Courts and ADR: A Symbiotic Relationship

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Introduction

1 In 1976, the Honourable Michael Kirby began an address to the Commercial Institute of Arbitrators in Australia on the topic of 'Law and Commercial Arbitration' with the following remark:

> I shall endeavour to perform an extraordinarily difficult task – to talk about the Law & Commercial Arbitration and make it scintillating.[1]

I do not know whether that quip was well-received by the audience, who presumably thought that at least one half of the topic was sufficiently scintillating to devote their careers to it. In the event that it was a flop, I propose to avoid repeating the mistake, and to confine myself instead to relatively safe comments about the history of ADR, its role in the judicial system, and its future direction.

2 I am mindful of the fact that as a judge of the Supreme Court of NSW, I might be thought by some to personify the kinds of institution to which ADR is the alternative. In order to dispel any apprehension that may follow, I will try as best I can to show precisely why it is that, in the civil sphere at least, the courts could not function as "efficiently" as at present they do without ADR.

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[1] Michael Kirby, 'The Law and Commercial Arbitration' (Speech delivered at the Commercial Institute of Arbitrators in Australia, Canberra, 25 June 1976).

The past

3 I will start by briefly looking at the history of the relationship between courts and ADR practitioners. Traditionally, that relationship was not always a happy one. As our nation's current Chief Justice has noted:

> In times not so far in the past the arbitrator was seen in some circles as a dubious, below stairs figure, requiring close curial supervision, a quasi-judicial equivalent of Uriah Heep. He operated what was regarded by legal elites as a second-rate system of backyard justice.[2]

This historical attitude might seem surprising in light of the fact, that although it has not always gone by that name, ADR has been around for millennia. Many of the oldest societies in human history utilised some form of arbitrator or mediator, be it a chief, a go-between, elders, relatives, friends or bystanders.[3]

4 In Ancient Greece, civil disputes were required to be submitted to arbitration before the jurisdiction of courts would be enlivened.[4] From the 7th to 1st century BC, arbitration was also extensively used by Greek city-states to settle border disputes. A treaty of peace for fifty years between Sparta and Argos, dated 418 BC, contained the following clause:

> If there should arise a difference between any of the towns of the Peloponnesus or beyond, either as to frontiers or any other object, there shall be an arbitration. If among the allied towns they are not able to come to an agreement the dispute will be brought before a neutral town chosen by common agreement.[5]

5 Only a cynic would remark the fact that this occurred in the course of the struggle between Athens (or the Delian League) and Sparta (or the Peloponnesian League) known as the Peloponnesian War. And only a very cynical cynic would think that Sparta might have been concerned to safeguard its home territory.

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[2] Robert French, 'Arbitration – The Court's Perspective' (1993) *Australian Dispute Resolution Journal* 279.
[3] Stanley Mosk, 'Arbitration Versus Litigation' (Speech delivered at the Conference on Arbitration, Los Angeles, 14 November 1952).
[4] Ibid.
[5] Sir Ninian Stephen, 'Yf by Theyr Good Dyscretions' (1991) 26(7) *Australian Law News* 42.

6 Similar clauses have been discovered in the ancient practices of the Hittites, the Persians and the Aztecs. The concept is also recorded in biblical writings, such as in the Proverbs of Solomon:

> What you have seen with your eyes do not bring hastily to court, for what will you do in the end if your neighbour puts you to shame?[6]

Similarly, in the New Testament, the apostle Matthew exhorts:

> Come to terms quickly with your accuser while you are going with him to court, lest your accuser hand you over to the judge, and the judge to the guard, and you be put in prison.[7]

7 In the Middle Ages, the prime example of ADR is to be found in the trade fairs held annually at fixed seasons in Western Europe. At those fairs, travelling merchants who had grievances with one another would go not to the Royal Courts of Law, nor even to the local customary courts, but instead sought recourse from a panel of four or five merchants chosen from those attending the fair. This was not seen as the slightest bit strange by the merchants who frequented the fairs; on the contrary, it was precisely what they demanded – 'prompt justice dispensed by fellow merchants familiar with the everyday problems of the market-place'.[8]

