



**NADRAC**  
NATIONAL ALTERNATIVE DISPUTE  
RESOLUTION ADVISORY COUNCIL



The Australian Institute of  
Judicial Administration Incorporated

# **COURT REFERRAL TO ADR: CRITERIA AND RESEARCH**

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for the

**National ADR  
Advisory Council**

**and**

**Australian Institute  
of Judicial Administration**

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## Preface

We are proud to present this paper on court referral to alternative dispute resolution (ADR). The paper, which has been prepared by Associate Prof. Kathy Mack of Flinders University, is a joint project of the Australian Institute of Judicial Administration (AIJA) and the National Alternative Dispute Resolution Advisory Council (NADRAC).

In its advice to Government, NADRAC has consistently emphasised the need for courts to develop criteria for referral to ADR and to make proper assessments on the suitability of dispute resolution processes for different cases and client groups. The AIJA has also stressed the importance of effective referral practices. In the AIJA's 2001 issues paper on quality in court connected mediation program, Hilary Astor noted that 'one of the important determinants of the efficiency and effectiveness of any court connected dispute resolution programs is that of appropriate diagnosis and referral'.<sup>1</sup>

This project has been a learning experience for both organisations. The issue of court referral to ADR is a subject that becomes increasingly complex the deeper one analyses it. There is a growing diversity in the structure of court programs, in the types of disputes dealt with and in nature of processes that are used to resolve them. Moreover, the effectiveness of any referral to ADR depends not only on the suitability of the case for such referral but also on the timing and manner of the referral and on the nature of the ADR service to which it is referred. The wide variety of empirical research into ADR compounds the challenge.

Kathy Mack has unravelled this complexity with great insight, creativity and hard analysis. The paper points to the need for courts (and, indeed, other agencies) to develop a framework for referring matters to ADR which takes into consideration the factors and issues identified in this paper. Continuing education of judicial and court officers, and further research into the effectiveness of court ADR programs are additional priorities.

The paper is a significant contribution to our thinking about when, how and in what circumstances courts decide that a matter is better dealt with by means other than judicial determination. We thank Kathy Mack for her hard work, and also thank members of the advisory group who have brought considerable expertise to this project.

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<sup>1</sup> Hilary Astor (2001) *Quality in Court Connected Mediation Programs*, Melbourne, AIJA, p.29.

As the Hon. JJ Spigelman has observed, courts ‘are presently engaged ... in the early stage of a long process of gathering experience which will assist ... in determining in what circumstances an order for [ADR] would prove fruitful’<sup>2</sup>. This paper does not offer a quick solution to referral to ADR but we hope that it will stimulate and focus discussion on this important topic, assist in the development of effective referral practices and through this contribute to the effectiveness and quality of alternative dispute resolution in Australia.

The Hon. Justice Underwood  
President  
Australian Institute of Judicial Administration

Professor Laurence Boulle  
Chair  
National Alternative Dispute Resolution Advisory Council  
December 2003

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<sup>2</sup> The Honourable JJ Spigelman (2001) ‘Mediation and the Court’ *Law Society Journal* 39(2) March p 66.

## Comments

NADRAC and the AIJA would welcome comments and additional information relevant to any of the matters raised in this paper. Comments may be sent to:

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## **Members of the Advisory Group**

The project has been overseen by a joint NADRAC/AIJA Advisory Group comprising:

Professor Hilary Astor (Sydney University)  
Professor Laurence Boulle (NADRAC and Bond University)  
Dr Andrew Cannon (Adelaide Magistrates Court)  
Dr Greg Lyons (Victorian Civil and Administrative Tribunal)  
Mr Ross Maxtead (Victorian Bar Association)  
Professor Tania Sourdin (NADRAC and La Trobe University)

Coordination:

Professor Greg Reinhardt, Executive Director, AIJA  
Mr David Syme, Director of Secretariat, NADRAC

## **About NADRAC**

The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent advisory body which provides the Australian 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.

Information about NADRAC may be obtained from [www.nadrac.gov.au](http://www.nadrac.gov.au)

## **About AIJA**

The AIJA is an incorporated association associated with Monash University. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

Information about AIJA may be obtained from [www.aija.org.au](http://www.aija.org.au)

## **Acknowledgments**

This report has been prepared with valuable support from many people and organisations.

