

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

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Dispute Resolution

Fiona Hollier – Resolution Institute

[18.10]	Introduction	614	[18.90]	Other ADR processes	623
[18.20]	Categories of ADR processes.....	615	[18.100]	Reasons for considering ADR	624
[18.30]	Mediation.....	616	[18.110]	Reasons for considering litigation	624
[18.40]	Conciliation.....	619	[18.120]	ADR provided by courts, tribunals and government agencies	625
[18.50]	Arbitration.....	620	[18.130]	ADR provided by Community Justice Centres.....	626
[18.60]	Expert determination.....	621	[18.140]	ADR services provided by not-for-profits...	626
[18.70]	Family dispute resolution.....	622	[18.150]	ADR services provided privately	627
[18.80]	Adjudication for building and construction security of payments disputes.....	623			

Introduction

[18.10] Most conflicts and civil disputes are settled informally. Whether they be business to business disputes, disputes between clients and organisations, between consumers and businesses, or between colleagues, neighbours, friends and families, people usually find a way of resolving the matter or at least coming up with a workable solution with little or no professional help. In the case of those civil disputes which are not resolved informally, most in NSW (and elsewhere across Australia) are settled with professional legal and/or other independent third-party assistance and without a court or tribunal decision. Some are settled before litigation is commenced, others once proceedings have commenced, and yet others are settled just before, during or even after the hearing.

Increasingly, parties and their advisors are seeking options for intervening early to resolve disputes. Intervening early has the advantages for parties of saving costs, reducing anxiety and stress, mitigating damage to relationships and preserving a level of confidentiality. Intervening early offers the potential to resolve at least some of the relationship and communication elements as well as the financial and commercial issues of the dispute. Intervening early also means savings to the public purse in reducing costs of court and tribunal administration and other public services required to assist people in dispute.

Options for intervening early include:

- directly negotiating between parties and/or their advisors. Direct negotiations may include a settlement conference focused on settling the dispute early;
- engaging in conflict management coaching. A conflict management coach aims to assist individuals to manage conflict more effectively. As an early intervention strategy particularly in disputes where relationship and emotional issues are significant, it helps parties to reflect on their current behaviours in conflict, to consider more effective ways of engaging and to prepare parties for participating in negotiation, mediation, conciliation or family dispute resolution;
- using a suite of processes, commonly known as alternative dispute resolution, in which an independent person helps people to resolve

their disputes. The descriptor “alternative” indicates a process that is an alternative to having a decision made by a judge or magistrate in court. As decisions made by judges, magistrates and tribunal members about civil matters have reduced, and use of ADR has become mainstream, the word “alternative” is increasingly being replaced by the word “appropriate” or sometimes the phrase is condensed to “dispute resolution”. Alternative Dispute Resolution processes, as the subject of this chapter, are described in detail below;

- including in commercial and other agreements a dispute resolution clause, specifying the parties’ agreement on how any future dispute should be resolved. Provided the dispute resolution clause is sufficiently clear, the court may effectively enforce it by staying or adjourning proceedings until the dispute resolution clause has been complied with;
- using collaborative practice, particularly in the area of family law. (The process has the support of the Family Law Council and the Family Court of Australia.) Collaborative practice involves an agreement between parties and their lawyers at the outset of family law proceedings that they will attempt to reach a resolution without the matter going to court. If discussions break down, the clients must hire new lawyers if they wish to pursue the matter in court (see www.collabprofessionalsnsw.org.au).

Early intervention is increasingly encouraged by legislation. Commonwealth examples for pre-filing dispute resolution include family law proceedings involving parenting disputes and the *Civil Dispute Resolution Act 2011* (Cth), which requires parties to file a “genuine steps” statement setting out what has been done to attempt settlement before filing to commence proceedings. In NSW, examples include the *Farm Debt Mediation Act 1994* (NSW) with the 2018 amendments, which requires creditors to participate in mediation before they take possession of property or other enforcement action under a farm mortgage and the *Retail Leases Act 1994* (NSW), which requires that parties to a tenancy dispute apply to the Retail Tenancy Unit of NSW Fair Trading for mediation before proceedings can commence.

Categories of ADR processes

[18.20] ADR processes are frequently grouped into four different categories:

- facilitative;
- advisory or evaluative;
- determinative; and
- hybrid.

In each of these, the role of the dispute resolver varies as does the relative reliance on interests and rights.

[18.22] Facilitative

In facilitative processes, which include mediation, facilitation and facilitated negotiation, interests are usually perceived as being central to resolving the dispute. With the help of a skilled facilitative dispute resolver, people can understand and explore their interests: what is important to them about the substantive issues, the relationships, the communication, the ongoing arrangements and the outcomes. Facilitative processes in legal contexts support parties to work cooperatively to reach outcomes, which meet a legal threshold and where everyone benefits. Facilitative dispute resolvers support the parties to identify their interests, generate options and to make their own decisions about their dispute. In most settings, parties can access legal advice and technical information as needed from their own legal advisors or other independent experts. Facilitative dispute resolvers do not themselves provide advice, evaluate the dispute or make a decision for the parties. In facilitative processes, if people bring their interests under the spotlight, rather than focusing mostly or exclusively on their legal rights, it maximises the opportunities to explore innovative ways to resolve the dispute, create value, improve relationships and get an outcome that suits everyone.

