Court-based Dispute Resolution

26 Mar 2017

Adapted from Prof Tania Sourdin, Alternative Dispute Resolution, 5th ed, 2016, Thomson Reuters. ADRAC gratefully acknowledges the authorship of Professor Sourdin, who kindly prepared this paper.

Introduction

Discussing ADR processes within courts and tribunals is difficult, as such a vast range of processes operate across jurisdictions and these have often been introduced to achieve different objectives (for example, many processes have been introduced to assist in case management). Many ADR processes and systems that are related to courts operate outside the court and tribunal system and are staffed by those external to the courts and tribunals (for example, barrister, solicitor and other professional independent mediators), while other processes operate within the court and tribunal system and are often staffed by court employees, members, judges, officers or other staff (such as registrars).[1]

In any discussion of court-related processes, it must also be emphasised that most disputes are resolved before entry into the court and tribunal system. The increasing growth in mandatory ADR before court and tribunal filing, a focus on pre-filing or pre-litigation requirements to attempt to resolve disputes and other initiatives (such as the *Legal Service Directions 2005* (Cth), the growth in collaborative practice and a greater focus on quality in the ADR sector) are continuing to reduce the number of disputes entering the court and tribunal system within Australia. Those disputes that end up in the litigation system form a very small minority of the overall number of disputes in our society.

Once within the litigation system, traditional trial processes account for the determination of a small number of disputes. It is unclear how “small” that number is, however research in 2014 and 2015 suggests that only one per cent or less of civil cases filed in higher courts in Australia end up in a full hearing with judicial determination. While in a sizable proportion of disputes there may be significant court activity (with multiple interlocutory court hearings) most disputes end up settling or in a default judgment process (if ever defended).

Increasingly, matters that are “settled” within the litigation system are finalised with the use of some type of ADR process. These processes may be used without the specific knowledge of the relevant court or tribunal, or may be used after active referral by a court or tribunal. There is some evidence that trials are reducing and that private forms of ADR may now be viewed as more attractive than court processes by some disputants.[2] One reason for introducing court-related ADR is a perception that it can enhance disputants’ participation in and satisfaction with court proceedings generally.[3]

This paper attempts to summarise some of the main referral and ADR processes operating within Australian civil courts and tribunals.[4] However, many quite complex processes operating within individual jurisdictions have not been summarised. The incorporation of ADR systems and processes into court and tribunal systems raises many issues. There are concerns in regard to the institutionalisation of ADR, the training and accreditation of practitioners, as well as issues about the role of the court and tribunal system and how it may relate to a larger and more informal ADR system. One significant and developing area relates to how information about ADR systems and processes is disseminated by courts and tribunals.

State court and tribunal systems

State court and tribunal systems deal with large numbers of litigated cases in comparison to federal courts and tribunals. For example, although the Federal Circuit Court of Australia deals with many thousands of disputes, Local Courts throughout Australia deal with a vastly greater number and array of civil, family and criminal matters.

New South Wales

Civil litigation processes (including ADR processes) in the New South Wales Supreme, District and Local Courts (as well as the Dust Diseases Tribunal, Industrial Relations Commission and Land and Environment Court) are covered by the *Civil Procedure Act 2005* (NSW),[5] which commenced operation in June and August 2005. The aim of this legislation is to provide for greater uniformity and compatibility in civil litigation in New South Wales. As in the Victorian and the federal jurisdictions, the legislation creates overarching objectives for the courts, litigants and representatives that support the use of ADR processes.

Supreme Court of New South Wales

The concept of mandatory referral to an ADR process conducted by an external practitioner is not a new concept in New South Wales, and in the past 25 years many civil disputes have been referred to ADR processes in the District and Supreme Courts of New South Wales.[6] The Supreme Court's *Practice Note No SC Gen 6 (Supreme Court – Mediation)*, issued on 10 March 2010, sets out the basis on which the Supreme Court will consider ordering mediation in civil matters.[7]

The *Civil Procedure Act 2005* (NSW) contains the framework for mediation[8] and arbitration[9] of civil matters in New South Wales courts, including the Supreme Court of New South Wales. Courts can make an order for a matter to be referred to mediation with or without a party's consent.[10]

The parties to the proceedings are required to participate "in good faith" in the mediation.[11] The legislation also provides a framework to deal with other important mediation issues relating to costs,[12] confidentiality, [13] and mediator liability.[14] Currently at the Supreme Court, parties can choose their own external mediator (private mediation) or can request to be appointed a court mediator by the court (court-annexed mediation).