Professor Laurence Boulle, Chairperson of NADRAC; David Syme, Director, NADRAC; and Professor Greg Reinhardt, the Executive Director of the AIJA, each deserve particular recognition for their support and assistance throughout the project.

As part of the project, an advisory committee was created. Members of the committee read drafts of the report and made many helpful suggestions.

Members of NADRAC also provided helpful comments on an early draft of the report.

Particular thanks go to Prof. Hilary Astor and Prof. Sharyn Roach Anleu for their valuable and extensive comments.

Dr Reeta Randhawa provided significant research assistance at the beginning of the project, especially in relation to legislation and case law. Rose Polkinghorne contributed considerable further research assistance as well as valuable editing of text and references.

Mavis Sansom and Ruth Harris typed and retyped and proofread the manuscript at various stages.

Kathy Jarrett of the AIJA prepared the report for publication.

This report reviews a very large body of research from many jurisdictions. Conducting useful empirical and evaluative research into dispute resolution and the courts requires exceptional skill, energy, imagination and tenacity. It is essential to acknowledge the achievements of the many researchers whose work is considered in this report.

Kathy Mack



# CHAPTER 1

## EXECUTIVE SUMMARY

### 1.1 Introduction

This project came about as a result of a joint initiative by the National ADR Advisory Committee (NADRAC) and the Australian Judicial Administration (AIJA) to develop information to assist courts in referring civil disputes to ADR.

The report attempts to discover whether empirical research establishes specific criteria, or identifies key features about disputes and/or disputants and/or ADR programs, which might provide a checklist to guide a court in making a referral to ADR. The report reviews and analyses the very extensive empirical research literature on ADR, with a particular focus on evaluations of court-connected ADR programs in civil disputes. Policy research is considered as well.

The expected outcomes of the project are reflected in this research report:

- Outline different approaches to matching processes to disputes (Chapters 2 and 7).
- Summarise the issues associated with court/tribunal referral to ADR. (Chapters 3, 5 and 6).
- Provide a summary of case law on judicial referral. (Chapter 8).
- Present options for further work on this topic. (Chapter 9).

Throughout the report, the term "ADR" is used to indicate structured methods of resolving disputes other than formal court based adjudication. In this sense, ADR can include facilitative, advisory, or determinative processes (National Alternative Dispute Resolution Advisory Council (NADRAC), 1997; 2001: 7-10) such as forms of arbitration, conciliation, neutral evaluation, mediation, or other assisted negotiation. As used in this report, 'ADR' does not include informal, unassisted, party-party or lawyer-lawyer negotiation. The terms "court-connected" or "court-annexed" are used interchangeably to include any practice or program in which a court may refer civil disputes to an ADR process, whether such referrals are voluntary or mandatory or whether the ADR service is provided by the court or externally.

### 1.2 Framing the research question

Discussions of court referral of disputes to ADR often assume that fixed criteria can be used to identify disputes which are suitable for ADR or to match a particular dispute to a specific appropriate ADR process.

This notion of "matching" is expressed in terms of linking disputes/disputants with an ADR process, as though these were relatively stable elements (Sander and

Goldberg, 1994). 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 (Astor and Chinkin, 2002: 277-279; Sourdin, 1997: 24). (See also Keilitz, 1993a: 31-32.)

Another aspect of the concept of matching is the question of what is a good match or, to state the question negatively, what does it mean for a process to be *unsuitable* for a particular dispute? This requires identifying the court's goals in making referrals, determining what "success" means in light of these goals, and deciding how it can be measured.

There are many possible goals for a court-connected ADR program, and different stakeholders may also have different goals. Some of these goals may be complementary; others may be inconsistent. Similarly, "success" can have a range of possible meanings and be measured in many different ways. However, goals for court-connected programs are not often stated in ways that facilitate measurement of success. The notions of "success" used in much of the empirical research are quite limited. Settlement rates and party satisfaction are the most widely used measures. Even with these relatively narrow measures, there are substantial limits on the ability of empirical research to establish clear referral criteria.

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 program goals, jurisdiction, case mix, potential ADR users, local legal profession and culture, internal resources and external service providers.

