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**NEGOTIATED SETTLEMENTS WITHIN A
STATUTORY FRAMEWORK:
CAN PRIVATE AND PUBLIC INTERESTS BE
RECONCILED UNDER CONSUMER
PROTECTION LAWS**

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ABSTRACT

The object of this research paper is to establish whether or not private and public interests in respect of negotiated settlements within statutory frameworks, such as those under the Human Rights Act 1993 and Privacy Act 1993, can be reconciled.

I therefore examine the ideology and philosophy behind ADR and evaluate it in the context of both statutory bodies. I argue that the focus on dispute settlement and substantive outcomes under the respective legislation undermines the effectiveness of ADR as an alternative form of social reform. In particular, I submit that without jurisdictional principles for process choice and a transformative approach to mediation, the individualised and privatised nature of settlements within these statutory frameworks causes difficulty in reconciling both private and public interests.

The paper concludes that the present approach to ADR, including mediation under consumer protection laws, creates a dilemma in reconciling private and public interests because it is constrained by legal norms rather than community norms. Once the latter are recognised as a legitimate challenge to legal formalism then private settlements may serve public ends and both private and public interests can be reconciled.

Word Length

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 13, 686 words.

I INTRODUCTION

The purpose of this paper is to consider the philosophy underlying alternative dispute resolution ("ADR") processes under consumer protection laws and to evaluate the use of ADR within two specific statutory frameworks, namely: that of the Human Rights Commission and the office of the Privacy Commissioner. In particular, the paper searches for answers to questions arising out of my observations of ADR practices within a statutory framework having worked in both statutory bodies. Those questions relate to the ad hoc manner in which ADR provisions are currently being utilised and the obsession with procurement of settlements rates in respect of complaints to either of the offices.

The central thesis of this paper is to establish whether the private interests of individuals, in terms of negotiated settlements under consumer protection laws, can be reconciled with the public interests of our larger society.

At first, a cursory examination of the objectives of ADR would lead us to believe that the two opposing interests are themselves in conflict. However, upon closer evaluation of the underlying philosophy of ADR in respect of consumer protection laws, it would appear that this need not necessarily be the case. The answer, it is submitted, lies in both identifying the philosophy of the practice of ADR in these institutions and then establishing jurisdictional principles for process choice so that both interests are reconciled.

Accordingly, Part II of the paper provides the reader with background information concerning the ideology of ADR within a statutory framework, the goals of civil justice under consumer protection laws, the right of access to legal redress and the value of mediation of social conflict.

Part III of the paper then broadly outlines in an informative way the approach taken to ADR provided by the State under the Human Rights Act 1993 and the Privacy

Act 1993, together with a synopsis of the decision making powers in those informal forums and the rationale relating to compliance without enforcement.

Part IV highlights significant issues regarding procedural justice which relate to process choice, role conflict, fairness and confidentiality.

Part V specifically addresses issues concerning settlement outcomes under the respective Acts in relation to disputants' choices, empowerment and recognition, and the dilemma of regulating ADR in terms of education, accountability and public policy.

In concluding, I submit that the philosophy of ADR within a statutory framework should not merely be that of ensuring a "just settlement" but should ensure the validation of both disputants' perspectives and overlying public norms and values. This can be achieved by developing jurisdictional principles for "process" choice which are client-centred and by adopting a transformative approach to mediation which reflects empowerment and recognition and allows reconciliation of the disputants' perspectives with that of the larger social environment.

In my view, it is time to move away from the problem-solving approach to ADR with its primary focus on dispute settlement. In particular, a transformative model of ADR permits a more realistic approach to disputes because it emphasises human relationships and allows disputants to take responsibility for both the process and any resolution that may result. However, a focus on reconciliation rather than settlement may also require a shift in public perception, namely towards reconciliation and away from resolution, before private and public interests can be reconciled and truly meet the objectives of the legislation.

II IDEOLOGY OF ADR

This part of the paper sets out broadly the ideology behind the ADR movement in respect of the goal of civil justice that is central to the objectives of consumer protection laws. In particular, the rhetoric and reality of informalism and the protection of rights are examined to assess the effectiveness of ADR in relation to disputants and the dispute resolution movement as a whole.

In this respect, Part II highlights important issues that are raised about the effectiveness of ADR especially questions regarding the policy grounds of utilising ADR processes for consumer rights. In doing so, I examine whether private substantive rights of consumers are reconcilable with public substantive rights enforceable by the State on behalf of the community.

I believe that it is important that the ideology behind ADR is re-evaluated to determine whether or not the civil justice goal of "rights protection" is fulfilled under consumer protection laws and how ADR processes might assist in furthering such a goal.

A. *Ideology of Informalism*

According to Harrington¹ the catalyst of judicial reform and improvement in the administration of justice was a result of early reforms based on sociological jurisprudence which was hostile to legal formalism. She stated that Pound argued that "legal formalism failed to produce agreements based on shared underlying values and therefore it encouraged the instrumental use of law."²

¹ C Harrington *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (Greenwood Press, Westport, Connecticut, 1985).

² Above n1, 9.

Despite early reform of the law favouring delegalisation of dispute processing, the reform was not considered a substitute but rather a move to complement the existing legal system to ensure a more balanced approach between formal and social justice.³ In particular, the previous legalistic procedures were idealised to become non-adversarial, rehabilitative and to be used in a preventive way to resolve conflict as a form of social construction.⁴

It was argued that the legitimacy of the delegalisation reform was based on informal alternatives to the structured procedures characteristic of legal formalism.⁵

Proliferation of ADR processes followed the early reform by adopting a thesis that the adversarial structure and adjudication function of the courts prohibited the effective resolution of party-related disputes.⁶ It is interesting to note how readily that ideology was accepted; yet without empirical examination of the efficacy of ADR as an alternative.

New administrative institutional structures were created to implement informal dispute processing so transforming the previous judicial channels of access to justice. The aim was to enhance administration efficiencies but at the same recognise that the "law would be a more effective socializing agent if citizens participated more directly in informal proceedings".⁷

Thereafter, alternative administration processes continued to grow because of an increasing use of administration litigation to deal with matters which previously had been addressed by private contractual negotiations.⁸ Use of ADR processes appear to have increased following a reduction in private dispute processing historically provided by churches, schools and private associations.⁹ The new

³ Above n1, 10.

⁴ Above n1, 14.

⁵ Above n1, 15.

⁶ Above n1, 16.

⁷ Above n1, 22; Below n34, 277.

⁸ HH Perritt "Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes" (1987) 14 Pepperdine L Rev 863, 865.

⁹ Above n1, 31; compare below n34,276.

processes included arbitration, fact finding and mediation which were thought to be more suited to "rights disputes" where disputants' conflicting interests required reconciling.¹⁰

Harrington states that a proactive dispute process, which has the capacity to prevent and resolve conflict, is one of the main themes in the ideology behind the delegalisation reform.¹¹ She notes¹² that party-related disputes are complex and require a more flexible proactive decision making process to allow the disputants' role to be expanded in shaping both process and outcome, stating:¹³

The dispute-processing alternative substitutes the *disputants' capacity* for the court's. The *structure of mediation*, distinguished from adjudication, enhances the capacity of disputants to reach a consensus on future behaviour, because it involves them more directly in the negotiation and the construction of a settlement. The structure of mediation is characterized as being a more congenial environment for expressing underlying issues in conflicts between related parties. *The function of mediation*, reformers maintain, facilitates the resolution of these conflicts by drawing on the sanctions and incentives within the disputants' relationship.

One of the stated objectives of ADR was to provide an alternative process outside of the formal system of justice that provided faster, cheaper and less formal access to legal redress for disputes typically of an interpersonal or neighbourhood variety although this now appears to have been extended to "rights".

ADR processes, and in particular voluntary mediation, appear on the evidence to "make distinct contributions to the satisfactory administration of justice".¹⁴ This is evidenced by increased user satisfaction and achievements experienced by mediation clients.¹⁵ It seems that the core of the claim made for mediation is that

¹⁰ Above n8, 865.

¹¹ Above n1, 32.

¹² Above n1, 30-31.

¹³ Above n1, 32-33.

¹⁴ S Goldberg, E Green & F Sander *Dispute Resolution* (Little, Brown & Co, Boston, 1985) see ch 13, p 533.

¹⁵ Above n14, 532.

agreements generated by mediation are perceived to be fair, equitable and complied with over time, while at the same time "permit a more complete airing of grievances and improve relationships between disputants".¹⁶

Harris suggests that the characteristics of an effective consumer dispute resolution process would be: informality, accessibility, ease of use, speedy resolution, minimum expense, procedural fairness, independence and impartiality together with ensuring compliance with outcomes.¹⁷ It is interesting to compare both the Human Rights Commission and the Privacy Commissioner's Office and note that each comply with the majority of the characteristics listed.

In addition, Harris suggests that surveys indicate a high level of compliance with ADR outcomes.¹⁸ However, there is also some evidence that enforceability of outcomes remains a problem in all ADR processes.¹⁹

While ADR processes are perceived to make the justice system more efficient, accessible and responsive to the needs of consumers by providing a forum which is less formal and intimidating, the protection of rights may be overlooked in the resolution of private differences. In some circumstances, the adversary process may be the better method for protection of particular rights in which case we need to reevaluate rights as social constructs.

Alternatively, "rights" may be looked at as solely private possessions with no necessary public dimensions. If that is the case, we need to consider how the public interest might best be served by reviewing the policy that lies behind ADR within a statutory framework. This will largely depend on the underlying philosophy of ADR processes that are made available and the objectives of the disputants. Nevertheless, Harrington is of the view that when the exercise of rights becomes an

¹⁶ Above n14, 532-533.

¹⁷ W Harris "Consumer Disputes And Alternative Dispute Resolution" (1993) 4 ADRJ 238, 240.

¹⁸ Above n17, 249.

¹⁹ Above n17, 249.

expression of social problems then "rights are one context or framework in which social problem solving takes place".²⁰ She states:²¹

... substantive demands for social justice have been overshadowed by experimentation with techniques of alternative dispute resolution. This focus on dispute techniques has separated the politics of problem solving from the politics of taking rights seriously. ... Taking rights seriously can mean taking problem solving seriously. We need to turn our attention to the substantive rights and claims for justice that are expressed in the dispute-processing context. ...