There have now been a number of judgments in New South Wales that have dealt with the issue of mandatory mediation referral. For example, Hamilton J referred to common perceptions of mandatory referral and highlighted important benefits. His Honour stated:

> Perhaps the parties' initial reluctance results from a perception that willingness to engage in mediation may be regarded as weakness. In any event, about 80 per cent of mediations I have ordered over initial resistance have succeeded. I have ordered a second mediation, where the first had failed: *Unconventional Conventions Pty Ltd v Accent Oz Pty Ltd (in liq)*.[15] This second mediation succeeded.[16]

The Chief Justice, the Hon Tom Bathurst QC, has also endorsed the success of ADR within the court:

> Despite the initial reluctance of some, involvement in mediation prior to the commencement of litigation, or at least shortly after its commencement, has provided significant benefits. … The success of ADR has reduced the personal, financial and public costs of litigation by allowing parties to: maintain civil relationships while settling a dispute; settle disputes faster; narrow the issues in dispute even where settlement fails; and avoid placing unnecessary stress on the court system.[17]

Apart from mediation, the Supreme Court has long supported other ADR processes. For example, arbitration was in frequent use in common law matters for more than 25 years and can be ordered in certain circumstances.[18]

Other New South Wales courts

Other courts in New South Wales are increasingly using mediation and other ADR processes.[19] For example, for a number of years, the Land and Environment Court has had a registrar-based mediation system that has successfully resolved numerous disputes (with the exception of its criminal jurisdiction) and at no cost to the parties. In addition, many matters that involve disputes at the local council or other level are resolved by way of mediation prior to entry into that court system. There is also capacity for external referral to mediation on referral from the court, but the parties are responsible for the costs. The court also offers neutral evaluation as an alternative to litigation. It is now part of District Court practice that all appropriate cases are referred to mediation under the *Civil Procedure Act 2005*(NSW).[20]

ADR processes are also used in the Local Court. In that area, increasingly, matters are referred to mediators through a variety of statutory and other schemes. For example, the Community Justice Centres program assists in resolving disputes that commence in the Local Court and is also a service that can be used before court proceedings begin.[21]The wide range of programs that are allied to the Department of Family and Community Services, the juvenile justice area, and the Family Dispute Resolution program also assist in dispute resolution in respect of disputes that might otherwise progress through the New South Wales Local Court or tribunal systems.

The New South Wales Civil and Administrative Tribunal (NCAT) commenced in 2014 an amalgamation of over 20 pre-existing tribunals and bodies.[22] The purpose was to provide a more efficient and effective dispute resolution process and executive action review mechanism.[23] NCAT is legislatively required to facilitate the just, quick and cheap resolution of the real issues in proceedings.[24] NCAT may use or require parties to use “resolution processes”.[25]Resolution processes are defined as any process, including alternative dispute resolution, “in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceeds”.[26] NCAT offers a range of dispute resolution options including conciliation, mediation, conclave, preliminary sessions and directions hearings.

Queensland

Alternative dispute resolution is also used in the civil jurisdiction of the Supreme, District and Magistrates Courts in Queensland. The *Supreme Court of Queensland Act 1991* (Qld), Pt 8 and the *District Court of Queensland Act 1967*(Qld), Pt 7 establish dispute resolution processes in the Supreme Court and the District Court respectively. It has been said that it is “virtually compulsory for the parties to participate”.[27] The two primary forms of dispute resolution in use there are mediation and case appraisal.

The *Supreme Court of Queensland Act 1991* (Qld) and *District Court of Queensland Act 1967* (Qld) enable referral orders to be made either by consent or without the consent of a party. If a party does not consent, it can object to a referral order and argue as to why an order should not be made before the court.[28]

The *Uniform Civil Procedure Rules 1999* (Qld) have also provided a framework for mediation and other ADR processes that is similar to the “overarching obligations” more recently seen federally and in Victoria and New South Wales.[29] The objective of these Rules is to “facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense".[30] Parties to court proceedings also face an implied undertaking “to the court and to the other parties to proceed in an expeditious way".[31] The Rules also make explicit the court's pre-existing power to sanction a party who does not comply with the Rules or an order of the court.[32]

There is also provision made for “directions conferences” in the Magistrates Court,[33] which are aimed at resolving matters or narrowing issues that remain to be determined at trial.[34] At these conferences, the possibility of settling the proceeding without a hearing, or by referring it to mediation, is generally considered.