### **1.3 ADR research findings♦**

Most evaluative research has been directed at mediation across a range of settings, especially family mediation and the comparison of ADR - usually mediation - to litigation. This research appears to address two questions: does ADR work, and does ADR work better than litigation?

#### **1.3.1 Mediation**

The most consistent finding of research into mediation is high client satisfaction. Research on mediation, regardless of the type of mediation or the program, has found that most disputes which are referred will go to mediation and will settle before, during or shortly after mediation. Outcomes, including rate of settlement and degree of satisfaction, do not appear to vary much, whether participation is voluntary or compelled. General public awareness of mediation is limited, and uptake of voluntary mediation is low. There is still considerable debate about the

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\* Minimal references are given in this executive summary. More complete citation is contained in the body of the report.

substantive fairness of mediation and, more broadly, its significance for access to justice. The long term impact and overall cost effectiveness of mediation are unclear.

John Wade emphasises that the positive results shown in the Australian and US research are linked to the quality of the mediation program, which entails "highly trained, debriefed, *problem-solving* mediation services (especially in family and workers compensation disputes), staffed by well-paid mediators, who use an intake process..." (Wade, 1998: 115).

### **1.3.2 Family mediation**

Family mediation is an area where ADR has been widely used and studied. Extensive research involving divorce mediation in many countries shows that participants usually settled and that most participants reported they were satisfied with the process and the outcome, though those who settled tended to report greater satisfaction. Child custody mediation also has positive process features, mainly involving improved communication, though these gains do not appear to last beyond the mediation process itself.

The overall conclusions about divorce mediation are not especially striking:

Clearly, the research does not lend empirical support to the more extreme fears of unfairness and imbalance voiced by mediation critics. At the same time, the research also fails to support many of the hopes and claims made by mediation reformers. (Pearson, 1994: 80)

### **1.3.3 ADR (usually mediation) compared with litigation**

The usual ADR process in court-connected programs is "mediation" in some form, though there is considerable variation in the processes encompassed by that label. Some forms of US "evaluative" mediation appear to be more like early neutral evaluation in Australia. Generally, research finds that participants reported fairly high levels of satisfaction, but there is no consensus on increased settlement rates, earlier resolution or cost or time savings for courts or participants.

To summarise the research: participants in family mediation show greater satisfaction with mediation over adjudication fairly consistently, with some evidence of cost savings for participants. Research is contradictory on whether outcomes differ 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.

Any comparison of ADR to litigation is made more difficult because of the lack of clear performance standards or quality measures for civil litigation generally, and the lack of clarity in what "litigation" comprises. Is the comparison between ADR

and trial, or ADR and lawyer negotiation, or ADR and a judicial settlement conference?

#### **1.4 Process issues**

Although many factors drive the need for referral criteria, one particular concern is that the person making the referral decision may not have the "skill" to make "wise referral decisions" (Astor and Chinkin, 2002: 278) and so may need the guidance which criteria might provide. Thus, an important preliminary procedural issue in developing criteria for court referral to ADR is to consider who will make the referral. Asking who makes the referral also raises the question of the role of party choice in allocating cases to ADR. Other significant process questions which are closely linked to the referral decision itself are the timing of the referral and to whom the dispute is referred.

##### **1.4.1 Who refers?**

There is no research which appears to directly address the question whether any category of referrers – judicial officers, court staff or ADR providers – have any greater success rate than any other category. However, some research specifically praised court staff who act as coordinators for the referral process.

##### **1.4.2 Compulsory referral**

Empirical research is simply inconclusive on the question whether compulsory referral affects likelihood of settlement or satisfaction. The state of the US research is summed up by Wissler. Her own study found that

cases were more likely to settle if they entered mediation at the judge's own initiative or at a party's request than if they were randomly assigned to mediation.

She then described up the state of US research:

[However] the findings of other civil mediation studies ... are mixed. Two studies found no differences in settlement rates between mandatory and voluntary referral. In two other studies, the rate of settlement appeared somewhat higher in cases that entered mediation voluntarily rather than by random assignment. (2002: 676)

Without some degree of compulsion, it appears that few will choose mediation. Empirical research shows that those referred compulsorily to ADR do not generally express objections after the fact nor do they opt out, if given the choice. However, party acceptance of a compelled ADR referral does not itself resolve more difficult policy questions of the link between party choice, (perceptions of) fairness, and legitimacy.

