

Benefits of ADR

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

The benefits of dispute resolution, in a general sense, are almost self-evident. The resolution of disputes saves time and resources, reduces stress and conflict, and promotes social integration, cohesion and harmony.

When considering the benefits of ADR as a sub-set of dispute resolution, it is common to compare and contrast ADR with (i) litigation; and (ii) other forms of dispute resolution (which do not involve a third party), such as negotiation. There are dangers in undertaking such comparisons. They can mask proselytising, unstated bias, or limited perspectives. And there is much to be said in favour of viewing dispute resolution as comprising a spectrum of *complementary* processes.

However, the fact remains that disputants are often faced with a choice (albeit non-mutually exclusive) as to which DR process to undertake at any particular point in time. And there are some real differences (both hard and soft) between the available alternatives, knowledge of which can assist disputants to make informed choices about which process best suits their dispute.

Benefits of ADR for disputants, compared to litigation

The benefits of ADR as compared to litigation can include the following:

- the ability to participate in selection of the DR practitioner
- the ability to participate in selection of the form of ADR
- greater control, therefore, over both the process and the outcome (at least in relation to non-adjudicative forms of ADR)

- greater prospect of achieving proportionality between nature and 'sizer' of dispute, and the mechanism for resolving
- less need for legal representation
- ADR processes are conducted in private
- ADR processes are less formal, more flexible, and more familiar
- ADR outcomes are usually confidential
- ADR processes can concentrate more on interests rather than rights
- the range of available outcomes is, therefore, greater (and can include such matters as apologies)
- ADR processes usually cost significantly less than litigation
- costs of the process are agreed upfront and are more transparent
- disputants are not exposed to the risk of an adverse costs order (requiring them to pay the other party's costs)
- ADR outcomes may be more certain and predictable because they are generally not subject to challenge (for example by way of appeal)
- ADR processes can result in outcomes at earlier stages in the life of a dispute (before the facts are established and/or while they are still emerging)
- ADR processes can result in more enduring outcomes because they are consensual rather than imposed
- ADR outcomes can accommodate a wider spectrum of risks and concerns
- ADR processes can assist disputants to maintain good ongoing relations, including by reducing adversarialism and increasing insight and reflection
- ADR processes and outcomes are not 'winner takes all'
- ADR processes can be directed to particular issues, and resolve disputes in stages, whereas litigation often requires parties to raise all issues that bear upon their legal rights at the one time (or run the risk of being estopped from doing so down the track).

Benefits of ADR for disputants compared to other forms of dispute resolution (eg negotiation)

The benefits of ADR as compared to other forms of dispute resolution, not involving a disinterested third party, can include the following:

- ADR processes can help parties to overcome ‘churning’
- a DR practitioner can assist the disputants to see their dispute in a more focussed and clearer light
- a DR practitioner can assist disputants to communicate their points of view more effectively and respectfully
- a DR practitioner can assist disputants to listen to other points of view more effectively
- a DR practitioner can assist disputants to feel ‘heard’
- a DR practitioner can assist disputants to better understand risks and pitfalls attending particular ‘positions’
- a DR practitioner can help disputants identify and respond to ‘sub-textual’ or hidden blockers to the resolution of their dispute
- ADR processes can assist disputants to take control over, and responsibility for, their dispute by reducing legal formalism and dependency upon legal representatives
- a DR practitioner can assist disputants to overcome problems which attend disparities between them – of education, wealth, status, culture etc
- a DR practitioner can assist disputants to identify new, creative, and adaptive ways of resolving their disputes – by reference to what really matters to them.

Societal benefits of ADR

ADRAC considers that ADR processes are properly seen as an increasingly vital (and legally recognised/enforceable) means of accessing justice.¹

The role played by ADR in facilitating access to justice, and maintaining the rule of law, informs any consideration of the societal benefits of ADR. In 2009 the Access to Justice Taskforce (part of the Commonwealth Attorney-General’s Department) published ‘*A Strategic Framework for Access to Justice in the Federal Civil Justice System*’. The Taskforce canvassed the societal benefits of ADR in the following, highly resonant, terms:

Australia’s federal civil justice system...includes...dispute resolution services that help people negotiate their own solutions such as Family Relationship Service...

Why is access to justice important?

The rule of law is a central feature of a modern democratic society. It is a precondition for a flourishing civil society for people to be able to plan and live their lives as they choose.... This underpins economic and social cooperation.

Maintenance of the rule of law is fundamental to Australia's economy and prosperity. The rule of law frames the relationship between state and society, founded upon an accepted set of social, political and economic norms. A strong rule of law means that a country has less corruption, protected and enforceable legal rights, due process, good governance and accountable government....

[The rule of law]...plays a central role in the ways in which societies distribute the benefits and bear the costs of development strategies and policies, and it influences investment decisions and the organization of production'....

...Difficulties in obtaining access to justice reinforce poverty and exclusion. Maintaining a strong rule of law is a precondition to protecting disadvantaged communities and helping people leave poverty behind....

...Access to justice is an essential element of the rule of law and supports democracy.... Continuing improvements in access to justice are important to maintaining a strong rule of law.

People have, and will continue to have, disputes. Mostly these are resolved without resorting to the machinery of formal justice.... Access to justice should include resilience: reinforcing and enhancing the capacity of people to resolve disputes themselves. However, the Government has a role in ensuring that there are mechanisms available to resolve disputes lawfully, peacefully and fairly, and to reinforce the fundamental principles that are embodied in laws. An accessible and effective way of resolving disputes is therefore central to the rule of law. Without it, disputes are either unresolved or dispute resolution is driven underground. In either case, the outcome is a loss of confidence in the rule of law and the expectation that society has the capacity to ensure cooperation is respected and rewarded. In this scenario, those with resources or other

strengths would tend to prevail, regardless of the fairness of the outcome, depriving people of the enjoyment of legitimate rights and interests and encouraging lawlessness. That has impacts for individuals in respect of immediate disputes, but is more generally damaging on social cohesion and the fundamental basis of the economic cooperation that is the basis of social progress.²

In short, ADR facilitates access to justice, underpins the rule of law and democratic governance, contributes to economic prosperity, and supports a fairer and more cohesive society.

Notwithstanding the Taskforce's ringing endorsement of the systemic benefits of ADR, ADRAC considers that they remain under-recognised - by policy-makers, legislatures, governments, business, and community groups.

1. See the topic [Access to justice and ADR](#) herein. This view of ADR finds support among members of the judiciary, academia, parliamentary committees, legislatures, and government policy-makers at all levels.

2. Pages 1-2.