Alternative Dispute Resolution as a Judicial Tool
(A comment)

In Australia, and I suspect elsewhere in the common law world, the last few decades have seen an increased resort to alternative dispute resolution and a decrease in the adversary trial process. In this sense it can be said that ADR is a useful judicial tool because it relieves the pressure on the judicial system and thus, the pressure on community resources needed to maintain that system. In Australia there appears to be increasing acceptance that in order to save the State the expense of properly maintaining the judiciary - and this includes the provision of legal aid in civil cases - people should be encouraged to resolve their disputes by ADR. But this encouragement could also be seen as an abdication of the State's responsibility to provide a modern and efficient judicial system that encourages the resolution of disputes in accordance with law and it also takes the pressure off the judiciary to reform its procedures so that they are as efficient and cost effective as ADR.

Preparation for a trial is generally a slow process that uses up time and costs. A benefit of ADR over the trial method of dispute resolution is the fact that the parties can enter into ADR much quicker than they can enter into the trial, and thus resolve the dispute much quicker. The down side of this is the risk that the dispute may be resolved on the basis of inadequate facts and therefore produce an unfair result. For it has been said that, "Inexpensive, expeditious and informal adjunction is not always synonymous with fair and just adjudication."[1]

Another benefit of ADR over the trial process is that it affords litigants privacy that is not afforded them by the trial process. I think that this is often the reason for commercial disputes going to arbitration rather than the courts. But this benefit, like early resolution, comes at a cost; this time to society in general. It must not be forgotten that the court is not just a publicly funded provider of dispute resolution services.[2] As the Chief Justice of New South Wales has observed on more than one occasion, the courts, as an arm of government, publicly affirm rights and publicly denounce improper behaviour, thus setting standards.[3] So, ADR cannot be described as a tool assisting the judiciary when it keeps out of the public eye cases in which the public have a legitimate interest in the outcome. As Judge Edwards said, "Just imagine the impoverished nature of civil rights law that would have resulted

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[1] Judge Harry T Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) Har L Rev 668.
[2] Gleeson CJ "The Future State of the Judicature" November 1998.
[3] E.g., Spigelman CJ Opening Law Term Dinner," 1 February 1999.

had all the race discrimination cases [in America] in the sixties and seventies been mediated rather than adjudicated."[4] Related to this is the fact that ADR does nothing to assist the judiciary to develop the common law. This development is important because it promotes predictability and certainty that in turns promotes the orderly development of a society. I wonder how would the law of negligence developed if Mrs Donoghue's claim had been resolved by ADR?

I have to accept that ADR has grown to be a useful judicial tool because it enables litigants to get a result – not necessarily justice in accordance with law – but a result or resolution of the dispute quickly and relatively inexpensively. But my point is that the down side of the growth of ADR, the diminution of the role of the judiciary as an arm of government and the slowing of the development of the common law, should be the constant spur for the judiciary to think "outside the square" and change its processes and procedures to minimise the cost and delay of the trial process. This is not the occasion for a full debate on this complex issue, but I suggest that the growth of ADR and the corresponding disappearance of the trial should cause the judiciary to re-examine such fundamental matters as the importance of the single cataclysmic event, a continuous trial. Why must we have a single continuous trial? Why do we have all the costly and lengthy preparation for this showpiece of a trial? Can there be some joining of the best of ADR and the best of the trial process that will give greater access to a just result in accordance with law for everybody? Obviously I don't pretend to have the answers to these questions, but I am willing to engage in debate about them.

Perhaps the courts should provide a full ADR service as a branch of their traditional work. I see it rather like a department store with the quality goods, or trial process in accordance with law, on the upper floors and a bargain basement, or alternative dispute resolution in the basement. Close collaboration between the upper floors and the ground floors might work to the advantage of both. The standards applied on the upper floors might rub off onto the ADR in the basement so that the results of ADR align more with justice than expediency, and the procedures in the basement might rub off on the upper floors and reduce cost and delay of the trial process. After all, not all cases or disputes are suited to resolution by trial. In fact in many instances, small claims, family will disputes and the like, the process of resolution by a trial worsens the situation. See, for example, *Burchell v Bullard* [2005] EWCA Civ 358 where the recovery of £5,000 cost £185,000.[5] Yet

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[4] Supra at 697.

[5] Discussed by Justice Steytler of the Supreme Court of Western Australia, "Western Australia Institute of Dispute Management Launch", 28 September 1006.

notwithstanding this rather obvious fact, the majority of disputes start off in the courts and follow procedures designed to conclude with a trial process and only get to ADR by pre-trial diversion.

I understand that that there have been some developments along these lines in Switzerland and France, and perhaps other places as well.[6] The Swiss doctrine, about which others no doubt know more than me, of the so-called "Juge D'Appui", or support judge, is an arrangement whereby a judge works in tandem with the arbitration process, lending assistance when needed by making such court orders as might be necessary to facilitate the process or to enforce particular measures when no other enforcement mechanism is readily available. The support judge also has the power to suspend proceedings to set aside an award in order to give the arbitrator an opportunity to eliminate the grounds for setting it aside, where that can be done.[7] This is an idea that might be worthy of further consideration to bring ADR and trial process closer together. Perhaps points of law that arise in the course of ADR could be referred to the support judge for determination in accordance with law. Why shouldn't the courts give advisory opinions? In Australia there is a power for a judge to do this in certain cases when he or she is sitting in an Administrative Appeal Tribunal[8]. This kind of development might facilitate the resolution of disputes and at the same time develop the law and permit the declaration of matters of principle in a public forum. I realise that these ideas face difficulties but the growth of ADR, whilst acting as a tool to the judiciary, is also acting to its detriment, calling for some radical re-thinking.

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[6] Justice Steytler supra.
[7] Catherine Kessedjian, "Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International Society" 29 Melb. U. L. Rev. 765
[8] See *Administrative Appeals Tribunal Act* (C'th) 1975, s59.