[18.24] Advisory or evaluative

Examples include conciliation, what is sometimes referred to as “advisory” or “evaluative” mediation, case appraisal and (early) neutral evaluation. Each of these processes combines to a greater or lesser extent a focus on rights and interests, dependent in part on the context, the resourcing available, the time allowed, the service being sought by the parties and the service being

offered by the dispute resolver or the dispute resolution service. The dispute resolver may provide an expert opinion or information based on legal rights to the parties. In most settings, parties can access legal advice and technical information as needed from their own legal advisors or other independent experts. Parties can consider the information provided by the dispute resolver, their legal advisor or other technical expert, as well as their discernment about their interests, as a basis for generating options and making their own decisions about their dispute. As with the primarily facilitative processes, considering interests often increases the potential for finding outcomes, where everyone benefits. Focusing on interests, rather than relying exclusively or mainly on legal rights, enables the parties to address their relationship and communication interests and maximise the value that is available through cooperative problem solving.

[18.26] Determinative processes

Similar to court-based decision-making, determinative alternative dispute resolution processes such as arbitration, expert determination and adjudication, focus on the legal rights of the parties. Differently to courts and tribunals, the non-court based determinative processes provide greater scope to tailor the process to address at least some of the parties’ interests as well. In designing the process, dispute resolvers may consult with parties about their interests in relation to confidentiality, timeframes, the scope of issues to be covered, the potential for some issues to be mediated or litigated, the extent of evidence to be considered, face-to-face or online interactions and so on. In making a decision for the parties, determinative dispute resolvers rely on the legal rights of the parties and the evidence presented.

[18.28] Hybrid processes

Most typically, hybrid processes such as med-arb, arb-med and med-arb-med combine facilitative and determinative processes. A dispute resolver may start in one role and by agreement with the parties, move to another during the course of the process. Alternatively, one practitioner may, for

example, fulfil the facilitative role and another may fulfil the determinative role. Hybrid processes are used most frequently in complex and high value cases, where seamless transitions between facilitative and determinative processes may be perceived to be particularly valuable to resolve different aspects of the dispute, and/or where continuity of the dispute resolver is perceived to

offer a streamlined process if the matter or certain aspects of the matter cannot be resolved by the parties themselves. As the market for hybrid processes expand and the practice of hybrid processes develops, issues such as confidentiality and in particular the use of private sessions, are being explored.

Mediation

[18.30] Mediation is readily available in NSW, through private practitioners, court and tribunal mediator panels and accessible low cost or free services such as those offered by Community Justice Centres, Legal Aid, the Small Business Commissioner and a range of not-for-profits such as Relationships Australia, Unifam and Centacare. Mediation may be undertaken voluntarily, as a requirement before court proceedings (eg, family dispute resolution), at the direction of a court or tribunal once proceedings have commenced or required as part of a contract.

Mediation including the variant of family dispute resolution, together with conciliation, is one of the most frequently used ADR processes in NSW and across Australia.

Mediation has been offered in Australia since the mid-1970s. Initially, it was most frequently used to resolve community, neighbourhood and workplace disputes. From the mid-1980s, it was increasingly used in commercial disputes. By the early 2000s, there was a range of statutory services, private mediation providers and a choice of dispute resolution organisations, mediation training providers and membership bodies. There began to be interest in and an impetus for reaching agreement about a way to describe mediation and standards of practice for the benefit of practitioners and even more for the benefit of consumers.

With assistance and support from the then National Alternative Dispute Resolution Advisory Council (NADRAC), two government grants and the cooperation of more than 40 organisations associated with mediation across Australia, the National Mediator Accreditation System (NMAS) was established in 2008. The System was revised in 2015, after consultation with essentially the same group of organisations. The definition below represents the consensus reached by

those organisations, most of which continue to be members of the Mediator Standards Board (the body that oversees NMAS) and to offer accreditation under NMAS to their members, associates or employees (see the Mediator Standards Board (MSB) at www.msb.org.au).

Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:

- (a) communicate with each other, exchange information and seek understanding
- (b) identify, clarify and explore interests, issues and underlying needs
- (c) consider their alternatives
- (d) generate and evaluate options
- (e) negotiate with each other; and
- (f) reach and make their own decisions.

From the National Mediator Accreditation System 2015 page 2

Even though mediator accreditation in Australia is voluntary, large numbers of mediators have chosen to become “nationally accredited” having met necessary training, assessment and good character requirements. Nationally accredited mediators are also required to belong to an appropriate member or workplace organisation, to adhere to the ethical code of that organisation, to commit to standards of practice and to have professional or statutory indemnity cover. To maintain their accreditation, mediators must meet the requirements above on an ongoing basis and both to practise mediation and to participate in continuing professional development. Accreditation and renewal of accreditation are managed by Recognised Mediator Accreditation Bodies (RMABS). The largest of these is Resolution Institute (see www.resolution.institute).