8 Later, in the 14th century, England, along with other nations, witnessed the emergence of a new form of trade association known as the guild. Guilds were essentially combinations of people practising particular trades in particular towns, who banded together to share the 'arts' or 'mysteries' of their crafts, as well as to seek to improve their position collectively in society.[9] They also had their own internal dispute resolution processes. Sir Ninian Stephen in his excellent history of arbitration cites the example of the Clothworkers Guild in London, which had a dispute resolution system recorded in the 'Ordynaunce for Controversies to be Decyded by the Master Wardenes and Assistauntes'. Though written five centuries ago, it may have a familiar ring to some of you:

> Yf any dyscorde stryfe or debate at any tyme hereafter shall fortune to happen for any cause or matter whatsoever it be betwyxte one housholder and an other… of the sayde Company or

[6] *Holy Bible* (Hachette, United Kingdom, 2011), Proverbs 25:7-8.
[7] Ibid, Matthew 5:25.
[8] Stephen, above n 5.
[9] Including by imposing barriers on entry into the trade and other very restrictive trade practices: all designed to enhance the incomes of the guilds' members.

> Fellowshippe… [t]hat then the sayde parties before they move or attempte by course of lawe any suite betweene them or one agaynste the other in that behalf shall firste shewe theyr matter and cause of theyr greefe with the circumstaunces of the same to the Master and Wardenes of the saide arte or mystery of Clotheworkers… to thintente yf by theyr good dyscretions some quiet order and good ende may be taken therin to the satisfaction of such parties and by their assent according to righte and equitie in eschewinge of further trouble and suite of lawe.[10]

9 The proud legal tradition of prolixity in drafting has a long history.

10 Some legal historians have gone so far as to suggest that arbitration may have been the very origin of courts. The theory is that disputants first voluntarily submitted their quarrels to arbitration, and when this procedure had become sufficiently regular, became compelled to do so, at which point the court came into existence.[11] That theory does not fit well, at least in the common law world, with the courts' institution as the performers of the sovereign attribute of doing justice. (That may explain why, in the common law world, there was for so many years, by all accounts, 'a degree of hostility towards arbitration on the part of the courts, a sense that the jurisdiction of the courts was being impaired by this instance of private-enterprise justice'[12]).

11 One theory is that judges were reluctant to lose their prominence as the supreme adjudicators of disputes, which they perceived to be a very real threat as an increasing proportion of standard business disputes were resolved outside the four walls of the court, with judges being resorted to only for the very hard or unusual cases. Another explanation is the perceived deficiencies of in the arbitration process, such as its difficulty of enforcement.[13] Another factor, only infrequently highlighted, is that the original royal courts in England were supported by fees and even produced revenue, such that any procedure which encroached upon the supremacy of the courts entailed a loss of income for judges and for the Crown.[14]

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[10] Ibid.
[11] William Seagle, *The History of Law* (Tudor, 1946).
[12] Stephen, above n 5.
[13] *Raguz v Sullivan* (2000) 50 NSWLR 236, [46].
[14] Casper W. Ooms, 'On the Lawyer's Place in Arbitration' (Speech delivered at the National Meeting of the Business Forms Institute, Chicago, 25 April 1952)

12 However, history records a gradual shift in the zeitgeist of both the community at large, and in particular of judges, towards a more embracing view of ADR. One of the drivers for this was a series of legislative enactments in the 19th Century. Although various forms of the law merchant had been recognised by Parliament since 1353, the shift in attitudes really began with the *Civil Procedure Act* of 1833,[15] which provided that parties who submit to arbitration could no longer revoke their decision except by leave of a court. This was followed in 1854 by the *Common Law Procedure Act*,[16] which formalised arbitration processes and introduced several innovations, including stated cases and compulsory references to arbitration, and was rounded out in 1889 with the *Arbitration Act*,[17] which gave courts powers to enforce arbitration agreements and to support the arbitral process. From this time onwards, 'arbitration [could] no longer be said to be in any sense a covert rival to litigation. Instead it [was] an acknowledged alternative'.[18]

