DISPUTE MANAGEMENT & RESOLUTION: EXAM NOTES

LECTURE 1: INTRODUCTION TO DR

1. Why DR is important

Why a Broad approach to DR is Important

1. Most matters settle – better to proactively manage the process
2. Integrated with litigation in justice system
3. Statutory schemes can mandate DR processes
4. Can be consequences of not engaging in DR eg costs
5. What do clients want – a day in court or a resolution?
6. Government policy in favour of a variety of DR methods
7. Costs of litigation – are other DR processes necessary to meet access to justice concerns?

Courts in 2020 – should they do things differently?

- "Future years will see the strict rigours of the adversarial approach modified to encourage a more collegiate approach to the identification of real issues in contention, and the more efficient and inexpensive means of resolving those issues".

Mega Litigation

- "An invariable characteristic of mega-litigation is that it imposes a very large burden, not only on the parties, but on the court system and, through that system, the community," *Seven Network Ltd v News Ltd* [2007] FCA 1062 (Sackville J)

General Notes

- Consensual – parties generally agree to undertake process; in circumstances where it is mandatory it is still consensual in terms of reaching an outcome
- Parties don't have to settle but there can be pressure to settle particularly if they can't afford to litigate
- Problem solving approach – goal is to get to heart of the issue – more constructive dialogue between them
- Can choose process then choose whether or not to settle
- May result in better exchanges of information; keep an open dialogue, discuss & explain option
- Collaborative approach:
    - Parties know if process doesn't work may need to litigate
    - Law shapes & influences process – may require individuals to engage in particular DR process
- Some DR processes have their own legislation – each state has uniform legislation on Arbitration ADR doesn't fail when it doesn't settle the matter, may narrow issues or repair relationship between parties
- Family law: 5% cases litigated, discrimination law: 80-5% of matters resolved before litigated
- Public policy: a system where everyone litigates is not viable

- Processes aimed at achieve something quicker, most cost effective & just. In SC can be ordered to mediate
- Surveys indicate – commercial disputes – want time-conscious, awareness of commercial ramifications & resolution that brings matter to an end in a manner that satisfies issues that have lead to proceedings
- Big dispute involving television rights –1 party spent $4 million on photocopying –some circumstances may be necessary but places large burden on court system – costs (tax deductions for legal costs)
- Pushing certain individuals into processes – particularly where much less funding for legal aid & they don't have the resources for litigation
- Commercial relationships just as important has family relationship – parties lose trust in supplier
- Can discover issues actually agree on –statement of facts being jointly submitted by parties –move beyond
- Timing – mandatory system makes you do it upfront – good as people immediately turn their mind to it
- 'ripeness of a dispute' – whether both parties & what they have available to them make dispute ripe to be resolved through DR
- alternative: 'toxic costs' – so far down the track & have so many costs that they can't move from position

2. Terminology of ADR

NADRAC definition: **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.

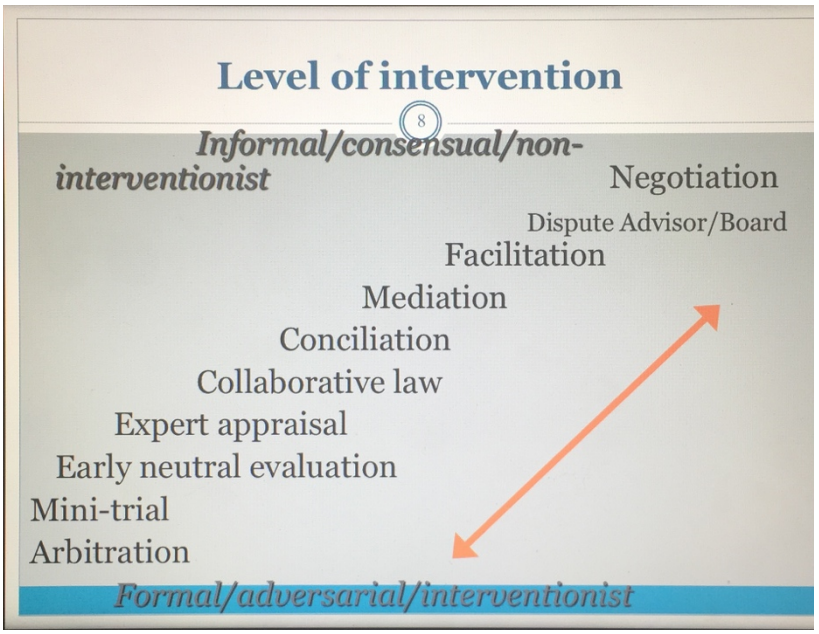
- 'alarming drop in revenue' – not necessarily the case – Therese thinks moved away from 'alternative' bit
- ADR began 1970-80s as alternative to adjudication
- A – appropriate, alternative, assisting
- D – not a statement of claim but issues that are informing conflict between the parties
- R – court will give you an outcome (1 win, 1 lose) – but does it actually resolve those issues?
- Commercial – confidentiality – telecommunications, insurance, paypal, ebay – use DR processes