[18.32] The role of the mediator

Mediators help parties to:

- identify the issues that need to be discussed;
- explore their interests – what is important to them about the substantive issues, the relationships, the communication, the ongoing arrangements and the outcomes;
- feel supported and safe;
- communicate clearly;
- keep the discussions on track;
- find a practical solution to the problem.

Mediators do not:

- give legal or other advice;
- make decisions about who is right or wrong or what the outcome should be;
- help one side win against the other;
- make any findings of fact;
- consider the evidence;
- provide counselling.

[18.34] The mediation process

As described by NMAS, the mediation process is applicable to a broad range of circumstances and offers potential for careful design to suit particular circumstances. Participation in mediation is voluntary as a party may leave or terminate the session at any time, even in circumstances where mediation is a pre-court proceeding requirement or has been directed by a court.

The National Mediator Accreditation System describes three stages in conducting mediation: preliminary conference or intake, the mediation meeting, suspending or terminating.

Preliminary conference or intake

A mediator or another person with appropriate skills may conduct the intake session, to decide if the matter is suitable for mediation and to ensure the parties understand the mediation process and the roles of the mediator, the parties and any advisors or support people. During intake, mediators assess the openness of parties to cooperative problem solving and negotiation and satisfy themselves that participating in mediation does not present a risk to parties' well being. Parties are asked if they have had or need any legal or other professional advice in preparation for the mediation meeting. Finally, they are asked if they agree to participate in the mediation and are usually asked to complete an agreement to mediate.

Mediation meeting

Mediation meetings are most commonly a structured meeting, in person or through video link-up, with all the parties in dispute and their advisors and a mediator. The process usually includes both joint and private sessions between the parties and mediator. The mediator guides the parties through the process and ensures their communication is appropriate and productive. Mediators use a range of techniques including listening, asking questions and summarising to support parties to understand what has led to the dispute and what all the parties need in order to resolve the dispute. Mediators also assist parties to consider their options carefully, particularly in comparison with the possible alternatives if mediation is not successful. Mediators assist parties to decide outcomes for themselves and to have those outcomes recorded appropriately.

Variants to the most commonly used approach described above include:

- co-mediation or team mediation used to respond to gender, cultural or other diversity issues and/or to help address complexity particularly in multi-party disputes;
- online conferencing or video link-up most commonly used, where it is not appropriate for parties to be in the same location or where parties are located at significant distances from each other. Online mediation is gaining popularity, because of its cost efficiencies and effectiveness and because of parties' increasing familiarity with online tools and interactions;
- shuttle mediation with the parties in separate rooms and the mediators moving between them may be used if violence or other circumstance means that having the parties together in the same room is unsuitable. Shuttle mediation may also be preferred by some parties and lawyers because it has similarities to the way legal settlement talks are conducted. Unless shuttle mediation is required for reasons of safety or well-being, most experienced mediators find joint sessions, where the parties communicate directly most effective and most likely to satisfy the parties' desire to have a say and be heard.

Suspending or terminating

Mediators may suspend or terminate the mediation in circumstances, where they consider that mediation is no longer suitable or productive.

This may be because either or both parties are not participating appropriately or wish to discontinue, or if mediation is being misused by either party or their advisor(s), or there are safety or well-being issues. The National Mediator Accreditation System encourages mediators to advise of their intention to suspend or terminate the mediation and to encourage the parties to consider alternative procedures for achieving resolution.

[18.36] When is mediation most likely to be suitable?

Mediation can be effective in most dispute types and is one of the most frequently used ADR processes. Even parties who initially assume mediation will not assist them are often surprised by what a difference the mediator and mediation process can make. As parties discuss their issues, they become better informed about their choices and the possibilities to resolve their dispute. With this information, they are often able and willing to agree on a pathway forward. When parties have control of their issues and the resolution, they mostly stick to the outcomes they have agreed.

Whether to proceed with mediation can only be decided after a thorough preliminary meeting or intake session. Sometimes more than one preliminary meeting is needed so that a mediator can help a party to become ready to participate productively and to design the process to accommodate any safety, communication, relationship, physical or mental health and comfort needs. Indicators of likely readiness and suitability include:

- parties wish to resolve the dispute in a way that is comparatively quick, inexpensive and informal;
- confidentiality is desirable: in most circumstances, parties can agree to keep the mediation discussions and outcome confidential. There are also legislative provisions related to mediation confidentiality and privilege applicable in some areas, see, for example, ss 30 and 31 of the *Civil Procedure Act 2005* (NSW);
- there are non-legal interests or a non-legal remedy is sought: many disputes involve legal and non-legal issues. Often the non-legal issues, such as a relationship or emotional discomfort or distress that has been experienced, is of equal or greater significance than the legal issue. If the relationship or emotional issues can be addressed through mediation, the legal issue

may be more easily addressed. If the non-legal issues are not addressed, even litigation about the legal issue may not resolve the overall dispute;