The Queensland Civil and Administrative Tribunal (QCAT), which commenced operation on 1 December 2009, replaced 29 tribunals and many matters that might otherwise have proceeded in the Magistrates Court or in a small tribunal are now filed at QCAT. One of the “defining features” of QCAT's jurisdiction is the use of compulsory conferences – a hybrid process of mediation and case management.[35] In the 2013–2014 reporting period, 61 per cent of compulsory conferences resulted in a finalised outcome.[36] The Department of Justice in Queensland also runs an extensive ADR scheme that assists people who are in dispute and who might otherwise be engaged in court or tribunal proceedings.[37]

Victoria

Victoria has the oldest and most well-established court connected ADR programs in Australia. There have also been a number of recent changes to the way in which civil dispute resolution takes place in Victoria which further supports ADR. For example, the *Civil Procedure Act 2010* (Vic) has imposed overarching and specific conduct obligations on various participants to court proceedings.[38] The Act applies to proceedings in the Victorian Supreme Court, the County Court and the Magistrates’ Court.

The *Civil Procedure Act 2010* (Vic) also enhanced the courts' case management powers. In addition to existing powers, it enables courts to "make any order or give any direction it considers appropriate to further the overarching purpose in relation to pre-trial procedures",[39] which includes the power to "order the use of appropriate dispute resolution to assist in the conduct and resolution of all or part of the civil proceedings".[40]

The County Court of Victoria has one of the most extensive referral systems within Australia. Most of the referrals have been to external ADR practitioners; however, some internal mediation and even judicial dispute resolution takes place in the Supreme and County Courts of Victoria.

As Judge Shelton noted, "mediation is now an accepted step in civil litigation with virtually all cases in the County Court automatically being referred to mediation".[41] In domestic partnership disputes and testators' family maintenance claims, the County Court also offers case conferences "as a substitute for private mediation".[42]

The *Supreme Court (General Civil Procedure) Rules 2005* (Vic)[43] provide that mediation can be ordered without the parties' consent. However, in common with some other courts, the Supreme Court does not have the power to order arbitration without the consent of the parties.[44] Not unlike the Supreme Court of New South Wales, it also has power to refer a dispute to a special referee without the consent of parties.[45]

Western Australia

In Western Australia, the Supreme Court has an ADR scheme that provides for the mediation of disputes by registrars of the court and others.[46] The District Court has a well-developed pre-trial scheme. The *District Court Rules 2005*(WA) outline the mediation processes used in the court, specifying that mediation can also serve as a pre-trial conference.[47]

> In 2013, the District Court held 2,835 pre-trial alternative dispute resolution conferences.[48] It was also noted that:

> Civil litigation is managed through an extensive program of case management and alternative dispute resolution. The success of the program is measured by the very few civil cases that actually proceed to a trial in the District Court. Of the 4,243 civil cases finalised in 2013, 57 (1.4%) proceeded to trial in 2013.[49]

The civil program in the Supreme Court, which involves mainly registrars, is very active. In 2014, 583 matters were mediated.[50] The Court has noted that:

> All defended civil cases are subject to mediation prior to going to trial … Some cases are mediated by Judges. The Registrars and some Judges receive extensive training in mediation. The Supreme Court's approach to managing civil disputes, including the use of in-house mediators, is very successful as less than 2% of contested civil matters are resolved by trial.[51]

Family law cases in Western Australia are heard by the Family Court of Western Australia. The Court is funded by the Commonwealth, but is governed by the *Family Court Act 1997* (WA). The Act reflects the federal family law legislation, requiring parties to attend family dispute resolution before applying for parenting orders.[52] The objective of this requirement is to ensure that parties make a "genuine effort" to resolve parenting disputes before applying for a parenting order.[53] There are some exceptions to this requirement, including where there has been family violence.[54]

The State Administrative Tribunal (SAT) of Western Australia was set up under the *State Administrative Tribunal Act 2004* (WA). The Tribunal uses Facilitative Dispute Resolution (FDR) as well as mediation to deal with many disputes.[55] Facilitative Dispute Resolution has been described as:

- directions hearings in which issues are identified, options are developed and, in certain types of applications, alternatives to the proposal are discussed;
- mediations "to achieve the resolution of matters by settlement between the parties";
- compulsory conferences "to identify and clarify the issues in the proceeding and promote the resolution of the matters by settlement between the parties"; and

- in review proceedings, invitations by the Tribunal to respondents to reconsider their decisions under s 31 of the SAT Act, often in light of further information or clarification provided, or modifications or amendments made, by applicants through the other FDR processes.[56]

Other States and Territories

South Australia has had extensive range of ADR processes that are used in the courts. Mediation is provided for in the Supreme, District and Magistrates' Courts.[57] Mediation can be ordered without consent.[58] In particular, South Australia has supported conferences and mediation for a number of years.[59] In conferences, alternatives to litigation are usually discussed.

