COMMERCIAL ALTERNATIVE DISPUTE RESOLUTION by Maxwell J Fulton, Sydney, Law Book Company, 1989, 156pp, $35

It has long been accepted that those engaged in commercial transactions will attempt to resolve the disputes that inevitably arise outside of the courts, preferring quicker, cheaper processes that take into account the customs and usages of their trade. Thus the law merchant was one of the earliest developments of a specialist jurisdiction within the evolving common law,[1] and the Australian colonies inherited the Arbitration Act 1697 (Imp)[2] from the Westminster Parliament. But the preferred methods of resolving commercial disputes have not been limited to arbitration and specialist court procedures; commercial people have always negotiated, bargained and applied economic and social pressures in their efforts to reach a mutually acceptable basis for continuing their transactions, without having recourse to the formal procedures of the legal system.[3] Thus the trend that became apparent in the 1980s in Australia of resorting to alternative dispute resolution processes (or ADR as the movement has become known) is one of highlighting and formalising techniques that have long been in use. It is the degree of interest shown by members of the legal profession[4] and the law schools[5] in processes such as conciliation, mediation, mini-trials and arbitration that is new. Further, this interest has been institutionalised through, inter alia, the introduction of the Community Justice Centres in New South Wales,[6] the creation of the Australian Commercial Disputes Centre,[7] the work of the

1 The law merchant was administered in specialist courts which were held at the fairs and markets in which much commercial dealing took place. The laws applied were based upon the recognised customs and practices of merchants; Radcliffe and Cross, Hand and Bentley (eds), *The English Legal System* (6th edn, Butterworths) p244.

2 9 Will III c 15. See Smith, "Commercial Arbitration in Australia", paper given at Lawasia Conference, Hong Kong, September 1989.

3 See Fitzgerald, "Grievances, Disputes and Outcomes: A Comparison of Australia and the United States" (1983) 1 *Law in Context* 15 cited in Fulton, *Commercial Alternative Dispute Resolution* (1989) 5 (hereinafter Fulton).

4 As exemplified by the *Guidelines for Solicitors who Act as Mediators*, prepared by the New South Wales Law Society Dispute Resolution Committee, approved by Council, May 1988, (July 1988) *Law Society Journal* 29 and the formation of a professional organisation LEADR (Lawyers Engaged in Alternative Dispute Resolution) by lawyers in a number of commercial law firms in Australia.

5 Alternative dispute resolution courses have been introduced or proposed at the Universities of Sydney, Melbourne, Adelaide, Queensland, Western Australia, Wollongong, and New South Wales, Bond and Macquarie Universities and the University of Technology Sydney. The first such course was at Sydney and was introduced in 1988. See Astor and Chinkin, "Teaching Dispute Resolution at Sydney Law School", forthcoming (1990) *Legal Education Review*.

6 Established by the *Community Justice Act* 1983 (NSW). There are similar Neighbourhood Justice centres in Victoria and Queensland has introduced similar centres.

7 Incorporated as a company limited by guarantee in Sydney in 1986 to provide "an overall non-court dispute resolution service for the commercial community" throughout Australia. See Newton, "Commercial Dispute Resolution Services", paper presented to Continuing Legal Education Seminar, University of Sydney, 13 October 1897 p2. See also Newton, "Alternative Dispute Resolution and the Lawyer" (1987) 61 *ALJ* 562.

Institute of Arbitrators[8] and even the incorporation of ADR processes within the courts.

Inevitably this development has led to the publication of a number of books which explain and evaluate the processes and their use. While there is as yet no comprehensive book on ADR in Australia[9] there is an increasing number of books which focus upon a particular aspect of dispute resolution,[10] one of which is the book under review.

Fulton presents in a small volume (130 pages plus appendices) an overview of the processes currently available to claimants wishing to resolve commercial disputes. His starting point is to examine the role of legal rules both in "giving a framework to the business structure of society, thereby maintaining the conditions for market exchange to take place"[11] and in the resolution of disputes. He points out the results of American and Australian research showing the actual limited use of litigation to resolve commercial disputes[12] and outlines the adjudicative process, including that adopted in the Commercial List where a "managerial" style of judging is becoming common. He then seeks to determine whether litigation plays a dominant role in the resolution of commercial disputes by considering whether the litigation process fulfils the expectations business persons have in it. To do this Fulton analyses litigation in the light of criteria summarised by McGarvie J:[13] the speed of litigation; the simplicity of procedures; costs; effectiveness from a number of perspectives and whether the adjudicator is aware of the practical consequences of a decision. To give weight to his conclusions Fulton "sent a questionnaire to each of the top 200 companies, as identified by Ibis Business Information Pty Limited"[14] asking them how frequently they used litigation and alternative dispute resolution processes and about their experiences with each. While this sample does not claim to provide comprehensive data, the answers to the questionnaire help to fill the empirical vacuum by providing a systematic evaluation of how commercial disputes are actually being handled in Australia.