- parties want to have a say and be heard: feedback from parties often includes satisfaction about finally being heard and therefore being ready to move forward to agreeing an outcome;
- parties are willing to listen and hear: if parties want to have their say and be heard, they have a reciprocal responsibility to listen and hear;
- parties want to decide the outcome: because mediation is a facilitative process, parties decide the outcome themselves, rather than having it imposed upon them;
- parties are willing to cooperate to reach an outcome in which each party benefits;
- relationships are important: mediation may improve relationships through the process of communication and understanding. Mediation agreements may contain clauses about how parties will communicate and behave towards each other in future;
- parties' needs can be accommodated, for example, by including support people, choosing an appropriate venue and location, taking breaks, providing interpreters and so on. (Support people participate in mediation, to the extent negotiated between the mediator and the parties. Usually, this means that they have an important role in supporting parties to participate constructively, rather than participating actively themselves. In some circumstances, by agreement they may participate more actively, particularly in cases where one or both parties have a physical or mental disability that prevents them from participating fully on their own behalf.)

As described above, whether to proceed with mediation can only be decided after a thorough preliminary meeting or intake session. If matters that indicate possible unsuitability arise, the mediator will need to decide whether or not to go ahead with the mediation depending on whether the matters can be addressed through careful process design and so as not to impact negatively on the parties and the mediation process. Factors that may indicate a need for careful assessment of suitability for mediation include:

- significant power imbalances;
- inability by one or both parties to participate effectively in the session because of vulnerability or lack of behaviour control;

- issues of violence;
- persistent unwillingness to listen and hear;
- persistent unwillingness to cooperate so that the other party will also benefit from the outcome;
- circumstances in which parties' safety, communication, relationship, physical or mental health and comfort needs cannot be appropriately addressed.

Conciliation

[18.40] Conciliation is widely used in NSW primarily in a court, a tribunal or a government agency. (Advisory or evaluative mediation, which in process is similar to conciliation, is more frequently used by private dispute resolvers.) Conciliation may be voluntary, court ordered or required as part of a contract. Conciliation processes are sometimes referred to by different names, including conferencing or mediation.

Conciliation together with mediation, including the variant of family dispute resolution, is one of the most frequently used ADR processes in NSW and across Australia.

Providers of conciliation services often require conciliators to be accredited under the National Mediator Accreditation System (NMAS). Mediators and conciliators can use their practice as a conciliator as well as continuing professional development in conciliation to contribute to the requirements for ongoing NMAS accreditation. The overlap between accreditation of mediators and conciliators indicates similarities in the knowledge, skill and ethical requirements of both as well as significant similarities in process. Conciliation, as previously indicated, is usually considered as an advisory or evaluative process. Conciliation blends the facilitative process of mediation with an evaluative or advisory function. Conciliation often focuses more on the legal rights of the parties than mediation does, particularly when provided by a court or tribunal as part of a case management process and involving legal opinion by the conciliator.

Conciliation is a process where the participants, with the help of an independent person as conciliator:

- listen to and are heard by each other
- work out what the disputed issues are
- work out what everyone agrees on
- identify areas of common ground
- aim to reach a workable agreement
- develop options to resolve each issue

- receive expert advice and legal information (in some circumstances).

From Your Guide to Dispute Resolution NADRAC 2012

[18.42] The role of a conciliator

The role of a conciliator is similar to that of a mediator and yet different in significant ways. A conciliator may have professional expertise in the subject matter in dispute and in contrast to a mediator, will generally provide advice about the issues and may suggest options for resolution.

Conciliators usually help parties to:

- identify the relevant issues to be discussed;
- explore important interests relating to the particular dispute;
- be better informed by sharing their specialist knowledge, some legal information and advice about the issues;
- keep the discussions on track;
- reach an agreement often after making suggestions about some options or a solution;
- manage interactions so that they are fair.

Conciliators do not:

- decide who is right or wrong;
- make a judgement or decision about the dispute;
- tell parties what decision to make;
- provide counselling.

[18.44] The conciliation process

The format of the conciliation process varies depending on the context. It may be very similar to a mediation process or it could be condensed with less time spent on exploring the issues and interests and a stronger focus on reaching an agreement in a shorter timeframe. In some settings, conciliators attend to a number of different disputes almost simultaneously, moving between each and consulting with the different parties for each dispute in turn.

[18.46] When is conciliation most likely to be suitable?

Conciliation is most likely to be suitable when parties want to:

- resolve the dispute in a way that is comparatively inexpensive and informal;
- keep discussions confidential;
- decide the outcome themselves;
- hear the views of someone with expertise or want advice on the facts in dispute. This can be particularly useful when parties are unrepresented;
- try another process when earlier mediation has not resulted in an agreement;

- access a low-cost or free conciliation offered by a court, tribunal, government or other agency.

Conciliation may be unsuitable when there is:

- significant power imbalance;
- inability by one or both parties to participate effectively in the session because of vulnerability or lack of behaviour control;
- issues of violence;
- persistent unwillingness to listen and hear;
- persistent unwillingness to cooperate making it less likely that an outcome can be reached which will benefit each party;
- a circumstance that does not permit parties' safety, communication, relationship, physical or mental health and comfort needs to be addressed appropriately.

