

Litigation & Dispute Management

Final

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ALTERNATIVE DISPUTE RESOLUTION

Step 1: Cite professional responsibility:

- Part of assisting achievement of the court's main purpose (s 5A, *Court Procedure Rules 2006* (ACT); s 37M, *Federal Court of Australia Act 1976* (Cth)).
- Part of a lawyer's professional conduct rules (r 7.2 *Legal Profession (Solicitors) Conduct Rules 2015*; r 17A *Legal Profession (Barristers) Rules 2021*).
- Good faith participation is expressly required by some statutes.
 - Example: s 196 *Civil Law (Wrongs) Act 2002* (ACT): it's the duty of each party to a proceeding referred for mediation or neutral evaluation under s 195 to take part, genuinely and sincerely, in the mediation or neutral evaluation.
 - Example: s 4-10 *Civil Dispute Resolution Act 2011* (Cth) – must advise a client to undertake 'genuine steps to resolve dispute' prior to beginning (most) civil proceedings (mandatory).

Step 2: Cite privilege and confidentiality:

- Apply s131 *Evidence Act 1995* (Cth), *Evidence Act 2011* (ACT):
 - (1) Evidence is not to be adduced of:
 - a. A communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
 - b. A document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

Note subsection (2) sets out various expectations.

- Note: other express provisions protecting confidentiality of negotiations in s 52B *Court Procedures Act 2006* (ACT), s 53B *Federal Court of Australia Act 1976* (Cth).

Step 3: Consider appropriate type of ADR:

Type	Description
Negotiation	<ul style="list-style-type: none"> • Parties only • Most common form • Parties negotiate their own resolution or settlement of their dispute. • May occur directly between parties or between lawyers. • May occur at any point in a dispute including before litigation, during litigation and even after litigation. • Part of the ordinary process of litigation (<i>Tresize v National Australia Bank</i>). • Pros: highest control to parties – may produce better/longer lasting outcomes; less expensive, quicker, more informal, less adversarial than litigation; preserves relationships; broader coverage than litigation; can be confidential. • Cons: power imbalances may result in unfair outcomes; second rate justice for the poor; can be a strategy to exacerbate delay; may trivialize legal rights and courts or undermine public interest value of courts; not always culturally appropriate; may produce unfair outcomes to take away legal rights; no public scrutiny because confidential
Conciliation + Mediation	<ul style="list-style-type: none"> • Neutral third party involved - parties have assistance of an impartial third party who is advisory on the dispute's substance and determines the process for dispute resolution. • Facilitative. • Pros: parties control outcome; less expensive, informal, quicker, adversarial than litigation; broader coverage than litigation; parties can benefit from views of a third party; can be confidential.

	<ul style="list-style-type: none"> • Cons: power imbalances resulting in unfair outcomes; more expensive than negotiation; can be strategy to rattle or test other side with no intention to settle; may trivialise legal rights and courts or undermine public interest; not always culturally appropriate; bargain away legal rights; views of third party can't be vetted/controlled and may not be favourable; no public scrutiny.
Neutral evaluation	<ul style="list-style-type: none"> • Neutral third party involved. • Facilitative
Arbitration	<ul style="list-style-type: none"> • Neutral third party involved evaluating a dispute and deciding. • Determinative. • Arbitrator is a subject-matter specialist; chosen by agreement between parties; hears the dispute; makes findings of fact and law; gives an advisory opinion or determination. • Parties are usually not in control of outcome – it is binding, no appeal rights. • Frequently used in commercial, construction and international trade disputes. • Pros: parties have some control over process, formalities similar to litigation without risk of power imbalances and unfair outcomes; arbitrator selected by parties with knowledge of subject matter; can be confidential. • Cons: parties don't control outcome; often slow and expensive like litigation; often just as formal as litigation but with no appeal rights; often as adversarial as litigation; no public scrutiny.
Adjudication	<ul style="list-style-type: none"> • Neutral third party involved. • Determinative.

PARTIES

- Identify the necessary and proper parties.
- Determine if the person/entity has legal capacity to be a party.
- Identify proper plaintiff/applicant.
 - If applicable, assess if multiple plaintiffs can be joined.
 - If applicable, consider if representative proceedings apply.
 - If applicable, address wrongly named plaintiff situation.
 - Consider the number of causes of action.
- Identify the proper defendant.
 - If applicable, address doubt as to who should be defendant.
 - If applicable, consider whether all jointly liable parties have been joined.
- If applicable, consider whether to add a party.
 - Consider inconvenience caused by inclusion/omission of party if considering adding them or removing/omitting them.
- If applicable, determine whether third-party proceedings are appropriate.
- If applicable, consider removing a party.
- If applicable, deal with parties affected by death, bankruptcy or disability.

Step 1: Identify the necessary and proper parties:

- all persons necessary for resolving the dispute should be parties to the proceeding.
 - Necessary party = one whose presence is required to enable the court to adjudicate effectively and completely on all issues (r 210, *Court Procedure Rules 2006* (ACT)).
- Once a party ☐ has rights (e.g., to adduce evidence, make submissions, appeal) and obligations (e.g., being bound by the judgment).

Step 2: Determine if the person/entity has legal capacity to be a party:

- A person must have legal capacity to sue or be sued.
- This includes:
 - Natural persons (with exceptions).
 - Corporations under *Corporations Act 2001* (Cth) or state/territory associations (which confer legal capacity to sue and be sued).
 - Corporations can sue/be sued in corporate name.
 - In the ACTSC, they can start + carry on a proceeding:
 - Through solicitor acting for corporation; or
 - With leave, via authorised officer/employee.
 - Must state Australian Company Number (CAN) or ARBN on proceedings.
 - Statutory corporations established by legislation with capacity to sue/be sued (e.g., *ASIC Act 2001* (Cth)).
 - Foreign corporations with capacity to sue/be sued in their home jurisdiction.
 - Bodies politic (e.g., Cth, States, Territories, foreign govts).
 - Partnerships:

