

Guest Editor's Note

Bar News Special ADR Edition

By Mary Walker



The *Bar News* Editorial Committee has engaged the ADR Committee to assist with this *Special ADR Edition of Bar News*. It is a privilege to be invited to be special editor of this edition. Many eminent jurists and practitioners have provided articles which illustrate the breadth of engagement in ADR across jurisdictions. I wish to thank them for their contributions. I mention particularly, the Governor of New South Wales, the Chief Justice of the Supreme Court of NSW, the Chief Justice and Deputy Chief Justice of the Family Court of Australia, the Hon P.A. Bergin SC and the Hon Terry Sheahan AO for their reflections. I also wish to thank past and present members of the ADR Committee for their diligence and dedication to the development of ADR as a practice area at our Bar.

As this edition goes to print Covid-19 restrictions are requiring us to re-evaluate and to re-consider how we fulfil our obligations during this difficult time. e-Courts and Online Dispute Resolution (ODR) are coming to the fore. As we learn to use video-conferencing, Microsoft Teams, Zoom or hybrids of these with “social distancing” or “physical distancing with social isolation”, our ADR practitioners are experimenting with ODR platforms and an amalgam of interfaces to simulate mediations and hybrid ADR processes.

Several key themes have been presented in this edition: *ADR and the Administration of Justice*, *Developing Excellence of Barristers Appearing as Representatives in or Conducting ADR Processes*, *Envisaging Future Practice in ADR at the Bar* and *Encouraging the Bar to Lead in ADR*. As noted in a number of the articles published in this edition, commentators have preferred that “ADR” represent “additional” rather than “alternative” dispute resolution (coined by Sir Laurence Street AC KCMG QC). A tribute to Sir Laurence’s contribution to ADR has been included in this edition. The Chief Justice noted in his *Opening Address* at the NSW Bar Association 2011 *Advanced Alternative Dispute Resolution Workshop* (p.5-6) that every effort ought to be made to ensure that ADR is integrated into court processes, that it is not in competition but is “additional” and “appropriate.”

The cover of this edition illustrates our ability to assist parties to choose an appropriate dispute resolution mechanism for their dispute by informing the client or instructing solicitor about alternatives to a fully contested adjudication of the case (our obligation pursuant to Bar Rule 36 *Legal Profession Uniform Conduct (Barristers) Rules 2015*). The cover outlines not only our obligations and ADR options but the ideas of “varieties of dispute processing” and the “multi-door courthouse”, concepts formulated by the late Professor Frank Sander at the Pound Conference in 1976 (USA). A Vale to Professor Emeritus Frank E.A. Sander, Harvard University, the father of modern dispute resolution has also been included.

We are fortunate to have the Chief Justice opine as to the future of ADR in this edition, the Hon P.A. Bergin discussing ADR and the legal profession and the Chief Justice and Deputy Chief Justice of the Family Court of Australia commenting on their view that *Good lawyers are good advocates, but great lawyers excel at problem solving*. Moses SC provides an analysis of ADR and the NSW Bar in the 21st Century and talks of specialist advocacy in and outside of the courtroom while Davidson SC examines the art of advocacy in mediation. Snap shots from different jurisdictions and case notes are highlighted. On the international front, the Governor reflects on matters arising in international arbitration focussing on apparent bias and conflicts of interest and I provide a note on the introduction of the United Nations Convention on International Settlement Agreements Resulting from Mediation. Statistics on ADR at the New South Wales Bar and a collage of comments from members of the ADR Committee provide some insights into the current practice of ADR at our Bar. Also, an interview with the Hon Terry Sheahan AO, draws upon his involvement in 1986 as Attorney General in establishing the first independent ADR organisation in Australia, the Australian Commercial Disputes Centre. I tried to contact the Hon Andrew Rogers QC for a contribution to this edition however was

unable to reach him, but I acknowledge his pragmatic contribution in this arena. I also acknowledge the contribution of the Hon Justice Brian Preston, Chief Judge of the Land and Environment of New South Wales, who has developed a multi-door courthouse and championed the use of ADR. At the time of commissioning articles for this edition, unfortunately Justice Preston was overseas and was unable to contribute.

