Administrative justice and alternative dispute resolution: the Australian experience

Trevor Buck
University of Leicester

DCA Research Series 8/05
November 2005
Administrative justice and alternative dispute resolution: the Australian experience

Trevor Buck
University of Leicester
The Research Unit, Department for Constitutional Affairs, was formed in April 1996. Its aim is to develop and focus the use of research so that it informs the various stages of policy-making and the implementation and evaluation of policy.

Crown Copyright 2005.  
Extracts from this document may be reproduced for non-commercial purposes on condition that the source is acknowledged.

First Published 2005

ISBN 1 84099 064 3
Acknowledgements

I am most grateful to my colleagues at the Faculty of Law, University of Leicester, who showed interest in, and gave me encouragement to undertake, this research project. Particular thanks are due to Helen Young at the University of Leicester Library for her guidance on accessing relevant materials.

Author

Trevor Buck is a Senior Lecturer in the Faculty of Law, University of Leicester. He teaches constitutional and administrative law, family law, and social security law. He has research interests in public law, social welfare and family law. Trevor has managed a number of empirical socio-legal research projects and has recently published (with co-authors, Professor David Bonner and Dr Roy Sainsbury 2005) Making Social Security Law: the Role and Work of the Social Security and Child Support Commissioners, (2005) London: Ashgate. This is a socio-legal analysis of the Commissioners set in the context of the government’s tribunal reform agenda.

For further details, see <http://www.le.ac.uk/law/staff/tgb1.html>

Disclaimer

Whilst this research paper was produced with the financial support and general assistance of the Department for Constitutional Affairs, the views expressed within are those of the report’s authors and do not necessarily reflect the opinion of the Department.
## Contents

Executive Summary .................................................................................................................. i  

1 Introduction – Australian Government, Courts and Tribunals ...................... 1  

2 Courts .................................................................................................................................. 4  
   2.1 The Federal Court system ....................................................................................... 4  
   2.2 State and Territory Courts .................................................................................... 7  
   2.3 The Nature of Administrative Law Australia ...................................................... 7  
   2.4 ADR in the Federal Courts  
       2.4.1 Pre-action procedures and protocols .......................................................... 11  
       2.4.2 Mediation in the Federal Courts ................................................................ 12  

3 Tribunals ............................................................................................................................... 20  
   3.1 The development of tribunals in Australia .......................................................... 20  
   3.2 The Administrative Review Council (ARC) ......................................................... 21  
   3.3 The Council of Australasian Tribunals (COAT) ................................................... 21  
   3.4 The Commonwealth Tribunals  
       3.4.1 The Administrative Appeals Tribunal (AAT) ............................................. 22  
       3.4.2 Social Security Appeal Tribunal (SSAT) ..................................................... 24  
       3.4.3 Veterans’ Review Board (VRB) .................................................................. 24  
       3.4.4 Migration Review Tribunal (MRT) ............................................................... 25  
       3.4.5 Refugee Review Tribunal (RRT) ................................................................ 26  
       3.4.6 The National Native Title Tribunal (NNTT) ................................................. 26  
   3.5 Reviews of the Australian tribunal sector ............................................................. 28  
       3.5.1 The demise of ART ..................................................................................... 32  
   3.6 State and Territory Tribunals  
       3.6.1 The development of State and Territory Tribunals ........................................ 34  
       3.6.2 Victoria: Victorian Civil and Administrative Tribunal (VCAT) .................... 34  
       3.6.3 New South Wales: Administrative Decisions Tribunal (ADT) ....................... 36  
       3.6.4 Australian Capital Territory: Administrative Appeals Tribunal (AAT) .......... 39  
       3.6.5 Western Australia: The State Administrative Appeals Tribunal (SAT) ........ 40  

4 Ombudsmen in Australia ................................................................................................. 45  
   4.1 The Commonwealth Ombudsman ........................................................................ 45  
   4.2 State and Territory Ombudsman Offices ............................................................... 46  

5 Alternative Dispute Resolution ....................................................................................... 49  
   5.1 ADR philosophy and policy .................................................................................. 49  
   5.2 The development of ADR in Australia .................................................................. 50  
   5.3 Definitions .............................................................................................................. 55  
   5.4 Court and tribunal referral to ADR ...................................................................... 58  
   5.5 ADR and family law .............................................................................................. 62
5.6 ADR and human rights 64
5.7 ADR within specific industries 66
5.8 Ethnic and cultural factors 67
5.9 Maintaining ADR standards 67
5.10 The Commonwealth’s model litigant obligation’ 69

6 Concluding Remarks .......................................................... 71

Bibliography ............................................................................. 73
Useful Websites .......................................................................... 79

Appendix 1: Glossary of Common Terms 81
Appendix 2: Family Court in Australia: Flowchart of Court Process 89
Appendix 3: The Statutory Functions of the Administrative Review Council 91
Appendix 4: The Objects of the Council of Australasian Tribunals 93
Appendix 5: The Administrative Decisions Tribunal of New South Wales (Practice Note No. 1) 95
Appendix 7: Commonwealth Ombudsman annual report: Case Studies 101
Appendix 8: The Benchmarks and their underlying principles 103
Appendix 9: NADRAC: ADR Standards – List of Recommendations 105
Appendix 10: Legal Services Direction 1999 109
Appendix 11: Glossary of Abbreviations 111

Figures

Figure 1 The Federal/State Court system in Australia 5
Figure 2 The Victorian and Civil Administrative Tribunal: divisional structure 35
Figure 3 VCAT Mediation Statistics: 2003-04 35
Executive Summary

Overview
This report examines the system of administrative justice in Australia and, in particular, the rationale and development of alternative dispute resolution (ADR) within that system. The report outlines the development of administrative justice through its main institutions; the courts, tribunals and ombudsmen, at both the Commonwealth and the State/Territory levels of government. It also addresses developments in ADR and how these have been maintained across the range of institutions and sectors of dispute resolution activity.

Introduction
This section provides a brief outline of constitutional arrangements in Australia relevant to administrative justice. It also introduces the use of ADR methods in the federal court structure. The emphasis within the family law system on using the ‘counselling’ and ‘mediation’ (see Appendix 1 for a glossary of ADR terms) services is noted, as is the development of ADR in tribunals and small claims courts in the States/Territories.

The principal forms of administrative law remedy in Australia though similar to those in the UK, have developed along different pathways. There has been an earlier development of freedom of information laws and a more robust statutory version of judicial review. The development of ‘merits review’ epitomised by the Commonwealth’s Administrative Appeals Tribunal (AAT) (see section 3.4.1 below) and copied in the States/Territories has been a significant achievement. The various Ombudsmen Schemes in Australia (see section 4 below) have also thrived and the underlying (Commonwealth) legislation provides stronger powers for the Ombudsman to adopt a ‘systemic’ role in addition to resolving individuals’ grievances.

Courts
A perception of increased litigiousness in the courts, the need to account more for the use of judicial and other resources, and an increase in the numbers of self-represented litigants are all factors in the growth of ADR in Australia. As in the UK there has been a move towards more active case management in the courts and a culture change from adversarial to enabling methods. The federal Family Court procedures (see sections 2.1, 2.4, 5.5 and Appendix 2) are a good example of these developments.
The settlement rates at mediation in the federal courts have been quite good (around 55 per cent). However, mediations remain a relatively small proportion of the overall caseload of the Federal Court and the Federal Magistrates Court. The State and Territory Supreme Courts appear to utilise mediation to a greater extent, though the reasons for this appear to derive from the differing caseload profiles of the Federal and State Courts rather than any principled difference in approach. On the other hand, the (federal) Family Court aims to have 90 per cent of cases resolved through mediated agreements within six months of filing (Family Court report, 2004:21). The emphasis on ADR in the family law system has been highlighted in legislative amendments that urge the use of the 'legal system as a last resort rather than a first resort'.

There is a continuing debate about the respective merits of using court officers or external providers for mediation services. In general, there is a 'mixed economy' of court and external providers. That has allowed for flexibility – a wider choice of providers to fit the circumstances. However, it has also increased demands to maintain good quality standards and raised general questions about how to regulate and co-ordinate the development of such services.

There is also a continuing debate about the issue of mandatory court-ordered mediation. For example, after 1997, the Federal Court obtained a power to require mediation before attempting formal legal proceedings. Although such non-consensual mediation has attracted objections (Ingleby, 1993), it does not appear to have caused difficulties, at least in the Federal Court regime.

There is also a linked debate about judicial participation in ADR, not least because of the Constitutional constraints on the concept of the 'judicial power' (see sections 1 and 2.1). However, the prevailing policy appears to be that judicial participation should not become a standard feature of the courts' case management path (Civil Justice Review, 2003:151). Such concerns have not however, stopped the Family Court from experimenting with ‘case evaluation’ (see Appendix 1) undertaken by a judge and, in general, continuing to produce new ADR initiatives in the family law field. Case evaluation has also been used in some State courts.

**Tribunals**

Tribunals in Australia have developed along similar lines to the tribunal sector in the UK – an early *ad hoc* development followed by a more coherent public focus provided, in Australia, by the Kerr Report (1971). The consequent creation of a Commonwealth Administrative
Appeal Tribunal (AAT) created a model of a 'merits review' tribunal, which would examine the full range of administrative decision-making and has been generally regarded as a far-sighted and innovative initiative. An outline of the development of tribunals and their policy themes is given in sections 3.1 and 3.5. An Administrative Review Council (ARC) (section 3.2) now monitors the whole terrain of administrative justice. Its statutory functions are set out in Appendix 3. One of ARC’s key suggestions has been the amalgamation of the Commonwealth merits review tribunals (Administrative Review Council, 1995). A Council of Australasian Tribunals (COAT) (section 3.3), a similar body to the British Council on Tribunals, was established in 2002. The objectives of COAT are set out in Appendix 4.

There are also four specialised Commonwealth tribunals considered, the Social Security Appeal Tribunal (SSAT), the Veterans’ Review Board (VRB), the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) (see sections 3.4.2 – 3.4.5).

The National Native Title Tribunal (NNTT) (see section 3.4.6) differs from the other specialised Commonwealth Tribunals. It has been developed to address the particularly sensitive problems of the legal recognition of the rights and interests of Aboriginal and Torres Strait Islander people in land and waters, according to their traditional laws and customs. This Tribunal is an Australian Commonwealth government agency and mediates native title claims under the direction of the Federal Court of Australia. The Tribunal is building up an expertise in multi-party and community mediation and has used a number of innovative methods. It provides a model of how ADR methods may be flexibly adapted to accommodate ethnic and cultural factors.

The development of Tribunals in the States/Territories (section 3.6) has mirrored Commonwealth developments though there has been greater success in producing Tribunals that handle both Citizen v State and Party v Party disputes. One of the largest State Tribunals is the Victorian Civil and Administrative Appeals Tribunal (VCAT) (section 3.6.2) where mediation is used extensively in some of its divisions. Similarly, the Administrative Decisions Tribunal (ADT) in New South Wales (NSW) (section 3.6.3) has a legislative mandate to make use of mediation, which it has employed notably in its equal opportunity division. The Australian Capital Territory (ACT) (section 3.6.4) also has an Administrative Appeal Tribunal modelled on the Commonwealth’s AAT and has issued a useful guide about the use of mediation in its land and planning division: see Appendix 6 and claims a significant reduction in waiting times by focussing on early, mediated resolution of cases (AAT Report, 2004:140).
The new State Administrative Tribunal (SAT) of Western Australia (WA) (section 3.6.5) is an exciting development in Australia’s tribunal sector. The Tribunal only became operational on 1 January 2005. SAT brings together the administrative merits review and appellate functions of a large number of (diverse) tribunals and boards. The policy intent is that it adopts state of the art technology and procedures to flexibly customise the forum to the nature of the dispute. There seems no doubt that the development of this Tribunal and the arrival of formal reports and evaluations of its operation and effectiveness will be awaited with interest in Australia and further afield.

Ombudsmen
The Ombudsman technique of making government accountable has been developed to a sophisticated level both in the Commonwealth (section 4.1) and at State and Territory level (section 4.2). There have also been developments, as in the UK, of Ombudsman schemes in the private sector. The grounds on which the (Commonwealth) Ombudsman can intervene are quite broad and efforts are made to reduce unnecessary procedural hurdles for users of these systems. In certain respects, the Ombudsman offices are natural sources of ADR activity, as they do not usually have any coercive powers. Their role is generally to recommend administrative response to grievances, though their influence is strong precisely because their recommendations are usually acted upon. Many of the Ombudsman Offices have developed ADR techniques in their casework: see Appendix 7 for case study examples. They have tended to focus increasingly on speedy, informal resolution at an early stage rather than relying too heavily on their formal investigative and reporting powers (Perry, 1998). Sometimes these informal processes are encouraged by legislation. For example, the South Australian Ombudsman legislation contains a power to deal with a complaint by conciliation ‘at any time’. There is also some evidence of Ombudsman offices being used for complaints that contain significant public interest, public policy and/or ‘systemic’ issues, rather than merely individual grievance fixing. Where this is the case it is more likely that the Ombudsman’s formal investigative and reporting powers will be used. The greater pragmatic style of the Ombudsman is likely to flourish in the future. There are two underlying trends: first, the increased attention to public interest and systemic issues rather than individual grievance; secondly, the increased use of ADR, in particular for individual grievances.

Alternative Dispute Resolution (ADR)
ADR is often criticised on the basis it lacks any theoretical clarity, yet in truth ADR is often only a proposition about the particular procedural form or means to reach an agreed outcome to a dispute (see section 5.1). However, there are important matters of principle to
consider; the extent of the mediator's duty of confidentiality, the extent of judicial participation in ADR processes, and the appropriateness or otherwise of mandatory mediation. However, the fact that different solutions to these problems are found in different contexts does not necessarily mean that ADR has a flawed theoretical framework; it merely indicates that ADR methods must ultimately be evaluated in their individual contexts to produce meaningful reflection on their 'success'. The context-dependency of ADR has also meant that the empirical research can often seem equivocal at first sight. Mack's (2003) review, for example, of the research relating to the optimal time for court and tribunal referral to ADR inevitably failed to produce any generalised checklist guidance of relevant criteria, and indeed specifically advised against attempting any such exercise. Ruddock's (2004) identification of three key elements of policy provides a useful synthesis: (i) the mainstreaming of ADR in the federal civil justice system; (ii) assisting with customising ADR methods for particular jurisdictions, such as in family law and human rights; and (iii) the commitment to promoting and engaging in ADR in its role as 'model litigant' (see further, section 5.10).

The development of ADR in Australia (section 5.2) has occurred against a background of concern about a perceived 'crisis' in civil justice: the difficulties experienced by heavier caseloads and the rising costs and general inaccessibility of court litigation. Developments over the last thirty years have produced a robust infrastructure that supports ADR. For example, ADR is now integrated into law school curricula, the legal professions generally support such developments and the use of ADR has been pervasive within the family law system. The government’s establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC) in 1995 has also been a significant support. NADRAC has tackled the definitional problems which frequently occur in the use of ADR terminology (section 5.3). Its production of a glossary of common terms (see Appendix 1 of this Report) is a very useful antidote to such confusion and can be used as a useful reference tool in producing explanatory leaflets and other guides to the public.

The point at which a dispute should be directed to ADR or should be re-routed from traditional litigation to ADR will remain a contentious issue and those who expect clear answers are likely to be disappointed (see section 5.4). Mack’s (2003) review successfully debunks the assumption that particular types of dispute can be regularly 'matched' with a particular type of ADR process and concludes there are substantial limits on the ability of empirical research to establish clear referral criteria. Nevertheless, the research does provide some positive and consistent messages; for example, the regular results of high client satisfaction with mediation, which varies little according to whether the mediation is
voluntary or compulsory. Ultimately, the conclusion is that 'each court or tribunal must develop its own referral process and criteria, in light of its own programme goals, jurisdiction and case mix, potential ADR users, local legal profession and culture, internal resources, and external service providers' (Mack, 2003:8).

The influence of the family law system generally on the development of ADR in Australia cannot be underestimated (section 5.5). Generally, the Family Court will refer cases for mediation with the consent of the parties. PDR has become a pervasive element of the Family Court’s procedures (see Appendix 2) and the government has increased its financial support to community-based organisation through the Family Relationship Services Programme.

Conciliation is used as a major technique by Australia's principal human rights organisation, the Human Rights and Equal Opportunity Commission (HREOC) (section 5.6). However, in the human rights field there is an awareness of the need to hold a proper balance between efficient dispute resolution and the protection of the parties' legal rights (Ruddock, 2004).

Industry-based ADR has also flourished in Australia (section 5.7). Various Ombudsman and schemes have been customised for particular industries; for example, the Banking and Financial Services Ombudsman and the Telecommunications Ombudsman. The government has produced some useful benchmarks to apply to nationally based customer dispute schemes established under the auspices of an industry: see Minister for Customs and Consumer Affairs (1997) and Appendix 8. These schemes have had much success in the effective handling of disputes and their early diversion from courts and tribunals.

There have been concerns are raised about the possible power imbalances between parties that may occur in ADR processes along cultural, ethnic, gender and age dimensions (section 5.8). However, some commentators point to the contribution which the flexibility of ADR processes can make to customise dispute resolution to take account of these factors.

Ultimately, the success of ADR will depend on the quality of the professional work and stands invested in its delivery both by 'external' providers and by providers from within the court, tribunal and ombudsman organisations. NADRAC's work on ADR standards (section 5.9) focuses on two key principles: a 'diversity principle' that recognises the diversity of contexts in which ADR is practised and a 'consistency principle' that identifies essential standards for all ADR service providers (NADRA, 2000; 2001).
The Commonwealth government, under its 'model litigant obligations' (section 5.10 and Appendix 11) is required to endeavour to avoid litigation wherever possible. Similarly, the UK government has made pledges, where it is party to a dispute, to consider and use ADR ‘in all suitable cases wherever the other party accepts it.’ (LCD, 2001).

**Concluding remarks**

Since the 1970s, Australia has developed a rich range of ADR practice across its cornerstone institutions of administrative justice: the Courts, the Tribunals and the Ombudsman schemes (section 6). It has established a strong, diverse infrastructure of ADR practice. There appears to have been a shift from the traditional adversarial attitude towards dispute resolution to the greater use of ADR in the context of a legal system that is generally moving towards a greater and increasingly flexible control over court and tribunal proceedings and the conduct of Ombudsman investigations. The perceived advantages and disadvantages of ADR will continue to be debated. It is likely that as ADR expands further into the field of human rights and administrative justice generally, the concerns about the extent of the shift from rights-based to interest-based dispute resolution will grow. The fear is that important questions of legal principle may be suppressed in an ADR-friendly environment. On the other hand, if ADR works and cases are appropriately settled at an early stage, judicial resources can be more profitably focused on attending to cases which contain strong public interest points that require an authoritative determination in a court or tribunal forum. What is required is a system that is sufficiently sensitised to identifying appropriate routes of dispute resolution in their individual contexts. In the realm of administrative justice, a great challenge remains to ensure that there are sufficient safeguards to ensure that significant legal rights are not jeopardised by the promise of expedition and costs savings held out by an increased use of ADR.
1 Introduction – Australian Government, Courts and Tribunals

The federal system of government in Australia is a system of power sharing between the federal government (the Commonwealth) and the States and Territories. The Australian Constitution was passed as part of a British Act of Parliament in 1900, and took effect on 1 January 1901. There are six States with their own elected bi-cameral Parliaments: New South Wales (NSW), South Australia (SA), Queensland (Qld), Tasmania (Tas), Victoria (Vic) and Western Australia (WA). There are also ten Territories, but these are directly subject to Commonwealth law making powers, though the Australian Capital Territory (ACT), The Northern Territory (NT) and Norfolk Island have a large degree of autonomy under self-government arrangements. The Commonwealth Parliament consists of the Queen (who is represented by the Governor-General), the Senate, and the House of Representatives. The people of each of the States elect the same number of senators (currently 12); while in the House of Representatives the number of Members depends on the size of the State’s population. By convention, the leader of the party commanding a majority in the House of Representatives becomes the Prime Minister.¹

The Constitution reflects the principle of the ‘separation of powers’. The legislative power is vested in the Federal Parliament, the executive power is vested in the Queen and the judicial power is vested in ‘a Federal Supreme Court to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction’.² The effect of this doctrine is that, for example, if a tribunal is not regarded as having been vested with ‘judicial power’ but purports to exercise such power, its actions will be invalid. However, there have been real difficulties in precisely delineating whether any particular power is legislative, administrative or judicial. Enright concludes:

‘There is no rhyme or reason in the approach of the courts to separation of powers. It is therefore, a matter of speculation as to how the courts actually distinguish between the powers. Some clue, however, may be in their resort to an array of relatively amorphous criteria such as policy, tradition, history and precedent. Trite and simplistic as it sounds, in a situation of great confusion, as the High Court has created with classification of powers, the ultimate determinate in many cases may be just a gut feeling by the court as it asks and answers a simple question: ‘would it be acceptable to have this function exercised by a tribunal or by a court?’ The overt

¹ There can be circumstances, however, where there is no general agreed convention to control the exercise of the Governor-General’s reserve powers. Such a situation arose in 1975 when the Governor-General, Sir John Kerr dismissed the Prime Minister, Mr E G Whitlam, after the Senate – controlled by Opposition parties – blocked the passage of the Supply Bill in an attempt to deprive the Whitlam Government of the funds needed to govern. Some people argue that Sir John acted properly in dismissing Mr Whitlam as it was consistent with a ‘convention’ that a Prime Minister who cannot obtain supply should either seek a general election or be dismissed. Others contend that the dismissal of Mr Whitlam breached the convention that a person who retains majority support of the House of Representatives, as Mr Whitlam did, is entitled to remain Prime Minister.
² Constitution, Chapter III, s 71.
reason is policy and tradition. The covert feeling that drives the decision is what the courts feel comfortable with.'
(2001:56).

The Constitution only confers a limited jurisdiction on the Commonwealth Parliament to make laws. Most of these matters are listed in sections 51 and 52 of the Constitution. They include taxation; defence; external affairs; interstate and international trade; foreign trading and financial corporations; marriage and divorce; immigration; bankruptcy; and interstate industrial arbitration. However, other matters (not listed) may come within the authority of the Commonwealth Parliament if they relate in some way to the listed matters. The Constitution also specifically preserves the constitutions of the six former colonies though the Australian Constitution now binds the States and therefore State Constitutions must be read subject to the Australian Constitution.

There are few matters on which States have lost their autonomy to make laws. However, State Parliaments can, in principle, make laws on any subject of relevance to its needs and because they are not constrained to a list of specified matters there are significant areas, such as education, criminal law, and roads that are principally governed by State law rather than Commonwealth law. However, although State Parliaments have law making powers on a wider range of subjects, Commonwealth law will override State law to the extent that the latter is inconsistent with the former. There are some areas that are almost entirely regulated by Commonwealth rather than State laws: e.g. bankruptcy, marriage and divorce, and immigration. The Commonwealth has also evolved exclusive powers to raise income tax and States are dependent on financial assistance from the Commonwealth. The Commonwealth (Cth) also has power to attach conditions to such financial assistance and has used this to exert control in areas where it has no express law making power.

---

3 'For example, even though the Commonwealth Parliament has no specific power in relation to the environment, it can, under its external affairs power, prohibit the construction of a dam by a State if that is necessary to give effect to an international agreement on the environment.' (Attorney-General's Department: http://www.ag.gov.au/).
4 However, the states cannot impose duties of customs and excise (section 90) and cannot raise defence forces without the consent of the Commonwealth Parliament (section 114).
5 Australian Constitution, section 109.
6 'For example, the Commonwealth has exerted significant control over universities in this way even though it has no specific power in relation to education.' (Attorney-General's Department: http://www.ag.gov.au/).
Australian Constitution has no coherent Charter of Rights, but there is some express protection against Commonwealth (but not State) legislative and executive action.

However, since 1992, Australian citizens have been able to lodge individual complaints with the UN Human Rights Committee under the First Optional Protocol, for breaches of the International Covenant of Civil and Political Rights (1966). Australia also has a Human Rights and Equal Opportunity Commission which is a national independent statutory government body: see the Human Rights and Equal Opportunity Commission Act 1986 (Cth). Finally, the Australian Capital Territory is the first Australian jurisdiction to have an explicit statutory basis for human rights protection: see the Human Rights Act 2004 (ACT). The Human Rights Act incorporates international human rights standards into ACT law by requiring them to be interpreted consistently with human rights 'as far as possible'.

For example, section 51(xxxi) (acquisition of property must be 'on just terms'), section 80 (trial by jury is required in relation to some criminal offences), and section 116 (a right exists to exercise any religion) and section 117 (non-discrimination of non-residents of a State).
2 Courts

2.1 The Federal Court System

The Australia Constitution reflects British (unwritten) constitutional arrangements in that, broadly, there is recognition of the separation of power principle but in practice there is a confluence of the executive and legislative powers. Equally, in both jurisdictions the independence of the judiciary is regarded as of great importance. The security of tenure of federal judges is guaranteed by the Constitution and legislation provides for security of tenure for judges at the State and Territory level. The essence of the Federal Court system is set out in Figure 1.1 below and a brief description of each court is given below.

The Australian Constitution\(^9\) provides for the establishment of the High Court of Australia. It comprises a Chief Justice and (currently) six other Justices. It has a civil and a criminal jurisdiction and is Australia's ultimate Court of Appeal. It has an original jurisdiction in respect of, inter alia, matters arising under any international treaty, suits between States and matters, which concern judicial review of administrative action against an officer of the Federal Government or of a Federal Court. The High Court shares some of this jurisdiction with the Federal Court. It can hear criminal and civil appeals from the Federal Court, the State Supreme Courts and the Family Court. It also decides federal matters such as constitutional and interstate disputes. The primary function of the High Court is to interpret the meaning of Australia's Constitution. It will decide whether a Commonwealth Act (Cth) has been properly made within its legislative powers, i.e. it has the power to test the validity of Commonwealth Acts. The Constitution also gives the Commonwealth Parliament power to create other Federal Courts (for example, the Federal Magistrates Court and the Family Court), and to vest federal 'judicial power'\(^{10}\) in such courts and in courts of the States.

