

ALTERNATIVE DISPUTE RESOLUTION: PANACEA OR ANATHEMA?

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The Alternative Dispute Resolution (ADR) movement has seen an extraordinary transformation in the last ten years. Little more than a decade ago, only a handful of scholars and attorneys perceived the need for alternatives to litigation. The ADR idea was seen as nothing more than a hobbyhorse for a few offbeat scholars. Today, with the rise of public complaints about the inefficiencies and injustices of our traditional court systems, the ADR movement has attracted a bandwagon following of adherents. ADR is no longer shackled with the reputation of a cult movement.

Problems with Litigation

- Expensive
- Time Consuming
- Antagonism
- Unintended Consequences
- Issue of Fairness (The best attorneys usually cost the most)

(Thomas Stipanowich, ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution”, *Journal of Empirical Legal Studies*, Vol.1(3), 843–912, 2004)

- In 1994, the Dunlop Commission on the Future of Worker Management Relations concluded that **low-income workers do not have equal access to the courts, and that court tends not to be the optimum forum for those who want to continue working for their employer.**

ADR as an Alternative Mechanism

- ADR became to be thought of as a new way of resolving disputes.
- However, ADR roots run deep in human history, and they have long played a crucial role in cultures across the globe.
- Perhaps the earliest legislation of using alternative dispute resolution ... the Rhodian Sea Law codifies traditional rules for determining liability for ship cargo losses and dispute resolution (700 B.C.)
- It would be a long list ... Based on the historical review, it is necessary to ask what alternative dispute resolution is, and how it transforms the litigation experience of disputants, attorneys, and judges.

Definition

- Alternative dispute resolution (ADR) refers to a variety of processes that help parties resolve disputes without a trial.
- These processes are generally confidential, less formal, and less stressful than traditional court proceedings.
- ADR, a shorthand for Alternative Dispute Resolution, is the term commonly used to include all forms of non-adjudicatory third party dispute processes.

- An increasingly important aspect of ADR is the privilege which attaches to both parties in an alternative dispute resolution proceeding and the individual(s) presiding over the proceeding.

National Alternative Dispute Resolution Advisory Council (NADRAC) definition of ADR

- ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.
- ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.

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ADR as dispute resolution in the United States

- In the last quarter of the 20th century, a tide of change swept over federal and state court systems in the United States. It took a variety of forms, usually centering on mediation or nonbinding arbitration, aimed at providing parties with choices of intervention strategies for resolution of disputes.
- There is **substantial evidence** that mediation and other ADR approaches can result in enhanced satisfaction, reduced dispute resolution costs, shorter disposition times, improved compliance with a settlement, and other benefits in some contexts.
- Encouraged by receptive federal and state courts, many companies have incorporated binding arbitration agreements in consumer services and employment contracts.
- Many businesses now have multistep conflict-management systems designed to address employee grievances and disputes without public or private adjudication.
- Current data indicate that, white-collar employees may enjoy outcomes comparable or superior to litigation, and for some, arbitration may currently be the only affordable mechanism to adjudicate a claim.

From Alternative To Appropriate: ADR in Australia (Sourdin, p. 2)

- In the past, dispute resolution processes that were alternative to traditional court proceedings were often referred to as “Alternative Dispute Resolution” (ADR)
- More recently, ADR has been used to refer to Appropriate Dispute Resolution (can also be an acronym for “assisted”, “additional” or “affirmative” dispute resolution processes)
- ADR is increasingly being seen not as an alternative to the formal justice system, but as a dispute resolution system in its own right.
- Impossible to construct precise definitions of ADR processes that are accurate in respect of the range of processes available and the contexts in which they operate

ADR, PDR in Australia (Sourdin, p.2)

- **Appropriate Dispute Resolution** - The use of appropriate rather than alternative has been cemented in Victoria in Australia, with legislation in that State now referring to Appropriate Disputes Resolution. These shifts are significant and signal not only a policy view about the importance of non-court DR processes but also a recognition that such processes will often support more effective forms of DR
- **Primary Dispute Resolution** - In the Family Court of Australia and related contexts, the term Primary Dispute Resolution (PDR) was used in the past to describe similar processes.
- Throughout the textbook, ADR is used to describe the processes that may be used within or outside courts and tribunals to manage, resolve or determine disputes, or to reach agreement where the processes do not involve traditional (more adversarial) trial or hearing processes
- ADR is also used to describe processes that may be non-adjudicatory as well as adjudicatory and which may produce binding or non-binding decisions. ADR includes processes described as negotiation, mediation, case appraisal and arbitration

NADRAC’s Definition of PDR

- PDR (Primary Dispute Resolution) is a term used in **particular jurisdictions** to describe dispute resolution processes which take place prior to, or instead of, determination by a court

The screenshot shows the Family Court of Australia website. The main heading is "Reaching an agreement without going to court". Below this, there is a section titled "Dispute resolution- what is it?". The text explains that dispute resolution refers to services designed to help resolve disputes without needing to go to court. It mentions that the Family Court of Australia and the Federal Circuit Court of Australia use these services, which are funded by the Australian Government. The text also states that these services are an affordable and often quick option for resolving disputes, allowing for greater control and management of the process and the outcome. A sidebar on the left contains a "Live Chat" button and a list of topics: Family Law in Australia, Separation & Divorce, Parenting, Missing Children, Property & Finance, Court Orders, Getting help, Family Violence, Child dispute services, and About going to court and court processes. The main content area also includes a "Dispute resolution- what is it?" section with a brief definition and a link to the Family Relationship Advice Line.

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An ADR practitioner as a “third party”

- ADR processes will usually involve a third party (often referred to as an impartial ADR practitioner or more traditionally as a “skilled helper”) who either assists the parties in a dispute or conflict to reach a decision by agreement, or makes a recommendation or a decision that may be binding or non-binding upon the parties
- NADRAC has described ADR as an “umbrella terms for processes, other than judicial determination, in which an impartial person assists those in dispute to resolve the issues between them
- There are however now exceptions to this definition that arise in ADR. eg “collaborative practice” (discussed in Topic 6) involves a team approach and does not ordinarily involve a third party who is an impartial facilitator (although some collaborative team models may promote this). See further discussion in Topic 6
- Judicial determination may also involve grafted ADR processes and techniques, and may be preceded by judicial dispute resolution processes
- Debate over whether ADR definitions should be broad or narrow – see page 4 for discussion. NADRAC’s view is that it is better to “describe” rather than “define” ADR processes
- NADRAC notes that DR processes may be classified as facilitative, advisory or determinative:
 - **Facilitative** processes involve a third party, often with no advisory or determinative role, providing assistance in managing the process of DR. These processes include **mediation and facilitation**
 - **Advisory** processes involve a third party who investigates the dispute and provides advice on the facts and possible outcomes. These procedures include **investigation, case appraisal and dispute counselling**
 - **Determinative** processes involve a third party investigating the dispute, which may include a formal hearing, and the making of a determination, which is potentially enforceable. These processes include **adjudication and arbitration**, and may be binding or non-binding
- Although the NADRAC descriptions have helped to produce some increased certainty in the area of ADR definitions, there are still considerable variations in the way in which various ADR processes are defined and used within Australian courts and tribunals and outside the litigation system
- See page 5 for further discussion of the definitional issues

Typical Forms of ADR