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Australia

ADR in the Australian court and tribunal system

Tania Sourdin

There is a reference to ADR procedures in almost every court and tribunal in Australia. In many instances ADR processes have become an integral part of the work of courts and tribunals. In other cases, while ADR may be referred to in legislation, practice directions and decisions of courts, ADR practice is not uniform. The use made of ADR processes will depend upon the individual preferences of those within the particular court and tribunal.

Discussing ADR processes within courts and tribunals is difficult as such a

vast range of processes operate across jurisdictions and they have often been introduced to achieve different objectives (for example, many processes have been introduced to assist in case management).

Many ADR processes and systems operate outside the court and tribunal system and are staffed by those external to the courts and tribunals, while others operate within the court and tribunal system and are often staffed by court employees, officers or other staff.

There are many issues that are raised by the incorporation of ADR systems

and processes into courts and tribunals. This relationship raises issues concerning the institutionalisation of ADR, the training and accreditation of practitioners, as well as issues about the role of the court and tribunal system and how it may relate to a larger and more informal ADR system.

There are also issues about how judges develop ADR processes as an adjunct to conventional judging. For example, 'facilitative judging' may involve judges using 'hot tubs' to resolve disputes among experts or using ADR skills such

as reframing and summarising to improve courtroom communication.

State court and tribunal systems

State courts and tribunal systems in Australia deal with large numbers of litigated cases in comparison to federal courts and tribunals. For example, although the Family Court of Australia deals with many thousands of disputes, local courts throughout Australia deal with a vastly greater number and array of civil, family and criminal matters.

Most states in Australia now provide for the mandatory referral of proceedings to ADR processes. In many cases this power has been present for some years and is not controversial. For many people, the issue of mandatory referral only raises concerns where facilitative processes are

New South Wales

The concept of mandatory referral to an ADR process conducted by an external practitioner is not a new concept in NSW. Many civil disputes have for the past 15 years been referred to arbitration processes in the District Court and the Supreme Court of New South Wales without the parties' consent.¹ This 'short form' arbitration is relatively informal in that no transcript is taken, the parties may contribute directly, the setting is usually in a conference room and expert evidence is not usually presented.

What is relatively new in New South Wales (although not in other States of Australia) is a preparedness to refer matters out to mediation processes without the consent of the parties to a dispute. In the Supreme Court of New South Wales, the Practice Note² also

either by consent or without the consent of a party. If a party does not consent to a referral order, a party can argue as to why an order should not be made before the Court.⁴ There are a number of cases that have dealt with this power.⁵

Courts will order ADR without consent where the parties have not voluntarily arranged ADR and the filing of an application to the Court may trigger referral to an ADR process. The programs that operate in the Queensland Courts are regarded as 'an integral part of the court system.'⁶

Victoria

The County Court of Victoria has one of the most extensive ADR referral systems. Well over 1000 cases have been referred to mediation pursuant to the County Court civil procedure regime.

One of the platforms of the County Court's Civil Initiative (Order 34A) is said by the Court to be 'that each case is subject to a directions hearing held subsequent to the filing of an appearance of the defendant.' Mediation is encouraged in the great majority of cases, and on occasions ordered without the consent of the parties, at the first directions hearings.⁷

The Supreme Court Rules⁸ provide that mediation can be ordered without the parties' consent. However it does not have the power to order arbitration without the consent of the parties. Not unlike the Supreme Court of New South Wales it also has power to refer a dispute, without the consent of parties, to a special referee.

Victoria embraced mediation as a form of dispute resolution in respect of civil cases throughout the 1990s and discussed issues relating to standards at an earlier time.

Western Australia

The Supreme Court of Western Australia has an ADR scheme that provides for the mediation of disputes by registrars of the Court and others.⁹ The District Court has a well developed pre-trial scheme.