---

\(^9\) Chapter III sections 71-80

\(^{10}\) 'Federal judicial power' is judicial power relating to one or more of the classes of dispute set out in sections 75 and 76 of the Constitution.
Figure 1 The Federal/State Court system in Australia

Federal courts
State courts

High Court of Australia

Federal Court

Family Court

Federal Magistrates Court

State and Territory Supreme Courts

District or County Courts

Courts of summary jurisdiction

The Federal Court of Australia\[^{12}\] has both original and appellate jurisdiction and sits in each State and in ACT and the NT as required. The Court hears civil cases relating to federal matters such as: taxation, customs, trade practices, industrial law, bankruptcy, immigration, administrative law, patents, copyright, environmental law, sexual and racial discrimination.

\[^{11}\] Note: all Courts have both civil and criminal jurisdictions, with the exception of the Family Court and the Federal Magistrates Court that have exclusively civil jurisdictions.

\[^{12}\] Created by the Federal Court of Australia Act 1976
and access to information. It is quite common to find the Federal Court is given exclusive jurisdiction in these areas. The 'Full Federal Court' (i.e. three Federal Court judges) hear appeals from a single judge of the Federal Court. Decisions of the Full Federal Court may be appealed to the High Court if the High Court gives leave to appeal. The Federal Court also has an appellate jurisdiction in relation to certain decisions of State Supreme Courts and the decisions of the Supreme Courts of the Territories, except the NT, when exercising federal jurisdiction. The Federal Court is also able to hear class actions, i.e. actions involving seven or more people who have claims against a defendant arising out of similar circumstances. Class actions enable a group or people to combine their resources to take action against a party that may be larger and possess more financial resources than any one individual.

The Family Court of Australia\textsuperscript{13} administers Australia's family laws. The court deals with: divorce (although all applications are initially filed in the Federal Magistrates' Court), division of property and maintenance, child-related matters, determining parenting orders and plans. The Full Family Court (three Family Court judges) hears appeals from a single judge of the Family Court. A party given leave may appeal to the High Court from a Full Family Court. In recent years, the Family Court's federal jurisdiction has been widened to include bankruptcy, administrative law and taxation appeals. These issues often intersect with family law. For example, recent legislative amendments\textsuperscript{14} enable the Family Court to determine family and bankruptcy cases concurrently and make orders with respect to the property of a bankrupt spouse Prior to these changes a party would have to start proceedings in both the Federal Court and the Family Court. There is great emphasis under the Family Law Act 1975 on counselling and mediation services and it is not always necessary to start court proceedings in order to access these services. The Family Court exercises original and appellate jurisdiction throughout mainland Australia except in WA (which has its own ‘Family Court of Western Australia’\textsuperscript{15}) and the NT (where the Supreme Court of the Northern Territory and the Family Court of Australia exercise concurrent original jurisdiction). See further the section on ‘family law and ADR’ below.

The Federal Magistrates Court of Australia was established in 1999\textsuperscript{16} and is an independent Federal Court under the Constitution. It deals with a range of less complex federal disputes that previously went to the Federal and Family Courts. The Court provides a quicker, cheaper option for litigants and eases the workload of both the Federal and Family Court.

\textsuperscript{13} Family Law Act 1975 (Cth) came into effect on 5 January 1976 and established the Family Court of Australia.
\textsuperscript{14} These changes came into effect on 19 September 2005.
\textsuperscript{15} This is a State Court but is funded by the Commonwealth. The judges of the Family Court of Western Australia have also held commissions as judges of the Family Court of Australia since 1987.
\textsuperscript{16} See the Federal Magistrates Act 1999 (Cth)
The court hears less complex areas of law but its jurisdiction is concurrent with the Family and Federal Courts. The matters that can be initiated in the Federal Magistrates Court include: applications for the dissolution of marriage, family law property matters less than $300,000; spousal maintenance; parenting orders where the parties consent to the matter being heard in the Federal Magistrates Court. The Federal Magistrates Court also has jurisdiction over: consumer protection, review of administrative decisions, bankruptcy matters, anti-discrimination complaints not satisfactorily resolved by the Human Rights and Equal Opportunity Commission (HREOC). Parties are encouraged to use ADR methods such as conciliation, counselling and mediation: see Appendix 1 for a glossary of ADR terms and definitions.

2.2 State and Territory Courts
Each State and (inhabited) Territory has its own system of courts. This comprises a State Supreme Court, an intermediate court (usually known as a District or County Court) and courts of summary jurisdiction. In addition, small claims courts and tribunals with simplified procedures have been established in most States and Territories to enable minor legal disputes to be dealt with quickly, cheaply and informally. State and Territory courts have original jurisdiction in all matters brought under State and Territory laws, and in matters arising under federal laws where authorised by the Commonwealth Parliament. Most criminal matters (whether arising under Commonwealth, State or Territory law) are dealt with by State or Territory courts. In addition, some States have also established specialist courts: for example, the Land and Environment Court and the Compensation Court in NSW, and the Planning and Environment Court in Queensland. Sometimes the State Supreme Courts exercise an appellate jurisdiction in relation to these specialist courts and in other cases a supervisory role. The State and Territory Supreme Courts deal with the most important civil litigation, the more serious criminal cases and with appeals from the lower State Courts.

2.3 The Nature of Administrative Law in Australia
The major forms of legal accountability of executive action in Australia include: a range of legal requirements to give reasons for decisions, freedom of information laws, judicial review, appeal to the AAT in the Commonwealth and similar bodies in the States and Territories and various Commonwealth and State/Territory Ombudsman Schemes.

---

17 i.e. not including the Australian Antarctic Territory and the Jervis Bay Territory.
18 See the list of 'useful Websites' at the end of this Report.
19 One could also add; getting an official to remake the decision, collateral review (e.g. Cooper v Wandsworth Board of Works (1863) 143 ER 414, and special review (i.e. review provided by statute for a specific decision) – a typical example being the statutory authorisation of a body to make a decision and the provision of an appeal or review to a second body: see Enright (2001:6, 686-87).
The requirement to give reasons is to some extent, a precondition for the existence of any form of administrative justice. Administrative decisions cannot be challenged easily in circumstances where the reasons for a decision remain unknown or unclear. However, as under English law, there is 'no general right to reasons at common law'. Nevertheless, there are some important legislative provisions that provide wide-ranging access to reasons for decisions taken under Commonwealth legislation and there are individual statutes containing specific provisions requiring reasons for particular decisions. In addition, a failure to provide reasons is a discrete ground for intervention by the (Commonwealth) Ombudsman.

Australia has had freedom of information legislation for many years in both the Commonwealth and in the States. The legislation provides access to information by various means and enables an individual to put right incorrect information about them held on government files.

In order to address the technicality and complexity of judicial review at common law, the Administrative Decisions (Judicial Review) Act 1977 (Cth) was passed. The grounds and remedies available are set out in this Act. This statutory version of judicial review is available in addition to, and as an alternative to judicial review at common law and has been mimicked by State judicial review legislation (Ratnapala, 2002:110). It would seem that the Act has been partly successful, in that the remedies have been streamlined and have been more flexible and accessible than remedies at common law. In addition, the grounds are set out more clearly. Finally, the procedure is simpler than that available at common law. Statutory judicial review provides for the review of decisions, conduct engaged in for the purpose of making a decision and failure to make a decision. Applications are made to the Federal Court or the Federal Magistrates Court for a judicial review order, the latter being a reformed version of the common law remedies of prohibition, mandamus, certiorari, injunction and declaration. Enright comments that they 'are a reformed version in being more potent, more flexible and more available' (2001:260).

---

20 Public Service Board v Osmond (1986) 159 CLR 656.
22 Ombudsman Act 1976 (Cth), s 15(1)(c)(ii).
Even where the case has been made out for one of the orders of review the Court must exercise its discretion whether to make an order or not. Broadly, the test used is whether it is considered in the interests of justice to do so. There are several grounds for review at common law that are summarised as: error of power (includes jurisdictional error, misuse of power, failure to exercise power, altering power and bias); procedural error (includes denial of natural justice or procedural fairness and failure to observe statutory procedures); and error of process (includes errors of law committed in finding facts, interpreting law, applying law to the facts and complying with legal requirements); see Enright (2001: 365). There are a number of complexities relating to the choice of remedy available for the various grounds. The statutory grounds for review are generally a restatement of the common law grounds. Section 5 of the Act sets out the (nine) grounds available in relation to decisions already made. Section 6 sets out (nine grounds in respect of conduct in which a person has or is engaged or is proposing to engage for the purposes of the making a decision. Arguably, the drafting of these sections also allows 'the court some creativity to recognise other abuses and misuses of power.' (Enright, 2001:373). Section 7 provides for review on the grounds that there has been a failure to make a decision or delay in making it.

One of the most powerful remedial elements of administrative justice in Australia is the concept of 'merits review' undertaken by the AAT since 1975. There are no specific 'grounds' for review by the AAT. A merits review of decisions, which the AAT is authorised to review, is a concrete right of any individual with standing to apply. In short, to obtain a review of a decision by the AAT a person must establish, firstly, that the decision in question is one that the AAT is authorised to review. There are now around 400 Commonwealth enactment’s that authorise AAT review (Downs, 2004:8). Secondly, the person must have standing; i.e. the person must have an interest that is affected by the decision. The rules on standing are, will ultimately remake the original decision-maker's decision. This will involve, in essence, three elements: deciding questions of fact, law and exercising discretion. The AAT, in remaking the decision will be able to exercise all the available powers of the original decision-maker. A party may appeal its decision on a question of law to the Federal Court and in some circumstances such appeals may be transferred to the Federal Magistrates Court. The AAT can also refer a question of law, on its own motion, to the Federal Court.

The Ombudsman Schemes have also taken a strong hold in the Australian legal culture. There has been a Commonwealth Ombudsman since 1976 and there is currently one in

---

26 Ibid.
27 See Administrative Appeals Tribunal Act 1975 (Cth), ss 27 and 43.
28 Ombudsman Act 1976 (Cth)
each of the States and for the NT and the ACT. These are examined in further detail below. It can be noted here however, that they have two principal functions. One is to intervene and resolve individuals’ complaints about the government’s administrative actions. Another role, however, is far more 'systemic' in its nature. The Commonwealth Ombudsman has a special ground to review administrative decisions and impugn common law or statutory provisions authorising administrative action on the basis that the provision is or may be 'unreasonable, unjust, oppressive or improperly discriminatory.'

2.4 ADR in the Federal Courts

In the key strategy paper on the federal civil justice system (Civil Justice Review, 2003), a number of factors are indicated to explain the need for more efficient ways to resolve disputes by courts and outside the court system: in particular, the growth of litigation in the Federal Courts, the greater demands to account for resources and the increasing number of self-represented litigants. For example, the proportion of self-represented litigants in the High Court increased from 5 per cent in 1992-93 to 30 per cent in 2001-02. The number of self-represented litigants commencing or seeking to commence proceedings in the Court increased again during 2003-04. In particular, 48 per cent of the applications for leave or special leave to appeal and 68 per cent of the applications for constitutional writs filed in the Court during the reporting period were filed by self-represented litigants and 46 per cent of the matters heard by a single Justice involved self-represented litigants. The demand on the Registry staff in assisting the increasing number of self-represented litigants coming before the Court remains very high. (High Court Report 2004:7)

Such developments have led to more active approaches to case management and the greater use of ADR. The latter is reckoned to have 'grown exponentially' over the past 30 years' (Civil Justice Review, 2003:45-6). The government's strategy paper pinpoints the need to bring about cultural and behavioural change to the adversarial tradition. However, such policy is sometimes confused as the lines between 'adversarial' and 'inquisitorial' are often blurred and attacks on the adversarial tradition are sometimes fuelled by political concerns about developing an increasingly litigious culture. Indeed, the Australian Prime Minister, John Howard, has warned about the dangers of going down the American path of becoming too litigious. The legal profession is identified in the federal civil justice strategy

---

29 Ombudsman Act 1976 (Cth), s 15(1)(a).
30 For example, in the High Court there were 209 matters filed in 1981-82 compared to 2,925 in 2002-02. In the Federal Court there were 593 matters (including appeals) filed in 1980 compared to 4,840 filed in 20020-03: Civil Justice Review, 2003:16, 26.
31 The use of ADR in the Federal Court has been available since 1987. The High Court’s work is predominantly concerned with appeals from other courts on points of law and therefore there is little scope for ADR there.
review (hereafter 'the strategy paper') as the potential driving force behind a culture change towards the adoption of less adversarial approaches to dispute resolution. The strategy paper refers with approval to the movement in the United States and Canada of so-called 'collaborative law'; particularly active in the family law arena.

'The collaborative family law system centres on a fundamental rule that lawyers and clients must agree to work only towards a settlement. If legal proceedings are subsequently filed then the collaborative lawyers must withdraw and the clients must obtain new representation for the court proceedings. The system relies on the personal honour and integrity of lawyers who choose to practice collaborative law since all documents and information are produced voluntarily without the benefit of the formal disclosure requirements associated with court procedures'.


The strategy paper reports that the process of collaborative law has yet to be adopted in Australia though a group of lawyers in Queensland are currently exploring the possibilities.

2.4.1 Pre-action procedures and protocols

The formulation of policy in relation to court-based dispute resolution must of necessity involve some consideration of the function of pre-action procedures. The question is whether such procedures are successful in filtering out disputes not suitable for further action or at least do they help in getting the parties to focus on the relevant issues thus making any subsequent court action more efficient? The Australian Federal Family Court has developed such procedures in respect of both financial and parenting matters. The case management directions of the Family Court specify that 'in most cases, parties must undertake pre-action procedures such as ADR, exchange of information and offers of settlement before filing an application in Family Court.' See Appendix 2 for an overview of the Family Court's case management system. The Family Law Rules 2004 prescribe that each party in a case 'must comply with pre-action procedures... including attempting to resolve the dispute using primary dispute resolution methods'. However, there are a number of important exceptions to compliance with this rule in cases where:

(a) for a parenting case – the case involves allegations of child abuse or family violence;
(b) for a property case – the case involves allegations of family violence or fraud;
(c) the application is urgent;
(d) the applicant would be unduly prejudiced;
(e) there has been a previous application in the same cause of action in the 12 months immediately before the start of the case;

33 The development of pre-action protocols in the UK is noted with some interest in the federal civil justice strategy review (Civil Justice Review, 2003:140-1).
34 These procedures are relatively recent (29 March 2004) but no doubt they will be evaluated in due course.
(f) the case is an Application for Divorce; or
(g) the case is a Child Support Application or Appeal.\textsuperscript{36}

The Court has the power to take into account non-compliance with the procedures when making orders about case management and costs. The strategy paper briefly discusses the merits of having a general pre-action procedure (Civil Justice Review, 2003: 143-4) and suggests the possibility of having a 'general guide' to pre-action behaviour which would not be enforceable but would contain sufficient information to provide, in particular, self-represented litigants, with an idea of the best and most effective way to resolve disputes.\textsuperscript{37}

\subsection{Mediation in the Federal Courts}

Mediation has been available in the Federal Court since 1987 and the settlement rate at mediation has averaged around 55 per cent. A comparable rate of settlement at mediation has been achieved in the Federal Magistrates Court: see Federal Magistrates Court Report (2004). However, mediations are still a relatively small proportion of the overall caseload of both the Federal Court\textsuperscript{38} and the Federal Magistrates Court.\textsuperscript{39} In general federal law matters in the Federal Magistrates Court, where mediation is considered suitable, a federal magistrate may order clients to attend mediation that may be conducted by a registrar of the Federal Court or a private mediator. The number of referrals to mediation made by the Court increased from 115 in 2002-03 to 134 in 2003-04. In 2003-04, Federal Court registrars mediated 124 matters; eight by a private mediator (and two not allocated by the end of the year). Of the 134 referrals made in general federal law, 57 were in the area of trade practices, 47 in human rights, 21 in bankruptcy, five in copyright and four related to administrative law (Federal Magistrates Court Report, 2004:29). However, this remains a very small proportion of the overall number of cases (6,672 in 2003-04) dealt with in general federal matters by the Court.

As regards family law matters, the Federal Magistrates Court, which uses the mediation and conciliation services of the Family Court, has to consider whether mediation is suitable and if so whether to refer the case to the ‘primary dispute resolution’ (PDR) services (see Appendix 1

\textsuperscript{36} Family Law Rules 2004 (Cth),r.1.05(2).
\textsuperscript{37} The paper cites with approval the British practice direction about pre-action protocols: Civil Justice Review (2003:144).
\textsuperscript{38} In 2003-04, there were 330 matters referred under the court-annexed mediation scheme in the context of around 4,000 filings and 2,134 judgements delivered in the reporting period: see Federal Court report, 2004: chap 3.
\textsuperscript{39} In 2003-04 there were 134 referrals to ‘primary dispute resolution’ in the context of a total of 6,672 filings in the ‘general federal law’ jurisdiction of the Federal Magistrates Court. However, the position is more complex in relation to the FMC’s family law jurisdiction (a total of 70,261 filings in 2003-04, where mediation is more endemic: see Federal Magistrates Court report 2004: Part 3.
for a description of PDR) provided by the Family Court or, alternatively, community based organisations. Parties are ordered to undertake a PDR process at various stages in the court process. They are given an appointment for mediation at the Family Court when they first file material in order to ensure that at least one attempt has been made to resolve their dispute prior to going to court. If there is no resolution the parties are ordered to attend a further PDR process either at the Family Court or with a community-based organisation. This will be either an order to counselling, mediation in children's matters or conciliation of property matters.

The Federal Magistrates Court has agreements with 35 community based organisations to deliver PDR services (i.e. counselling, mediation and conciliation) on a fee-for-service basis. Many of these community organisations receive funding under the Family Relationships Services Programme (FRSP) via the Attorney-General's Department and the Department of Family and Community services. There are in total around 100 community organisations currently receiving funding under the FRSP to provide family relationships services through about 350 outlets across Australia. In 2004-05, these organisations received periodical payments totalling approximately $49 million. Although FRSP services are intended to be provided to clients on a fee-for-service basis, organisations must ensure that people without the capacity to pay are not turned away or refused access to a service.

FRSP funds a range of statutory and administrative sub-programmes, including counselling and mediation services provided by organisations approved under the relevant legislation. Counsellors and mediators in approved organisations are protected from providing evidence in legal proceedings of anything said, or any admission made, during a counselling or mediation session, so long as child abuse is not an issue. Mediation organisations also have immunity from suit in performing their functions under the Family Law Act. Some State and Territory authorities also provide mediation services in the family law area. The focus on the best interests of the child as the 'paramount' consideration when the court is making an order in relation to a child has ensured a child-focussed system. An example given of the continuing application of this principle, given in Australia's last report to the United Nations Committee on the Rights of the Child, was the establishment of the Queensland Children Services Tribunal in 2000. An independent tribunal to review certain decisions made by Queensland government agencies about the provision of services to children in State care,

---

40 For further details about the FRSP, see http://www.facs.gov.au/internet/facsinternet.nsf/family/frsp-family_relationships_service_program.htm
42 Ibid, ss 19M and 19N.
'Acting in the best interests of the child is established as the paramount consideration for the tribunal in making its decisions' (Australia's CRC Report, 2004: para 103).

In family law matters, there are compelling reasons to attempt early, amicable settlement as the enduring relationship of the parents and parent-child relationships are crucial to a child's future development. Recent amendments to the legislation make it explicit that parents should preferably agree matters relating to children via 'parenting plans' rather than seeking court orders.

'The parents of a child are encouraged:

(a) to agree about matters concerning the child; and
(b) to take responsibility for their parenting arrangements and for resolving parental conflict; and
(c) to use the legal system as a last resort rather than a first resort; and
(d) to minimise the possibility of present and future conflict by using or reaching an agreement; and
(e) in reaching their agreement, to regard the best interests of the child as the paramount consideration'

(Family Law Act 1975 (Cth), s63B) – emphasis added.

It is not surprising therefore that there are larger numbers of referrals to mediation in the Family Court than in the other federal courts. During 2003-04, 1,100 matters were referred to PDR with community organisations; 679 matters were referred to community organisations for counselling; 21 matters were referred to community organisations for mediation. The Family Court's own mediation section undertook 4,250 interviews in 2003-04. In addition, deputy registrars for the Family Court undertook 1,697 conciliation conferences in property matters during 2003-04 and 372 conciliation conferences in property matters were referred to community organisations. (Federal Magistrates Court Report, 2004:31-33). In the Family Court, ADR services comprise mediation in cases affecting children, conciliation conferencing in property disputes and case assessment conferencing to better assess the needs of families in dispute at an early stage and narrow and define the issues. At the end of 2003-04 the Family Court was resolving 90 per cent of cases within 13.2 months and 70 per cent within six months.’ (Family Court report, 2004:20-1).

In the Federal Court, a judge may refer issues in a 'native title' case to a registrar for case management conference or mediation. (See the section on the NNTT below). In the Federal Court's annual report for 2003-04 one case is cited as 'a good example of the successful interplay of mediation and judicial supervision'. In this case the initial mediation before the NNTT did not result in a settlement and it proceeded to a hearing by a single judge followed
by an appeal to the Full Federal Court and an appeal to the High Court. The High Court
remitted the matter in part to the Full Federal Court for further hearing. At that point the Court
referred the matter to a registrar for mediation, which led to a consent determination being
made in December 2003.\textsuperscript{44} The Federal Court's annual report also notes the increasing
interest in other types of ADR, for example, 'early neutral evaluation' and that 'judges are
increasingly looking to other informal procedures that will encourage the parties to identify,
and deal with, the central issues with a view to assisting settlement (Federal Court,
2004:20).

Since 1987 the Federal Court has run a programme of 'assisted dispute resolution', in
essence a court-annexed mediation programme. The Court's registrars who have been
trained as mediators normally conduct mediations, but the Court will also facilitate parties
using external mediators (53 in 2003-04). There has been a debate in Australia, as
elsewhere, about the respective merits of using court officers or external providers: see Law
Reform Commission of Western Australia (1999). The use of court officers for mediation
does allow the court to oversee more closely the quality of the mediation service and is
readily available at any stage of proceedings. Nevertheless, there has been some concern
that court-annexed mediation loses the opportunities to create an environment disassociated
from the traditional negative images that some people hold towards court process. On the
other hand there is also concern that 'the administration of justice by the courts... may be
compromised by the involvement of outside neutrals and the association of courts... with
outside commercial interests (Australian Law Reform Commission, 1998: para 5.84). It is
thought however, that the legal profession is generally satisfied with the quality of mediation
work done by court registrars (Civil Justice Review, 2003:149).

The number of matters referred by the Federal Court for mediation has risen from around 55
in the first two years of operation (1987-88) to 330 in 2003-04 (this latter figure includes the
53 referred to external mediators). The settlement rate of cases referred to mediation since
1987 as averaged 55 per cent: see Federal Court report, 2004:23)\textsuperscript{45}. The majority of
referrals have been in matters concerning trade practices, intellectual property, native title,
taxation, workplace relations, bankruptcy and admiralty. Before April 1997 the parties'
consent was required prior to a mediation referral. After that date the Court could refer
without such consent.\textsuperscript{46} The policy underlying court-ordered mediation is that there may be

\textsuperscript{44} See Attorney-General of the Northern Territory v Ward (2003) FCAFC 283.
\textsuperscript{45} However, as the Family Court's annual report points out, settlement rates should not be the only criterion of
evaluation – '[m]any matters which do not settle proceed to trial with issues better defined, or on the basis of
agreed facts settled by the parties with the assistance of the mediator.' Federal Court report, 2004:23
\textsuperscript{46} Federal Court of Australia Act 1976, s53A. However, referral to arbitration still requires the parties' consent.
some cases where, despite initial opposition by some of the parties, mediation could nevertheless be valuable. It was not envisaged that the power to order mediation would be used frequently, but according to the circumstances of an individual case, court-ordered referral to ADR:

'... may assist in situations where the parties or their lawyers are so accustomed to the litigation process that they are unlikely to use ADR voluntarily, or where a particular lawyer has a prejudice against ADR which may be overcome by an order from the court to attend' (Powell, 2003).

Another example of its potential use is where the courts could enforce mediation at a stage in proceedings just before a significant expense is about to be incurred (Dawson, 1993: 175). However, Ingleby discusses the case against mandatory mediation. He argues three sets of propositions against compulsory participation in mediation:

- Definitional arguments - mediation loses its defining characteristics if the parties do not enter of their own volition or the process is institutionalised.
- Lack of justification – the arguments in favour of compulsory mediation are based on unwarranted extrapolations from data about voluntary mediation. Indeed, compulsory mediation may increase the costs and formality of dispute processing.
- The rule of law – compulsory mediation represents a challenge to many of the ideas comprehended by the rule of law.’ (Ingleby, 1993:443).

Nevertheless, it would appear that the introduction of mandatory mediation has not produced any significant difficulties. It would appear that although the Federal Court has not formally evaluated its own court-ordered mediation ‘anecdotal feedback’ from the Court to the Civil Justice Review team indicated that ‘similar rates of settlement are achieved at non-consensual mediation as at consensual mediation.’ (Civil Justice Review, 2003: 148).

It has been pointed out that the Federal Court appears to use mediation far less than some of the State Supreme Courts. One explanation for this is that the Federal Court handles a large number of migration cases, which are generally not suitable for mediation, whereas the State Supreme Courts handle a larger number of cases such as building disputes, and personal injuries, which are more amenable to ADR solutions (Civil Justice Review, 2003:146). One suggestion has been to abolish the fee that is payable under the Federal Court Regulations for mediation: it is currently $303 for individuals and $606 for
corporations.\textsuperscript{47} The strategy paper has recommended that the mediation fees in both the Federal Court and the Federal Magistrates Courts should be abolished.

Judicial participation in mediation in Australia, as in other jurisdictions, is a contentious issue. There is a danger that judicial involvement may threaten ‘public confidence in the integrity and impartiality of the court’ (Australian Law Reform Commission, 1998: para 5.83). In most models of mediation, a mediator is able to discuss the relevant issues with each party separately.\textsuperscript{48} Sir Laurence Street, a former Chief Justice and Lieutenant Governor of New South Wales with long experience in commercial mediation, noted that such behaviour by a judge was forsaking a fundamental principle of judicial impartiality and any private access to a judicial figure offended general principles of fairness and absence of hidden influence (Street, 1997). Another concern is that it may also be difficult to educate clients on the proper role of the judge as mediator and instead may raise incorrect expectations that the judge-mediator will determine the mediation. The strategy paper refers to the debate about whether the process of judges acting as a mediator has any Constitutional implications. The issue depends on one’s view of the Constitutional scope of the judicial power of the Commonwealth.

‘I am of the opinion that the words "judicial power" as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.’