In Tasmania, mandatory referral to mediation was permitted in 2000.[60] The court directs mediation where it appears that there is a good prospect of settlement or where it considers that a mediated settlement is preferable.[61]

In the Australian Capital Territory, there has been a close focus on ADR and its relationship to the litigation system. The *Mediation Act 1997* (ACT) set up a comprehensive regulatory scheme that applies to mediators. In addition, legislation such as the *Domestic Relationships Act 1994* (ACT) and the *Leases (Commercial and Retail) Act 2001*(ACT) allow for referral to mediation or arbitration.[62]

Legislation in the Northern Territory provides for ADR processes mostly within the Local Court.[63] However, there has been an increasing focus on ADR in the Northern Territory Supreme Court. In 2010, *Practice Note 1* was issued, which enabled mandatory referral of matters to mediation before a judge, master or registrar, or to an external mediator from a list kept by the court.[64]

Federal schemes

Australian federal courts and tribunals have been involved and engaged in ADR development for more than 25 years. The emphasis in federal courts and tribunals has largely been on mediation and conciliation processes rather than other ADR processes, such as evaluation and arbitration, although the AAT has used a number of advisory and evaluative forms of ADR.[65] Court staff in the Federal Court and

Family Court and members of the Administrative Appeals Tribunal (AAT) have undertaken much of the mediation and conciliation work. Each court and tribunal has constructed an ADR program to meet its own needs.

In June 2008, the National Alternative Dispute Resolution Advisory Council (NADRAC) received a reference from the Commonwealth Attorney-General to provide advice regarding encouraging greater ADR use across the federal sector. NADRAC conducted an inquiry and published the results of that advice and recommendations in the report, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction*.[66] Also in September 2009, a report of the Access to Justice Taskforce in the Commonwealth Attorney-General's department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, was produced, with the ultimate aim of promoting effective (and earlier) dispute resolution in order to overcome barriers to access to justice.[67] These two reports have led to substantial and significant changes to the obligations that attach to those involved in ADR and also to the establishment of dispute resolution obligations in the pre-litigation area.

As in many State jurisdictions, there have also been changes introduced into federal courts that impact on the obligations that litigants have when conducting litigation. For example, the *Federal Court of Australia Act 1976* (Cth) was amended in November 2009[68] and new obligations are now placed on the Federal Court, litigants and legal practitioners to facilitate the just resolution of disputes according to law, and to do this as quickly, inexpensively and efficiently as possible.[69]

Federal Court of Australia

In the Federal Court of Australia, matters have been referred to mediation without the parties' consent since 1997.[70]The “Assisted Dispute Resolution” program that commenced in 1987 (and, until 1997, required the consent of the parties) was based upon the mediation of disputes by registrars of the court. Registrars have performed much of the mediation work, although external mediators in Victoria and New South Wales have mediated a number of matters. Mediations conducted by registrars have dealt with a wide range of disputes, including issues that range from trade practices disputes to asylum seeker interventions. In 2009, the Federal Court of Australia

became a recognised mediation accreditation body (RMAB) under the National Mediator Accreditation System and the registrars of the court who conduct mediations are all accredited practitioners.

Part 28 of the *Federal Court Rules 2011* (Cth) sets out the way in which a range of alternative dispute resolutions processes will be dealt with.[71] The rules also make clear that "[a]t any hearing, the Court may make directions for the management, conduct and hearing of a proceeding", including an order referring the proceeding to an arbitrator, mediator or "suitable person" for resolution by an ADR process, and for referral to a case management conference or a pre-trial settlement conference.[72] An order referring proceedings to arbitration currently requires the consent of both parties[73] (as opposed to any other form of alternative dispute resolution, which can be ordered with or without the consent of the parties). Appeals from arbitrations in the Federal Court are on questions of law only[74] and an arbitrator may refer a question of law back to the court for determination.[75] The Federal Court also makes available a voluntary "fast-track" resolution process for commercial, personal insolvency and intellectual property (apart from patents) matters. This expedited process specifically calls for the most appropriate dispute resolution mechanism(s) to be employed (under the guidance of a managing judge).[76]

Family Court of Australia

Extensive changes to the family law system were introduced in 2006. These changes included the introduction of a new hearing model in relation to children's matters. Significant reforms were also implemented in relation to ADR, which is now largely conducted outside the courts.

