

Week 8 - Lecture

ADR (Alternate Dispute Resolution) and Case Study

Role of Law

- One of the law's functions is to deal with disputes.
- How?
 - System of rights/obligations that structure society.
 - Rules and principles by which disputes can be resolved.
 - Specialist bodies that adjudicate disputes.
 - Enforcement mechanisms.

The Court

- When you go to a court, you give up the power of the decision of the dispute to a third party i.e. the judge
- Not every party can go to the court- it has to do something with your legal rights

Litigation and the Trial Process

- Pre-trial
 - Discovery- looking through documents to determine whether they are relevant
 - Paperwork
- Adversarial trial
 - Evidence
 - Argument
- Decision
- Appeal?

Why might a party to a dispute want to avoid the litigation and trial process?

- you give up control over the outcome
- expensive and lengthy
- may damage your reputation- generally, the decision etc is public so if a large corporate goes to court, there could be damage reputation

What is ADR

Green, 'Settling Large Case Litigation: An Alternative Approach' (1978)

- As a lawyer, Green dealt with a large scale commercial dispute around patents.

- Legal proceedings had commenced and the parties had spent several hundred thousand dollars and multiple years waiting for a hearing.
- They agreed instead to set up their own “mini-trial” moderated by a neutral 3rd party (a former judge).
- They met, exchanged information and senior management tried to resolve the dispute.
- After two days, the parties settled.
- Saved the parties >\$1million in legal costs and years more of waiting for a hearing and then a judgment.

ADR

- The ‘DR’ stands for ‘Dispute Resolution’.
- What does the ‘A’ stand for?
 - ‘Alternative’
- The Federal Family Court refers to it as ‘Primary Dispute Resolution’, because the Court disposes of 95% of matters by means other than litigation.

Definition

‘The processes that may be used within or outside courts and tribunals to manage, resolve or determine disputes or to reach agreement and where the processes do not involve traditional (more adversarial) trial or hearing processes, it describes processes that may be non-adjudicatory as well as adjudicatory, which may produce binding or non-binding decisions. It includes processes described as negotiation, mediation, evaluation, case appraisal and arbitration.’ - Tania Sourdin, *Alternative Dispute Resolution* (2012)

Facilitation, arbitration, negotiation, mediation —> then litigation is the last result as mentioned above, it is expensive, lengthy, can destroy relationships etc

Different Types of ADR

- **Facilitative:** involves a 3rd party, with no advisory or determinative role, who provides assistance in managing the process of dispute resolution —> **Mediation and facilitation.**
- **Advisory:** involves a 3rd party who investigates the dispute and provides advice on the facts and possible outcomes —> **Investigation, case appraisal and dispute counselling.**
- **Determinative:** involves a 3rd party investigating the dispute and the making of a determination, which is potentially enforceable —> **Adjudication and arbitration.**

Differences

ADR processes can differ in terms of:

- Length and formality;

- Role of a 3rd party;
- Role of the parties;
- Subject of the dispute;315
- Reporting and referral requirements;
- Objectives of the process; and,
- Philosophical underpinnings.

Major types of ADR

(i) Negotiation

- Disputants work out an agreement between themselves.
- ‘A process in which the participants in a dispute personally, or through the use of representatives such as lawyers or agents, identify issues to be negotiated, develop options, consider alternatives and endeavour to reach an agreement. If representatives are used, they act on behalf of the participants and may have authority to reach agreements on their behalf.’ (NADRAC)

Principled Negotiation

Two sisters each want an entire orange. Only one orange is available and it was cut in half as a fair outcome to the dispute. The first sister squeezed her half for the juice and threw away the peel, the second sister peeled her half to use the zest in a cake and threw the rest away (including the juice). Neither was satisfied or had their needs met by the outcome, but their interests could have been satisfied, maximising their personal gain and causing no detriment to the other, with each taking a part of the whole orange. - Fisher and Ury's *Getting to Yes: Negotiating Agreement Without Giving In*

(ii) Mediation

- Where an impartial 3rd party helps disputants work out how to resolve a conflict. The disputants, not the mediators, decide the terms of the agreement reached.
- ‘[A] process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision... Mediators do not advise upon, evaluate or determine disputes.’ (*National Mediation Accreditation System and Standards 2008*)

(iii) Conciliation

‘A process in which the parties to a dispute, with the assistance of a conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcomes of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.’

(iv) Arbitration

- Where an impartial 3rd party (after hearing from both sides) makes a final, usually binding, decision. The discussion and decision, while structured, may not be as regulated by the formal procedures and rules of evidence as in a courtroom.
- '[A] process in which the parties to a dispute present arguments and evidence to the arbitrator who makes a determination.' (NADRAC)

(v) Combined models.

A process in which multiple dispute resolution processes might come into play. For example-

- Negotiation-mediation: parties might begin by negotiating, but then utilise a mediator to help reach final agreement.
- Mediation-arbitration: a dispute resolution practitioner first uses one process (mediation) and then a different one (arbitration);

When does ADR take place?

- Pre-litigation ADR
- Self-referred litigation-related ADR
- Court-connected ADR
- Court-integrated ADR

Examples

- Pre-litigation ADR (WA):
 - Both the District Court and Supreme Court have mediation schemes.
 - The DC program held 2693 pre-trial alternative dispute resolution conferences in 2010 and only 1.5% of matters that had the potential to go to trial were actually finalised by trial. The Court Registrars are all accredited mediators.
 - The SC program mediated over 600 civil matters in 2009 with a success rate of ~63%, almost every matter went to mediation and some went more than once.
- Court-connected ADR (Commonwealth):
 - Family Court requires Family Dispute Resolution to be attempted when a person seeks a parenting order.