\textit{(Chief Justice Griffin in Huddart Parker and Co Pty Ltd v Moorehead (1909) CLR 330, 357).}

Subsequent modern case law has suggested that the judicial process is in effect integral to the Constitutional notion of the judicial power itself, i.e. open and public inquiry, natural justice, a structured procedure to find facts and apply the law to the facts. Arguably, mediation processes fall somewhat short of these standards. It can therefore be argued that mediation is not consistent with the proper exercise of the judicial power, i.e. judges should not participate.

The High Court of Australia has developed some principles to test whether the performance of a function could be incompatible with judicial power.

‘Incompatibility might consist in so permanent and complete commitment to performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable. It might consist in the

\textsuperscript{47} The fee for mediations conducted by court officers in the Federal Magistrates Court in general federal law proceedings is $230.00.

\textsuperscript{48} This is sometimes referred to in ADR literature as ‘caucusing’.
performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her functions with integrity is compromised or impaired. Or it might consist [thirdly] in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished.'


It has been argued that a judge undertaking mediation offends the third principle in Grollo, as it may diminish public confidence in the judiciary by undermining the public's perception of judicial impartiality (Tucker, 2000). However, a Federal Court Justice has argued the contrary position and pointed out that where the likelihood of success via mediation was high a judge might justifiably be entitled to conduct the mediation and measures could be easily made to ensure that a judge-mediator had no further role in a case if the mediation was unsuccessful (Moore, 2003). In any event, other forms of ADR may be suitable too for judicial involvement, such as case conferences in open court, provided the judge is precluded from conducting the eventual trial of the issue. The strategy paper, unsurprisingly, appears to adopt a cautious approach.

‘Judicial involvement in ADR needs to be managed carefully to ensure that it is only used strategically, in cases identified as being specifically suited to judicial ADR, and that it does not become a standard feature of the case management path adopted by the courts.’


In the Family Court there has been work undertaken on 'case evaluation', referred to in the Family Court as 'judicial settlement conferences', where a judge will evaluate the merits of a case and can provide an opinion on how the case is likely to be decided if it went to trial.

'The Court is choosing cases to pilot that would otherwise be likely to last several days and the conference is held when all the parties are ready for trial and all the evidence is available. Rates of settlement have been extremely high'.


The Family Court has perhaps the most mature systems for ADR of all the Federal Courts, termed ‘primary dispute resolution’ (PDR)49 in the 1975 Act to refer to respectively counselling, mediation and arbitration services (see further the section on 'Family Law and ADR' below). Counselling can be utilised with regard to any matter arising under the Family Law Act involving a parent, adoptive parent, a child or a party to a marriage. Mediation, conducted by a mediator trained in law, social work or psychology, can be provided for disputes relating to either children or property. Arbitration (or 'conciliation conferencing') can be used for property disputes. The Court aims to have 90 per cent of cases resolved through

49 See Appendix 1 to this report for a description of the term 'PDR'.

18
mediated agreements within six months of filing. The Court's annual report for 2003-04 states that it was resolving 90 per cent of cases within 13.2 months and 70 per cent within six months. The target for client satisfaction with mediation processes was 75 per cent. A result of 54 per cent client satisfaction was achieved.\textsuperscript{50} However, this data should be read in the light of the fact that many clients have already received mediation services from other providers prior to filing at the Court. In that context, the satisfaction rate (a measure of satisfaction with the process not their own outcomes) is very positive. The Family Court, now with 30 years experience in providing mediation, continues to initiate new programmes to find suitable ADR methodologies to fit particular types of dispute. For example, in 2004, it instituted a 'Children's Cases Programme' in the Sydney and Parramatta Registries, described as follows:

'IIts critical features are that the proceedings are conducted, with the informed written consent of the parties, in a less adversarial way. Ordinary rules of evidence do not apply. The trial is deemed to commence on the first occasion that the matter comes before the judge. The judge controls the way in which the hearing proceeds. After a discussion with the parties and their legal representative, the judge determines what the real issues are and directs what evidence is to be required and the manner in which it is to be given. The judge may at his/her discretion limit cross-examination. The proceedings concentrate upon the parties' proposals for the future of the child, rather than the past history of the parental relationship except in so far as it may be relevant to determining the primary issue. The judge may interview the children concerned and is entitled to act upon what they say at such interviews as he/she sees fit.

During the hearing the judge may actively encourage the parties to examine the possibility of settlement and is able to call upon the assistance of a court mediator to assist in that process. The hearing may take the form of various appearances rather than one event, and the judge may shift between the processes of determining contentious material facts and issues and using mediation techniques to assist in determining the case.

The process is intended to occupy much less court time and to provide a determination in a far shorter time than occurs with the traditional, more adversarial trial.'

\textit{(Family Court Report, 2004:1)} - Emphasis added.

\footnotetext{50} According to a client satisfaction survey, conducted by the Family Court in 2004. 'The percentages reported represent parties in the survey who responded that they were either "satisfied" or "very satisfied" with the relevant processes (not the client's satisfaction with their outcome).' Family Court report, 2004:20.
3 Tribunals

3.1 The development of tribunals in Australia

There was an ad hoc development of tribunals in Australia, similar to that occurring in the UK. The Constitutional constraint on the scope of the 'judicial power' to curial forms of dispute resolution to an extent moulded the development of the tribunal sector firmly to the notion of a 'merits review', where the tribunal in effect 'stands in the shoes' of the original decision-maker and remakes the decision with the same legal and policy framework available to the original decision-maker. Some attribute tribunal development more to the pressures from well-organised lobbies, such as trade unions or war veterans, or the magnitude of commercial interests, rather than any coherent policy. In any event, by the 1970s, tribunals in Australia outnumbered courts by more than two to one and it is now the case that ordinary Australians are more likely to experience tribunal rather than court proceedings (Creyke, 2004:8, 10). However, the early piecemeal development led to a major review under the chairmanship of Justice Kerr, then a judge of the Commonwealth Industrial Relations Court.\(^{51}\)

The Kerr Report (1971) prompted a new Federal Court to review decisions on the basis of unlawfulness, a general tribunal to hear appeals on the merits (the Administrative Review Tribunal, later renamed the Administrative Appeals Tribunal (AAT)), an Ombudsman that would investigate complaints that, on expense grounds, did not warrant litigation, and an overall monitoring body, the ARC which would, inter alia, advise bodies which decisions should be subject to merits review. The creation of AAT was said to be 'the most far-sighted and innovative of the [Kerr] recommendations' (Creyke, 2004:10). The creation of AAT was included in the reforms to replace appeals to specialised tribunals and it has been said, 'was a stop taken by no other country with a common law legal system' (Creyke, 2004: 10-11).

Kerr noted two particular advantages of adopting this model of a general administrative review tribunal as opposed to a court or specialised tribunal. Firstly, many areas of decision-making could not justify the establishment of a specialist tribunal. Secondly, a general tribunal was preferable to the possible proliferation of specialised tribunals. 'It was recognised that there was a need to avoid a future re-version to the haphazard growth of administrative law bodies' (Martin, 2004:20). Kerr's recommendations were later endorsed by the Bland Report (1973) and were picked up by the reformist Whitlam government. See generally, Creyke and McMillan (1998).

\(^{51}\) The jurisdiction of the old Federal Industrial Relations Court was transferred to the Federal Court in May 1997.
3.2 The Administrative Review Council (ARC)\textsuperscript{52}

The ARC held its first meeting in 1976. Its role was to monitor the new administrative law arrangements that the Kerr Report had inspired. Its functions has expanded since then and it remains an independent source of advice on administrative law matters to the government. The proposed 'Administrative Justice Council' that will take over from the existing Council on Tribunals in the UK is comparable to this body. ARC has a wide role to, inter alia, ‘keep the Commonwealth administrative law system under review, monitor developments in administrative land recommend to the Minister improvements that might be made to the system.’ See Appendix 3 for the full text of ARC’s statutory obligations. It has a particular recommendatory role in relation to the Commonwealth merits review tribunals. It has produced a number of significant reports, for example the Better Decisions Report (ARC, 1995) that examined these (five) merits review tribunals (see the section on Commonwealth tribunals below). One of ARC’s recent reports has examined automated computer systems designed to assist administrative decision-making. ARC identified best practice principles to ensure that such automated decision-making is undertaken consistently with ‘administrative law values’. The best practice principles are intended to provide ‘a useful framework for government agencies installing such systems or reviewing their practices’ (ARC, 2004:iii). ARC is currently involved in a number of projects. One project will address the problems of the use of coercive investigative powers of government agencies. The project will assess whether the various powers used to obtain information, otherwise than by court order, might be amenable to greater consistency across government and whether such powers have suitable accountability mechanisms. Another project is examining the scope of judicial review.

3.3 The Council of Australasian Tribunals (COAT)\textsuperscript{53}

The Australian Law Reform Commission has recommended in its Managing Justice Report (Australian Law Reform Commission, 2000) the creation of a co-ordinating Council on Tribunals and ARC, in its response to this report, had consulted and a first meeting was held in June 2002. The idea expanded and COAT (also taking in New Zealand) was established. This brings Australia into line with Canada and the UK, both of whom have a dedicated co-ordinating body. There is some coherence in the nature of existing tribunals.

‘A comparative survey of the specialist tribunals, the MRT/RRT, SSAT and VRB, indicated all four have implemented nearly half of the [reform] recommendations relating specifically to tribunals. In particular professional development is a focus, core skills for tribunal members are required, performance appraisal is practised, and there is a public appointment process with requirements to meet stated criteria. Terms of appointment are between three to five years, renewable. Reasons are

\textsuperscript{52} Established under the Administrative Appeals Tribunal Act 1975 (Cth). See ‘Useful Websites’.

\textsuperscript{53} See ‘Useful Websites’ at the end of this Report.
provided, hearings are generally provided, with hearings on the papers only by consent, representation is permitted, if requested, but not always by lawyers. All four tribunals apply an active inquisitorial approach. (Creyke, 2004:13).

However, there are no common standards about when to use ADR methods, there is no uniform rule about practice directions by heads of tribunals, nor is there agreement about formulating the content of statements of reasons. Furthermore, not all hearings are in public, nor is there agreement about handling confidential or sensitive information. Creyke suggests COAT might address such issues (2004:13). The objectives of COAT are reproduced at Appendix 4. There has also been a development of a shift from the use of multi-member panels, for example, a single member now hears around four out of five AAT cases. In the late 1990s multi-member panels heard nearly half of AAT cases. Similar streamlining has occurred in the SSAT where previously three-member panels were the norm. Now most panels in the SSAT consist of two members but can be made up to a maximum of four. However, multi-member panels are still the norm in the migration tribunals.

There are probably two main reasons for the general drift towards a greater use of single members. Firstly, greater budgetary accountability has focused the need to justify the more costly allocation of multi-member panels. Secondly, there has been an increased awareness of the need for greater flexibility to fit the dispute forum around the points at issue between the parties. Recent amendments to the legislation54 have given greater powers to the AAT President to reconstitute the composition of tribunals, and to take into account a wide range of factors in deciding whether to increase or reduce panels.55

3.4 The Commonwealth Tribunals

3.4.1 The Administrative Appeals Tribunal (AAT)

The leading Commonwealth tribunal that reviews decision-making is the AAT.56 The establishment of this Tribunal in 1975 is said to reflect an awareness of how far government was intruding into every aspect of citizen's lives.

'The presence of a general review tribunal has promoted the concept of providing for review of administrative decisions generally. In practice consideration is given to administrative review in connection with all new pieces of Commonwealth legislation'. (Downes, 2004:8)

54 Administrative Appeals Tribunal Amendment Act 2005 (Cth)
55 For example, the degree of public importance or complexity of the matters to which the proceeding relates; the degree of financial importance of the matters to which that proceeding relates; the purpose or object underlying the enactment under which the reviewable decision was made; and the degree to which it is desirable for any or all of the persons who are to constitute the Tribunal to have knowledge, expertise or experience in relation to the matters to which the proceeding relates;
56 Administrative Appeals Tribunal Act 1975 (Cth)
The Tribunal is empowered to undertake a merits review of administrative decisions made in the exercise of a statutory power under approximately 400 Commonwealth Acts, including social security, veterans' entitlements, Commonwealth employees' compensation, taxation, migration, freedom of information. A merits review has been said to involve 'standing in the shoes' of the original decision-maker (Enright, 2001). An appeal lies from the AAT to the Federal Court on a question of law. The AAT will generally have the same powers as the body or person making the original decisions and may vary or substitute its own decision in place of the original decision. Victoria and the Australian Capital Territory have established administrative tribunals based on the AAT model (see below).

The Australian tribunal sector has, like its British counterparts, always resisted the perception that it dispensed 'second class' justice. The overall aims are well put by Downes.57

'The universal aim of tribunals is to resolve disputes fairly, informally, efficiently, quickly and cheaply. It should not be thought that the goals of economy, speed and efficiency compromise the supervening requirement for fairness. The absence of formality and the technical requirements of the rules of evidence do not displace due process, natural justice or procedural fairness' (2004:8).

Following the failure of more radical reform initiatives, the AAT's procedures were nevertheless streamlined under the Administrative Appeals Tribunal Amendment Act 2005 (Cth). An official news release reported that 'these important reforms will streamline the Tribunal's procedures to enhance its effectiveness in resolving disputes, and provide it with the flexibility to meet the demands placed upon it'.58

A new statutory objective was inserted into the legislation and provides that 'in carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'.59

Other Commonwealth 'merits review' tribunals include the SSAT; VRB, MRT and RRT and brief descriptions of these tribunals are given in the following sections. On occasion the Head of the AAT and the Heads of these other four Commonwealth Tribunals meet informally to discuss issues of common interest.60

---

57 The Hon Justice Garry Downes AM, President of the Administrative Appeals Tribunal.
59 Administrative Appeal Tribunal Act 1975 (Cth), s 2A, as inserted by Administrative Appeal Tribunal Amendment Act 2005 (Cth).
60 Migration Review Tribunal Report (2004:5)
3.4.2 Social Security Appeal Tribunal\textsuperscript{61} (SSAT)

This Commonwealth Tribunal was first established in 1975. Initially, it could only make recommendations, but from 1988 it had determinative powers. The Tribunal is the first level of external review of decisions made by \textit{Centrelink}\textsuperscript{62} about social security, family assistance, education or training payments. It currently receives around 10,000 appeals each year. Its statutory objective is to provide a mechanism of review that is ‘fair, just, economical, informal and quick’. Further rights of appeal from SSAT may be available to the Commonwealth AAT (A full merits review), to the Federal Court (on a question of law) and, by leave, to the High Court of Australia. The ‘informality’ of SSAT’s proceedings is underwritten in the legislation.\textsuperscript{63}

This states that technicalities, legal forms or rules of evidence do not bind the Tribunal. It is not a court of law and aims to reflect this in its practices and procedures. The SSAT’s annual report sets out a number of indicators intended to measure Tribunal performance in this area.

- ‘The avoidance of unnecessary use of legal expressions in its letters to applicants, at its hearings and in its written reasons for decision.
- Maintenance of an informal hearing environment, without compromising professionalism, so as not to discourage or intimidate people who are not familiar or comfortable with a Tribunal setting.
- Centrelink is not represented at the hearing, other than by its statement and the provision of relevant material from the applicant’s file to the Tribunal.
- Although applicants have a right to legal representation, it is made clear that this is by no means required. They may also bring family or friends for support at the hearing.
- Applications can be lodged easily and without undue formality. They can be lodged by telephone, in writing or by teletype (TTY) machine for hearing impaired applicants.
- Directors and members monitor performance against the requirement to be informal (in particular by the presiding member, who is responsible for the conduct of the hearing).’

\textit{(Social Security Appeal Tribunal Report, 2004:21).}

3.4.3 Veterans’ Review Board\textsuperscript{64} (VRB)

The VRB was set up in 1985, following earlier bodies dating from 1929. It currently makes decisions about claims for acceptance of injury or disease as war-caused or defence-caused, and claims for a number of war-related pensions. During 2003-04, a total of 5,110

\begin{footnotesize}
\begin{enumerate}
\item The Social Security (Administration) Act 1999 (Cth) and the A New Tax System (Family Assistance) (Administration) Act 1999 (Cth) set out the powers, functions and procedures of SSAT.
\item An agency of the Department of Human Services.
\item Social Security (Administration) Act 1999 (Cth), s 167.
\item See the Veterans’ Entitlements Act 1986 (Cth) and the Military Rehabilitation and Compensation Act 2004 (Cth)
\end{enumerate}
\end{footnotesize}
new applications were notified to the Board (VRB, 2004:16). The VRB currently has one (full-time) Principal Member, 13 (part-time) senior members, 15 (part-time) service members and 12 (part-time) ordinary members operating across all six States.

A Senate Committee Report (2003), which generally recommended that incremental rather than radical structural change would be the preferred option, also proposed that a variation of the VRB's existing review process be trialled in a State. It proposed that the trial should introduce pre-hearing mediation and conciliation processes as used in the AAT and should include the presence of the claimant, the advocate and a representative of the Department. It also proposed an increased use of VRB Registrars to check that applications were not defective due to poor documentation. The VRB has responded with some initiatives to improving case management but 'it has resisted the introduction of a formal mediation and conciliation process' (Veterans' Review Board, 2004:2). In this way it believes it can put into practice the Senate Committee's broad recommendations without the radical change that would be required to introduce a formal mediation and conciliation process, though such measures will not be precluded at a later stage. It would appear that VRB's main objection to such a change is that the measure would interpose another review process followed possibly by a subsequent hearing by the VRB and possibly by further conciliation and hearing at the AAT level.

Unrepresented applications are scrutinised by the registrars who undertake detailed case appraisals. The VRB's annual report claims that:

Registrar conduct detailed examination of unrepresented applications to assist applicants in understanding the legislation, the evidentiary situation, and the legal and medical issues in their cases. In a number of instances, applicants were assisted in the evidentiary development of their cases and in others they were assisted in obtaining representation."

(Veterans' Review Board, 2004:11)

3.4.4 Migration Review Tribunal (MRT)

This Tribunal was established under the Migration Act 1958 (Cth) and came into existence in its present form in June 1999. It provides an independent merit review of visa and visa-related decisions made by the Minister for Immigration and Multicultural and Indigenous Affairs or by officers of that Department. Like the other merits review tribunals, it does not have any more discretion than the original decision-maker and must make its decision within the same legislative and policy framework. It must also provide a mechanism of review that
is ‘fair, just, economical, informal and quick’. The MRT’s website also helpfully expands on what is meant by a ‘merits review’.

‘The principal objective of merits review is to ensure that the administrative decision reached in a case is the correct and preferable decision. Correct in the sense that the decision made is consistent with law and policy, and preferable in the sense that, if there is an area of discretion in making a correct decision, the decision made is the most appropriate in the circumstances. A merits review system should also improve the general quality and consistency of decision-making, and enhance openness and accountability across a particular area of administration.’

The MRT has one Principal Member (who is currently also the Head of the RRT), two senior members, five full-time members and 59 part-time members. It had 7,915 cases lodged with it in 2003-04. ADR is not used in this tribunal.

3.4.5 Refugee Review Tribunal (RRT)
This Tribunal was also established under the Migration Act 1958 (Cth) and in July 1993 commenced in its present form. Its core function is to undertake an independent merit review of decisions made by the Department of Immigration and Multicultural and Indigenous Affairs to refuse or cancel protection visas to non-citizens in Australia. A criterion for the grant of a protection visa is if the person is a non-citizen in Australia to whom Australia has protection obligations under the UN Convention and Protocol Relating to the Status of Refugees. In addition, the Tribunal also has the power, in respect of certain ‘transitory persons’, to conduct an assessment of whether a person is covered by the definition of a ‘refugee’ in Article 1A of the Refugees Convention as mended by the protocol. This tribunal also has a legal obligation to provide a mechanism of review that is ‘fair, just, economical, informal and quick’. The Tribunal currently has a total membership of 74, comprising the Principal Member (who also currently heads the MRT), a Deputy Principle Member, four senior members, 10 full-time members and 58 part-time members. The RRT had 3,344 cases lodged with it in 2003-04 (RRT, 2004:3). ADR is not used in this tribunal. Both the MRT and the RRT are concerned with largely non-negotiable citizenship rights.

3.4.6 The National Native Title Tribunal\(^7\) (NNTT)
This is not a ‘merits review’ tribunal on the model of the AAT. However, it is included here as it has a unique structure and strong ADR features. ‘Native title’ describes the rights and interest of Aboriginal and Torres Strait Islander people in land and waters, according to their traditional laws and customs that are recognised under Australian law.

---

\(^5\) Migration Act 1958 (Cth), s353.
\(^6\) See the MRT’s website: http://www.mrt.gov.au/
\(^7\) Established under the Native Title Act 1993 (Cth).
In 1992 the High Court of Australia rejected the previously held legal notion that the Australian continent belonged to no one at the time of the Europeans' arrival. It recognised for the first time that Indigenous Australians may continue to hold native title. The NNTT established in 1994 in response to this legal landmark and is of great interest in terms of the model of administrative justice it provides. Neate, Jones and Clark refer to native title mediation as 'using a primarily interest-based model in a rights-based context' (2003:4).

This Tribunal is in various respects distinguishable from the AAT and the other four specialised Commonwealth Tribunals outlined above. The NNTT is an Australia Commonwealth government agency. It mediates native title claims under the direction of the Federal Court of Australia. The Tribunal will also assist those who are proposing land developments, such as mining. It can act, in effect, as an arbitrator or umpire where the parties cannot reach agreement about proposed developments. The Tribunal also assists those who want to negotiate other sorts of agreements, such as 'indigenous land use agreements'. These are voluntary agreements between a native title group and others about the use and management of land and waters. Such agreements allow people to 'negotiate flexible, pragmatic agreements to suit their particular circumstances'.

‘Parties to this mediation, in addition to the Indigenous applicants, may include governments (Local, State and Federal), pastoral interests, mining interests, utilities providers and recreational users of the land. Parties can number in their hundreds, and the mediation often involves a complex interweaving of historical, social, political, economic and cultural interests. The task of the Tribunal is to provide a forum in which parties are able to explore their interests in a way that produces mutually acceptable outcomes’ (Neate, Jones and Clark, 2003:4).

There is currently a President, two deputy Presidents, seven full-time members and four part-time members. Applications are filed with the Federal Court, which may refer the case to the NNTT for mandatory mediation. The Tribunal provides a means by which Aboriginal and Torres Strait Islander people and landholders can seek determinations that native title or native title rights exist over land in Australia or can seek compensation or determinations about proposed future acts over native title land. There is a highly structured procedure for persons to register and publish a native title claim and allow time for other potential parties to join the proceedings. The Tribunal will then investigate the claim and has used innovative methods of mediation to resolve disputes. There is an appeal to the Federal Court where matters cannot be resolved. Underlying the framework of the Native Title Act 1993 (Cth) there is a deliberate policy to promote mediation as the preferred alternative to litigation:

68 See Mabo v Queensland (No 2) [1992] 175 CLR 1, at 15.
69 See the website information on such agreements: http://www.nntt.gov.au/ilua/
(see Civil Justice Review 2003:136). However, there has been concern that the mediation process may create a power imbalance that could disadvantage Indigenous Australians: see Dodos (1996) and Neate (2001).

3.5 Review of the Australian tribunal sector

The 'merits review' conducted by AAT has increased. By 2000 it was hearing appeals from most agencies making decisions affecting citizens – authorised by several hundred pieces of legislation. However, hearings became more formal in part because of pressure from the courts. Both the Kerr (1971) and Bland (1973) Reports envisaged that the numbers of Commonwealth tribunals should be strictly limited. However, there was a growing pressure from areas that started to generate high volumes of appeal work, for example, in relation to financial support for tertiary students, social security, veterans' affairs and migration. These developments led to the emergence of specialist tribunals in addition to the AAT (Creyke, 2004:11).

In the 1980s the desire to 'downsize' public services reached the tribunal sector and it became a target for efficiency savings. ARC was tasked to review the tribunal system (Administrative Review Council, 1994; 1995). The message given in ARC's influential report Better Decisions was that the system should be 'simple, affordable, timely and fair' (Administrative Review Council, 1995:181). ARC recommended a return to the Kerr/Bland model. It suggested that the four specialist tribunals (SSAT, MRT, RRT and VRB) and AAT should be amalgamated in a new super tribunal to be called the Administrative Review Tribunal (ART). The idea was that ART would have a number of specialist divisions corresponding to the main specialist tribunals and a general division.

The recommendations put forward by ARC constitute probably the most comprehensive review of tribunals since the Kerr Report (1971). In March 1997, the then Attorney-General, the Hon Daryl Williams, announced that the government accepted the recommendations 'in principle'. An inter-departmental committee was set up to refine the proposals with an overall strategy to reduce 'the number of applications, the overall costs of merits review and excessive legalism'. There followed much opposition in the press, mainly on the basis that the reforms would undermine the Tribunal's independence – it had been proposed that

70 See Craig v South Australia (1995) 184 CLR 163. The High Court of Australia indicated its intention to stringently supervise tribunals.

71 Indeed, it would see that the Leggatt Review recommendation in the UK to have a Divisional structure in a reformed Tribunal Service (later rejected in the White Paper in July 2004) was based on the ART model.


73 See Creyke (2004:12 n17).
the President need not be a judge and that the departments whose decisions were being
questioned would fund it.

The Australian Law Reform Commission (2000) conducted its own review *(Managing
Justice)* of the civil justice system and reviewed, inter alia, the AAT and the four specialist
Commonwealth Tribunals. The Australian Law Reform Commission (ALRC) also
commissioned some major empirical research. For example, it examined 1,665 AAT cases
and consulted widely with tribunal members, government agencies and others. It also
conducted a broad-based national, community consultation programme. The final report
contains 138 recommendations. In June 2003, the government released a point-by-point
response to *Managing Justice* (Australian Law Reform Commission, 2000).74 Contrary to the
underlying rationale of tribunals that they provide cheaper and quicker justice, the research
had suggested that spending on tribunals was on a par with court expenditure and that the
mediation duration75 of AAT cases, for example, was longer than for cases in the Federal
Court and the Family Court. The research prompted a greater awareness that the use of
ADR processes needs to be subjected more rigorously to empirical study in order to find out
whether their supposed benefits are in fact delivered (Dobinson, 2004:16).

In response to such perceived flaws, ALRC recommended decision-making continuity in the
handling of cases from application to determination. The report team had examined the case
management practices of the Federal Court of Australia and other foreign jurisdictions, which
had benefited from use of teams of tribunal members and registry staff managing a particular
docket of cases.