13 A final turning point was the watershed case of *Scott v Avery*[19] in 1856. That decision upheld the validity of a clause making an arbitral award a condition precedent to any right of action under a contract. The decision has been credited with 'overturn[ing] a long history of judicial opposition to arbitration',[20] although in truth the tide had likely started to turn well before then. Probably the most striking thing about that decision was the candid acknowledgement by Lord Campbell of the economic incentive that had previously underpinned judicial hostility to ADR. He said:

> My Lords, I know that there has been a very great inclination in the courts for a good many years to throw obstacles in the way of arbitration. Now, I wish to speak with great respect of my predecessors the judges; but I must just let your Lordships into the secret of that tendency. My Lords, there is no disguising the fact, that as formerly the emoluments of the judges depended mainly or almost entirely upon fees, and they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil. … Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law.[21]

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[15] *Civil Procedure Act 1833*, 3 & 4 Wm 4, c 42.
[16] *Common Law Procedure Act 1854*, 17 & 18 Vict, c 125.
[17] *Arbitration Act 1889*, 52 & 53 Vict, c 49.
[18] Peter McClellan, 'Dispute Resolution in the 21st Century: Mediate or Litigate?' (Speech delivered at the National Australian Insurance Law Association Conference, Hamilton Island, 17 September 2008).
[19] (1856) 5 HL Cas 811.
[20] James Spigelman, 'International Commercial Litigation: An Asian Perspective' (Speech delivered at the Biennial LAWASIA Conference, Hong Kong, 7 June 2007).
[21] *Scott v Avery* (1856) 28 LT OS 207, 211.

This would have been quite a controversial concession to make, which is likely the reason that it does not appear in later, revised reports of the decision.[22]

The more recent past

14 In Australia, ADR has only really come to life in the past 35 years. Advisory, arbitral and other determinative processes existed in the 1970s and earlier. But it was in the 1980s and early 1990s that ADR really burst onto the scene, championed by Sir Laurence Street – the so-called 'Godfather of ADR' in Australia[23] – who saw it as an idea whose time had come. In 1991, he said:

> Arbitration has come of age. Mediation is being taught and practised. The holistic inter-relation between the procedures in the dispute resolution spectrum is becoming more generally recognised and understood. Practising lawyers are now conscious of their professional obligation to advise clients on the selection of the procedures best suited to the case in hand.[24]

15 That endorsement by one of the nation's pre-eminent judicial officers no doubt contributed to its widespread acceptance in the legal community in the late 1990s and then into the 2000s, during which time Australian ADR grew exponentially and become institutionalised as a standard feature of the justice system. I note in passing that not only did Sir Laurence help bring ADR into the spotlight, but he also contributed to the ongoing controversy as to what the 'A' in ADR stands for. Although 'alternative dispute resolution' was the conventionally accepted usage, Sir Laurence preferred the term 'additional', to eschew any suggestion that the sovereignty of the judicial dispute resolution process could be called into question. Since then it has been suggested that the 'A' stands for 'appropriate', 'administrative', 'assisted', 'amicable', and I do not doubt, many other A-words. At the very least it is easy to describe the 'A' as 'adaptable'.[25]

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[22] *Scott v Avery* [1856] 5 HLC 811, 853. See further *Raguz v Sullivan* (2000) 50 NSWLR 236 at [47]-[48].
[23] Rashda Rana, 'How International Commercial Arbitration has Influenced the Growth of ADR in Asia' (2014) 1 *Alternative Dispute Resolution Bulletin* 116.
[24] Sir Laurence Street, 'Editorial: The Courts and Mediation – A Warning' (1991) 2 *Australian Dispute Resolution Journal* 203.
[25] For what may be considered an alternative conception of 'ADR', see Sackar J's decision in *Virginia Nemeth (by her tutor) v Australian Litigation Funders Pty Ltd* [2013] NSWSC 529, particularly at [211], [231] and [301], and the decision of the Court of Appeal in *Nemeth v Australian Litigation Funders Pty Ltd* [2014] NSWCA 198.

