> has been a further increase of no less than 50% to an overall total of $NZ 4888 million . . . and the figures I have been given show that exports in each direction are now quite close to being in balance. . . . in fact in 1988 Australian manufacturers had the comfortable knowledge that one day in five was occupied in providing exports for the New Zealand market across the Tasman.

Sir Owen said that the harmonisation concept need not result in the laws of the two countries being mirror images but rather in 'the practical and sensible aim [of] the achievement of compatability'. □

additional dispute resolution and the courts

> Arguments are to be avoided; they are always vulgar and often convincing.
>
> Oscar Wilde, *The Importance of Being Earnest*, 1895.

alternative dispute resolution. Professor Helen Gamble, part-time Commissioner of the NSWLRC and former Chairman of that Commission, proposed alternative dispute resolution as an appropriate subject for a joint inquiry by all law reform commissions. Professor Gamble was speaking at the 14th Australasian Law Reform Conference.

She said that the techniques of alternative dispute resolution (mediation, arbitration and conciliation) are being increasingly used as alternatives to the normal court system.

> This trend is likely to accelerate as the economic and management demands largely responsible for it increase. As decisions about justice are made to depend more upon management principles it is likely that even more cases will be turned away from the Courts. The ability of the community to fund litigation will inform policy development as much as traditional views about public responsibility for ensuring the provision of due process. In this climate the use of alternative dispute resolution will increase. It is therefore important for there to be a thorough understanding of the processes and of the implications of its extended use. . . . The task for the law reform commissions is to examine the relationship between the court system and alternative dispute resolution.

The NSWLRC received a reference to inquire into limited aspects of alternative dispute resolution in November 1987. It was asked to enquire into and report on the need for training and accreditation of mediators and any related matter. Professor Gamble said that the outstanding feature of the reference has been the rapid rate of change even since 1987. So much so that it is now very difficult the keep abreast of all the new public and private initiatives.

Some of the organisations participating in alternative dispute resolution are,

- community justice centres
- the Australian Commercial Disputes Centre
- Unifam, Family Mediation
- Conflict Resolution Network
- private legal practitioners (Barristers and Solicitors)
- a retired judge of the Family Court
- Consumer Claims Tribunal.

Many groups have started to provide training in alternative dispute resolution, including:

- University of Sydney Law School
- University of Technology Law School
- Conflict Resolution Network, including Macquarie University
- personnel sections of many government agencies and private firms.

Professor Gamble said that the sorts of occasions on which alternative dispute resolution is considered particularly appropriate include:

- where the amounts of money involved are small
- where the dispute does not involve complex questions of law
- where there are detailed questions of fact outstanding between the parties which would take large amounts of court time to resolve
- where the parties cannot walk away from the dispute, but know that they must continue in the relationship
- where the dispute is not justiciable
- where the dispute is only part of the problem between the parties.

In her concluding remarks Professor Gamble said

> The field of ADR is well developed and capable of further expansion. It has also proved responsive and adaptable to change and more than willing to undertake new work. By comparison the capacity of the court system to change seems limited, perhaps because the courts have not attracted the same amount of support as has been given to the development of ADR in recent years. The differences between the two institutions are apparently not in the levels of financial support voted to them. ADR has never attracted significant funding. One of the most significant features of the ADR movement is that it has not been favoured financially. Most exponents have either relied on the energy and enthusiasm of volunteers with minimal government support or have made themselves financially viable by relying on user-pay programmes. There is a need now to study more fully and to try to understand the services that can be offered by the two institutions.

The former NSW Chief Justice, Sir Laurence Street, also addressed the Conference. The following is an edited version of his stimulating address.

It is my purpose in this address to co-relate the functions of the court system and ADR procedures in the resolution of disputes.

From the tribal chieftain on through King Solomon deciding the paternity suit on to the great courts of our Western democracies, the function of adjudicating, of deciding disputes, is an exercise of an essentially sovereign character.

In the United States and other constitutional democracies that embrace the concept of separation of powers the judiciary is just as much an integral part of sovereignty as it was part of King Solomon's authority.

What I have said thus far is equally valid in totalitarian states as it is in western democracies. Power to adjudicate lies with the sovereign, that is to say the state.

