

6-1-2000

Mediation in the 90s: the promise of the past

Tom Altobelli

Recommended Citation

Altobelli, Tom (2000) "Mediation in the 90s: the promise of the past," *ADR Bulletin*: Vol. 3: No. 1, Article 3.
Available at: <http://epublications.bond.edu.au/adr/vol3/iss1/3>

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



Current issues in ADR

Mediation in the 90s: the promise of the past

Tom Altobelli

Introduction

History is often the best indicator of the future, particularly if we are prepared to observe and learn from the lessons which history tries to teach us. A review of the 1990s in terms of the growth of ADR¹ reveals significant activity and measurable growth. This augurs well for the future. In this article I aim to trace the growth of ADR over the last decade or so. I argue that the 'promise of the past' is evidenced by:

- ADR legislation;
- changing attitudes and practices in the courts and the legal profession;
- changing responses by governments to ADR;
- the adoption of ADR by Australian industry; and
- increased education about ADR.

While the past has been very promising, already there are indications of threats to ADR in the future. The growth of ADR in Australia will need to overcome factors including:

- judicialisation of ADR;
- institutionalisation of ADR;
- disunity within the ADR profession; and
- lack of co-ordination and consistency in ADR legislation.

Nonetheless, I suggest that these challenges are quite manageable, and that the promise of the future is far brighter than the promise of the past.

Legislation

One of the best indicators of growth of ADR in Australia has been the steady but significant increase in the number of Australian laws which mandate, provide for or refer to various forms of ADR. The research below examines legislation which, in one way or another, refers to mediation or mediation type processes which, for some reason, are not labelled as such. The results would have been

even broader had the research extended to conciliation, conferencing or arbitration.

One of the central points made in this article is that legislative activity in the area of ADR is evidence of the growth and development of ADR in Australia. But this is not a statement which should be accepted at face value. Many of the examples given below include minor references to mediation, indeed possibly quite esoteric ones in some cases. The question needs to be asked: what does legislation aim to achieve, and what does it in fact achieve? It is only by briefly exploring this question that it is possible to fully appreciate the implications of increased legislative activity in ADR.

Legislation is the means by which governments implement their policies. It is by no means the only way, but it is certainly the most effective way to implement policy. As Chisholm² has stated, 'Acts of parliament are, among other things, forms of communication'. Legislation is the means by which governments communicate with the people. It lets us know what governments are thinking, often even if they are not overtly saying it. Chisholm³ asks two further questions.

- To whom is the law being addressed?
- What is the purpose of communication?

Laws could be addressed to all Australians, in a general sense, but this response lacks reality because most Australians have little knowledge about the laws that affect them, and few would really have the skills to access and understand those laws anyway. These factors don't detract from the fact that laws can be addressed to all Australians, but it does suggest few Australians are listening. More realistic responses to the question might be, as Chisholm points out, that laws are addressed to everyone who is affected by them, to people who advise about the law (lawyers and industry experts) and to the legal system (lawyers and judicial officers). ➤



➤ And what is the purpose of the communication? Chisholm argues that laws go further than just setting out rules — they have wider purposes which certainly include changing perceptions. But whose perceptions are sought to be changed? The answer to this sub-question may well be the same as the answer to our first question: to whom is the law addressed? The writer suggests, however, that the change in perceptions is aimed not just at those affected by the law and those who advise in relation to it, but perceptions are sought to be changed more broadly. Indeed, I suggest that community perceptions are sought to be changed, in an indirect sense, when the parliament makes laws. Thus laws tell us not just what to do, but how to do it as well.

