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# Developments in ADR

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## CONTENTS

# Chapter 9

# DEVELOPMENTS IN ADR

**Professor Tania Sourdin [†] and Professor Nadja Alexander [*]**

## 1. INTRODUCTION

Alternative Dispute Resolution (ADR) processes are now widely used throughout Australia to resolve and manage disputes without the need to use traditional rights-based processes such as litigation. ADR usually refers to dispute resolution processes that are 'alternative' to traditional court proceedings. ADR is also now used as an acronym for 'assisted', 'additional', 'affirmative' or 'appropriate'[1] dispute resolution processes, and the change in terminology is the result of a recognition that these processes are now mainstream and dominant dispute resolution processes within the Australian environment. ADR processes can be used across diverse areas, including commercial, legal, social, environmental and political fields.

ADR processes usually involve a third party, referred to as an ADR practitioner, who either assists the parties in a dispute to reach a decision by agreement or makes their own decision that may be binding or non-binding upon the parties. The Australian National Alternative Dispute Resolution Advisory Council (NADRAC) describes ADR as an "umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them".

This chapter reviews developments in and the growth of ADR processes in Australia. It is primarily focussed on changes in the civil rather than the criminal sector, although the authors note that the changes in the criminal sector are significant and warrant separate consideration. Some initial issues relating to ADR generally and the increasing trend to support ADR processes before court proceedings are discussed, and questions involving the difficulty in defining processes are explored. There is then a focus on the impact of changes in this sector on the legal profession and the judiciary, and the major ADR processes in use within the court and tribunal sector are outlined. Finally, there is a review of the NADRAC

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[1] Recently, ADR has been used to refer to 'Appropriate Dispute Resolution', and the use of 'appropriate' instead of 'alternative' has been enshrined in Victorian legislation. This movement is significant. It signals not only a change in policy about the importance of non-court dispute resolution processes but also a recognition that such processes will often support more effective forms of dispute resolution than traditional litigation.

approach in their 'Resolve to Resolve' Report and a consideration of future trends in this area.

## 2. ADR PROCESSES AND REQUIREMENTS

### 2.1 Defining ADR

Significant issues have arisen in the past within Australia from attempts to define ADR. It has been said that it is impossible to devise concise definitions of ADR processes that are accurate in respect of the range of processes available and the contexts in which they operate. These issues have meant that evaluation and research are often not comparable and that reporting of ADR use can be unreliable. For example, for many legal practitioners, ADR has meant mediation, and for some, a court 'conference' would probably not be identified as ADR. The difficulties in defining ADR are magnified by the creation of jurisdiction specific schemes that often locates ADR outside the litigation system. It has been noted that ADR is increasingly being seen 'not as an alternative to the formal justice system, but as a dispute resolution system in its own right'. Between courts of different jurisdictions there are also differences. For example, in the Family Court of Australia, the term 'primary dispute resolution' (PDR) was previously used to describe similar processes. It was stated in a report by the Family Court that:

> The term "Primary Dispute Resolution" was used initially because it reflects the outcome achieved by the Court in disposing of 95 per cent of matters by means other than litigation. In such circumstances it seems ludicrous to speak of "alternative dispute resolution" when in fact means other than litigation have long been the primary means of resolving disputes in the Court.

Dispute resolution processes may be classified as follows:[2]

- Determinative processes, which involve a third party who investigates the dispute, and may include a formal hearing and a determination that may be enforceable. Such processes include adjudication and arbitration3 and may be binding or non-binding. [4]
- Advisory processes, which involve a third party to investigate the dispute and provide advice about the facts and outcomes. Such processes include investigation, case appraisal and evaluation. [5] Advisory processes are commonly used in Online Dispute Resolution (ODR).
- Facilitative processes, which involve a third party, often with no advisory or determinative role, who provides assistance in managing the process of

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[2] Adopting the terminology used in National Alternative Dispute Resolution Advisory Council, Alternative Dispute Resolution Definitions, NADRAC, Canberra, March 1997.

[3] Ibid.

[4] Ibid.

[5] Ibid.

dispute resolution. Such processes include mediation and facilitation,[6] and may be outside or related to court or tribunal systems or both.

- Transformative processes, which involve a third party with no advisory or determinative role who works together with participants to shape a process with the purpose of empowering the participants to transform their relationships. As transformation occurs, participants may be in a more constructive space to resolve the current and future disputes.

Although descriptions such as these have assisted in producing more certainty in ADR definitions, considerable variations remain in the way in which various ADR processes are defined and used within Australian courts and tribunals and outside the litigation system. This difficulty arises in large part because processes are described similarly in legislation and rules, but can vary greatly in their practical application.

In this chapter, the term ADR is used to describe the processes that may be used within or outside courts and tribunals to manage, determine or resolve disputes or to reach agreement. Where the processes do not involve traditional, more adversarial, trial or hearing processes, the term ADR is used to describe processes that may be non-adjudicatory as well as adjudicatory, which may produce binding or non-binding decisions. ADR includes processes such as negotiation, collaborative lawyering, mediation, evaluation, case appraisal and arbitration.

## 2.2 Standards and accreditation for mediators

With the increasing referral of disputants to forms of ADR in Australian jurisdictions, the development of standards and accreditation in the area of ADR became an important issue from the late 1980s. In January 2008, the National Mediator Accreditation System (NMAS) became operational in Australia.[7] The NMAS is a voluntary 'opt in' scheme and was developed after years of discussion about mediation accreditation and the development of standards in the area.

The NMAS is partly a response to continuing concerns about credentialing and is directed towards the creation of 'basic standards'. It has been assumed that in particular sectors additional work will be required and that different sectors will implement additional measures, which are likely to be expressed by reference to quality assurance and quality improvement. The NMAS has three tiers:

- A system of accreditation that involves approval and practice requirements for mediators (the Approval and Practice Standards);
- A self-recognition framework for Recognised Mediation Accreditation bodies (RMABs), which include professional bodies, mediation agencies, courts, tribunals and other entities and
- A standards coordinating body – the Mediator Standards Board.

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6 Ibid p 7.

7 See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134622 for the Report on the Scheme and copies of the Mediator Approval and Practice Standards (accessed 2 June 2010).

In the national arena, the development of professional standards has been supported by the emerging ADR industry sector. In addition, NADRAC has supported the development of policy, settled definitions of ADR and supported accreditation approaches. NADRAC was established and is funded by the Federal Attorney-General, and for more than 15 years, has provided policy advice in the ADR area. It has also supported ADR growth by providing impartial advice from a diverse council. Other NADRAC areas of focus include supporting research and encouraging client feedback and complaints systems, which it views as an essential part of a quality system. NADRAC has recommended that such provision form part of accreditation systems that develop in the alternative dispute resolution field.[8] Another and related important issue relates to how ADR practitioners, courts and users gain information about ADR quality and the need to ensure that practitioners are not overburdened by requirements to seek user inputs.[9]

The NMAS developments were linked to trends within the family dispute resolution area, where an accreditation system has also been phased in since 2007. The accreditation system for family dispute resolution practitioners was developed after reforms to the *Family Law Act 1975* (Cth). The purposes of the family accreditation system are to 'ensure the provision of high quality dispute resolution services, and to recognise the professionalism of the sector'.[10] Regulation 83 of the *Family Law Regulations 1984* (Cth) provides for minimum standards of education, training and experience in order to satisfy accreditation requirements.

### 2.3 Pre-filing requirements

There has been considerable interest in the creation of pre-litigation or pre-filing ADR obligations over the past decade. Essentially, these obligations require that, before commencing court or tribunal proceedings, individuals or organisations attempt to resolve their differences. The obligations may arise as a result of:

- specific and directed legislation (as in the retail lease area) or more general legislation (as in the family and federal proceedings areas);
- contractual obligations (as in many commercial matters where arbitration may be required) or
- specific industry or government initiatives (as in the banking and financial sector where, as noted below, many schemes require 'members' to use external dispute resolution processes).

Model litigant obligations, legal services directions or pledges may also create and support obligations to use ADR. The *Civil Dispute Resolution Act 2011* (Cth)

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8 National Alternative Dispute Resolution Advisory Council, A Framework for ADR Standards, Report to the Commonwealth Attorney-General, April 2003, Recommendation 3, pp 63, 73: see http://www.nadrac.gov.au/ (accessed 2 June 2010). The NMAS already enables this in the mediation area.

9 It has been noted that bureaucratic hurdles can impede the development of flexible practices and reduce the practitioner base –Pou C, Mediator Quality Assurance: A Report to the Maryland Mediator Quality Assurance Oversight Committee, February 2002, p 19.

10 See http://www.ag.gov.au/fdrproviders (Accessed 2 June 2010).

(CDP Act) is a recent piece of legislation dealing with these issues. In terms of pre-litigation requirements, it essentially requires that disputants file a 'genuine steps' statement that sets out what attempts have been made to resolve their differences before commencing litigation in respect of a range of civil disputes. The requirements in the genuine steps statement are modelled on the recommendations in a 2009 NADRAC report on access to justice.[11]

The broad aims of the CDR Act are to:

- focus parties on the early resolution of disputes;
- change the adversarial culture of disputes and
- encourage lawyers to provide clients with information about alternatives to litigation.