16 However despite the credit Sir Laurence has often received for ADR's rise to prominence in this country, there is evidence that the attitudinal shift began earlier still. For example, Rogers J said, in the decision of *Qantas Airways Ltd v Dillingham Corporation* (1985) 4 NSWLR 113, at 118:

> The former judicial hostility to arbitration needs to be discarded and a hospitable climate for arbitral resolution of disputes created. It used to be thought that difficult questions of law or complex questions of fact presented a sufficient reason for relieving a party from the obligation to abide by an arbitration clause... That approach should be treated now as a relic of the past.

It is likely that Australian judges may have taken a cue from international counterparts. Across the pond, Chief Justice Warren Burger was effusive about ADR in a write-up for *Forbes Magazine* as early as 1971:

> There are a great many problems that should not come to judges at all and can be disposed of in other ways – better ways. I can suggest one basic way that must be developed more widely in this course, and that is the use of private arbitration… This is one area we have to enlarge.[26]

The present

17 A current and still uncompleted research study of judicial attitudes has found, by way of preliminary observation, that by and large, 'judges, recognise the advantages of ADR, and that the statutory empowerment of judges to refer parties to ADR (with or without the parties' consent) plays a role in delivering justice that is impartial and discharged with due process, but also is efficient and affordable.'[27] The research, which has been spearheaded by Dr Nicky McWilliam from UTS, and has involved one-on-one interviews across five jurisdictions with over 107 judges – of whom, unfortunately for the researchers, I was one – aims to examine views and perceptions of judges in relation to court-referred ADR. To my knowledge, it is the most extensive study of its kind in Australian history. Another preliminary observation of that study is that much hinges on the culture of the particular jurisdiction, the judicial officer's personal familiarity with ADR, and the resources available to a court within a jurisdiction, suggesting that there is still room for further harmonisation of ADR approaches across jurisdictions.

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[26] *Forbes Magazine*, vol 108, 1 July 1971, at 21–23.
[27] Dr Nicky McWilliam, 'Court-Referred ADR: Perceptions of Members of the Judiciary ' (University of Technology Sydney) (preliminary summary of findings on file with author).

18 Whatever the variations in judicial attitudes, it is clear now that ADR has grown in popularity, acceptance and formalisation over the past 35 years to become a standard feature in Australia's litigation landscape. Indeed the judicial system is heavily reliant upon it, with some courts depending on a 90% plus settlement rate to keep their civil lists operating with reasonable despatch.[28] While most of this heroic work takes place beyond the gaze of the court and is thanks to the work of those in this audience and the professions you represent, the courts have also played an active role in promoting mediation since the first court-referred mediation in Australia 23 years ago.[29]

19 In the Equity Division of the Supreme Court of New South Wales, mediations have been conducted by Registrars since 1996. Approximately 4,500 cases per year are considered to be suitable for mediation, including many civil cases (including appeals). There are exceptions for proceeds of crime cases, cases that have a high likelihood of proceeding to default judgment or have no defendant, all cases in the Adoptions and Protective Lists, and 90 per cent of cases in the Corporations List. Of those cases where mediation is applicable, roughly a quarter each year are compulsorily referred to mediation – two-thirds to court-annexed mediation and the other third to external providers – with the total settlement rate surpassing 50% for the past five years.[30]

20 The Court has also recently piloted a program of using informal settlement conferences in family provision cases. This commenced last year, under the supervision of the Family Provision List Judge, Justice Hallen, who conducted some 159 such conferences, with 35% settling at the conference and another 13% settling in the subsequent three weeks. Other forms of court-ordered ADR – such as arbitration and reference out – have petered out in recent years, and indeed the last referral to arbitration by the Supreme Court was in 2006. Mediation, however, remains in the ascendancy because of its empowering quality in enabling the parties to agree on a position that is acceptable (or, at least, bearable) for

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[28] French, above n 2.
[29] Angela Bowne, 'Reforms to Civil Justice: Alternative Dispute Resolution and the Courts' (2015) 39 *Australian Bar Review* 275, citing *AWA Ltd v Daniels* (unreported, NSW SC, 24 February 1992, Rogers CJ Comm Div).
[30] Supreme Court of New South Wales, 'Provisional Statistics' (29 May 2015) <http://www.supremecourt.justice.nsw.gov.au/Documents/Annual%20Reviews/Annual_Review_2014_Provisional_statistical_data_290515_2.pdf>.

everybody, rather than risking a position that is highly undesirable for at least one of the parties.

