

## ***Alternative Dispute Resolution***

**Alternative Dispute Resolution (“ADR”) normally refers to processes in which a third party is used to resolve disputes between parties. ‘Alternative’ refers to the fact that the premise of such processes is to keep the matter free from judicial determination, or in other words, from going to Court.**

### **Why seek Alternative Dispute Resolution?**

The most common form of resolution between two parties is through the traditional adversarial court processes. In recent times however, there has been an increase in the number of parties seeking to resolve a dispute through the use of mediation, arbitration, conferencing and conciliation.

Some of the reasons why this has been the case is that using a dispute resolution measure has the potential of reducing the costs borne by each party. Alternative dispute resolution may also be beneficial for those who prefer less confrontation.

Another reason why alternative dispute resolution has grown in popularity is because of the substantial amount of time that may be saved in comparison to court matters.

### **Types of Dispute Resolution**

#### **Early Neutral Evaluation**

This occurs early in the stages of a dispute. The aim of this process is to resolve the dispute before it reaches further conflict. A determination is made of the key issues of the dispute and the most effective ways of resolving the dispute. This can prove to be an efficient cost minimization process, if both parties are committed to resolving the issue without the need for litigation.

After an objective determination is made through looking at the strengths and weaknesses of the case, the evaluator (who is normally a respected member of the legal profession) will offer an opinion as to the likely outcome if the proceedings were to go to Court and encourage settlement based on the evaluation. The neutral evaluator may in special circumstances receive evidence and examine witnesses and administer oaths to witnesses. Therefore, in some instances, the process of early neutral evaluation can be seen as setting up a non-binding adjudicative process. Similar to the courts, parties will present their arguments and will receive from the neutral evaluator an assessment of how the matter will likely be resolved in Court.

#### **Arbitration**

This is perhaps the most similar process to court proceedings. Arbitration involves the parties in dispute presenting their arguments and evidence to an arbitrator, who makes a determination, thus arbitration is often referred to as a ‘determinative process’.

The parties in dispute are to present evidence of their case to the arbitrator. Parties also have the opportunity to cross-examine the other party witnesses with the aim of persuading the arbitrator to make a favourable decision. The formal nature and requirement that decisions of an arbitrator be made according to legal procedures and principles, make this form of dispute resolution the closest to litigation in the traditional sense.

#### **Mediation**

This process involves both parties sitting together with a third neutral party (mediator). The mediator has no power to determine the outcome of the dispute, nor are they supposed to advise the parties on the matter. The mediator is there to assist both parties in coming to an understanding and identification of the issues at hand, develop options towards the resolution of disputes, consider alternatives and aid the parties in coming to an agreement. Mediations are known to be of a ‘facilitative process’ rather than an advisory or determinative one.

More recently, mediation has been classified under four different headings. These being:

1. *Settlement Mediation*

In this type of mediation, compromise between the two parties is encouraged, with the goal of settling the dispute between them.

2. *Facilitative Mediation*

In this type of mediation the focus is upon the needs and interests of the parties instead of their strict legal rights.

3. *Therapeutic Mediation*

Reparation of the relationship is the aim of this type of mediation. The underlying causes of the problems are discussed.

4. *Evaluative Mediation*

This method of evaluation relies most heavily on strict legal rights and entitlements to come to a settlement. Court remedies are often applied in evaluative mediation.

Co-mediation is a term that refers to a mediation process with two mediators present.

Mediation may be undertaken voluntarily or by order of the Courts. This is most prevalent in the area of family law.

**Expert Appraisal, Case Appraisal, Case Presentation**

Rather than be determinative, or facilitative these processes are advisory. Here, the ADR practitioner appraises the disputes and provides advice as to the facts of the case, the law in the area and how they think the matter will be best resolved.

Expert appraisal occurs when a dispute resolution practitioner is chosen based on their expert knowledge on the subject matter in dispute.

**Hybrid Processes**

Conciliation is the process by which the parties to the dispute, together with the conciliator, aim to identify the issues, develop options, consider alternatives and try to reach an agreement. Conciliators have an advisory role rather than a determinative one. Advice will most commonly take the form of suggestions for terms of settlement. They aim to actively encourage the participants to reach an agreement.

**Dispute Review Boards**

Dispute Review Boards, are gaining greater usage in Australia, especially where certain projects involve many different parties. Often Dispute Review

Boards may be seen as a tool for avoiding dispute rather than a tool for dispute resolution.

This process is characterized by a panel of experts who are not involved with the project.

**Conferencing**

Conferencing as a generic term refers to meetings where all parties, advocates and even third parties discuss the issues in dispute.

**Circle Sentencing & Restorative Conferencing**

This is mostly used in the criminal law arena and aims at keeping 'petty' criminals out of the formal prison system. The rationale behind restorative conferencing is community focused. The aim of restorative conference is to see the victim come to terms with the crime and for the offender to see the consequences of their crime. Suitable punishments for the offender will be discussed at the conference, with the aim of facilitating rehabilitation and providing something back to the victim and community.

*Comasters can act for clients in dispute resolutions.*

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**Important:** This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

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