The Schemes operating in Western

This expansion [of ADR] has been so significant that it has been claimed that court trial work has now declined in some areas.

concerned. However, in states such as Victoria, mandatory referral to mediation in the County Court has been common for more than a decade. In New South Wales, mandatory referral to an abbreviated form of arbitration has been in place for more than 15 years. ADR use in these two jurisdictions has resulted in the finalisation of many thousands of civil cases.

In other jurisdictions such as Queensland and Western Australia, ADR use has also expanded over the past decade. This expansion has been so significant that it has been claimed that court trial work has now declined in some areas.

The following provides a very brief summary of some developments in each state and within the federal system.

provides an alternative to a referral 'without consent'.

Chief Justice Spigelman has referred to the adoption of a formal *Declaration of Principles on Court Annexed Mediation* by the Council of Chief Justices, which included the following:

Mediation is an integral part of the Courts' adjudicative processes and the *shadow of the Court* promotes resolution [emphasis added].

Queensland

The *Supreme Court of Queensland Act 1991* (Qld) provides that dispute resolution processes are 'virtually compulsory for the parties to participate (in)'.³ The two primary forms of dispute resolution in use are mediation and case appraisal. The Act enables referral orders to be made

Australia were the subject of review and comment in late 1999. The Law Reform Commission of Western Australia at that time recommended a greater focus on ADR processes within the civil and litigation system. The Commission noted at that time that in District Court proceedings 30 percent of matters resolved after assistance by a registrar trained in ADR.¹⁰

Other States and Territories

South Australia has had a range of ADR referral processes for some years. In particular, it has supported conferences and mediation. In conferences alternatives to litigation are usually discussed. Mediation has been ordered without consent in South Australia.¹¹

In Tasmania, mandatory referral to mediation was recently permitted. The Court will now direct mediation where it appears there is a good prospect of settlement or where it considers a mediated settlement is preferable.¹²

In the Australian Capital Territory there has been a close focus on ADR and its relationship to the litigation system. The *Mediation Act 1997* (ACT) set up a comprehensive regulatory scheme that applied to mediators.

Federal schemes

Australian federal courts and tribunals have been involved and engaged in ADR development for more than a decade. The emphasis in federal courts and tribunals has largely been upon mediation and conciliation processes rather than other ADR processes such as evaluation and arbitration. Court staff in the Federal Court have undertaken much of the mediation work. Many significant federal tribunals that have adopted ADR processes as an essential part of their framework. For example, the National Native Title Tribunal has a well established role in providing ADR services (mediation and more recently arbitration) in complex multi-party disputes.

The Federal Court

In the Federal Court of Australia matters have been referred to mediation without the parties' consent since 1997.¹³ The *Assisted Dispute*

Resolution program was commenced in 1987 and until 1997 required the consent of the parties. This program was based on mediation of disputes by registrars of the Court. Registrars of the Court have performed much of the mediation work although external mediators in Victoria and in New South Wales have mediated a number of matters.

The ADR program in the Federal Court is reasonably well developed and varies from state to state. Some of that variation is undoubtedly attributable to the backgrounds, interests and caseloads of different judges as well as practitioner preferences.

The Family Court

A range of dispute resolution services have been offered by the Family Court, including mediation, conciliation, counselling, information sessions, parenting programs, children's programs and other programs designed to impart life skills to the participants. Case conferences are increasingly being used as a case management and dispute resolution process.¹⁴ In 2000 the Court commenced a major review of its dispute resolution services. In early 2000 a decision was made to refer to all of the current primary dispute resolution processes as 'mediation' and endorse a facilitative model of communication in all processes that were previously referred to as PDR (primary dispute resolution) services.¹⁵ Increasingly, matters are referred to well developed services that exist outside the Court.

The mediation scheme related to the Family Court was described as 'the most comprehensive statutory mediation scheme, and the most detailed mediation legislation in Australia to date.'¹⁶ Much of the mediation work is conducted by external agencies which receive some funding from the Commonwealth. The regulations deal with topics concerning mediator accreditation and training. The regulations also specify processes and case management guidelines.