Arbitration

[18.50] In arbitration, the parties to a dispute present arguments and evidence to one or more independent person(s) (the arbitrators) who makes a determination based on this information. The determination is known as an award. Generally, people going to arbitration will have agreed in advance that the arbitrator's decision will be binding and enforceable.

Arbitration is usually a more formal and structured process than mediation or conciliation. It can seem very similar to a short form of court or tribunal hearing. Arbitration is often in a highly specialised area, in which the arbitrator(s) have expertise and experience.

Arbitration may be voluntary, required under a court order (only made where all of the participants have agreed to attend arbitration) or required as part of a contract. Often, people involved in a dispute over a contract will use arbitration because they agreed in the contract to use it if such a dispute arose.

From Your Guide to Dispute Resolution NADRAC 2012

[18.52] The role of an arbitrator

An arbitrator draws on his or her legal background and/or expertise in the subject of the dispute, to consider the evidence that parties submit and to make a decision. Arbitrators:

- decide how the process will be run, usually after consulting with parties;
- ensure that the parties follow guidelines about participating in the process;
- make a determination and write an award which may be final, binding and enforceable, if this is agreed in advance by the parties.

It is generally recognised that it is advisable for arbitrators to undertake training in arbitration. Arbitrators in Australia have most frequently undertaken training offered by Resolution Institute in conjunction with the University of Adelaide or training by the Chartered Institute of Arbitrators. In Australia, Resolution Institute accredits arbitrators and requires ongoing practice and professional development for arbitrators to retain accreditation (see www.resolution.institute).

[18.54] The arbitration process

The arbitration procedure may be governed by statute or rules, see for example, the *Commercial Arbitration Act 2010* (NSW) or the Resolution Institute Arbitration Rules 2016.

Arbitration usually involves one party giving notice to another of an intent to arbitrate. If the other party agrees the arbitration process commences, based on the rules and procedures selected by the parties or specified by contract. The arbitration process may include:

- parties making written statements;
- parties submitting evidence;
- an arbitrator or a panel of three arbitrators holding hearing(s), which parties and/or their legal representatives attend in person or by video link-up;
- expert or other witnesses being called.

The process concludes by the arbitrator considering all the evidence and producing an award. This will set out the decisions the arbitrator(s) has reached on the issues between the parties. Unless challenged, the award determines the rights and obligations of the parties.

[18.56] When is arbitration most likely to be suitable?

Arbitration is most likely to be suitable when the matter is primarily about legal issues, is complex and of high value and when parties want:

- a decision to be made for them by an independent third party with legal and technical knowledge and commercial savvy as appropriate;
- certainty – an arbitrator’s decision is final and can only be appealed in exceptional circumstances (eg, a serious unfairness in the arbitration process). Appeal against an arbitration award is relatively rare, which means that there is less risk of unknown additional time and costs often associated with an appeal from a court decision;
- privacy and confidentiality – the arbitrator’s award is confidential unless the parties agree otherwise. This reduces the chance of public commentary about the outcome;
- the opportunity to negotiate timeframes in front with an arbitrator to provide a decision that is generally faster than through court;
- a determinative process that has some flexibility to be tailored to suit some of the needs, particularly procedural needs of the parties;
- the potential to explore ways of containing costs. The costs of arbitration, as with court proceedings, vary according to the complexity of the matter, the willingness of parties to have the matter settled and the legal representation and advice that is needed. If parties choose arbitration, then with the arbitrator, they can consider various aspects of the process such as timeframes for submissions, size of submissions, which aspects of the matter will be included or excluded, how many meetings are to be held and whether these will be in person or online and so on. The flexibility available in arbitration can contribute to containing costs, which generally means that the overall costs are lower than they would be with court proceedings;
- an alternative process to mediation or conciliation, because of preference or because previous mediation or conciliation has not resolved the dispute.

Arbitration might not be suitable if parties would prefer a prescribed process as is more frequently offered by courts and tribunals or if parties are particularly looking for a fast and low-cost process.

Expert determination

[18.60] Expert determination is an informal, fast and effective process in which an independent expert makes a decision about the dispute. It can be used to resolve a wide range of disputes, including accounting, share valuations, industrial and construction. Parties agree beforehand whether or not they will be bound by the decision of the expert. Unlike arbitration, expert determination is not covered by legislation.

[18.62] The role of the expert determiner

An expert determiner decides a technical or specialised matter, drawing on his or her expertise

in the field and basing it on the evidence presented by the parties. The rules being used need to make clear that the expert determiner is not an arbitrator and the process is not an arbitration (as defined by statute.)

While there is no training offered regularly in expert determination, or an expert determiner accreditation, Resolution Institute requires expert determiners that it nominates for disputes to hold arbitration accreditation, to provide a level of quality assurance for customers (see www.resolution.institute).

An expert determiner:

- confirms with parties whether or not the decision will be legally binding;

- confirms with parties the extent of confidentiality;
- consults with parties about the process including about the scope of matters, process and timing for making submissions and submitting documents and other evidence, the role of experts retained by parties, schedule for and attendance at meetings and so on;
- adopts procedures that are suitable to the matter and that will provide a speedy, cost-effective and fair means of determining the dispute;
- acts fairly and impartially.