It is also argued that "[t]hough not without an ideology, ADR has never had a unified theory to explain what it accomplishes and how it works".²² Much descriptive analysis has, in recent years, been undertaken at a macroscopic level but few appear to have analysed where ADR fits in terms of the microscopic structure of a dispute. Conversely, there has been minimal macroscopic analysis of the jurisprudence of dispute resolution.

B. Goals of Civil Justice

It is apparent that ADR's central philosophy appears to be built upon the creation of trust between disputing parties. But what actually is a dispute? Lieberman suggests "a dispute arises only when the one against whom the complaint is lodged fails to respond satisfactorily to the aggrieved party. And a 'legal dispute' arises only when the claim is grounded in a legal entitlement".²³ How then do disputes fit within the civil justice system?

²⁰ Above n1, 173.

²¹ Above n1, 173.

²² JK Lieberman & JF Henry "Lessons from the Alternative Dispute Resolution Movement" (1986) 53 U Chi L Rev 424.

²³ Above n22, 426.

Sherman²⁴ notes that there is a compelling need to improve the public image and quality of the civil justice system which has meant that the courts have had to dramatically change the way they function in order to regain public trust and confidence.²⁵ This has required a shift in focus from that of changing the substantive law to actually improving the quality of the justice system overall.²⁶

In this regard, the aim of ADR should be to avoid separating out into "ideological camps over controversial policy issues such as adequacy of access to all citizens,... and the wisdom of channelling more cases into alternative dispute resolution (ADR)".²⁷

Instead, I believe we must look at both process issues and the microscopic nature of each dispute. This should start with an evaluation of the micro context of a dispute, in terms of both the disputants' perspective's and the wider society, so that we understand how both private and public interests can be reconciled under consumer protection laws.

First, however, it would appear that there are several societal goals underlying the debate in respect of civil justice reform and it is therefore necessary to determine where consumer disputes fit in, in the wider jurisprudential sense. The goals of civil justice have been identified to include: resource allocation, social justice, fundamental rights protection, public order, human relations, legitimacy and administration.²⁸ It is the goal of "rights protection" which I wish to address specifically in this paper.

Individual protection of fundamental rights within the civil justice system has been considered a prime goal of New Zealand in recent years and this is exemplified by

²⁴ EF Sherman "A Process Model and Agenda for Civil Justice Reforms in the States" (1994) 46 Stan L Rev 1553.

²⁵ Above n24, 1554; see footnote no 3.

²⁶ Above n24, 1558-1559.

²⁷ Above n24, 1559.

²⁸ RAB Bush "Dispute Resolution Alternatives And The Goals Of Civil Justice: Jurisdictional Principles For Process Choice" 1984 Wis L Rev 893, 908.

the number of statutory laws that have been enacted including the Human Rights Act 1993 and the Privacy Act 1993. Bush describes the goal of "rights protection" thus:²⁹

...a concern for the integrity of the individual person, the desire to protect against any kind of action that seriously denigrates or devalues the significance of an individual human being as such. The preservation of the individual's unique value is seen as the very foundation of the social enterprise. ... the preservation of what are seen as the basic conditions to which social organization must adhere in order to be justifiable.

While the protection of rights is important and often commensurate with other goals of our civil justice system, it is the violation of those individual rights which is highly significant in that express recognition of such rights may prevent future violations. ADR lends itself to the goal of rights protection because it allows the parties to a dispute to become directly involved in the resolution of that dispute by promoting a focus that is both outcome and process orientated unlike some other civil justice goals which are dependent on outcomes or results.³⁰ But informal resolution need not depend on the vindication of rights - although it may allow parties to clarify the nature of the dispute which is perceived as a challenge to those rights.

It is sometimes argued that the use of ADR in respect of the goal of rights protection is inappropriate because ADR fails to recognise and articulate the violation in a way that can set a precedent for future reference.

This argument focuses simply on outcome and fails to take into account the value of the parties' involvement in ADR processes whereby hands-on dispute handling also assists in furthering the other civil justice goals such as human relations, social justice and public order. The goal of legitimacy is also likely to be furthered where dispute handling is seen as "meriting social assistance" in a manner that is fair and

²⁹ Above n28, 913.

³⁰ Above n28, 914.

even handed.³¹ The criticism also ignores the interdependence of the goals of the civil justice system and the fact that they are intrinsically linked to each other.

So if the civil justice goal of consumer protection laws is the protection of individual rights how does ADR and the ideology of informalism promote this?

C. Access to Legal Redress

There is little doubt that it is in the interests of consumers to have an effective and accessible means of resolving disputes and enforcing rights.

Harris suggests that both the costs and formality of traditional litigation deters consumers from exercising their legal rights and favours the larger party who is already knowledgeable and familiar with court procedures and is also more easily able to meet the costs of litigation.³² Others note that ADR also has the potential to serve the interests of the more powerful party against the disadvantaged party because it deters large scale structural changes in political and societal institutions which formal adjudication can do.³³

The criticism of Abel³⁴ in particular, is that informal institutions, which it is submitted would include statutory bodies such as the Human Rights Commission and office of the Privacy Commissioner, neutralise conflict that might otherwise threaten capital or the state thereby perpetuating the status quo.³⁵ This occurs because informal institutions “[respond] to grievances in ways that inhibit their transformation into serious challenges to the domination of state and capital”.³⁶ As a result, the institutions are ultimately controlled by respondents in that the process allows the “[forestalling of] public sympathy by satisfying claims through payment

³¹ Above n28, 919.

³² Above n17, 239.

³³ Above n14, 534.

³⁴ RL Abel (ed) *The Politics of Informal Justice* (Academic Press Inc, New York, 1982) see Volume 1 ch 10 “The Contradictions of Informal Justice” 267.

³⁵ Above n34, 280.

³⁶ Above n34, 280.

of small, predictable amounts".³⁷ In other words, the potential for modifying behaviour as a form of social ordering is transformed into a simple monetary claim.³⁸ Accordingly, informal institutions end up processing only those matters which do not challenge the basic structure of society.³⁹ The rationale behind their approach appears to be that as the conflict results from misunderstandings that arise through poor communications, the role of informal institutions is an expressive rather than instrumental one.⁴⁰

Abel also argues that informal institutions not only confine their jurisdiction but they also:⁴¹

...shape conflict by scapegoating the exceptional enterprise that is totally irresponsible, thereby diverting attention from routine business practices and ensuring that regulation and publicity will have only a very limited general deterrent effect. ... Informal institutions thus collapse the political into the personal...

In reality, informal institutions neutralise conflict by essentially individualising the dispute within a private context. The privatisation of the dispute precludes public redress because the informal institutions do not name respondents who are the subject of those complaints.⁴²

However, while ADR ideally provides processes that are easy for consumers to initiate and use, an aspect seen in the past as an inherent failure of the traditional legal system especially for disputes that involved small amounts of money, it has not encouraged legal redress on a structural level. Nevertheless, the availability of ADR processes for consumer disputes are realistic alternatives to the traditional court processes for although "[t]hey do not increase the accessibility of the ordinary

³⁷ Above n34, 281.

³⁸ Above n34, 282.

³⁹ Above n34, 283.

⁴⁰ Above n34, 284.

⁴¹ Above n34, 287; 288.

⁴² Above n34, 292.

courts to the consumer [they] do increase the consumer's access to justice in a broader sense".⁴³

In providing more accessible legal redress for the protection of individual rights, through ADR processes, one should always be mindful that this may result in some disputes being screened out of the courts where judicial intervention might well have been the most effective way to resolve the conflict.⁴⁴

Despite this, it would appear that certain types of societal harm have not previously been accorded a legal remedy (privacy interests and non-discriminatory rights to equal treatment) and with societal recognition of these fundamental harms and corresponding legal rights, there has been growing acceptance of gaps in the enforcement of those rights.⁴⁵

The effort to encourage individuals to enforce fundamental rights has required reformers to devise alternative means of access to the law to enable enforcement of rights created by the new laws. Procedural informality was seen as one means of implementing the substantive rights, by virtue of its perceived accessibility, less threatening environment and speedy resolution or settlement without recourse to the more formal legal avenues offered through the courts. It seems procedural informality, in respect of the protection of rights, stemmed largely from the "possibilities of achieving social change by making rights effective".⁴⁶

Mediation and conciliation have largely been the ADR processes most favoured under consumer protection laws. Conciliation probably more so, despite some proponents suggesting it tends to undermine the enforcement of rights.⁴⁷ However, conciliation's acceptance appears to be politically uncontroversial in that the

⁴³ Above n17, 250.

⁴⁴ Above n14, 6.

⁴⁵ Above n34, see Volume 2 ch 7 B Garth "The Movement toward Procedural Informality in North America and Western Europe: A Critical Survey" 183, 188.

⁴⁶ Above n34; n45, 192.

⁴⁷ Above n34; n45, 193.

process itself is low cost and encourages social harmony.⁴⁸ It also appears to promote the ideals of restorative justice, as an added incentive, in allowing individuals to vindicate their rights by means of a conciliated settlement rather than having to proceed through the more costly and formal court procedures.

It is submitted that there may be disadvantages in promoting and emphasising conciliation as an ADR process to make rights effective. This is because the focus of conciliation is to reach settlements or outcomes which emphasise the legal rights of the disputants rather than the nature of the relationships between them. Moreover, the outcome can be influenced by the conciliator's interpretation of the law which could be perceived to benefit the larger party who generally has access to more knowledge about legal rights.⁴⁹ Access to legal redress in the form of conciliation may not, in reality, be that different in terms of outcome than a decision reached in the ordinary courts in that it produces similar party dissatisfaction because of the win-lose result.

This raises the question of what is the philosophy underlying ADR provisions under consumer protection laws.

