

2. RESOLVING DISPUTES WITHOUT LITIGATION: ALTERNATIVE DISPUTE RESOLUTION, COSTS AND ETHICS.

Alternative 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 clients best interests in relation to the matter: *Legal Professional Uniform Law Australian Solicitors Conduct Rules 2015 r 7.2*

- Alternative dispute resolution, also known as ‘appropriate dispute resolution’ refers to the processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.
- **There are four key types of ADR:**
 - **Facilitative Dispute Resolution**
 - Dispute resolution practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about individual issues or the whole dispute.
 - Mediation, Facilitation, Facilitated Negotiation
 - **Advisory Dispute Resolution**
 - Processes in which dispute resolution practitioners consider and appraise the dispute and provide advice as to the facts of the dispute, the law and possible or desirable outcomes.
 - Expert appraisal, case appraisal, case presentation, mini-trial and early-neutral evaluation.
 - **Determinative Dispute Resolution**
 - Are processes in which a dispute resolution practitioner evaluates the dispute and makes a determination
 - Arbitration, Private Judging, Expert Determination.
 - **Combined/Hybrid Dispute Resolution**
 - Processes in which the dispute resolution practitioner plays multiple roles.
 - Conciliation, Conferencing, Med-Arb.

Alternative Dispute Resolution (ADR) Glossary

Adjudication	A process in which the parties present arguments and evidence to a DRP who makes a determination which is enforceable by the authority of the adjudicator. For example, state tribunals.
Arbitration	Process in which parties present arguments and evidence to a DRP who makes a determination.
Case Appraisal	Process in which a DPR investigates the dispute and provides advice on possible and desirable outcomes and the means through which they might be achieved.

Case Presentation (Mini-Trial)	Process in which parties present their evidence and arguments to a DPR who provides advice on the facts, and in some cases, a desirable outcome and how it might be achieved.
Conciliation	Process in which parties with a conciliator identify issues, develop options, consider alternatives and endeavour to reach agreement. The conciliator may have an advisory role but not a determinative role.
Dispute Resolution	All processes used to resolve disputes, whether within or outside court proceedings. Dispute resolution processes may be facilitative, advisory or determinative.
Early Neutral Evaluation	Process in which parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. The practitioner makes a determination on the key issues in the dispute and the most effective means of resolving them without determining the facts of the dispute.
Expert Determination	Process in which the parties present arguments and evidence to a practitioner chosen on the basis of their specialist qualification or experience in the subject matter of the dispute and who makes a determination.
Facilitated Negotiation	Process in which the parties to the dispute, who have identified the issues to be negotiated, utilise the assistance of a DRP to negotiate the outcome. The facilitator has no determinative or advisory role on the content of the matters discussed or outcomes, but may advise on or determine the process of facilitation.
Facilitation	Process in which the parties identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitators have no advisory or determinative role on the content of the matters discussed or the outcome of the process but may advise or determine the process of facilitation.
Judicial Dispute Resolution	A range of dispute resolution processes other than adjudication which are conducted by judges or magistrates; for example, a judicial settlement conference.
Mediation	Process in which the parties to the dispute with the assistance of a DRP identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the outcome, but may advise on or determine the process of mediation whereby resolution is attempted. May be undertaken voluntarily, under a court order or subject to an existing contractual agreement.
Private Judging	Is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner chosen on the basis of their experience as a member of the judiciary who makes a determination in accordance with what their opinion would be if the matter was judicially determined.

Enforcability of Agreements to use ADR?

- There is no legislative basis for enforcing dispute resolution clauses otherwise than those which provide for arbitration under the *Commercial Arbitration Act 2010 (NSW)*.
- A court may however, in principle, make orders to enforce the agreement of a conciliation or mediation clause as a precondition to the commencement of litigation in relation to the procedure (*Hooper Bailie Associated Ltd v Natcan Group Pty Ltd*)

Relevant Case: *Hooper Bailie Associated Ltd v Natcan Group Pty Ltd*

Negotiation

- The distinguishing feature of negotiation by comparison to other forms of dispute resolution is that negotiation involves no third party whose role is to facilitate, advise or determine the resolution of a dispute.
 - Parties are left to their own to determine how the negotiation processes should proceed and what the substances of the negotiation should be about.
- Negotiation may take many forms, however, two dominant approaches may be taken in the course of negotiations:
 - Positional
 - ‘Zero-Sum Game’ approach to negotiation
 - Interest-Based
 - ‘Getting to Yes’
 - Parties focus on justification for wants as opposed to the wants themselves; may allow for a more optimal outcome to be achieved where the wants can be distributed to both.
 - Example: Both parties want an orange. Under a positional approach, both parties would aim to secure the entire orange. Under an interest based approach, parties would prioritise why they wanted the orange/their individual interest in the orange. It could evolve under such a system that one party wants the orange for the zest, the other for the juice; allowing a more optimal outcome to be reached.