The CDR Act requires prospective litigants to lodge a statement with the court detailing the genuine steps they have taken to resolve their dispute or, if they have not, the reasons why. This is a mechanism to ensure that litigants are informed and prompted to consider what other options there may be. Section 4 (1A) explains that "a person takes *genuine steps to resolve a dispute* if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute." Section 9 provides that legal representatives have a duty to advise and assist in relation to a genuine steps statement.

In New South Wales and Victoria, attempts have been made to introduce similar requirements. These attempts have been somewhat controversial and have generated significant comment. In New South Wales, legislative amendments made in 2010 were postponed in 2011 and party repealed in 2012. In Victoria, there was also an attempt to introduce a 'reasonable steps' obligation in 2010 as part of a much broader scheme of overarching obligations to bind courts, lawyers and litigants to a more 'reasonable' standard of behaviour. This scheme set out more extensive pre-litigation requirements that required prospective litigants to take steps, exchange material and documents, and consider dispute resolution options. Although enacted, the section of the *Civil Procedure Act* (2010) (Vic) dealing with pre-litigation requirements was repealed in 2011 following a change of government. However, the changes that were made mean that courts can still make rules relating to pre-litigation requirements.

### 2.4 Location of ADR

Each of the initiatives outlined above has been in response to a series of reports that have highlighted the utility and benefits of ADR processes in the pre-litigation area. For example, the Victorian proposal emerged after consideration of the Victorian Law Reform Commission (VLRC) report[12] that focused on civil justice

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[11] National Alternative Dispute Resolution Advisory Council, The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction (prepared for the Attorney-General of the Commonwealth of Australia), September 2009.

[12] Victorian Law Reform Commission (VLRC), Civil Justice Review, Report No 14 (2008).

reform. The Commonwealth response was informed by a more specific ADR focus and extensive pre-existing litigation reforms already present at the Commonwealth level. The New South Wales approach arose after a detailed discussion and consultation process.[13] These changes and many jurisdictional changes over the past 10 years are directed at locating ADR outside the court system as well as within the court system.

At the Commonwealth level, with regard to the then *Civil Dispute Resolution Bill 2010* (Cth), the Commonwealth Attorney-General noted:

> The *Civil Dispute Resolution Bill* is all about seeking to resolve disputes at the most appropriate level. It encourages parties to resolve their disputes at the earliest possible opportunity, and to do so outside of the courts – promoting a move away from the often stressful, expensive adversarial culture of litigation.[14]

By far, the largest pre-litigation scheme that imposes mandatory attendance at a dispute resolution process in Australia operates in the family dispute area. Initiatives that have been phased in since 2006 under the *Family Law Act 1975* (Cth) represent a significant change in family law.[15] The explanatory memorandum to the *Family Law Amendment* (*Shared Parental Responsibility) Act 2006* states: "this is a key change to encourage a culture of agreement making and avoidance of an adversarial court system."[16]

In state jurisdictions, there are many examples of ad hoc requirements that encourage 'would-be litigants' to use the courts as a 'last resort'. For example, in South Australia, legislation can require parties in civil disputes to notify one another of a claim before the initiating process is filed.[17] In other jurisdictions, specific state legislation requires mandatory attendance at some form of ADR session as a pre-condition to litigation.[18] The legislation can require different pre-litigation reporting standards and notice periods, some examples of which include:

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13 NSW Justice and Attorney General, *ADR Blueprint – Draft Recommendations Report 1: Pre-action Protocols & Standards*, NSW Justice and Attorney General, Sydney, 2009, available at <www.ipc.nsw.gov.au/lawlink/ADR/ll_adr.nsf/vwFiles/ADR_blueprint_draft_recs1_preaction_protocols.pdf/$file/ADR_blueprint_draft_recs1_preaction_protocols.pdf> (accessed 21 September 2011).

14 See second reading speech, *Civil Dispute Resolution Bill 2010* (Cth), 16 June 2010, available on <http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2010_16June2010-SecondReadingSpeech-CivilDisputeResolutionBill2010> (accessed 21 September 2011).

15 See the *Family Law Amendment* (*Shared Parental Responsibility) Act 2006* (Cth), Revised Explanatory Memorandum (2006) p 1.

16 Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth), Revised Explanatory Memorandum (2006) p 20.

17 See *Supreme Court Civil Rules 2006* (SA) r 33. Under the rule, parties in most matters are required to serve an unfiled process on another party 90 days before filing in a court.

18 For example, Family Law Act 1975 (Cth), s 79(9); Retail Leases Act 1994 (NSW), Pt 8; Farm Debt Mediation Act 1994 (NSW);Local Court Rules (NT), r 7.12.

- The *Farm Debt Mediation Act 1994* (NSW) provides that a mediation must occur before a creditor can take possession of property or other action under a 'farm mortgage'. Similarly, the purpose of the *Farm Debt Mediation Act 2011* (Vic) is to require "… a creditor to provide a farmer with the option to mediate before taking possession of property or other enforcement action under a farm mortgage": s 1.[19]
- The *Retail Leases Act 1994* (NSW) provides for the mediation of retail tenancy disputes. Under that legislation, court proceedings would not normally be commenced until a certificate has been provided by the Registrar of the Retail Tenancy Disputes Unit or a court has satisfied itself that the dispute is unlikely to be resolved by mediation.[20]

In the community sector, ADR has grown in response to the establishment of community justice centres (eg, Community Justice Centres in New South Wales;[21] Dispute Resolution Centres in Queensland;[22] the Dispute Settlement Centre in Victoria;[23] the Conflict Resolution Service in the Australian Capital Territory and Community Mediation Services in South Australia, Western Australia and Tasmania), government and private funding of family-directed dispute resolution services, grass-roots changes that have occurred in councils (in which mediation programs have been set up), schools where anti-bullying and peer mediation processes have been developed, and various other areas where ADR strategies are now being used.[24]

Dispute resolution schemes have been set up in various industries to provide low-cost (or free), effective and relatively quick means of resolving consumer complaints about products and services. These schemes are often funded by a cooperative of industry members (examples include the Telecommunications Industry Ombudsman (TIO) and the Financial Ombudsman Service (FOS)) and are intended to deal with disputes between business and consumers. Generally, the scope of these schemes is limited in that they do not deal with internal disputes or disputes with contractors, suppliers or other business entities. In 2008, reforms were introduced that enabled

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19 See ABC News, Banks Forced to Offer Farm Mediation, available on <www.abc.net.au/news/2011-06-30/banks-forced-to-offer-farm-mediation/2777152> (accessed 24 September 2011).

20 Retail Leases Act 1994 (NSW), s 68(2).

21 These centres pre-dated the legislation. See Community Justice Centres Act 1983 (NSW). For information, see <www.lawlink.nsw.gov.au/cjc> (accessed7 September 2011).

22 See the Dispute Resolution Centres Act 1990 (Qld). See <www.justice.qld.gov.au/justice-services/dispute-resolution> (accessed 7 September 2011).

23 See Dispute Settlement Centre of Victoria on <www.disputes.vic.gov.au> (accessed 7 September 2011).

24 For example, the growth in victim–offender conferencing schemes in specific areas, and schemes directed at assisting particular parts of the community, such as the Aboriginal Alternative Dispute Resolution Service in Western Australia.

many of these schemes to merge (eg, FICS, BFSO and IOS merged to become the Financial Ombudsman Service (FOS)).[25]

This drive to locate ADR both outside and within the court system has not been led solely by policy-makers, with many judges and courts also voicing their support. For example, in his opening address to the National Access to Justice and Pro Bono Conference in 2006, the former Chief Justice of Australia, The Hon Murray Gleeson AO, said:

> Access to justice has a much wider meaning than access to litigation. Even the incomplete form of justice that is measured in terms of legal rights and obligations is not delivered solely, or even mainly, through courts or other dispute resolution processes. To think of justice exclusively in an adversarial legal context would be a serious error.[26]

The maturity of the existing pre-litigation schemes and ADR process options has, over the past decade, supported this enthusiasm to embrace more developed pre-litigation arrangements.

## 3. OVERVIEW OF PROCESSES WITHIN THE LITIGATION FRAMEWORK

### 3.1 In the civil jurisdiction

In the civil jurisdiction, ADR processes may operate in the context of case management. Courts attempt to ensure that disputants are aware of ADR processes so as to reduce costs and delays. Referral to ADR processes, such as mediation, arbitration, case appraisal, neutral evaluation, referral to a referee or expert or settlement conference, takes place so as to assist courts to support the efficient, just and economical resolution of the dispute. At the same time, there is a growing acceptance that ADR processes can be regarded as a separate and interlinked system of dispute resolution[27] that can assist in improving access to justice, increase individual participation and enhance participants' satisfaction with the judicial process.[28]

ADR processes in the litigation context may be internally managed by court staff, registrars, judges, masters or magistrates or externally referred to and conducted by ADR providers selected by the parties. Costs vary, with those conducted by the court more likely to be free or subsidised. Courts may also order parties to pay costs, with costs sanctions attaching to various behaviours shown by parties during the process. Some schemes state when referral may occur, most have clear legislative

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25 See <www.fos.org.au/centric/home_page.jsp> (accessed 9 September 2011).