‘Such a case management system would not place members in charge of all
conferences but would allow registrars or other tribunal staff to retain responsibility
for pre-hearing case events in most cases. However, allocation of a 'docket' of cases
to teams of members and registrars allows for increased accountability from
members and registrars for the effective, timely resolution of cases; for consistent
dealing with cases; and flexibility to involve members in making early determinations
in appropriate cases. It also affirms that case management is part of the overall
review process and subject to direction or intervention by members where
appropriate.’
(Dobinson, 2004:17).

However, the members and staff of the AAT had broader concerns about the ALRC's
recommendations on case management. The hierarchical membership and staffing
arrangements of AAT proved difficult to accommodate within a team management system. It

---

74 Incidentally describing the report as one of the most significant ever produced by ALRC
75 This was measured from the time application was made to the AAT, to the final outcome of the case and was
found to be 8.13 months: see Australian Law Reform Commission, 1999: paras 13.36-12.39.
was thought that these reservations were less appropriately applied to the proposed ART, which was envisaged to have a more level membership structure, and subject to fewer constraints in the constitution of tribunals. Overall, ALRC considered that legislation and practice should emphasise the administrative and investigative character of tribunal processes.

‘That is, tribunal procedures can and should be arranged to permit enhanced and independent inquiry into case facts and a process that does not rely primarily on a single hearing, but on a mixture of oral hearings and decisions on the papers.’ (Dobinson, 2004:18).

ALRC’s report encouraged tribunals and government agencies under challenge to make better arrangements for contact to enable the agency to assist the tribunal to investigate particular cases. It recommended that guidelines for members be issued on their investigative duties and to assist unrepresented applicants and encourage the proposed ART to use multi-member panels for cases of complexity and/or specialism or where there were significant benefits for the continuing professional development of members.

The Managing Justice Report (Australian Law Reform Commission, 2000) also identified a number of strong points in existing arrangements. For example, it found that the AAT’s conference system was particularly successful in helping parties to settle. The view which emerged was that AAT procedures did not need radical change, merely ‘fine-tuning’, in particular to address concerns about the time taken to process cases. There also appears to be a growing awareness that while structural reform to the tribunal needs to be undertaken very carefully, effective reform can only be achieved by developing a ‘healthy professional culture – one that values lifelong learning, takes ethical concerns seriously, and embraces a “service idea”’ (Dobinson 2004:16). The Managing Justice Report recommended that every federal review tribunal should have an effective professional development programme. This should include induction, orientation programmes, mentoring, continuing education and training programmes and development of performance standards for tribunals.

The report also made recommendations regarding the use of experts in certain administrative law cases. Generally, it recommended greater disclosure of documents, and parties were to be encouraged to accept the instruction of a single expert. The report found that tribunals should encourage experts to communicate at an earlier stage in the proceeds, produce joint reports, statements of facts, agreed chronologies, encourage pre-hearing conferences, and evidence to be presented in some Federal Court cases in a panel format, i.e. all experts were to be able to hear and comment on the evidence of the others.
ALRC’s case file research on AAT cases showed that limiting the participation of lawyers and other representatives could increase the number of cases going to a hearing rather than resolving them by agreement. This research has highlighted the way in which representation can secure consensual settlement. The research found that

‘79% of cases with applicant representation resolved by consent, compared to 54% of cases where there was no applicant representation. 17% of cases with applicant representation were resolved by hearing and determination, compared to 35% of cases where there was no applicant representation’. (ALRC, 2000: para 9.100 and fn 155).

ALRC recommended that legislation and practice directions for the new ART should provide the Tribunal with discretion to permit applicants and representatives to participate in hearings, as the members consider appropriate and useful including immigration, refugee and social security cases where there are currently restrictions. The Australian government’s finalised response to Managing Justice came three years later in the form of the federal ‘strategy paper’ (Civil Justice Review, 2003). During that period, arguably, many of the ALRC’s recommendations have been progressed.76

The Managing Justice Report had found that a number of unrepresented parties involved in legal disputes was large and on the increase. About 33 per cent of AAT cases involved one or more unrepresented parties. ALRC called for federal tribunals to publish data on unrepresented parties. This would assist with measuring un-met legal need as well as relative overcomes for such cases. In the AAT there are client service offices, and in larger registries, ‘dedicated outreach officers to assist applicants in person.’ (Downes, 2004:9).

Nearly all matters in AAT are listed for preliminary conference before specialised conference registrars ‘who are also able to help unrepresented applicants' (Downes 2004:9). Tribunal members will also help applicants to understand the issues where they can, though obvious difficulties can arise if tribunals become too involved in assisting parties. The appearance of larger numbers of self-represented parties in the tribunal sector has increased the pressure for more effective advice services to be available. The AAT has recently introduced a pilot scheme in Sydney and Melbourne conducted by the Legal Aid Commission in NSW and Victoria under which solicitors attend regularly at the tribunal to offer free advice to applicants when requested.

76 However, Dobinson comments that there has been little implementation of the recommendations that relate to federal review tribunals (2004:70).
The demise of the Administrative Review Tribunal (ART)

The vision of the 'super tribunal' (ART) that would take in the AAT and the four main specialised Commonwealth tribunals, was contained in the Administrative Review Bill in 2000 introduced by the government. However, these plans were abandoned because of Senate opposition. In 2003 the government announced it was still committed to tribunal reform but would not re-introduce the ART legislation 'in the current Parliament'. Instead, it announced a programme of 'sensible reform of the existing tribunals on an individual basis' starting with the AAT.

There had been concerns that the proposed ART would be an executive style tribunal designed to operate in a manner which would 'harmonise with the needs of the institutions and policies of government'. Such an approach would, it was feared, detract from the authority and independence of the tribunal (Creyke, 2004:12). Following pressure from the veterans' community it was decided that the VRB should stay outside of the new ART. Also, the refugee and immigration division of ART (i.e. one-third of the proposed ART caseload) was not to be covered by core provisions of the two ART Bills. When all that remained were the divisions corresponding to the SSAT and AAT the case for reform fell away.

The overall objective to create a comprehensive, coherent and integrated tribunal had been undermined. However, under the ART Bills, the procedural provisions were not as flexible as they could have been. The norm for hearings would have been single member panels, representation only with leave, no right of appearance and hearings on the papers. Creyke commented that 'the resemblance between the ART Bills and the Better Decisions Report had become tenuous' (2004.13). The ART Bills were defeated in the senate in February 2001.

Following the demise of the ART Bills, the government's less radical 'sensible' reform of existing tribunals was progressed by the introduction of a new Administrative Appeals Tribunal Amendment Bill in the House of Representatives on 11 August 2004. This was aimed at improving the AAT's procedures, the removal of restrictive Constitutional requirements, a better use of ordinary members, reform of the role of the Federal Court and changes to the qualification requirements for appointment as President. As regards the procedural reforms, it has been said that 'the emphasis on an increased use of ADR to

---

78 Creyke, 2004:12 n 19.
resolve administrative disputes is possibly the most significant aspects of the reforms to the Tribunal procedures proposed in the [2004] Bill.\textsuperscript{79} The overall policy is for the AAT to be able 'to deliver informal, fast and fair merits review, unfettered by costly and legalistic procedures' and 'enabling the AAT to flexibly manage its workload and to ensure that reviews are conducted as efficiently as possible'.\textsuperscript{80}

This legislation, it was claimed, would not involve a fundamental change to 'the purpose, structure or function' of the AAT\textsuperscript{81} but nevertheless has involved a substantial consultation process and has been heralded as 'the most comprehensive review of the Administrative Appeals Tribunal Act 1975 (Cth) since it came into operation almost 30 years ago'.\textsuperscript{82} AAT's procedures will be more streamlined under the Administrative Appeals Tribunal Amendment Act 2005 (Cth), which will come fully into force later in 2005. See generally, Humphreys (2005), on the implications of this Act.

Creyke comments that although the ART Bills did not reach the statute book, at least some of the reforms suggested by both ARC's Better Decisions Report and ALRC's Managing Justice Report could in fact be implemented without Parliament. These include the sharing of tribunal premises, libraries, IT systems and registry and front counter staff. The two migration tribunals, the RRT and MRT are apparently moving to share premises and resources and there has been a rationalisation of the SSAT registries (Creyke, 2004:13). Finally, the VRB is likely to acquire a wider jurisdiction following the report of a Senate Committee Report (2003) into proposed legislation to amalgamate veterans' and military compensation schemes. Despite the Senate Committee’s caution over reform of the VRB, it would appear that some of the demands for the further amalgamation of the Commonwealth Tribunals are likely to appear on the public agenda in the future.

Finally, it is worth remembering that the concept of (generic) AAT to hear appeals across all areas of public administration has also been emulated in most of the States and Territories. ‘Although the amalgamation proposal of the Better Decisions report may not have been accepted, it is clear that already many of the reforms proposed for the ART super tribunal are being implemented. The federal tribunal landscape in 2004 strongly reflects the recommendations for more uniform procedures and for the increased professionalism of tribunal members. So all has not been lost. Indeed it can be said that the report has had a significant impact on the framework of tribunal

\textsuperscript{80} Ibid.
\textsuperscript{81} Attorney-General's Department, 8 June 2004, Media Release 088/2004.
\textsuperscript{82} Attorney-General's Department, 11 August 2004, Media Release 144/2004.
review in Australia. Amalgamation may not have been achieved, but it appears that many of the reforms proposed by the report will in fact quietly materialise.’ (Creyke, 2004:14)

3.6 State and Territory Tribunals
The proposed ART reforms (see above) in the Commonwealth have also had their effect on tribunals operating at the State and Territory level of Australian government.

3.6.1 The development of State and Territory tribunals
The State and Territory tribunal sector has had a parallel history to that in the Commonwealth; an ad hoc development following the specialisation of government administrative functions. The uncoordinated growth of tribunals has also led to calls for rationalisation. In the State of Victoria, for example, the idea of a general administrative tribunal had appeared several years before the Kerr Report of 1971. The Victorian Statute Law Revision Committee had tabled a report in the Victorian Parliament proposing the creation of such a body, a proposal closely scrutinised by the Kerr Committee (Martin, 2004:20). The Victorian Administrative Appeal Tribunal was established. Although the development in the States and Territories has, to an extent, mirrored Commonwealth developments, the States and Territories have had greater success in producing tribunals that handle both citizen v government (administrative) and party v party (civil) disputes. The following sections provide an outline and some commentary on some of the key tribunals in the States and Territories.

3.6.2 Victoria: Victorian Civil and Administrative Tribunal (VCAT)83
This is one of the largest of the State tribunals established in 1998 from the Victorian AAT and a number of smaller tribunals and boards. VCAT has three divisions; a civil division which exercises original jurisdiction in relation to disputes between individuals, an administrative division which is mainly concerned with the merits review of administrative decisions of government and a human rights division which hears discrimination complaints and guardianship matters: see Figure 2 below.

83 See the Civil and Administrative Tribunal Act 1998 (Vic) and Wade (1996) and 'Useful Websites'.
Figure 2  The Victorian and Civil Administrative Tribunal: divisional structure

<table>
<thead>
<tr>
<th>CIVIL DIVISION</th>
<th>ADMINISTRATIVE DIVISION</th>
<th>HUMAN RIGHTS DIVISION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Claims List</td>
<td>General List</td>
<td>*Anti-Discrimination List</td>
</tr>
<tr>
<td>Credit list</td>
<td>Land Valuation List</td>
<td>Guardianship List</td>
</tr>
<tr>
<td>*Domestic Building List</td>
<td>Occupational and Business Regulation List</td>
<td></td>
</tr>
<tr>
<td>Real Property List</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Residential Tenancies List</td>
<td>*Planning and Environment List</td>
<td></td>
</tr>
<tr>
<td>*Retail Tenancies List</td>
<td>Taxation List</td>
<td></td>
</tr>
</tbody>
</table>

*Mediation used in these Lists

The Victorian and Civil Administrative Tribunal has a five-tiered hierarchy of members at the head of which is a President who is a State Supreme Court Judge. There are two Vice Presidents who are County Court judges appointed to head a division. There are eight Deputy Presidents who are appointed to manage one or more lists (one of whom is also appointed to head a division). There are also senior members (12 full-time and 8 sessional) and other members (8 full-time, 114 sessional) who serve on the lists on a full-time or sessional basis. VCAT conducts hearings in Melbourne and 11 other cities and towns and 57 rural locations.

Mediation is used extensively in the Domestic Building, Retail Tenancies, Planning and Environment and Anti-Discrimination Lists. VCAT has an overall caseload of around 86,000 cases (VCAT Report, 2004). The mediation statistics for VCAT are set out in Figure 3 below.

Figure 3  VCAT Mediation Statistics: 2003-04

<table>
<thead>
<tr>
<th></th>
<th>Total applications received in List</th>
<th>Cases finalised prior to mediation</th>
<th>Cases finalised at mediation</th>
<th>Mediation success rate (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anti-Discrimination List</td>
<td>481</td>
<td>19</td>
<td>126</td>
<td>70</td>
</tr>
<tr>
<td>Domestic Building List</td>
<td>839</td>
<td>39</td>
<td>275</td>
<td>66</td>
</tr>
<tr>
<td>Planning and Environment List</td>
<td>3,702</td>
<td>68</td>
<td>356</td>
<td>68</td>
</tr>
<tr>
<td>Retail Tenancies List</td>
<td>161</td>
<td>8</td>
<td>19</td>
<td>61</td>
</tr>
<tr>
<td>Overall (4 Lists)</td>
<td>5183</td>
<td>134</td>
<td>776</td>
<td>67</td>
</tr>
</tbody>
</table>


84 In addition, there are six other Vice Presidents who are County Court Judges and can be called to sit at VCAT
VCAT is accepting an increasing proportion of ‘online’ applications. Its overall success rate in mediation is reported to be 65 per cent (VCAT, 2004:6, 14). It provides regular user group meetings across its various Lists. In order to address some concerns about delays in casework, VCAT introduced ‘Operation Jaguar’ in 2003. It claims the delays in the Planning and Environment List and the Civil Claims List have been eliminated (VCAT, 2004:7, 19, 34).

The mediation waiting times in the Planning and Environment List decreased from 22 to 18 weeks and in the Civil Claims List from 21 weeks to eight weeks. The operation combined a number of initiatives to streamline the processes associated with the List’s decision-making. A particular success was the introduction of ‘practice days’.

‘Practice days’ – Held regularly each Friday, practice days are generally conducted by the President or Deputy President and enable matters that can and should be heard and determined quickly to be accommodated without prejudice to the general operation of the List. A Practice Note was prepared setting out the procedures for bringing on a matter at the practice day, including a key provision that, other than for extremely urgent matters, an application to have a matter considered on a Friday practice day can be made eight days before the proposed hearing...

One of its most visible outcomes has been the success of practice days – it was not unusual for the List to deal with 15 to 20 cases in a single practice day. This not only expedited the decision-making process but also freed List members for other tasks. Other improvements that flowed from Operation Jaguar included the increased number of oral decisions delivered by members. This meant that parties knew the outcome of their case immediately following the hearing or within several days. Where considered written reasons were required, members concentrated on writing shorter decisions, which also improved the timeliness of decision-making’ (VCAT, 2004:34).

Mediation is the preferred form of ADR at VCAT though ‘compulsory conference’ is also utilised. Compulsory conferencing is regarded as a ‘robust evaluative form of mediation where the member expresses a view to the parties as to the likely outcome if the matter were to go to trial’ (VCAT, 2004:14). VCAT has a principal mediator and a group of 53 mediators. Most anti-discrimination matters proceeded to mediation. During 2003-04, of 2,336 cases initially listed 64 per cent proceeded to mediation. The overall success rate was reported as 67 per cent (VCAT, 2004:14).

3.6.3 New South Wales: Administrative Decisions Tribunal (ADT)86

Following the Kerr Report (1971) the New South Wales Law Reform Commission (1972) published a report recommending a similar general appeals tribunal to the Commonwealth AAT but with some significant differences in the detail (Martin, 2004:20). The NSW Tribunal would have two functions. Firstly, an inquiry and direction function where official actions could be set aside if taken beyond the scope of the decision-making power or where

---

86 See Administrative Decisions Tribunal Act 1997 (NSW), Administrative Decisions Tribunal Amendment Act 2004 (NSW) and 'Useful Websites' below.
decisions were harsh, discriminatory or otherwise unjust. Secondly, an appeal function in cases requiring judicial determination such as would be given in a court: see (New South Wales Law Reform Commission, 1972 (Survey), para 52).

The ADT was established in its current form in 1998, and, like VCAT, also has a limited jurisdiction to hear private disputes. The ADT has a President, a Deputy President and there are in total 68 judicial and 80 non-judicial members. It has a Rules Committee but it prefers to issue practice notes. 'This approach enables the Tribunal to take a flexible approach to dealing with practice issues, and making amendments quickly if needed' (ADT, 2004:29). It processed around 900 cases in 2003-04 (ADT, 2004:4). It has six divisions: the General, Community Services, Revenue, Equal Opportunities, Retail Leases and Legal Services Divisions. The first three constitute the main work relating to the accountability of government/agency decision-making. The ADT also has an 'appeal panel' that hears appeals from its own divisions and 'external' appeals from other decision-making bodies, mainly from the Guardianship Tribunal. There were 100 appeal cases in 2003-04.

'Internal appeals may be made on a question of law, and the Appeal Panel may grant leave to extend the appeal to a review of the merits. External appeals may be made as of right on any question of law, or by leave of the Appeal Panel on any other grounds. If the Appeal Panel grants leave to extend an internal appeal to the merits, it must decide "what the correct and preferable decision is." No such limitation applies to external appeals made "on any other grounds."' (ADT, 2004:21).

The legislation provides for both 'mediation' and 'early neutral evaluation' as the available forms of alternative dispute resolution: see Appendix 1 (NADRAC's glossary of common terms). Neutral evaluation was reported as not in use (ADT, 2004:29). Mediation on the other hand was available in a number of equal opportunity, community services, freedom of information and privacy matters. Its main use in 2003-04 appeared to be in the Equal Opportunity division. Of 76 cases where mediation was conducted, 46 settled at mediation, 17 afterwards and 13 proceeded to a hearing. The ADT may make an order referring a matter arising in tribunal proceedings for mediation or neutral evaluation if:

- the Tribunal considers the circumstances appropriate;
- the parties to the proceedings consent to the referral; and
- the parties to the proceedings agree as to who is to be the mediator or neutral evaluator for the matter.\textsuperscript{87}

The ADT has recently reinvigorated its mediation practice, following a report it commissioned from the Australian Commercial Disputes Centre and a new practice note was issued: see

\textsuperscript{87} Halsbury's Laws of Australia, para 10-935.
Appendix 5. An 'agreement to mediate' must be signed by each party prior to participating in mediation. Training mediators who are also qualified tribunal members are provided at no cost to the parties. If the matter is not resolved via mediation the mediators will take no part in any subsequent hearing. The practice note details some of the circumstances where mediation would not be considered appropriate: see Appendix 5, para 4.

The Administrative Decisions Tribunal Act 1997 (NSW) sets out the overall 'objectives' of the legislation.

'The objects of this Act are as follows:
(a) to establish an independent Administrative Decisions Tribunal:
   (i) to make decisions at first instance in relation to matters over which it is given jurisdiction by an enactment, and
   (ii) to review decisions made by administrators where it is given jurisdiction by an enactment to do so, and
   (iii) to exercise such other functions as are conferred or imposed on it by or under this or any other Act or law,
(b) to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair,
(c) to enable proceedings before the Tribunal to be determined in an informal and expeditious manner,
(d) to provide a preliminary process for the internal review of revisable decisions before the review of such decisions by the Tribunal,
(e) to require administrators making reviewable decisions to notify persons of decisions affecting them and of any review rights they might have and to provide reasons for their decisions on request,
(f) to foster an atmosphere in which administrative review is viewed positively as a means of enhancing the delivery of services and programmes,
(g) to promote and effect compliance by administrators with legislation enacted by Parliament for the benefit of the citizens of New South Wales,'
(Section 3).

One can see that the primary legislation explicitly sets out some of the underlying policy matters to encourage information resolution of disputes: see paras' (b) (c) and (f) above, for example. The procedure is flexible in order to encompass such objectives and there are linkages with the courts in that the appeal panel's decision can be further appealed or referred on a question of law to the Supreme Court of New South Wales and in any event the State Supreme Court retains a power to review decisions of the ADT. The ADT also has a power to give an opinion on legal questions the (NSW) Ombudsman has referred to it.88

88 See Ombudsman Act 1974 (NSW), s 35C.
The ADT has robust powers to ensure that administrators give written reasons for their decisions\(^{89}\) and that they entertain internal reviews\(^{90}\) prior to proceeding to a determination. However, although the legislation is ‘enabling’ from the point of view of the user, the Australian legacy of tribunals viewed as part of the executive arm is still to be detected in, for example, a provision that instructs the Tribunal while reviewing a decision that it:

- must give effect to any relevant government policy in force at the time the reviewable decision was made except to the extent that the policy is contrary to law or the policy procedures an unjust decision in circumstances of the case; and
- may have regard to any other policy the administrator who made the reviewable decision applies in relation to the matter concerned except to the extent the policy is contrary to government policy or to law or to the extent the policy produces an unjust decision in the circumstance of the case.\(^{91}\)

### 3.6.4 Australian Capital Territory: Administrative Appeals Tribunal (AAT)\(^{92}\)

This tribunal comprises two divisions: the General Division and the Land and Planning Division. It has a clear explanatory leaflet on the use of mediation in the latter Division: see Appendix 6. This tribunal 'largely mirrors the Commonwealth AAT' (Martin, 2004:20)

'The Tribunal had jurisdiction, as at 20 June 2004, to review administrative decisions of Ministers, statutory authorities and Territory officials under Acts and Regulations. The more important areas of decision-making subject to review by the Tribunal include planning, land management, tree protection, revenue, housing assistance, licensing, professional and occupational registration and discipline and freedom of information requests. Planning matters comprise the largest group of matters; approximately 47% of all applications were lodged in the Land and Planning Division of the Tribunal in the year under review' ([Administrative Appeals Tribunal (ACT) Report, 2004:138](#)).

The membership of the Tribunal consists of a President, three senior (part-time) members and seven (part-time) members. Court-ordered mediation was introduced in amendments to the legislation that came into effect in July 2003. These required that before hearing an application for review of a decision made under the Land (Planning and Environment) Act 1991 and the Tree Protection (Interim Scheme) Act 2001 the Tribunal must consider whether the application is suitable for mediation. The Tribunal can direct the parties to attend mediation. The Tribunal's annual report notes that

'During the period covered by this report, the Tribunal has referred 46 cases to mediation. 29 of those cases have resulted in a decision being made by the Tribunal

---

\(^{89}\) See Halsbury's Laws of Australia, para 10-903.

\(^{90}\) Halsbury's Laws of Australia, para 10-923.

\(^{91}\) Halsbury's Laws of Australia, para 10-963. 'Government policy' in this context means the policy of the Cabinet, the Premier or any other Minister that administrators must apply in the exercise of discretionary powers. Administrative Decisions Tribunal Act 1997 (NSW), s 64(5).

\(^{92}\) Established under the Administrative Appeals Tribunal Act 1989. See 'Useful Websites'.

39
with the written consent of the parties without the need for the matters involved to be the subject of a hearing’ (Administrative Appeals Tribunal Report, 2004:138).

The report observes the significant reduction in the average period of time for the completion of cases compared to earlier years and notes that this ‘is attributable to the early resolution of a significant number of cases achieved by mediation’ (Administrative Appeals Tribunal Report, 2004:140).

In addition to the AAT there are currently the following specialised tribunals in ACT: Commercial Tenancy Tribunal, Credit Tribunal, Discrimination Tribunal, Guardianship & Management of Property Tribunal, Mental Health Tribunal, Residential Tenancies Tribunal.

3.6.5 Western Australia: The State Administrative Tribunal (SAT)93

This is the newest of the State and Territory administrative tribunals. The proposal for a State Administrative Tribunal was introduced in the State Parliament in 2003. The legislation was assented to on 23 November 2004 and became fully operational on 25 January 2005. SAT employs a range of modern ADR methods and is therefore discussed in some detail in this section. It has been said that the provenance of this legislation can be traced back to the Franks Report (1957) in Britain and the ‘expanded vision’ of those recommendations in the Kerr Report (1971) in Australia. However, it arguably goes much further than the Franks/Kerr vision of tribunals.

‘The SAT is intended to have a jurisdiction that will result in it exercising an original decision making function in a number of specialist areas and a review function in respect of a considerable range of public decisions within the State, as well as a disciplinary hearing function in the place of a large number of existing professional and occupational boards’ (Barker and Simmonds, 2004:23).

One key element in the thinking behind this Tribunal is that there was a need to detach the task of administrative review from the courts. It was thought that a tribunal would be a better forum to deal with policy orientated review and the courts would not be compromised by any intrusion into matters of policy.

The Law Reform Commission of Western Australia (1999), noting similar developments in Victoria and New South Wales, recommended an administrative review body be established that would bring together the review and appellate functions of existing tribunals and boards

---

93 Established under the State Administrative Tribunal Act 2004 (WA). See ‘Useful Websites’. See generally, Barker (2005), for an account of the various developments leading up to the establishment of SA and commentary on its first six months of operation.
and a number of courts and other bodies, except in the areas of industrial relations and workers' compensation. The State Attorney-General set up a Taskforce in March 2001 to act on these recommendations and produce detailed proposals. The Taskforce Report (2002) appeared and recommended the establishment of a State Administrative Tribunal (SAT) modelled on the Victorian and New South Wales generalist Tribunals (VCAT and ADT).

One key recommendation related to a number of vocational boards. The view was taken that 'the nexus between the general regulatory functions of these boards and their disciplinary functions should be broken' (Barker and Simmonds, 2004:25). Following the Victorian and NSW models, it was recommended that proceedings should be conducted with as little formality as possible and should not be bound by strict rules of evidence (Taskforce Report 2002). Its procedures should be flexible, according to the factual and legal context and whether the parties were represented or not. The Taskforce Report (2002) recommended also an emphasis on using the various forms of ADR and, in the event of these tools failing, speedy progress to resolving cases. The tribunal, though bound by common law rules of natural justice, should be able to regulate its own procedure. The Taskforce's recommendations have largely been reflected in the legislation, though there are some departures on some matters of detail: see Barker and Simmonds (2004:26). It has been claimed that the new Tribunal will outpace similar administrative law developments elsewhere in Australia:

‘The breadth of the current proposal in Western Australia [WA] is significantly greater than that of the Commonwealth Administrative Appeals Tribunal and reflects, and in some respects extends, that of the Victorian Civil and Administrative Tribunal. In this way, the passage of the State Administrative Tribunal legislation will effect a significant change in public administration in WA' (Barker and Simmonds, 2004:27).

