<table>
<tr><th>Category</th><th colspan="3">Deeper Understanding
[Combination of textbook and statutes; properly apply articles]</th></tr>
<tr><td rowspan="3">1.
Civil Justice System And ADR</td><td colspan="3">Astor and Chinkin: Litigation and alternative methods: a false dichotomy</td></tr>
<tr><td colspan="2">1. Introduction</td><td>

“ADR is now to be found within the formal justice system which has adopted it and made it its own”.

✓ “The institutionalization of ADR” has meant that most courts and tribunals use one or, more usually, several forms of ADR
✓ The relationship between litigation and ADR is more “complex, interactive, even enmeshed.”

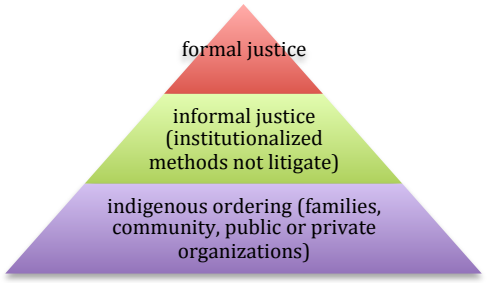
</td></tr>
<tr><td>2. The resolution of disputes: the disputes pyramid</td><td>2.1 The concept of the pyramid</td><td>

The author’s pyramid

✓ Litigation is the dominant method; it is rarely used and occupies the very apex.
✓ The rest of the body of pyramid is occupied by other methods: seeking advice and negotiating, “lumping it”, “industry or workplace grievance or complaints mechanism, ombudsman and many others.”

Christine Parker’s pyramid

✓ Different ways should not be seen as separate processed, but the benefit of each should be “recognized and deliberately used” for benefit of each.
✓ Three levels of options:



✓ Overlaps with next-to-it ones and each checks the disadvantage of the other so that:
✓ “Formal justice can be an alternative and regulator of informal justice while informal justice can be used persistently to critique professional models of justice and challenge it to become more collaborative, personal and based in community norms and power.”

Miller and Sarat’s pyramid

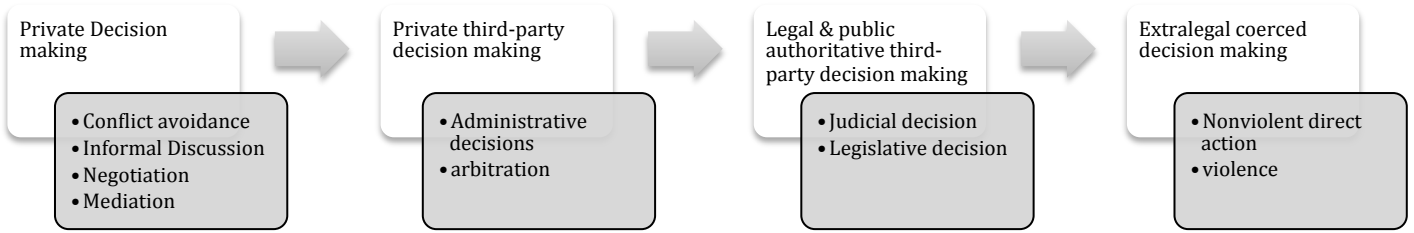
✓ “A vast and uneven pyramid” where the base is occupied by numerous grievances, including reactions like:
<ol type="i">
Not perceive that they have suffered an injury
Not know of a legal remedy
Lump it (different with endurance; “persist as long as the disputants find the costs of avoidance or resolution higher than the cost of puting up with a conflict situation”)
Remove himself/herself from the source of the dispute i.e. go to other stores, move home
Self-help: physical retaliation, seizure of property, removal of an offending object

✓ Those cases where the other party responded positively and offered appropriate recompense form another layer of the pyramid.