Conciliation as an ADR process may be of little value to some disputants because it may ultimately result in little change to the status quo. In effect, the goal of social change becomes largely symbolic in that the emphasis on rights is simply one of non-adversary legal advice. In practice, civil justice reform of the protection of rights reflects alternative access to a legal resolution rather than a contractual solution and/or agreement between the parties to the dispute.

In this respect, the reform fails to acknowledge the diversity of public norms and values. If the State's role is to provide an alternative forum for the enforcement of rights so as to avoid social disruption by reacting to disputants' "legal needs" then this reduces the chance of promoting social change because it only validates an

⁴⁸ Above n34; n45, 196; 197.

⁴⁹ Above n34; n45, 198.

individual's substantive rights.⁵⁰ It also may serve to reinforce dependence on the State, as a specific economic or political structure, for the vindication of rights.

The other problem with conciliation is that it assumes that the private "needs" of disputants are satisfied by achieving an outcome or end result. While this might be true for some it is not necessarily the objective of many complainants who often wish for their complaint to be acknowledged so that the same thing does not happen to someone else. It is submitted that this endorsement of public values and norms is where mediation of social conflict is most appropriate.

D. Mediation of Social Conflict

For many consumers, traditional legal redress for resolving disputes has been inadequate in that the legal system has seldom been "responsive ... to issues that affect the quality of everyday life".⁵¹

More particularly, small unresolved problems in terms of the law, often influence the attitudes of people about law and order more generally.⁵² Despite complaint mechanisms being available complainants are still reluctant to pursue disputes under consumer protection laws. It seems that this is due in part to the perceived "improbability of success".⁵³ In particular, many complaint systems do not prevent or always deter future abuses and only satisfy some isolated individuals. Why is this?

It may have much to do with the social organisation of the societal group in which the complainant is a member. For example, Felstiner⁵⁴ describes two ideal types of social organisation: the technological complex rich society ("TCRS") and the

⁵⁰ Above n34; n45, 206.

⁵¹ L Nader "Disputing Without the Force of Law" (1979) 88 Yale LJ 998, 1001.

⁵² Above n51, 1002.

⁵³ Above n51, 1007.

⁵⁴ WLF Felstiner "Influences Of Social Organization On Dispute Processing" (1974) 9 Law & Soc Rev 63.

technological simple poor society ("TSPS"). He is of the view that the former is less concerned with interpersonal relationships than the latter.⁵⁵ Accordingly, the form of dispute processing utilised by complainants differs according to the type of social organisation of which they are a member.

A distinction occurs between self-assertion of individual interests and the importance of group values or prevention of future behaviours. In particular, where group values are important then avoidance as a technique is more likely to be used as a form of dispute processing. Avoidance, however, appears more difficult for outsiders to recognise and consequently, is infrequently reported.⁵⁶ But with this technique come variable costs which may account for why some complainants do or do not utilise consumer dispute processes offered within a statutory framework. This it seems is because, in reacting to disputes, avoidance may not carry such a high cost as it might if interests other than that out of which the dispute rose were jeopardised, for example, a dispute which centres around a single interest such as self-assertion of an individual's right to privacy. Whereas:⁵⁷

...[A]voidance has high costs in a TSPS and one would as a result expect significant use of other forms of dispute processing which are more likely to aid the maintenance of threatened, but important, social relationships.

In terms of consumer complaints, complainants appear to avoid a dispute by refusing to take any action in respect of it even though the dispute is neither resolved or acknowledged nor interaction between the individual complainant and respondent altered.⁵⁸ Where this occurs it is probable that the complainant views mediation as being futile because of the discrepancy in the size and power of the respondent organisation.⁵⁹ A good illustration of this would be cases of sexual harassment in employment. Sexual harassment is frequently ignored, at least initially, by those subject to such behaviour. On the other hand, this may also have

⁵⁵ Above n54, 65.

⁵⁶ WLF Felstiner "Avoidance As Dispute Processing: An Elaboration" (1975) 9 *Law & Soc Rev* 695; above n54, 76.

⁵⁷ Above n54, 80.

⁵⁸ Above n54, 81.

⁵⁹ Above n54, 81.

something to do with a lack of knowledge of the avenues of redress available to the harassed person.

It is submitted that the reluctance of consumers to complain to third parties may also stem from either a lack of knowledge or a disenchantment with ADR processes that are presently offered within statutory frameworks. Consequently, most ADR provisions appear under utilised because they are not consumer-centred. In addition, the expectations of consumers means that they are inevitably disappointed in the actual provision of ADR services as complaints officers often can, and do, reinforce existing inequalities by responding to "interests" which differ to those of complainants.⁶⁰

This happens, in my view, predominantly because the complaint officers are constrained by the narrow parameters imposed by the consumer statutes. While disputing parties are encouraged to find creative solutions to the problem that caused their dispute, the problem-solving approach in mediation is too narrow. Although disputants' interests are identified, success is nevertheless measured by the final outcome or result. The existence of a third party, whose function is to separate the problem from the people, is not dissimilar to the adversarial approach taken in the courts except that mediation is conducted privately.

Mediation as a process is aimed at building trust between disputants so allowing them to explore workable relationships. Otherwise, "any truncated attempted at settlement would inevitably be deficient with regard to process and flawed with regard to outcome" according to Durbach, who quotes the following:⁶¹

'The ethical dilemma that faces mediators working in a number of different areas is how to maintain the integrity of the mediation process ... without letting the process be used to violate important interests of the community.'

⁶⁰ Above n51, 1008.

⁶¹ A Durbach "Test Case Mediation - Privatising The Public Interest" (1995) 6 ADRJ 233, 241; see footnote no 11 for source of quotation.

If parties lose control of both the dispute and reconciliation process then the capacity to advance the public interest diminishes.⁶²

The mediation of social conflict, in terms of protection of consumer rights, involves much more than simple problem-solving. In essence, it is more than an alternative to equity through the courts. It involves a contractual arrangement between the disputing parties which modifies future behaviour. It is acknowledged that without statistical aggregated complaint data there is little pressure on system reform or changes in public norms and, as a result, complainants may remain dissatisfied with the process and/or outcome. It therefore seems unlikely that consumer legislation will vindicate disputants' rights fully until rights are conceptualised as collective harms.

While voluntary mediation is often concerned with substantive rights, the process is also conceptually broader than simply an alternative process to litigation. It involves a linear relationship where the parties contractually agree to participate as a step towards understanding and exchanging views in the hope of reconciling their differences.⁶³

Perhaps the theory which best describes what the practice of mediation ought to be under consumer protection laws is that which Folger and Bush⁶⁴ describe as the transformative approach. A transformative approach to mediation entails assisting the disputants to better understand one another's perspective so enhancing opportunities for moral growth by allowing them to take responsibility for their actions that gave rise to the dispute. "[I]t is as much about changing people as it is about resolving disputes".⁶⁵ The emphasis is not merely on settlement but on recognition and empowerment within human interactions. It is conceptually

⁶² Above n61, 241.

⁶³ Sir L Street "The Court System And Alternative Dispute Resolution Procedures"(1990) 1 ADRJ 5, 9.

⁶⁴ RAB Bush & JP Folger *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (Jossey-Bass, San Francisco, 1994).

⁶⁵ L Boule *Mediation: Principles, Process, Practice* (Butterworths, Australia, 1996) 306.

different to the "directive, settlement-orientated practice [of problem-solving] that focuses on defining problems and producing solutions".⁶⁶

Recognition of others' perspectives goes beyond the immediate dispute to the on-going lives of the parties themselves - "[t]he parties' goals and choices are treated as central at all levels of decision making".⁶⁷

The mediator's role then becomes one of enhancing party interaction so that disputants define and resolve their differences themselves. The experience of the mediation process, while not necessarily resulting in a settlement, permits the disputants rather than the mediator to articulate and reflect their concerns and decisions.⁶⁸ It encourages parties' deliberation and choice making and seeks to avoid the mediator from "making any global assessment of what the dispute as a whole is about".⁶⁹

This is not only a reframing of mediation but also a reframing of consumer disputes - recognising that these too are about relationships, recognition, empowerment and not merely resolution.

Such an approach moves away from disputants' private self-interests because the conflict provides an opportunity for disputants to interact in a way that reinforces and recognises the other's perspectives. The value of mediation is not in defining the problem but actually in the interaction that takes place between the disputants.⁷⁰

I will now broadly outline both the approach and alternative dispute resolution processes currently provided by the Human Rights Commission and the office of the Privacy Commissioner.

⁶⁶ Above n64, 108.

⁶⁷ Above n64, 101.

⁶⁸ Above n64, 138.

⁶⁹ Above n64, 192.

⁷⁰ Above n64, 279.

III INSTITUTIONALISATION OF ADR

A. *ADR Under Consumer Protection Laws*

Both the Human Right Commission and the Office of the Privacy Commissioner carry out their functions pursuant to the enactments under which they are created. The statutes provide both formal and informal processes to resolve disputants' conflicts. In particular, impartial third parties are involved mainly in the process of fact finding, facilitation, conciliation and less often, in a mediation role, either in combination or as an aside to the distinct although sometimes complementary processes.

In practice, the primary process utilised is the process of investigation of a complainant's allegations and if, subsequently, those allegations appear to have substance, to attempt resolution through either mediation or conciliation. The Commission and Privacy Commissioner also both have powers to compel the disputant parties to attend a conciliation conference.⁷¹ If a complaint is found to lack substance, or mediation or conciliation breaks down, there is provision for the matter to be referred to the Complaints Review Tribunal.⁷² The disputant parties, however, usually have little real choice as to the process that is adopted, although in the early stages of the investigation conducted by the Human Rights Commission, a preference is offered between two options (investigation or mediation).

There is no systematic analysis made by the third party as to which options might best reflect the parties' objectives in terms of both outcome and process. The complainants only real choices are either withdrawal or, if the complaint lacks

⁷¹ Human Rights Act 1993, s80; Privacy Act 1993, s76.

