Alternative or mainstream?

Is it time to take the 'A' out of ADR?

The continuing and growing integration of alternative dispute resolution (ADR) processes into the legal mainstream, particularly in civil matters, means that practitioners should rethink their attitude to ADR options. Report by **Paul Coves**.

Alternative dispute resolution (ADR) is a term widely accepted in the legal system to describe a range of processes engaged in by disputants, practitioners and/or third parties to resolve disputes.

Acceptance of ADR's 'alternative' status within the Australian legal context comes from the fact that ADR is the 'new (but now, admittedly, somewhat late adolescent) kid on the block'. Its process options are alternative to those of litigation, whereby disputes are resolved through judicial determination based on a party's legal rights.

ADR processes more commonly encountered by legal practitioners in the civil dispute sphere are negotiation, facilitation, mediation, conciliation and arbitration. Others such as early neutral evaluation and case appraisal are less commonly utilised but form part of a growing number of ADR process options in the dispute resolution spectrum, which range from the informal (negotiation) to the formal (adjudication).

Outside of the traditional legal context, by sheer weight of numbers, the alternatives to court-determined dispute resolution are really mainstream. They are the dominant means of dealing with disputes and deserve more consideration.

If it is accepted that (a) there is a continuing trend in the reduction of judicially determined civil disputes, (b) increasing numbers of self-represented parties in civil disputes before the courts, and (c) the use of ADR processes in civil disputes is increasing, then legal practitioners engaged in civil dispute resolution should consider the alternatives, to properly service their clients and keep up with the game.

As legal practitioners, is it time to realign our thinking and take the 'A' out of ADR?

Growth of ADR and inclusion in legislation

There has been an upsurge in the burgeoning ADR 'industry'. While many factors impact on its growth, two simple reasons are primarily offered – time and cost. Whether correct or not, the perception is that determination of one's legal rights through a litigious process is both more costly and time-consuming than that achieved through ADR alone.

The perceived general benefits of ADR processes over those of litigation are seen to be in process flexibility, informality, speed, confidentiality and cost-effectiveness. They are processes by which the 'rules' are set or agreed by the participants and outcomes are, in many cases, consensual rather than those unilaterally imposed by a third-party decision-maker.

Various forms of ADR process have been enshrined in legislation throughout Australia for some time. In Queensland, the *Uniform Civil Procedure Rules 1999* and the *Queensland Civil and Administrative Tribunal Act 2009* regulate the majority of civil disputes and incorporate ADR into their respective dispute resolution processes.

Similarly, the *Civil Dispute Resolution Act 2011* (Cth) (CDRA) in the federal jurisdiction requires "genuine steps statements" to be filed by parties in many matters at the time of commencing proceedings.

In personal injuries, succession, family and community dispute, entry-level alternative dispute resolution is also contemplated by mandatory legislative or practice direction requirements.

ADR and access to justice

The growth of ADR into the civil justice system is not without its critics. This is especially so when ADR options are mandatorily included in legislation as a prerequisite before entry into court. In England, where mediation has been embraced as a preferred legislative method of ADR, the words of Lord Neuberger, Master of the Rolls, when considering the possible inclusion of mandatory mediation into pre-court process are salutary:

"Requiring all individuals to mediate before gaining access to the court will necessarily have a greater impact on some classes of litigation than others. Some litigants will have the resources to afford both mediation and litigation. Others will not … Financial pressure on some litigants may well mean that a mediated solution becomes a substitute for justice because the requirement to mediate is a fetter on access to justice. Such financially based fetters run the risk of depriving some citizens of their right of access to justice."[2]

I acknowledge that self-interest is a strong horse; however, the concerns expressed by Lord Neuberger have been reflected in Australia by members of the judiciary and those who, in my view, have faith in a discretionary rather than mandatory system of ADR inclusion in litigation. In my experience, some matters are not capable of mediated or other consensual forms of settlement. Choice should prevail.

Where to from here?

ADR processes are here to stay. While cost efficiencies and access to justice may be competitive tensions, it is consumers (disputants) who demand value for money. Justice (if arguably not achievable through ADR processes) it would seem, has its price.

Legal practitioners, whether in-house or in private practice, are well served by understanding the ADR options available to them in attaining the early resolution of disputes. For whatever reason, the decreasing number of civil disputes being resolved by judicial determination creates opportunity for those practitioners willing to embrace ADR.

What was once alternative is now mainstream. In today's competitive legal market, practitioners who have expertise in 'alternative' dispute resolution practices are well placed for success.

This article appears courtesy of the Queensland Law Society Alternative Dispute Resolution Committee.
Paul Coves is a consultant solicitor, nationally accredited mediator and registered family dispute resolution practitioner. He is also a member of the committee.

Notes

1 Section 3(b) *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

2 Lord Neuberger of Abbotsbury MR, 'Has Mediation Had its Day?', Gordon Slynn Memorial Lecture, 10 November 2010.