

LLB103 Lectures

Week 1- The contemporary importance of alternative dispute resolution

Alternative Dispute Resolution

Defining 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.'
- **NEED TO BE ABLE TO DEFINE CONCEPTS FOR EXAM**

Key Processes

- Negotiation
- Mediation
- Conciliation
- Case appraisal
- Arbitration
- Litigation

Relevance

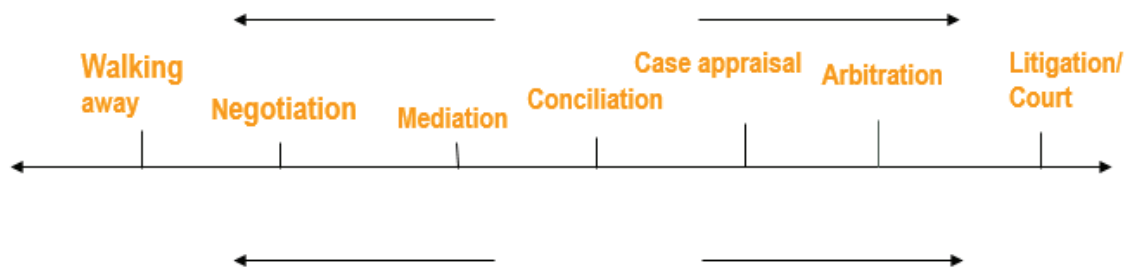
- DR is now the main way that disputes in Australia (and worldwide) are resolved.
- Litigation continues to be privileged as a dispute resolution tool in our law schools.
- It has been estimated that the number of commenced civil actions that culminate in adjudication is actually less than 5%.
- Legislation now makes ADR compulsory in a number of circumstances.
- For example, the *Civil Dispute Resolution Act 2011* (Cth) was enacted to ensure that parties take genuine steps to resolve disputes before civil proceedings are instituted (s 3).
- Section 53A of the *Federal Court of Australia Act 1976* (Cth) allows a court to refer a matter to mediation or arbitration.

Week 2- Introduction to ADR and the spectrum of dispute resolution forums

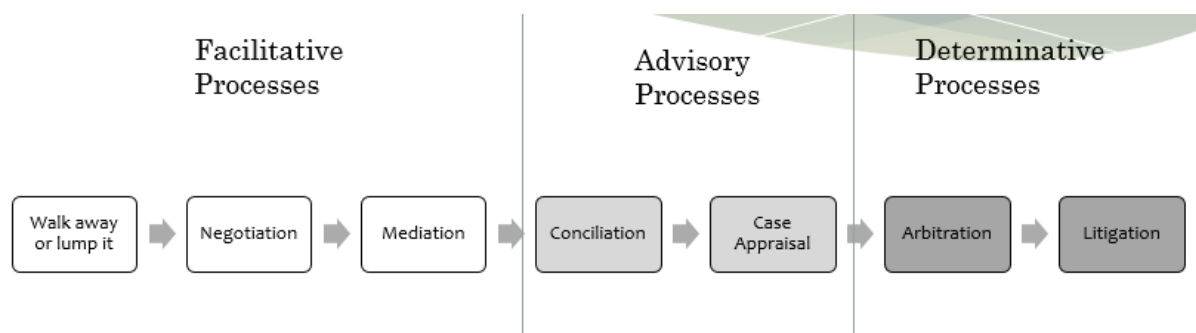
History

- Statutory regulation (must try ADR before litigation)
- Court-annexed dispute resolution
- Accrediting bodies and schemes (also providing training)

Dispute Resolution Spectrum



- As you move from one side of spectrum to other, consensuality of outcome changes
- Formality (in four different senses) changes from one side of spectrum to other as well
- Third-party intervention also changes from one side to the other



Why is the Spectrum a Valuable Tool?

- It helps to provide clarity in our thinking about dispute resolution options.
- It supports our understanding of processes.
- It helps with making comparisons and assessments between options.
- It provides us with a useful visual aid for communicating effectively with clients about the options available to them, and their characteristics, benefits and disadvantages.

Why must we use it carefully?

- A tool like the spectrum can only provide a relatively basic and unsophisticated representation.
- We should not underestimate the complexity of disputes, or the internal diversity that is possible within DR processes themselves.
- We have to beware that it does not result in too simplistic a map, or an over-generalisation or distortion of the nature of processes.

Facilitative Processes

- Facilitative dispute resolution processes:
 - ...'are processes in which a dispute resolution practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are mediation, facilitation and facilitated negotiation' (NADRAC, 2003, p. 7).
- Mediation and negotiation for this course
- Third party not to enter dispute, but to facilitate dialogue to effectively solve dispute
- Independent third party has no role with respect to content → can't give advice to the parties (tell them what a judge is likely to do etc.)

Advisory/Evaluative Processes

- Advisory dispute resolution processes:
 - ...'are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation' (NADRAC, 2003, p.4).
- Evaluative mediation, conciliation and case appraisal for this course
- Independent third party starts to provide advice about the law and what a likely outcome would be if it went to court
- Talk about how similar cases have been resolved in the past

Determinative

- Someone makes a determination or a decision
- Determinative dispute resolution processes:
 - '...are process in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination' (NADRAC, 2003, p.6).
- Arbitration and litigation for this course

Understanding the key processes

- Negotiation
- Mediation
- Conciliation
- Case appraisal
- Arbitration
- Litigation

Negotiation

- Where two or more people involved in a legal dispute communicate to see if they can resolve some or all of their issues/differences.
- "A verbal interactive process involving two or more parties who are seeking to reach agreement over a problem or conflict of interest between them and *in which they seek as far as possible to preserve their interests, but to adjust their views and positions* in the joint effort to reach agreement." (Anstey, 1991, p.91)
- Indirect- clients have a proxy or representative