Positional Based

Parties are opponents or adversaries
 Objective to achieve as many outcomes as possible
 Makes minimal concessions

 Makes concessions slowly and incrementally to obtain agreement

Interest Based

Parties are ‘collaborative’
 Objective to satisfy both parties interests

 Develop options in an attempt to ‘expand the pie’
 Evaluates options early on, attempts to satisfy interests from beginning.

○ Advantages to negotiation?

- There are widely considered advantages to negotiation:
 - It is flexible and can be conducted by either parties, or lawyers, or both.
 - It is relatively cost effective; only a limited amount of special preparation is required.
 - Clients retain complete control of the outcome through conducting the process independently, or by giving instructions to their lawyer/needing approval for any agreement reached.

○ Disadvantages to negotiation?

- Some disadvantages may include
 - The success of negotiation depends upon how well the dispute has been researched and analysed.
 - Success can be determined by the skill of the negotiator and the strategy and tactics employed

- Negotiation may lead to weak or poor outcomes if the strengths of a case are not properly exploited
- The informality of negotiation can lead to confusion
- The parties may not reach agreement if expectations are unrealistic, or unwilling to compromise.

SCAFFOLD: COSTS AFTER OFFERS TO SETTLE

1. Does the offer follow the specifications under the UCPR?

- a. Made in notice by writing: UCPR 20.26(1)
- b. Did it identify:
 - i. The claim or part to which it relates: UCPR 20.26(2)(a)(i)
 - ii. The proposed orders for disposal, including any amount for monetary judgement: UCPR 20.26(2)(a)(ii)
- c. If only part, must identify whether the balance of proceedings will be pursued/defended: UCPR 20.26(2)(b)(i)(ii)
- d. Must not include an amount as to costs and must not be expressed to be inclusive of costs: UCPR 20.26(2)(c)
- e. Statement to say in accordance with these rules (d)
- f. Time period open for acceptance: (f)

Open legislation for further specifics about specifying costs, and dates etc.

2. Did the offer involve a 'genuine offer of compromise'

- a. I.e not merely made just to trigger the costs consequences: Leach v the Nominal Defendant (QBE Insurance Australia)
 - i. To be determined objectively according to the circumstances of the particular case at the time the offer was made (not with benefit of hindsight)
- b. 'Offer not likely to encourage early settlement'
 - i. Hart Security Australia v Boucousis (no 2)

3. Party making the offer must be able to carry out and be willing to carry out the offer: UCPR 42.17(2)

- a. If this is not the case, unless the court orders otherwise, rules 42.14 and 42.15 do not apply.

4. The offer was accepted and no provision is made for costs

- a. Costs follow the event on an ordinary basis

5. The Plaintiff Offered to settle but the defendant rejected: UCPR 42.14

- a. Only applies where the plaintiff gets equal to or more than the plaintiff's original offer: 42.14(1)
 - i. I.E No rule where the plaintiff's offer is rejected and they get less than their initial offer.
- b. Unless court orders otherwise:
 - i. Plaintiff's costs assessed on ordinary basis from date of commencement until date of offer: 42.14(2)(a)
 - ii. P's costs assessed on indemnity basis from date of offer until date of judgement: 42.14(2)(b)
 1. If offer made before first day of trial, from the beginning of the following day: 42.14(2)(b)(i)

2. If made after first day of the trial, from 11 am following day: 42.14(b)(ii).
 - iii. Grounds for finding otherwise:
 1. Not an offer likely to encourage actual settlement: Hart v Security of Australia v Boucousis (No 2)
- 6. The defendant offered to settle but plaintiff rejected**
 - a. Where the plaintiff gets less than or equal to the amount offered in the defendant's offer: UCPR 42.15(1)
 - i. The plaintiff entitled to order for costs assessed on an ordinary basis from date of commencement to the time from which the defendant becomes entitled to costs (i.e date of offer): 42.15(2)(a)
 - ii. Defendant entitled for costs assessed on indemnity basis following offer.
 1. If offer made before first day of trial: beginning of following day: 42.15(2)(b)(i)
 2. If following first day of trial: from 11am following day: 42.15(2)(b)(ii)
 - b. Where the defendant wins at trial: UCPR 42.15A
 - i. Defendant entitled to costs assessed on ordinary basis from date of commencement until date of offer: 42.15A(2)(a)
 - ii. D entitled to costs on indemnity basis from date of offer until date of judgement: 42.15A(2)(b)
 1. If offer made before first day of trial: beginning of following day: 42.15A(2)(b)(i)
 2. If following first day of trial: from 11am following day: 42.15A(2)(b)(ii)