21 It used to be thought that mediation should only be ordered with the consent of all parties. However a wealth of research in the past two decades has demonstrated that mediation ordered over even a very strong objection from the parties can still have sufficient prospects of success, as the data show that 'reluctant starters may become willing participants'.[31] This is attributed to the posturing of barristers, who will frequently not want to be seen in court as admitting any weakness in their case, but may well change their tune once the conference room doors have closed. As Justice Hamilton explained in 2001:

> This is an area in which the received wisdom has in my experience changed radically in a period of a few months. A short time ago there was general acceptance of the view… that there was no point in a mediation engaged in by a reluctant party... However, since the power was conferred upon the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered.[32]

22 There has also been a push in various jurisdictions towards expanding the scope for mandatory pre-trial mediation. In 2010, Victoria had a scheme whereby all Supreme Court matters, except for appeals from Magistrates' Courts and VCAT, and judicial review matters, were required to go through at least one round of mediation before proceeding to trial.[33] Unfortunately this regime was short-lived. The Federal Court has since adopted its own 'pre-action protocol', requiring parties in certain types of dispute to demonstrate that they have taken 'genuine steps' toward resolving their dispute prior to commencing it in the Court.[34] NSW attempted its own version of this system in the form of Part 2A of the *Civil Procedure Act 2005* (NSW); unfortunately this was repealed before its commencement date pursuant to a change in government.

The future

[31] James Spigelman, 'Mediation and the Court' (2001) 39(2) *Law Society Journal* 63, 65.
[32] *Remuneration Planning Corp Pty Ltd v Fitton; Fitton v Costello* [2001] NSWSC 1208 [3].
[33] Marilyn Warren, 'ADR and a Different Approach to Litigation' (Speech delivered at the Law Institute of Victoria, Melbourne, 18 March 2009).
[34] Melissa Hanks, 'Perspectives on Mandatory Mediation' (2012) 35 *UNSW Law Journal* 929.

23 So what future for the relationship between courts and ADR in Australia? Clearly, the two systems are now inextricably linked, but not just linked: we need one another. As I have said, the courts would be completely overrun within weeks if ADR were to cease. By the same token, even according to its staunchest advocates, ADR is not a complete panacea to resolve all of the community's disputes.[35] There are a number of reasons for this. First, some types of dispute are, by their nature, unsuitable for ADR, particularly those that affect the public interest in some way, such as uncontested grants of probate, adoption of children matters, winding-up of companies and recovery of proceeds of crime.

24 Second, as many of you will know all too well, sometimes a dispute is simply incapable of resolution by ADR processes, such as where parties to mediation obstinately refuse to settle. This is not necessarily a bad thing. As the former Chief Justice of NSW, the Honourable James Spigelman, pointed out at a 2009 dinner hosted by LEADR (as it was then known):

> We do not live in a Confucian society in which overriding value is attributed to the restoration of social harmony… There are occasions, most clearly in a criminal context, but also often in a civil context, where there is a very real public purpose in proclaiming that one party was right and another party was wrong. The performance of that function in a public manner is, and will remain, an important aspect of the administration of justice.[36]

25 Third, and perhaps most importantly, the existence of a sovereign judiciary is an essential prerequisite to the rule of law and to the proper governance of society. Perhaps the point is best made by the following comments of Sir Laurence Street:

> It cannot be doubted that litigation – the process of formal determination of a dispute by a court – stands clear and positive amongst dispute resolution procedures…[37] [W]e recognise the need for, and we provide, additional mechanisms to assist the court system in the fulfilment of its sovereign dispute-resolving function. But these mechanisms are not, and cannot be recognised as alternative, in the true sense of the word, to the court system.[38]