[18.64] The expert determination process

The expert determination process is usually governed by rules such as the Resolution Institute Expert Determination Rules 2016 agreed by parties or specified in a contract. The process includes:

- a preliminary conference to decide details of the process, the scope of issues and administrative arrangements;

- parties making submissions and providing documents and other evidence;
- hearings if and as considered appropriate to expedite the process;
- parties accessing advice from legal and other expert advisors as appropriate.

[18.66] When is expert determination most likely to be suitable?

Expert determination is most likely to be suitable when parties want an independent expert, to decide:

- a technical or specialised issue between the parties;
- an informal, fast and cost-effective determinative process;
- a process that can be tailored to suit the matter.

Expert determination is less likely to be suitable if parties require a determinative process governed by statute or if relationship and emotional issues are significant in the dispute.

Family dispute resolution

[18.70] Since 2006, the *Family Law Act 1975* (Cth) has required most parties who have a dispute about parenting to participate in dispute resolution before commencing parenting proceedings.

The new provisions created a new category of ADR called Family Dispute Resolution (FDR) to be conducted by Family Dispute Resolution Practitioners (FDRPs). The qualification and registration requirements of FDRPs are set out in the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth) and administered by the Commonwealth Attorney-General's Department.

In order to file an application in relation to a parenting dispute, a party must be able to demonstrate they have made a genuine effort to resolve the dispute through FDR or otherwise that the matter is not suitable for FDR. There are a number of limited exceptions, including where a matter is unsuitable for mediation or relates to urgent issues. There is a process for FDRPs to issue parties with certificates that may provide one of the following:

1. the party did not attend FDR because the other party refused to attend;
2. the party did not attend FDR because the matter was assessed as unsuitable;
3. the parties attended FDR and all attendees made a genuine effort to resolve the issues;
4. the party attended FDR but did not make a genuine effort;
5. the party began attending FDR, but it was not appropriate to continue.

Parties may also submit an affidavit in lieu of a certificate to the court if they wish to claim an exception from the FDR requirement.

A network of federally funded Family Relationship Centres (FRCs) was also established in 2006 to provide FDR and other supportive services, including parenting programs and counselling services. FRCs are managed by a number of non-government service providers including Relationships Australia, Interrelate, Uniting Care and Anglicare. As well as FRCs, other FDR providers include:

- private practitioners working independently or through a non-FRC mediation provider;
- Legal Aid NSW.

While there is no legislative requirement to attempt ADR before starting property proceedings

in the Family Court, many separating couples find ADR very useful. Private ADR providers, a range of FRCs and Community Justice Centres, can assist with property disputes.

Adjudication for building and construction security of payments disputes

[18.80] In New South Wales, as in all other state jurisdiction in Australia, security of payment legislation aims to improve cash flow in the building and construction industry. Specifically, the *Building and Construction Industry Security of Payment Act 1999* (NSW) aims to ensure that any person who undertakes to carry out construction work or to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments. This is a statutory entitlement which does not require the relevant construction contract to make provision for progress payments.

Under this legislation, where there is a dispute over payment, a claimant may lodge an application for adjudication. Adjudication is a determinative process, which under this legislation is a fast and inexpensive process, completed within specified timeframes.

An adjudicator's determination about the payment dispute is usually an interim decision. While a right of review of an interim decision is limited, parties retain the right to have the

dispute dealt with on a full and final basis through litigation or arbitration at a later time.

Adjudicators determine matters within strict time limits. Most commonly, adjudicators rely on documents prepared and submitted by applicants and claimants. In some cases, adjudicators may request to hear from disputants directly.

Applications are submitted to Nominating Authorities that are authorised and subject to regulation by Fair Trading NSW. Nominating authorities are:

- Adjudicate Today Pty Ltd: www.adjudicate.com.au;
- Australian Building & Construction Dispute Resolution Service: www.abcdrs.com.au;
- Australian Solutions Centre Pty Ltd: www.solutionscentre.com.au;
- Expert Adjudication: www.expertadj.com.au;
- Master Builders Association of New South Wales Pty Ltd: www.mbansw.asn.au;
- Resolution Institute (formerly LEADR & IAMA): www.resolution.institute.

Other ADR processes

[18.90] ADR includes a range of other processes such as:

- online dispute resolution (ODR), which is increasingly being used. Online dispute resolution platforms are providing options to conduct current or amended forms of ADR, such as mediation and arbitration. Features that are being explored for inclusion in platforms include case management, appointment scheduling, integrated video and audio, settlement calculators, blind bidding, diversity in public and private chat rooms,

document submission, video, audio and written messaging and integrated billing. There is also preliminary exploration of how artificial intelligence may be used;

- case appraisal, where a dispute resolution practitioner investigates the dispute and provides advice on possible and desirable outcomes. Expert appraisal is a similar process relying on the subject matter expertise of the dispute resolution practitioner;
- mini-trial, where the parties present their evidence and arguments to a dispute resolution

- practitioner who provides advice on the facts in dispute and on possible outcomes;
- early neutral evaluation, a process in which the parties at an early stage present arguments and evidence to a dispute resolution practitioner who then makes a determination on the key issues in dispute and most effective means of resolving the dispute without determining the facts of the dispute;
 - fact finding, an investigation process in which the parties present arguments and evidence to a dispute resolution practitioner who makes a determination as to the facts, but who does not make any finding or recommendations on the outcome;
 - multi-party mediation, sometimes called conflict management, is a mediation process, which involves several parties or groups of parties.