⁷² Above n71, s82; s77 respectively.

substance or conciliation fails, to request a referral of the complaint to the Complaints Review Tribunal ("the Tribunal").⁷³

B. *Decision Making in Informal Forums*

It is submitted that in understanding how ADR might ensure that both private and public interests can be reconciled under consumers protection laws, we need to consider whether ADR provisions in the legislation are intended to facilitate administrative settlements as an adjunct to the court system or whether ADR is intended to facilitate the resolution of disputes on a contractual basis outside of the legal framework.

The distinction is important because of the ramifications in terms of decision making. ADR within a statutory framework cannot have been enacted simply to satisfy private interests. The legislation is intended to regulate people's behaviour and acknowledge the protection of certain fundamental rights.

I suspect that ADR under the Human Rights Act 1993 and Privacy Act 1993 was primarily intended to operate as an adjunct to the traditional court system. This is supported by the practices that have evolved within the two statutory organisations in that the investigation process is usually followed by conciliation and/or an "opinion" by a third party. Having established whose legal rights prevail, the disputants may then settle or the matter may proceed on to the Tribunal.

However, it is suggested that "[i]nexpensive, expeditious, and informal adjudication is not always synonymous with *fair* and *just* adjudication".⁷⁴ In fact, where the decision makers do not understand the values at stake, any deficiencies in

⁷³ Above n71, s83(4); s83.

⁷⁴ HT Edwards "Alternative Dispute Resolution: Panacea Or Anathema?" (1986) 99 Harv LR 668, 679.

informal processes can result in "nothing more than inexpensive and ill-informed decisions" reflecting existing power structures within our society.⁷⁵

On the other hand, it is argued that fundamental substantive public interests will not be enforced by processes that encourage disputants to "understand" each other.⁷⁶ In my view, this overlooks the importance of managing conflict by modifying behaviour. While decisions made by third parties may resolve specific problems they rarely prevent future occurrences of similar behaviour because there is no educative component built in to the process. If disputants learn to interact better with each other through ADR processes then they are more likely to take responsibility for any decision making that eventuates.

It is also argued that "whenever an ADR decision facilitator lacks a clear legal standard, impartiality may be more difficult to attain".⁷⁷ As a result, decision makers' impartiality, the hallmark of ADR facilitators, is more difficult to evaluate and disputants' confidence in the processes is lessened.⁷⁸

While it is acknowledged that disputing is simply another mode of decision making⁷⁹ it is evident that some obviously believe that the lack of an authority figure to determine the dispute can impair the quality or accuracy of the result⁸⁰ as well as causing other problems such as credibility. For example, it is suggested that disputes which the public perceive to be important require decisions made by figures of public repute. Such disputes might include those in which the law enacts general consumer enforcement schemes, for example, consumer protection laws.

It is submitted that leaving decision making to either an impartial third party or the disputants is a matter that should be governed by the jurisdictional principles

⁷⁵ Above n74, 679.

⁷⁶ Above n74, 678.

⁷⁷ E Brunet "Questioning The Quality Of Alternative Dispute Resolution" (1987) 62 Tulane LR 1, 27.

⁷⁸ Above n77, 27.

⁷⁹ Above n77, 34.

⁸⁰ Above n77, 41.

related to process choice rather than the State. In any event, matters considered of substantive public value can be publicised if need be by aggregating complaint data to ensure the "guidance function of the law".⁸¹ Moreover, I do not believe that it is helpful to equate procedural shortcomings with substantive shortcomings in that this could underestimate the decision making attributes of transformative mediation.

C. *Compliance without Enforcement*

If disputants become directly involved in both the process and resolution of their disputes it is possible that the resulting interpersonal ties could become effective mechanisms of social control.⁸² In such situations the disputants actually "fashion their own norms and will be engaged in the productive enterprises of private ordering".⁸³ Compliance therefore occurs without enforcement or the sanctions of the law.

In reality, mediation can protect the public values at stake, provided the mediator remains an outsider to the dispute,⁸⁴ by conceptualising problems into opportunities for disputants to interact and learn about themselves and arrive at resolutions not possible in other forums.⁸⁵

Brunet accepts that disputants often have similar incentives to resolve disputes together with information necessary to understand and evaluate the dispute in order to reach a proper resolution.⁸⁶

⁸¹ Above n77, 30.

⁸² Above n51, 1001 where Nader is of the contrary view that interpersonal ties can no longer serve as effective mechanisms of social control in modern industrialised society.

⁸³ Above n77, 14; 29.

⁸⁴ Above n65, 20; see also footnote no 51 which describes this as contractual mediation.

⁸⁵ C Menkel-Meadow "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices" (1995) 11 *Neg Jnl* 217, 240.

⁸⁶ Above n77, 30.

It is claimed that ADR outcomes, and in particular mediated settlements, are rarely authored directly by a third party and accordingly, disputants "may be able to avoid the impact of the policies underlying the substantive law".⁸⁷ As a result, mediated outcomes may be significantly different from litigation because public values support substantive legal norms which are result directed.⁸⁸ This has caused a degree of criticism but, in my view, is premised on outcome values only. According to Brunet, any signal arising from ADR that "outcomes dictated by substantive law are unworthy of enforcement" is probably less significant where ADR outcomes are "private" ones.⁸⁹

If it is accepted that the rejection of legal norms in the ADR context can lead to creative solutions in individual cases, there is no reason why this should not benefit the public interests of society as "there is no universal need to draft and publicise all positive law to reach all citizens".⁹⁰ Brunet claims this view is supported by Fuller who believes that citizens learn of the law through cultural habits of patterned behaviour rather than reading case-law.⁹¹ Indeed, of the many civil disputes which are filed in the courts most are settled privately without any case-law resulting.

ADR and particularly mediation are concerned primarily with valuative norms rather than legal norms. This suggests to me that disputants are not compelled to reach solutions that are directed by substantive law.

⁸⁷ Above n77, 17.

⁸⁸ Above n77, 17.

⁸⁹ Above n77, 18.

⁹⁰ Above n77, 25.

⁹¹ Above n77, 25.

IV PROCEDURAL JUSTICE

A. *Jurisdictional Principles*

It would appear from my observations that the statutory alternative dispute resolution provisions under both the Human Rights Act 1993 and the Privacy Act 1993 are utilised in an ad hoc fashion and require jurisdictional principles for process choice. At present the ADR provisions under those two Acts are used neither effectively or efficiently. Public consumer dispute handling bodies must encourage process choice that not only reflects the interests of the disputing parties but also the larger society of which they are part.

Professor Bush⁹² argues that the goals of society in any civil justice system are multiple and that for alternative dispute resolution processes to be effective they must be selected by evaluative criteria and jurisdictional principles, particularly in respect of process choice, with "due attention to the entire complex of civil justice goals".⁹³ In other words, principles guiding the use of dispute handling alternatives should be the goals of the civil justice system itself.

He suggests that advocates of the goal of "rights protection" in the civil justice system focus on two general rights: *outcome rights* which refer to the rights of individuals to certain treatment by others outside of the dispute handling processes; and *process rights* which are rights of individuals to certain treatment by others within the dispute handling processes.⁹⁴

In this respect, the dispute handling alternatives within the civil justice system not only monitor outcomes of individual violations of fundamental rights but also

⁹² Above n28, 908.

⁹³ Above n28, 961.

⁹⁴ Above n28, 913.

protect *process rights* when an outside party such as the State, has a role to play in individual dispute resolution.⁹⁵

It is the process rights with which I am concerned. Any furthering of the goal of protection of fundamental rights within statutory bodies such as the Human Rights Commission and Privacy Commissioner's Office requires more than simply the upholding of outcome-orientated rights but in addition, requires protection of process-orientated rights.

It is noted that the other goals of social justice in the civil justice system, such as preserving human relations,⁹⁶ depend "not so much on the outcome of the dispute handling process, ... but rather on the parties' experience in the process itself".⁹⁷ In effect, the process of handling disputes can have a significant impact on the goals of ordering human relations, including improving them, because it does not rely on the use of decision criteria.⁹⁸

In Bush's view, process pluralism is not goal pluralism and "without a framework that forces a multi-goal focus"⁹⁹ the difficulties of goal competition may become an issue for both parties.

This is compounded by the absence of any jurisdictional principles as to what type of process is needed to further the differing goals. Bush believes that there has been no thorough theoretical justification for the pluralism approach.¹⁰⁰ He suggests that the crucial question in using dispute handling alternatives is which process to use in which type of case.¹⁰¹ Previous discourse has argued that different types of cases require different processes, however, the real issue is which case requires which process.¹⁰²

⁹⁵ Above n28, 913.

⁹⁶ Above n28, 911; 917.

⁹⁷ Above n28, 917.

⁹⁸ Above n28, 918.

⁹⁹ Above n28, 926.

¹⁰⁰ Above n28, 947.

¹⁰¹ Above n28, 949.

¹⁰² Above n28, 950.

If disputants are able to identify the civil justice goals they seek, then a link can be made to the factors which match cases to processes. The general characteristics of each alternative dispute process ("process factors") need to be determined and "enumerated with reference to *all* of the civil justice goals" identified.¹⁰³ Such an exercise will be analytical rather than descriptive.

Once the disputants have identified the goals of civil justice they seek in any particular case, the process factors can be analysed as to which are relevant to those goals. The specific process can then be determined by reference to the significant process factors.

It is submitted that both the Human Rights Commission and the Office of the Privacy Commissioner must give urgent consideration to ensuring process choice for disputants if the objectives of the respective Acts are to be fully effective. At present, the primary focus of processes utilised concern *outcome rights* and there is very little recognition that *process rights* are valued.

B. *Process Choice*

If process choice is not recognised, and therefore not valued, then disputants and even third parties themselves become confused about the role of the alternative processes. In particular, there are many misconceptions as to what alternative dispute processes actually involve and what their likely effects will be. This is exemplified in the statutory bodies above, where impartial third party officers are employed as investigators and subsequently, are expected to mediate or conciliate disputes. This is expected despite some officers having no detailed knowledge and/or experience of the salient process factors of a given process or which process factors are important in terms of the disputing parties' interests and society's goals in respect of civil justice.

¹⁰³ Above n28, 952.

In particular, the investigation process is largely assumed to revolve around both legal rules and procedural protocols. However, the process employed is not expressly regulated by the Statute but left to the statutory body to implement as it thinks fit.