26 That fact that our society demands that both systems be preserved, and be allowed to flourish, is not the end of the matter. There is much to be said for practitioners from each sphere becoming as familiar as possible with the practices and insights of their counterparts

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[35] *Kulukundis Shipping Co v Amtorg Trading Corp*, 126 F 2d 978, 987b, 32 (2nd Cir. 1942).
[36] James Spigelman, 'Address to the LEADR Dinner' (Speech delivered at the University and Schools' Club Sydney, 9 November 2000).
[37] Sir Laurence Street, 'The Language of Alternative Dispute Resolution' (1992) 66 *Australian Law Journal* 194, 194
[38] Sir Laurence Street, 'The Court System and Alternative Dispute Resolution Procedures' (1990) 1 *Australian Dispute Resolution Journal* 5.

over the fence. Legal practitioners, in particular, have much learn to from their ADR colleagues. To borrow another quote:

> We must understand the symbiosis of their relationship with the court system, we must study their techniques, and we must be ready to practise them where appropriate if we lawyers are to discharge to the full our obligation to serve the peace, order and good government of our nation through the administration of justice.[39]

27 Factors such as commercial awareness, the need for swift and discreet resolution of disputes, and for some forms of ADR, emotional and psychological factors, have always been the particular forté not of lawyers but of ADR practitioners. For this reason the legal profession should be always on the lookout for developments happening at the coalface amongst those who make daily use of ADR procedures. Many of these practices have so much to recommend themselves that they will almost certainly be mirrored by legislative enactments in due course. For example, early neutral evaluation – the process whereby parties to a dispute present arguments and evidence to a dispute resolution practitioner in an attempt to resolve the matter at an early stage and get a non-binding feel for the strength of the case – has already proved popular, with some 36% of Fortune 1000 companies participating in a US study in 2013 stating that they had had recent experience with the procedure.

28 Another innovation is evaluative mediation, where the mediator assists the parties to reach a resolution by pointing out strengths and weaknesses of their case from a legal perspective, and makes non-binding recommendations as to the outcome of the issues.[40] This is distinct from 'facilitative mediation' (where the mediator structures a process for the parties to reach a mutually agreeable resolution), and from 'transformative mediation' (which involves the ideals of empowering parties to reconcile as much as possible by recognising the legitimacy of each other's viewpoints).[41] Many mediative models are in fact combinations of some or all of these approaches.

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[39] Ibid.
[40] National Alternative Dispute Resolution Advisory Council, 'Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution' (September 2003) <http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF>.
[41] Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative and Transformative Mediation' (14 July 2015) Mediate <http://www.mediate.com/articles/zumeta.cfm>.

29 There has also been a surge in various forms of 'collaborative' approaches to ADR, under the banner of 'collaborative law' and 'collaborative practice'. Collaborative law in its original form is premised on a contract that prohibits parties from litigating during the negotiations, which are a four-way meeting between clients and their lawyers, and typically comes with the proviso that legal practitioners engaged in the process agree not to represent their client in subsequent proceedings should the negotiations fail. There are suggestions that this form of ADR is better suited for certain types of disputes – such as family disputes[42] – than others – such as building and construction industry disputes.[43] And once you bring in other professionals such as psychologists, financial planners, child consultants and coaches, collaborative practice evolves into another new form: 'interdisciplinary collaborative practice'.

30 In short then, things have come a long way since the dark days where arbitrators were feared and distrusted as shadowy figures operating in a realm beyond the court's reach. For all we know you may still be shadowy figures, but the courts have come to rely on your pragmatism, ingenuity and skill in resolving the vast majority of the nation's disputes.

[42] Family Law Council, 'Collaborative Practice in Family Law' (December 2006) <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Collaborative%20Practice%20in%20Family%20Law.pdf>.
[43] Henry Kha, 'Evaluation of Collaborative Law in the Australian Context' (2015) 25 *Australian Dispute Resolution Journal* 178.