Reasons for considering ADR

[18.100] There are many reasons to consider ADR, including that ADR processes:

- are often much faster and less expensive than going to court;
- can maximise the self-determination of the parties. Participants may negotiate on and agree to an outcome that is different from what a court would or could order. Agreements may include resolution of legal issues and other matters that are important to the parties;
- are often informal and allow more direct involvement by parties than court processes do;
- can be more flexible than court processes and parties can choose a process that has certain benefits for the particular dispute. For example, if the dispute concerns scientific, engineering or other technical issues, parties can engage an ADR practitioner with more specialist knowledge than a judicial decision-maker might have;
- are typically confidential and will not be conducted in an open courtroom or result in published reasons for judgment;
- may maintain or improve personal and business relationships for the future;
- can help resolve non-legal disputes for which court is not an appropriate avenue, for example, interpersonal disputes between neighbours, friends and family members;
- may assist the parties to clarify and narrow the issues in dispute, even where the ADR process does not result in a settlement or a resolution;
- can bring forward the date of settlement, thereby minimising the amount of time and money spent on the dispute;
- may decrease the pressure on courts and the public purse;
- may increase access to justice for parties who do not have the financial or personal resources to go to court;
- usually result in parties typically reporting high levels of satisfaction with the process.

Reasons for considering litigation

[18.110]

- If the dispute involves a matter of public interest, it may be more appropriate to have a court judgment to set a precedent.
- If a party is self-represented and considers they may not be able to represent their interests effectively, they may prefer a court ruling that they can feel confident is fair at least in terms of their legal rights.
- If there is a history of physical or emotional violence or abuse or other source of power imbalance or vulnerability.
- If parties want to have the right to go to court about a matter, they may prefer not to have a binding determination such as is usually an outcome of arbitration.
- If parties want ease of enforceability, this may be facilitated by a court or tribunal order.

Agreements made using facilitative or advisory processes may need an additional step of having a court order made to achieve the same level of enforceability.

- If ADR is not successful and is followed by litigation, the legal costs may be higher overall. This supports the need for thorough intake for suitability for an ADR process.

Alternative dispute resolution provided by courts, tribunals and government agencies

[18.120] Parties may, at any time while their dispute is before the court, choose to use an ADR process. Courts may adjourn proceedings to accommodate such attempts.

The *Civil Procedure Act 2005* (NSW) contains specific referral powers in relation to mediation (Pt 4) and arbitration (Pt 5), including the power to make mandatory referrals. There is also a range of other pieces of legislation that promote or require ADR between parties to legal proceedings and provide specific referral powers. Examples of court provision are:

- Local courts: registrars regularly conduct pre-trial review meetings with clients at which settlement is discussed. Local courts may also refer matters such as Apprehended Personal Violence Orders (APVOs) and matters that would otherwise be referred to the Small Claims Division to Community Justice Centres (see below).
- The Children’s Court uses ADR procedures such as dispute resolution conferences, external mediation and, in some areas, care circles for cases involving Aboriginal children in care and protection cases in order to provide frank and open discussion between the parties in a structured forum to encourage agreement on what action should be taken in the best interests of the child or young person.
- “Family courts” as a term refers to the various courts in NSW that have jurisdiction under the *Family Law Act 1975* to make orders relating to children and young people. They are the Family Court of Australia, the Federal Circuit court and State Local courts.
- District Courts: Matters are regularly referred to ADR (which the District Court defines to include settlement conferences) at the time of listing them for hearing. Additionally, matters

may be referred to ADR at an earlier stage, where it is considered that it may be beneficial in either the resolution of the matter or in narrowing the issues between the parties.

- Supreme Court: Almost all family provision cases are referred to mediation. In other contested civil cases (including appeals), litigants are encouraged to consider mediation, and the Court may order mediation to take place even if one party objects. Most of the mediations are conducted by Supreme Court registrar-mediators.
- Land and Environment Court: The Land and Environment Court uses mediation, conciliation and hybrid forms of ADR. Sessions are conducted by commissioners or registrars who are trained mediators or by external mediators.

The NSW Civil and Administrative Tribunal (NCAT) uses ADR processes including conciliation, mediation and adjudication for a wide range of civil matters. Also used are expert conclaves for building disputes.

Most NSW government agencies incorporate ADR processes for suitable matters. Examples of NSW commissions which provide ADR or hybrid ADR processes include the Aged Care Complaints Commission, the Health Care Complaints Commission, the Workers Compensation Commission, the Information and Privacy Commission and the Small Business Commission.