26 The Hon M Gleeson AO, Chief Justice, High Court of Australia, Opening Address (National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006) p 1, available on <www.highcourt.gov.au/speeches/cj/cj_11aug06.pdf> (accessed 23 September 2011).

27 Spigelman, J, 'Mediation and the Court' (2001) 39(2) *Law Society Journal* 62.

28 Sourdin, T, *Alternative Dispute Resolution and the Courts*, 2004, The Federation Press, Sydney.

support and it is ordinarily accepted that courts' case management powers or rules allow ADR to occur at any stage of the litigation process.

### *3.1.1 Mediation*

In the jurisdictions where a definition of mediation is provided in the relevant legislation, there are certain common characteristics in the conception of the process, although generally the definitions are descriptive and broad, leaving flexibility to the processes in practice. [29] Consistent among most of the jurisdictions is an understanding that mediation is a structured negotiation process, in which the mediator as an independent, impartial third party helps the parties to a dispute come to their own resolution or agreement on the issues.[30] In some jurisdictions, there is no reference to a 'structured' process with an 'impartial' third party, leaving open 'many key issues relating to the boundaries of mediation and the appropriate limits of the mediator's authority.'[31] In practice, the mediator may end up using a number of meditative and conciliatory techniques to assist parties to achieve settlement in many court-supervised or directed mediations. As noted by the Australian Law Reform Commission, some studies have shown that court-based mediators may adopt an interventionist approach, motivated in part by their knowledge of court orders likely in the particular dispute.[32]

In two jurisdictions – South Australia and Tasmania – conciliation as a form of mediation is included in their definition.[33] The NMAS sets out a broad description of mediation that includes a facilitative approach to mediation. However, mediators wishing to give advice must move into a blended process and meet the competency requirements under the standards. Hence, although there are common elements in the many definitions of mediation, no one particular model is employed around Australia.

All models of referral provide that a court may order a proceeding, or part thereof, to mediation on its own initiative or on application of either party.[34] In all Australian

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29 Insofar as mediators are accredited to the National Standard, they will need to adhere to the definition of mediation in the Standards: see National Mediator Approval Standards, Art 2.1.

30 Federal Court Rules (Cth) O72r7(1)(b); Court Procedure Rules(ACT) r1176(1); Civil Procedure Act 2005 (NSW) s25; Supreme Court of Queensland Act 1991 (QLD) s96; Supreme Court Civil Rules 2006 (SA) r4; Alternative Dispute Resolution Act 2001(TAS) s3, Supreme Court Rules 2000 (TAS) r519(1).

31 Boulle, L, 'In and Out the Bramble Bush: ADR in Queensland Courts and Legislation,' in Sourdin, T (ed), *Alternative Dispute Resolution and the Courts* 2004.

32 Australian Law Reform Commission, 'Review of the Federal Civil Justice System' Discussion Paper 62 (1999).

33 Supreme Court Civil Rules 2006 (SA) r4; Alternative Dispute Resolution Act 2001 (TAS) s3.

34 Federal Court of Australia Act 1976 (Cth) s53A(1); Court Procedures Rules 2006 (ACT) r1179; Civil Procedure Act 2005 (NSW) s26(1); Supreme Court Rules (NT) r48.13; Supreme Court of Queensland Act 1991 (QLD) s102(3), Uniform Civil Procedure Rules 1999 (QLD) r320; Supreme Court Act 1935 (SA) s65(1); Supreme Court Rules 2000 (TAS) r518(1), Alternative Dispute Resolution Act 2001(TAS) s5; Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.07; Rules of the Supreme Court 1971 (WA) O29r2(1).

jurisdictions there is, subject to exception, capacity to either refer matters to mediation without consent[35] or attend a court if they object[36] or, if there are no express provisions, there are implied provisions to that effect in case management powers.[37]

There is some diversity in terms of who may qualify to be a mediator in court-ordered schemes, if the parties fail to elect a mediator themselves with courts from different states maintaining a list of external and internal mediators, including registrars, associate judges and judges. An increasing number of courts and tribunals in Australia are now requiring mediators to meet the Australian National Mediator Approval Standards.[38] Choice of mediator in court schemes generally lies with the parties, unless the parties elect to allow the courts to decide or fail to decide themselves.[39]

Mediators' powers differ among jurisdictions. Although the starting point is generally that a mediator is an impartial practitioner who adheres to procedural requirements as set out in the referring order, court practice notes, the legislation or directions issued by the court, in certain jurisdictions mediators have more flexibility and control. In Tasmania, mediators may conduct mediations in any manner they determine, subject to guidelines *if* the court imposes such guidelines.[40] In Queensland, mediators are empowered to gather information about the dispute however they decide, determine whether a party is to be represented, separately consult with each party, as well as seek advice from independent third parties.[41]

In most jurisdictions, those fulfilling the duties of a mediator pursuant to a court appointment have the same protection and immunity as a judge has in the exercise of their judicial functions,[42] and NADRAC has recently recommended that this immunity be reduced. In 2011, NADRAC released a report that specifically explored

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35 *Civil Procedure Act 2005* (NSW) s26(1); *Supreme Court Act 1935* (SA) s65(1) (only a Judge may order without consent, a Master or Registrar requires parties consent); *Supreme Court Rules 2000* (TAS) r518(1), *Alternative Dispute Resolution Act 2001*(TAS) s5; *Supreme Court (General Civil Procedure) Rules 2005* (VIC) r50.07.

36 Supreme Court of Queensland Act 1991 (QLD) ss102-103.

37 Supreme Court Rules (NT) r1.10; Rules of the Supreme Court 1971 (WA) rr29 and 29A.

38 See recommendation 3 of Sourdin, T, *Mediation in the Supreme and County Court of Victoria: A Report* Department of Justice, 2008, Victoria, p 1.

39 *Court Procedures Rules 2006* (ACT) r1175 and *Civil Procedure Act 2005* (NSW) s34(a) specifically state that nothing in the Act prevents the parties to a proceeding from agreeing to, and arranging for, mediation of any mater otherwise than as referred to in the Act; *Uniform Civil Procedure Rules 1999* (QLD) s323(1)(a)(iii); *Civil Procedure Act 2005* (NSW) s26(2); *Alternative Dispute Resolution Act 2001*(TAS) s5; *Supreme Court Act 1935*(WA) s69(c).

40 Supreme Court Rules 2000 (TAS) r519(2)-(3).

41 Uniform Civil Procedure Rules 1999 (QLD) rr326 and 328.

42 Federal Court of Australia Act 1976 (Cth) s53C; Mediation Act 1997 (ACT) s12; Civil Procedure Act 2005 (NSW) s33; Supreme Court Act 1991 (QLD) s113(3); Supreme Court Act 1935 (SA) s65(2); Alternative Dispute Resolution Act 2001 (TAS) s12; Supreme Court Act 1986 (VIC) s27A; Supreme Court Act 1935 (WA) s70.

issues relating to confidentiality, admissibility and the immunity of ADR practitioners.[43] A key recommendation made by NADRAC in this report was that statutory immunity should be removed for most ADR practitioners. In making this recommendation, it was noted that:

> The pivotal consideration for NADRAC is that the nature of ADR, unlike litigation, already presents an issue for accountability, because the process takes place in private with "the potential to shield malpractice and unfairness unless … [ADR practitioners] can be held liable''.[44]

NADRAC also considered insurance and other arrangements for ADR practitioners and the current statutory arrangements.

Although mediation is often promoted as a consensual process, in certain jurisdictions there is a duty on the parties to take part in a proactive way. This is variously phrased as a duty to take part in 'good faith,'[45] 'genuinely and constructively,'[46] or 'reasonably and genuinely,'[47] with case law suggesting that the courts will take into account the parties' behaviour, particularly in relation to assessment of costs. These provisions address the concern that mediation ordered over the objection of the party will fail to encourage an interaction that could potentially lead to settlement. In interpreting 'good faith' provisions, Australian courts have tended to define good faith in terms of the absence of 'bad faith behaviour',[48] although this is a rapidly developing area of case law.

Comprehensive confidentiality and disclosure provisions are included in all Australian schemes, in addition to the common law protection of 'without prejudice' communications made with the bona fide intention of settling a dispute.[49] As such, there are not only evidential restrictions placed on the discussions and documents that may be divulged in a mediation restricting their publications, but also further non-disclosure obligations enforced against the mediators themselves. Thus, there are broad provisions applying across the jurisdictions that prevent evidence of any communication made, or document prepared for or in the course of, a mediation session being admissible in proceedings before any other court or body entitled to hear evidence.[50] A further protection is offered in NSW, the ACT and Tasmania that

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43 NADRAC, *Maintaining and enhancing the integrity of ADR processes: From principles to practice through people*, Commonwealth of Australia, February 2011, Chs 3–5, available on <www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_IntegrityofADRprocesses> (accessed 23 September 2011).