This is an uncharacteristic excursion into the theoretical for me but I am convinced that laws have a wider impact than just on those who are affected by them, and lawyers and the judiciary. For one thing, when we talk about people who are affected by laws, we need to consider the dimension of time. Laws have an effect on the people for whom it is relevant not just at the time of implementation, but well into the future. Cultural change may be effected by laws in various ways. It can be effected radically or incrementally. Examples of radical cultural change by way of legislation include the *Family Law Act 1975* (Cth) and the *Trade Practices Act 1984* (Cth). An example of incremental (but nonetheless real and effective) cultural change is that of ADR legislation. The history of ADR legislation in Australia is one of modest, specific but isolated initiatives which go back to the 1980s and possibly earlier. In 1990, for example, a survey of ADR legislation would have been brief and perfunctory. By 1995, when I first commenced serious research into this area, there had been activity which was significant in comparison to 1990 but which was limited and isolated, both in geographic terms and in terms of the subject matter.⁴ By 2000, however, it is possible to discern quite significant activity in terms of ADR legislation which is harder to limit or isolate by reference to geography and subject matter. This is, I suggest, incremental cultural change. This cultural change goes beyond mere rule making, or dictating how those directly affected by the laws and lawyers are to

behave. This cultural change is an attempt to change the norm. While the individual laws are important in themselves, perhaps even more important is the message conveyed by them. That message is that dispute resolution is to be viewed in increasingly non-adversarial terms, and that ADR processes are to be viewed as legitimate, credible and, indeed, preferred to traditional dispute resolution.

Observations about ADR legislation

In 1990 there were but a handful of Australian Commonwealth or State laws which referred to or provided for mediation in some way or another. Ten years later, there are approximately 104 statutory instruments across Australia referring in some way to mediation or mediation-like processes. That is significant growth indeed but, interestingly, by comparison to California it would be regarded as quite modest.⁵

Attitudes and practices in legal profession and the courts

The proliferation of legislation relating in some way to ADR is evidence itself of the growth in ADR in Australia in the 1990s, but that legislation also has an inevitable flow-on impact on the legal profession and the courts administering those laws. This is also manifested in other ways.

The ALRC, in their issues paper 25 *Review of the Adversarial System of Litigation: ADR – its role in federal dispute resolution*⁶ (IP 25), acknowledged the view that litigation ‘has been transformed in recent years’ and that the focus of the litigation has shifted from the trial to pre-trial settlement procedures. This has been facilitated by many of the Acts referred to in the section above,⁷ and in this regard possibly the most profound changes were introduced by the State and Commonwealth equivalents of the Courts Legislation (Mediation and Evaluation) Amendment Acts. These changes are significant because of the framework of court assisted or court annexed ADR which has been established, and for the message communicated by these Acts, even if the actual implementation and usage of these amendments has not been consistent across the spectrum of the users of the courts. One of the most interesting developments evidencing changes of attitudes and practices in the ➤



➤ courts is the way in which the Federal Court of Australia moved from voluntary mediation to mandatory mediation. This was a change initiated by the Federal Court judges themselves.⁸ In 1999 it was suggested that a similar change was contemplated in the NSW Supreme Court. The NSW Attorney General was considering amendments to the *Supreme Court Act 1970* (NSW), the effect of which would be to make mediation and neutral evaluation mandatory if the court considered the circumstances appropriate. This move was said to have had the support of the Chief Justice of the Supreme Court, the Attorney General and the Law Society of NSW, but not the NSW Bar Association which opposed it. The writer doubts if this is the end of the matter. If, or rather when, this change is made, there are inevitable flow-on possibilities for other NSW courts.

In relation to changing judicial attitudes to ADR, IP 25 notes:

3.85 Although there has been no substantial research into judicial attitudes towards ADR processes, a 1994 survey into the attitudes of Federal Court judges shows that most judges believe settlement before trial is preferable to going to trial. Judges generally indicated that it was appropriate for them to encourage parties to settle the dispute before trial or to advise them to consider seriously alternative means of dispute resolution. However, the judges did not view themselves as having a role in the actual process of discussing settlement options and negotiating. This can be contrasted with the attitudes of judges of the Supreme Court and District Court of South Australia. Judges there view themselves as having a significant role in the process of settlement. These Courts are currently piloting a mediation program which provides for sitting judges to conduct mediations.