Fulton, not surprisingly, concludes (along with other commentators and observers) that "the litigation process does not rate highly as an efficient resolver of disputes."[15] It is too slow, the procedures are too complex, the costs to parties and the public are too high, adversarial procedures are inappropriate for dealing with complex technical issues and judicial remedies

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8 See for example, Institute of Arbitrators Australia, *Rules for the Conduct of Commercial Conciliations and Explanatory Notes* (1988).

9 The American text Goldberg, Green and Sander, *Dispute Resolution* (1985, supp1987) is much referred to. See also Pears, *Beyond Dispute ADR in Australia* (1989) 2.

10 For example, Sharkey and Dorter, *Commercial Arbitration* (1986); Fitch, *Commercial Arbitration in the Australian Construction Industry* (1989).

11 Fulton, 4.

12 Galanter, "Reading the Landscape of Disputes", (1983) 31 *UCLA LR* 4; Macaulay, "Non-Contractual Relations in Business", in Aubert (ed) *Sociology of Law: Selected Readings* (1969) 194.

13 McGarvie, "Litigation and Arbitration: A General Account of Dispute Resolution as it is and as it is developing", in *Dispute Resolution in Commercial Matters: Papers of the Colloquium of the Australian Academy of Science* (1986) cited in Fulton, 39.

14 The questionnaire is included as Appendix 1 of the book.

15 Fulton, 50.

are often inadequate. There are therefore good reasons for disputants, "in some, if not all disputes" to explore the use of ADR processes "rather than looking to litigation from the outset".[16]

The processes that are examined in the book are arbitration and final-offer arbitration, mediation, mini-trials and rent-a-judge. The overview of each of these processes is extremely good. In a short space Fulton gives the essentials of each process and attempts an evaluation of its use and effectiveness. Great attention in Australia is directed towards mediation (notably by the Australian Commercial Disputes Centre and as exemplified by the direction of the work of the NSW Law Reform Commission)[17] and accordingly the fullest account is of mediation. This chapter is a balanced discussion of the advantages and disadvantages of mediation for both individual disputants and society at large. It also considers the role of lawyers in advising clients to try mediation and in the actual mediation process. Fulton concludes that they have an important contribution in the former context but that they generally should not play an active role in the latter. Mediation is a private process in which the mediator attempts to assist the parties reach a mutually acceptable, appropriate outcome to their dispute. Lawyers might find it difficult to accept the non-adversarial format and thus undermine its effectiveness. However clients are always free to consult with their lawyers. While asserting the advantages of mediation for disputants where there is an on-going relationship between them and where each shares some responsibility for the dispute, Fulton, perhaps surprisingly, regards mediation as less suitable for multipartite disputes.[18] However, neither arbitration nor litigation have satisfactorily resolved the problem of multiple parties with the bilateral, adversarial model proving resistant to the incorporation of a plurality of interests. Proponents of mediation argue that it facilitates the inclusion of other participants and that a skilful mediator can effectively focus attention on a number of conflicting interests more readily than can a court. The preferred role of a mediator is another topic where there are conflicting opinions. Should a mediator be interventionist and express personal opinions or should she or he make the parties formulate their own options? Is there any clear distinction between mediators and conciliators? Fulton acknowledges the confusion in distinguishing between mediators and conciliators and prefers instead to distinguish between active and passive mediators.[19]

The book effectively summarises each of the processes listed. However the difficult question that remains for clients and their legal advisers is to determine which factors in the context of any given dispute makes recourse to one process more appropriate than to some other process. Which process is likely to provide the parties with the optimum solution? While expressing a preference at all times for bilateral settlement, Fulton discusses the multi-door courthouse approach adopted in the United States as one way of answering that question. He also outlines the Western Australian initiative in establish-

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16 Fulton, 124.

17 See NSW Law Reform Commission, Discussion Paper, *Alternative Dispute Resolution, Training and Accreditation of Mediators*, (October 1989).

18 Fulton, 83.

19 Fulton, 74-75.

ing the Joint Alternative Dispute Resolution Committee which wishes to bring into existence:[20]

> a system for civil dispute resolution that integrates all available methods into a co-ordinated scheme that provides the parties with a range of methods and options that allows them to choose the best and most appropriate form of dispute resolution method for the issues and circumstances confronting them.

