

## Access to justice and ADR

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*This paper was prepared and settled jointly by the members of ADRAC.*

A degree of controversy still surrounds characterising ADR as an ‘access to justice’ issue. One perspective is that: justice is administered by courts; ADR processes are not part of the justice system; ADR outcomes do not need to conform to any enforceable ‘justice’ standard; and it is misleading or inappropriate to treat ADR as falling within the rubric of ‘access to justice’.

Another perspective, and one which ADRAC favours, is that courts do not administer ‘justice’ in a general, freestanding sense, but according to law; justice can be a wider concept than the adjudication of legal rights and wrongs; subject to limited exceptions, the law itself recognises that significant public and private interests attend the settlement of disputes by agreement; ADR processes, whether annexed to court proceedings or otherwise, are an important means of giving disputants a voice (itself an aspect of accessing justice); ADR processes possess significant advantages for disputants over fully contested legal proceedings. For these reasons (and others), ADR processes and outcomes are an increasingly vital (and legally recognised/enforceable) means of accessing justice.

The view ADRAC favours has achieved widespread and longstanding acceptance by jurists, parliaments, and governments at all levels.

For instance, in the *Justice Statement* issued by the Commonwealth Attorney-General’s Department in 1995, four ‘key themes and beliefs’ were identified: namely (i) a commitment to equality before the law; (ii) a belief in the desirability of preventing disputes from occurring or escalating where possible; (iii) making it possible for people to resolve disputes by simple and accessible means; and (iv) ensuring that the services already delivered in the

legal system are delivered more efficiently and with a much greater awareness of and orientation to their consumers – the public.

All of these ‘key themes and beliefs’ directly support the role of ADR in promoting access to justice. The 1995 *Justice Statement* explicitly recognised this.<sup>1</sup> Indeed, the Commonwealth’s Access to Justice Advisory Committee had recommended a year earlier that NADRAC be established.<sup>2</sup> The 1995 *Justice Statement* announced the Commonwealth Government’s acceptance of this recommendation as an ‘access to justice’ initiative.

In 1999 the then Chief Justice of the Family Court, Alastair Nicholson, and Sue Lynch wrote:

Any discussion of access to justice needs to be set within a broader context than that of the legal system alone.<sup>3</sup>

Ten years later in September 2009 the Access to Justice Taskforce in the Commonwealth Attorney-General’s Department published ‘*A Strategic Framework for Access to Justice in the Federal Civil Justice System*’. The then Attorney-General Robert McClelland stated in a Foreword to that Report:

Access to justice is central to the rule of law and integral to the enjoyment of basic human rights. It is an essential precondition to social inclusion and a critical element of a well-functioning democracy... An effective justice system must be accessible in all of its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than ease of access to sandstone buildings or getting legal advice... While courts are an important aspect of the justice system, there are many situations where courts are the last place people will get the outcome they are looking for to resolve issues... The critical test is whether our justice system is fair, simple, affordable and accessible. It is also important that the system provides effective early intervention to help people resolve problems before they escalate and lead to entrenched disadvantage.

The Taskforce’s Report characterised ADR processes as a critically important component of the federal civil justice system. The Taskforce stated:

Courts are not the primary means by which people resolve their disputes. They never have been. Very few civil disputes reach formal justice mechanisms such as courts, and fewer reach final determination..... To improve the quality of dispute resolution, justice must be maintained in individuals' daily activities, and dispute resolution mechanisms situated within a community and economic context. Reform should focus on everyday justice, not simply the mechanics of legal institutions which people may not understand or be able to afford.<sup>4</sup>

Access to justice is not only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve 'everyday justice'; the justice quality of people's social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved.<sup>5</sup>

The Senate's Legal and Constitutional Affairs References Committee inquired into and reported on '*Access to Justice*' in December 2009. The Committee characterised (and examined) ADR through the prism of 'access to justice'. It expressly endorsed efforts to enhance the use of ADR as an alternative means of delivering justice.<sup>6</sup>

In December 2014 the Productivity Commission released a detailed report into '*Access to Justice Arrangements*' following a detailed inquiry. The Commission's Terms of Reference directed it to have regard specifically to:

...alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, in both metropolitan areas and regional and remote communities, and the costs and benefits of these...

Significantly, many of the 'key points' identified by the Commission in its Report related to the role of ADR in improving access to justice. The Commission stated:

Where parties are unable to reach a private resolution, the civil justice system provides them with a range of means for resolving their disputes and asserting their legal rights. The federal, state and territory courts, statutory tribunals, government and industry ombudsmen and complaint bodies, and organisations and individuals offering alternative dispute resolution services all form part of the civil justice mix.<sup>7</sup>

ADR refers to a range of ways that people can resolve disputes without resorting solely to court and tribunal hearings for determination. Progressing disputes through formal court and tribunal processes is resource intensive and can be lengthy, costly and stressful for the parties involved. For some disputes, it is more appropriate for parties to seek a resolution through the use of ADR.

ADR methods are employed across the civil justice system to resolve a wide array of disputes and complaints. For example, parties in dispute may engage in ADR privately, supported by legal professionals or ADR practitioners. Indeed, it is not uncommon for companies to agree to ADR mechanisms within contracts as their primary enforcement option. Alternatively, specialised dispute resolution bodies may facilitate ADR processes. Services may be publicly or industry funded and may operate as part of a larger suite of services to assist disputing parties (such as in the case of legal aid commissions (LACs)). Many government departments also use ADR techniques to lessen the uncertainty and costs associated with litigation. Finally, courts and tribunals often refer or require parties in dispute to participate in ADR, either before or as part of litigation proceedings.<sup>8</sup>

ADRAC supports the proposition that ADR is part of ‘access to justice’, and that the availability of effective ADR enhances access to justice, including for those most in need of it. Acceptance of ADR’s role in enhancing access to justice brings with it an acknowledgment that public resources should be invested in it, such as by way of legal aid funding, investment of resources in policy development and implementation, and funding of community-based ADR services.

Governments recognise, fairly readily, their responsibility to facilitate, promote and fund initiatives directed to improving access to justice. The more ADR is seen as an integral part of ‘accessing justice’ the more likely it is to attract the attention it deserves from governments and other justice system stakeholders.

1. Page 25.

2. The description of this document as an ‘Action Plan’ is something of an understatement. It runs to nearly 500 closely-typed pages.

3. ‘*A Just Society? What access to Justice means to twelve Australians*’, 1999, page 108.

4. Page 3.

5. Page 4.

6. Page 105.

7. Page 5.

8. Page 284.