</td></tr>
</table>

2.2 Making a legal claim	**People do not often resort to law as a means of revolving disputes** i. "Many fairly significant grievance do not even reach the first stage of a claim being made" ii. "A large portion of all claims were either settled without dispute, or were not pursued for some other reason" iii. "In Australia, in only 5.7% of disputes did either party file a court case, in US a little bit higher 10.7%" **Some reasons people do not approach legal system:** i. Not affordable ii. Alienated from the institutions and processes of the law iii. Mystified by court procedures iv. Lack trust in the system For **large companies**, the legal approach may be a negotiating tactic, a threat, or a means of moving the dispute forward. For **inexperienced litigants**, it may be an act of desperation.
2.3 Recourse to ADR	The state needs to **distribute the limited resources to where it is worthy,** 'which cases are regarded as deserving of expensive superior court resources.' The privatizing (make it private not communal) effect of ADR may allow the market to operate more freely and without interventionary regulation.

Christopher Moore, 'Approaches for managing and resolving conflict'

The Whittamore-Singson Case Fact		Andrew and his wife Janelle were both recruited into Fairview Medical Clinic, whose director was Dr. Singson. On their five-year contract, there was detailed no-competition clause after quitting early before the contract expiration. Janelle and Andrew were going to divorce and their worse relationship influenced other staff and patients. Andrew would be easier to find patient so he was the one to leave. Andrew talked to Singson hoping to not invoke the no-competition clause upon his leaving. Singson considered the potential loss and the bad precedent of management so refused Andrew.
Conflict manage-ment in this case	Overview	
	Discussion	Andrew did initiate informal discussion with Singson but they failed to reach an acceptable conclusion. A dispute existed from a disagreement "only when two parties are unable and/or unwilling to resolve their disagreement; that is, when one or both are not prepared to accept the status quo".
	Negotiation	**"Structured communication and bargaining process"** "Educate each other about their needs and interests, making mutually acceptable exchanges that satisfy them and address less tangible issues such as concerns about trust, respect, or the form their relationship will take

			in the future." - If negotiations are hard to initiate and start, or have begun and reached an impasse (dilemma that cannot move forward), then parties may need to use a third party.
		Mediation	- A mutually accepted third-party who has **no authority to make binding decisions**. - **What can mediator help?** 1. Open or improve communications 2. Establish or build more respectful and productive working relationships 3. Better identify, understand, and consider each other's need, interests and concerns 4. Propose and implement more effective problem-solving or negotiation procedures 5. Recognize or build mutually acceptable agreements. - In this case, they can forward their dispute to the board of directors of the clinic for a third-party decision. But Andrew would not be sure of fairness.
		Arbitration	- Private process – people select arbitration – not open for public scrutiny – parties can submit their dispute to a mutually acceptable individual or panel of intermediaries to make a decision. - The **intermediaries decide if the outcome of the process will be a nonbinding recommendation or a binding** decision. - Two **subsidiary methods**: ✓ Med-arb: use mediation as the procedure of first resort to resolve their disputes; same person or panel as intermediary; may be reluctant to reveal information in mediation. ✓ Mediation-then-arbitration: different third-party for processes; less worried about information sharing.
		Judicial	- **From private to public domain** - **Not only consider disputants' argument, but also broader societal values, standards, laws, regulations, and appropriate precedents.** - Can reflect socially sanctioned laws or norms. - Downsides: long time, expensive, highly unpredictable.
		Legislation	- Public means of solving a conflict that uses voting to secure a decision on a law, rule, or regulation that will have an impact on disputants' relationships, interests, and perceived or actual benefits. - Used more in larger disputes and public issues. - **Disputants' influence is very limited;** the outcome of legislation may not resolve fundamental differences and may be less than satisfactory for all concerned because of compromises that had to be made to pass it. - Andrew considered that there should be a law against no-competition clauses, but it takes a long time.
		Extra-legal	- Violate and non-violate
		What to do in this case	- Their conflict is **ripe for negotiation:** 1. People involved could potentially engage in a joint problem-solving process 2. Cooperation of one another to meet their goals or satisfy their interests 3. Able to identify and agree on the major issues in dispute 4. In a situation where their interests are not necessarily or entirely incompatible 5. Able to influence one another and undertake or prevent actions that can either harm or rewarding 6. Pressured by deadlines and time constraints and share a motivation for early settlement 7. Don't want to be influenced by external constraints such as the unpredictability of a judicial decision, costs of establishing a new practice, etc