The State Administrative Tribunal is currently adopting flexible procedures appropriate to the nature of applications before it. Sometimes single members, other times multi-member panels will be deployed and some matters can be determined 'on the papers' without the need for an oral hearing. The Tribunal is adopting 'user-friendly forms of application and hearing procedures, as suggested by the Taskforce.' (Barker and Simmonds, 2004:27). Most applications will be listed for a direction hearing soon after lodgement. Modern case management practices are being implemented, providing for the electronic lodgement of applications and other documents: see generally Barker (2005). Tribunal members have web-based access to the Tribunal's information base and other resources. The tribunal is based in Perth, but will sit in country and regional areas. The legislation provided for questions of law to be referred by the Tribunal to the President in the course of a hearing of an application and judicial guidance could therefore be given to a tribunal before final
determination, thus reducing the incidents of appeals. Decisions of the SAT are appealable to the Supreme Court of Western Australia on a point of law only.

There were two Acts which establish the SAT: The State Administrative Tribunal Act 2004 (WA) and the State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 (WA). The latter confers jurisdiction on the new Tribunal by amending each relevant Act (called an enabling Act) to place it within the jurisdiction of SAT. The conferral Act amends each of the 142 enabling Acts and repeals two Acts to consolidate more than 500 decisions and appeal rights and place them within SAT’s jurisdiction.\(^{94}\)

The Attorney-General of Western Australia set out the benefits of SAT in the first reading of the legislation as follows.

‘The benefits of a SAT are numerous and include a right to obtain reasons for decisions made by public servants; the removal of confusion in the public mind because one overarching tribunal is identified as the place where people can seek redress; less formal, less expensive and more flexible procedures than used in traditional courts by using a more inquisitorial and less adversarial approach; the development of best tribunal practices – both procedural and in terms of common decision-making principles across various jurisdictions; improved quality and consistency in decision-making; in a democratic context, the provision of a more appropriate and timely means for citizens to obtain administrative justice; in many instances, the improvement in public accountability of official decision-making flowing from heightened scrutiny of administrative decisions; separation of the licensing and registration functions carried out by vocational bodies from the disciplinary function; and avoiding the ad hoc creation of new tribunals to provide administrative review in evolving areas of government decision-making’

(Mr J A McGinty, Legislative Assembly, Parliament of Western Australia, 24 June 2003, p.9102).

SAT applications are divided into four streams: Human Rights, Development & Resources, Commercial & Civil and Vocational Regulation. Applications to SAT can be made by telephone or via an electronically available pro-forma. SAT’s website\(^ {95} \) sets out its objectives (which are contained in the legislation).

‘The main objectives of the tribunal in dealing with matters within its jurisdiction are:

To achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;

To act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and

To make appropriate use of the knowledge and experience of tribunal members.’

\(^{94}\) As the legislation required much amendment to each enabling Act one commentator noted that it was the ‘largest legislative package ever introduced into that Parliament’ (Martin, 2004:20).

\(^ {95} \) See ‘Useful Websites’ at the end of this report.
The Attorney-General of Western Australia explained SAT’s jurisdiction in the second reading of the legislation in the Legislative Assembly.

'The jurisdiction of SAT falls into three categories. Firstly, a review jurisdiction that consolidates matters such as town planning appeals, administrative appeals to the courts, and ministerial appeals under legislation. In this jurisdiction, SAT will be able to review licensing decisions made to numerous facets of everyday life, including dogs, hairdressers, fishing, caravan parks, taxis, lawyers and doctors. Secondly, an original jurisdiction, where SAT members will adjudicate matters relating to a number of areas, including guardianship and administration, equal opportunity and strata titles matters, retirement villages disputes and what are currently commercial tribunal matters. SAT will make a variety of decisions relating to its original jurisdiction ranging from the amount of compensation payable to people whose land is being resumed or the value of Aboriginal artefacts through to a minor dispute relating to a commercial tenancy. Thirdly, SAT will be an original vocational jurisdiction, in which SAT members will perform a wide range of disciplinary functions over professions, occupations and businesses. For example, it will assume responsibility for the disciplining of lawyers, doctors, nurses, land valuers, debt collectors, travel agents, real estate agents, plumbers, electricians and optometrists. In relation to each of those jurisdictions, each relevant Act – called an enabling Act – is amended by the conferral Bill to place its jurisdiction within SAT. There are general provisions in the SAT Bill dealing with procedural matters, but a particular enabling Act may have its own overriding provisions about those matters.'

(McGinty, 2nd reading).

The Tribunal comprises a President\(^{96}\) (a State Supreme Court judge) and two Deputy Presidents (District Court judges) appointed for a period up to five years, to provide judicial leadership and they appear on cases where a senior legal presence is required. In addition, there are judicial and non-judicial members supported by a chief executive and around 55 support staff. There are (4) full-time senior members and (9) ordinary members and in addition, there are (31) senior sessional members and (63) ordinary sessional members. On SAT’s website it is claimed that, ‘[SAT] amalgamated some, or all, of the review, civil and disciplinary functions of nearly 50 industry and public sector boards and tribunals and a number of courts in creating one of the most comprehensive administrative jurisdictions in Australia.\(^{97}\)

In the debates on the legislation it was stressed that one of the overarching principles was that the procedure adopted by SAT should be flexible. The rules of evidence will not apply. The President has control over who will constitute SAT for any particular matter and will have regard to a number of factors including the degree of public importance, the complexity of the matter and the extent to which any sitting member of SAT needs to have special knowledge or experience relevant to the matter in question. It should be noted that there is nothing in the relevant legislation dictating how final hearings of applications should be

\(^{96}\) Justice Barker, who chaired the influential Taskforce Report (2002).

\(^{97}\) http://www.sat.justice.wa.gov.au
conducted. The legislation does however, set out the Tribunal's main objectives 'which provides some signposts as to the practice and procedure the Tribunal should adopt' (Barker, 2005:39).

'(a) to achieve the resolutions of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;
(b) to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to the parties; and
(c) to make appropriate use of the knowledge and experience of Tribunal Members.'

(State Administrative Tribunal Act 2004 (WA))

It is also intended that SAT adopts cutting-edge modern technology to enable users to access SAT’s jurisdictions and to give SAT the flexibility to cope with changes and increased demands in the future.

The strong emphasis placed by SAT on the use of ADR, it is claimed, is already proving beneficial. SAT has only been operating since 1 January 2005, therefore some caution is required in relation to claims made about its effectiveness, and at the time of writing there were no reported statistics or formal evaluations available. However, the SAT President, commenting on the Tribunal’s first six months of operation has stated that,..

'Already the use of mediation and compulsory conferences has produced significant outcomes for parties, in all [four] streams'

(Barker, 2005:36).

It is also interesting to note the ambitions of the current President of SAT, the Hon Justice Barker, to develop SAT so that it has a systemic function.

'One particular benefit that the Taskforce did not explicitly state in its report, is the capacity of a generalist tribunal like the SAT to provide an account of any systemic failure in the public administration in the areas of decision-making that fall within the Tribunal's jurisdiction. However, I think it is implicit in the recommendations of the Taskforce that the new generalist tribunal should form an overview function in respect of the performance of the primary decision-makers whose decisions the Tribunal is called upon to review. This is indeed a very important function of a generalist tribunal, as it will always find itself in the privileged position, from a public administration point of view, of gaining something of an overview of the way in which legislation is administered in the State, at least in relation to those matters that come before the Tribunal.

In this regard, the Tribunal has already seen, and is likely to keep seeing, instances of decision-making that the Tribunal not only considers has resulted in administrative injustice, but also suggest a particular systemic approach to decision-making that should be reconsidered by the primary decision-maker'

(Barker, 2005:47).
4 Ombudsmen in Australia

The ombudsman principle took hold in Australia shortly after its appearance in the UK. Ombudsmen appeared first in some of the States and in 1976 an Act was passed to create an Ombudsman for the Commonwealth.98 There are now Ombudsmen for each State, the NT and for the ACT.99 There are additionally three specialised provisions relating to the Commonwealth Ombudsman system: a Defence Forces Ombudsman,100 a separate Act dealing with police complaints,101 and there is flexibility for the Commonwealth Ombudsman to enter into an Ombudsman Scheme' with the consent of a Minister, i.e. to apply the Ombudsman techniques of inquiry in relation to any matter under Commonwealth legislation. There are also Ombudsmen in the private sector, for example, the Banking and Financial Services Ombudsman.102

4.1 The Commonwealth Ombudsman

The Commonwealth Ombudsman receives complaints about the administration and investigate a complaint by a citizen or on his or her own motion, and then recommends to officials what needs to be done to put matters right. Where the official does not respond adequately a report to the government and publication can expose the injustice. There are broadly, four classes of grounds on which the Ombudsman can intervene: a failure to give reasons for the decision, the grounds for judicial review, the merits of the decision, and a special ground under which the Ombudsman can impugn a common law or statutory provision authorising administrative action on the basis that the provision is or may be 'unreasonable, unjust, oppressive or improperly discriminatory.'103 This provision, according to one commentator, 'potentially makes the Ombudsman a legislative scrutineer or a human rights commissioner' (Enright, 2001:65). As in the UK, the Ombudsman does not have coercive power. If the Department does not heed the recommendation, the Ombudsman can report the matter to the responsible Minister and possibly to Parliament and can also publicise the problem. There 'is virtually no formality for a citizen who complains to the Ombudsman' (Enright, 2001:650). Once an investigation commences there are, as in the UK, wide powers to gather information.

98 Ombudsman Act 1976 (Cth).
100 Ibid, Pt IIA.
101 Complaints (Australian Federal Police) Act 1981 (Cth)
102 See ‘Useful Websites’
103 Ombudsman Act 1976 (Cth) s 15(1)(a)(iii).
There is some evidence that the Commonwealth Ombudsman has incorporated ADR in both their system of complaint handling (Taylor, 2003). On occasion, the Ombudsman will include in the recommendation an advice to enter mediation. The Commonwealth Ombudsman is currently expending training on ADR and mediation (Commonwealth Ombudsman, 2004:16). Two case studies, given in the Ombudsman's Annual Report 2002-03, provide an illustration of how ADR has been incorporated into the ombudsman system: see Appendix 7).

4.2 State and Territory Ombudsman Offices

The first Ombudsman in Australia was appointed in Western Australia in 1971, and three further States legislated for Ombudsmen prior to the Ombudsman Act (Cth) 1976. The State and Territory Ombudsmen Schemes all show, to differing degrees, the pervasive use of ADR techniques in handling their complaints. The NSW Ombudsman report 'conciliation' and 'mediation' being used both in relation to their community services division and their work on police complaints. In addition, there have been training initiatives for Ombudsman staff on ADR methods and skills (NSW Ombudsman Report, 2004:27, 114). Conciliation functions are also found in the Victorian Ombudsman's duties in relation to investigating police complaints. One typical outcome is that a referral will be made to independent mediation services by the Ombudsman Service: see Victorian Ombudsman (2004:34). The Victorian Ombudsman's jurisdiction, like the other State Ombudsman Schemes, has increased in the breadth of subject matter dealt with and more complaints are being dealt with by informal resolution rather than via the statutory reporting routes.

'... [Ombudsman's] Office has moved from dealing with complaints by formal to informal means of resolution. In the early days, both the Ombudsman and the Deputy Ombudsman (Police Complaints) relied substantially upon formal investigation. However, there has been a gradual change in dealing with complaints by less formal means which was eventually recognised by an amendment to the Ombudsman Act [Vic] in 1989, which allowed the Ombudsman to conduct enquiries to determine whether the complaint could be resolved informally. Today, very few formal investigations are conducted.'

(Perry, 1998:12).

Most of the Ombudsman have moved towards a focus on resolving complaints by less formal means than initiating statutory reports under their founding legislation. The Queensland Ombudsman, for example, stated:

'The major difference that an informal resolution approach makes is that it provides a quicker outcome for both parties. More formal methods of investigating complaints require agencies to submit formal reports in response to a complaint we receive. In contrast, informal resolution involves our officers conducting file inspections, making telephone inquiries and liaising between agency officers and the person who has made the complaint. This year we resolved 99% of complaints by an informal approach, which is an improvement on the previous year's performance of 95%'

(Queensland Ombudsman Report, 2004:26)
Similarly, in WA the majority of investigations are conducted informally but for complex matters or matters raising public interest and 'systemic' issues the following comment was made:

'... we consider conducting a more detailed investigation where there is significant public interest in the matter complained about, or the complaint has significant public policy implications, or raises systemic policy, procedural or legislative issues. At the systemic level, investigations are more likely to proceed on a formal basis and involve the use of the Ombudsman's Royal Commission powers. In addition to the above criteria, we also consider the following when making decisions about whether to investigate an issue, as well as how the investigation should be conducted:

- public interest in the matter
- public policy implications of the matter
- whether there is a reasonable prospect of proving an allegation or group of allegations
- whether any practical outcome can be achieved for the complainant, due to the passage of time
- whether important systemic policy, procedural or legislative issues are involved
- available resources

(Western Australia Ombudsman, 2004:4).

In at least one of the State and Territory Ombudsman offices the facility for undertaking ADR methods is built into the founding legislation. For example, in South Australia the relevant legislation contains a provision giving the Ombudsman a discretionary power 'at any time' to decide to 'deal with a complaint by conciliation' and may also decide that a complaint shall not be formally investigated or further investigated if it has been properly resolved by conciliation. The Tasmanian Ombudsman (as Health Complaints Commission) is charged with the conciliation or investigation of health complaints. Indeed, it has been suggested in a position paper from the Tasmanian Ombudsman's Office that the Ombudsman 'should have a range of dispute resolution techniques available to resolve complaints. ADR could include mediation, conciliation and facilitating mutually agreed outcomes'. The position paper recommends following similar provisions operation in SA and NSW, that the relevant legislation be amended to provide that the parties to a complaint may be referred for conciliation; and such conciliation would be privileged and voluntary. It is argued that such specific legislation provision 'would legitimise and encourage a less formal process providing for mutually acceptable outcomes'. The position paper concluded that 'a formal conciliation power had a valuable role to play when the Ombudsman forms an opinion that a complainant has cause to be aggrieved but pursuit of a full investigation may be unreasonable in the circumstances but it appears that the matter may be resolved through

104 Ombudsman Act 1972 (SA), s 17A
conciliation.' (Tasmanian Ombudsman, 2004a:71-2). The South Australia Ombudsman's Annual Report for 2003-04 provides some detailed case study examples in relation to land use and planning matters where conciliation was successfully deployed.105

There have been some significant changes in the nature of Ombudsman bodies in Australia. 'The effect of these changes is very marked and a new breed of Ombudsman is emerging. There is a subtle, but distinct move away from the redress of individuals' complaints to focus more on major systemic issues, 'own motion' investigations and an increasing auditing and monitoring role, which have as their primary objective an improvement in the overall quality of public administration. Likewise there is a move away from regarding procedural justice outcomes as sufficient in themselves. The Ombudsman has always been regarded as the champion of procedural justice, whose task is to identify defective administrative action and to formulate recommendations for redress. Lacking any determinative power, the Ombudsman has relied on persuasive and reasoned argument to effect change. Ultimately, the Ombudsman did not see that the resolution of disputes was necessarily the end point of the investigative process. This is no longer seen as an adequate response. The emerging trend is more towards the resolution of disputes, through such means as conciliation and mediation, and the achievement of outcomes that are demonstrably fair and reasonable. Independence, impartiality and jurisdictional certainty are still the essential features of the Ombudsman's role, but the traditional 'arm's length' approach to dealing with agencies and complainants, is no longer realistic.' 

Tasmanian Ombudsman (2004:71), emphasis added.

The 'emerging trend' of the move towards ADR techniques by the ombudsmen schemes can be best demonstrated by the reasons offered for closures of formal investigations. For example, The Tasmanian Ombudsman estimated that 40 per cent of cases were discontinued as the matter was resolved through negotiation with the relevant agency (compared to 26% and 27.5% in 2001-02 and 2002-03): see Tasmanian Ombudsman Report, 2004: 32. 106 It is likely that the increasingly proactive and pragmatic approaches of the various Ombudsmen in Australia, making good use of ADR methods where appropriate, will continue to flourish and develop in the foreseeable future.

---

105 The SA Ombudsman views the powers to publish reports of investigations where these are in the public interest as sufficient to authorise the publication of the result of conciliation conferences (South Australia Ombudsman, 2004:17-19).

106 In addition to the 40% resolved through negotiation, there was a further 25% of cases the Ombudsman declined to investigate, another 25% in which no defective administration was found and in the remaining 10% of cases the complaint was sustained in whole or in part.
5 Alternative Dispute Resolution

5.1 ADR philosophy and policy

It is difficult to identify any kind of theoretical purity in the underlying philosophy of ADR and indeed critics often attack advocates of ADR as supporting it as ‘an article of faith’ rather than with proper regard to the empirical evidence (Ingleby, 1993:441). In Australia as elsewhere, ADR has been prompted by a set of diverse and practical responses to difficulties appearing in curial dispute resolution; in particular increased delays and costs. The 'philosophy' if it can be called that, is to produce customised solutions to a range of dispute scenarios varying in their nature with different subject matter and different types of disputant. It is difficult to identify exactly where the line should be drawn between the employment of ADR and traditional litigation and on what basis.

'Some cases will inevitably require a judicial resolution either because of the nature of the proceedings or the disputants. Indeed, it is essential for the integrity of the judicial system that a proportion of cases are resolved by judicial determination, or the normative value of judicial decisions in interpreting legislation and ensuring the evolution of the common law would be diminished' (Civil Justice Review, 2003:132).

In the federal civil justice system ADR has been used to address rising costs and delays, but it is also recognised that early resolution of disputes usually achieved via ADR methods is also less stressful for litigants.

One principle perhaps of dispute resolution generally is that 'the means of resolving a dispute should be proportionate to the nature of the dispute in terms of its value, complexity and importance to the disputants and the public more broadly.' (Civil Justice Review, 2003:133). This is a theme that resonates with the advocacy of 'proportionate dispute resolution' in Britain (White Paper, 2004). However, ADR in Australia has not been regarded as a complete substitute for curial dispute resolution. It has been presented as a 'bonus, an additional facility, supplementing adjudication' (Civil Justice Review, 2003).

It is often simply assumed that ADR methodology always involves early intervention in a dispute. However, a number of commentators have noted that though the timing of a referral to ADR may be extremely important 'there is not a universally optimal time to refer disputes to ADR, and early referral is not necessarily better as the parties may not yet be ready to settle and the dispute not yet 'ripe' for resolution. Hence ADR can increase costs by adding another layer to the dispute resolution process when used indiscriminately.' (Civil Justice Review, 2003:133). NADRAC and the Australian Institute of Judicial Administration produced
an extensive paper to more clearly identify the criteria that might be used to identify the optimal time for referral (Mack, 2003): see further below. There is also an awareness of the need to protect the rights, in particular of the self-represented litigant.

'... it is important that self-represented litigants understand the relevant ADR process, as well as the alternatives, and are not pressured into settlements without understanding their right to a judicial determination of the dispute. Furthermore, although ADR is capable of redressing some power imbalances between disputants, these imbalances will only be heightened if one party is forced to participate in ADR because, for example, of a financial incapacity to litigate the matter or a lack of bargaining power' (Civil Justice Review, 2003:134).

Ruddock\textsuperscript{107} (2004:2) maintains that the Australian government's approach to ADR is 'multifaceted'. In essence, it contains three major strands. It is working to mainstream ADR within the federal civil justice system. It is helping to tailor particular ADR solutions for particular jurisdictions, such as human rights and family law. Finally, it is committed to promoting and engaging in ADR processes when it is itself a party to a dispute.\textsuperscript{108} It is likely therefore that there will be an increasing demand for ADR solutions in relation to the classic concerns of administrative law – citizen's complaints against government and government-related agency decision-making.

5.2 The development of ADR in Australia

Australian writers on ADR are keen to point out that the indigenous communities of Australia had used a range of techniques to manage conflict, e.g. shaming, exclusion, compensation, initiation and training based on a system of kinship based law: see Astor and Chinkin (1992). There was an early focus on conciliation and arbitration to manage the labour market 'although this progressively developed into a rather formal litigious system' (Condliffe, 2000). Though there were also early developments in arbitration, tribunals and Ombudsmen as 'alternatives' to court resolution, none of these provided the key element of self-determination for the disputing parties. Condliffe (2000) maintains that the modern ADR movement in Australia began in earnest in the 1970s and it was the element of self-determination of the parties 'which tied mediation into the rise of communitarian and consumer rights ideals and projects of the time and which marks the beginning of the modern ADR movement.'

The technique of 'arbitration' (see Appendix 1 – glossary of common terms) arguably has the longest historical roots. The Conciliation and Arbitration Act 1904 (Cth) established a

\textsuperscript{107} The Hon Philip Ruddock MP, Attorney-General of Australia since October 2003.

\textsuperscript{108} See the relevant part of the Legal Services Directions 1999 reproduced at Appendix 10 of this report. See further the section on the Commonwealth's obligations as a 'model litigant' in the section below.
Commonwealth Court of Conciliation and Arbitration to hear applications regarding employer/employee awards. In 1956 it split into two organisations, the Conciliation and Arbitration Commission and the Industrial Court, following a High Court case\textsuperscript{109} that found it was unconstitutional for an arbitral body to exercise 'judicial power'. After this case, the arbitral function of making awards and settling industrial disputes fell to the Commission and the judicial function of prosecuting under the Act fell to the Court. The Federal Court as we have seen now accommodates the industrial relations jurisdiction. Uniform legislation was introduced from 1984 to 1990 across the Commonwealth, States and Territories to allow any matter to be referred to arbitration provided the parties agree to be bound by it.

In 1975, the Institute of Arbitrators was set up, later changing its name to the Institute of Arbitrators and Mediators (IAMA).\textsuperscript{110} The organisation aims to serve the community, commerce and industry to promote dispute resolution methods including arbitration, mediation and conciliation. It has chapters in each State and Territory of Australia. It focuses on professional development and training, administers the accreditation of mediators and arbitrators, and produces a professional journal (the \textit{Arbitrator and Mediator}) and a newsletter.

One of the largest and most innovative areas of ADR developments in Australia is in the field of family law. The Family Law Act 1975 (Cth) underlined the need to manage disputes by ADR processes and they were highlighted in the Act as 'Primary Dispute Resolution' (PDR) (see Appendix 1 glossary of common terms). The Family Law Regulations contain comprehensive mediation protocols. The Commonwealth has funded community-based services (e.g. \textit{Relationships Australia} and \textit{Centacare}) to provide the required services under this legislation. These services have in turn 'provided the impetus for the development of new and innovative processes, supervision and research'. (Condliffe, 2000). Most significantly, the establishment of the Family Court in 1975 with its emphasis on informality, the empowerment of the parties, and pre-trial processes such as counselling and conferences was 'an early and powerful symbol which contributed significantly to the rise of the ADR movement' (Condliffe, 2000). There are further details relating to ADR and family law in a separate section below.

Another landmark in the development of ADR in Australia was the foundation of Community Justice Centres (CJCs), organisations that provide accessible information and dispute

\textsuperscript{109} Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.  
\textsuperscript{110} See 'Useful Websites'.

51
resolution to all sections of the community, first in NSW in 1983,\textsuperscript{111} and then in Victoria (1987) and Queensland (1990), modelled on ones developing in the United States. CJsCs are generally State government funded, community-based organisation that provide mediation services to the community to help people resolve their own disputes without legal action. These services are generally intended to be ‘free, confidential, voluntary, timely, and easy to use.’\textsuperscript{112}

These centres focus in particular on disputes that have been unresponsive to conventional methods and minor disputes, in particular household and neighbour disputes. The CJC established by the government of the Northern Territory lists\textsuperscript{113} the type of dispute as follows:

- Local community/neighbourhood disputes over such things as a fence, noise, pets, trees, property damage and people’s behaviour
- Workplace-communication
- Clubs and organisations whose members are in conflict
- Relationships between family members
- Small claims/civil claims
- Victim Offender Conferencing
- Many other types of disputes

The preferred method of dispute resolution is mediation. Spencer (2002:8) comments favourably that the training of mediators by the New South Wales CJC is rigorous and of a very high standard.

‘The impact of the CJC’s should not be underestimated. They have provided a fertile ground for the dissemination of the philosophy and practice of dispute resolution and are a shining example of the successes of mediation programmes that are well organised and where only well trained mediators are allowed to mediate disputes.’ (Spencer, 2002:9).

Condliffe (2000), the Chief Executive of the Institute of Arbitrators and Mediators, states that CJsCs are aimed at ‘providing services to a long neglected and ill used sector of conflict – community disputes. They also pioneered the use of mediation in public issue disputes, victim offender mediation (sometimes called “conferencing”) and family mediation’. Condliffe (2000) states that many of these services were supported with legislative protections and administrative resources enabling them to provide co-ordinated services across large sections of the community. He argues that the development, particularly in NSW, was ‘a

\textsuperscript{111} See Community Justice Centre Act 1983 (NSW)
\textsuperscript{113} See Northern Territory government, Department of Justice: http://www.nt.gov.au/justice/graphpages/cjc/index.shtml
catalyst that other States copied and which spurred other interest groups, principally the legal profession, to respond to."

There have been significant developments too in the commercial sector. In response to the increasing costs of arbitration and courts, the NSW government established the Australian Commercial Disputes Centre in 1986. This organisation provides training programmes for mediators and designs dispute resolution systems for public and private organisations. The Australian Commercial Disputes Centre operates mainly in the private sector. It lists commercial transactions, partnership disputes, planning and environmental matters, workplace grievances, building and construction matters, IT, general contractual disputes, professional indemnity, public liability, and person injury claims amongst its subject matter.

The development of ADR would not be complete without some mention of the contribution made by the legal professions. In 1986, for example, the NSW Law Society formed an ADR Committee to advise on the developments and issues around the philosophy, processes and practice of ADR.

One of the Committee’s many successes have been the development of the NSW Law Society’s @Settlement Weeks’, which identified matters languishing in court lists that were appropriate for mediation (Spencer, 2002:10-11).

