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**Comparing ADR in Australia and New
Zealand: Introduction and Update**

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Alternative Dispute Resolution (ADR) has re-emerged on the policy agenda in both Australia and New Zealand (NZ), as in other parts of the world.¹ The legal world, including ironically ADR as an ‘alternative’ to formal court adjudication, tends to move in cycles. It becomes increasingly formalized, antagonizing or irrelevant to more and more of those involved, until judges or legislators try to restore more simplicity and user-friendliness.

Sometimes, perhaps often, these cycles coincide with business cycles. This is certainly true following the Global Financial Crisis (GFC²) and dramatic declines in economic performance world-wide since 2008. Australian companies can no longer so easily afford the obscene amounts of legal fees spent in notorious litigation like *Seven Network Limited v News Limited* [2007] FCA 1062.³ That attracted adverse judicial and media commentary even in the “good old days”.⁴ When the 3404-paragraph actual judgment was handed down in mid-2007, Justice Sackville took the unusual step of adding a 61-paragraph non-authoritative “Summary”. It explained some particular features of this “meta-litigation”, which inevitably “imposes a very large burden, not only on the parties, but on the court system and, through that system, the community” (para 2):

4 The trial lasted for 120 hearing days and took place in an electronic courtroom. Electronic trials have many advantages, but reducing the amount of documentation produced or relied on by the parties is not one of them. The outcome of the processes of discovery and production of documents in this case was an electronic database containing 85,653 documents, comprising 589,392 pages. Ultimately, 12,849 ‘documents’, comprising 115,586 pages, were admitted into evidence. The Exhibit List would have been very much longer had I not rejected the tender of substantial categories of documents that the parties, particularly Seven, wished to have in evidence.

5 Quite apart from the evidence, the volume of written submissions filed by the parties was truly astonishing. Seven produced 1,556 pages of written Closing Submissions in Chief and 812 pages of Reply Submissions (not counting confidential portions of certain chapters and one electronic attachment containing spreadsheets which apparently runs for 8,900 or so pages). The Respondents managed to generate some 2,594 pages of written Closing Submissions between them. The parties’ Closing Submissions were supplemented by yet further outlines, notes and summaries.

6 In addition, the pleadings amounted to 1,028 pages. The statements of lay witnesses that were admitted into evidence run to 1,613 pages. The expert

¹ See eg my Blog at http://blogs.usyd.edu.au/japaneselaw/2009/04/australias_less_lethargic_law.html; and ‘Senior UK Judges Visit NZ’ 728 Lawtalk (4 May 2009) at p3, http://www.lawsociety.org.nz/publications_and_submissions/lawtalk/2009_issues/lawtalk_issue_728/senior_uk_judges_visit_new_zealand.

² See generally my SCIL Working Paper No 19, at http://www.law.usyd.edu.au/scil/pdf/2009/SCILWP19_Nottage.pdf

³ http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/1062.html

⁴ “How not to play the litigation game”, Sydney Morning Herald, 28 July 2007, <http://www.smh.com.au/news/business/how-not-to-play-the-litigation-game/2007/07/27/1185339258902.html>

reports in evidence totalled 2,041 pages of text, plus many hundred pages of appendices, calculations and the like. The transcript of the trial is 9,530 pages in length.

7 I have not been idle these past nine months.

3. COSTS

8 It is not surprising that a case that generates this volume of material also generates very large costs. What is surprising is the sheer amount of money that has been devoted to a single case. My estimate is that the parties have spent in the order of \$200 million on legal costs in connection with these proceedings.

9 When the case was opened, Mr Sheahan SC, on behalf of Seven, suggested that it would be claiming more than \$1.1 billion in damages. By the time final submissions were made, Seven's damages claim, at best, had been reduced to an amount between \$194.8 and \$212.3 million. This amount was to be 'grossed up' by a factor of 1.429 to account for income tax. Pre-judgment interest was also to be added. Bearing in mind that (as the parties agree) tax has to be paid on any damages award, the maximum amount at stake in this litigation has not been very much more than the total legal costs incurred to date.