Further evidence of this is found in very strong and clear statements by senior judges.⁹

Changes in attitude in the legal profession are evidenced by significant ADR related initiatives such as that of the Law Society of NSW. In August 1999 the Law Society's EDR Task Force presented its report.¹⁰ Its motivation was 'repositioning solicitors in the marketplace by examining the role of solicitors in litigation and dispute resolution process and structures'.¹¹

These are very powerful statements coming from the professional organisation representing the largest group of lawyers in Australia. The Report goes on to make 27 recommendations to implement reform strategies in education and training, legislative and court reform, and marketing and community education.

These cultural changes within the legal profession have also been observed by other major groups representing the interests of lawyers.¹² Nonetheless, despite the obvious progress which has been made in terms of cultural change within the courts and the legal profession, there is still quite some distance to travel.¹³

Reflecting on the 1990s, however, it is interesting to observe that the courts and the legal profession are taking on themselves the responsibility for cultural change and not necessarily merely reacting to legislative or consumer driven initiatives.

Governments and ADR

Again, the proliferation of ADR legislation is evidence of cultural change within governments as regard ADR, but there is other evidence which is conflicting. The attitude of the Attorney General of the Commonwealth is exemplified in statements made in a press release:

... the Government firmly believes that mediation and alternative dispute resolution should be the norm rather than the exception.¹⁴

A major conference was held in Canberra in 1999 to consider the role of the Commonwealth Government in disputes involving it. It was noted that the Commonwealth was by far the most prolific litigator in the federal sphere, being a party to almost half of the cases litigated in Federal Courts and tribunals.¹⁵ Furthermore, research indicated that it was far more likely for a case in which the Government is a party to go to a hearing in the Federal Court.¹⁶ Thus the Commonwealth Government's rhetoric, and its enthusiasm with federal legislation, was not also evidenced by its behaviour as a litigant.¹⁷

The Government's 'Model Litigant Policy' was advanced by some as an indication of a change of policy as regards dispute resolution.¹⁸ ➤



➤ Meadows¹⁹ presents the contrasting viewpoint of a person litigating against the Commonwealth. He contrasts how a private corporation approaches dispute resolution to the approach of the Commonwealth and makes observations in relation to the Model Litigant Policy:

Despite concerns about the government's patchy record as a litigant, and its failure as perceived by some to 'practise what it preaches' when it comes to ADR, there are some significant highlights over the last decade which demonstrate what Commonwealth government entities can do when they set their minds to it. The Administrative Appeals Tribunal (AAT), for example, is a prolific user of ADR including conciliation conferences and mediation. The Small Taxation Appeals Tribunal applies, innovatively, mediation in small taxation matters. The Australian Competition and Consumer Commission (ACCC) has used ADR processes in the resolution of cases brought by the ACCC for contraventions of the *Trade Practices Act 1974* (Cth). The Family Court of Australia has been a significant provider of ADR services including conciliation and mediation, and the legislated mediation scheme established by the *Family Law Act, Rules and Regulations* is one of the most extensive in the world.

The *Australian Standard: Guide for the Prevention, Handling and Resolution of Disputes* sets out benchmarks for conflict management systems, codes of practice and dispute resolution clauses.

Whilst the Commonwealth government's performance in ADR is a mixed one, there are suggestions of a new direction for dispute management in the government ...²⁰

Industry and ADR

Certain industries have 'embraced' ADR in the 1990s because of legislation — retail and residential leases, provision of aged care services, resolution of disputes between farmers and their lenders, and so on. But many other industries have established schemes integrating ADR in their overall complaints and disputes management structures. Indeed, there are benchmarks for such schemes.²¹

Examples include the Telecommunications Industry Ombudsman, the Life Insurance Complaints Scheme,²² the General Insurance

Enquiries and Complaints Scheme, the Australian Banking Industry Ombudsman,²³ the Franchising Industry Code, Oil Code, National Electricity Code and the Credit Unions Dispute Resolution Service.