		A mediator may be called into negotiations when: 1. Parties have difficulty contact each other, starting talks. 2. Cannot reach agreement on an acceptable forum or structure for negotiation 3. Emotions are intense, preventing a calm discussion 4. A significance lack of trust and respect 5. Communication is pool in quantity and quality, cannot improve on their own 6. Misperceptions or stereotypes 7. Repetitive negative behaviours 8. Disagreement over the data – what information is important, how it is collected and evaluated 9. Stuck in bargaining over positions, each preferred solutions but unable to identify each other's interests 10. Cannot divide the issue into multiple smaller ones 11. Perceived or actual incompatible interests, or differences over beliefs and values 12. Reluctant to settle in fear of setting a precedent for future 13. Feeling pressure not to settle from circumstances or parties beyond those in negotiations 14. Lack trust and concerned that the settlement will not be implemented as agreed

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

S 3 Objective

The objective of these rules is to **assist solicitors to act ethically and in accordance with the principles of professional conduct** established by common law and these rules.

S 7.2 Communication of advice

A solicitor **must inform the client about the alternatives to fully contested adjudication**; unless you reasonably believe your client already has the understanding of those alternatives

S 22.1 Communication with opponents

A solicitor must not **knowingly make a false statement to an opponent in relation to the case, including compromise.**

S 22.2

Must **take all necessary steps to correct any false statement** made **as soon as possible after aware**

S 22.3

Will not have made a false statement simply by failing to correct later on

S 34 Dealing with other persons

34.1 A solicitor must not in any action or communication associated with representing a client:

34.1.1 **Make any statement grossly exceeds the legitimate assertion of the rights / entitlements of the client** and which misleads or intimidates the other person.

34.1.2 **Threaten** the institution of criminal or disciplinary proceedings against the other person

34.1.3 Use tactics that go beyond legitimate advocacy which are designed to **embarrass or frustrate** another person

34.2 In practice, must not seek instructions in a manner to **oppress or harass a person who is reasonably at a significant disadvantage**

The term 'court'

1) Any body described as such; 2) any **tribunal** exercising judicial, or quasi-judicial, functions; 3) a professional disciplinary tribunal; 4) an industrial tribunal 5) an administrative tribunal 6) an investigation or inquiry established or conducted under statute or by a parliament 7) a Royal Commission 8) **an arbitration or mediation or any other form of dispute resolution**

Productivity Commission 2014, Access to Justice Arrangement: Overview, Inquiry Report No. 72

1. Courts in all jurisdictions have undergone reforms but the progress has been uneven.
2. Need more government funding – government funded legal assistance service would generate net benefits to the community; the nature and predictability of funding arrangements constrain the capacity of legal assistance providers to direct assistance.
3. What does 'access to justice mean'? 'Making it easier for people to resolve their disputes'.
4. Data on page 24 shows that the three most prevailing legal problems are: consumer, housing, government.
5. Civil justice system provides with a arrange of means for resolving their disputes and asserting their legal rights: the federal and State courts, statutory tribunals, government and industry ombudsmen and complaint bodies, and organizations and individuals offering alternative dispute resolution services.
6. COST TOO HIGH: citing Martin CJ in Western Australia – the hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians.
7. Citing Law Council of Australia: 'The effective access enjoyed by individuals necessarily depends on a range of factors, including geographic location, economic capacity, health, education, cultural and linguistic variation, formal and informal discrimination…'
8. Improving accessibility would 1) protect individuals and business from infringement of their legal rights by others 2) promote social order and communicates and reinforces civic values and norms 3) help avoid issues escalating into more serious problems.