10 It is difficult to understand how the costs incurred by the parties can be said to be proportionate to what is truly at stake, measured in financial terms. In my view, the expenditure of \$200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful, but borders on the scandalous.

Justice Sackville ended his "Summary" with this warning:

58 It is appropriate to conclude this Summary with a cautionary tale that the parties in the present case would do well to heed closely. So far as I am aware, the longest civil trial in recent Australian history took place in the Supreme Court of South Australia. The Duke litigation (Duke Group Ltd (in liq) v Pilmer (1998) 27 ACSR 1) ran for 471 days, from 15 June 1994 to 29 September 1997. Remarkably enough, the trial judge delivered judgment, nearly 500 printed pages in length, within a mere four months of the conclusion of the hearing.

59 That, however, was merely the end of the beginning. Allowing for multiple appeals, including two journeys to the High Court of Australia, the case finally concluded on 19 November 2004, when the High Court refused a second application for special leave to appeal. Ten and a half years had elapsed since the commencement of the trial and over twelve years since the commencement of the proceedings. Nearly seven years had passed since the trial judge had given judgment.

60 Even now, it is not too late for the parties to bring these

protracted and excessively expensive proceedings to a conclusion by mutual agreement and thus avoid the costs and uncertainties of the appellate process. In the light of my findings of fact and conclusions of law, the parties should be able to assess realistically their prospects on appeal. They should also take into account that the transactions that gave rise to this litigation are long passed and have been overtaken, not only by later events, but a changed commercial environment in the industries in which they operate.

61 The alternative to a negotiated resolution may be a reprise of the Duke litigation. I do not recommend this course.

Nonetheless, Kerry Stokes (cross-examined for 14 days in this litigation) remained executive Chairman of (unsuccessful plaintiff) Seven. He reportedly stated that “we feel completely justified in bringing the action” and that an appeal was being “fully considered”.⁵ For a while, it seemed like some sense (cents) would belatedly prevail. The parties agreed to settle the costs.⁶ But Seven then appealed, generating concerns on the part of Justice Dowsett.⁷ The trial was set for November 2008, but no judgment has been reported as of May 2009.

Australia’s federal government is also concerned about continued rises in the amount it spends on legal services – over half a billion dollars in FY 2008.⁸ Soon after that news, the Federal Attorney- General, Robert McClelland, reportedly welcomed the release of the ‘Alternative Dispute Resolution in the Civil Justice System’ issues paper by the National Alternative Dispute Resolution Advisory Council (NADRAC).⁹ Moves are also afoot in the States, beginning with a more wide-ranging Civil Justice Review by the Victorian Law Reform Commission.¹⁰ In May 2009, the NSW Attorney-General’s Department released its “Blueprint for Alternative Dispute Resolution in NSW” Discussion Paper.¹¹

The latter included support to move forward to ‘remodel’ uniform Commercial Arbitration Acts based on the UNCITRAL Model Law on International Commercial Arbitration (1985, revised in 2006). That had also been agreed by Australia’s Standing Committee of Attorney Generals (SCAG) at their meeting 16-17 April 2009:¹²

⁵ Idem.

⁶ “Seven and News strike costs deal in C7 case”, *ibid*, 15 September 2007, <http://www.smh.com.au/news/business/seven-and-news-strike-costs-deal-in-c7-case/2007/09/14/1189276984103.html>

⁷ “Judges want to read less about it”, *ibid*, 25 August 2008, <http://business.smh.com.au/business/judges-want-to-read-less-about-it-20080824-41ej.html>

⁸ “Federal legal costs blow out to more than \$500m”, *The Australian*, 20 March 2009, <http://business.smh.com.au/business/judges-want-to-read-less-about-it-20080824-41ej.html>

⁹ http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2009_FirstQuarter_26March2009-EncouragingAccessToJusticeThroughAlternativeDisputeResolution

¹⁰ <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Completed+Projects/Civil+Justice/>

¹¹ [http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/ADR_Blueprint.doc/\\$file/ADR_Blueprint.doc](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/ADR_Blueprint.doc/$file/ADR_Blueprint.doc)

¹² Available via http://www.scag.org.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes

Ministers agreed to the drafting of new uniform commercial arbitration legislation based on the [Model Law], supplemented by any additional provisions as are necessary or appropriate for the domestic scheme. The aim of the draft model Bill is to give effect to the overriding purpose of commercial arbitration, which is to provide a method of finally resolving disputes that is quicker, cheaper and less formal than litigation.