44 Ibid p 89.

45 Civil Procedure Act 2005 (NSW) s27.

46 Court Procedure Rules (ACT) r1180.

47 Uniform Civil Procedure Rules (QLD) s325.

48 Aiton Australia Pty Ltd v Transfield Pty Ltd [1999] NSWSC 996.

49 Field v Commissioner for Railways (NSW) (1957) 99 CLR 285, 291–292.

50 Federal Court of Australia Act 1976 (Cth) s53B; Mediation Act 1997 (ACT) s9; Civil Procedure Act 2005 (NSW) s30(4); Supreme Court Rules (NT) r48.18(3); Supreme Court Act 1991 (QLD)

attaches the same privilege with respect to defamation as exists in judicial proceedings to a mediation session and documents produced either in the session or for the purposes of arranging it.[51] This has also been described in terms of affording the mediating party, including their lawyer or agent, and any documents they produced, the same protection and immunity the party and documents would have if the dispute were before the Supreme Court.[52]

As well as the disclosure requirements on mediators, common across the jurisdictions is a provision requiring mediators to have a documentation and reporting function. This is either included as an exception to the disclosure obligation imposed on mediators,[53] or separately provided for in the legislation.[54] In the absence of general legislative reporting duties, practice notes or internal policies can outline the requirement of mediators to provide a report following the end of the process.[55] Most schemes oblige mediators to provide the referring court with a certificate relating to completion of mediation and whether or not settlements were reached, but without commenting on the extent to which parties took part or refused to take part in the process.[56] These minimalist reporting requirements aim to protect the integrity of the process and its associated principles of confidentiality.

Generally, cost benefits accrue to parties who engage in court-ordered mediation, as opposed to those who employ external services, as many schemes offer the services of court officials at reduced or no cost. Where user-pay systems are applicable in the court context, there are legislative provisions that regulate the division of costs between the parties. Costs also serve to encourage certain behaviour in the parties, with courts empowered to redistribute costs in the case between parties where, for example, one party has either unreasonably refused to mediate or is in breach of a duty to mediate in good faith. Costs sanctions can relate to costs in the case generally, and they may also be related to mediation costs. The starting position with mediation costs (mediation fees and associated legal costs) is generally that the parties pay either equal proportions of the costs[57] or as agreed

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s114; Supreme Court Act 1935 (SA) s65(6); Supreme Court Rules 2000 (TAS) r520(3), Alternative Dispute Resolution Act 2001 (TAS) s10(4)-(5); Supreme Court Act 1986 (VIC) s24A, Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.07; Supreme Court Act 1935 (WA) s71(1)-(2).

51 Mediation Act 1997 (ACT) s11; Civil Procedure Act 2005 (NSW) s30(2); Alternative Dispute Resolution Act 2001 (TAS) s10.

52 Supreme Court Act 1991 (QLD) s113.

53 Supreme Court Rules (NT) r48.13(14); Supreme Court Act 1935 (WA) s72(2)(a).

54 Supreme Court Rules (NT) r48.13(16); Supreme Court Rules 2000 (TAS) r520(1); Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.07(4).

55 Supreme Court of South Australia, Practice Directions 2006 Part I: Ch 9 Mediations, Direction 9.13.

56 Uniform Civil Procedure Rules 2005 (NSW) r20.7; Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.07; Supreme Court Act 1991 (QLD) s108, Uniform Civil Procedure Rules 1999 (QLD) rr331(2) and 335 – a mediator can report that a party failed to attend but not on how they performed in the mediation; Supreme Court Rules 2000 (TAS) r520(1).

57 Supreme Court Rules (NT) r48.13(11); Rules of the Supreme Court 1971 (WA) O29r3(1)(bb).

between themselves, or failing that, as specified in a court order.[58] Party agreement is not required in Queensland and Victoria, as once the power of referral is employed, costs are entirely at the court's discretion.[59] In the remaining jurisdictions, in the absence of agreement between the parties, the court may take into account mediation fees and associated legal costs when awarding the costs of the case generally.[60] In addition to encouraging compliance with requirements to consider ADR processes and participate in mediation in good faith, including mediation costs in costs in the case encourages proportionality in dispute resolution.

### *3.1.2 Arbitration*

Domestic arbitration exists as an alternative to mediation and also litigation in a number of jurisdictions, including New South Wales, Victoria, South Australia and the Federal Court. However, empirical evidence shows arbitration is not commonly used in relation to court referral, with mediation being the preferred choice of both parties and courts.[61]

Consent is a requirement of referral to arbitration at the Federal level and in the Victorian Supreme Court,[62] with additional consent required for the nomination of the arbitrator in the Federal Court.[63] The NSW legislation is silent on consent, and instead referral to arbitration is limited by the types of case that may be considered suitable. The process is available only for disputes concerning claims for damages, and claims for equitable or ancillary relief to a damages claim,[64] if there is an issue contested between the parties and cause has not been shown as to why the proceedings should not be referred.[65]

The NSW provisions are the most comprehensive in terms of providing information about the practice and procedure to be followed, with the referring court able to give directions about the conduct of the arbitration.[66] Parties are given the same rights to representation and examination and cross-examination of witnesses as

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58 Court Procedure Rules 2006 (ACT) r1181; Civil Procedure Act 2005 (NSW) s28; Supreme Court Rules 2000 (TAS) r522.

59 Uniform Civil Procedure Rules 1999 (QLD) s323; Supreme Court (General Civil procedure) Rules 2005 (VIC) r50.07(8).

60 See, for example, *Newcastle City Council v Paul Wieland* [2009] NSWCA 113.

61 For example, in the NSW Supreme Court, referral to arbitration fell from 58 in 2002 to 0 in 2005 and only one in 2006. However, the Supreme Court attributes this low rate partly to the expanded jurisdiction of the District Court into work that had typically been arbitrated in the Supreme Court. Supreme Court of NSW, Annual Report 2007/2008, 27.

62 Federal Court of Australia Act 1976 (Cth) s53A(1A); Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.08.

63 Federal Court Rules (Cth) O72r9.

64 Civil Procedure Act 2005 (NSW) s38(1).

65 Ibid s38(3).

66 Ibid s38(2).

they would in court proceedings[67] and may be held in contempt.[68] Similarly, the rules of evidence and the powers of the referring court in calling witnesses and ordering the production of documents are the same as for court proceedings.[69] The procedure of the arbitration is, however, to be determined by the arbitrator, who must act according to equity, good conscience and the substantial merits of the case.[70] The arbitrator has the same protection and immunity as a judicial officer of the court in exercising their functions.[71] At the Federal level, the parties may request that consent orders be made setting out the way in which arbitration is to be conducted, the time within which to conduct the arbitration, and the manner in which the arbitrator and expenses are to be paid.[72] Similarly, in NSW, there are detailed provisions about who may be an arbitrator[73] and their functions,[74] whereas the Federal Court leaves it to the judge's discretion.

In NSW, if an award is granted in writing signed by the arbitrator and containing reasons for the determination,[75] it is final and conclusive and taken to be a judgment of the court.[76] At the Federal level, an arbitration award achieves binding status on registration with the court or on application of the party to have the court make an order in the terms of an award.[77] In NSW, an aggrieved party may apply to the referring court for a rehearing of the proceedings within 28 days,[78] whereas in the Federal Court applications for review are available on questions of law only. A costs discretion included in NSW is intended to dissuade parties from treating arbitration as a preliminary process to a full hearing.[7980]

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67 Ibid s48.

68 Ibid s53.

69 Ibid ss50-51.

70 Ibid s49.

71 Ibid s55.

72 Federal Court Rules (Cth) O72 r9(3).

73 A senior judicial officer of the court is empowered to appoint either a former judicial officer, a Bar Council nominated barrister, or a Law Society Council nominated solicitor: *Civil Procedure Act 2005* (NSW) s36.

74 The arbitrator may exercise all of the functions of the court by which the proceedings were referred in determining the issues in dispute and making an award in the referred proceedings, on the evidence adduced before them: *Civil Procedure Act 2005* (NSW) s37(2) and s39(1).

75 Civil Procedure Act 2005 (NSW) s39(2).

76 Ibid s40

77 Federal Court of Australia Act 1976 (Cth) s54.

78 Civil Procedure Act 2005 (NSW) ss42-43.

79 Civil Procedure Act 2005 (NSW) s46.

80 *Central Area Health Service v Cooper* [2001] NSWCA 329; BC200105631; *MacDougall v Curlevski* (1996) 40 NSWLR 430; BC9605362; *Quach v Mustafa* (NSWCA, Kirby P, Sheller and Powell JJA, 15 June 1995, unreported, BC9504778); *Morgan v Johnson* (1998) 44 NSWLR 578; BC9804556; *Gambrill v Cook* (1998) 44 NSWLR 578; [1998] NSWSC 367; BC9804556.