Most State and Territory Law Societies and Bar Associations have dispute resolution committees that advise courts and government departments and also conduct training, accreditation and practice disputes resolution. In 1989, NSW lawyers set up an interest group that became the Leading Edge Alternative Dispute Resolvers (LEADR) in 2000. Its headquarters is in Sydney but it now has chapters in every State and Territory of Australia and New Zealand. Its overall aim is to promote ADR via education and research. It offers a number of services including professional accreditation, training, a biennial international conference on ADR, and a pro bono mediation service for legally aided parties and produces a number of publications including LEADR Brief.

ADR has now been fully integrated into law school curricula in Australia. Consequently, ‘nearly all lawyers admitted in their respective States and Territories will enter the profession with some understanding of dispute resolution’ (Spencer, 2000:20). Specialist courses, for example, on family law dispute resolution and court annexed dispute resolution, are also available across an increasing range of postgraduate courses.

---

114 See the Australian Commercial Disputes Centre website: http://www.acdcltd.com.au/
In 1990, the *Australian* (Now *Australasian*) *Dispute Resolution Journal* was established, prompted by the formation of the Australian Dispute Resolution Association in 1987 which had an organising committee of academics, and legal and dispute resolution practitioners. The journal contains comprehensive covering of all ADR areas ranging from training and skills through to theoretical and policy dimensions.

It should also be noted that over the past ten years a highly influential role has been taken by the National Alternative Dispute Resolution Advisory Council (NADRAC), a non-statutory body appointed by the Attorney-General, that was established in October 1995 following the Sackville Report (1994) on access to justice. NADRAC Council members are appointed by the Attorney-General and funding is provided through the Attorney-General's Department. It was recognised that there was a need for a national body to advise the government, federal courts and tribunals on ADR issues to achieve and maintain a high quality, accessible, integrated federal ADR system.

> 'The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent advisory council charged with providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision.' *(NADRAC Chapter, para 1)*.

In addition to its role in examining professional, training and service standards to be achieved in the ADR field, it is tasked with advising on the desirability and implications of the use of alternative dispute resolution processes to manage case flows within courts and tribunals and provides an annual report to the Attorney-General. In its annual report for 2003-04, for example, NADRAC reports on issues relating to mediator accreditation, the promotion of improved ADR research, and the completion of a review of Commonwealth statutory provisions affecting ADR including the development of a database of such provisions (NADRAC Report, 2004). NADRAC compiles and collates statistics on ADR in relation to Federal and State courts, tribunals, workers compensation schemes, industry/customer ADR schemes, government ombudsmen, health care complaints schemes and community mediation services: see NADRAC (2003a).

Finally, mention should be made of the International Legal Services Advisory Council (ILSAC), which, along with NADRAC, facilitates discussion between the various ADR

---

116 See 'Useful Websites'.
117 NADRAC currently has 12 Council members, including the Chair, the Hon Justice Murray Kellam, a Justice of the Supreme Court of Victoria, former President of the Australian Institute of Judicial Administration and of the Victorian Civil and Administrative Tribunal.
118 See 'Useful Websites'.

54
bodies in Australia to promote the wider recognition of Australian ADR practitioners and services. ILSAC is a part-time advisory body with private and public sector representation that reports to the Attorney-General. 'Its key role is to help improve Australia's international performance in legal and related services, including ADR.' (Ruddock, 2004:10). It organises 'missions' to other countries to discuss, inter alia, matters relating to international commercial dispute resolution, including ADR. 'There are no official statistics on Australia's trade in international commercial dispute resolution services. Informal estimates vary and range between around $10 million per annum to well in excess of this figure. There appear to be good prospects for increased exports of these services in the Asia-Pacific Region'. (Ruddock, 2004:11).

The initiatives outlined above occurred against a background of increasing concern about a developing 'crisis' in civil justice, i.e. the perception of heavier caseloads and the inaccessibility of litigation for many. In addition, an increasing level of government regulation to control business activity and protect consumer, human and environmental rights have inevitably increased case flows to the courts. Condliffe (2000) identified four broad trends. Firstly, the development of a number of specialist courts and tribunals that have been more willing to use more flexible responses to dispute management. Secondly, a greater government willingness to give courts (e.g. the High Court and the Federal Courts) more self-governing opportunities makes them responsible for their workloads and resources. Condliffe (200) maintains that 'this has sensitised these bodies to the cost pressures not only upon themselves as organisations but to their clientele who must use them'. Thirdly, the courts have embraced 'case management' techniques as a response to their growing lists and also 'in a more general sense to deal with the apparent and perceived inadequacies in their processes'. Finally, there has been the use of ADR processes to make procedures more accountable, client centred and efficient.

5.3 Definitions
The federal civil justice strategy paper made it clear that 'ADR methods should not be viewed as "alternative", especially in the family law context, since they are now accepted as mainstream dispute resolution processes' (Civil Justice Review, 2003:131). In fact, discussions of ADR are often confusing where terms are not clearly explained. It is not only the word 'alternative' that can cause difficulties. There are further confusions in Australia, as elsewhere, not least because the (federal) Family Courts refer to all ADR process (except arbitration) as 'mediation'. Given the way in which the terminology has evolved in different sectors this is not perhaps surprising. However, the term 'ADR' has been over-used and sometimes misused (Buck, 2004:3). In the UK, a government discussion paper (LCD, 2000)
stated that ADR generally refers to a number of processes providing an 'alternative' to court litigation, but is can also refer to dispute resolution processes where those involved would be unlikely to resort to the courts. The paper pointed out a useful distinction between processes where a neutral third party makes a decision and those where the neutral offers an opinion, and/or seeks to bring the parties to an agreement. In the former case the term 'alternative adjudication' (e.g. arbitration, expert determination, Ombudsmen and regulators) is used, and in the latter case the term 'assisted settlement' (e.g. mediation, conciliation and early neutral evaluation) is used. However, even this distinction has its exceptions. For example, 'med-arb' (see Appendix 1 – glossary of common terms) is a process where there is an initial agreement to mediate and in default of settlement submission to a determinative arbitration. Furthermore, there is some evidence that Ombudsman Schemes in Australia (see above) and elsewhere (Doyle, 2003) are increasingly employing mediation techniques.

The definitional problem is not merely an academic debate as the confusion about terms can prevent public agencies imparting clear information and can therefore act as an obstacle to growing public confidence. It is also likely that as more courts and tribunals make use of ADR procedures there will be a greater need to develop consistent understandings of relevant terms. In Australia, there has been an impressive attempt to achieve more consistency (and confidence) in the use of terminology in this field, though confusingly, in the family law system the term 'PDR' is employed.

NADRAC issued a glossary of terms in 1997 (NADRAC, 1997). The 'glossary of common terms' was later updated (NADRAC, 2003). (There have been reproduced at Appendix 1). NADRAC's paper enumerates the benefits of using terms consistently while carefully pointing out that the glossary should not be used 'to be prescriptive or to constrain appropriate practices'. The advantage for users of ADR is to receive accurate information and have realistic expectations about the processes they are undertaking. The advantage for courts and other referring agencies is to help match processes to specific disputes. The advantage for service providers and ADR practitioners is to develop consistent and comparable standards. Finally, common terms will provide a basis for policy and programme development, data collection and evaluation. A common confusion, for example, is the distinction between 'mediation' and 'conciliation'. NADRAC argue that 'mediation' should be used for processes where 'the mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted'.

56
"In NADRAC's view, 'mediation' is a purely facilitative process, whereas 'conciliation' may comprise a mixture of different processes including facilitation and advice. NADRAC considers that the term 'mediation' should be used where the practitioner has no advisory role on the content of the dispute and the term 'conciliation' where the practitioner does have such a role. NADRAC notes, however, that both 'mediation' and 'conciliation' are now used to refer to a wide range of processes and that an overlap in their usage is inevitable' (NADRAC, 2003:3).

There is good evidence that NADRAC's influence in establishing a more consistent understanding of ADR terminology is taking root in the legal culture of Australia. The categorisation of 'dispute resolution' as including processes that may be 'facilitative, advisory or determinative' is particularly useful. NADRAC's influence in generating a more shared and consistent understanding of ADR terminology is reflected, for example, in the Administrative Appeals Tribunal Amendment Act 2005 (Cth) where the amendments to the Administrative Appeals Tribunal Act 1975 deliberately refrain from providing an exhaustive definition but instead provides a checklist of the main ADR processes from which the Tribunal President can choose when directing a resolution of a dispute by ADR.

'Alternative dispute resolution processes mean procedures and services for the resolution of disputes, and includes:
(a) conferencing; and
(b) mediation; and
(c) neutral evaluation; and
(d) case appraisal; and
(e) conciliation; and
(f) procedures or services specified in the regulations;
but does not include:
(g) arbitration; or
(h) court procedures or services.
Paragraphs (b) to (f) of this definition do not limit paragraph (a) of this definition.' (Administrative Appeals Tribunal Act 1975, s3(1), as amended).

The descriptions of (a) to (e) above are marked with an asterisk (*) in Appendix 1. 'Conferencing' and 'mediation' were the only two alternative dispute resolution processes available under the Administrative Appeals Tribunal Act 1975 (Cth). 'Neutral evaluation', 'case appraisal' and 'conciliation' and other services or processes specified in regulations are now also available. Arbitration or court procedures or court services are expressly excluded from the definition: see generally, Humphreys (2005) on the implications of the new legislative amendments.
5.4 Courts and tribunal referral to ADR

The advice NADRAC has given to the Australian government has consistently emphasised the importance of developing criteria to guide the courts and tribunals to making their decisions to refer cases to ADR in the various Federal, State and Territory jurisdictions. There are often a number of interlined questions involved. Is the case suitable for referral in terms of the nature of the parties and the subject matter of the dispute? What kind of ADR process and which types of service provider are suitable? There is also the matter of the timing and manner of the referral. These and other issues about the referral practices of Australian courts and tribunals have been discussed in the context of a review of relevant empirical research by Mack (2003) on behalf of NADRAC and the Australian Institute of Judicial Administration.

Mack attempts to discover whether empirical research establishes specific criteria, or identifies key features about disputes and/or disputants and/or ADR programmes, which might provide a checklist to guide a court or tribunal in making a referral to ADR. It proves a useful and extensive review of the extensive empirical research literature on ADR. Mack notes that there is often an underlying assumption that particular types of dispute can be regularly 'matched' with a particular type of ADR process. However, she concludes:

‘The reality is that there are very many components, and they are all moving targets. They are variable in many dimensions, they are dynamic and they exert mutual influence on each other’. (2003:2).

There are often a number of goals underlying a court or tribunal-annexed programme, some of which may be complementary, others inconsistent. This also makes the measurement of 'success' of any referral rather difficult. Mack concludes that 'settlement rates' and 'party satisfaction' are the most widely used measures,119 but 'even with these relatively narrow measures, there are substantial limits on the ability of empirical research to establish clear referral criteria. (Mack, 2003:2).

One of the report's conclusions is that a search for any generalised checklist is fruitless.

‘In light of the many complex and dynamic qualities, which go into the process of matching, the search for generally applicable criteria will not be a productive strategy. It is more valuable to use research to identify areas in which each individual court must make specific choices, and to provide guidance for each court to design its own referral processes and criteria, in light of particular local features such as programme

---

119 In reviewing the research literature, Mack also identifies rates of compliance, the nature of agreements, efficiency and improvements in the post-dispute climate and further measures of ‘success’ (Mack, 2003:18).
goals, jurisdiction, case mix, potential ADR users, local legal profession and culture, internal resources and external service providers'.

(Mack, 2003:2).

However, despite the equivocation of these findings the report also identifies that the ‘most consistent finding of research into mediation is high client satisfaction.’ (Mack, 2003:2). NADRAC also report that, the research literature generally indicates a high client satisfaction rate with mediation and that compared with adversarial methods, mediation produces higher compliance and lower re-litigation rates (NADRAC, 2004: para 120).¹²⁰ Most disputes that are referred for mediation will settle before, during or shortly after mediation. Furthermore, the outcomes of mediation, i.e. the rate of settlement and the degree of satisfaction do not appear to vary much irrespective of whether participation is voluntary or compulsory. However, there is a remaining problem of the public's unawareness of mediation and the consequent uptake of voluntary mediation is low.

Although family mediation has been widely studied, and generally, family mediation showed greater satisfaction rates over adjudication, there were contradictory findings on whether outcomes differed between family mediation and litigation.

‘Research comparing mediation with general civil litigation and small claims processes is either mixed or contradictory, as is research comparing arbitration with adjudication. Research on early neutral evaluation processes seems more positive, though there is relatively little research specifically on the subject’.

(Mack, 2003:3).

There is often a lack of clarity to what ADR is being compared: the final court/tribunal trial of an issue, a lawyer-led negotiated settlement or a judicial settlement conference? It is recognised in Australia,¹²¹ as in the UK, that the majority of civil disputes are already resolved outside of the formal court system and few proceedings are resolved through a final hearing.

‘Conventional wisdom dictates that 95% of all substantial civil cases settle before a judgment or determination.’

(VCAT report 2004:14).

In considering how to formulate criteria for referral it is important to consider who refers and at what point in time does the referral take place. Mack reports that there is no research which directly addresses whether any category of referrer – judicial officers, court staff or ADR providers – have any greater success rate.

¹²¹ ‘Only 4% of Family Court first instance proceedings result in a final hearing,24 compared with 22% of Federal Court first instance proceedings’. (Civil Justice Review, 2003:132).
The empirical research is also inconclusive on the question of whether compulsory referral affects the likelihood of settlement or satisfaction. The research generally showed that those referred compulsorily to ADR ‘do not generally express objections after the fact nor do they opt out, if given the choice’ (Mack, 2003:4). It is also recognised generally that there is not an automatically correct time to make a referral and having an automatic referral stage within the litigation process it is likely to produce inappropriate referrals.

Although Mack found that there were a number of individual criteria listed in the ADR literature as being significant in some way there was very little research that attempted to directly address such individual factors. There were however, a number of factors that Mack indicated are based on essential principles necessary for an ADR process to take place at all rather than their impact on likely success. These included: the capacity of the parties to participate safely or effectively on their own behalf; the relevant costs of ADR and litigation and the benefits of each; cultural factors; the need for or possibility of more flexible results not possible in an adjudicated outcome; and the ‘public interest may require a formal, public binding determination, or an authoritative interpretation and application of statute or case law’ (Mack, 2003:6)

This latter factor is particularly relevant to the content of administrative justice. It has also been acknowledged that in some circumstances a non-public ADR process would be unsuitable, for example, where there was a significant question of statutory or constitutional interpretation. Arguably, in these circumstances the court or tribunal should not encourage or assist ‘settlement’. There may also be claims, e.g. consumer fraud allegations, which cry out for the establishment of a precedental case and/or a public hearing to deter violations. There will always be a need in the civil justice system for the public sanctioning of dangerous or otherwise unacceptable conduct. Administrative law cases may have an element of impact on third parties. The potential impact on others may be far ranging. Again, this is a situation that may call for a court determination rather than an ADR response. Lawyers frequently express concerns that a case turning on an issue of law is not suitable for ADR (Mack, 2003:60).

It would appear that the research is inconclusive about whether the type of case, e.g. family, administrative, general civil, more specific civil cases, is a positive or negative indicator of ADR success (Mack, 3003:61). Nevertheless, there are some reasonably consistent research findings suggesting that the following qualities may be significant factors in ADR effectiveness:
• ‘The participation of a party or representative with authority to settle or to be bound by any outcome.
• ADR appears to be less effective in resolving a dispute between parties who have major, non-negotiable value difference.
• Intensity of conflict also appears to make ADR less likely to succeed.
• Genuine concern for children appears to make ADR more likely to succeed.
• Legal representation of the parties can support or undermine ADR, depending on the attitudes, knowledge and skill of the legal practitioner.
• Bundles of features, which recur in a particular case type, may be more important than the specific nature of the dispute. For example, some research suggests that family matters are more likely to result in successful outcomes when referred to ADR. However, other research suggests that it is not specifically the family nature of the dispute, but its multi-issue nature and the ongoing relationships which are key factors in successful ADR’.

(Mack, 2003:6-7)

Mack makes two general conclusions in her report:

‘The review of the research covered in this report demonstrates that there are very few criteria, which are consistently and reliably justified by empirical research over a range of contexts. The most important general criteria are those of principle, which indicate features essential to a minimally fair process or to allow the ADR process to function at all. Even these can only be expressed at a very high level of generality, and may not be suitable for concrete or easy application in any particular case.’

(March, 2003:8)

Secondly, she concludes that though there may be some value in developing specific factors for limited purposes there is little point in devising more general criteria across the whole field:

‘An effective approach to court referral must acknowledge that no one set of criteria will be generally applicable. Empirical research can provide some guidance, but not single model checklist or generic criteria for all courts. Ultimately, each court or tribunal must develop its own referral process and criteria, in light of its own programme goals, jurisdiction and case mix, potential ADR users, local legal profession and culture, internal resources, and external service providers’.

(Astor, 2001) (Mack, 2003:8)

The evident complexities arising from the referral decision-making examined by Mack does not however appear to have forestalled the movement towards the greater use of court and tribunal referral to mediation and other ADR processes. It is perhaps significant, as an indicator of what the future might hold, to reflect upon the recent developments made to the Commonwealth AAT’s procedures, a Tribunal that has been the exemplar of ‘merits review’ throughout Australia. The number of ADR methodologies available to the Tribunal, as discussed earlier, has been increased.
'These reforms clearly indicate that the Government envisages that there will be an expansion in the frequency and variety of ADR processes within the Tribunal resulting in "informal, quick, fair, just and economical" merits review. No doubt it is hoped that more matters will be settled at an earlier point of time with less expense than it will the case at the present. In addressing the capacity of the Tribunal to deliver these desired outcomes, it needs to be remembered that in 2003/2004, 81% of applications that were finalised did so without the Tribunal determining the matter following a hearing. The challenge for the Tribunal will be to introduce processes that build on this existing high rate of settlement without adding to the costs of the parties or detracting from public policy imperatives'.

(Humphreys, 2005)

Sourdin (2005) discusses the extent to which ADR skills and techniques can be blended with tribunal processes in order to produce a more flexible response to users' needs. In particular, she examines the extent, to which ADR processes are separated from the tribunal member function and how such processes can be used to support the tribunal, including its determinative function.

5.5 ADR and family law
The Family Law Act 1975 (Cth), as mentioned earlier in this report, has had a profound effect in terms of legitimising the use of ADR methods in Australia. Under that Act, unfortunately, different terminology emerged. The key concept is 'PDR'. PDR services include counselling, mediation, arbitration, neutral evaluation, case appraisal and conciliation. See Appendix 1 (glossary of common terms). State and Territory mediation schemes in family law started in 1980. 'Federally funded schemes were piloted in Noble Park (metropolitan Melbourne) and Wollongong in the mid 1980s and further funding was provided for mediation through marriage counselling organisations in the late 1980s and the early 1990s' (Ruddock, 2004:4). In 1996, the (1975) Act was amended to provide a sharper focus for separating families on the 'best interests of the child' and, consistently with this policy, encouragement has been given to the use of PDR to assist parents to reach amicable agreements about their post-separation roles in relation to their children. Ruddock (2004:4) noted the increased support since the mid-1990s given by the Australian government to community based organisations, for example through the Family Relationships Services Programme and legal aid agencies for PDR in relation to separating families. The government also created, as noted above, the Federal Magistrates Court that promotes the use of PDR services.

Programmes have included, for example, the creation of a Contact Orders Programme for high conflict families – to help parents take more account of their children's needs. The

122 See 'Useful Websites'.
government has underlined the use of PDR by legal aid commissions where appropriate. The Commonwealth guidelines require that legal aid commissions try PDR services to resolve family disputes before making a grant of legal assistance for court proceedings. Assistance for litigation should be pursued only as a last resort. In-house PDR services have, or are in the process of being, established in all the States and Territories. Services delivered by legal aid commissions are commonly based on a conferencing model in which the parties to the dispute have legal representation at the conference that is run by an independent chair. The chair may be a legal practitioner or social worker whose responsibilities can include making a recommendation on whether legal aid is continued if the PDR is unsuccessful in resolving the dispute. Legal Aid Queensland\textsuperscript{23} has trialled a voluntary PDR property arbitration programme.

‘Legal Aid Queensland remains the only legal aid commission to offer two distinct PDR streams to assist clients resolve their family law issues – the family law conference program and the property arbitration program. The property arbitration program continues to provide clients with an alternative to litigation for the resolution of property disputes. During the year the program resolved 45 matters including 23 by arbitral award and 22 by negotiation through the arbitration process. Since the commencement of the property arbitration program in November 2001 the number of referrals have steadily increased with a significant number of matters in progress. Referrals into the program are sourced from advice lawyers, preferred suppliers, direct client applications, court orders and through the family law conference program.’

\textit{(Legal Aid Queensland report, 2004:50)}

PDR services are also extensively used prior to filing with the courts. This will enable clients to be aware of the pitfalls and costs of litigation and it provides a forum for early resolution of their difficulties. In order to promote the use of PDR in family law matters the government has included a clause in the Commonwealth priorities for legal aid, attached to the legal aid agreements between the Commonwealth and each State and Territory, which requires that consideration is given to resolving family law disputes by using a PDR method. Applicants must first attempt resolution by PDR before a grant of legal aid for court proceedings can be made. Legal aid commissions throughout Australia provide PDR services. These services have received a boost in their funding in recent years (see Civil Justice Review, 2003:157).

There are broadly three phases in the Family Court's management system: prevention, resolution and determination. Most of the Courts' mediation service is used at the resolution stage. (See the flow chart of the Family Court procedures given in Appendix 2). Only around 36 per cent of matters proceed from the resolution phase to the determination phase and

\textsuperscript{23} Ibid
only 6 per cent of cases are heard to judgement (Civil Justice Review, 2003:159). The Federal Magistrates Court has the same range of PDR referral options as the Family Court.

Two key reports by the Family Law Pathways Advisory Group\textsuperscript{124} and the House of Representatives Standing Committee on Family and Community Affairs\textsuperscript{125} have increased the profile and importance of primary dispute resolution in helping parents make agreements about their children after divorce and separation’ (Ruddock, 2004:5). In the family law area, one can see that the processes are frequently quite dynamic; they assist in developing the parties’ parenting skills in a post-separation context. The three generic pathways identified were self-help, supported and litigation. The policy suggested was to encourage the use of self-help and supported pathways with litigation kept as a last resort.

\textquoteleft'The self help pathway would be suitable for parents who have a relationship which allows them to make parenting decisions without any external help, whereas the supported pathway would be suitable for parents who may experience difficulties, but would be capable of managing their separation and parenting responsibilities with appropriate support. The litigation pathway may be necessary in some cases where parents cannot reach any agreement or where issues of violence, child abuse or abduction need to be addressed\textquoteright. (Civil Justice Review, 2003:155)

There has also been recent interest in developing \textit{child-inclusive} practices in professional development programme for professionals working in family dispute resolution: see Moloney and Webb (2003). The pathways report also identified the need for post-order PDR services (and see Civil Justice Review, 2003:160). In particular, there has been recent interest in extending children's contact centre services. A total of 35 contact services were recorded in the strategy paper (Civil Justice Review 2003:161). However, the pathway report noted a continuing public confusion about the terminology and methods used by PDR services and a lack of co-ordination between the various services on offer. There was also a perceived need for better communication between PDR services and the legal profession.

\textbf{5.6 ADR and human rights}

As stated earlier in this report, Australia has no Charter of Rights to supplement its Constitution, however, it has established a Human Rights and Equal Opportunities Commission (HREOC). The Human Rights and Equal Opportunities Commission Act 1986 (Cth) requires the HREOC to use conciliation to try to resolve disputes under anti-discrimination and human rights law.\textsuperscript{126} The conciliation of disputes is a significant part of the HREOC’s workload, 38 per cent of their complaint workload (429 of 1129) was conciliated in

\textsuperscript{124} Pathways Report (2001)
\textsuperscript{125} House of Representatives Committee (2004).
\textsuperscript{126} Human Rights and Equal Opportunities Commission Act 1986 (Cth), ss 46PF(1), 11(1)(f)(i) and 31(b)(i)
2003-04 (HREOC Report, 2004:Chap 4). Parties to an HREOC conciliation are assisted by a neutral third party to identify the issues in the dispute, discuss options and attempt to resolve the dispute. The conciliator does not determine the dispute. 'HREOC' uses various types of voluntary conciliation conferences including face-to-face conferences, tele-conferences, and shuttle conferences' (Ruddock, 2004:6); and also see (Raymond and Ball, 2000). Within this framework there is a real emphasis to conciliators to encourage a fair process. Any settlement between the parties to a human rights or discrimination in employment or occupation dispute is to reflect 'a recognition of the specific rights involved.' The statutory provisions state that, 'The Commission shall, in endeavouring to effect a settlement of the matter that gave rise to an inquiry, have regard to the need to ensure that any settlement of the matter reflects a recognition of human rights and the need to protect those rights.' Conciliators will employ a number of strategies to ensure procedural fairness including the adaptation of the formality and type of conference to the particular circumstances of the case (Ruddock, 2004:7). HREOC conciliations are generally held in private and on a confidential basis. However, parties can choose to make their conciliation agreement public. HREOC also keeps Conciliation Register containing non-identifying information on dispute outcomes for the use of future parties and for the purpose of increasing public awareness of discrimination and human rights issues, 64 per cent of cases that were conciliated were settled in 2002-03 and 65 per cent in 2003-04.

The President of the HREOC can terminate a complaint of unlawful discrimination before, during or after it is conciliated on a number of grounds, including where he or she is satisfied there is no unlawful discrimination, where more than 12 months have passed between the discrimination and the lodging of the complaint, where the complaint is trivial, vexatious, misconceived or lacking in substance, where a more appropriate remedy is reasonably available, where there is no reasonable prospect of settlement at conciliation, or where the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Magistrates Court. Where an unlawful discrimination complaint is terminated the complainant has the right to commence an action in the Federal Court or the Federal Magistrates Court. Even before it is terminated with the HREOC, a complainant can obtain an interim injunction from either Court to maintain the status quo that existed before the complaint was lodged. However, complaints concerning discrimination in employment or a breach of human rights, which cannot be conciliated, cannot be taken to the Federal Court. If the President is satisfied that the subject matter of the complaint constitutes discrimination

---

128 Currently the Hon John von Doussa QC, a Judge of the Federal Court of Australia, appoint on 1 May 2003 for a five year term.
129 Human Rights and Equal Opportunities Commission Act 1986 (Cth), s46PH(1)
or a breach of human rights these findings are reported to the Attorney-General for tabling in Parliament.

