

5-1-1998

# Compulsory ADR before commencing proceedings?

Alan Limbury

---

## Recommended Citation

Limbury, Alan (1998) "Compulsory ADR before commencing proceedings?," *ADR Bulletin*: Vol. 1: No. 1, Article 4.  
Available at: <http://epublications.bond.edu.au/adr/vol1/iss1/4>

This Article is brought to you by [epublications@bond](mailto:epublications@bond). It has been accepted for inclusion in ADR Bulletin by an authorized administrator of [epublications@bond](mailto:epublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).



## New initiatives in ADR

# Compulsory ADR before commencing proceedings?

*Alan Limbury*

In this article Alan Limbury, who is Chair of the ADR Committee of the Law Council of Australia, examines aspects of currently-mooted proposals to require parties to use ADR before they resort to court-based litigation.

## Courts and adjudication

The role of courts of justice is to adjudicate as to rights and obligations according to law. President Abraham Lincoln and Justice Sandra Day O'Connor are often quoted to the effect that dispute resolution by litigation should be the last resort. On this basis, the important contribution to society made by the judicial development of legal principle is an incident of the resolution of disputes rather than an end in itself.

Adjudication and arbitration under judicial supervision are superior to other dispute resolution processes only if the standard applied is justice according to law. Lawyers in particular appreciate the importance to our society of a system that delivers justice according to law. Under the overarching protection of this sovereign system, the increasing use of other processes suggests there are other standards which many disputants regard as worth pursuing before resorting to adjudication.

Enough experience has been gained in Australia of consensual forms of dispute resolution for us to conclude that they offer some potential for the saving of time and money; the preservation of relationships; privacy; and the crafting of outcomes that meet the interests of the disputants in ways which may not be achieved by adjudication.

## The multi-door courthouse

Harvard Law School Professor Frank EA Sander's suggested *multi-door courthouse* holds out

the prospect of disputes being attracted to a single location where experts in a wide variety of dispute resolution processes, of which litigation is one, recommend one or more, simultaneously or sequentially, to the disputants. A one-stop shop is certainly the least confusing model for people with a dispute to be resolved and Sander's suggestion is attractive in theory.

In practice, turning existing courts into multi-door courthouses, especially by asking existing court staff to undertake new tasks relating to the newer processes, is likely in the short term to portray adjudication as superior or preferred, with the new processes being available as supplements, not because of their intrinsic value but because they may help in clearing court backlogs. Over time, court staff can be retrained if the commitment and funding are there. The difficulty these days is that governments refuse to increase funding for courts, which cannot afford to devote sufficient resources to the newer processes.

The court door should be seen as the *last door*, not the front door, not merely because of the potential advantages to the disputants offered by more flexible processes but because the expenditure of public money should not be incurred in resolving disputes unless the disputants have been unable to reach their own resolution privately with the assistance of a trained dispute resolver. Governments accept the responsibility to provide a forum to resolve disputes by adjudication but have not accepted a responsibility to provide a forum for the

resolution of disputes by any other means.

Accordingly, in the absence of government commitment to the multi-door courthouse, the concept of litigation being the last resort could be given political acceptance and legislative expression by requiring, as a condition of entry to the judicial system, that all applicants for relief in Federal and State courts (other than for urgent interlocutory relief) have first attempted to resolve their disputes by alternative means.

## Pre-court ADR

One way in which this might be achieved would be to require an applicant to file, with the application, a certificate from a neutral third party, that the applicant sought to resolve the dispute by other means and that the dispute was not completely resolved. An important issue here is whether the certificate should vouch for the good faith efforts of the applicant. If so, the dispute resolver may be placed in the position of assisting the disputants while judging one of them.

At the State level, farm debt and retail tenancy disputes are already subject to such a regime in NSW. There is an inherent power imbalance in such cases which explains why they were selected for this treatment but there does not seem to be any particular reason why all disputes that present for litigation (other than for urgent interlocutory relief) should not be subject to the same requirement.

Any proposal along these lines should supplement necessary improved arrangements within the court system designed to encourage litigants to attempt ADR processes between commencement of proceedings and trial. Whether proceedings were commenced for urgent interlocutory relief without initial resort to ADR or whether ADR was attempted prior to commencement, courts should encourage continued consideration of alternative processes at all stages of preparation for trial, to promote the winnowing out of those cases that really require judicial consideration.

