

## Module 2- History

### Aboriginal DR

At the time of Australia's colonisation Aboriginal people had well-developed systems of law based on kinship structures prescribing rights and obligations over a wide spectrum of activities

Traditional Aboriginal values	Anglo-Australian values
custodianship of land	proprietorship of land
oral laws and history	written laws and history;
communal, egalitarian and cooperative values	individualistic, hierarchical and competitive values
elder orientation	
extended family and non-specific parenting a	nuclear families and specific parenting

Disputes often concerned breaches of customary or cultural obligations. For example, failing to observe sacred law or breaching kinship or marital obligations.

Disputes relied on values and:

- the authority of Elders and their exercise of powers of influence and intervention to resolve matters peaceably
- social pressure
- The strong presence of women as authoritative DR interveners
- systems of informal councils
- restitution and sanctions such as spearing

#### NADRAC BARRIERS:

- Consider additional intake and preparation issues
- selection of practitioner(s)
- differing concepts of time and place
- attendance and representation at ADR sessions
- changes to conventional processes and ground rules

### Access to Justice Movement

Argues that the formal justice system is:

- not necessary to resolve many types of disputes
- expensive and inaccessible
- a waste of personal and state resources
- disputes could be better managed or resolved by ordinary people empowered by processes that were
  - responsive to the needs of the parties
  - consensual and preserving of relationships

- quick and inexpensive
- embraced party self-determination and principled negotiation
- rejected reliance on an external intervener's determination and a win/lose outcome

### Wave of ADR

- The 'first wave' of thinking about ADR was evangelic
- The 'second wave' was followed by a more balanced and sceptical analysis
- Enthusiasm for ADR in the 1970s and 80s came from:
  - The community justice movement
  - Civil justice reform

### Community Justice movement

- The *community justice movement* sought to assist and empower people to effectively and efficiently manage disputes arising in their local community that were not otherwise dealt with well by the formal justice system
  - Inspired by developments in the USA, several Australian states initiated community-based DR through publicly-funded, local and accessible justice programs to address neighbourhood, family, workplace and community disputes
  - Community justice programs also save resources within the broader justice system by dealing with less serious matters and freeing courts and police to focus on more serious cases

### Civil Justice Reform

- *Civil justice reform* is the second key influence on the development of Australian DR
- Is a public good contributing to:
  - social and economic well-being
  - social order
  - the peaceful resolution of disputes and protection of rights
- provides a safeguard against arbitrary government action
- is open and publicly accountable
- creates and reinforces civic values and norms
- supports economic activity and security of property rights

Achieving these public goods have been compromised by access to justice problems, the cost of systems and inefficiencies in their operation.

- The 1976 Pound Conference attended by leading US lawyers led to broad support for ADR as a way of addressing the expense, inaccessibility and delay of litigation, and as more caring and humane
- The International Mediation Institute organised a Global Pound Conference in 2016 to improve access to and quality of justice in civil and commercial dispute.

**Critique:** That informal justice can fail to uphold the legal rights and entitlements of parties in dispute & DR is not a panacea for all civil justice system shortcomings.

### Institutionalised DR processes

NLDR has been embedded in commercial, family and industrial relations legal practice

- *Commercial law* has used arbitration for many centuries and is promoted to resolve international and local disputes