It has been 30 years since the First Settlement Week was held by the Supreme Court of NSW and the NSW Law Society. It seems counterintuitive to be continuing to advocate acceptance of ADR at our Bar. In the 1990's and early 2000's, Australia was at the forefront of global developments in ADR in the civil and commercial jurisdictions. What is often neglected is the acknowledgment of the earlier formulation of ADR in the industrial and employment fields, family law, community justice centres and in tribunals. It is evident by reference to the Lord Woolf *Access to Justice Report on the Civil Justice System in England and Wales* (UK 1996), the Sackville Report on *Access to Justice* (2002), Australian Government Attorney General's Department, *Access to Justice Taskforce A Strategic Framework for Access to Justice in the Federal Justice Civil Justice System* (2009), the 2014 Australian Government Productivity Commission Report *Access to Justice Arrangements*, the Lord Jackson Report on the *Review of Civil Litigation Costs* (UK 2009) and the introduction of *Civil Procedure Act 2005* (NSW) that ADR has become an integral part of case management in courts exercising civil jurisdiction and is now an accepted part of the administration of justice in Australian jurisdictions.

The institutionalisation of ADR has been written about since the 1990's. In addition to legislative changes to include ADR processes and the introduction of court practice notes, the amendments noted in the *Legal Profession Uniform Conduct (Barristers) Amendment (Work of a Barrister) Rule 2016* and the *Legal Profession Uniform Admission Amendment (Academic Areas of Knowledge) Rule 2017*

(*Priestly 11*), were not insignificant and have cemented ADR in our legal practice and education frameworks.

On 20 June 1997, Bar Rule 74 of the New South Wales Bar Association Rules was gazetted. Between 1997 and 2011 barrister's work was defined to include acting as a referee, arbitrator or mediator (BR 74(g)). From 8 August 2011 until 2 September 2016 this was no longer the case and ADR was relegated to, at best, Bar Rule "11(g) carrying out work properly incidental to the kinds of work referred to in [11](a)-(f), and [11](h) such other work as is from time to time commonly carried out by barristers". Since 2 September 2016, the *Legal Profession Uniform Conduct (Barristers) Rules 2015* reflects the true work of ADR at the Bar as including, "11(d) representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution".

The *Priestly 11* are eleven law subjects required to be successfully completed for admission into practice as a legal practitioner in Australia. The *Legal Profession Uniform Admission Amendment (Academic Areas of Knowledge) Rule 2017* noted the changes to the *Priestly 11* to include ADR. The changes were to clause 11, the title of the subject changed from "Civil Procedure" to "Civil Dispute Resolution", a new topic 12 "Alternative Dispute Resolution" was added and topic 13 was altered to read, "Obligations of Parties and Practitioners Relating to the Resolution of Disputes".

Regulations, rules and guidelines have been developed to manage the proliferation of ADR processes. The Law Council of Australia formulated an ADR policy in 1989 and has promulgated a Trilogy of Mediation Guidelines (*Ethical Guidelines for Mediators, Guidelines for Lawyers in Mediations and Guidelines for Parties in Mediations*) which has been adopted or used as a base for the development of ethical guidelines by many institutions here and abroad. The Governor refers to the *IBA Guidelines on Conflicts of Interest in International Arbitration*. Ethical conduct and competency standards in ADR



The Bar Association's ADR Committee:

Back row (standing, left to right): The Hon Stephen O'Ryan QC, Navid Sedaghati, Mark Darian-Smith, Jodi Steele, Wilson Chan, Tom Davie, Louise Mathias, Fiona Sinclair, Hugh Stowe

Front row (seated, left to right): Greg Laughton SC, Mary Walker, John Fernon SC, Stephen Walsh QC

Absent: Max Kimber SC, Terry Mehigan SC, Steven Goldstein, Neil Jackson, Julie Kearney, Mary Rebehy

processes are now under scrutiny. The Chief Justice's seminal paper, *Off with the Wig: Issues that Arise for Advocates when Switching from the Courtroom to the Negotiating Table*, (30 March 2017) outlines guidance on ethical practice in ADR. The Chief Justice came to the conclusion that: "In a dispute resolution environment where advocates must learn to wear two hats – or wigs, if you will – it is important that they are attuned to the nuances in duties and immunities that apply to each role" (p.14 [46]) and that "[p]erhaps it is fair to say now that ADR has evolved to the stage not merely of being additional or supplementary but complementary and integrative" within the judicial system (p.1 [3]).