The process also operates without jurisdictional principles or strict protocols. Accordingly, the process can produce unreal expectations, distorted inter-party communications and frequently, dissatisfaction. The third party officers can also influence which process is utilised either subconsciously or consciously because of process bias. Bias can also arise from the parties' preconceptions about the process itself.¹⁰⁴

For example, there are common misconceptions as to what the mediation process involves, namely, that mediation lacks rules, sanctions, formal direction and order. Often the informality of the process carries with it an increased risk of prejudice in that a mediator may have initially been the investigator or be more comfortable with one particular process. The risk of prejudice can be heightened in disputes concerning intimate areas of life particularly if the parties are of unequal status or of a particular disposition in terms of moral norms, group or class.¹⁰⁵

Of course, such risks can be greatly reduced simply by ensuring that the third party and disputants are aware of the process, what it involves and what the parties can expect out of it. The risks can also be largely ameliorated by identifying the goals of disputants early on and selecting the process of their choice which then has its own inbuilt checks and formalities.¹⁰⁶ This will require evaluation of the extent to which party goals are acknowledged and possible within statutory goals of the respective legislation.

¹⁰⁴ Above n28, 1009.

¹⁰⁵ R Delgado, C Dunn, P Brown, H Lee, D Hubbert "Fairness And Formality: Minimizing The Risk Of Prejudice In Alternative Dispute Resolution" 1985 Wisc L Rev 1359, 1403.

¹⁰⁶ Above n105, 1403.

Conciliation is also misunderstood in terms of its process and expectations. It is often assumed that because conciliation is informal, consensual and without rules, it involves an uncertain and unpredictable process.¹⁰⁷

In most complaints under the Human Rights Act 1993 and Privacy Act 1993 the ultimate outcome, following investigation and conciliation, reflects the legal rules of the legislation. The process does ensure some knowledge on the part of the parties in respect of the procedure, law, tribunal involvement and type of possible settlement options.

Unfortunately, misconceptions relating to the different statutory processes abound and the roles of the complaint officers concerned are seldom understood by the disputants. This causes confusion and inevitable dissatisfaction in terms of both the outcome and the process for one or both parties. Disputants should always be informed of the limitations and implications of the different ADR processes if both their interests and those of society are to be reconciled.

C. *Role Conflict*

There is no doubt that there are inherent conflicts within the structures of the two statutory bodies in providing alternative dispute resolution processes where there is no process choice. These are exacerbated further when disputants have little knowledge of the roles of the complaint officers to whom they complain.

The most obvious conflict is that of the role of the impartial third party both investigating and then subsequently conciliating or mediating a complaint. In particular, the impartiality of a third party decision maker whose role changes between processes is likely to be severely diminished in that she or he is perceived to be both judge and jury. "A government official [the

¹⁰⁷ R. Williams "Should the State Provide Alternative Dispute Resolution Services?" (1987) 6 Civ Just Q 142, 147.

investigator] cannot appropriately act without maintaining fidelity to the legal authority that both describes and constrains his power."¹⁰⁸

Furthermore, it seems likely that "the needs of those who prompt the [investigation] will determine the types of facts they seek and the types of facts they find".¹⁰⁹ While not unresolvable, this perceived conflict could be problematic if the issue is not acknowledged. Once acknowledged however, the collection of facts by the investigator could result in the investigator using legal facts in a creative way in facilitating resolution of the complaint.¹¹⁰

Facts collected co-operatively are more useful in conflict resolution than those gathered separately because otherwise each party has a tendency to rigidly stick to its own particular facts and position.¹¹¹

It is also recognised that legal procedures or rules set limits on which facts are relevant to resolving a dispute.¹¹² If the investigator is required to explain how the facts that are collected satisfy the legal rules of the legislation under which they are working, the formality of the process is increased. The purpose for which the facts are collected in an investigation will therefore be quite different to the narrative collection of facts in a mediation process where the focus is on the disputants' values and perceptions behind their competing claims.

D. *Fairness*

Concern has been expressed, particularly in Australia, about the lack of procedural fairness in ADR processes.¹¹³ Fairness, as with adjudication, is an important element of any ADR process but it should be remembered that fairness is more

¹⁰⁸ JM Hyman "Trial Advocacy as an Impediment to Wise Negotiation" (1989) 5 Neg Jnl 237, 242.

¹⁰⁹ AM Davis "Follett on Facts: Timely Advice from an ADR Pioneer" (1991) 7 Neg Jnl 131, 134.

¹¹⁰ Above n108, 242.

¹¹¹ Above n109, 136.

¹¹² Above n108, 241.

¹¹³ Above n17, 249.

likely to be achieved in processes where no final decision can be imposed on the disputants.¹¹⁴

It is suggested that the lack of formal procedural rules appears to increase the risk of prejudice within ADR processes. This view is supported by studies which indicate that people holding prejudicial attitudes may act on those in informal settings because there are no external constraints (rules of evidence or procedure) to control any bias..... However, this is a possibility rather than a certainty or real likelihood.¹¹⁵

Informality also appears to exacerbate power differentials between disputants because the weaker or disadvantaged party's bargaining power cannot be compensated for, with the result that the dispute is unlikely to be resolved fairly. Delgado suggests that bias can be reduced by setting procedural boundaries, ensuring that the third party facilitator is acceptable to both disputants and requiring identification of the ADR situations in which prejudice is greatest.¹¹⁶

One must, however, first identify what is meant by "fairness". Albin identifies four types of fairness: structural, process, procedural and outcome fairness.¹¹⁷ In terms of public and private interests, both substantive and procedural fairness ought to be considered.¹¹⁸ The issue it seems "is not *whether* but *how* [fairness has] an impact" in negotiations.¹¹⁹

Procedural fairness relates to specific mechanisms used in reaching agreements and the actual features of ADR processes such as reciprocity and integrative procedures. In integrative negotiations, differing concepts of fairness become part of the bargaining process - "[f]air processes or procedures do not always lead to

¹¹⁴ JS Murray "Guideposts For An Institutional Framework Of Consensual Dispute Processing" 1984 Jnl Dispute Resolution 45, 71-72.

¹¹⁵ Above n105, 1374.

¹¹⁶ Above n105, 1403 and 1404.

¹¹⁷ C Albin "The Role of Fairness in Negotiation" (1993) 9 Neg Jnl 223, 225.

¹¹⁸ KE Menzel "Judging the Fairness of Mediation: A Critical Framework" (1991) 9 Med Q 3,4.

¹¹⁹ Above n117, 242.

solutions viewed as fair nor does outcome fairness necessarily result from process fairness".¹²⁰

In mediation, procedural fairness can be evaluated by looking at mediator impartiality, the voluntary decisions of the disputants, disputants' understandings of the dispute, power imbalances, non-coercive negotiations and disclosure of information. Substantive fairness relates to the outcome of the mediation and content of any subsequent agreement. Agreement rates are certainly cited as institutional measures of success and fairness is typically assumed but this may overlook other factors which are equally important for equitable and fair treatment of disputants involved in mediation.¹²¹

One of the other factors which should be taken into account is the agreement itself. If the content of the agreement is fair it should produce compliance.¹²² If a disputant does not believe that the agreement is fair then he or she will not comply. Evidence to date suggests that mediated agreements provide more compliance and stability long term than adjudicated decisions.¹²³ Compliance as an indicator of fairness, is therefore also a valuable measurement when considering the interests of both disputants and society.¹²⁴

E. Confidentiality

It is said that the confidentiality attached to mediation "fosters an atmosphere of trust essential to mediation".¹²⁵ The difficulty is that public display and recognition of outcomes are often necessary before any social or legislative reform occurs.¹²⁶ This immediately creates tension in terms of reconciling the public and private

¹²⁰ Above n117, 241.

¹²¹ Above n118, 7.

¹²² Above n118, 7.

¹²³ Above n118, 10.

¹²⁴ Above n118, 8.

¹²⁵ Notes "Protecting Confidentiality In Mediation" (1984) 98 Harv L Rev 441.

¹²⁶ GR Clarke and IT Davies "Mediation - When Is It Not An Appropriate Dispute Resolution Process?" (1992) 3 ADRJ 70, 77.

interests of certain disputes particularly those involving discrimination or sexual harassment. In particular, mediation or conciliation of cases under the Human Rights Act 1993 are conducted in private and on a confidential basis on the grounds that this encourages frank and open interaction and negotiation between the disputants. There is no subsequent publicity of what transpired at the mediation or disclosure in terms of the settlement, unless publication is negotiated as part of the settlement.

Mediation is usually conducted on a "without prejudice" basis which prevents the disputants using information leading up to the mediated settlement in subsequent forums such as court proceedings. Any privilege attached to the interparty communications may be waived by disputants if they agree to do so, either in whole or part. As a matter of law, disclosure might be required in some instances particularly when mediation is conducted by a statutory body.¹²⁷

There are particular privileges attached to the mediation process. First, there is a privilege that protects communications made during the mediation itself. Secondly, there is a privilege in respect of the mediator which protects him or her from subsequently being required to testify.¹²⁸ The rationale behind these privileges lies in the maintenance of the integrity of the mediation process itself.

It is, however, questionable whether or not the New Zealand courts would uphold a contractual term relating to confidentiality in mediated agreements on the grounds that, in some circumstances, the term could be "void as against public policy".¹²⁹ Furthermore, other enactments such as the Official Information Act 1982 may compel production of documentation and/or information within the knowledge of the third party.

¹²⁷ Official Information Act 1982; see also n71, s129 where disclosure of certain matters is not required; s95.

¹²⁸ Above n71, ss 130(2), 130(4); ss 96(2), 96(4).

¹²⁹ Above n125, 451.

Even if confidentiality is protected by Statute, there are two exceptions to the statutory privileges accorded mediation. Those exceptions relate to actions concerning obligations or duties of care to bargain in good faith¹³⁰ and actions to enforce a mediation agreement which has been breached.