Industries across Australia seem to have embraced mediation as a preferred industrial relations dispute resolution method, notwithstanding that conciliation and arbitration have historically been the preferred processes.²⁴ It almost seems that with the growth of enterprise bargaining, the agreements giving effect to the same provide for mediation, thus recognising that, more often than not, mediation provides speedy, personalised dispute resolution with minimal cost and delay.²⁵ The Australian Press Council, the self-regulatory body of the newspaper industry, uses ADR.²⁶

While the above is very positive, there are less flattering indications about how small business deals with disputes and ADR, and there is much scope to improve in this sector. As part of its Review of Small Business Access to the Legal System, the Commonwealth Attorney General's Department commissioned research into the attitudes and experience of small business in relation to disputes. In April 1999 two documents were prepared by the consultants:²⁷ a *Survey of Small Business Attitudes and Experience in Disputes and their Resolution: Results, Implications and Directions*, and a report. This important research has not yet received the attention that it deserves. It covered businesses with up to 19 full time employees.²⁸

The research noted²⁹ that mediation processes only account for 5 per cent of the total number of disputes managed within the relevant period. Mediation was recognised as having tangible benefits as a dispute resolution process relating to business disputes. Indeed, the report is quite supportive of compulsory mediation in the business context.

ADR and education

The EDR Task Force of the Law Society of NSW³⁰ made a number of specific recommendations in relation to education and training — indeed, 13 out of 27 recommendations relate to this. The emphasis of this report on education clearly reflects the importance of this issue. ➤



➤ It is both interesting and important to note that the EDR Task Force recognised the importance of, and therefore encouraged, the teaching and practice of ADR from as early as secondary school.³¹ The role of initiatives such as the Schools Conflict Resolution and Mediation Competition (SCRAM) is inestimable in the present context. Of course peer mediation in schools across Australia has been growing steadily.³² Perhaps the most dramatic change within the legal profession is the recognition of the importance of adequately skilling legal practitioners and aspiring practitioners in communication, problem solving, negotiation and non-adversarial dispute resolution skills.

Nonetheless the EDR Task Force noted that ADR studies can be found in the curricula of most NSW law schools as an elective subject and indeed, at UWS Macarthur, Dispute Resolution was a core (mandatory) subject.³³ Similarly, the EDT Task Force noted that ADR related studies can be found in the curricula of all NSW Practical Legal Training providers. At a postgraduate level, courses in ADR were found to be expanding rapidly.

I believe that significant cultural change is taking place in the legal profession so far as dispute resolution is concerned. The 'new lawyers' — those who have graduated in the 1990s — are entering practice with attitudes and skills about dispute resolution which few of their predecessors possessed at the equivalent level in their careers. The 'new lawyers' think and respond to conflict situations differently — litigation is but one of the options available to them. Indeed, for the 'new lawyers', the acronym ADR cannot stand for alternative dispute resolution because, for them, the alternativeness of non-litigation is out of their mindset or paradigm. The 'new lawyers' were trained and educated to simply match the most appropriate dispute resolution option (litigation included) to the dispute as it presented itself. The 'new lawyers' are currently in the first decade of their legal careers. Some of them are entering positions of influence and responsibility, and as time goes by my vision is that the 'new lawyers' will come to significantly influence the way in which the entire legal profession responds to disputes. At some point, hopefully in the not too distant future, the vision of the Law

Society's EDR Task Force will have been realised — lawyers will have regained control over the resolution of disputes, and significant and sustainable change in the dispute resolution culture will have been achieved through the promotion of effective and efficient consensual methods of dispute resolution.

Concerns for the future

While the past has been very promising indeed, I would like to briefly discuss some important issues which I regard as factors which will hinder the continued growth of ADR if not managed correctly.

