# Chapter 1: Introduction

- ADR (alternative dispute res) and negotiations are as old as the ability to communicate. Aboriginal and Torres Strait Islander people have been involved in their own form via customary law for thousands of years.
- Also used by govt at early stage to manage labour market.
- It is also embedded within the Australian Constitution in s 51xxxv which provides Cth with the power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes.
- This led to the *Commonwealth Conciliation and Arbitration Act 1904* which established the Cth Court of Conciliation and Arbitration to hear applications for the making of awards and the resolution of disputes between employers/employees.
- The court was split into 2 bodies:
    - Commonwealth Conciliation and Arbitration Commission
    - Commonwealth Relations Court.
- Dispute res has grown in both public and private spheres, but mostly in public spheres, due to legislation which provides for non-adjudicative dispute res to be the first step before litigation.
- The beginning of the govt-funded Community Justice Centres Pilot in 19080 (NSW) provided the initial impetus for the development of the ADR system. Other industries began to create their own ADR systems.
- Fastest growing area of ADR is in family law.
- Dispute res is not an alternative to litigation, rather it is one of a number of processes that seeks to resolve disputes before a court may have to adjudicate them. Thus the 'A' in ADR is a bit misleading.
- A better way to describe such processes such as conciliation, negotiation, mediation, arbitration and litigation is to refer to them simply as 'dispute resolution'.

<u>Definitions of ADR</u>

- Definitions from National ADR Advisory Council.
- **Mediation:** process by which the parties to a dispute, with the assistance of a neutral 3rd party (the mediator), identify the issues in dispute.
    - Develop options around these issues, consider alternatives and try to reach an agreement, which encompasses the underlying needs and interests of the parties.
    - The mediator has no advisory or determinative role, which is up to the parties.
    - **Co-mediation:** Where 2 mediators conduct the session. Commonly used for matrimonial matters, will disputes.
    - **Shuttle mediation:** Where parties don't meet face to face, but are located in different rooms, and the mediator shuffles between them, conveying the parties' viewpoints etc. The mediator is the messenger.
    - **Expert mediation:** Where the mediator may have input into the resolution by using his substantive expertise.
- **Conciliation:** There is usually only 1 party, who is the aggrieved and a complaint target who, up to a certain point, may not have perceived that a dispute exists, but who may either voluntarily or by statute, taken part in the conciliation process with the aim of achieving a resolution.
    - The conciliator is normally an expert in the subject matter of the dispute and can offer advice.
    - Don't always involve face-to-face meetings.
- **Facilitation:** Where there is a group of parties. The facilitator is neutral, not having an advisory role, but rather, to identify problems, tasks to be accomplished or disputed issues to be resolved.

  - Facilitator may be employed to assist in planning meetings being held by a company or organisation. The planners have a mutually desired outcome but diverse views on how it might be achieved.
  - **Facilitated negotiation:** process in which the parties to a dispute, who have already identified issues to be negotiated, utilise the services of a facilitator to assist in negotiating the outcome.
  - A dispute resolver might be used to facilitate a public meeting or workshop, where members may be in conflict amongst themselves or have a common interest.
- **Arbitration:** where parties to a dispute present arguments and evidence to a neutral 3rd party (arbitrator) who makes a determination.
  - The determination may be based on his expert knowledge.
  - Arbitration is a processes as close to judicial determination as one can get.
  - The arbitrator can be part of a court-annexed scheme or might not be legally qualified.
- **Early Neutral Evaluation:** Involves engaging an evaluator, usually a legal practitioner, who specialises in the subject matter, and the parties put their case before her.
  - The evaluator encourages parties to settle matter along consensual lines and if this doesn't work, she will producer her evaluation of the likely court outcome.
  - The parties then attempt to negotiate a settlement based on the evaluation.
- **Med-arb:** normally for bodies dealing with consumer or injury claims or administrative appeals.
  - Dispute resolver first encourages parties to settle via normal mediation process.
  - If settlement doesn't work, the mediator has the power to give advice on outcomes or even impose a decision.
- It is important for a person entering ADR to check out the actual process to be followed and which they are expected to enter into.

<u>Selecting a dispute resolution process</u>[1]

- In some cases, ADR might not be appropriate:
  - Someone's safety at risk
  - Participant's mental capacity impaired by drugs, alcohol etc, resulting in inability to negotiate
  - Power imbalance
  - Parties not willing to participate
  - Another ARD process more appropriate.
- Additional criteria raising issues about the need for public, adjudicative and binding processes:
  - When a definitive/authoritative resolution is required for precedential value and the ADR process won't achieve this.
  - When the matter affects a person that is not a party to the ADR
  - When there is a need for public sanctioning of the conduct
  - Where a party is not able to negotiate effectively (by themselves or with lawyer)
- NSWSC recommended additional factors in selecting ADR.
- **Factors to consider for mediation:**
  - Matter complex or likely to be lengthy;
  - Involves 2+ parties;
  - Parties have continuing relationship;
  - Either party could be classified as 'frequent litigator' or evidence that the subject matter is related to a large number of other disputes;
  - Possible outcome maybe flexible and differing contractual arrangements can be created;
  - Parties have desire to keep matter private;
  - Parties can reach a view as to likely outcomes should the matter proceed further;

[1] T Sourdin, *Alternative Dispute Resolution* (4th ed, Lawbook Co., Sydney, 2012) pp 446- 452.

# DISPUTE RESOLUTION NOTES: CHAPTER 1