Problems	Possible solution
1. People don't understand their rights and cannot identify when their problem has a legal dimension	i. Legal assistance service use methods to reach these clients ii. A holistic service iii. Training of non-legal community workers to identify legal problems
2. People don't know where to go for advice and assistance	i. Online resources
3. Too expensive	i. Place an onus on lawyers to ensure that their clients understand the estimated cost
4. Cannot tell the quality of the legal service	i. Ensure a base level of quality e.g. entry restrictions to the legal profession ii. Provide consumer with an avenue for recourse when quality falls short or charges are excessive iii. But as per Melbourne barrister Stephen Warne, the disciplinary prosecution tend to fail unless based on a fee of at least twice what the disciplinary tribunal decides to be the reasonable fee
5. 1/3 who chose not to act on a substantial legal problem cited a belief that it would be too costly; 1/3 thought it would take too long	i. Ombudsmen is cheaper and quicker - $650 around; 86% within 1 month; 97% within 6 months ii. ADR can be effective iii. For family disputes, informal resolution processes iv. Tribunals – but is seen as 'creeping legalism' thus drift away from its initial intention v. Court reforms – but improvement is uneven.
WHAT ARE THE COURT REFORMS	i. Strike a better balance between accessibility and perfection ii. Traditionally judges are umpire rather than player but now a more active judicial management of cases iii. No 'best' model for case management iv. Includes – abolishing formal pleadings; controlling the number of pre-trial appearances; strictly observing time limits; training on discovery management to support the judges' performance as a 'gate-keeper' v. Equipping judges and court for self-representation e.g. simplify justice system – but different levels of court would treat self-representation differently

9. Criticism that since the system is adversarial, there is little incentive to cooperate – but moving to an inquisitorial system would address a fundamental change to the underlying tenets of Australia's legal system
10. Assisting the 'missing middle' – who are not rich enough to bring a litigation and not poor enough to get legal aid
11. Can use legal expenses insurance – interesting new way where the risk is spread: consumers pay a premium based on an insurer's assessment of risk and their legal expenses are covered when required.
12. Different legal aid agencies – LAC, CLC, ATSILS, FVPLS on page 45.

Textbook, Bamford, Chapter 1 'The Civil Justice System'

1. Civil Justice System – three categories of parties

1) Courts and tribunals

2) Organizations, either wholly or partially **funded by the state**, that provide DR service – they are not part of the state but their existence is often mandated by legislation e.g. Dispute Settlement Centre in Vic, family law DR centres, employment ombudsmen

3) Private organizations **recognized by the state** as providing appropriate DR service but not necessarily created or funded by the state, e.g. industry ombudsmen, Financial Ombudsman service

4) WHAT IS **EXCLUDED are most of the private DR services**

2. Court reforms

1) Within Australian context, there have been two broad directions of procedural reform – one is toward **greater court control over the conduct of litigation by introducing case management** into litigation process; the other is to **minimize the use of courts and adjudication to finalize cases by encouraging settlement before trial.**

Case Management

1) Before case management, the parties control both the pace and the issues and the evidence.
2) Case management is to give the court a role in determining the pace while **not interfering with the party control of issues or evidence**.
3) In 1997, HCA's opinion on Queensland v JL Holdings indicated that it was of paramount importance that cases should be determined on their merits and that case management considerations should not outweigh this in all but exceptional cases.
4) But in 2009, HCA reversed the effect of this case and **gave greater weight to the necessity for effective case management** in **Aon Risk Service v ANU** – as such, case management has become an essential feature of contemporary civil litigation.

Minimizing adjudication

Growth of **non-court bodies or organizations** that are now part of the civil justice system

Other reforms

1) **Discovery** procedure
2) Move to minimise the extent to which **oral evidence** is used – written form e.g. witness statement
3) **Expert witness** – more use of court-appointed experts
4) **Jury** – almost all civil cases are heard without a jury; in Vic, both parties have the right to seek a jury trial with 6 jurors

Future direction for reforms

1) **Pre-action procedural obligations** – be met before the commencement of litigation
2) **'Proportionality' to litigation** – if the cost is disproportionate to the amount in dispute – prevent a well-resourced party from using procedural steps to exhaust the resources of less well-resources parties
3) Expert witness – give evidence under review
4) Case-management from pre-trial stage to trial stage.