Regardless of those exceptions, the requirement for confidentiality in ADR processes has the potential to undermine the public policy interest of certain cases and may also diminish confidence in voluntary mediation within a statutory framework. It does this because the privatisation of public interests that are perceived to be of value can result in both reduced equity and future access for others.¹³¹

Durbach is of the view that "the use of mediation poses the risk of invisibility and important community interests and tenuous rights hard won 'could fade from the public agenda'".¹³² She provides an example of the long running Australian sex discrimination case which was finally settled in 1994. In that case the High Court had, in 1989, dismissed the appeal and held that Australian Iron and Steel Pty Ltd's ("AIS") employment practices amounted to both unlawful direct and indirect discrimination. It was a case which, she said, "demonstrated the inefficiency of sex-segregated workforces and the need for flexible job structures based on merit"¹³³ and which led to changes in practices and attitudes to women in the workforce.

In the interim period between 1980, when the first complaints were lodged, and 1989, the Anti-Discrimination Board also received a further 700 other complaints which were eventually settled by mediation in May 1993. While the mediation provided complainants with long overdue financial compensation it did not allow for public disclosure of the global settlement figure nor the criteria relied upon for

¹³⁰ Above n125, 452-453; above n71, s 130(2); s96(2).

¹³¹ Above n61, 242.

¹³² Above n61, 235.

¹³³ Above n61, 237.

calculating damages.¹³⁴ This, according to Durbach, gave rise to further distortion and speculation because the confidentiality terms agreed upon in settling the matter ensured control of information and protection of AIS from the public and shareholders.¹³⁵ The women, the subject of the mediated complaints, were also particularly disadvantaged in that they entered into the mediation at an advanced stage of the discrimination dispute having little or no knowledge of the previous events. As a result, they had little ability to shape either the form or outcome of the mediation which effectively eroded the earlier gains and social justice accorded by the Court - "[a]s the women lost control of the dispute and its resolution, their capacity to advance the public interest diminished".¹³⁶ In effect, the confidentiality of the mediation appears to have sabotaged any further social reform.

It is the issue of public access to which I now turn in considering whether private and public interests might be reconciled in terms of negotiated settlements under consumer protection laws.

A recent New Zealand Human Rights Commission's opinion is a case in point.¹³⁷ In that case the Commission formed an opinion that a senior female manager in a commercial organisation had been discriminated against on the basis of her sex because the organisation did not promote her to a newly created management position. Discrimination occurred because of a high level of subjectivity utilised in the respondent company's appointment process. This fact was supported by evidence of other women's experiences in management in that organisation, who believed that they had not been promoted within the organisation on the basis of their sex.

Unfortunately, the private settlement that resulted curtailed any likelihood of the case having precedent value in educating others or encouraging social reform.

¹³⁴ Above n61, 238; see "Female steel workers win payout" *The Evening Post*, Wellington, New Zealand, 24 February 1993, 8.

¹³⁵ Above n61, 241.

¹³⁶ Above n61, 241.

¹³⁷ Human Rights Commission "Human Rights Act Updates - Notes on Significant Opinions of the Human Rights Commission" (1995) 1 HRLP 32, 33.

Without public scrutiny and awareness of that case, it is doubtful whether the settlement actually resulted in any modification to the respondent organisation's promotion or recruitment practices. It would have been desirable, but the privatised nature of the settlement means that it is unlikely that even the employees of the organisation itself would know of that opinion.

How then can the private and public interests be reconciled so that the appropriate balance can be achieved particularly in cases where public interests ought to override the interests of individual complainants?

The enactment of the Human Rights Act 1993 may have helped a little in this respect. Complaints can now be pursued by way of class actions.¹³⁸ The Act effectively provides for group actions and if, as a matter of policy, subsequent publication of respondents' names was a term of any negotiated settlements arising from mediation or conciliation then this would, I believe, go some way to resolving the issue.

Until such time as confidentiality of the terms of negotiated settlements are given statutory protection the publication of respondent names is at least a possibility.¹³⁹ It may also assist complainants to feel that 'real' justice has been achieved. It is clear that this would be a powerful tool against discrimination and other wrongs to which minority groups or the less powerful are subjected.¹⁴⁰ If this does not occur then mediation of some cases may well not be the most appropriate resolution process to satisfy the civil justice goal of rights protection and public and private interests will continue to be difficult to reconcile under the respective legislative framework.

A distinction should, however, be made concerning confidentiality, both in mediation and conciliation, as it relates to the process of mediation or conciliation and to the terms of negotiated settlements. While confidentiality in terms of the

¹³⁸ Human Rights Act 1993, s83(2).

¹³⁹ The Privacy Commissioner already does this by way of case notes.

¹⁴⁰ Above n126, 77.

integrity of the process is crucial, the same is not necessarily true for confidentiality undertakings in settlement agreements, particularly if there are over-riding public interests in having the issues exposed as would be the case with some discrimination cases.

Certainly, confidentiality during the mediation process leading to an agreement "is a critical requirement for a consensual system".¹⁴¹ However, it is suggested that any "agreement which might result ... could be publicly available at the discretion of the parties or as dictated by the nature of the enforcement process".¹⁴²

While the common law 'without prejudice' privilege protection appears to end when a settlement is reached that privilege may in time be qualified by either the Court¹⁴³ or the Tribunal.

In the meantime, the Human Right Commission and Privacy Commissioner do from time to time influence conciliated settlements by ensuring respondents agree to certain settlement terms such as implementing new policies or practice improvements, although their statutory powers to do so may be questionable.¹⁴⁴

One also wonders whether Parliament in enacting the Human Rights Act 1993 and Privacy Act 1993 ever intended that mediated or conciliated settlement terms not be publicly available, given the objects of the legislation to further social reform.

In this respect, I note that a number of American States have provisions guaranteeing public access to certain kinds of State Commission proceedings or relevant information deemed within the public interest.¹⁴⁵ In my view, there seems no reason why similar solutions should not be possible on the same basis in New Zealand. Other solutions could include publication of emerging trends or practices

¹⁴¹ Above n114, 72.

¹⁴² Above n114, 72.

¹⁴³ Above n65, 283.

¹⁴⁴ *New Zealand Van Lines Ltd v Proceedings Commissioner* (1994) 17 TCL 3/1; Unreported, 3 August 1994, High Court, Rotorua Registry, AP 83/93.

¹⁴⁵ Above n24, 1581.

either by way of the Annual Reports or in more general publications. While case notes on significant opinions are currently published by the Privacy Commissioner and the Human Rights Commission in Brookers' publication "Human Rights Law and Practice" I suspect that, in reality, access to both is generally limited to those practising or working in the areas. This rather limits the potential educative function that each statutory body has and confines settlement outcomes to the "shadow of the law". What is meant by this expression?

V SETTLEMENT OUTCOMES

A. *Active Choice in Negotiated Settlements*

It is said that ADR assisted negotiations between disputants operate "in the shadow of the law".¹⁴⁶ This is true in part, in that if disputants choose to settle their disputes utilising the ADR processes available to them and as a result, decide to make no public record of the terms of the settlement, the public will be none the wiser. However, this is an active choice made by the disputants themselves, the terms of which may be outside the framework of the law.

Bargaining in the shadow of the law is described by Mnookin as being a process whereby the parties work out their own legally enforceable arrangement - a process of private ordering.¹⁴⁷ Mnookin suggests that negotiated outcomes are affected by parties' preferences, entitlements created by the law, transactional costs, attitudes towards risks and strategic behaviour.¹⁴⁸ The parties do not bargain in a vacuum but in the shadow of the law in that the "range of negotiated outcomes would be limited to those that leave both [parties] as well off as they would be in the absence of a bargain".¹⁴⁹ This infers that it is possible for parties to negotiate an outcome

¹⁴⁶ PS Adler "Casting Sunshine on Negotiated Settlements" (1990) 6 Neg Jnl 305, 306.

¹⁴⁷ RH Mnookin and L Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950.

¹⁴⁸ Above n147, 997.

¹⁴⁹ Above n147, 969.

which may well be better than that imposed by a court. However, parties are seldom aware of what information or criteria a court might rely upon in making its decision and accordingly, this is unlikely to be the sole determining factor.

The question often asked is why negotiated settlements should be shielded from public scrutiny. In permitting private settlements, public institutions, which exist to uphold the protection of individual rights under the law for everyone, create a two-tiered justice system by encouraging people to hide behind the curtain of confidentiality. However, this is also true of settlements within the adjudication system. So why is there such a fuss about negotiated settlements under ADR?

No doubt it is because the settlement can take place outside of the legal framework and does not rely on legal rules to uphold public norms and values. Certainly, traditionally, public norms and values have been clarified through precedent evolving through the courts. However, this is not to say that clarification of public norms and values cannot be achieved through informal processes in other forums through the utilisation of community norms. In other words, through private ordering of society. Is there any real harm to the public interest?

It is submitted that while there is no obligation on parties involved in civil actions to make public their settlements under the adjudication system, why should public institutions endorsing ADR, such as the Human Rights Commission and office of the Privacy Commissioner, be any different?

At the end of the day it is the disputants' choice as to how the dispute might best be resolved and for some, the value of ADR and in particular mediation, which assists disputants to channel conflicts constructively and prevent future conflicts from arising¹⁵⁰ may be more worthwhile in terms of the public interest than any public disclosure of the terms of a settlement or agreement. In effect, the private settlement may in fact serve public ends. This takes us back to the philosophy of

¹⁵⁰ Above n77, 14.

the transformative approach of mediation which encourages both empowerment and recognition as central objectives.

B. Empowerment and Recognition

The word "empowerment" has become a buzz word especially in discourse concerning democracy in recent years. But with ADR, its analysis relates to the individual and to the community or social order.¹⁵¹ In terms of individuals it means self-esteem, increased autonomy in decision making and personal responsibility and awareness as a form of rehabilitation. Community or social empowerment involves legitimising disadvantaged groups' control over their lives and developing norms and values for resolving disputes so that the collective community is rehabilitated as a whole.¹⁵²

It is argued that the concept of empowerment is illusionary in that the shift from "rights" to "relationships" ultimately disempowers individuals and communities because it extends State control over both.¹⁵³ However, empowerment does not necessarily have to involve a shift at all. It actually involves taking responsibility for one's choices, goals, skills, resources and decision making.