Judicialisation of ADR

The judicialisation of ADR³⁴ means, in this context, that courts are increasingly called upon to pass judgement upon matters pertaining to ADR. Thus a body of caselaw in relation to mediation, for example, is starting to develop. As ADR legislation abounds, so the likelihood of judicial interpretation on ADR will increase.

With relative ease, 19 cases were found in less than one hour of research, spanning several Australian jurisdictions, and dealing with many diverse aspects of mediation. I could have continued my searching, but there was no need — the point I wish to make about judicialisation of ADR is clearly made just from this list. What impressed me about this list is that I am familiar with so few of the cases. I was under the impression that cases dealing with aspects of mediation were, in fact, few and far between. The reality is completely the opposite.

But that should not cause surprise. Surely the inevitable consequence of the growth of ADR in Australia is that the judiciary will be called upon to adjudicate in relation to various aspects of ADR. This is a growing pain, not a fatal disease. It is almost a tacit recognition by our legal system that ADR has come of age.

But when will the judicialisation of ADR become a threat? Bryant³⁵ suggests that judicialisation becomes a clear concern when it becomes intrusive, creates uncertainty and ultimately threatens the use of ADR.³⁶ In other words, judicialisation becomes a threat when the very integrity of the process of ADR is undermined. I can conceive of that ➤



➤ happening through judicial activity in two ways. Firstly, I regard as the central concept of ADR — the aorta of ADR so to speak — that parties are free to agree or not agree as they chose. Some people call this consensuality, and this is not to be confused with the notion of voluntarism. I believe that parties can be mandated to attend ADR procedures including mediation, and that while this may impact on the voluntary nature of participation, it does not impact on the heart of the process — that agreement is entirely voluntary. The first possible threat of judicialisation is that agreement is no longer voluntary. I can conceive of this happening through courts imposing unreasonable obligations on parties to participate in ADR processes in 'good faith'. The more the concept of 'good faith' is unpacked, examined, refined and defined, the easier it becomes for the law to regulate whether agreement is mandatory rather than voluntary.³⁷ While I express this fear, I cannot see this happening in the foreseeable future.

The second conceivable threat of judicialisation is that it tends to both prescribe and proscribe conduct associated with ADR participation — for the mediator, the parties and their representatives. Thus, for example, if confidentiality is not upheld, all participants in mediation will become wary of what they say and do in mediation. If courts will readily intervene in order to resolve the uncertainty sometimes inherent in the terms of agreements reached at ADR sessions, it is conceivable that the center of gravity of these processes will shift from the getting of the agreement to the documenting of the agreement. These examples are, of course, simplistic. The reality is that ADR processes never take place in a vacuum. As judicialisation increases, so all participants will become increasingly concerned about the consequences of action and inaction, and will act and react accordingly. Judicialisation only becomes a threat, however, when conduct associated with participation in ADR processes becomes so regulated that the autonomy of the participants becomes illusory and the flexibility of processes and informality merely invites litigation.

Institutionalisation of ADR

I see nothing wrong with the

institutionalisation of ADR if all that this means is it becomes recognised as an established norm of dispute resolution in contemporary society. What I fear is institutionalisation in the sense of ADR losing its identity and its distinctiveness. I think, with respect, that Jesus Christ made a point 2000 years ago in a slightly different context when he said

You are the salt of the earth. But if the salt loses its saltiness, how can it be made salty again? It is no longer good for anything, except to be thrown out and trampled by men.³⁸

The point is particularly apposite in the present context. I fear that if institutionalisation of ADR leads to loss of its distinctiveness, it may well be the beginning of the end for ADR. Like unsalty salt, it will be good for little or nothing.