### **1.4.3 Timing**

It appears that parties (and their lawyers) can be satisfied with ADR which takes place at any stage, though rapid resolution is sometimes linked with greater satisfaction. In general, empirical research does not consistently link likelihood of success (settlement/satisfaction) with referral at any specific stage of the litigation process. The relation between ADR referral and discovery raises concerns of principle, as insufficient information may affect power balance.

Earlier referral which leads to settlement appears to be more effective at reducing costs, but may have a lower settlement rate. It seems to be generally accepted that there is no automatically right or wrong time for referral; conversely, a system of automatic referral at a certain stage in the litigation process will inevitably result in some inappropriate referrals.

### **1.4.4 Who is the ADR service provider?**

Very little empirical research investigates whether satisfaction or settlement is affected by whether the ADR is provided by a judge, court staff or an outside third party, whether voluntary or paid. There are, of course, significant practical and policy issues to be resolved in choosing ADR providers in a court-connected program.

## **1.5 Specific referral criteria**

There are a number of individual criteria or factors which are regularly listed in the ADR literature as being significant for appropriate referral. However, there is relatively little empirical research directly addressing many of these factors. Where there is research, it tends to be inconclusive:

For the past twenty years legal scholars, social scientists and behavioural theorists have (with varying degrees of success) addressed why one mediation fails and another succeeds. Explanations for mediation effectiveness remain largely contradictory, especially in assessing the relative influence that one set of variables, over another set, has on settlement. (Henderson, 1996: 124)

### **1.5.1 Referral criteria based on principle**

Some factors which are thought to be significant in affecting whether a court should refer a matter to ADR, especially for facilitative processes, appear to be based on essential principles necessary for an appropriate ADR process to take place at all, rather than on their impact on likely success. These include:

- The capacity of the parties to participate safely or effectively on their own behalf. This may be affected by factors such as:
  - Current fear of violence by a party

- An unmanaged mental illness or intellectual disability without appropriate advocacy
- The existence and nature of any power imbalance, and the extent to which any power imbalance can be redressed
- Any relevant court orders which make ADR difficult (eg. a restraining order)
- The relative costs of ADR and litigation, compared with the benefits of each
- Cultural factors
- The need for or possibility of more flexible results, not possible in an adjudicated outcome
- Public interest may require a formal, public, binding determination, or an authoritative interpretation and application of statute or case law.

### **1.5.2 Conflicting or inconclusive research**

The factors discussed in this section have sometimes been the subject of extensive research, but the research has not produced clear generalisable results. These factors have not been shown to be clear barriers to effective ADR, nor have they been established as consistent or reliable indicators that ADR success is likely.

- type of case – family, general civil, or more specific civil
- a matter which is primarily a dispute of fact – or needs expertise or authoritative fact finding
- amount in issue
- multiple/complex issues
- multiple parties
- social characteristics (eg. gender, race)

### **1.5.3 Empirically based criteria**

There are some reasonably consistent research findings which suggest 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 differences.
- 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.

Key elements of procedural fairness in the ADR process, and in the referral process itself, appear to be significant factors in party satisfaction. Considerable research finds that perceptions of fairness and legitimacy are linked to certain process features, including participant control, dignity of treatment and the opportunity to be heard by an unbiased third party, which need to be considered in any court referral to ADR.

#### **1.5.4 Practitioner skill**

The experience, skill, and interventions of the ADR practitioner may be more significant factors in ADR success than party or case characteristics. Skilled, experienced practitioners can sometimes achieve success even in the face of very unpromising party and dispute characteristics. At the same time, a poorly managed program without sufficient skilled, trained staff may be ineffective in resolving disputes with characteristics which suggest likely success. Nonetheless, there will be some disputes and disputants presenting so many features inconsistent with likely ADR success that referral would be inappropriate.

#### **1.6 Australian court-connected ADR programs**

Perhaps the most striking feature of ADR and the courts in Australia is the wide variety of programs and referral practices.

ADR processes which are fairly widely used include those called mediation, conciliation, arbitration, case appraisal, settlement conferences and settlement weeks. ADR may be conducted by court staff, judicial registrars, judges and magistrates themselves or by external ADR providers approved by the court and/or chosen by the parties. ADR may be free, partly subsidised or entirely at parties' expense, and ADR expenses may or may not be recoverable as costs.