Empowerment, in mediation, has been defined conceptually in general terms as being achieved when disputing parties experience a strengthened awareness of their own self-worth and their ability to deal with whatever difficulties they face, regardless of external constraints.¹⁵⁴ Empowerment is not, therefore, dependent on outcome.

¹⁵¹ S Cobb "Empowerment and Mediation: A Narrative Perspective" (1993) 9 Neg Jnl 245.

¹⁵² Above n151, 246.

¹⁵³ Above n151, 246.

¹⁵⁴ Above n64, 84.

In mediation, in particular, empowerment is not about balancing power between the disputants, controlling or influencing the mediation process or about the mediator becoming advocate, counsellor or adviser to the disputants.¹⁵⁵

Recognition, on the other hand, is linked to empowerment in that it is a voluntary acknowledgment and awareness by one disputant of the other's perspective¹⁵⁶ by considering and giving recognition to the other in the form of thought, words and actions.¹⁵⁷ "It is the *decision* of the party to expand his focus from self alone to include the other that represents the moral growth expressed in giving recognition."¹⁵⁸

Like empowerment, the meaning of recognition is not one of reconciliation nor self-awareness but of "*letting go* -... one's focus on self and becoming interested in the perspective of the other party as such, ...not as an instrument for fulfilling one's own needs".¹⁵⁹

Mediators, in using the transformative approach, are able to clarify points in the mediation where choices can be made by the disputants which both empower them and provide opportunities to give recognition to each other.¹⁶⁰ This is achieved by interpreting, translating and reframing disputants' narratives to help the other's understanding rather than organising issues and solutions as done with the problem-solving approach.¹⁶¹

For these reasons, transformative mediation does far more than simply assist private settlement between the disputants. That is why the focus on outcome or settlement does little to further the objectives of the Human Rights Act 1993 and

¹⁵⁵ Above n64, 96.

¹⁵⁶ Above n64, 85.

¹⁵⁷ Above n64, 89-92.

¹⁵⁸ Above n64, 93.

¹⁵⁹ Above n64, 97.

¹⁶⁰ Above n64, 100.

¹⁶¹ Above n64, 101.

the Privacy Act 1993. In this respect, I now consider the limitations of such a focus.

C. *Output Driven Settlement Rates*

ADR is frequently judged by its settlement rates in terms of its success, but this informs us little about the measurement of success or what constitutes a successful resolution of a dispute under consumer protection laws.

The obsession with settlement rates and outcomes appears to be worthy of some discussion to understand why private interests of disputants and public interests of society appear difficult to reconcile. Edwards suggests that "the mere resolution of a dispute is not proof that the public interest has been served".¹⁶²

Negotiated settlements should not only reflect outcome percentages but should also include resolutions in which the disputants may not have reached any final agreement. Procedural justice research indicates that "process may be as important to people as the outcome" in the successful resolution of a dispute.¹⁶³

Fiss suggests that "settlement is a capitulation to the conditions of mass society and should be neither encouraged or praised".¹⁶⁴ He is of the view that settlement is no substitute for judgment even though it may appear to be a perfect substitute because it can declare the parties' rights.¹⁶⁵ Moreover, officials within legislative branches of the law are required to interpret the values embodied in Statutes and that duty is not discharged when the matter is settled - "when the parties settle, society gets less than what appears".¹⁶⁶ In essence, it is said that the parties simply secure peace. Even if settlement avoids an opinion, this does not necessarily mean that justice has not been secured.

¹⁶² Above n74, 677-678.

¹⁶³ FEA Sander "The Obsession with Settlement Rates" (1995) 11 Neg Jnl 329, 330.

¹⁶⁴ OM Fiss "Against Settlement" (1984) 93 Yale LJ 1073, 1075.

¹⁶⁵ Above n164, 1085.

¹⁶⁶ Above n164, 1085.

On the contrary, user satisfaction research indicates that disputants value mediation and are likely to share similar perceptions of the outcome which helps reinforce attitudes of obligation and voluntary compliance thereby promoting social coherence and lower conflict.¹⁶⁷ Some people are satisfied by simply going through a process and in this respect, any ADR process might suffice.¹⁶⁸ However, in terms of the outcome, there may in fact be little difference in settlement rates between ADR and adjudication. User satisfaction seems to have more to do with therapeutic value than justice 'per se' so rates of settlement may be meaningless to measure.

Another criticism of focusing on settlement rates as a measure of success is that settlements may reflect the power imbalance between disputants and therefore, simply maintain the status quo. In reality, it would appear that only a relatively few cases do actually reach the Complaints Review Tribunal and those cases generally involve matters of fundamental principle or outright denial of the alleged events. Accordingly, we can assume that generally ADR assists disputants in reaching a resolution of some sort. The aim must be to ensure the quality of the processes and acceptance that justice may not be achieved by "uncritical celebration of settlement Settlement is not the answer; it is the question".¹⁶⁹

How then can ADR within a statutory framework satisfy the public interest under consumer protection laws? In the first instance, I believe it would do well to avoid what is described as the "centripetal pull of bureaucratisation which, ... can result in a rigidity of approach, as well as a privileging of efficiency and number-crunching over quality".¹⁷⁰

¹⁶⁷ R Singer "The Rolling Stones Revisited: Exploring The Concept Of User Satisfaction As A Measure Of Success In Alternative Dispute Resolution" (1995) 6 ADRJ 77, 83.

¹⁶⁸ Above n167, 88.

¹⁶⁹ M Galanter & M Cahill "Most Cases Settle: Judicial Promotion and Regulation of Settlements" (1994) 46 Stan L Rev 1339, 1391.

¹⁷⁰ M Thornton "Mediation Policy And The State" (1993) 4 ADRJ 230, 234.

Institutionalising ADR can foster norms appropriate for specialist areas of mediation under anti-discrimination legislation by according full effect to the particularity of each case. ADR and settlement, if it eventuates, does not reduce the social function of the legislation to one of simply resolving private disputes but instead "calls on substantive community values".¹⁷¹ Justice and the law are not synonymous.¹⁷²

Justice is not the will of the stronger; it is not efficiency in government; it is not the reduction of violence: Justice is what we discover -... when we walk together, listen together, ... in our curiosity about what justice is and where justice comes from. ... Justice is the way one defines a righteous life; justice does involve according other persons their due ...

Why then is there a perceived dilemma in regulating ADR?

D. Dilemma of Regulating ADR

The Honourable Justice Kirby believes that there is an "imperative need to found the future development of mediation (... and ADR generally) upon a sound theoretical basis" and that this must be based on sound empirical information.¹⁷³

This proposition is particularly applicable to ADR processes provided within statutory frameworks under consumer protection laws where the good intentions of Parliament have not necessarily been considered either in terms of the underlying philosophy of the use of ADR in such contexts or in terms of jurisdictional principles concerning process choice. Despite Parliament's endorsement and recognition of ADR, the perceived dilemma of regulating ADR must surely be the distinction between dispute settlement and the resolution of conflict.¹⁷⁴ This distinction becomes blurred when there are no unified definitions of the dispute

¹⁷¹ AW McThenia, TL Shaffer "For Reconciliation" (1985) 94 Yale LJ 1660, 1664.

¹⁷² Above 171, 1664-1665.

¹⁷³ The Hon M Kirby "Mediation: Current Controversies And Future Directions" (1992) 3 ADRJ 139, 145.

¹⁷⁴ Above n173, 144.

resolution processes available and creates specific problems when applied to ADR processes within a statutory framework.

The primary problem with statute-based ADR is that it is constrained by the legal framework so that its capacity for flexibility can be limited and its processes become more formalised and mainstreamed.¹⁷⁵ This means that legal boundaries and rules tend to control the use of ADR processes. By introducing legal concepts such as the rules of natural justice the disputants end up in a system focused on outcomes which is not dissimilar to that of adjudication. Thornton makes a similar point:¹⁷⁶

The fact that conciliation is conducted by a state agency renders inevitable the paramouncy of bureaucratic values; that is, the focus is directed towards efficiency measured by the number of complaints resolved. ...

The conjunction of the bureaucratic prescript of efficiency and the political need to produce results by means of 'resolved' complaints constantly militates against tackling the entrenched manifestations of institutionalised discrimination.

The emphasis on mediation as case management of complaints, rather than actively using mediation as a process of reconciliation, undermines the potential effectiveness mediation may have in bringing about social reform. The conclusion one can draw from this is that both the Human Rights Commission and office of the Privacy Commissioner simply function as an adjunct to the courts in ensuring disputes concerning rights are settled instead of providing an alternative process for resolution of conflict. The alternative focus on reconciliation, rather than resolution as prescribed by legal norms, is a different function entirely and complements the other more formal processes provided.

At the same time, traditionally disempowered complainants appear to find conciliation, at least, personally more satisfying than a formal court process.

¹⁷⁵ N Mulcahy "Conciliation And Race Complaints" (1992) 3 ADRJ 21, 25.

¹⁷⁶ M Thornton "Equivocations Of Conciliation: The Resolution Of Discrimination Complaints In Australia" (1989) 52 Mod L Rev 733, 739; 750.

Despite the positive and practical individual benefits derived from conciliation and mediation the “absence of consensus as to what are the primary goals of conciliation [or mediation] highlights the difficulties involved in the evaluative task”.¹⁷⁷

It is argued that ADR represents procedural reforms and “should not swallow substance”.¹⁷⁸ But it is the focus on substance and negotiated settlements within statutory frameworks which creates the dilemma in reconciling both private and public interests.

If conflict management is the underlying philosophy of ADR provisions under consumer protection laws then ADR may well achieve private reconciliation that resolves a dispute efficiently and internally through a system of private ordering. If conciliation and mediation are utilised by informal institutions to satisfy social justice then the underlying aim will be one of fostering social relations. In this respect, it is likely that both private and public interests will be able to be reconciled because both are paramount to resolution of the conflict.