Generally, the Family Court may, at any stage of the proceedings, order that parties attend conciliation, family counselling, "family dispute resolution" (FDR), attend an appointment with a family consultant or participate in an "appropriate course, program or other service".[77] With the consent of the parties, the Family Court may also order that matters be referred to arbitration.[78] Such an award can be reviewed (and set aside, if necessary), on questions of law, by a single judge of the Family Court, or the Federal Circuit Court.[79] Both courts can also determine questions of law referred by an arbitrator.[80]

One of the largest pre-litigation schemes that imposes mandatory attendance at a dispute resolution process in Australia is set up through legislation and with significant infrastructure and operates in the family dispute area.

The amendments to the *Family Law Act 1975* (Cth) introduced in 2007 mean that if an individual wants to apply to the court for a parenting order under Pt VII of the Act, they first need to attend FDR. This is defined as a process (other than a judicial process) whereby an independent FDR practitioner (who must be accredited) helps people "affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other".[81] Once the FDR process has been engaged in, the parties can obtain a certificate from the FDR practitioner confirming that an attempt at family dispute resolution was made, and then may apply to seek a Family Court order.[82]

Federal Circuit Court of Australia

The Federal Magistrates Court was renamed the Federal Circuit Court of Australia (FCC) in April 2013. Part 4 of the *Federal Circuit Court of Australia Act 1999* (Cth) entitled *Dispute Resolution for Proceedings other than Proceedings Under the Family Law Act 1975* establishes dispute resolution processes (DRP). Part 6 of the *Federal Circuit Court of Australia Act 1999* (Cth), entitled *Practice and Procedure,* read together with the *Civil Dispute Resolution Act 2011*(Cth), also supports extensive case management and pre-litigation obligations in relation to ADR. The Explanatory Memorandum to the *Federal Magistrates Bill 1999* (Cth) notes that:

> Obligations are imposed on the Federal Magistrates Court and legal practitioners to advise parties about primary dispute resolution processes that may help in resolving their dispute.
>
> Parties who have been ordered by the Federal Court to undertake a primary dispute resolution process may apply to the court to have a question of law determined which arises out of the proceedings. Such an application must be accompanied by a statement by the person conducting the primary dispute

resolution process to the effect that the determination of the question of law would be likely to assist parties in settling.[83]

Part 4 requires the court to consider whether to advise people to use DRP once they have commenced proceedings (s 22). If the court "considers that a [DRP] may help the parties to a dispute before it to resolve that dispute … [it] must advise the parties to use [that process]" (s 23). A duty is also placed on legal practitioners to consider whether to advise the parties about the DRP that could be used to resolve any matter in dispute (s 24). If requested, officers of the Federal Circuit Court must advise parties about the DRP that could be used to resolve any matter (s 25).

Administrative Appeals Tribunal

A variety of case conferencing, mediation and evaluative ADR processes operate within the administrative review area. In addition, following amendments in 2005 by the *Administrative Appeals Tribunal Amendment Act 2005* (Cth),[84]a range of other processes are now available. The range of ADR processes set out in s 3 of the 2005 amending Act include conferencing, mediation, conciliation, neutral evaluation, case appraisal and other procedures or services specified in the regulations. The Administrative Appeals Tribunal (AAT) ADR Committee[85] has produced guidelines and detailed process descriptions in relation to each of the processes.

National Native Title Tribunal

The Federal Court is now responsible for managing native title applications.[86] The National Native Title Tribunal's (NNTT) mediation function and Indigenous Land Use Agreements (ILUA) negotiations related to native title claims mediation were transferred to the Federal Court as part of institutional reforms that occurred in 2012. The Federal Court can refer mediation matters to the NNTT or another mediation body or mediator. The NNTT can provide mediation in areas such as future acts and can assist parties in negotiating standalone ILUAs.[87]

Key issues

The increased referral of disputes to ADR processes has raised numerous issues for the litigation system and the courts. At the same time, there have been greater opportunities for lawyers to play a more constructive role in the resolution of disputes through engagement in ADR (either as ADR practitioners or representatives). Lawyers are increasingly involved in compliance work, risk analysis, dispute system design and management work that clearly sits under the ADR umbrella. Many lawyers also work as ADR practitioners and offer ADR services as part of the package of services that are available to prospective clients.

These changes offer practitioners some significant opportunities to establish client bases that may not have previously existed. While some commentators have suggested that lawyers need to remodel themselves to ensure that they can work effectively within the litigation environment,[88] others consider that the growth in ADR as well as technological and other changes will mean that many lawyers will no longer be able to undertake more traditional and litigation focussed work.[89] Clearly, many clients now expect lawyers to be informed about ADR processes. Clients also expect lawyers to be able to give advice about managing and avoiding disputes and not just “fight” a case or the other party.