This should help finally to shake off the legacy of English arbitration law and practice, traditionally more prone to court intervention. Such reforms to the CAAs – designed for domestic arbitrations – would more closely align Australia’s federal International Arbitration Act, which adopted the Model Law in 1989 and is itself now under Review.¹³

As well as soul-searching and (mega-)penny-pinching in the wake of the GFC, these ADR reform initiatives in Australia take place in the context of other influences from overseas. New Zealand has already adopted the 2006 revisions to the Model Law, extending most of that regime to domestic as well as international arbitrations.¹⁴ Both countries – and other partners particularly in the Asia-Pacific – are entering into more and more BITs and FTAs providing for investor-state arbitrations, which implies the need to build up more capacity in arbitration law and practice generally.¹⁵ And both countries are now bringing into force a *Trans-Tasman Court Proceedings and Regulatory Enforcement Treaty*.¹⁶ Australian courts will be treated largely like NZ courts, and vice versa, creating a judgments enforcement regime similar to that found among EU member states. But one way out of this will for parties to Trans-Tasman contracts to select instead arbitration – in Australia, NZ, or elsewhere.

On the other hand, Australia and NZ are not focusing enough on business-to-consumer (B2C) ADR. Instead, Australian Treasury officials’ Discussion Paper for a new Australian Consumer Law focuses overwhelmingly on harmonizing substantive consumer law nation-wide.¹⁷ NZ will follow the Australian lead, as it too sits on the Ministerial Council on Consumer Affairs, and has long collaborated closely in certain consumer law fields (eg food safety standards). It may not be late, however, to restore consumer access to justice to the policy agenda. Australia’s own Productivity Commission recommended many improvements in its Consumer Policy Review published in 2008. I have identified other issues (eg in home building dispute resolution in NSW or the Telecommunications Ombudsman scheme) in reports on Australia for the European Commission and Japan’s Cabinet Office.¹⁸ Even more

¹³ See my Blog at http://blogs.usyd.edu.au/japaneselaw/2009/04/australias_less_lethargic_law.html, with further references – especially to my co-authored Submission / article manuscript at <http://ssrn.com/abstract=1378722>

¹⁴ See my SCIL Working Paper No 6 (June 2008) at <http://www.law.usyd.edu.au/scil/pdf/SCILWP6Finalised.pdf>

¹⁵ See my SCIL Working Paper No 21 with Romesh Weeramantry (March 2009), at http://www.law.usyd.edu.au/scil/pdf/2009/SCILWP21_NottageWeeramantry.pdf, with further references – especially to my co-authored paper at www.ssrn.com/abstract=1151167.

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http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_SecondQuarter_17April2009-SupportForTrans-TasmanLawReform

¹⁷ See my posting at <http://www.eastasiaforum.org/2009/03/25/australias-lethargic-law-reform-how-not-to-revive-consumer-spending/>

¹⁸ See my SSRN Research Paper version at <http://ssrn.com/abstract=1370106>

than disputes between businesses, credible B2C ADR is crucial to turning the (substantive) “law in books” into “law in action”.

Against this contemporary backdrop, the rest of this Working Paper provides an overview of the ADR framework and historical development particularly in Australia and New Zealand, rarely compared expressly. It focuses on issues raised by organizers of a Panel on ADR, to which I was invited to speak at the 2003 Lawasia conference. That was held in Tokyo, so I also tried explicitly or implicitly to touch on issues of particular interest to those familiar with Japanese law. Readers are now free to cite to it, and comments on this combined Paper are also most welcome.