Reviewing statistics found in annual reports of courts and tribunals and those collated by the NSW Bar Association show that ADR aligned to litigation and the engagement of the Bar in ADR is increasing. An example is found in the Supreme Court Annual Review 2018. Mediation is described (p.21) as the alternative dispute resolution method most commonly employed in Supreme Court proceedings and statistical analysis of the Sydney Registry illustrated (p.33):

During 2018 the registry recorded a total number of 1,169 referrals to mediation (court-annexed or private), which was a 24 per cent increase from the 2017 total of 943 referrals. The number of court annexed mediation listings (which are conducted by

the Court's registrars) decreased from 571 in 2017 to 428 in 2018, so the increase in the total referrals arises from increased referrals to private mediators. It is possible that the total number of referrals does not fully include the use of private mediation because it is not essential for litigants to obtain a formal referral for mediation to use private mediation, nor (where no referral order has been made) to disclose to the Court that private mediation has been used.

The Bar's current statistics which have been reproduced in this edition show that in 2018, 1000 out of 1518 respondents (65.9%) stated that they had appeared in mediation or arbitration during the preceding year. In 2018, 13% of respondents indicated that they are accredited as mediators or arbitrators.

Arbitration and expert determination are processes similar to our traditional competency skills embedded in litigation. Our transition to practise in determinative ADR methods is not foreign to our basic legal training. Here lies the difficulty. The theory and practice of mediation is an additional learning (not necessarily separate from our legal training). Assuming that most barristers will be mediating matters which have their genesis as legal disputes and are court-referred, the challenge is how to employ these additional skills and frameworks without resorting to old habits and minimising the process.

Justice Black in *Tresize v National Australia Bank Ltd* (1994) 50 FCR 134 (at 137) remarked that:

Settlement is part of the ordinary process of litigation in the adversarial system, and advising on settlement and negotiating settlements is part of the every-day work of litigation solicitors and of counsel.

Negotiating settlements is a commonplace event in practising as an advocate. Negotiation is the kernel of the majority of consensual ADR processes including mediation. Statistics illustrate a large majority of cases initiated in the civil jurisdictions of our courts resolve through settlement. To be effective, consensual ADR processes rely heavily on the advice and risk analyses provided by legal practitioners and they also rely heavily on the negotiation skills of legal practitioners. The reports of Lord Woolf and Lord Jackson have highlighted the need for ADR processes and court initiatives through practice notes and court rules to draw negotiations in at an earlier time rather than rely upon old practices of negotiating at the steps of the court immediately before a final hearing of a matter. None of this is "new", it merely exemplifies the need for practitioners to be knowledgeable and skilled in negotiation and the spectrum of ADR processes in addition to trial advocacy. ODR has been emerging since the mid-1990's. A great deal of the activity, other than ODR pilots, has been involved in the resolution of small consumer claims, such as dispute resolution processes developed by eBay and Alibaba and by some tribunals. A treatise on the pilots of ODR is for another day. Distilling the experiences of those involved in ODR and to identify lessons arising from work in this area will assist us to refine our future practices. Covid-19 has brought the need for e-Courts and ODR forward. Activity in this area is encountering inevitable teething problems. Intrinsicly, some of these features will be integrated into the practices adopted by courts, tribunals and the profession in the future. ODR will be the area of invention of platforms for use in ADR with applications adopted for use for ADR outreach to regional and country Australia and internationally. I do not believe that ODR will change everything, I hope it does not. I believe however we need to amalgamate some of the useful procedures utilised now for a post-Covid period.

The challenge for 2020 and the near horizon in ADR is a focus on ethical behaviour and best practice in ADR if barristers are to be pre-eminent practitioners in this area. Barristers have the ability to be leaders in ADR. **BN**