

# ADR forms, methods and practices

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*This paper was prepared and settled jointly by the members of ADRAC.*

## Introduction

Dispute resolution comes in as many forms as there are people in dispute. Perhaps because it takes at least two people to be in dispute, it could be said that dispute resolution comes in half as many forms as there are people in dispute. On the other hand, perhaps because each person in a dispute might aspire to different forms of dispute resolution there could be in fact as many (or even more) forms of dispute resolution as there are people in dispute.

## Quote

In recognition of the importance of the process it is often said that the aim is to match 'the forum with the fuss'.

## Classification of forms and methods

In broad terms, the forms have for some time been classified according to the relative influence of the dispute resolution (DR) practitioner and the participants: facilitative, advisory, determinative - in ascending order of influence.

Forms of DR are also classified according to whether participants need to agree on the process prior to commencing the process or whether one party, by initiating a process, can compel others to participate. That is, dispute resolution can be categorised according to the degree of voluntariness of participation. ATNAs (Alternatives to Negotiated Agreement) comprise the involuntary segment.

Forms of DR are also classified according to providers, and others according to participants. There are, for example, Industry Schemes, NGOs and private practitioners and there is Family Dispute Resolution, Small Business Dispute Resolution, Farm Debt Mediation etc.

## **Classification of DR Practices**

DR practices can be considered according to the degree of regulation and its source of authority (such as legislation or professional guidelines). Generally speaking, the role of the DR practitioner is more active where the applicable regulatory framework is more detailed. There are some notable exceptions: franchising and Family Dispute Resolution among them.

The practice of DR is relatively diverse, and varies according to the significance of initial qualifications and requirements for continuing professional development. It is this variety and the concomitant variation in accountability which contributes to the ongoing discussion of the degree to which DR is a profession.

## **Connection between forms, methods and practices of dispute resolution**

DR in this sense refers to identifiable formal and informal approaches. While each approach results in a distinct experience for participants, and carries with it particular expectations of the DR practitioner, the goal is similar in that participants' goals are progress toward resolution and where appropriate resolution itself. The practitioner aims to assist participants to accomplish resolution to the extent that their practice requirements and responsibilities permit.

## **Classic definitions**

Core forms and practices that are defined according to the relative influence of practitioners and participants include facilitative, advisory and determinative forms.

NADRAC defines facilitative ADR as processes in which a DR 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.

NADRAC defines advisory ADR as processes in which a DR 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.

NADRAC defines determinative ADR as processes in which a DR 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.

## **DR forms as at 2017**

While the categories of facilitative, advisory and determinative forms of dispute resolution continue in common usage, anecdotal evidence suggests that the emphasis appears to have shifted from describing the role of the DR practitioner to describing the role of participants.

For example, instead of choosing a DR process according to the authority of the practitioner, participants may choose a DR process according to the level of reassurance that a process will provide them. While it could be said that these are two sides of the same coin, the shift, if indeed there is a shift, suggests that DR participants are significantly more informed and assertive than a decade ago.

In 2003, NADRAC described almost 40 distinct practices of DR. In 2017 it seems likely that the number in common use has consolidated to considerably less.

Perhaps this trend reinforces the concept of supply and demand: participants' selections (the demand) determining the supply.

While the number of distinctly identifiable forms of DR may be contracting, numerous hybrid methods and practices continue to develop. Some are ephemeral; some gain traction. Most can be described as having one or more facilitative, advisory and/or determinative components. Some forms of DR are now bespoke processes, pieces of a jigsaw put together (sometimes by a DR consultant) in the interest of accommodating the circumstances of the participants and their particular dispute.

## **Context**

What is it that participants consider when they are choosing a DR process? Promotional literature suggests that time and money are the ubiquitous motivators. Experience suggests that it a desire for procedural fairness/natural justice is also a driver.

*How* resolution is arrived at may be as important as the terms of the resolution.

## **Mapping forms, methods & approaches**

DR is a fundamental tenet of the quality of life of families, communities and society in much the same way that health and education are fundamental. Some would say that the healthier and the more educated an individual, the higher the quality of life for each other person. It seems reasonable to consider that the more peaceful each person is, the more peaceful the collective population.

In Australia health and education are described, discussed and planned for on the basis of detailed numerical and descriptive analysis. Data is used to predict where schools will be needed, the number of people likely to qualify for university, etc. Governments frequently announce how much it costs to keep a patient in hospital for a day compared with treating the person in their own home. Recently, on the basis of data describing falling rates of immunisation, community indignation and government consternation has resulted in health campaigns that have successfully raised the rates of childhood immunisation, bringing equanimity to communities and balance to government budgets. NAPLAN, as controversial as it is, enables primary and secondary education to be described, discussed and planned for.

ADR is yet to be described in a standardised way, sufficient to be discussed and planned for. If a tree falls in a forest and nobody hears it fall, has it fallen? If participants reach an agreement through a DR process and it is not recorded, has there been resolution? In the 21st century, if it's not recorded by the ABS, does it exist?

## **Future of forms, methods & practices**

The growth of DR forms, methods and practices has been organic, sometimes reactive, sometimes responsive and sometimes proactive.

## **Questions that arise re forms methods & practices**

The informality and flexibility of DR provides scope for approaches to adapt iteratively to changing circumstances and expectations. Definitions, designed to characterise forms of DR in the interests of potential participants being able to make choices, may become out of date.

In their place and sometimes in parallel with well-defined and accountable approaches, individualised forms of DR can develop. Some appear to be driven by the needs of a changing society. Others appear to be driven by a changing profession of dispute resolvers. DR approaches which are not defined and which rely on the 'trust my idiosyncrasies' approach deny consumers the opportunity to prepare fully for participation and to complain if they believe it appropriate.

For 'the forum to fit the fuss', information that describes 'the forum' and its suitability in terms of various criteria of 'fusses' needs to be available. It is the acquisition and analysis of information which will enable appropriate standards to be set and enforced for the benefit of would-be participants and DR practitioners

### **Data that could be collected re forms methods & practices**

The NADRAC document 'ADR Statistics: Published Statistics on Alternative Dispute Resolution in Australia' describes the data that was available in 2003. A comparison with, say, 2018 could be instructive.