Views about the relationship between ADR and the judicial role and judicial practice have also evolved in recent years. Much discussion has focused on perspectives that are similar to those raised in respect of the role of courts. However, views have also focused on the nature of the judicial function and the constitutional impediments that may prevent a judge from undertaking an ADR process.[90]

Often the issues relating to the relationship between ADR and the litigation system are framed by the question: “Should judges mediate?”[91] There has been some discomfort within Australia about the notion of judges acting as mediators and discussion has often focused on this issue although in many overseas jurisdictions[92] this approach is common.[93]

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1. T Sourdin and A Zariski, 'Judicial Dispute Resolution – A Global Approach' in *Global Legal Issues Volume 3* (Korean Legislation Research Institute, Seoul, 2012).

2. See also T Sourdin, 'Resolving Disputes Without Courts?' (2013) 32(1) *The Arbitrator & Mediator* 25, 29.

3. T Sourdin, 'The Role of the Court in Alternative Dispute Resolution' (2013) *Asian Journal on Mediation* 80, 93.

4. Increasingly, ADR processes are being adopted in criminal jurisdictions as an adjunct to sentencing and conferencing programs.

5. *Civil Procedure Act 2005* (NSW): see Sch 1 for application to various courts.

6. See Supreme Court of New South Wales, *Mediation*, available onhttp://www.supremecourt.justice.nsw.gov.au/Pages/SCO2_practiceprocedure/sco2_mediationinthesc/sco2_mediationinthesc.aspx (accessed 23 March 2015).

7. Supreme Court of New South Wales, *Practice Note No SC Gen 6 (Supreme Court – Mediation)*, available onhttp://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/516 (accessed 23 March 2015); see also *Civil Procedure Act 2005* (NSW) Pt 4.

8. *Civil Procedure Act 2005* (NSW) Pt 4.

9. *Civil Procedure Act 2005* (NSW) Pt 5.

10. *Civil Procedure Act 2005* (NSW) s 26(1).

11. *Civil Procedure Act 2005* (NSW) s 27.

12. *Civil Procedure Act 2005* (NSW) s 28.

13. *Civil Procedure Act 2005* (NSW) s 31.

14. *Civil Procedure Act 2005* (NSW) s 33.

15. *Unconventional Conventions Pty Ltd v Accent Oz Pty Ltd (in liq)* [2004] NSWSC 1050.

16. J Hamilton, 'Thirty Years of Civil Procedure Reform in Australia: A Personal Reminiscence' (2005) 26 *Australian Bar Review* 258, 265.

17. Chief Justice of New South Wales, the Hon T Bathurst, *Opening Address* (Presented at 2011 Advanced Dispute Resolution Workshop, Sydney, 13 August 2011) p 4, available on http://www.austlii.edu.au/au/journals/NSWJSchol/2011/26.html (accessed 23 March 2015).↩ 18. See *Civil Procedure Act*

2005 (NSW) s 38.

19. In respect of the Land and Environment Court see NSW Land and Environment Court, Resolving Disputes, available on http://www.lec.justice.nsw.gov.au/Pages/resolving_disputes/resolving_disputes.aspx (accessed 7 September 2015). See also for example, the*Local Courts (Civil Claims) Act 1970* (NSW) s 21L.

20. For example, see District Court of New South Wales Practice Notes: *Practice Note DC (Civil) No.1* (Sections 3, 5 and 5.9). At Section 10 it is noted "10.1 The Court will refer all appropriate cases for alternate dispute resolution under Part 4 of the *Civil Procedure Act*. The parties must have instructions about suitability for mediation, arbitration or other alternate dispute resolution when they ask for a hearing date. Parties should note that the Court's power to order mediation does not depend on the consent of the parties".

21. See the New South Wales Local Courts Website information on ADR.

22. New South Wales Civil and Administrative Tribunal, 2014 *Annual Report* (NCAT, 2014) p 4.

23. New South Wales Civil and Administrative Tribunal, 2014 *Annual Report* (NCAT, 2014) p 4.

24. *Civil and Administrative Tribunal Act 2013* (NSW) s 36(1).

25. *Civil and Administrative Tribunal Act 2013* (NSW) s 37(1).

26. *Civil and Administrative Tribunal Act 2013* (NSW) s 37(2).

