ADR in Australia
From Indigenous Culture to Co-option by Courts

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From the mainstream to the Margins and Back Again

• Looking beyond the Aussies stereotypes
  – Stoic self-reliance
  – Colourful characters
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Dancing with Crocodiles?
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You Call That a Knife?
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*From the Mainstream to the Margins and Back Again*

- Prominence of community-focussed processes
- Indigenous Dispute Resolution
- Industrial relations – conciliation with arbitration in the background
- Community justice & ADR
- Increasing interest from government & courts
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Indigenous Dispute Resolution

- Distinctive notions of:
  - family – kinship rules
  - country – it literally sustains life
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Indigenous Dispute Resolution
Mediation – ‘Talking under the mango tree’
Sauve, 1996
A transformative, therapeutic focus
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*Indigenous Dispute Resolution*

- Similarity & diversity
- Knowledge of the local stories created an obligation to care for the land
- Smallness of the group created extreme loyalty

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Indigenous Dispute Resolution
• Public airing of grievance
• Retaliation discouraged
• Social pressure – close-knit communities
• Usually a jury of Elders
• No rules of evidence

Behrendt & Kelly,
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*Indigenous Dispute Resolution*

- Informal ‘circle’ culture
- Use of restitution
- Settlement discussed with disputants
- Informal, communal appeal available
- Spearing – when used, done symbolically

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Conciliation in Industrial Relations

Prominence of trade unions in colonial Australia
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Conciliation in Industrial Relations

Shearers Strike - 1891

Military Parade in front of the Barcaldine Shearers Camp
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Conciliation in Industrial Relations

- Conciliation & arbitration power included in the Australian Constitution - 1900
- Response to industrial turmoil of the 1890s
- Part of a broader compact – a living wage, closer control of wages & prices, protectionism
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Conciliation in Industrial Relations
Justice Higgins – ‘the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lockout.’
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These examples suggest a strong commitment to relatively inclusive DR processes
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Community Justice Movement

- 1970s & 1980s - wave of enthusiasm for ADR
- Unusual allies – supporters & critics of the legal system
- Community justice centres
- Community legal centres
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Community Justice Movement

- Perceived Advantages of Mediation & ADR
  - Greater user choice
  - Flexibility
  - Potential for fairer outcomes
  - Non-confrontational processes
  - Parties can be heard & participate
  - User ownership & control of the process
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‘Although all the pieces of the jigsaw are still present, the picture has changed.’ Astor & Chinkin, 2002

- Institutionalisation
- Court-connected ADR
- Statutory schemes
- Training, standards
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Increasing judicialisation of ADR

- 1990 – very little reference to mediation in legislation.
- 2000 – 104 such references
- Legal profession – increasingly interested
  Tom Altobelli, 2000
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Increasing judicialisation of ADR

- 2005 – 118 statutory schemes listed

*Spencer & Altobelli, 2005*
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Alexander– Dispute Resolution Framework– 6 trends
  – Institutionalisation
  – Regulation
  – Legalisation
  – Innovation
  – Internationalisation
  – Co-ordination
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Current (Continuing) Controversies
Family Dispute Resolution
• From promotion to prescription
• Primary Dispute Resolution
• Continuing concerns relating to domestic violence
• Establishment of Family Relationship Centres
  – Moving the focus well & truly beyond lawyers
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Current Controversies

Mediator Accreditation
- Scheme introduced in 2008 – after a decade of discussion & debate
- Although voluntary, now a *de facto* requirement
- A long, continuing process
- Why only mediators?
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Current Controversies

The emergence of industry-based dispute resolution

• Dramatic growth since the early-1990s
• ‘Fabulous monsters’
• How can such schemes best be held accountable?
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Current Developments

*Inquiry Into ADR & Restorative Justice*

- Parliament of Victoria – May 2009
  - Call for agreed performance measures & data collection – also need more research
  - Need to develop an ADR Framework
  - Services, community education, referral protocols, cross-cultural training
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Current Developments

Strategic Framework for Access to Justice

- Federal Government – September 2009
- 5 Access to Justice Principles
  - Accessibility
  - Appropriateness
  - Equity
  - Efficiency
  - Effectiveness
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Current Developments

*The Resolve to Resolve*

- National ADR Advisory Council – November 2009
  - Promote greater awareness & use of ADR
  - Genuine attempts to resolve prior to litigation
  - Costs orders, obligations on parties & lawyers
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Current Developments

The Resolve to Resolve

• National ADR Advisory Council – November 2009
  – Develop a National ADR Protocol
  – Promoting public & professional awareness of ADR
  – Provide a platform for On-line DR
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Engaging Indigenous Communities

NADRAC

- Indigenous Dispute Resolution and Conflict Management - January 2006

Dept of Aboriginal & Torres Strait Islander Policy & Development

- Protocols for Consultation & Negotiation
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Future Prospects

• Promoting ADR scholarship
  – focus more closely on education & research
• Specialist courts & tribunals – often with more of a community focus – a form of ADR in itself?
• Educating decision-makers to be effective in facilitative roles
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Thanks for listening

If you have any comments or questions, please email me – j.giddings@griffith.edu.au