In contrast to the detailed outline of the process in the NSW and Federal Court jurisdictions, the provisions in the Civil Procedure Rules of the Supreme Courts in Victoria and South Australia offer little direction on the conduct, nature and procedure of arbitration. In South Australia, the provisions empower the court to order arbitration, appoint the arbitrator (a position for which a Judge or Master is eligible),[81] issue directions for the conduct of the arbitration, and assign to the arbitrator such powers of the court it chooses. The provisions also allow for the arbitrator's award to be registered in the court and enforced as a judgment therein.[82] Likewise, in Victoria, the power to refer the proceeding or a question to arbitration at any stage exists, and this may occur with or without consent in the County Court, but only with the consent of the parties in the Supreme Court.[83]

'Commercial' arbitration that does not require court referral is used to deal with commercial disputes outside the court system.[84] These more formal models of arbitration operate in different states and territories[85] under their domestic Commercial Arbitration Acts. These Acts have as their agreed 'core' the newly amended *International Arbitration Act 1974* (Cth) (as amended in 2010).[86] Commentators suggest that the new legislation will do much to support the regime applying to arbitration in Australia,[87] and that it clarifies a number of 'concern' areas such as uncertainty relating to the confidentiality of arbitral proceedings.[88]

New South Wales was the first to adopt the amendments, and to encourage commercial arbitration, a new Australian International Disputes Centre[89] has been set up in that state. In these models of commercial dispute resolution, arbitration usually operates pursuant to agreement between parties – courts can only intervene in an arbitration under defined circumstances (s 5) of the *Commercial Arbitration Act* (NSW) 2010. Some of the other changes in the new law that are being applied across Australia and are based on the Commonwealth agreed model law are as follows:

- As in many state civil procedure laws, an overarching objective of the legislation has been set out – to enable commercial disputes to be resolved in a cost effective manner, informally and quickly (s 1C).

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81 Supreme Court Civil Rules 2006 (SA) rr221-222.

82 Supreme Court Civil Rules 2006 (SA) r222.

83 Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.08; County Court Civil Procedure Rules 2008 (VIC) r50.08.

84 See, for example, Commercial Arbitration Act 1984 (NSW).

85 See Commercial Arbitration Act 1986 (ACT) and Commercial Arbitration Act 1984 (NSW).

86 See full text of *International Arbitration Act 1974* (Cth) at www.comlaw.gov.au/Details/C2011C00342> (accessed 27 August 2011).

87 See Garnett R and Nottage L, 'The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?', Research Paper No 10/88, Sydney Law School, September 14, 2010, available at Social Science Research Network (SSRN) on <http://ssrn.com/abstract=1676604> (accessed 27 August 2011).

88 Jones D, *Commercial Arbitration in Australia*, Thomson Reuters, Sydney, 2011, at pp 340–361.

89 See http://www.disputescentre.com.au/> (accessed 12 November 2011).

- The 2006 amendments to the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on International Commercial Arbitration* (1985) have been adopted (s 2A).
- A party must raise any objection to a non-compliance without delay or the right to object is waived (s 4).
- If there is an agreement to arbitrate, a court must refer the matter to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being acted on (s 8).
- There must be such a real danger of bias to create a doubt regarding the impartiality or independence of an arbitrator, and any concerns must be raised within 15 days of becoming aware of the grounds, otherwise the arbitrator can continue (ss 12 and 13).
- An arbitral tribunal has significant powers to conduct arbitral proceedings (Pt 5), order interim measures and make orders with respect to security for costs, discovery of documents and interrogatories and giving of evidence by affidavit (s 17).
- Parties must not disclose confidential information in relation to the arbitral proceedings unless they 'opt out' or the Act provides otherwise (ss 27E–27I). This reverses *Esso Australia Resources Ltd v Plowman*.[90]
- There are now limited grounds for setting aside an award (ss 34 and 34A).
- A right of appeal is only available if both parties agree or 'opt in' – leave of a court is still required (ss 34A).

In all Australian states and territories, Commercial Arbitration Acts are similar in their content and govern commercial arbitration and follow the Commonwealth model law in this area.

### *3.1.3 Case appraisal*

Case appraisal is defined as an advisory process in which the case appraiser can express a non-binding opinion on the merits of the case, including both the liability question and the appropriate quantum of damages.[91] When case appraisal was first introduced in Queensland in 1995, practitioners showed significant interest in it.[92] However, with the popularity of mediation and in particular the diversity of mediation models[93] on offer, interest in case appraisal has waned.[94]

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90 Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10.

91 National Alternative Dispute Resolution Advisory Council, 'Glossary of ADR Terms', http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADRGlossary_of_ADR_Terms. See also Supreme Court of Queensland Act 1991 (QLD) s97.

92 Spegel, N and Paratz, D, 'Courts Introduce ADR', 16 *Queensland L* (1995), at 20.

93 On six different mediation models, see Alexander N, 'The Mediation Meta-Model: Understanding Practice,' 26 (1) *Conflict Resolution Quarterly*, 2008, 97-123.

94 Supreme Court of Queensland, *Annual Report 2006/2007*, pp 36-37.

The same provisions that apply in relation to mediation in terms of attending and not impeding the process apply to parties' participation in case appraisal.[95] Similarly, a case appraisal process is subject to the same confidentiality, disclosure and immunity provisions as mediation.[96] However, stricter approval procedures apply to case appraisers as opposed to mediators — they must be a barrister or solicitor of five years satisfy the suitable person criteria and have applied in the prescribed manner.[97] The case appraiser's jurisdiction over determination of the issues in dispute is the same as the court that referred the matter, and he or she must make a decision consistent with one that could have been given by that court. Furthermore, the parties have the same rights to representation as in a court process,[98] and the appraiser may seek information from any person applicable to a determination of the dispute.[99] Empowering the appraiser to adopt any procedure that will encourage a settlement quickly[100] demonstrates how 'judicialised' the scheme is. Finally, the decision of a case appraiser, including a determination of costs,[101] is final and binding if parties do not elect to continue to trial within 28 days.[102] In the Supreme Court, a further order of the court is required to give effect to the decision.[103]

### *3.1.4 Neutral evaluation*

In the ACT and Tasmania, a court may order that a proceeding undergo neutral evaluation, with both jurisdictions defining the process as one where an evaluator identifies and reduces the issues of fact and law in dispute, assesses the relative strengths and weaknesses of each party's case and offers an opinion about the likely outcome of the proceedings.[104] In the ACT, this process is subject to the same rules as mediation in relation to referral,[105] the duty of parties to take part,[106] costs[107] and enforceability of agreements or arrangements. In Tasmania, the provisions in the *Alternative Dispute Resolution Act* that outline the referral procedure for mediation and its costs[108] also apply to neutral evaluation. However, unlike meditation in Tasmania, there are no further provisions outlined in the relevant court's rules that

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95 *Ibid* s103

96 Ibid ss112, 113, 114.

97 Uniform Civil Procedure Rules 1999 (QLD) r315.

98 Ibid r336.

99 Ibid r337.

100 Supreme Court of Queensland Act 1991 (QLD) s104.

101 Uniform Civil Procedure Rules 1999 (QLD) r340.

102 Ibid rr341 and r343.

103 Supreme Court of Queensland Act 1991 (QLD) s97(2)(b).

104 Civil Procedures Rules 1997 (ACT) r1176; Alternative Dispute Resolution Act 2001 (TAS) s3(3).

105 Civil Procedures Rules 1997 (ACT) r1179.

106 Ibid r1180.

107 Ibid r1181.

108 Alternative Dispute Resolution Act 2001 (TAS) s7.

introduce or expand on the neutral evaluation provisions. So, in theory, any court or tribunal[109] may order referral to neutral evaluation without party consent,[110] but in practice it is not a widely used form of dispute resolution.

### *3.1.5 Referral to a referee/expert*

Referral to a referee or a court-appointed expert is becoming popular in many jurisdictions, as its case management benefits in limiting issues in dispute are recognised by the courts. The power to appoint an expert is now considered to be available to courts to ensure the just, efficient and cost-effective management of litigation.[111] Referral of questions requiring technical expertise for the questions' proper understanding and resolution can improve cost effectiveness and efficient utilisation of judicial resources.[112] Conferral of a power to refer a matter to a special referee generally enables a court to refer the whole of a proceeding, or any question arising in a proceeding, for inquiry and report by a referee.[113] However, in Victoria, a distinction is drawn between the reference of a question to a special referee where the referee is required to decide and reference of a question where only the opinion of the referee is needed,[114] and the court will only order a reference if satisfied this would better achieve the effective, complete, prompt and economical determination of the proceeding than a conventional trial.[115] This is particularly the case where one party objects to the referral.[116]

In NSW, a referee may be any person, apart from a judicial officer or officer of the court if that officer does not have the permission of a senior judicial officer.[117] The referee is then authorised to inquire into and report on any facts relevant to the inquiry,[118] without being bound by the rules of evidence unless directed otherwise by the court.[119] However, evidence given before a special referee is not evidence in the

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109 *Alternative Dispute Resolution Act 2001* (TAS) s3(1) 'court' means –(a) the Supreme Court or the lower courts within the meaning of the Magistrates Court Act 1987; or (b) a tribunal prescribed by the regulations.

110 Ibid s5.

111 *Tyler v Thomas* [2006] FCAFC 6 at 29.

