profession in both civil law and common law jurisdictions, for the profession has not wholehearted embraced mediation. There is growing recognition of the emerging duty on lawyers as gatekeepers of the disputing universe to advise clients of the availability of ADR options, to take a more proactive role in conflict prevention and avoidance, and to take the initiative in applying ADR processes in a more timely fashion.

As mediation evolves as a profession, key issues relevant to regulation and institutionalization of the profession continue to be debated. Issues include the development of professional standards or codes of conduct and certification and accreditation schemes for mediators. This debate will undoubtedly continue. In Australia, the debate takes place within the structured framework established by NADRAC, which resisted the development of uniform standards for mediation and instead adopted a 'framework' that allows for and encourages innovation and diversity of mediation practice and recognises that establishment and maintenance of standards is a responsibility that should be shared by all members of the ADR community.

While many (if not most) ADR practitioners struggle to establish a fulltime career in what is still, in many ways, a profession in its infancy, mediation and other ADR practices now bear some of the hallmarks of a well-established profession with sophisticated analytical and diagnostic tools of practice. These tools include 'conflict wellness check-ups' and 'risk analyses' to assist clients, lawyers and other decision-makers to make wise decisions in the course of preparing for negotiation, mediation and litigotiation.

The importance of reflecting on mediation practice is emphasised in many of the contributions to this issue. It is through such reflection that we develop helpful practice tools and techniques for career planning and establishment of viable and meaningful mediation practices. Wade and Mosten provide valuable insights in this regard.

Most authors to this special dispute resolution issue find reason for 'optimism regarding the future use of mediation'. Woody Mosten predicts that mediation will continue to grow in use. Alexander concludes that although many mediation programs in civil law countries are in their infancy, some jurisdictions, such as that of Germany, are 'poised for change' with expansion planned in voluntary and mandatory mediation schemes. We can also look forward to the development of on-line ADR and e-commence, with emergence of on-line dispute resolution systems by organization such as ICSID, the ICC and the European Chamber of Commerce and Industry.

It is hoped that this special issue of the Bond Law Review makes a small contribution to the shared responsibility of promoting and facilitating the development of ADR by providing a forum for the publication and exchange of ideas.

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