## Potential advantages

Some advantages of such a proposal would be: ➤



- (a) reducing the number of cases presenting for litigation (reducing the backlog before it begins);
  - (b) reserving valuable judicial time for cases that require the development of new legal principle;
  - (c) saving public money for cases that cannot be resolved consensually beforehand;
  - (d) accelerating settlement of those cases destined for settlement anyway so they never enter the system;
  - (e) creating greater awareness in the community at large about ADR processes and thereby stimulating greater resort to them as inherently useful;
  - (f) stimulating even more attention to ADR within the legal profession;
  - (g) giving legislative expression to the concept of litigation as the last resort.
- (e) ADR processes may not protect the weak from the powerful as courts can (**Comment:** power imbalance is a problem in some ADR processes, especially where disputants are not legally represented. If a disputant is likely to do better in court, having regard to the costs and time involved, it may be inappropriate to settle for less. In some situations, usually involving an abuse of power, an adjudicated outcome alone will reinforce the expectations of society and protect the weaker party. It may be argued these people should not be required to attempt consensual processes before litigating. However, the power of the purse enables some to withstand litigation better than others, so even the courts cannot remedy all power imbalances);

### Potential disadvantages

Some disadvantages are:

- (a) some disputants will see the prerequisite as another costly hurdle to be overcome on the way to court (**Comment:** the additional spending of private money must be balanced against the saving of public money; further, settlement in ADR will produce savings to those whose cases are resolved at this stage);
- (b) it denies the right of access to the court system at the time of one's choosing; (**Comment:** it is a policy question whether disputants should be entitled to trigger the expenditure of public money to resolve their disputes if they have not first attempted to resolve them with the assistance of a trained dispute resolver);
- (c) it requires disputants to find ADR practitioners of competence at a price they can afford (**Comment:** there are now many competent trained mediators (some might say a surplus) throughout Australia — courts have lists of them. Competition will keep prices affordable);
- (d) some disputants may use the opportunity to gather information to improve their case in court (**Comment:** this is a risk to be guarded against. Participation in ADR does not require full disclosure. In any event, litigation requires proper discovery — there are few surprises in court these days);
- (f) such a regime could lead to strike out applications if the claim presented to the court is not coextensive with the dispute submitted to ADR. It would be better to sort out the most appropriate process after litigation has commenced, when the claim has been articulated (**Comment:** this could be a real problem if it happens often. One would need to monitor such a system carefully to see whether such interlocutory proceedings were stifling the system);
- (g) lawyers who do not agree with an interests-based approach and whose main focus is the protection of rights (a position hard to criticise given lawyers' calling) may participate in ADR processes while inhibiting the possibility of an agreed outcome (**Comment:** over time, the needs of the disputants (lawyers' clients) will prevail. If they desire an agreed outcome they will engage lawyers whose approach is less rights-oriented);
- (h) sometimes commencing proceedings is all that is necessary to start the negotiation process. One party is often happy to stall until faced with the reality of litigation (**Comment:** such cases must be weighed against those that may be spared entry to the court system by the introduction of the proposal);

- (i) while parties should be referred to ADR at some time in the dispute before trial, there is no real advantage in requiring that to be before filing. Once parties are in court a judge or other qualified person can determine the most appropriate process (**Comment:** this is the ideal espoused by Sander).

### Policy and trade-offs

As with most important policy decisions, the question whether disputants should be required to attempt ADR as a prerequisite to entry into the court system involves trade-offs between various interests that are by no means easy to make. ●

The author is grateful to Bernadette Rogers, Director of Alternative Dispute Resolution of the Queensland Law Society, and other members of the ADR Committee of the Law Council of Australia, for their comments on these ideas and for their criticisms, many of which have been incorporated into this paper.

*Alan L Limbury, Managing Director,  
Strategic Resolution, Sydney.*

*Alan Limbury can be contacted on  
(02) 9368 0274 or fax (02) 9368 0643.*

### Prospect website

.....▶

For the latest, up-to-date  
information about Prospect  
Media Pty Ltd, new product titles  
and existing business and legal  
publications, ordering online  
and much more: contact us at our  
web site:

[www.prospectmedia.com.au](http://www.prospectmedia.com.au)