I take, then, as the indispensable starting point of co-relating the court system and ADR procedures, the proposition that the judicial institution, with its inherent sovereign quality, cannot be confronted by any alternative mechanism. We cannot, for example, countenance any alternative parliament or legislature; we may provide, and indeed we do provide, additional or delegated mechanisms whereby to legislate or regulate. Again, we cannot countenance any alternative to the executive authority of the sovereign such, for example, as a military executive power structure; in this instance, too, we recognise additional or delegated mechanisms such as the Police Force to aid the exercise of sovereign executive authority. And so it is with the judicial branch of government, the court system; we 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, I repeat are not, and cannot be, recognised as alternative, in the true sense of the word, to the court system.

The importance of affirming the sovereign nature of our judicial institution is that this carries with it acknowledgement that the judiciary is the fiduciary custodian of our rule of law. It has the responsibility to enunciate, to apply and to require the enforcement of the rule of law. This is its true role in a democracy. It has become custom-

ary for the judiciary to fulfil this function through the medium of deciding disputes the resolution of which calls for the enunciation and application of the law. But the judges are not, nor should they be, obliged to be available to decide every dispute that may arise in society.

The judicial resource is too precious to be spread too thinly. This is a very real risk in modern democracies. So pressing, and so indeed so valid, is the demand for equal justice for all, that judges have faced an expectation that they will be all things to all people in the realm of dispute resolution. Let me give an example of the point I seek to make. The conventional role of the judge as the exponent of the law is seen at its best in a jury trial. The judge directs the jury on the law and the jury decide the dispute. Indeed in the United States trial judges do not sum up on the facts at all. As pressures of case lists have created a need for more expeditious and economical hearings, the cumbersome jury trial is in this country, and in some other common law countries, being phased out and replaced with a fact-finding judge. A parallel process can be seen in the abandonment in this country of the system of lay justices and the establishment in lieu of fully professional magistrates' courts.

The extension of the role of judges as universal fact finders is both a logical and a not surprising development. Judges are professionally the best equipped to decide disputes. But here lies the risk of overtaxing our judicial resources. It has become recognised in the last couple of decades that society must evolve and encourage supportive, additional processes that will enable the size of the judiciary to be contained and hence the quality of its individual members to be preserved on the highest plane. Only thus can society enable the judges to fulfil their essential task of maintaining, interpreting and seeing to the enforcement of the rule of law.

Where, then, do the ADR procedures, that is to say additional dispute resolution procedures, find their accommodation with the judicial institution? There are, I suggest, two categories to be considered in this regard, the first being arbitration (of which I identify four types) and the second being other consensual processes (which have endlessly variable forms). I take each of these categories in turn.

international arbitration. I have referred to four types of arbitration. The first is international commercial arbitration. The resolution of a dispute between entities that belong to two different sovereign nations does not inherently fall within the exclusive sovereign authority of either nation. It is thus to be distinguished fundamentally from the mechanisms that exist for the resolution of domestic disputes such as I have thus far been discussing.

conventional arbitration. The second type of arbitration I put before you is the conventional arbitration of a dispute between two entities within the domestic arena of a nation. Such arbitration is ordinarily regulated by statute in point of procedure, and the awards that issue are ordinarily capable of being enforced through the judicial process. Moreover, the judicial institution exercises to a greater or lesser degree facilitative powers in relation to the conduct of such arbitrations together with enforcement and some appellate powers in relation to awards. Invariably the originating ingredient in the initiation of an arbitration of this character is that the parties have made a contract to abide by the decision of the arbitrator. The contract may be a clause in their original agreement. It may be a specific ad hoc agreement reached once a dispute has arisen. In either event the arbitration is a contractual process chosen by the parties as the path to follow in resolving their dispute. So far from its being a procedure alternative to litigation, it is a procedure that exists within the purview of, and will be supported and enforced by, the court in exactly the same way as any other contract, subject of course to the regulatory provisions of any relevant statute.

is the arbitrator a judge? It is at times said that an arbitrator in an arbitration of this character is an alternative judge. I entirely reject this proposition. The arbitrator may have a duty to act judicialaly, but so do many other persons in authority in

our society. The arbitrator may be bound to apply the law, but once again so are many others. In essence the arbitrator is contractually chosen by the parties to decide their dispute. Both the powers and procedures of the arbitrator are on an entirely different plane from the powers and procedures of a court of justice. He or she does not sit with the wide-ranging protection, power and authority that are a part of the ordinary function of a judge — protection from contempt and civil liability, power to control and direct the course of proceedings by personally enforceable orders.