The HREOC’s customer surveys indicate that, in 2001-02, 83 per cent of parties were satisfied with the service they received, in 2002-03, 84 per cent were satisfied. ‘Data for the past year indicates that 89 per cent of parties were satisfied with the service they received and 57 per cent rated the service they received as "very good" or "excellent".’ (HREOC Report 2004). Australia’s Attorney-General concluded:

‘The HREOC conciliation system allows an appropriate balance to be achieved between the need for efficient, accessible and confidential dispute resolution and the need to protect the rights of the parties and the interest of the wider public in the development of anti-discrimination law’. (Ruddock, 2004:9)

5.7 ADR within specific industries

There are several examples in Australia of industry-based dispute resolution schemes (Civil Justice Review, 2003:140-1) mainly in the financial, banking and insurance sectors. There are, for example, a number of Ombudsman Schemes: the Banking and Financial Services Ombudsman, the Telecommunications Industry Ombudsman and an Energy Industry Ombudsman (SA). The industries themselves have encouraged such schemes as it often makes good business sense to address consumer complaints at an early stage. The Australian government has also encouraged effective industry-based complaint handling and has issued ‘benchmarks’ for such schemes (Minister for Customs and Consumer Affairs, 1997). These benchmarks are not legally binding in any way but were developed ‘to apply primarily to nationally-based customer dispute schemes set up under the auspices of an industry’. They have a three-fold purpose: to act as a guide to good practice for industry sectors contemplating setting up such schemes; for existing schemes to consider their own practice against the benchmarks; and to serve as a guide to consumers as to what to expect. It is pointed out that the establishment of such schemes will not obviate the need for each business to have its own internal complaint handling mechanism in the first instance. The benchmarks proposed are based on six key principles that are further discussed in the benchmark document: see Appendix 8.

Some of these schemes have had much success in effectively handling complaints at an early stage and diverting disputes from courts and tribunals. For example, out of 5,859 complaints to the Australian Banking and Financial Services Ombudsman in 2003-04, 90.1 per cent were resolved prior to an investigation. It is claimed this indicates a ‘marked

---

130 See ‘Useful Websites’
improvement in members' internal dispute resolution and a positive acceptance of ADR processes' (Banking and Financial Services Ombudsman, 2004:1).

5.8 Ethnic and cultural factors

Earlier work by NADRAC (1997a) has addressed ethnic and cultural factors that can affect the fairness and justice of ADR procedures and outcomes. Such considerations also have an impact on the formulation of relevant standards to accommodate such diversity. NADRAC (1999) has also produced more user-friendly guidance on dealing with differences between the participants in ADR processes, including cultural, gender, age and power imbalances. The flexibility of ADR processes is regarded as an advantage when the need arises to customise dispute resolution in order to account for such differences.

The resolution of Native Title disputes (see the section on the NNTT above) raises a number of culture issues. Some of these were highlighted in a NADRAC Report, (1997a) and the Tribunal has implemented some measures to address the concerns about possible power imbalances in this context. NADRAC has also undertaken more recent work with Indigenous peoples in collaboration with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the Australia National University Institute for Indigenous Australia. AIATSIS\textsuperscript{131} commenced a three year project in 2003, the Indigenous Facilitation and Mediation Project which aims to identify best practice in Indigenous decision-making and conflict management in the native title context and to develop a national model for accrediting regionally-based Indigenous facilitators and mediators.

5.9 Maintaining ADR standards

The diversity of ADR activity and the increasing reliance upon ADR solutions require that standards of service are kept high. To that end there has been much discussion about how best to deliver systems of professional competency, training and accreditation and which are the most appropriate and best-equipped bodies to undertake this work. There are already some quality control standards in place, for example, in relation to family law PDR service providers. Community organisations funded by the government under the Family Relationships Services Programme are subject to quality standards via their contracts (Civil Justice Review, 2003:135). NADRAC's deliberations on this issue (see NADRAC 2000, 2001) revealed the need to balance two principles:

\textsuperscript{131} See 'Useful Websites'.
The first is to recognise the diversity of contexts in which ADR is practised and to promote the development of standards within those particular contexts (the diversity principle). The second is to promote some consistency in the practice of ADR by identifying essential standards for all ADR service providers (the consistency principle).

(NADRAC, 2001:vii)

NADRAC pointed out that standards can operate at different levels: at the practice level, such as codes, guidelines or benchmarks; at the individual practitioner level, for example, qualifications, competencies and other credentials; or at the organisational level, such as quality management it suggested that standards of practice, such as a code of practice, were more widely applicable across the whole ADR field. It recommended a framework for the development of standards for ADR in which service providers, practitioners, government and non-government organisations would share responsibility. The focus of its carefully deliberated conclusions and recommendations was a proposal to have a code of practice ‘in order to educate and protect consumers, and build consumer confidence in ADR processes’. Some essential standards of practice should apply to all ADR services and it was argued service providers should adopt and comply with an appropriate code of practice. Equally, NADRAC recognised the need for the provision of an effective complaint mechanism, contained within the relevant code of practice, as an essential standard for ADR service provision. Where possible, it recommended that access should be made to a second tier complaints process, conducted by an independent person or body.

NADRAC also thought that the idea of an ‘ADR Ombudsman’ to provide a second tier complaints process warranted further consideration.

The compliance with any code of practice should be based, NADRAC suggested, ‘primarily on self-regulation’. It was cautious of any suggestion that government intervenes too far in ADR regulation.

‘Existing evidence on the provision of ADR does not indicate the need for more direct regulation across all ADR, although intervention in areas where there are particular problems may be justified. Conversely, a market approach would neither address the risks associated with service provision, nor meet the social objective of promoting ADR’

(NADRAC, 2001:xii).

Government could, however, play a part by ensuring compliance with ADR codes of practice through its own contractual arrangements. There might also be incentives for those bodies with an appropriate code in place, such as the granting of preferred supplier status, statutory protections, and the consideration of favourable professional indemnity insurance conditions.
NADRAC also believes that the statutory immunity provisions for ADR practitioners should be conditional on compliance with a code of practice. It thought that any requirement for accreditation, which was in need of greater clarity of standards, should be determined on a sector-by-sector basis. One threat identified in relation to the future of ADR was the lack of appropriate infrastructure, in particular, the absence of a 'peak body' in the ADR field.

'The establishment of a peak body or bodies, or an ADR complaints body, could assist implementation of many of the recommendations contained in this report... . The primary impetus for an ADR peak body should come from the ADR field itself, not from government'.

(NADRAC, 2001:xiv)

The code of practice to be adopted by ADR service providers should, according to NADRAC, describe five principle elements: process, informed participation, access and fairness, service quality, complaints and compliance. The 'service quality' element of a code, for example, would describe the knowledge, skills and ethics that are required by practitioners and the service provider's and practitioners' obligations to ensure the quality of ADR processes. Areas of 'knowledge', for example, would include knowledge about 'conflict, culture, negotiation, communication, context, procedures, self, decision-making and ADR' (NADRAC, 2001:xvi). See Appendix 9 for NADRAC’s list of 21 recommendations on ADR standards.

5.10 The Commonwealth’s 'model litigant obligation'

The model litigant obligation of the Commonwealth has a long history in Australia. The Commonwealth, as a litigant, has the dual responsibility to deal with cases efficiently and effectively as part of its responsibilities to taxpayers and the community and to ensure that it acts appropriately and respects its responsibilities to the justice system. As noted earlier in this report government policy towards ADR can be characterised as ‘multi-faceted’ and falling into three main strands (Ruddock, 2004). One of these strands involves the use of ADR when the government itself is a party to litigation. The model litigant policy in effect forms part of the Legal Services Directions issued in 1999. The Commonwealth is required to endeavour ‘to avoid litigation wherever possible’.

'The intention is that, while it is appropriate for the Commonwealth to protect its rights and interests, the means of doing so should be the subject of careful consideration. It should be remembered that litigation is only one avenue among many that the Commonwealth may pursue to protect its rights and interest'.

(Ruddock, 2004:9)

---

132 See Melbourne Steamship Limited v Moorhead (1912) 15 CLR 133.
133 Issued by the Commonwealth Attorney-General: see Appendix 11 of this report.
The Attorney-General’s department is reviewing the Legal Services Directions, in particular whether the obligation to consider ADR should be reinforced or made more detailed. An issue paper recommended that Appendix B to the Directions could be expanded or a separate Appendix developed dealing with ADR. It suggested that Appendix B, para 2 of the Legal Services Directions:

‘... could make more explicit that agencies should actively consider ADR as one option for dispute resolution. In addition, it could contain requirements for the conduct of ADR processes, in particular, that agencies will conduct them in good faith. Aspects of this might be that, when participating in ADR, agencies should ensure that their representatives have the authority to settle matters, should engage fully with the chosen process by steps such as providing necessary information, and should not use ADR to prolong a dispute’.

(Attorney-General’s Department, 2004:para 58)

In addition the paper (Attorney-General’s Department, 2004) suggested that agencies engaging in ADR might be required or encouraged to ensure that they used providers conforming to accepted standards of practice and any relevant codes of practice. This is consistent with NADRAC’s (2001) recommendations that professional standards are developed as part of an ongoing process but that regulation of ADR is based primarily on self-regulation. NADRAC’s Report (2001) further suggested that compliance with any relevant ADR code of practice/standard formed part of the contracts entered into by Commonwealth agencies that provide ADR. However, a report published by the Attorney-General’s Department (Tongue, 2003) found a lack of reported use of ADR with few government agencies reporting either the use of external ADR or internal service spending on ADR. It would appear there is capacity for a greater use of ADR by Commonwealth departments and agencies (Civil Justice Review, 2003:139).

134 In the UK, the Lord Chancellor announced four commitments to settle legal disputes out of court: ‘Alternative Dispute Resolution will be considered and used in all suitable cases wherever the other party accepts it. In future, Departments will provide appropriate clauses in their standard procurement contracts on the use of ADR techniques to settle their disputes. The precise method of settlement would be tailored to the details of individual cases. Central Government will produce procurement guidance on the different options available for ADR in Government disputes and how they might be best deployed in different circumstances. This will spread best practice and ensure consistency across Government. Departments will improve flexibility in reaching agreement on financial compensation, including using an independent assessment of a possible settlement figure.’ (LCD, 2001).
6 Concluding Remarks

Since the 1970s Australia has developed a rich range of ADR practice across its cornerstone institutions of administrative justice: the Courts, the Tribunals and the Ombudsman Schemes. There has been a range of organisations and bodies established – for example, Community Justice Centres, NADRAC, the Institute of Arbitrators and Mediators – which can be said to have established a strong, diverse infrastructure of ADR practice. It ranges from community based mediation that focuses on early intervention in, for example, neighbour disputes, to industry-wide dispute resolution schemes and structured mediation, conciliation and other ADR processes within the court and tribunal sectors at both the Commonwealth and State and Territory levels. There appears to have been a shift from the traditional adversarial attitude towards dispute resolution to the greater use of ADR in the context of a legal system that is generally moving towards a greater and increasingly flexible control over court and tribunal proceedings and the conduct of Ombudsman investigations. The government's latest key 'strategy paper' comments that: -

'... shifting cultural attitudes away from a combative way of thinking and towards a more conciliatory approach to dispute resolution is a crucial part of encouraging the resolution of disputes at the lowest appropriate level'.

(Civil Justice Review, 2003:129)

There are a number of perceived advantages of ADR from the perspective of the parties and from the government's viewpoint. The provision of a range of alternative forms of dispute resolution offers the prospect of greater user choice and, in principle, the customisation of dispute resolution to the needs of the parties will tend to make an agreed settlement more likely. This will generally save costs and avoid unnecessary delays. However, it should not be forgotten that there is also some evidence that where ADR methods are rigidly embedded as an automatic element to court or tribunal procedure they may actually add a further procedural hurdle and have the opposite effect. Nevertheless, the flexibility and non-confrontational nature of ADR processes, where used appropriately, can assist in providing users with a sense of self-determination, ownership and control of the process and the ability to be heard and participate in developing outcomes. This is especially the case in relation to ADR procedures intended to accommodate ethnic and cultural difference.

'One benefit of ADR is that it can enable people of diverse backgrounds to resolve disputes in a way that is comfortable for them, allowing the adoption of culturally sensitive processes and practices which are not 'fettered by the substantive, procedural and evidentiary rules of the formal civil justice system' [see NADRAC, 1997b:para 4.25]. The flexibility of ADR processes allows the participants to control the parameters, processes and outcomes of the dispute and its resolution, which may be a very empowering experience for disputants from minority groups'.

(Civil Justice Review, 2003:135)
Another benefit of ADR is the potential to maintain (or at least mitigate the damage to) the relationship between the parties where there are clear common interests at issue. This is most obviously seen in the family law arena and in neighbour and business disputes. Of course, such benefits have proved difficult to measure. Nevertheless, it is probable that the extent to which individuals' ability to resolve their disputes 'has played an often unacknowledged role in the social and economic success of this country' (Ruddock, 2004).

There are also perceived disadvantages of ADR methods. Some see the private and confidential nature of many ADR processes as offending modern notions of transparency and fairness. There is always the danger that some may inappropriately arrive at settlement rather than pursue further their more concrete, legal rights; convenience can override principle. There is also a residual concern that ADR might become a 'second class' form of justice, though as Condliffe (2000) remarks, 'lurking behind these attitudes may well be lawyers' fear of loss of power, prestige and income to other organised practitioners'.

As ADR expands into the field of human rights and administrative justice generally, the concerns about the extent of the shift from rights-based to interest-based dispute resolution will grow. The fear is that important questions of legal principle may be suppressed in an ADR-friendly environment. On the other hand, the assumed flexibility and choice of procedure, where ADR methods are employed, arguably indicates a greater likelihood that cases with strong public interest points will arrive at an appropriate court forum at which an authoritative determination and/or precedent can appear. In the past, traditional court systems have often been criticised precisely because of the arbitrary manner in which cases (frequently, not the best cases) arrive in the higher courts.

What is required is a system that is sufficiently sensitised to identifying appropriate routes of dispute resolution in their individual contexts. In the realm of administrative justice, a great challenge remains to ensure that there are sufficient safeguards to ensure that significant legal rights are not jeopardised by the promise of expedition and cost savings held out by an increased use of ADR.
Bibliography


NADRAC (2003) *Dispute Resolution Terms: the use of terms in (alternative) dispute resolution*, Canberra: NADRAC.

NADRAC (2003a) *ADR Statistics*, Canberra: NADRAC.


Senate Committee report (2003) Administrative review of veteran and military compensation and income support, 4 December 2003, Canberra: Senate Finance and Public Administration References Committee,


Useful Websites

Australian Institute of Aboriginal and Torres Strait Islander Studies  http://www.aiatsis.gov.au/
Family Court of Australia http://www.familycourt.gov.au/
Family Relationship Services Program (FRSP)
High Court of Australia  http://www.hcourt.gov.au/
National Alternative Dispute Resolution Advisory Council (NADRAC)
Planning and Environment Court (Qld) http://www.courts.qld.gov.au/about/role_pe.htm
State Administrative Tribunal (WA)
   &parentid=1&cached=false&control=SetCommunity&PageID=0&CommunityID=235&paren
   tname=CommunityPage
State and Territory Ombudsman offices
   New South Wales Ombudsman  www.ombo.nsw.gov.au
   Northern Territory Ombudsman  www.nt.gov.au/omb_hcsccl/OMBUDSMAN
   Queensland Ombudsman  www.ombudsman.qld.gov.au
   South Australian Ombudsman  www.ombudsman.sa.gov.au
   Victorian Ombudsman  www.ombudsman.vic.gov.au
   Western Australian Parliamentary Commissioner for Administrative Investigations
   www.ombudsman.wa.gov.au
States and Territories Supreme Courts:
   Western Australia  http://www.moj.wa.gov.au/portal/server.pt
Victorian Civil and Administrative Tribunal (Vic)  http://www.vcat.vic.gov.au/
Appendix 1: Glossary of Common Terms

Extracted from NADRAC (2003)

Dispute Resolution Terms: the use of terms in (alternative) dispute resolution,
Canberra: National Alternative Dispute Resolution Advisory Council, pp 4-10

This glossary is a resource for agencies, legislators and policy makers. It explains common usage of terms used in dispute resolution in Australia. This glossary is not intended to be a set of definitions. Agencies, practitioners and legislators may use these terms in different ways. Readers should therefore check how terms are used in any particular situation.

This glossary supersedes NADRAC’s earlier publication Alternative Dispute Resolution Definitions (1997).

ADR is an umbrella terms for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance. See also PDR.

Adjudication is a process in which the parties present arguments and evidence to a dispute resolution practitioner (the adjudicator) who makes a determination, which is enforceable by the authority of the adjudicator. The most common form of internally enforceable adjudication is determination by State authorities empowered to enforce decisions by law (for example, courts, tribunals) within the traditional judicial system. However, there is also other internally enforceable adjudication processes (for example, internal disciplinary or grievance processes implemented by employers).

Advisory dispute resolution processes are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation.

Arbitration is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.

Automated dispute resolution processes are processes conducted through a computer programme or other artificial intelligence, and do not involve a ‘human’ practitioner. See also blind bidding and on-line dispute resolution.

Automated negotiation (or blind-bidding) is a ‘form of computer assisted negotiation in which no practitioner (other than computer software) is needed. The two parties agree in advance to be bound by any settlement reached, on the understanding that once blind offers are within a designated range … they will be resolved by splitting the difference. The software keeps offers confidential unless and until they come within this range, at which point a binding settlement is reached.’ See also automated dispute resolution processes. (Consumers International (2000) Disputes in Cyberspace)

*Note (ed): entries marked with an asterisk(*) are those included in the list of ADR processes available for judicial referral in the Administrative Appeals Tribunal Amendment Act 2005 (Cth)
**Case appraisal** is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved.

**Case presentation** (or *Mini-trial*) is a process in which the parties present their evidence and arguments to a dispute resolution practitioner who provides advice on the facts of the dispute, and, in some cases, on possible and desirable outcomes and the means whereby these may be achieved. See also *mini-trial*.

**Clients** are individuals or organisations that engage dispute resolution service providers in a professional capacity. A client may not necessarily be a party to a dispute, but may engage a dispute resolution service provider to assist the resolution of a dispute between others.

**Combined or hybrid dispute resolution processes** are processes in which the dispute resolution practitioner plays multiple roles. For example, in *conciliation* and in *conferencing*, the dispute resolution practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In *hybrid* processes, such as *med-arb*, the practitioner first uses one process (*mediation*) and then a different one (*arbitration*).

**Co-mediation** is a process in which the parties to a dispute, with the assistance of two dispute resolution practitioners (the mediators), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Community Mediation** is mediation of a community issue.

**Community Mediation Service** is a mediation service provided by a non-government or community organisation.

**Community mediator** is a mediator chosen from a panel representative of the community in general.

**Conciliation counselling** is a term used previously to describe some of the processes used by counsellors in the Family Court of Australia to assist parties to settle disputes concerning children. The Court now uses the term *mediation* to describe these processes.

*Conciliation* is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

Note: there are wide variations in meanings for 'conciliation', which may be used to refer to a range of processes used to resolve complaints and disputes including:

- Informal discussions held between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute

- Combined processes in which for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the
dispute, makes proposals for settlement or actively contributes to the terms of any agreement”.

*Conference/Conferencing* is a general term, which refers to meetings in which the parties and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.

*Consensus building* is a process where parties to a dispute, with the assistance of a facilitator, identify the facts and stakeholders, settle on the issues for discussion and consider options. This allows parties to build rapport through discussions that assist in development of better communication, relationships and agreed understanding of the issues.

*Counselling* refers to a wide range of processes designed to assist people to solve personal and interpersonal issues and problems. *Counselling* has a specific meaning under the Family Law Act, where it is included as a *Primary Dispute Resolution* process (see PDR).

*Determining dispute resolution processes* are processes in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative dispute resolution processes are *arbitration, expert determination and private judging*.

*Determinative case appraisal* is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the appraiser) who makes a determination as to the most effective means whereby the dispute may be resolved, without making any determination as to the facts of the dispute.

*Dispute counselling* is a process in which a dispute resolution practitioner (the dispute counsellor) investigates the dispute and provides the parties or a party to the dispute with advice on the issues which should be considered, possible and desirable outcomes and the means whereby these may be achieved.

*Dispute resolution* refers to all processes that are used to resolve disputes, whether within or outside court proceedings. Dispute resolution processes may be *facilitative, advisory or determinative* (see descriptions elsewhere in this glossary). Dispute resolution processes other than judicial determination are often referred to as *ADR*.

*Dispute resolution practitioner* is an impartial person who assists those in dispute to resolve the issues between them. A practitioner may work privately as a statutory officer or through engagement by a dispute resolution organisation. A sole practitioner is a sole trader or other individual operating alone and directly engaged by clients.

*Diversionary, victim-offender, community accountability, restorative and family group conferencing* are processes which aim to steer an offender away from the formal criminal justice (or disciplinary) system and refer him/her to a meeting (conference) with the victim, others affected by the offence, family members and/or other support people. The practitioner who facilitates the conference may be part of the criminal justice system (for example, a police or corrections officer) or an independent person.

*Early neutral evaluation* is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute.
**Education for self-advocacy** is a process in which a party to a dispute is provided with information, knowledge or skills, which assist them to negotiate directly with the other party or parties. See also dispute counselling and decision-making for one.

**Evaluative mediation** is a term used to describe processes where a mediator, as well as facilitating negotiations between the parties, also evaluates the merits of the dispute and provides suggestions as to its resolution. (See also combined processes). Note: evaluative mediation may be seen as a contradiction in terms since it is inconsistent with the definition of mediation provided in this glossary.

**Expert appraisal** is a process in which a dispute resolution practitioner, chosen on the basis of their expert knowledge or the subject matter (the expert appraiser), investigates the dispute. The appraiser then provides advice on the facts and possible and desirable outcomes and the means whereby these may be achieved.

**Expert determination** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner, who is chosen on the basis of their specialist qualification or experience in the subject matter of the dispute (the expert) and who makes a determination.

**Expert mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner chosen on the basis of his/her expert knowledge on the subject matter of the dispute (the expert mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Facilitated negotiation** is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a dispute resolution practitioner (the facilitator), to negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Facilitation** is a process in which the parties (usually a group), with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Facilitative dispute resolution processes** are processes in which a dispute resolution practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are mediation, facilitation and facilitated negotiation.

**Fact finding** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the investigator) who makes a determination as to the facts of the dispute, but who does not make any finding or recommendations as to the outcomes for resolution. See also investigation.

**Family and child mediation** is defined in the Family Law Act as ‘mediation of any dispute that could be the subject of proceedings (other than prescribed proceedings) under the Act
and that involves (a) a parent or adoptive parent of a child; or (b) a child; or (c) a party to a marriage' (section 4). See also PDR.

**Fast-track arbitration** is a process in which the parties to a dispute present, at an early stage in an attempt to resolve the dispute, arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination on the most important and most immediate issues in dispute.

**Hybrid disputes resolution processes** – see **combined dispute resolution processes**

**Indigenous dispute resolution** refers to a wide range of processes used to resolve dispute involving Indigenous people, including the various processes described in this glossary. Other examples include elder arbitration, agreement-making and consensus-building. In the Australian context the term Indigenous (capital 'I') refers specifically to the Aboriginal and Torres Strait Islander peoples.

**Indirect negotiation** is a process in which the parties to a dispute use representatives (for example, lawyers or agents) to identify issues to be negotiated, develop options, consider alternatives and endeavour to negotiate an agreement. The representatives act on behalf of the participants, and may have authority to reach agreements on their own behalf. In some cases the process may involve the assistance of a dispute resolution practitioner (the facilitator) but the facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Industry dispute resolution**: Industry specific dispute resolution schemes deal with complaints and disputes between consumers (including some small business consumers) and a particular industry. Schemes are usually funded by the industry but governed by an equal number of industry and consumer representatives. Some schemes are required to meet standards established by ASIC. If the industry member and consumer do not reach agreement, most schemes have the power to make a determination. The determination is binding on the industry member, but not the consumer who can choose to accept or reject the determination. Depending on the scheme, the power to make the determination lies with an Ombudsman, panel or referee.

**Inter-mediation** is a 'process similar to mediation ... the ... [dispute resolution practitioner] interacts with the parties in dispute to assess all relevant material, identify key issues ... and helps to design a process that will lead to resolution of the dispute.' (Commonwealth Office of Small Business 2001, *Resolving Small Business Disputes*).

**Investigation** is a process in which a dispute resolution practitioner (the investigator) investigates the dispute and provides advice (but not a determination) on the facts of the dispute. See also **fact finding**.

**Judicial dispute resolution (or judicial ADR)** is a term used to describe a range of dispute resolution processes, other than adjudication, which are conducted by judges or magistrates. An example is judicial settlement conference.

**Med-arb** see **Combined processes**

* **Mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.
Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

**An alternative is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute.'**

**Mini-trial** is a process in which the parties’ present arguments and evidence to a dispute resolution practitioner who provides advice as to the facts of the dispute and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved. See also *case presentation*.

**Multi-party mediation** is a mediation process, which involves several parties or groups of parties.

**Ombudsman (or Ombud)** is a person who ‘functions as a defender of the people in their dealings with government ... In Australia, there is a Commonwealth Ombudsman as well as a State and Territory Ombudsmen ... In addition, a number of industry ombudsmen have been appointed, whose responsibility it is to protect citizens’ interests in their dealings with a variety of service providers, especially in industries previously owned or regulated by governments, for example telecommunications, energy, banking and insurance’. (Commonwealth Ombudsman Home page: [http://www.ombudsman.gov.au/about_us/default.htm](http://www.ombudsman.gov.au/about_us/default.htm))

**On-line dispute resolutions, ODR, eADR, cyber-ADR are** processes where a substantial part, or all, of the communication in the dispute resolution process takes place electronically, especially via e-mail. See also *automated dispute resolution processes*.

**Partnering** involves the development of a 'charter based on the parties' need to act in good faith and with fair dealing with one another. The partnering process focuses on the definition of mutual objectives, improved communication, the identification of likely problems and development of formal problem-solving and dispute resolution strategies.