Most Australian courts now have legislation and/or rules of court which give explicit authority for the court to refer eligible matters to some form of ADR, and there is relatively little restriction on the ability of courts make such referrals. Rarely, legislation or rules will require referral to ADR for certain types of cases, with the possibility of non-referral for cases shown to be unsuitable. Court referral to ADR may occur at any stage of the litigation process, even before a formal claim is filed with the court.

Many courts are able to refer disputes to ADR without party consent. At the same time, legislation or rules provide only minimal guidance to courts about appropriate referral to ADR. The most frequently used statutory factor appears to be likelihood of settlement, with some recognition of other possible benefits.

## 1.7 Conclusion and future research directions

To repeat the question: Is it possible to establish specific criteria, or to identify key features about disputes and/or disputants, supported by empirical research, which will indicate whether ADR is or is not likely to be effective and whether a court should refer a matter to ADR?

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.

Nonetheless, there may be value in developing and articulating specific factors or guidelines, at least for limited purposes. Criteria are thought to enable predictability or consistency. Perhaps most important in the court referral context, criteria can provide grounds on which a party can persuade a court to make a referral or a basis for a party to oppose a referral. This is especially important if the decision-making model chosen is "presumptive", where referral is automatic unless the matter is clearly unsuitable.

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 a 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 program goals, jurisdiction and case mix, potential ADR users, local legal profession and culture, internal resources, and external service providers (Astor, 2001).

Future research which may assist this process might include:

- Studying the impact of ADR referral on unassisted lawyer negotiation, and comparing ADR with lawyer negotiation.
- Developing and providing reliable, specific information about actual local ADR programs to judicial officers and legal practitioners, including general feedback on non-confidential aspects of specific cases which have been referred.
- Carrying out narrowly focussed evaluation of specific programs against clearly articulated goals.
- Making visible and sharing the expert clinical knowledge of locally experienced, skilled effective ADR referrers and practitioners.
- Developing a greater understanding of effective ADR practice.
- Supporting policy research.

## CHAPTER 2

### FRAMING THE RESEARCH QUESTION

#### 2.1 Introduction

Discussions of court referral of disputes to ADR often assume that fixed criteria can be used to identify disputes which are suitable for ADR or to match a particular dispute to a specific appropriate ADR process. It is expected that empirical research will establish what those criteria are. However, this simply stated question obscures the complexity of the issues involved.

This chapter attempts to untangle some of these different elements and to reframe the research question in a more useful way. The research strategy used to address the research question is also explained.

#### 2.2 Matching – “Fitting the forum to the fuss”

This notion of "matching" a dispute with an ADR process as the basis for referral to ADR is a recurring one in the ADR literature (Access to Justice Advisory Committee, 1994: 292-293; Astor and Chinkin, 2002; Australian Law Reform Commission, 1997: 87-88; Sander and Goldberg, 1994) as is "screening" (Boulle, 1996a; Sourdin, 2002), and is at the core of the multi-door courthouse concept (Gray, 1993: 92). However, these concepts include, and conceal, several distinct questions about court referral to ADR.

- Is the goal of referral a rigorous "matching" to maximise likelihood of a "successful" outcome?
- Should the referral process focus on "screening", that is, excluding disputes and disputants clearly unsuitable for ADR?
- Does referral only need to meet very basic "eligibility" for ADR, as determined by statutory or administrative or service provider requirements?

In this paper, the term "referral" is used to include any process in which a potential user is directed to an ADR process by a court (including court staff), which may incorporate "matching" "screening", or "eligibility" considerations.

There are other possible referral structures, which have been used in some contexts and will sometimes be discussed in this report. For example, referral may be

- automatic, in which all cases of a certain type or with certain features are allocated to a certain ADR process;
- presumptive, in the sense that matters are referred to ADR unless there is a reason not to; or
- based on random allocation, a process that might be used in order to provide a basis for a comparison about the effectiveness of certain types of ADR.

The role of party "choice" or self-referral is discussed below in Chapter 6.