In short, arbitration arising from a contract between the disputants is a procedure accepted within society as a means by which disputes can be resolved by the working through of a contractual process that can give rise to a legally enforceable result. It operates, I repeat, under the aegis of the courts, not as an alternative. The last resort, as well as the enforcing authority both of the process and of the result, lies in the hands of the courts.

expert appraisal. The third type of arbitration I identify originates from the same source as the second, or conventional, type, that is to say from a contract between the disputants. It involves the procedure of submitting the dispute to an expert appraiser. Classic examples are the 'look and sniff' arbitrations so common in London in resolving disputes in the commodities trade. Expert appraisal is coming to be used increasingly in this country in a variety of circumstances where the disputants don't wish to incur the expense and trouble of a cumbersome arbitration and agree to be bound by the summary decision of a trusted neutral. For presently relevant purposes it is important to recognise this procedure as nothing more or less than a contract and in consequence as involving obligations that, in the last resort, will be cognisable before, and where appropriate enforced by, the courts. It is no more a true alternative to the sovereign judicial process than a contract to pay a sum of money is a true alternative to a judgment for payment.

use of referee. The fourth type of arbitration I should mention is not really arbitration properly so-called. It is a procedure compulsorily imposed on the parties by the court as an aid to enabling the court to discharge its function of resolving a dispute that has been brought before it. It originates in an order of the court requiring a referee (often miscalled arbitrator) to hear the dispute, reach a decision and report back to the court so that the court can then consider the reported findings and enter such judgment as it considers appropriate. It requires no argument to expose the additional or supportive character of this procedure. It is in every sense a subordinated, delegated process imposed on the parties by order of the court.

mediation. I turn, then, to the other of the two categories of procedures that commonly fall within the classification of ADR. This comprises an almost endless variety of procedures that parties to a dispute may agree to adopt in order to achieve its resolution. Some common forms are emerging such as senior executive appraisal, minitrial and the like. They can all, however, for present purposes be subsumed under the description of mediation, that is to say a structured process which is chosen by the parties as the means through which to reach agreement for the resolution of their dispute. As with ordinary domestic arbitration, the initiation of these procedures, that I shall describe by the global word 'mediation', is essentially the agreement between the parties to meet or exchange views in the hope of achieving a settlement. It is throughout an entirely voluntary, without prejudice process. Either party is free to walk away from the negotiations at any stage. Of course if it results in an agreed settlement, then that is documented and becomes contractually binding. The mediator as such does not decide any aspect of the dispute or purport to impose any determination on the parties. Inherent within the personal dynamics of a structured mediation is a significantly enhanced prospect of satisfactory agreed resolution of the dispute.

mediation and judicial determination. What is important for presently relevant purposes is to note the absurdity of describing mediation as an alternative to judicial determination. The relationship between the two is not lateral, that is to say it does not involve the disputants deciding to follow the mediation line *rather than* litigation. The relationship is between described as linear, that is to say the disputants agree to participate in a properly structured mediation as a step towards achieving resolution which, if unsuccessful, can be followed by litigation. Statistics show that the overwhelming majority of disputes taken to mediation are resolved at that stage. Of the few that remain unsettled a significant proportion have been narrowed with consequent saving in the costs in the ensuing litigation. Mediation is, in short, a step along the way — hopefully the last step — but certainly not a step alternative to the ultimate availability of recourse to sovereign judicial power as the dispute-resolving entity.

mediation explained. As mediation is a comparatively novel concept in common law countries and is not yet universally understood, I shall, before moving to the comparatively brief topic of international commercial arbitration, take a few moments to suggest a reason for the recency of its emergence and to explain in very broad outline its anatomy.

good faith vs trial of strength. The Islamic and Oriental cultures differ from Western cultures both in the structuring of commercial relationships and in the approach to resolving disputes. Commercial relationships in the former cultures are structured by a philosophical approach in which good faith plays a major part. In Western cultures precision in documentation and the application of principled legality govern the structuring of commercial relationships. In the realm of dispute resolution Islamic and Oriental cultures eschew so far as possible externally imposed determinations and strive to achieve a negotiated, consensual solution. Western cultures have in the forefront a confrontationalist approach, a trial of strength between the disputants by adversarial or inquisitorial process.