Examples of NSW government agencies that provide ADR or hybrid ADR services are Property NSW for valuation disputes, Planning NSW for planning disputes and Fair Trading NSW for disputes in a varied range of areas including strata, community living, community land management, retail leases, tenancy, homebuilding and building construction security of payments and so on.

ADR provided by Community Justice Centres

[18.130] As part of the NSW Department of Justice, Community Justice Centres (CJC) provide free, quick and accessible community mediation in accordance with the *Community Justice Centres Act 1983* (NSW). Services are provided across NSW using local mediators and venues. Anyone may request CJC mediation for themselves. Service providers may also refer parties to CJC mediation. CJC also receives referrals from courts and tribunals.

Community Justice Centres provide mediation in line with the highly facilitative form described earlier in this chapter. Mediators (and CJC staff) may not disclose any information obtained in connection with mediation except with consent of the parties or where necessary to prevent or minimise risk of injury to a person or damage to property.

Usually, CJC agreements are made in good faith. Parties may agree in writing that they wish to make a legally binding agreement.

Apart from criminal matters and matters assessed as unsuitable for mediation, CJC addresses a wide range of issues, including those related to:

- money and debt (eg, unpaid bills, small claims, small business);
- communities and associations (eg, disagreements within clubs and societies);
- business and consumers (eg, unpaid and disputed bills, quality complaints);
- employees (eg, disputes between employees and between employees and management);
- family, relationships and children (eg, family disputes, including extended family feuding, wills and estates, elder disputes, sibling disputes and in some cases children and property disputes following relationship breakdown);
- housing (eg, between tenants in public housing and between landlords and tenants);
- social relationships (eg, friends, acquaintances, mediation in schools).

CJC has more than 100 mediators, appointed to its panel for terms of up to three years. As required, CJC can arrange accessible venues, telephone and video link-ups, interpreters and similar support for parties to enable them to attend mediation. CJC can usually provide an Aboriginal mediator if requested by a party.

ADR services provided by not-for-profits

[18.140] Not-for-profit ADR provision includes a range of direct ADR services, professional membership services, training and accreditation

services and services that nominate dispute resolution practitioners in private practice.

<i>Name</i>	<i>Professional membership services</i>	<i>Accreditation services</i>	<i>Training and/or professional development services</i>	<i>Nomination or search directory services</i>
Resolution Institute	✓	✓	✓	✓
Australian Institute of Family Law Arbitrators and Mediators	✓	✓	✓	✓
Australian Dispute Resolution Australia (ADRA)	✓	✓	✓	
Australian Disputes Centre		✓	✓	✓

<i>Name</i>	<i>Professional membership services</i>	<i>Accreditation services</i>	<i>Training and/or professional development services</i>	<i>Nomination or search directory services</i>
NSW Law Society	✓	✓	✓	✓
NSW Bar Association	✓	✓	✓	✓
Australian Disputes Centre		✓	✓	✓
Australian Centre for International Commercial Arbitration (ACICA)				✓

Direct dispute resolution services are provided by a range of not-for-profits. Relationships Australia, Interrelate, Uniting Care, Centrecare and Anglicare

provide family dispute resolution through Family Relationship Centres as well as other services for families and communities.

ADR services provided privately

[18.150] Many dispute resolution practitioners work in private practice and contract their services directly to parties, often by word-of-mouth referral or through a government, not-for-profit or private agency. Information can be found about their

training, accreditation and experience through their own websites or through one of the search directories of their membership organisation listed in [18.140].

Contact points

[18.160] Parties with hearing or speech impairment may use a TTY, by ringing through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

People who need assistance with understanding and speaking English can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Aged Care Complaints Commissioner

www.agedcarecomplaints.gov.au
ph: 1800 550 552

Australian Disputes Centre

www.disputescentre.com.au
ph: 9239 0700

Community Justice Centres (CJC)

www.cjc.justice.nsw.gov.au
ph: 1800 990 777

Communities and Justice, Department of – previously Department of Family and Community Services (FACS)

www.dcj.nsw.gov.au
ph: 9716 2222

Family Relationships Online

www.familyrelationships.gov.au
ph: 1800 050 321

Family Relationships Centres

www.familyrelationships.gov.au/Services/FRC/Pages/default.aspx

Health Care Complaints Commission (HCCC)

www.hccc.nsw.gov.au
ph: 1800 043 159 or 9219 7444

Law Society of NSW

www.lawsociety.com.au
ph: 9926 0333

Legal Aid NSW

www.legalaid.nsw.gov.au/
ph: 1300 888 529

NSW Civil and Administrative Tribunal (NCAT)

www.ncat.nsw.gov.au
ph: 1300 006 228

NSW Fair Trading

www.fairtrading.nsw.gov.au
ph: 13 32 20

NSW Small Business Commission

www.smallbusiness.nsw.gov.au
ph: 1300 795 534 or 8222 4815

Relationships Australia

www.relationshipsnsw.org.au
ph: 1300 364 277

Resolution Institute

www.resolution.institute
ph: 9251 3366 or 1800 651 650