The Federal Magistrates service

The Commonwealth Parliament established the Federal Magistrates

Service at the end of 1999. The Service is an independent federal court under the Australian Constitution. The commencing jurisdiction of the Federal Magistrates Service includes family law and child support, administrative law, bankruptcy law and consumer protection law. Part Four of the *Federal Magistrates Act 1999* (Cth) entitled 'Primary Dispute Resolution' establishes processes and procedures for dispute resolution as well as case management.

Other legislative schemes

The diversion of disputes from the court or tribunal setting is also encouraged by a number of different processes. For example, in South Australia legislation requires parties to notify one another of a claim before the initiating process is filed. Other legislation requires mandatory attendance at some form of ADR session as a pre-condition to litigation. The legislation often requires different reporting standards and notice periods. New South Wales has legislation in a number of different areas to prevent court proceedings being commenced without mediation occurring.

The *Farm Debt Mediation Act 1994* (NSW) provides that a mediation must occur before a creditor can take possession of property or other action under a 'farm mortgage'. Similarly, the *Retail Leases Act 1994* (NSW) provides for the mediation of retail tenancy disputes. Under that legislation court proceedings cannot be commenced until a certificate has been provided by the Registrar of the Retail Tenancy Disputes Unit or a court is satisfied that the dispute is unlikely to be resolved by mediation.¹⁷

The *Legal Profession Act 1987* (NSW) specifically provides for disputes between clients and legal practitioners to be referred to mediation; participation by the parties in mediation is voluntary.¹⁸ The *Strata Schemes Management Act 1996* (NSW) provides for mandatory mediation of strata scheme disputes prior to any application being made to the Registrar for an order concerning the dispute.



Conclusions

Growth in ADR use in courts and tribunals in Australia has undoubtedly been driven by the judiciary who are often keen supporters of ADR processes. Changes to the Australian litigation system involving the use of ADR processes have provided many challenges to ADR practitioners, lawyers, judges, administrators and parties.

One area of challenge concerns accessibility — how can processes be accessible to all sectors of the community and how can they be funded? Other challenges could be described as cultural. For example, it has been suggested that most lawyers are comfortable with adjudicative and determinative processes and are surprised to learn that their clients are often seeking facilitative and participatory processes to manage disputes and conflict. ●

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Endnotes

1. See *Arbitration (Civil Actions) Act 1983* (NSW)
2. Practice Note No 118.
3. Cairns BC *Australian Civil Procedure*, 4th ed, Law Book Company, Sydney, 1996, p 55.
4. *Supreme Court of Queensland Act 1991* (Qld) ss 101, 102, 126.
5. See for example *Witcombe v Jordin & Anor* [1998] QSC 26 May 1998.
6. Information Fact Sheet, Queensland Courts December 1999.
7. See <www.countycourt.vic.gov.au/mediation.htm> 18 July 2001.
8. *Supreme Court (General Civil Procedure) Rules 1996* (Vic) 0 50.
9. See s 69 of the *Supreme Court Act 1935* (WA).
10. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, (Perth, October 1999), p 84.
11. See *Barry Hopcroft and*

Barameda Fishing Company v A M Olsen and Ors [1998] SASC 7009

12. *Supreme Court Rules 2000* (Tas) Pt 20.

13. See *Federal Court of Australia Act 1976* (Cth) s 53 A.

14. A M Sikiotis, Deputy Registrar 'Case Conferences in the Family Court', Unpublished Paper (Dandenong), 26 April 2001.

15. Family Court of Australia, *Family Court of Australia Annual Report 1999-2000*, Canberra 2001 at <www.familycourt.gov.au/court/pdf/9900pt3.pdf> 18 July 2001 at 8.

16. T Altobelli 'ADR legislation Some Recent Developments' (1996) 3(1) *Commercial Dispute Resolution Journal* 1, 11.

17. *Retail Leases Act 1994* (NSW) s 68(2).

18. *Legal Profession Act 1987* (NSW) s 144.

19. Parts of this paper draw upon a book published by the author – *Alternative Dispute Resolution* (LawBook Co, Sydney 2002) with kind permission.