east meets west. These cultural differences have existed over the centuries with little inter-action. There has, however, in the last two or three decades been a dramatic shift in the pattern of international commerce. The Islamic nations of the Middle East have acquired power and wealth. They have become major investors in the West and major purchasers of goods and services from the West. In Asia the economic power of Japan, South Korea and Taiwan has been accompanied by an enormous surge in international commercial activity between those countries and the West. This interaction has given a new significance in the eyes of Western lawyers to the good faith element in commercial relationships and the consensus-oriented approach in dispute resolution. In the result we have seen demonstrable shifts in some of the doctrines of contract law in the West. And we have seen the advent of mediation as a dispute resolving process. I believe that it was this rise in status of Islamic and Oriental nations that, through cross-fertilisation, ushered in for the West the age of ADR.

It has been my purpose thus far to correlate the sovereign judicial function and additional dispute resolution procedures and to synthesise them in the part that they play in domestic dispute resolution. At the outset of this address I drew a distinction between the mechanisms for resolving domestic disputes (which I identified as the major topic for consideration) and the mechanisms for resolving international commercial disputes. it is to these latter mechanisms that I now turn.

international disputes. International commercial and maritime disputes are a broad category in which, leaving aside legislative definition, the parties belong to different nations. They do not, as I said earlier, fall within the exclusive sovereign authority of either nation. Their resolution accordingly requires the creation of rules and structures directed to procuring determinations that, by principles of international law, will be recognised between

sovereigns and accorded a greater or lesser degree of enforcement direct or indirect. There is here no element of a sovereign exercising the power of sovereignty by adjudicating in disputes within the realm.

Contracts between two mutually foreign entities almost invariably provide for the resolution of disputes through arbitration. Not all international engagements include an arbitration agreement and, for completeness, I should briefly touch on two categories of these in conclusion. The first such category is the category recognised as falling within the general scope of the law of Admiralty — a body of jealously guarded fictions and principles that enjoy international acceptance. Most notable amongst the fictions are the personification of a ship for the purposes of an action in rem and the concept of ambulatory (perhaps navigatory would be more fitting) sovereignty inhering in a ship.

The remaining category comprises international commercial contracts that do not include an arbitration agreement. In disputes within this category a sovereign may, in accordance with principles of private international law, extend the sovereign power by entertaining proceedings to which a foreigner is a party.

In the second part of this address I have skimmed over the field of international commercial and maritime disputes. I have done so for the purpose of showing that their relationship to the sovereign judicial power of one or other of the nations involved differs markedly from that relationship in the case of domestic disutes. It is in the field of domestic disputes that there is concern and lack of understanding about the role of ADR procedures. I have sought to dispel that concern. Increasing resort to arbitration, use of expert appraisals, references sent out by the courts and above all properly structured mediation are part of society's overall resources for resolving disputes. □

law reform in queensland

> The Queenslanders are loud-mouthed confident colonists who have justified their boasting by their action.
>
> Marcy Muir quoting Anthony Trollope in *Anthony Trollope in Australia,* Adelaide, 1949

The Queensland Law Reform Commission (QLRC), like many other institutions in the State, is assessing its future role and functions in the wake of the Fitzgerald report which recommends the establishment of two permanent Commissions:

- an Electoral and Administrative Review Commission; and
- a Criminal Justice Commission.

These two Commissions will take over law reform in the areas of administrative law, and criminal law, previously within the functional area of interest of the QLRC. The report justified this more on the basis that there is a special need for administrative reform and 'the peculiar nature of the criminal law'.

The report does deal with the future role of the QLRC:

> The Law Reform Commission in the past has addressed and will continue to address areas of enormous potential significance to the community and will deal with a variety of legal topics and initiatives of major significance in the general law. Its resources for that should be enhanced. In the two respects mentioned, however it is proposed that separate bodies be established to consider appropriate law reform.

The Electoral and Adminstrative Review Commission is to monitor the sufficiency of the QLRC's resources.