112 Benefits recognised in: *Integer Computing Pty Ltd v Facom Australia Ltd* (VSC, Marks J, No 8992/87, 10 April 1987, unreported, BC8701728); *Telecomputing PCS Pty Ltd v Bridge Wholesale Acceptance Corp (Aust) Ltd* (1991) 24 NSWLR 513 at 517; *Najjar v Haines* (1991) 25 NSWLR 224 at 246; *Guillot Enterprises (LE) Pty Ltd v Twin Disc (Pacific) Pty Ltd* [2009] VSC 69; BC200901238.

113 Federal Court Rules (Cth) O34r2; Uniform Civil Procedure Rules 2005 (NSW) r20.14; Supreme Court Rules 2000 (TAS) r574.

114 Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.01.

115 *Abigroup Contractors Pty Ltd v BPB Pty Ltd* [2000] VSC 261; BC200003305.

116 *Tyler v Thomas*, above n 111 at 29.

117 Uniform Civil Procedure Rules 2005 (NSW) r20.15.

118 Ibid r20.17(1)

119 Ibid r20.20

proceeding unless tendered and admitted into evidence by the court.[120] In Tasmania, a more restricted view is adopted, and the referee may take evidence and enforce the attendance of witnesses, inspect or view that evidence, and make orders with respect to discovery, provided such actions are within the authority of the judge issuing the reference.[121] The conduct of the reference must be in the same manner, or as nearly as possible, as a trial in the court.[122] In Victoria, the conduct of the reference reflects the directions given by the court, including directions as to discovery, interrogatories, evidence and witnesses.[123] At the Federal level, procedural issues are left largely to the discretion of the court, with the referring officer entitled to authorise the expert to inquire into and report on any relevant facts in accordance with any instructions it issues.[124]

A written report provided by the referee to the court must detail the referee's opinion with the reasons for that decision or opinion.[125] Furnishing the court with reasons enables the court to deliberate as to what use, if any, it should make of the report.[126] In Tasmania, an adoption of the report as a whole may be enforced as a judgment or order to the same effect.[127] In the Federal Court, a report is admissible as evidence on the question on which it is made, but is not binding on the parties unless they agree to be bound by it.[128]

### *3.1.6 Settlement conference*

Many courts provide for settlement conferences to occur early in the proceedings for the purpose of exploring the possibility of settlement,[129] either as part of an initial directions hearing or as a separate court-ordered conference. In South Australia, the settlement conference follows a status conference, which is itself held within seven weeks after the first appearance is filed and where an initial referral to alternative dispute resolution is considered.[130] In Queensland, consideration of possible settlement, and/or the simplification of the issues, are potential factors for the

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120 *Skinner & Edwards (Builders) Pty Ltd v Australian Telecommunications Corp* (1992) 27 NSWLR 567.

121 Supreme Court Rules 2000 (TAS) r579.

122 Ibid r577.

123 Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.02.

124 Federal Court Rules (Cth) O34r2.

125 Uniform Civil Procedure Rules 2005 (NSW) r20.23; Supreme Court Rules 2000 (TAS) r574; Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.01(2)(b).

126 Uniform Civil Procedure Rules 2005 (NSW) 20.24; Supreme Court Rules 2000 (TAS) r575; Supreme Court (General Civil Procedure) Rules 2005 (VIC) r50.04; See also Astor Properties Pty Ltd v L'Union des Assurance de Paris (1989) 17 NSWLR 483 at 492.

127 Supreme Court Rules 2000 (TAS) r575.

128 Federal Court Rules (Cth) O34r3.

129 Supreme Court Rules (NT) s48.12(1); Supreme Court Civil Rules 2006 (SA) r126.

130 Supreme Court Civil Rules 2006 (SA) r125.

registrar to consider before making directions in a directions hearing.[131] In the NT, the judge or master is empowered to consider whether or not a proceeding is capable of settlement and direct the parties to explore this option before a master.[132]

Other provisions relate to confidentiality, admissibility of evidence, participation in settlement conferences and costs. In the NT, costs attach to a party that fails to attend, refuses to participate or applies without consent for an adjournment of the conference.[133] An offer of settlement made during the conference may also be taken into account for costs if the case proceeds to judgment.[134] The imposition of costs sanctions in this jurisdiction, and the corresponding lack in South Australia, reflects a different view as to the place and purpose of a settlement conference. South Australia, in adopting a case management approach, incorporates provisions that reflect the conference's preliminary place in the overall progress of the matter through litigation, whereas in the NT the scheme is offered as a potential alternative to litigation with full settlement of the matter viewed as a realistic outcome.

### 3.2 The administrative jurisdiction

Since the creation of the Administrative Appeals Tribunal (AAT) by the Commonwealth in 1976, the resolution of administrative disputes in Australia has moved to a model based on tribunals. The AAT was set up to operate as an independent general appellate tribunal with the power to review a wide range of administrative decisions, and support for this model is reflected in the growth of generalised civil and administrative tribunals across Australia. There are administrative tribunals in almost all jurisdictions today, and they are designed to enhance independence, streamline operations, facilitate the use of ADR and develop flexible and cost-effective practices to resolving disputes.

Tribunals at both the state and Federal level retain many characteristics of the court-based system, such as precedent, use of witnesses and enforceable orders, while modifying others to encourage speedier and more amicable resolution of disputes. In states with generalised administrative tribunals, there exist provisions empowering tribunals to order parties to use ADR procedures prior to the hearing.[135] Confidentiality attaches to all ADR procedures and is generally phrased as an inadmissibility of the evidence in any proceeding that follows the process.[136] There

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131 Uniform Civil Procedure Rules 1999 (QLD) s523.

132 Supreme Court Rules (NT) s48.12(2).

133 Ibid s48.12(10).

134 Ibid s48.12(12).

135 Victorian Civil and Administrative Tribunal Act 1998 (VIC) s83 (compulsory conferences), s88 (mediation); State Administrative Tribunal Act 2004 (WA) s52 (compulsory conference), s54 (mediation); ACT Civil and Administrative Tribunal Act 2008 (ACT) s33 (compulsory conferences), s35 (mediation); State Administrative Tribunal Act 2004 (WA), s54 (mediation), s52 (compulsory conferences).

136 Administrative Appeals Tribunal Act 1975 s34E(2); State Administrative Tribunal Act 2004 (WA) s55; Victorian Civil and Administrative Tribunal Act 1998 (VIC) ss85 and 92; Queensland Civil and Administrative Tribunal, as of 1 December 2009, will adopt confidentiality and admissibility

are fewer exceptions to this prohibition than in the civil jurisdiction, and often it is only the consent of the parties, or in cases where a party gave false and misleading information,[137] that will allow material adduced in ADR to be used in a hearing.

### *3.2.1 The AAT*

The AAT, as a merits review tribunal, has the power to review a decision made by a government, its authorities and ministers and officials and either affirm, vary or set aside that decision[138] by "placing itself in the position of the decision-maker exercising all the powers and discretion available to that person, and not confining itself to the material that was before him".[139] The AAT's president can direct a proceeding to ADR processes,[140] which includes conferencing, mediation, neutral evaluation, case appraisal and conciliation.[141] Conferencing offers the tribunal member or officer to take a more directive role than in mediation, as the process is not limited by the requirement of 'neutrality' of mediation and the merits of the case may be discussed.[142] Similar to the court context, it operates as an effective case management tool in helping to establish the issues and adopt steps for proceeding to trial if settlement is not achieved. Parties directed to an ADR process must act in good faith.[143]

A further limitation inherent in any outcome reached through an ADR process is that the terms of the settlement must be consistent with any determination of the dispute the AAT could themselves make within the scope of the relevant legislation.[144] The function of dispute resolution is made secondary to the AAT's duty to ensure the correct or preferable decision is made in the issuing of a decision.[145]

### *3.2.2 VCAT*

The establishment at state level of administrative tribunals empowered to address and determine appeals based on government decisions began with the Victoria Civil

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provisions similar to VCAT (Queensland Civil and Administrative Tribunal: Stage 1 Report on scope and initial implementation arrangements, June 2008).

137 Victorian Civil and Administrative Tribunal Act 1998 (VIC) ss 85 and 92; State Administrative Tribunal Act 2004 (WA) s55.

138 Administrative Appeals Tribunal Act 1975 (Cth) s51.

139 Turner v Minister for Immigration and Ethnic Affairs (1981) 35 ALR 388 at 390.

140 Administrative Appeals Tribunal Act 1975 (Cth) s34A(1).

141 Administrative Appeals Tribunal Amendment Act 2005 (Cth) s 3(1).

142 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunal*, Report No 39 (1995) 3.138-3.139.

143 Administrative Appeals Tribunal Act 1975 (Cth) s34(5).

144 Ibid s34D(1)(d). Also see Administrative Review Council Report, *Better Decisions: Review of Commonwealth Merits Review Tribunal*, Report No 39 (1995) 3.138-3.139.

