

Alternative Dispute Resolution (ADR)

“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” – National ADR Advisory Council (NADRAC)

- Lawyer’s responsibility to educate client on options for dispute resolution:
A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor 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 matter. – Solicitors’ Rules #7

Benefits and drawbacks

Benefits	Drawbacks
Save time & money – Court costs, lawyers’ fees, government	Lack of court protections
Confidential	Lack of enforceability
High settlement rates	Cost – DR practitioners may charge fee

Types of ADR processes

- (1) Facilitative
 - Assist dispute parties to:
 - Identify issues
 - Develop options
 - Consider alternatives
 - Endeavour to reach agreement about some issues/whole dispute
 - E.g.: Mediation, facilitation, facilitated negotiation
- (2) Advisory
 - Consider
 - Appraise
 - Advice facts of dispute
 - Some cases:
 - Possible/desirable outcomes
 - How outcomes may be achieved
 - E.g.: Case appraisal, mini-trial, case presentation
- (3) Determinative
 - Evaluate dispute ® Make determination
 - E.g.: Arbitration, private judging, determination
- (4) Combined
 - DR practitioner play multiple roles
 - E.g.: First use mediation and then arbitration

Negotiation

- Involves no 3rd party ® parties very much left to own devices

Advantages	Disadvantages
Flexible – conducted by parties and/or lawyers	Informality ® Confusion over process
Cost effective – limited amount of special preparation	Skill of negotiator + Strategy & Tactics
Control – clients conduct process themselves/give instructions to lawyer	Strengths of case not properly exploited ® Weak/poor outcome

- Positional vs. Interest-based negotiation

Positional	Interest-based
Parties = Opponents	Parties = Collaborative problem solvers
Goal: Win/give up as little as possible	Goal: Satisfy all parties' interests
Assert correctness of position	Identify interests
Make concessions slowly & incrementally to try obtain agreement	Evaluate options to satisfy interests

Mediation

- “Structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute” – CPA s26
- Most widely used form of ADR
- Neutral 3rd party (mediator) assists & facilitates agreement between parties.
 - Parties seek to persuade other party
- Mediator chosen by parties unless connected to court (ie. Family law mediation)
- Reasons for choosing mediation:
 - Required by law or contract
 - Faster and cheaper than litigation (assuming resolution is reached)
 - Confidentiality
 - Maintains relationship
 - Greater client involvement
- Role of lawyer:
 - Advise if dispute suitable for mediation
 - Describe process
 - Negotiate on client's behalf
 - Contact other party/mediator for client
 - Attend mediation with client to advise during mediation
- Position Statement: Written form of communication between parties and mediator, takes place prior to mediation

Compulsory mediation

- Ordered by court which has power to refer a matter to mediation w/o parties consent
- CPA permits court to make orders for compulsory mediation (ie. Victorian Law Reform Commission, *Civil Justice Review* 2008)
- Applied in: (where either P/D opposed mediation)
 - *Higgins v Higgins*
 - *Waterhouse v Perkins*