### **2.3 Substance/process**

Another dimension which intersects with ideas of matching or screening is the inevitable substance/process distinction. From the court's point of view, referral can be determined by prescribing processes: by establishing who refers, when the referral is made and what is referred, in light of applicable law and the available services and providers. This approach leaves the substantive screening or matching decision to be made by someone else, somewhere else. (See Chapter 5 for a fuller consideration of the process aspects of referral.)

### **2.4 Indeterminacy/variability**

The "matching" or "screening" question is often framed as matching disputes/disputants with an ADR process in order to achieve a successful outcome, as though these were relatively stable elements (Sander and Goldberg, 1994). The reality is that there are many more components, and they are all moving targets. They may not be clearly articulated in the first place; they are variable in many dimensions; they are dynamic, changing over time. They may not be independent; rather, they exert mutual influence on each other (Astor and Chinkin, 2002: 277-279; Keilitz, 1993a; Sourdin, 1997: 24).

Several elements which must be considered in any matching or screening process are:

- the courts (including their referral processes)
- the dispute
- the disputants (including legal practitioners)
- the context
- ADR process and providers
- the meaning of "success" or effectiveness

There are many ways to categorise these elements. Henderson's categories are: "structural features", "mediator characteristics" and "procedural features" (Henderson, 1996: 143-146). Astor and Chinkin's categories are: "the referral agent", "the nature of the dispute", "ripeness for the relevant process", "the parties" and "the lawyers" (2002: 277-281). Bercovitch and Jackson, in writing about international conflicts, articulate a structure of "antecedent" factors, "concurrent" conditions and "consequent" conditions (2001: 65).

No matter what categories are chosen, they tend to lose their boundaries or their determinacy. For example, within a given ADR process, such as mediation, there is a great deal of flexibility or variability in the actual practices and features, which reflect differences in practitioners, providers, needs of disputants/dispute and the context. "[F]orum types should not be confused with the processes that occur in them" (McEwen and Wissler, 2002: 443). This is vividly reflected in the debates

about ADR terminology (National Alternative Dispute Resolution Advisory Council (NADRAC), 2001: 7-8) and the lack of comparability of empirical research, especially from the US, where it appears that court-connected mediation is often more directive or evaluative than is the (apparent) practice in Australia. (For an extreme example, see the description of "Michigan Mediation" (Bergman and Bickerman, 1998: 127) .) This is not to say ADR process names have no value. "Mediation" is a useful term, as long as it is understood primarily as a description for a cluster or core of ADR features which can vary more or less within a range.

Similarly, dispute labels are not really definitive (Gray, 1993: 95). "Family" or "neighbour" (Whiting, 1992, 1994) can sometimes be shorthand for specific clusters of disputant/contextual characteristics — eg family disputes are likely to involve multiple issues and people with an ongoing relationship, whereas personal injury is more likely to involve a single issue — quantum of damages — between people whose only contact was the car accident that brought them to court. However, family disputes do not necessarily have these characteristics, and so referring all "family" disputes to a process suitable for multi-issue disputes between people with ongoing relationships may result in some inappropriate referrals (Whiting, 1992, 1994).

Another indeterminate or variable dimension is the question of what is a good match or what it means for a process to be (un)suitable for a particular dispute. This requires articulating a concept of successful or effective ADR linked with the goals of making referrals. Parties, their lawyers, the court and the ADR provider may all have different goals. Unfortunately, court-connected programs in Australia rarely state their goals in a systematic way. Mechanisms for establishing the goals of other stakeholders are limited at best and, as a result, measures of success tend to be limited and uninformed by reference to goals. (See Chapter 3 for a fuller analysis.)

One fairly lengthy list of the variable dimensions includes:

the kinds of cases being served; the kinds of parties who generally participate; whether the parties are represented by lawyers or other professionals; what kinds of people serve as the neutrals (eg lawyers, judges, professionals from other disciplines or citizens without professional affiliation or background); the character of the role the neutral is to play (eg purely facilitative or, in some measure, evaluative, or helping the parties devise case development plans); what powers, if any, the court confers on the neutrals and what kind of training and monitoring they receive; whether participation in the ADR program is voluntary (really) or mandatory (as a matter of rule or sociological reality); whether the parties are required to pay for the ADR services (and, if so, how substantial those charges are); the court's budget constraints; as well as the magnitude of docket pressures and the timeframes within which the court can deliver key elements of traditional litigation services (eg trial dates and rulings on major motions). ... local or regional demographic and cultural variables, the nature and severity of conflict of interest problems for neutrals [in a small community], differences in local legal culture. (Brazil, 2002: 718)