So what are the major threats to the distinctiveness of ADR? I don't regard legislation which provides for ADR as a threat to its distinctiveness. I don't believe that merely offering various ADR processes as an adjunct to more traditional dispute resolution is any threat to its distinctiveness. I do believe that a threat will arise if the provision of ADR services to the community is appropriated by the courts, to the exclusion of others. I think that these concerns are eloquently stated by Sir Laurence Street in his important article 'The Mediation Evolution – Its Moral Validity and Social Origin'.³⁹ Having expressed concerns in this regard, I don't think that this is reasonably foreseeable at this time. Indeed, the opposite seems to be happening — some courts, notably the Family Court of Australia, are being forced to move away from their roles as providers of ADR services, with this role being distributed among community groups.

Lack of unity in the ADR profession

I regard lack of unity in the ADR profession as a significant actual threat to the continued growth of ADR in Australia. This lack of unity is hindering the marketing of the mediation industry itself. It is an industry poised to take advantage of growth. There is no doubt that demand for ADR services in Australia has grown significantly over the last decade, and yet the industry itself suffers from lack of cohesion, and a failure to see the Big Picture and thereby appreciate the awesome opportunities which are present.⁴⁰ The dilemma is, I suggest, that we are better ➤



➤ at preaching the virtues of co-operation as against competition than we are at actually practising it. To continue the Biblical parallel, in our respective corners of the vineyards of discord, where we are all busy practising our skills, we are so busy telling our customers and clients about the virtues of co-operation that we don't perceive the intensive competition going on within the vineyard itself. So what happens? The industry doesn't market itself. There are tensions within organisations promoting ADR in their discrete sectors of the marketplace. There are latent rivalries between lawyer and non-lawyer providers of ADR, and between those with formal qualifications and those without. I do not subscribe to the utopian view of non-competition and complete co-operation — by no means. I simply believe that an obstacle to further growth in the ADR industry is being able to co-operate more, at least as regards strategies to help the industry grow.

ADR legislation – lack of co-ordination and consistency

This is a serious problem which I have examined previously.⁴¹ The task of broadening this research to examine more of the legislation which has been enacted since the publication of that article would be quite monumental. Even a superficial examination of the legislation mentioned earlier in this article reveals inconsistencies between legislative approach, policy and implementation — for example, definitions are inconsistent, key issues such as confidentiality and accreditation are treated in a diverse but piecemeal fashion. The argument for co-ordination is, in my opinion, even stronger today than it ever was. ●

*Dr Tom Altobelli, LL.M (Syd) SJ.D (UTS)
Principal Altobelli & Associates Sydney,
Senior Lecturer, Faculty of Law, University
of Wollongong, Accredited Specialist
Mediation.*

Endnotes

1. I refuse to enter into the terminological debate about whether it is alternative, appropriate or assisted dispute resolution — in the present context, any of these definitions will be adequate.

2. Chisholm R, 'The recent family law

reforms: child's play' College of Law Seminar Paper 96/58 at para 9.

3. As above.

4. See Altobelli T, 'ADR legislation: some recent developments' (1996-7) 3 CDRJ 1; 'New South Wales ADR legislation' (1997) 8 ADRJ 200; 'Recent legislative developments: a new era for ADR in NSW' (1995) 6 ADRJ 187.

5. Bryant K C, 'California lawmakers turn focus toward ADR' 1997 (Spring) *Dispute Resolution Journal* 55 at 56.

6. June 1998, AGPS Canberra.

7. See IP 25 para 3.8.

8. Black M, 'The courts, tribunals and ADR-assisted dispute resolution in the Federal Court of Australia' (1996) 7(2) ADRJ 138.

9. Brennan G, 'Key Issues in Judicial Administration' speech, 15th Annual Conference of the ALIA, Wellington 20-22 September 1996 pp 6 and 9. Cited in IP 25 at paras 9.4 and 9.5.

10. Report of the EDR (Early Dispute Resolution) Task Force, Law Society of NSW, August 1999.

11. As above, preface p 2.

12. See ALRC Report No 89, *Managing Justice A Review of the Federal Civil Justice System* at para 3.35.

13. As above, para 3.32.

14. D Williams, 6 April 1998.

15. Rose A, 'Federal government in civil litigation and dispute resolution' in *The Management of Disputes Involving the Commonwealth* ACCC conference papers Canberra, 1999, p 124.