145 Humphreys, D (AAT Registrar), *Paper for the Institute of Arbitrators and Mediators Australia*, presented at 30th Anniversary Conference of Administrative Appeals Tribunal (2005), p 2.

and Administrative Tribunal (VCAT) in 1998. It is now one of the largest administrative tribunals in the world, accepting over 90 000 applications each year. VCAT follows world best practice in terms of its structure, [146] streamlined organisation and use of technology to enhance access to justice,[147] even limiting the circumstances in which a participant may have access to legal representation so as to create an even playing field and remove pecuniary advantage.[148]

The approach of VCAT to ADR is similarly progressive, and it became the first state-based tribunal to divert disputes to conferences and/or mediation prior to tribunal hearings and order ADR without consent of the parties. VCAT resolves 65 to 75 per cent of its disputes through ADR procedures, including mediation, compulsory conferences, referral to special referees and neutral evaluation. [149] Mediation is the preferred process of the VCAT, however, compulsory conferences, involving "negotiation between the parties and member advice regarding the likely outcome of each party's case in the event the matter proceeds to hearing"[150], are also used.

### 3.3 Current issues

The integration of ADR into the Australian legal system over the past 30 years has raised a number of complex issues for courts, judges and policy makers. Simultaneously, increased opportunities for lawyers have arisen in response to the changing ADR environment where the focus is on lawyers playing a more constructive, less adversarial role in dispute resolution. More and more, lawyers today are involved in compliance work, risk analysis, dispute system design and management, all under the ADR umbrella. Many lawyers also work as ADR practitioners and offer ADR services as part of the range of services they undertake. These changes offer practitioners opportunities to establish client bases that have not existed before. While some commentators have suggested that lawyers need to remodel themselves to ensure that they can work effectively within the litigation environment, others consider that ADR and technological and other changes will mean that many lawyers will no longer be able to undertake more traditional work that was linked to litigation.

Clearly, many clients now expect lawyers to be informed about ADR processes, and increasingly these are located outside the litigation area, with much ADR taking place outside the litigation system. Changing client preferences mean that clients also expect lawyers to be able to give advice about managing and avoiding disputes,

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146 See <http://www.vcat.vic.gov.au/CA256DBB0022825D/HomePage?ReadForm&1=Home~&2=~&3=~>

147 VCAT was the first Australian tribunal to introduce electronic filing of applications, SMS hearing reminder systems and world best practice interactive websites (including informative videos, and easily accessible legal information).

148 Victorian Civil and Administrative Tribunal Act 1998 (VIC) s62(1)(b).

149 Sourdin, T 'Facilitating the Resolution of Disputes Before the Tribunal' 8th Annual AIJA Tribunals Conference - The Rise and Rise of Tribunals.

150 Ibid.

not just ‘fighting’ them. The way judges are involved in ADR processes also raises key issues, and perhaps the transformation of legal practice may be accompanied by a slower ad hoc transformation of judicial practice. The issue of judges as mediators is considered further below.

NADRAC has played a critical role in defining, exploring and these changing roles, and recent reports have supported significant cultural and other changes. This work is discussed briefly below.

### *3.3.1 The work of NADRAC*

NADRAC has supported policy, legislative and cultural change in respect of ADR innovations, which has helped to support the rapid development of ADR in Australia. Recent references from the Commonwealth Attorney-General to NADRAC have resulted in a range of reports that are intended to support the ongoing development of ADR within the Australian justice system. NADRAC is an independent, non-statutory body that provides policy advice to the Commonwealth Attorney-General on the development of ways of resolving or managing disputes without judicial decision, including providing coordinated and consistent advice on achieving and maintaining a high quality, accessible, integrated Commonwealth ADR system.

Research and administrative support is provided to NADRAC by officers within the Commonwealth Attorney-General’s Department, which has resulted in a range of reports intended to support the ongoing development of ADR within the Australian justice system, and prompting a number of reform initiatives[151].

## 4. Development in the Courts

In recent years, differing views about the relationship between ADR and the judicial role and judicial practice have arisen. Views have also been expressed about the nature of the judicial function and the constitutional impediments that may prevent a judge from undertaking an ADR process. Many Australian judges appear to draw a line between acceptable pre-trial judicial activity, which facilitates negotiation by ensuring that issues are clear and all evidence is on the table, and unacceptable judicial activism whereby the judge expresses opinions about the merits of the case before they have been appropriately canvassed. This key issue in

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151 The following are examples of some of these reform initiatives:

2011 Dispute Resolution Guide (April 2011) National Principles for Resolving Disputes and supporting Guide (April 2011) Maintaining and enhancing the integrity of ADR processes: From principles to practice through people (February 2011)

2010 Managing Disputes in Federal Government Agencies: Essential Elements of a Dispute Management Plan (September 2010) National Principles for the Resolution of Disputes – Interim Report (July 2010)

2009 The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction (September 2009)‘Solid work you mob are doing - Case studies in Indigenous Dispute Resolution and Conflict management in Australia’ (August 2009) ADR in the Civil Justice System - Issues Paper (March 2009).

debates about active judicial management suggests there are limits on the extent to which judges can work towards settlement before trial. This debate has been overtaken by developments in the Family Court of Australia and the Supreme and County Courts of Victoria, where associate judges act as mediators and judges may conduct settlement conferences that can resemble mediation.

One question that has been raised is whether or not maintaining a rigid distinction in Australia between negotiation and litigation processes is counter-productive in that it acts as a barrier to adopting more flexible and facilitative processes in litigation. Active promotion of settlement by judges is perceived to be fraught with danger, including the risk that parties are pressured to settle by a judge who has formed an impression of the case based on incomplete evidence. One view is that public confidence in the integrity and impartiality of the courts may be weakened if judges become more actively involved in settlement discussions, particularly if parties meet with a judge separately.

### 4.1 Mediating judges

Some of the issues that have surfaced with the integration of ADR into the litigation system touch on the role of the modern judge and whether or not judges should also mediate or blend ADR processes into court hearing processes. In relation to the first issue, a number of concerns have arisen in Australia about the notion of judges acting as mediators. Firstly, there is a general reluctance by some judges in some jurisdictions to mediate, and this concern is reflected in a narrower view of the objectives of the judicial process as being confined to stating, explaining and applying the law. However, this perspective is not uniform or fully articulated. For example, The Hon James Spigelman AC QC, formerly Chief Justice of the Supreme Court of New South Wales, stated in 2010 that he did not "favour judicial mediation" and that while "some courts in Australia have judges mediating [we] don't … we draw the line at registrars".

Where judges conduct or integrate ADR into hearing processes, the issues raised may be different from issues that relate to registrars and other court staff conducting such processes within courts. It has been suggested that disputants regard the involvement of such persons in a different manner and that their independence and neutrality have an impact on perceptions of the process. In terms of judicial mediation, it may be that what causes most concern is any suggestion that a judge meet privately with a party in dispute, thereby giving the impression of favouritism. In this regard, settlement conferences that involve all parties (and where no 'private' session takes place, as in mediation) may not raise such concerns. The notion of judges acting as 'evaluators' or chairing conventional settlement or conciliation conferences may therefore be acceptable to those who consider mediation to be inconsistent with the impartial judicial role.

Other commentators have focused on constitutional concerns about judges acting as mediators. Such arguments focus on the nature of mediation and the constraints on judges arising from Ch III of the *Australian Constitution*. It is said that the 'incompatibility principle' may arise "… in the performance of non-judicial functions of such a nature that the capacity of a judge to perform his or her judicial functions with integrity is compromised or impaired". Consideration of the

incompatibility doctrine requires consideration of its underlying purpose – ensuring that the fundamental principles of separation of powers are not undermined.

On this issue, NADRAC has recommended that "… judges should not mediate", but has also suggested that judges should adopt a facilitative role in disputes and supports the notion that "… ADR processes other than mediation may be acceptable forms of judicial dispute resolution".

### 4.2 Non-adversarial and therapeutic jurisprudence

ADR has also had an impact on how judges conduct court hearings. This has been relevant in many problem-solving courts where more therapeutic approaches are combined with adjudicative processes. These changes have the potential to change the role and function of the judge in court hearings and are linked to the broader impact of ADR on the court system. For example, in the family law area, the child-related proceedings model was renamed the less adversarial trial (LAT) and evaluated. In 2009, Chief Justice Bryant noted that:

> For judges, the LAT process means taking an active role in the proceedings from the first day of trial to the last, engaging with the parties, their legal representatives and with family consultants to ascertain the issues that are really in dispute and the evidence that will lead the judge to the best decision in respect of those issues. Judges do not have voluminous affidavit evidence before them on the first day—in fact, no affidavits will have been filed—and the judge often has to tease out the real issues in dispute. The judge, and not the parties or their representatives, directs the proceedings. All this must be achieved without compromising the authority and status of the Court. The LAT requires a level and type of verbal interaction that judges have not usually had to employ.[152]

## 5. Future trends

A threshold question in exploring the objectives of ADR processes concerns the role of ADR in our dispute resolution system and how ADR processes can relate to the conventional litigation system. The Commonwealth Government has accepted that close integration will continue. In the *Federal Civil Justice System Strategy Paper* released for discussion purposes in early 2004, a key recommendation was that "Government … continue[s] to take a leadership role in facilitating the coordination of the various elements of the federal civil justice system [including ADR]."

In 2009, the Federal Attorney-General released a report entitled "*A Strategic Framework for Access to Justice in the Federal Civil Justice System*"[153], in which it

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[152] See introduction by The Hon D Bryant, Chief Justice, in Family Court of Australia, *Less Adversarial Trial Handbook*, Attorney-General's Department (Cth), 2009, available on <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Papers/Papers+and+Reports/LAT> (accessed 27 August 2011).