Alternatively, if the underlying philosophy of ADR is to ensure disputes are settled and individual complainants achieve satisfaction by results that advance their substantive rights, not possible in a formal system of adjudication, then private and public interests are likely to be difficult to reconcile due to both the individualised and privatised nature of the settlement of that dispute.

Mediation, whether or not any resolution results can, it is submitted, transform individuals, organisations, systems and our society. Indeed, it may offer more than individual conflict resolution and certainly need not result in compromise,¹⁷⁹ as we understand it, so long as it is an open process free from legal constraints. The transformative model in particular permits change either in respect of the parties, or

¹⁷⁷ Above n 176, 759.

¹⁷⁸ Above n77, 31.

¹⁷⁹ Above n85, 225.

the dispute, through communications made in the mediation process.¹⁸⁰ Menkel-Meadow states:¹⁸¹

... mediation is transformative because it is educational. At its best, we learn about other people, other ways to conceptualize problems, ways to turn crises into opportunities, creative new ways to resolve complex issues and interact with each other. And we learn about ourselves and, perhaps, new ways to negotiate our next problem. But mediation has not solved racial and class inequalities in the world ... Mediation cannot transform all people-...

The perceived dilemma of regulating ADR can also be diminished if jurisdictional principles for process choice are acknowledged in the selection of the process. In this way, the problem identified by Edwards, namely that if non-legal values are to resolve disputes then there is a need for substantive expertise, can be nullified.¹⁸² He states that "the ADR movement often seeks to replace issue-orientated dispute resolution mechanisms with more generic mechanisms without considering the importance of substantive expertise".¹⁸³ He also concludes that the goal of ADR must be to provide equal justice for all.

In doing so, Edwards fails to acknowledge that equal justice for all may come in many different guises one of which might be social justice based on community norms and values. Moreover, information that comes to light during the course of a particular dispute may have widespread value and ramifications even if not in a legal sense. ADR processes can and do affect substantive law in an indirect way in that disputing itself is merely another form of decision making.¹⁸⁴

So what are the other dilemmas of regulating ADR aside from increasing formalism and emphasising substantive outcomes?

¹⁸⁰ Above n85, 229.

¹⁸¹ Above n85, 240.

¹⁸² Above n74, 684.

¹⁸³ Above n74, 683.

¹⁸⁴ Above n77, 34.

Probably the dilemma of most concern is the multi-roles of the complaints officers who are expected to be all things to all people. The aim of complaints officers in relation to most complaints is to ensure respondents compensate complainants and agree to comply with the law, particularly after an opinion has been formed that the law has been breached. Mulcahy states:¹⁸⁵

Conciliators are set a difficult task that requires skill in mediation, an ability to control the process and a capacity for empathy and perception. All of this takes place in the context of a backlog of complaints and a shortage of staff, with complaints on the increase.

Different complaints officers naturally will apply different methods to similar fact situations and Thornton suggests that conciliators are provided with little guidance as to how the conciliation process ought to be conducted.¹⁸⁶ Although these officers are responsible for both investigatory and conciliatory functions it is always with an "eye to settlement", stating "[t]he immunity from scrutiny therefore means that the success of conciliation is largely dependent on the good graces of particular agencies and their individual conciliators".¹⁸⁷

In the absence of any direction or accountability under respective consumer legislation, it is evident why public and private interests may be perceived to be non-reconcilable in that the approach taken may not always reflect the philosophy underlying the use of ADR, even if the statutory body has one.

Furthermore, complaints officers can have "altruistic desire(s) to contribute to the realisation of the legislative aims".¹⁸⁸ If that is the case then complaint officers will exercise an approach which facilitates resolution of complaints in a manner that endorses his or her preconceived norms and which will be contrary to the

¹⁸⁵ Above n175, 28.

¹⁸⁶ Above n178, 747.

¹⁸⁷ Above n178, 748.

¹⁸⁸ Above n178, 750.

therapeutic transformative approach that is assumed to compromise a "non-partisan stance".¹⁸⁹

There are also inherent contradictions with the conciliation procedure itself because while it purports to be a more "caring" process it actually operates to reinforce the interest of the dominant in society.¹⁹⁰

Even if conciliation does reduce the public benefits that could otherwise be derived from a more transparent legal process it nonetheless "represents a potentially subversive challenge to legal formalism" and mediation, in particular, may usurp the "abstract cloak enshrouding formalism" by exposing the structures which legitimate state dominance.¹⁹¹

VI CONCLUSION

What then is the answer, namely: can public and private interests in respect of negotiated settlements under consumer protection laws be reconciled?

The answer, I believe, is that private and public interests can be reconciled under consumer protection laws but this does not necessarily appear to be the case at present under the Human Rights Act 1993 and the Privacy Act 1993.

It is submitted the the reconciliation of both public and private interests will require a concerted effort by the two statutory bodies concerned. First, the statutory bodies will need to evaluate the underlying philosophy behind the differing ADR provisions within the statutory frameworks. By identifying the philosophy behind ADR the distinction between dispute settlement and conflict resolution will become

¹⁸⁹ Above n178, 752.

¹⁹⁰ Above n178, 758.

¹⁹¹ Above n178, 761.

quite clear. Negotiated settlements are "not an 'alternative' process, separate from adjudication, but [are] intimately and inseparably entwined with it".¹⁹²

In comparison, resolution of the conflict through reconciliation in mediation may involve no outcome in substantive terms. That must be the choice of disputants and should not be dictated either by the statutory body or complaints officer.

Secondly, those statutory bodies must adopt jurisdictional principles for process choice founded on the goals of the civil justice system itself. It will then be up to the disputants to choose, on the basis of jurisdictional principles, which process best reflects the goals they wish to achieve.

Furthermore, the role of the statutory bodies in terms of both ongoing conflict together with the relevance of the outcome of such conflict for the disputants, should be dictated by "insight into the origins, context, life history, and consequences of the conflict - insight that can only be obtained from the participants".¹⁹³

The goals that the disputants seek in any given dispute will vary considerably despite the subject matter of the dispute being constrained by the parameters of the legal framework. For some disputants the goal of social justice or human relations may be of more importance than the vindication of their individual rights which are alleged to have been breached. If that is the case then it seems probable that there will be "a continuity to disputing that may not be terminated even by a formal decision".¹⁹⁴ In such a case, the recognition of a consensual mediation process should serve as a complementary but separate system within the statutory framework.¹⁹⁵ Murray suggests:¹⁹⁶

¹⁹² M Galanter "The Quality of Settlements" 1988 *Jnl Dispute Resolution* 55, 82.

¹⁹³ WLF Felstiner, RL Abel, A Sarat "The Emergence And Transformation Of Disputes: Naming, Blaming, Claiming..." (1980-1981) 15 *Law & Soc Rev* 631, 639.

¹⁹⁴ Above n193, 635.

¹⁹⁵ Above n114, 73.

¹⁹⁶ Above n 114,73.

...the establishment of [a] consensual process should not obscure the interrelationship that must exist between such a process and the systems for settling disputes within society. A consensual dispute processing institution should be part of a comprehensive and phased system of settlement assistance made available to disputants.

Indeed, the scope of any conflict is likely to be influenced by both the objectives and behaviour of disputants and also "by the processual characteristics of disputant institutions".¹⁹⁷ In this respect, the two statutory bodies must acknowledge that disputants' objectives may change along the way.¹⁹⁸ While initial goals of civil justice determine jurisdictional principles for process choice, so too may the processes chosen subsequently alter the objectives of disputants.¹⁹⁹ The continual evaluation of options ensures that even if the dispute was to be individualised by choosing a more formal ADR process it may still have an important political dimension. Felstiner states:²⁰⁰

Ultimately, what we are concerned with is the capacity of people to respond to trouble, problems, and injustice. We believe that the study of dispute processing has been too removed from the actual difficulties and choices that accompany the recognition that one's life is troubled... . Recognition and action may not be appropriate or desirable in every instance. ...[H]owever, ...a healthy social order is one that minimizes barriers inhibiting the emergence of ...disputes and preventing their translation into claims for redress.

Accordingly, when community norms and values are accepted as being part of the realisation of some of the goals of civil justice, which are important for disputants in the exercise of jurisdictional principles, the process chosen will be recognised as a legitimate alternative to settlement. Private and public interests can then be reconciled, even if there is a private settlement, because the disputing process will serve public ends. ADR is much more than a settlement device and, mediation specifically, could be used more widely to assist to "organize individuals and

¹⁹⁷ Above n193, 643.

¹⁹⁸ Above n193, 642.

¹⁹⁹ Above n193, 643.

²⁰⁰ Above n193, 653.

strengthen communities of interest".²⁰¹ Once this occurs disputes can be viewed as social constructs in terms of the politics of consensus building.²⁰²

It is suggested that we must challenge the pattern of practice of mediation with its present emphasis on "problem-solving and settlements over other goals of social justice, promotion of equality or the improvement of human character".²⁰³

In this regard, it is submitted that statutory bodies such as the Human Rights Commission and the Privacy Commissioner should, in future, take a more client-centred approach which is both individually designed and executed²⁰⁴ if they are to reconcile the private interests of complainants with the public interests of our society. Fleming states:²⁰⁵

ADR is not a substitute for the courts, nor should it be. ADR is *not* even a single idea applicable to all kinds of situations. At its best, it is a congeries of ideas for encouraging disputants to play a greater role in settling their differences, for providing greater flexibility in processing their claims, and for doing so in a less complex, less costly, and less time-consuming manner. ...[T]he success of ADR will depend heavily on its ability to continually evaluate its own work, and to change its outlook in order to adapt to new conditions.

It is submitted that only by adopting such an approach will private and public interests in respect of negotiated settlements under consumer protection laws be effectively reconciled.

²⁰¹ Above n64, 19.

²⁰² Above n1, 173.

²⁰³ Above n85, 236.

²⁰⁴ DP Joyce "The Roles of the Intervenor: A Client-Centered Approach" (1995) 12 Med Q 301.

²⁰⁵ RW Fleming "Reflections On The ADR Movement" (1986) 34 Clev St L Rev 519, 528.

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