Each type of ADR has its own advantages and disadvantages, lets narrow it down by looking at mediation.

Why might a party to a dispute want to use mediation instead of litigation?

- time- when you want to resolve something quickly
- cost- if either party doesn't have enough money, have the money or want to use the money
- more likely to achieve a compromise so a win win situation

- allows you to have ownership of the outcome

Advantages of Mediation

- Parties focus on the problem, not each other.
- Both parties have an opportunity to tell their side of the story.
- Provides a setting in which each party listens to the other.
- Parties can hear how their behaviour is affecting, has affected, the other.
- More likely to keep to a solution if they are involved in the process of reaching it.
- Looks for a “win-win” situation, rather than the typical court winner/loser decision.
- More likely to take people’s specific situations into account.
- Parties are encouraged to identify what they really want.
- More likely to get to the root of the conflict.
- Holistic approach to the dispute between parties, not just the legal aspects.
- Looks not to the past but to the future, important where there is a continuing relationship between the parties.

Why might a party to a dispute object to using mediation instead of litigation?

- why might you chose to go to court
- if you dont feel comfortable talking to the other party, if you can stand up for your rights
- you may feel like you want to go public
- if theres violence

Disadvantages of Mediation

- Less powerful party just agrees to the stronger parties demands because they ‘fear the worst’ outside the mediation setting.
- Mediation is used as ‘cheap justice’.
- Can disguise responsibility and ignore rights.
- Poor citizens get diverted to mediation because its cheaper than giving them government legal representation.
- Compulsory mediation leads to parties just ‘going through the motions’.

Mediation is inappropriate when...

- Either party is unwilling.
- Either party is incapable of taking part or keeping to any agreement.
- It is not in one party’s interests to settle.
- There is the threat of violence.
- The dispute needs a public judgment.

Victim Conferencing

Different types

- **Victim Offender Mediation (VOM)**
 - Usually involves a victim and an offender in direct mediation facilitated by mediators or facilitators.
 - ‘Victim-offender mediation is a voluntary process of communication, conducted by a neutral mediator, which allows victims to express their needs and feelings, and offenders to accept and act on their responsibilities. This mediation process has benefits for victims and offenders at all stages of the criminal justice process because it deals with the personal effects of crime not usually addressed by the formal justice system. Hurt, pain and loss suffered by victims are acknowledged by offenders, and this acknowledgement is often the most healing part of the process. When victims know their pain has been heard, they stop reliving the event and begin to put the offence behind them.’ - Wynne, ‘Victim-Offender Mediation in Practice’ (2011).
- WA Mediation:
 - Initiated by victim, court or government services. VMU officers sit in at District Court and Magistrates Court sentencing mentions lists.
 - Available where an offender has pled guilty
 - Usually involves an apology (verbal or written), an explanation for the offence, discussion of background and/or ongoing issues, the return of property and/or monetary compensation, and payment of the victim’s out-of-pocket expenses.
- Mediation Process
 - Advantages:
 - Victim: hold offenders accountable, receive apology/compensation, get directly involved.
 - Offender: possible sentencing reduction, making amends
 - Community: rehabilitation.
- **Family Group Conferencing (FGC)**
 - Similar, but includes family, support persons and outside community representatives as well.
 - ‘This type of intervention is based on the idea of bringing the young offender, the victim, and their respective families and friends together in a meeting chaired by an appropriate independent adult (juvenile justice worker or police officer). Collectively, the group goes through the reasons for the crime, the harm suffered, and the best ways to resolve the issues. Usually, some kind of apology is made by the offender to the victim, and often the offender has to repair the damage they have caused in some way (through undertaking community work, or mowing lawns of the victim for a month).’ - Cunneen and White, *Juvenile Justice: Youth and Crime in Australia* (2007).
- **What happens in the FGC?**
 - **Differs across Australian jurisdictions in terms of-**

- The kinds of offenders for whom conferencing is available;
- The kinds of offences that can be conferenced;
- Who must agree to the outcome (though it is legally binding in all jurisdictions); and,
- The length of time to complete an outcome.

– **Models of the FGC**

Two major models: the Wagga Wagga and New Zealand models.

Similarities-

- Diversion from court prosecution;
- The length of time to complete an outcome.
- Young offender has admitted the offence;
- Attendance by the offender and their family/supporters, the victim and their supporters, a police officer, a convenor;
- Discussion of the offence and its impact;
- Everybody gets a chance to talk, ask/answer questions; and,
- Discussion of the outcome (agreement or undertaking) the offender will complete.

Some differences-

- Wagga model is about reintegrative shaming;
- The role of police; and,
- The level of cultural respect.

– **Benefits of FGC**

- The Re-Integrative Shaming Experiments Project (RISE), beginning in 1995, studied the effect of these conferences. It found that-
 - Offenders report greater procedural justice in conferences than in courts;
 - Offenders report higher levels of restorative justice in conferences than in courts;
 - Conferences increased offenders' respect for the police and law more than court; and,
 - Victims' sense of restorative justice is higher for those who went to conferences than for those who went to court.