16. Matruggio T and McAllister G, 'Part one: empirical information about the Federal Court of Australia' unpublished ALRC Sydney March 1999.

17. Beresford-Wylie S, 'The administrative review experience' in ACCC conference papers, above note 15, pp 73-84.

18. Govey I, 'How the Commonwealth should behave as a litigant' in ACCC conference papers, above note 15, pp 13-15.

19. Meadows P, 'The government as a litigant: a solicitor's view' ACCC conference papers, above note 15, pp 52-54.

20. Rose, above note 15, p 139. ➤



➤ 21. Dept of Industry, Science and Tourism, *Benchmarks for Industry-based Consumer Dispute Resolution Schemes*.

22. See Bean P, 'The evolution of an ADR scheme: the Life Insurance Complaints Service' (1995-6) 2 CDRI 127.

23. See McDonald G, 'The Banking Industry Ombudsman's Scheme' (1994) 1 CDRI 85.

24. For a brief history of conflict resolution in industrial relations see Davis E, 'Mediation within enterprise bargaining: NSW Fire Brigades 1995' (1998) 9(1) ADRI 5 at 5-6.

25. See Altobelli T, 'Mediation and enterprise bargaining' (1998) 1 ADR 16.

26. See Flint D and Mo J, 'The Australian Press Council: a provider in alternative dispute resolution' (1995-6) 2 CDRI 1.

27. Marsden Jacob Associates, Transformation Management Systems and Brian Sweeney & Associates.

28. *Survey of Small Business Attitudes and Experience in Disputes and their Resolution: Results, Implications and Directions* p ii, para 7.

29. As above, para 40-44.

30. Above note 10.

31. Above note 10, pp 11-12.

32. A discussion of the NSW experience in peer mediation is contained in Grose S and Alford W, 'The dispute resolution project: peer mediation in the schools' in Bagshaw D (ed) *Second International Mediation Conference — Mediation and Cultural Diversity Conference*

Proceedings.

33. This subject is taught to students in their penultimate year of law studies. The subject combines studies in ADR and civil procedure, and aims to balance the study of theories of conflict and court rules of procedure with practical training in mediation and negotiation.

34. The term judicialisation is not my own — see Bryant K C, above note 5. I build on some of the ideas expressed by Bryant in his article.

35. Bryant K C, above note 5.

36. I am taking liberties with Bryant's work here. Bryant regards legislation as judicialisation, whereas my concern with legislation is that it may institutionalise ADR — a matter I discuss below. I do share his concerns, though, in the slightly different context of courts adjudicating in relation to ADR matters.

37. A good example of this is a decision in the National Native Title Tribunal, *Mullanj Njama People; State of Western Australia* 1996 NNTTA 34 7 August 1996.

38. Matthew 5:13, English New International Version of the Bible.

39. (1998) 9 ADRI.

40. These are issues I have discussed elsewhere: see Altobelli T, 'Are you getting enough? Marketing mediation' (1999) 1(9) ADR 113-115.

41. See Altobelli T, 'NSW ADR legislators: the need for greater coordination and consistency, (1997) 8 ADRI 200.

Annotated Home Building Act 1989

New from Prospect

This new Prospect publication offers a greater understanding of the *Home Building Act 1989* (NSW) as a whole and, most significantly, the new provisions as they apply to the contractor, sub-contractor and owner-builder. Author Tom Davie provides expert analysis and commentary throughout this work, drawing from recent cases and his wealth of experience in construction and contract law to ensure that this annotated Act is an authoritative and invaluable reference.

Any inquiries for Prospect titles should be addressed to Prospect Media on ph (02) 9439 6077 or by email to:

selima@prospectmedia.com.au



PROSPECT