2. **Large Scale ADR**	**Llewellyn, 'Dealing with the legacy of native residential school abuse in Canada: Litigation, ADR and Restorative justice'** 1. **The main point of this article** is to suggest that litigation and traditional ADR are not the most proper way because they do not challenge the assumptions underlying the current torts law system; restorative justice, as not simply an alternative practice but also a comprehensive theory of justice, could provide a new lens. 2. **What are the abuses?** Sexual abuse, physical abuse, spiritual abuse and psychological abuse; removal from families, isolation from communities, destruction of their culture, language and spirituality 3. **What are the remedies?** Government ignorance, establish a healing fund, a Statement of reconciliation **4. What are the advantages of litigation?** 4.1 The legitimacy and authority of the mainstream judicial system in Canada society 4.2 The court would provide more satisfaction for those who seek vindication on a matter of principle. 4.3 Formal structures will provide protection for less powerful parties. 4.4 Public's access to these institutions 4.5 Being able to establish precedent 4.6 It is familiar and known – they know what to expect and how to prepare for it. **5. What are the disadvantages of litigation?** 5.1 Extremely high cost 5.2 Arduous and protracted process – facing cross-examination painful 5.3 Bipartisan and adversarial nature of tort litigation does not adequately accommodate the nature of the harms, because it assumes that the parties have adverse interests 5.4 The theory of justice underlying the system is unable to provide an adequate remedy **6. What about ADR?** 6.1 As per sander and Goldberg in 'Fitting the Forum to the Fuss', they suggested asking two questions to resolve a dispute: what are the client's goal & if the client is amenable to settle, what are the impediments and what ADR procedure can overcome the impediment? 6.2 Some people say since the goal of residential school victims cannot be properly achieved through litigation then go to ADR. 6.3 They fail to ask more about the general question of whether settlement is an appropriate goal at all. 6.4 The harm caused by residential schools cannot be understood in individualistic terms – family, communities, second even third generation, larger context of history **7. What's the main disadvantage of ADR?** 7.1 Wrong norm of settlement i. Mainstream ADR mechanisms share a common focus on settlement as their ultimate aim. ii. To those whose ultimate aim is not settlement but some loftier goal, ADR advocates could suggest litigation. iii. Settlement focuses on the individual dispute, not on the broader relationships at issue – but here, it should be more than individual. iv. Actually ADR is not located independently of the norms and sanctions of the legal system, but is typically situated near legal institutions and dependent upon legal norms and sanctions. E.g. negotiation and mediation share the current tort law system's assumption about the nature of the disputes and have adversarial character. 7.2 ADR is to make it confidential, not part of the public record 7.3 Parties must pay for them. 7.4 The claim that ADR sacrifices justice for the sake of peace – the underlying philosophy is the conception of corrective justice: justice can be achieved and remedies via a material transfer from wrongdoer to victim. **8. Advantages of restorative justice as an alternative** 8.1 Mainstream ADR mechanisms are not restorative in nature and restorative processes are founded on a conception of justice as

fundamentally concerned with restoring relationships – not necessarily personal or intimate relationships but rather social relationship of equality.

8.2 The task of justice on a corrective understanding is to remedy not to inquire into the conditions that led to the wrongdoing in the first place.

8.3 The conception of restorative justice is closer to what underlies traditional aboriginal understandings of justice – 'the teaching and healing of all the parties involved, with an eye on the past to understand how things have come to be, and an eye on the future to design measures that show the greatest promise of making it healthier for all concerned' – Rubert Ross

9. What does a restorative process look like?

9.1 Must involve all parties with a stake in the resolution

9.2 Must recognize and seek to address all the harms resulting form residential schools – including harms experienced by the wrongdoers and the community

9.3 Must be voluntary, not because of coercion, fear, threats etc

9.4 Truth-telling – avoid the shuttle diplomacy

Trevorrow v the State of South Australia

HELD:

1. The State's removal of plaintiff from his parents was ultra vires
2. Reject the statutory limitation defence of laches
3. The plaintiff was wrongfully imprisoned
4. The State breached its fiduciary duty / liable in negligence / plaintiff should be awarded damages
5. **'Cultural loss is a compensable head of damage'**