3. Different types of DR processes

Three (3) Main Groupings of DR Processes

1. Negotiation, facilitation
2. Conciliation, mediation, expert appraisal, early neutral evaluation, mini-trial/SMART
3. Arbitration, litigation

- Facilitative process: negotiation without 3rd party (consensual discussion/exchange/agreement)
- Ie dispute in community over whether particular development should go ahead – council gets facilitator to help with dialogue
- (2) – Advisory (3rd party assisting & advising – helps parties to determine what issues are & how may resolve – work through staged process – basis is principled negotiation)
- (3) determinative - arbitration (more like court process – popular; parties choose arbitrator ((empowered)), valuable in commercial context keeps process confidential & can get an arbitrated award)



- 'fitting the forum to the fuss' – what is going to work for these parties (this depends on their capacity to negotiate & the type of dispute)
- Dispute advisor – developed process in building & construction industry enabling parties to effectively communicate in order to keep projects going (industry specific process)

4. The legal profession & dispute resolution

Advocacy Rules for Dispute Resolution

A barrister must inform the client or the instructing practitioner about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

- About the culture of the legal profession – advocacy rules (above), implicit in solicitor's rules
- Is the presence of a lawyer in a mediation an impediment to that process? 3 possible roles:
    1. Giving advice & referring parties to DR processes
    2. Representing clients in DR processes
    3. Seek out lawyers & former judges to act as mediator

New Types of Statutory Obligations

- Federal - *Civil Dispute Resolution Act 2011*
    - Federal Civil matters – Act requires parties to file a statement about genuine steps they have taken to resolve the dispute
- NSW - Did not proceed with provisions in *Civil Procedure Act 2005* NSW
    - Now process in place to enact something similar

The Foundation Skills → Communication → week 1 ADR (part of readings): Summary

Listening Skills

- 'Active' listening – focusing on the words, pitch, tone, body language & other non-verbal cues (ie sighs & pauses)
- Non-verbal communication can provide additional info about emotions, opinions & context.
- Showing an attending (active) listening style can change the message, dynamics & atmosphere in which the information is conveyed.

Passive & Attentive Listening	Eye contact, appropriate environment, 'listening' posture with little or any 'two-way' dialogue apart from the use of encouragers such as 'uh huh', 'tell me more…' & 'and then?'
Active & Involved Listening	Asking open questions (promote open dialogue rather than 'yes/no' answers), paraphrasing & reflecting back on what has been heard & understood
Problem-solving Option Generation Listening	Clarification & summary of main elements where options & possibilities are explored without evaluative inputs.

- A speaker who is actively listened to for an uninterrupted period of time about a problem will:
  a) Be more likely to adopt the same approach when another is speaking
  b) Calm down, as the monologue can provide an opportunity for the speaker to relax
  c) Change pitch & tone – speaker will often speak at a slower pace & in a quieter voice after having had the opportunity to speak
  d) 'feel better' about the problem, & 'happier' & more 'confident'
  e) Start to develop options to resolve the problem
  f) Start to recount the 'story' from another perspective
  g) Tell the story in a shorter period of time than an 'interrupted' speaker would.