27. BC Cairns, *Australian Civil Procedure* (6th ed, Lawbook Co, Sydney, 2005) p 63.

28. *Uniform Civil Procedure Rules 1999* (Qld) rr 319 and 320.

29. *Uniform Civil Procedure Rules 1999* (Qld) Ch 9, Pt 4.

30. *Uniform Civil Procedure Rules 1999* (Qld) r 5(1).

31. *Uniform Civil Procedure Rules 1999* (Qld) r 5(3).

32. *Uniform Civil Procedure Rules 1999* (Qld) r 5(4).

33. *Uniform Civil Procedure Rules 1999* (Qld) Ch 13, Pt 9, Div 3.

34. Queensland Courts, *Directions Conferences*, available on http://www.courts.qld.gov.au/__data/assets/pdf_file/0009/91935/m-fs-directions-conferences.pdf (accessed 23 March 2015).

35. Queensland Civil and Administrative Tribunal, *Annual Report 2009–2010* (QCAT, 2011) p 9.

36. Queensland Civil and Administrative Tribunal, Annual Report 2013–2014 (QCAT, 2014) p 28.

37. See generally http://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/setting-disputes-out-of-court/ (accessed 26 November 2015).

38. The obligations are imposed on parties, legal practitioners or other representatives, legal practices, expert witnesses (where relevant) and any person who provides financial or other assistance to any party, insofar as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding.

39. *Civil Procedure Act 2010* (Vic) s 48(1).

40. *Civil Procedure Act 2010* (Vic) s 48(2)(c).

41. County Court of Victoria, *Annual Report 2008–2009* (County Court Victoria, 2009) p 24.

42. County Court of Victoria, *Annual Report 2008–2009* (County Court Victoria, 2009) p 25.

43. *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 50.07.

44. *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 50.08.

45. *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 50.01.

46. See *Supreme Court Act 1935* (WA) s 69. In 2000, the definition of a "mediator" was extended to include "a person agreed by the parties". Prior to that date, it included registrars and "approved persons".

47. See *District Court Rules 2005* (WA) rr 35 and 35A.

48. District Court of Western Australia, *Annual Review 2013* (District Court of Western Australia, 2013) p 15.

49. District Court of Western Australia, *Annual Review 2013* (District Court of Western Australia, 2013) p 15.

50. See the Supreme Court of Western Australia, *Annual Review 2014* (SCWA, 2014), available on http://www.supremecourt.wa.gov.au/_files/Annual_Review_2014.pdf (accessed 8 September 2015).

51. See the Supreme Court of Western Australia, *Annual Review 2014* (SCWA, 2014), available on http://www.supremecourt.wa.gov.au/_files/Annual_Review_2014.pdf (accessed 8 September 2015).

52. *Family Court Act 1997* (WA) s 66H.

53. *Family Court Act 1997* (WA) s 66H(2).

54. *Family Court Act 1997* (WA) s 66H(8).

55. See WA State Administrative Tribunal (SAT), *Annual Report 2013–2014* (SAT, 2014), available on http://www.sat.justice.wa.gov.au/_files/SAT%20AReport%202013-2014.pdf (accessed 7 September 2015).

56. D Parry, *Structure and Restructure, the Rise of FDR and Experts in Hot Tubs – Reflections on the First Decade of the State Administrative Tribunal of Western Australia* (Paper presented at the Council of Australasian Tribunals National Conference, Melbourne, 4–5 June 2015), available on http://www.sat.justice.wa.gov.au/_files/Judge_Parry_COAT_National_Conference_2015_paper.pdf. The FDR process is intended to provide additional dispute diagnosis opportunities.

57. See *Magistrates Court Act 1991* (SA) s 27; *District Court Act 1991* (SA) s 32; *Supreme Court Act 1935* (SA) s 65.

58. See *Barry Hopcroft and Barameda Fishing Company v A M Olsen* [1998] SASC 7009.

59. See *Barry Hopcroft and Barameda Fishing Company v A M Olsen* [1998] SASC 7009.

60. *Alternative Dispute Resolution Act 2001* (Tas) s 5(1).

61. Cases where mediated settlements may be regarded as preferable are those in which there are complex evidentiary issues and only a small amount of money is in dispute compared to the likely cost of the trial.

62. See *Domestic Relationships Act 1994* (ACT) s 8; *Leases (Commercial and Retail) Act 2001* (ACT) s 148, whereby if the court considers it "likely that parties may resolve the dispute" at a case management meeting, the court "must promote the

settlement of the dispute (either at the meeting or by referral to other dispute resolution mechanisms)". Provision is also made in s 52 of the *Leases (Commercial and Retail) Act 2001* (ACT) for the referral of disputes as to market rental to mediation.