**Parties** are persons or bodies who are in a dispute that are handled through a dispute resolution process.

**PDR (Primary Dispute Resolution)** is a term used in particular jurisdictions to describe dispute resolution processes which take place prior to, or instead of, determination by a court. The *Family Law Act 1972* (Cth) ‘encourages people to use primary dispute resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made’ (section 14). The *Federal Magistrates Act 1999* defines primary dispute resolution processes as ‘procedures and services for the resolution of disputes otherwise than by way of the exercise of judicial power of the Commonwealth, and includes: (a) counselling; and (b) mediation; and (c) arbitration; and (d) neutral evaluation; and (e) case appraisal; and (f) conciliation’ (section 21). See also *ADR*.

**Private judging** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner chosen on the basis of their experience as a member of the judiciary (the private judge) who makes a determination in accordance with their opinion as to what decision would be made if the matter was judicially determined.

**Referrers** (or referring agencies) are individuals and agencies that suggest, encourage, recommend or direct the use of dispute resolution (or other) services. Examples are courts, legal practitioners, community agencies, professionals, friends and relatives.
Restorative conferencing (see diversionary conferencing)

Senior executive appraisal is a form of case appraisal presentation or mini-trial where the facts of a case are presented to senior executives of the organisations in dispute.

Service Users (or consumers) are those who seek, use or receive dispute resolution (or other) services. They may not necessarily be involved in a dispute, have engaged a service provider or have participated directly in dispute resolution processes, but may seek information or other assistance from the dispute resolution service provider.

Shuttle mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement without being brought together. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. The mediator may move between parties who are located in different rooms, or meet different parties at different times for all or part of the process.

Statutory conciliation takes place where the dispute in question has resulted in a complaint under a statute. In this case, the conciliator will actively encourage the parties to reach an agreement, which accords with the advice of the statute.

Victim-offender mediation is a process in which the parties to a dispute arising from the commission by one of a crime against the other, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process.
Appendix 2: Family Court of Australia: Flowchart of Court Process

Extracted from:
Appendix 3: The Statutory Functions of the Administrative Review Council

The Administrative Appeals Tribunal Act, s 51.

(1) The functions of the Council are:

(aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and

(ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretion or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and

(b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and

(c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and

(d) to inquire into:

(i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and

(ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and

(iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction; and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in respect of any of the matters referred to in subparagraphs (i), (ii) and (iii); and

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and
(h) to promote knowledge about the Commonwealth administrative law system; and

(i) to consider, and report to the Minister on, matters referred to the Council by the
Minister.

(2) The Council may do all things necessary or convenient to be done for or in connection
with the performance of its functions.

(3) If the Council holds an inquiry, or gives any advice, referred to in paragraph (1)(ab), the
Council must give the Minister a copy of any findings made by the Council in the inquiry or a
copy of the advice, as the case may be.
Appendix 4: The Objects of the Council of Australasian Tribunals

(a) to establish a national network of Tribunals and a national register of Tribunal members;
(b) to establish a national network for members of Tribunals to consult and discuss areas of concern or interest and common experiences;
(c) to provide training and support for members of Tribunals, particularly of smaller Tribunals which may not have the resources to undertake such activities alone;
(d) to provide a forum for the exchange of information and opinions on aspects of Tribunals and Tribunal practices and procedures;
(e) to develop best practice or model procedural rules based on collective experience of what works;
(f) to develop standards of behaviour and conduct for members of Tribunals;
(g) to develop performance standards for Tribunals;
(h) to develop support systems for Tribunals, including case management and IT systems;
(i) to provide advice to governments on Tribunal requirements;
(j) to publish and encourage the publication of papers, articles and commentaries about Tribunals and Tribunal practices and procedures;
(k) to promote lectures, seminars and conferences about Tribunals and Tribunal practices and procedures;
(l) to make and disseminate reports, commentaries and submissions on aspects of Tribunals and Tribunal practices and procedures; and to co-operate with institutions of academic learning, and with other persons having an interest in Tribunals and Tribunal practices and procedures, in promoting the objects referred to in paragraphs (a) to (l).

Appendix 5: The Administrative Decisions Tribunal of New South Wales (Practice Note No.1)

(PN 16/04)
General, Equal Opportunity and Community Services Divisions: Mediation
Date: 30/06/2004

The purpose of this practice note is to outline the procedures that the Tribunal will follow when conducting mediations.

1. What is mediation?

Mediation is defined in the Administrative Decisions Tribunal Act 1997 (ADT Act) as a “structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.”

Mediation is one form of Alternative Dispute Resolution provided for by the ADT Act. The other form, neutral evaluation, is not currently in use.

The main features of mediation under the ADT Act are that:

- Mediation is voluntary. All parties must consent to mediate and are free to withdraw at any stage.
- The mediator is a Tribunal Member who is impartial. He or she does not take sides.
- Mediation is a confidential process. With rare exceptions, anything said by a party during a mediation session cannot be used as evidence in the hearing. In general, the mediator cannot disclose information provided by the parties without their consent and the parties cannot disclose information communicated during the mediation. (For further details, see the Agreement to Mediate.)

2. Objectives of referral to mediation

The objective of referring a matter to mediation is to provide a quick and effective mechanism for resolving or partly resolving applications that are before the Tribunal. The Tribunal will only refer certain kinds of applications to mediation. (See below under the heading “Types of matters the Tribunal refers to mediation”)

3. Advantages of mediation

A successful mediation has several advantages over a contested hearing. These advantages are that:

- there is a high level of satisfaction among participants;
- parties can agree to a settlement that the Tribunal would not have the power to order. For example, parties may agree to changes in the policies or procedures of an organisation even if the Tribunal could not make such an order;
- it is quicker and cheaper than a full Tribunal hearing; and
- it is private in contrast to hearings that are usually open to the public.

4. Types of matters the Tribunal refers to mediation

The Tribunal refers the following kinds of matters to mediation:

- complaints under the Anti-Discrimination Act 1977 (Equal Opportunity Division);
- applications under the Freedom of Information Act 1989 and the Privacy and Personal Information Protection Act 1998 (General Division); and
- applications for review of decisions under the Children and Young Persons (Care and Protection) Act 1998 (Community Services Division).
In the Retail Leases Division, parties to a retail tenancy dispute must attempt mediation before an application is lodged with the Tribunal. The Retail Tenancy Unit of the Department of State and Regional Development conducts those mediations.

Mediations are not normally available in the General Division or the Community Services Division except in relation to the kinds of matters listed above. Mediation is not available for any proceedings in the Legal Services Division, in other professional discipline cases or in the Revenue Division.

Even if mediation is available, the ADT Act prevents a matter being referred to mediation unless the circumstances are appropriate. The circumstances may not be appropriate where:

a) A party does not have the intellectual, physical or psychological capacity to meaningfully engage in the process. The Tribunal can appoint a person to represent someone who is totally or partially incapable of representing him or herself in mediation. That person would normally be a “best interest” representative, that is, a representative who is not be bound to act on the instructions of the incapacitated person.

b) There is a history of sexual harassment, violence or extreme animosity between the parties, including a restraining order such as an Apprehended Violence Order between two or more parties. In those cases one or more parties may feel intimidated by being in the same room as another party. In these cases a mediation may be held if the parties are separated throughout the mediation.

5. Cost

Although the ADT Act provides that the cost of mediation is to be shared among the parties, parties do not have to pay for mediation conducted internally by a Tribunal Member. The parties will have to pay their own legal costs if they engage a lawyer. The parties also pay for their own travel costs. The Tribunal does not reimburse parties for any lost wages while attending mediation. The Retail Tenancy Unit charges parties for mediations.

6. Venue

The Tribunal can hold mediation anywhere in New South Wales as long as there is a suitable room or rooms available. The Tribunal will choose a venue that is most convenient for all the parties.

7. Who attends?

The following people must attend the mediation:

- the mediator;
- each of the parties who have agreed to mediate. If the party is a corporation or a government agency, a person who has authority to settle the matter on behalf of the corporation or agency should attend.

With the consent of the mediator, each party can bring one or more people, including a lawyer, agent or support person to assist or advise them.

In some cases the applicant is aggrieved by the conduct of a person who is not a party to the proceedings or to the mediation. That situation could arise in equal opportunity matters where the person who is alleged to have sexually harassed the applicant is not a party, or has not agreed to mediate. A similar situation could arise in relation to a public sector agency in privacy complaints where the person whose conduct is the subject of the application, is not the nominated representative of the organisation or agency, attending the mediation. In either case, the applicant cannot expect a particular person to attend the mediation unless that person is a party. Where the party is a private organisation or a public sector agency, it is strongly recommended that, wherever possible, the person who does attend has the authority to resolve the matter on behalf of the respondent.

Each party, or representative of a party, should attend the mediation in person. In rare cases where it is not physically or financially possible for a person to attend in person, arrangements can be made for that person to take part by phone. Face-to-face mediation is always better than mediation by
phone but the Tribunal understands that if it is not possible for a person to attend mediation, participation by phone is the next best option.

8. Timing of mediation

A mediation can be held:

- after the first meeting at the Tribunal; or
- any time before the hearing.

**Mediation after the first meeting at the Tribunal.** A Tribunal Member will offer mediation to the parties at the first case conference, planning meeting or directions hearing, if the circumstances are appropriate. If the parties agree to mediate, the Tribunal Member will allocate a mediation date and the Registry will arrange for a mediator to conduct the mediation within a few weeks, at a time and place that is the most convenient for all the parties. Generally parties will not be directed to prepare witness statements or other documents before the mediation takes place. However, the Tribunal Member will generally make directions as to the filing and service of statements and submissions that will come into effect if the mediation is unsuccessful. A hearing date will be allocated if the mediation fails to resolve the dispute.

**Mediation before a hearing.** Even if parties do not choose to mediate after the first meeting at the Tribunal, they may change their mind and request mediation at any stage before the hearing takes place. The Tribunal is not obliged to offer mediation if it is not appropriate. Parties may try to settle the case without help from a Tribunal mediator. The Tribunal cannot generally offer mediation on the day of the hearing because it is unlikely that a mediator would be available on such short notice. It is possible to have more than one mediation session if the matter is not resolved at the first mediation.

9. The mediator and his/her role

A Tribunal Member with formal training in mediation will conduct the mediation. The mediator is selected from the Tribunal’s list of mediators.

The role of the mediator is to:

- be independent and impartial;
- assist discussion;
- ensure the parties remain focussed and respectful to each other; and
- help the parties to identify concerns, think about and evaluate options and negotiate an agreement.

The mediator will not:

- offer any opinion about who is “right” or “wrong”;
- give any legal or other professional advice; or
- make decisions for any of the parties.

The mediator may telephone the parties before the mediation to make sure that they are prepared for mediation. The mediator can only disclose information obtained in connection with mediation in limited circumstances. For example, the mediator can disclose information with the consent of the person to whom it relates or in order to carry out their role as a mediator. The mediator will not be involved in the hearing of the matter if the mediation does not resolve the dispute.

10. Preparing for mediation

Before mediation, parties should make a list of:

- their concerns;
- what they think the other party’s concerns may be;
- options that may address the concerns of all the parties;
• the alternatives if mediation is not successful; and
• any questions that they may have.

Parties should bring any factual reports such as medical reports or investigator’s reports or other documents that are relevant to their application.

11. The mediation session

The mediator will normally begin by outlining their role and the mediation process. Each party will then be given an opportunity to express their concerns. Following this exchange of information, the parties will be asked to suggest options, which are likely to be acceptable to everyone. The mediator may wish to speak to the parties individually to help them develop options that may resolve the dispute. Generally the parties will meet again to come to a final agreement.

12. Outcome of mediation

If the parties agree to a settlement at the mediation, they should make a record of the terms of settlement and sign it. A document prepared as a result of a mediation session is normally not admissible in evidence before a court or tribunal. If the agreement contains outcomes, which the Tribunal could order, then the parties may wish the Tribunal to make orders in terms of the agreement reached between the parties. The matter will be listed before the Tribunal to make those orders. However, the Tribunal cannot make an order unless it is satisfied that the agreement or arrangement is in the best interests of the person whose interests are considered by the Tribunal to be paramount. If the agreement contains outcomes that the Tribunal does not have the power to order (such as changes to an organisation’s procedures) then the document remains an agreement between the parties. In that case the Tribunal will order that the application be dismissed.

13. Helping us to improve our service

The Tribunal is committed to continually improving its alternative dispute resolution services. Parties and their representatives may be asked to complete a survey immediately following the mediation. The mediator will give you a copy of the survey and ask you to complete it confidentially and hand it to the Registry. If your mediation is held outside Sydney, then you can either give the survey to the mediator or post it to the Tribunal later.

Issued 30 June 2004

Magistrate NANCY HENNESSY
Acting President
Appendix 6: Administrative Appeals Tribunal  
(Australian Capital territory)

Land & Planning Division - Guide To Mediation

1. The need to consider Mediation
It is a requirement of the Administrative Appeals Tribunal Act 1989 (section 49D) that, before any hearing of an appeal, the Tribunal must consider whether the appeal is suitable for mediation and, if so, refer the matter to a registered mediator which the parties will be required to attend.

2. What is Mediation?
Mediation is a process to resolve disputes where the parties come together with the assistance of a mediator to isolate issues and work out their own practical solutions, rather than having a solution imposed on them by the Tribunal. Mediation gives each party an opportunity to have their say. It is a voluntary process from which any party may withdraw at any time. There will be a settlement of the appeal only if the parties agree. Mediation is a quicker and more cost-effective solution than a hearing.

3. Confidentiality
The mediator will keep all discussions at mediation confidential. Nothing done or said at mediation is admissible at any subsequent hearing unless all parties agree.

4. Representation
Mediation is an informal process and there is no requirement for you to be represented by a lawyer, professional or other representative unless you wish to be represented. The mediator may not permit a party to be represented by another person if he/she considers that would be unfair.

5. Authority to Settle
It is important that those attending the mediation have authority to agree to any terms of settlement if agreement is reached at the mediation.

6. The Result
If the mediation is successful, the result will be recorded and referred to the Tribunal for it to make a decision reflecting its terms. When the Tribunal records a decision the appeal will come to an end.

If the mediation is unsuccessful, the matter will go to a hearing and the parties will be required to comply with the directions given by the Tribunal.

Appendix 7: Commonwealth Ombudsman annual report: Case Studies

CASE STUDY

Complaint
Mr W, a customs agent, complained on behalf of a company he was representing in negotiations with the Department of Industry, Science and Resources (now the Department of Industry, Tourism and Resources (DITR)), about concessional customs treatment for imported semi-complete orthopaedic footwear. In December 1998, DITR advised Mr W that it would be recommending to the Minister that a concession be granted with effect 1 January 1999. However, no decision was formally made to that effect. In March 2000, DITR further advised Mr W that it would now be recommending to the Minister that no concessions are granted and a decision to that effect was made in February 2001. Mr W complained about the processes followed by DITR, including the change in advice, the length of time taken, and the information used as the basis for the recommendation to the Minister.

Investigation
Following an investigation, we formed the view that there had been a number of departmental deficiencies, including the precipitate initial decision without proper regard to the processes that needed to be followed to develop and authorise the proposed change, inadequate exploration of the legal issues involved, poor communication within DITR and inadequate contact with Mr W and the company. The Ombudsman recommended that DITR offer an apology to the company, and enter into mediation, at DITR’s expense, to identify a mutually satisfactory remedy.

Outcome
DITR agreed that its administration of this matter had been deficient and agreed to implement the recommendations.

CASE STUDY: MEDIATED OUTCOME

Complaint
Mr H’s company had undertaken some architectural design work as part of Defence’s Russell Offices redevelopment project. After a number of delays in progress with the particular project, which were unrelated to the complainant’s company, difficulties arose in the working arrangements. Mr H indicated he was withdrawing his company from the project. A replacement was appointed the next day, and Defence refused to pay any of the fees Mr H considered were outstanding from the work his company had carried out to date. Mr H approached my office seeking assistance.

Investigation
In the course of my investigation it became clear that there was, in fact, no contract in place between Defence and Mr H’s company, despite work being undertaken by the company for a number of months. In addition, it appeared that little effort was made by Defence to resolve the difficulties in the working arrangements. Finally, there was ground for concern about the decision making process that led to Defence’s refusal to pay the outstanding invoices.

Outcome
After some considerable negotiations, and while not necessarily agreeing with our view, Defence agreed to our recommendation to enter into mediation with Mr H at Defence’s expense, and a satisfactory resolution was reached.

Appendix 8: The Benchmarks and their underlying Principles

1. ACCESSIBILITY
The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

2. INDEPENDENCE
The decision-making process and administration of the scheme are independent from scheme members.

3. FAIRNESS
The scheme produces decisions, which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

4. ACCOUNTABILITY
The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

5. EFFICIENCY
The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

6. EFFECTIVENESS
The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Appendix 9: NADRAC: ADR Standards - List of Recommendations

**RECOMMENDATION 1**
THAT standards for ADR be developed based on the framework described in this report, comprising guidelines for developing and implementing standards, a requirement for a code of practice which takes account of essential areas and, where applicable, the enforcement of such a code through appropriate means. That developing ADR standards be an ongoing process and recognise the diversity of ADR.

**RECOMMENDATION 2**
THAT all ADR service providers adopt and comply with an appropriate code of practice, developed by ADR service providers or associations, which takes into account the elements contained in Section 5.2 of this report.

**RECOMMENDATION 3**
THAT ADR service providers have in place an appropriate and effective system for managing complaints. That such systems be based on appropriate complaint handling practices and take into account the elements of a code of practice, as outlined in Section 5.2 of this report.

**RECOMMENDATION 4**
THAT ADR organisations examine the feasibility and appropriateness of establishing an ADR Industry Ombudsman or similar body, in order to provide a second tier complaints system. That this examination take place in the context of consideration of a possible peak ADR body, as outlined in Recommendation 19.

**RECOMMENDATION 5**
THAT ADR organisations monitor the complaints arising from the processes described at Recommendations 3 and 4, identify any problem areas and undertake further consultation and research on the need for additional standards in such areas.

**RECOMMENDATION 6**
THAT regulation of ADR be based primarily on self-regulation, with the need for greater or lesser regulation to be assessed on a sector by sector basis.

**RECOMMENDATION 7**
THAT compliance by the service provider with an appropriate code of practice form part of any contract entered into by Commonwealth agencies providing for ADR.

**RECOMMENDATION 8**
THAT State, Territory and local government agencies include compliance with an appropriate code of practice in any contracts providing for ADR.

**RECOMMENDATION 9**
THAT government, industry, professional and consumer bodies undertake consumer education activities which encourage the inclusion of an appropriate code of practice in private contracts for ADR services.

**RECOMMENDATION 10**
THAT bodies, which mandate or compel the use of ADR give special attention to the need for mechanisms and procedures to ensure the ongoing quality of mandated ADR.
RECOMMENDATION 11
THAT Commonwealth, State and Territory Governments undertake a review of statutory provisions applying to ADR services, including those concerned with immunity, liability, inadmissibility of evidence, confidentiality, enforceability of ADR clauses and enforceability of agreements reached in ADR processes. That this review provide recommendations on how to: (a) achieve clarity in relation to the legal rights and obligations of parties, referrers and service providers, and (b) provide means by which consumers of ADR services can seek remedies for serious misconduct.

RECOMMENDATION 12
THAT the need for and nature of accreditation of ADR practitioners, organisations and programs be determined on a sector by sector basis.

RECOMMENDATION 13
THAT those responsible for accrediting ADR practitioners: (a) clearly define the level of competence and responsibility recognised through the accreditation; (b) use valid and reliable assessment procedures; (c) provide monitoring, review or audit processes; (d) provide fairness to those seeking accreditation; (e) ensure that accreditation processes are transparent and publicly available; and (f) provide consistency and comparability with similar accreditation regimes.

RECOMMENDATION 14
THAT those responsible for accrediting ADR practitioners develop processes for mutual recognition of qualifications, training and assessment.

RECOMMENDATION 15
THAT processes for selecting ADR practitioners be fair and transparent, and enable parties to have access to the best available practitioners.

RECOMMENDATION 16
THAT those engaging ADR practitioners clearly establish the knowledge, skills and ethics required through the processes described in Chapter 5 of this report, and that tertiary qualifications not be a universal requirement for ADR practitioners.

RECOMMENDATION 17
THAT ADR education and training providers inform participants of the objectives and expected outcomes of the education and training program which they offer, and the extent to which the program may lead to work as an ADR practitioner.

RECOMMENDATION 18
THAT education, training, assessment and professional development for ADR practitioners (a) take account of the elements of an appropriate code of practice described at Section 5.2 of this report, and be informed by the knowledge, skills and ethics relevant to the area of practice, as outlined in Section 5.3; and (b) be primarily performance based, use accepted national standards for education, training, and assessment, including recognition of prior learning or recognition of current competence, adopt best practice learning strategies that integrate theoretical knowledge and practical experience and, where feasible, use a lifelong learning approach.

RECOMMENDATION 19
THAT ADR organisations and practitioners, and government, industry, educational and professional bodies explore the feasibility and functions of a peak body or bodies, and consider the questions concerning a peak body raised in this report.
**RECOMMENDATION 20**
THAT the resources devoted to the development of and compliance with standards be commensurate with the risks to be addressed and the benefits to be achieved.

**RECOMMENDATION 21**
THAT the Commonwealth encourage relevant bodies to develop common performance and activity indicators for ADR in order to improve quality, consistency and comparability in ADR data collection.

Appendix 10: Legal Services Directions 1999

LEGAL SERVICES DIRECTIONS

(issued by the Attorney-General pursuant to section 55ZF of the Judiciary Act 1903, with effect from 1 September 1999)

...

Appendix B

DIRECTIONS ON THE COMMONWEALTH’S OBLIGATION TO ACT AS A MODEL LITIGANT

1. Consistently with the Attorney-General’s responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies must behave as a model litigant in the conduct of litigation.

Nature of the obligation

2. The obligation requires that the Commonwealth and its agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or an agency by:
   (a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation,
   (b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid,
   (c) acting consistently in the handling of claims and litigation,
   (d) endeavouring to avoid litigation, wherever possible,
   (e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
      (i) not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true, and
      (ii) not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum,
   (f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim,
   (g) not relying on technical defences unless the Commonwealth’s or the agency’s interests would be prejudiced by the failure to comply with a particular requirement,
   (h) not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and
   (i) apologising where the Commonwealth or the agency is aware that it or its lawyers have acted wrongfully or improperly.

NOTES: 1. The obligation applies to litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth Departments and agencies, as well as Ministers and officers where the Commonwealth provides a full indemnity in respect of an action for damages brought against them personally. Ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation. In addition, lawyers engaged in such
litigation, whether Australian Government Solicitor, in-house or private, will need to act in accordance with the obligation and to assist their client agency to do so.

2. In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

3. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

4. The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable.

5. The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.
# Appendix 11: Glossary of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
</tr>
<tr>
<td>ACT</td>
<td>Australian Capital Territory</td>
</tr>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>ADT</td>
<td>Administrative Decisions Tribunal</td>
</tr>
<tr>
<td>AIATSIS</td>
<td>Australian Institute of Aboriginal and Torres Strait Islander Studies</td>
</tr>
<tr>
<td>ALRC</td>
<td>Australian Law Reform Commission</td>
</tr>
<tr>
<td>ARC</td>
<td>Administrative Review Council</td>
</tr>
<tr>
<td>ART</td>
<td>Administrative Review Tribunal</td>
</tr>
<tr>
<td>CJC</td>
<td>Community Justice Centres</td>
</tr>
<tr>
<td>COAT</td>
<td>Council of Australasian Tribunals</td>
</tr>
<tr>
<td>FRSP</td>
<td>Family Relationships Services Programme</td>
</tr>
<tr>
<td>HRECO</td>
<td>Human Rights and Equal Opportunity Commission</td>
</tr>
<tr>
<td>IAMA</td>
<td>Institute of Arbitrators and Mediators</td>
</tr>
<tr>
<td>ILSAC</td>
<td>International Legal Services Advisory Council</td>
</tr>
<tr>
<td>LEADR</td>
<td>Leading Edge Alternative Dispute Resolvers</td>
</tr>
<tr>
<td>MRT</td>
<td>Migration Review Tribunal</td>
</tr>
<tr>
<td>NADRAC</td>
<td>National Alternative Dispute Resolution Advisory Council</td>
</tr>
<tr>
<td>NNTT</td>
<td>National Native Title Tribunal</td>
</tr>
<tr>
<td>NSW</td>
<td>New South Wales</td>
</tr>
<tr>
<td>NT</td>
<td>Northern Territory</td>
</tr>
<tr>
<td>PDR</td>
<td>Primary Dispute Resolution</td>
</tr>
<tr>
<td>Qld</td>
<td>Queensland</td>
</tr>
<tr>
<td>RRT</td>
<td>Refugee Review Tribunal</td>
</tr>
<tr>
<td>SA</td>
<td>South Australia</td>
</tr>
<tr>
<td>SAT</td>
<td>State Administrative Tribunal</td>
</tr>
<tr>
<td>SSAT</td>
<td>Social Security Appeal Tribunal</td>
</tr>
<tr>
<td>Tas</td>
<td>Tasmania</td>
</tr>
<tr>
<td>VCAT</td>
<td>Victorian Civil and Administrative Appeals Tribunal</td>
</tr>
<tr>
<td>Vic</td>
<td>Victoria</td>
</tr>
<tr>
<td>VRB</td>
<td>Veterans Review Board</td>
</tr>
<tr>
<td>WA</td>
<td>Western Australia</td>
</tr>
</tbody>
</table>
This report examines the Australian system of administrative justice, in particular, the role of alternative dispute resolution (ADR) within that system. The report outlines developments across the courts, tribunals and ombudsmen offices, at both the Commonwealth and the State/Territory levels of government. The report finds that Australia has produced a rich range of ADR practice across these cornerstone institutions, supported by a robust infrastructure.

There have been a number of important developments in the court system, in particular the role of mediation in family law has had a pervasive impact on the development of ADR generally. The pathway of tribunal development in Australia has generated a number of tribunals that present useful lessons. For example, the Commonwealth Administrative Appeals Tribunal is a model of a ‘merits review’ tribunal. The various ombudsman schemes in Australia have increased both their use of ADR in respect of individual grievances and their focus on systemic issues arising from individual complaints.

The debates about various aspects of ADR will continue, in particular there are concerns that important questions of legal principle could be disregarded. The report concludes that what is required is a system that is sufficiently sensitised to identifying appropriate routes of dispute resolution in their individual contexts.