

Legislation and ADR

14 Sep 2016

This paper was settled jointly by the members of ADRAC.

ADR is dealt with in a welter of legislation, at both Federal and State levels. A detailed review of legislative treatment of ADR is beyond the scope of this publication.

Broadly speaking, legislative treatment of ADR takes two forms. Particular ADR processes are directly mandated by some laws; whereas other laws empower courts, tribunals, or decision-makers to oblige disputants to undergo a form of ADR.

Legislative treatment of ADR intersects with a large number of freestanding topics (see cross-references at the end of this topic) and also raises additional issues and controversies.

For instance, there is a school of thought to the effect that 'legislating for ADR' is antithetical to achievement of ADR's underlying principles and values (such as self-responsibility and flexibility).¹

Others consider that legislation is necessary to (i) properly protect disputants; (ii) overcome blockers to the voluntary use of ADR; (iii) properly reflect the wider suite of interests, including public interests in the resolution of disputes; (iv) deal consistently and cohesively with important common issues such as confidentiality, accountability/disciplining of ADR practitioners and participation standards etc; and (v) take ADR beyond an ad hoc suite of cottage industry practices.

ADRAC considers that, posed in those terms, both perspectives have a degree of legitimacy but are unduly emphatic or unqualified.

To frame the debate as a choice between 'no regulation' and 'over regulation' is, perhaps, unhelpfully simplistic and binary. Rather, the search is for 'best regulation'.

Against this backdrop, three questions are addressed: first, how does legislation presently interact with ADR; secondly, what issues emerge; and thirdly, what changes can be expected in the future? The second and third questions are dealt with together.

How does legislation presently interact with ADR?

Legislation currently impacts on ADR in a myriad of ways, including the following:²

- some laws, as noted above, directly oblige participation in an ADR process, for instance as a feature of an industry scheme or as a necessary step before adjudicative decision-making
- more commonly, many laws empower a court, tribunal or decision-making to direct disputants to participate in an ADR process
- some laws import a generally recognised form of ADR (i.e. which exists outside the legislative process), but make participation a mandatory part of a statutory pathway³
- other laws adapt or create a distinctive form of ADR
- some laws refer expressly to 'ADR' (i.e. in terms), and/or define it⁴
- other laws make no overt reference to 'ADR', but make provision for one or more processes which come within the rubric of ADR. For instance, many laws make provision for 'case conferences', pre-hearing conferences, conciliations, or 'conciliation conferences' – often annexed to the court of tribunal process, and conducted by court or tribunal staff
- many laws deal with particular forms of ADR carrying a common title, but in ways which vary significantly – for instance, conciliation⁵
- some laws define or prescribe the duties of ADR practitioners⁶
- some laws deal with the nature and extent of immunity of the DR practitioner⁷

- many laws establishing an ADR process make provision for confidentiality - often in quite differing terms and to different effect⁸
- some laws prescribe admissibility rules in relation to things said and done in the course of an ADR process⁹
- some laws do not actually mandate participation in ADR, but impose a pre-action protocol which requires parties to identify steps they have taken to resolve their dispute
- some laws deal with enforcement of ADR outcomes.¹⁰

It is evident from the above non-exclusive list that legislation plays a variety of roles, not only in establishing some forms of ADR, but also in altering the processes of ADR in particular contexts.¹¹

It is also clear that legislation does not affect ADR in a uniform or consistent way. This can be attributed, to some extent at least, to the need for laws to cater to the distinctive features of different dispute contexts.

What issues emerge and what changes can be expected in the future?

A significant number of issues surround the legislative treatment of ADR, many of which have ongoing implications in terms of future developments. Some of the issues which emerge are:

- will there be more ADR-specific legislation or less in the future?
- to what extent might legislative treatment of ADR be captured, or influenced, by the current deregulation agenda?¹²
- should legislation 'lead the way' or follow on from established industry practice and experience?
- are current laws a richly embroidered tapestry or a 'dog's breakfast'?
- is there a need for greater simplicity or greater sophistication in the legislative treatment of ADR?
- should future laws involve 'hard' regulation (for example, by mandating participation in ADR) or 'soft' regulation which encourages voluntary participation in ADR?

- should there be a more focussed search for an underlying, cohesive set of principles to guide the legislative treatment of ADR – including when and how ADR should be regulated? For instance, is there scope for development of drafting guidelines to the effect that ADR-related laws should further the intrinsic ideals of flexibility and self-determination?¹³ Who is best placed to develop a core set of drafting principles?
- should laws dealing with ADR make provision for data collection and reporting to assist the growth of an evidence-based understanding of ADR-related issues?
- to what extent, if at all, might ADR processes which are presently annexed to courts and tribunals and undertaken by staff, be better undertaken by external DR practitioners? How would transitioning to external processes be funded?

ADRAC does not have fully formed views about any of these issues, but they warrant attention.

Indeed, ADRAC sees considerable merit in re-enlivening discussion about the ‘pros and cons’ of a dedicated, but uniform, ADR Act, of the kind canvassed by NADRAC some 7 years ago in its ‘*Resolve to Resolve*’ Report. Such an Act could be passed in one State and then be adopted by other States.

An ADR Act could contain a useful ‘minimum’ set of principles for ADR practice and procedure without adoption of a ‘one size fits all’ approach. An ADR Act could apply to both court/tribunal annexed ADR and ‘private’ ADR; it could also include a range of provisions to encourage voluntary resort to ADR.

ADRAC encourages feedback and input on an ADR Act, and the other issues canvassed above.

Other relevant topics include [Access to justice and ADR](#), [Accountability of ADR practitioners](#), [Benefits of ADR](#), [Evidence-based data collection for ADR research](#), and [Family Dispute Resolution](#).

1. See the topic [Principles of ADR](#).

2. NADRAC, ‘[Legislating for Alternative Dispute Resolution: A Guide for Government Policy-Makers and Legal Drafters](#)’ (Report, November 2006).

3. See, for example, *Family Law Act 1975* (Cth) s 60I.

4. See, for example, *Administrative Appeals Tribunal Act 1975* (Cth) s 3(1) (definition of 'alternative dispute resolution processes').
5. ADRAAC intends to publish a paper on Conciliation as part of this project.
6. See, for example, *Native Title Act 1993* (Cth) s 131B.
7. See, for example, *Federal Court of Australia Act 1976* (Cth) s 53C.
8. See, for example, *Family Law Act 1975* (Cth) 10D.
9. See, for example, *Federal Court of Australia Act 1976* (Cth) s 53B.
10. See, for example, *Administrative Appeals Tribunal Act 1975* (Cth) s 34D.
11. NADRAC, ['The Resolve to Resolve – Embracing ADR To Improve Access to Justice in the Federal Jurisdiction'](#) (Report, September 2009) 39.
12. See, for example, Senator the Honourable Michael Ronaldson, ['Fighting Australia's Over-regulation'](#) (Policy White Paper); see also the recent report published by Barbara Belcher on Internal Government Regulation, accessible on the Commonwealth Department of Finance's website.
13. See, for example, Senator the Honourable Michael Ronaldson, ['Fighting Australia's Over-regulation'](#) (Policy White Paper); see also the recent report published by Barbara Belcher on Internal Government Regulation, accessible on the Commonwealth Department of Finance's website.