63. *Local Court (Civil Jurisdiction) Rules* (NT), Part 32.

64. *See Practice Direction No 1 of 2010 – Mediation,* which varied Order 48 to provide for this extended referral.

65. There has been a trial of evaluation processes within the Perth Registry of the Federal Court.

66. NADRAC, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Report, NADRAC, 2009), available on http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/the-resolve-to-resolve-embracing-adr-improve-access-to-justice-september2009.pdf (accessed 26 March 2015).

67. Access to Justice Taskforce, Commonwealth Attorney-General, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, CAG, 2009) available on http://www.ag.gov.au/ (accessed 26 March 2015).

68. *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth).

69. *Federal Court of Australia Act 1976* (Cth) s 37M.

70. See *Federal Court of Australia Act 1976* (Cth) s 53A; see also ss 53A(1) and (1A) as amended by the *Law and Justice Legislation Amendment Act 1997* (Cth).

71. Div 28.2 of the *Federal Court Rules 2011* (Cth) relates to arbitration, Div 28.3 relates to mediation, and Div 28.4 to ADR processes generally.

72. *Federal Court Rules 2011* (Cth) r 5.04.

73. *Federal Court of Australia Act 1976* (Cth) s 53A(1A). Section 53C provides that mediators dealing with a referred matter are afforded the same immunity and protection as a judge exercising judicial functions.

74. *Federal Court of Australia Act 1976* (Cth) s 53AB(2).

75. *Federal Court of Australia Act 1976* (Cth) s 53AA.

76. Federal Court of Australia, *Practice Note CM 8 (Fast Track),* available on http://www.fedcourt.gov.au/pdfsrtfs_p/practice_notes_cm8.rtf(accessed 26 March 2015).

77. *Family Law Act 1975* (Cth) s 13C.

78. Matters which may be referred to arbitration include: Pt VIII matters (Property, Spousal Maintenance and Maintenance Agreements), Pt VIIIAB matters (Financial Matters Relating to De Facto Relationships): s 13E of the *Family Law Act 1975* (Cth).

79. *Family Law Act 1975* (Cth) ss 13J and 13K.

80. *Family Law Act 1975* (Cth) s 13G.

81. *Family Law Act 1975* (Cth) s 10F.

82. Section 60I(7) mandates that a court exercising jurisdiction under the *Family Law Act 1975* (Cth) "must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate". Exceptions are made (in ss 60I(9) and 60J) for child abuse, family violence, and urgent matters.

83. Explanatory Memorandum, *Federal Magistrates Bill 1999* (Cth) p 3.

84. The *Administrative Appeals Tribunal Amendment Act 2005* (Cth) (No 38 of 2005), amended a number of federal Acts, but primarily, for present purposes, the *Administrative Appeals Tribunal Act 1975* (Cth). All relevant amendments came into force on or by 16 May 2005.

85. For information on AAT ADR processes, see Administrative Appeals Tribunal, *Alternative Dispute Resolution.*

86. National Native Title Tribunal, *Mediation of Claims,* available on http://www.nntt.gov.au/nativetitleclaims/Pages/Mediation-of-claims.aspx(accessed 31 March 2015).

87. National Native Title Tribunal, *Mediation of Claims,* available on http://www.nntt.gov.au/nativetitleclaims/Pages/Mediation-of-claims.aspx.

88. See J Macfarlane, *The New Lawyer – How Settlement is Transforming the Practice of Law* (UBC Press, Vancouver, 2008).

89. See R Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Rev ed., Oxford University Press, London, 2010).

90. See, for example, T Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 37(1) *Monash University Law Review* 5.

91. See, for example, the Hon M Warren AC, Chief Justice of the Supreme Court of Victoria, *Should Judges Be Mediators?* (Paper presented at the Supreme and Federal Court Judges' Conference, Canberra, 27 January 2010), available onhttp://www.austlii.edu.au/au/journals/VicJSchol/2010/1.pdf (accessed 10 February 2017); Justice B Debelle, *Should Judges Act as Mediators*(Paper presented at the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1–3 June 2007).

92. See T Sourdin and A Zariski, *The Multi Tasking Judge* (Thompson Reuters, Pyrmont, Sydney, 2013).

93. T Sourdin and A Zariski, 'Judicial Dispute Resolution – A Global Approach' in *Global Legal Issues Volume 3* (Korean Legislation Research Institute, Seoul, 2012).