This still begs the questions of the criteria upon which such a determination is to be made and the training and experience of the person advising the disputants.

This book provides an extremely useful summary of the main methods used for the resolution of commercial disputes. I have just a few further comments to make. First, although the book is entitled "Commercial Alternative Dispute Resolution" it is, in fact, essentially Australian; the legal culture and court procedures discussed are Australian, the companies surveyed were Australian and the developments described are Australian. However these Australian perspectives are presented in the light of American readings and experiences which provide a basis from which further Australian initiatives can develop on either similar or distinctive lines. This increases the book's usefulness for the Australian student and practitioner who has previously been largely dependent on American materials.

Secondly, the book does not limit itself to only the so-called "alternative" dispute resolution processes but considers a wide range of processes, including litigation. The use of the adjective "alternative" raises the problematic question of "alternative to what?" This in turn demands a determination of which processes are to be regarded as "alternative". Fulton summarises this debate.[21] ADR can refer to processes which are alternatives to litigation, including, for example, arbitration. It can also refer to alternatives to adversarial processes or third party decision-making, thereby focusing on the element of agreement as to outcome reached by the parties. The former definition assumes litigation to be the norm and somehow more legitimate, with other methods as alternatives to it, an assumption which is not supported by the facts. The second definition excludes arbitration in which a decision is given by an arbitrator, despite its early development as an alternative to litigation.

Fulton prefers a wide approach, seeing ADR as a "response" to the highly structured dispute resolution processes controlled and decided by legally qualified and trained judges, and even as a response to lawyer controlled processes. This allows him the widest scope in discussion but he could have avoided the problem by entitling the book "Commercial Dispute Resolution" which is in fact what it covers. Elsewhere Fulton assumes the existence of the continuum model whereby the various processes are perceived as being placed at different places along a continuum according to the degree of coercion or consensus involved in the process.[22] Thus adjudication is at one extreme as the most coercive process while consensus-oriented, negotiated

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20 Kenfield, "Taking the 'A' out of 'ADR'", [1988] *October Brief* 18 cited Fulton, 129.
21 Fulton, 13-17.
22 Fulton, 73.

processes are at the other. However, this linear model can be misleading in that it ignores the reality of the psychological pressure and even coercion that can be brought to bear in the consensual processes, while litigation can be freely entered into. "Alternative" methods have always been used by lawyers and by courts and are thus not separate from them at the far end of a spectrum.[23] It has been convincingly argued that "alternative" methods are in fact, and should be, viewed as additional to litigation rather than as alternatives to it.[24]

Thirdly, Fulton's limitation of his subject-matter to commercial dispute resolution rather than including other types of disputes such as inter-personal disputes, family or neighbourhood disputes, discrimination or environmental disputes relieved him from the necessity of considering such complex issues as power, public interest and coercion in these processes outside of the strictly commercial setting. His theoretical framework therefore concentrates upon economic considerations rather on than these other issues that are so problematic in other contexts.

Fourthly, a difficulty facing anybody writing on any aspect of dispute resolution is the rapidity with which new initiatives are being taken both within and outside the courts. The flexibility of ADR methods allows for their constant refinement and adaptation as well as the development of hybrid processes. This makes the choice of what to include or exclude in such a book very difficult and subjective. However, to me some surprising omissions are expert determination and the variant on the mini-trial being pioneered by Sir Laurence Street, Senior Executive Appraisal.[25] The scope of commercial disputes is also limited by the exclusion of both international commercial disputes[26] and consumer disputes.

These are, however, minor points. Overall the book provides a useful survey of techniques available for the resolution of commercial disputes and an evaluation of both litigation and the alternative methods. While favouring recourse to ADR methods Fulton does not fall into the trap of perceiving them as totally beneficial as compared with litigation. This is a sensible and thoughtful account which is given further weight by the bibliography and references. Finally it gives this reviewer great pleasure to review a book which is still regrettably comparatively unusual in its gender neutrality in language and presentation.

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23 Galanter "'A Settlement Judge, not a Trial Judge': Judicial Mediation in the United States" 12 *Journal of Law and Society* 1 (1985).

24 For example, Sir Laurence Street, address to the 14th Australasian Law Reform Conference 1989, reported in [1989] *Reform* 182.

25 See Street "Senior Executive Appraisal", (July-August 1989) 6 *Aust Construction Law Newsletter* 9-11; Collins, "Alternative Dispute Resolution — Choosing the Best Settlement Option" (1989) 8 *Aust Construction Law Newsletter* 17.

26 This omission is surprising in the light of the facilitation of international commercial arbitrations by the *International Arbitration Amendment Act* (Cth) 1989.

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