[153] Commonwealth Attorney-General's Department, A Strategic Framework for Access to Justice in the Federal Civil Justice System, September 2009.

was noted that many litigants cannot afford to commence or continue court proceedings. Research on the demographics of those using the higher civil court system suggests that many disputants will not access higher courts because the system is too complex, costly or confusing. The report's major recommendation was for the setting up of a strategic framework for access to justice underpinned by principles of accessibility, appropriateness, equity, efficiency and effectiveness. A key finding was that an increase in the early consideration and use of non-litigious dispute resolution has a significant capacity to improve access to justice.

Court-based ADR processes are often modelled on the multi-door court-based ADR approach that was developed in the United States of America and Canada from the late 1970s. The multi-door approach assumes that there is a lack of coordination among various external ADR services and that guidance is required from courts to enable the public to access the broad range of processes. The issue must then relate to whether this coordinating function is located inside or outside the court system. Multi-door models tend to be court related, so they support ADR services that operate within courts or by court referral to external ADR practitioners. The multi-door approach was originally intended to provide many 'doors' for dispute resolution, so a litigant could access mediation, evaluation or adjudication from within a court – that is, the court would become a Dispute Resolution Centre. However, in practice, where multi-door systems are set up, they often have only one or two ADR options. Some of the shortcomings of the multi-door system relate to its inability to relate to external processes that operate outside the litigation arena in businesses, government and other organisations. Such schemes can benefit all parties to the dispute. They save consumers the expense of legal action while helping industry members to improve business practices and the quality of their goods and services without government intervention.

### 5.1 Slow ADR uptake

Despite great interest in Australian jurisdictions, the uptake of ADR can be, as NADRAC has noted, patchy and idiosyncratic. Strategies to support ADR uptake can include articulating its core principles, for example, government and court policy development based upon principles such as:

- except where ADR processes are inappropriate, judicial determination of disputes should be regarded as a last resort;
- people involved in civil disputes should be encouraged to first attempt to resolve their own disputes using facilitated interest based dispute resolution processes and
- litigants and their lawyers should be encouraged to use ADR processes to resolve, limit or manage their disputes, at all stages of the litigation process.[154]

Other strategies include education and public awareness.

[154] See NADRAC, The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction, 2009.

### *5.1.1 Education and public awareness*

Education and public awareness programs can encourage ADR uptake by ensuring that it is a visible option. Campaigns have included web-based material, brochures, signage and television programs, as well as news and general reporting of initiatives. Written material can be specifically focused on gatekeepers, such as local councils, lawyers, medical practitioners and others, who can help to inform and educate disputants about ADR options. Education can also be targeted at specific groups such as the banking and financial sector, debt counsellors or psychologists who work in the family sector. Within the workplace dispute resolution setting, efforts can be directed at employee advocates as well as ensuring that dispute resolution training is required of those who work in senior government and industry positions.

In many jurisdictions, courts, judges and court staff can also play an essential role in introducing and educating disputants about ADR. DVDs and web-based and written material can support education efforts. In addition, verbal encouragement and explanations about ADR by those associated with the court system can assist disputants to become aware of ADR choices. Other approaches can be even more innovative. School-based mediation programs can be directed at not only the students engaged in the program but also their parents. Training community leaders in mediation can assist in mentoring additional dispute resolution practitioners and can also support widespread ADR education. In 2009, NADRAC proposed that ADR and negotiation be a part of all undergraduate university courses in a diverse range of areas, including business, psychology, health and social welfare. In addition, dispute resolution skills and knowledge should be required of all law graduates. These approaches are designed to increase awareness and educate potential gatekeepers.

### *5.1.2 Research*

Many consider that ADR processes provide considerable benefits, and there is now ADR research and evaluation that articulates the benefits of ADR processes in a range of jurisdictions. However, ADR research and evaluation often focus on innovative programs and there is a lack of comparable ADR data collection in all jurisdictions. Existing data collection is often focused on either court-related programs and directed at case management or is focused on funded programs and will tend to be quantitative rather than qualitative in nature. Blended ADR systems that incorporate court-related systems, external systems and private forms of ADR may be particularly difficult to evaluate. Some work has been done to attempt to develop common ADR performance and activity indicators, but this has not yet been achieved. The fact that ADR researchers are drawn from a range of disciplines and may lack opportunities for research and information sharing, adds to the lack of reliable evaluative data on ADR.

### *5.1.3 ADR policy and programs*

ADR programs can be adapted to be used in a range of different social contexts. However, it is essential that ADR systems be designed with input by those who will be the end users of the system. ADR systems can be oriented towards resolution, conflict prevention and management (or may have all of these objectives). Policy

and program development in the ADR area is underpinned by dispute system design that often involves analysis of an entire existing dispute resolution and management system (formal and informal), so that new and existing procedures can be improved, adapted and implemented. This means that, when designing ADR programs, it is essential to consider existing traditional and community-based forms of dispute resolution as well as formal court-based forms. The programs must be culturally responsive and respond to the specific community in which they are to operate. Interest in the design of high-quality conflict and dispute management systems often arises in the context of peace building and capacity building and may also arise as part of a risk management approach within organisations. The systemic design process will often take place with the assistance of experts and ADR practitioners.[155]

For ADR systems to work effectively and to enable the design and development of sophisticated dispute systems, there is a need to balance the tensions between designing dispute resolution systems that are flexible and allow for a 'dynamic and procedurally fluid process' to be created[156], while at the same time, are able to be regulated. NADRAC has articulated the tension as a need to balance two principles: the diversity principle (the need to recognise the diversity of contexts in which ADR is practised) and the consistency principle (the need to promote some consistency by identifying essential standards).[157] Some of these tensions have arisen as a result of the growth in ADR in recent years and the way that ADR is used across the different jurisdictions and not 'owned' by any particular organisation, industry or grouping.

### 5.2 Mechanisms to encourage greater use of ADR

In Australia, some repeat litigators have been specifically targeted. For example, the Australian Government as a 'repeat litigator' is required to act as a model litigant within Australia and must endeavour to avoid, prevent and limit the scope of litigation. Government agencies must consider ADR and be satisfied that litigation is the most appropriate form of dispute resolution before commencing litigation. Sanctions and incentives range from mandatory ADR (this can apply to proceedings already in a court system and may also apply before proceedings are commenced with limited exceptions) to the imposition of costs orders if a disputant fails to use ADR either prior to commencing proceedings or once proceedings have commenced.

Pre-action requirements also exist in the private sector in Australia, where a financial services provider must belong to an External Dispute Resolution Scheme

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155 See, for example, Brahm E and Ouellet J, 'Designing New Dispute Resolution Systems' Beyond Intractability. Guy Burgess and Heidi Burgess (eds). Conflict Research Consortium, University of Colorado, Boulder. Posted: September 2003. <http://www.beyondintractability.org/essay/designing_dispute_systems/> (Accessed 2 June 2010).

156 See Society of Professionals in Dispute Resolution (SPIDR), Commission on Qualifications– Report 2, Ensuring Competence and Quality in Dispute Resolution Practice, Washington DC, 1995, p 262.

157 National Alternative Dispute Resolution Advisory Council, A Framework for ADR Standards, Attorney-General's Department, Canberra, 2001, Introduction: see http://www.nadrac.gov.au/ (accessed 2 June 2010).

as a condition of licensing, which it is contractually bound to use if a dispute arises. Consumers are not bound to use these schemes, but can elect to do so without incurring charges or costs. In addition, there are other pre-action protocols and requirements relating to court-based sanctions, as well as other mechanisms to encourage ADR use include developing guidelines, training court staff and gatekeepers (see [5.1.1 above) and placing obligations upon court staff, parties and legal practitioners (see [4] above).

## 6. Conclusion

ADR is now well established within Australia. Its development has been assisted by the creation and growth of professional ADR organisations. In addition, professional bodies such as law societies, institutes and Bar associations have fostered ADR processes within the ranks of the legal profession and have been partly responsible for introducing schemes in some courts. Members of the judiciary have played a key role in introducing and institutionalising ADR processes within and outside courts and tribunals. State governments around Australia have established community justice centres, which offer mediation services either free of charge or at a low cost for a range of dispute types. Industry schemes such as franchising and telecommunications have well-established ADR schemes.

In addition, there has been an increasing emphasis on ADR in education at school and tertiary levels, which has led to a growing acceptance and understanding of the processes. In addition, the development of the NMAS designed to enhance consumer certainty and support mediation referral has led to the increased use of mediation and additional consideration of pre-action or pre-filing protocols. This system is designed to enhance consumer certainty and support mediation referral. Within the broad Australian community, there are expectations that ADR processes as well as courts can assist to provide justice at all levels of the community.

However, further work needs to be done to shift cultural attitudes towards dispute resolution, particularly among members of the legal profession and litigants themselves. Attention and resources must be directed to empirical studies of various aspects of Australian ADR practice. Such research can play a valuable role in shaping future policy decisions and the Australian dispute resolution landscape over the next 10, 20 and 50 years.