As well as the very large number of different elements, there is also a significant dynamic quality, in the sense that all components change over time. This is well recognised (Sander and Goldberg, 1994: 52) and is articulated in different ways. Some debates are expressly about appropriate timing for referral to ADR (Sourdin, 1997: 24). Others use the term "ripeness" to indicate the notion of a dispute and disputants being ready for an ADR process. Ripeness includes timing but also embraces other components of readiness for ADR (Astor and Chinkin, 2002: 280; Sourdin, 2002: 110-112).

Even within the more limited framework of court-sponsored ADR programs, and "[e]ven without worrying about changes over time" (Brazil, 1999:720) any comparison of

different models for delivering ADR services [is] extraordinarily difficult and analytically dangerous. The difficulty is a function of the huge number of variables that could significantly affect the character and outcome of the analysis. The danger is a function of the fact that we cannot assume that conclusions ... valid for one program, in one specific setting, will be valid for programs in other invariably different setting. (Brazil, 1999: 720)

Brazil concludes that "when we try to compare the pros and cons of the different models or systems that might be used for delivering ADR services, we confront a system that is simultaneously fluid and extremely complex" (2002: 720).

Does this mean that that empirically justified screening or matching is simply not possible? Certainly, the complexity of the task can be overstated. It is also important to recognise that competent referral is done every day, by courts and other agencies (Astor, 2001: 34-35). (Of course, there may well be some poor quality, uninformed referral going on as well.)

Ultimately, as Brazil argues, "having acknowledged all of these considerations, we ... must face the fact that ... some policy decisions must be made now, for and in the circumstances that exist today" (2002: 720).

## **2.5 Decision-making models**

This leads to the question of the decision-making model which is to be employed. There may be several assumptions embedded in the concepts of matching or screening, and the desire for checklists. Checklists may be used as diagnostic tools, as in technical or scientific analysis, reflecting an implicit preference for a particular decision making model of classification or characterisation. The commitment to a categorisation may also reflect particular qualities of legal analysis. "Legal thinking honours logical cause and effect and single dimension thinking. It loves checklists and precedents and simple explanations such as 'When should mediation NOT be used'" (Chornenki, 1999: 263). This writer also comments that "[A] favourite metaphor [is] a recipe" (Chornenki, 1999: 263). In the ADR context, the preference arises for checklists, at least in part, perhaps, because of a concern that court-based

referral may be made by a judicial officer, who may not be well-informed or experienced in ADR (Astor and Chinkin, 2002: 276-277).

This faith in categorisation and checklists is reflected in attempts to match very particular qualities or characteristics from each of the various elements such as party, dispute, context, ADR process. "Component parts of a dispute may call for more than one process with different characteristics" (Astor and Chinkin, 2002: 280). This might involve developing a comprehensive list or taxonomy of features of ADR processes, then linking this list with similarly comprehensive lists of factors or characteristics of disputes/disputants/context, each of which is then related to outcomes based on empirical data. Examples of such efforts quickly demonstrate the limited usefulness of this approach. Attempts have included charts (Neslund, 1990; Sander and Goldberg, 1994), or lists: 36 different mediator interventions (Carnevale, Lim and McLaughlin, 1989) or 71 judicial intervention techniques (Wall and Rude, 1989). Few of the relationships between these different elements are well enough established to permit definitive links, or worse, numerical weightings. The very large number of factors leads to a matrix which quickly becomes too complex, except perhaps for a sophisticated artificial intelligence computer program.

As Hilary Astor points out: "These [referral] decisions are too complex for a "tick a box" approach" (2001: 30). Even John Wade has stated "... vital questions will always undermine any venture to create a rough checklist of factors that indicate a certain treatments. The checklists will be too simple ..." (2001: 262). Similarly, Tania Sourdin has pointed out that

"... even detailed criteria will be unlikely to reflect the broad range and fine subtleties of disputes which enter the litigation system. Mechanical application of such criteria to a dispute, without a proper understanding of how ADR processes could affect the outcome, may result in inappropriate referral decisions" (1997: 24).

Other decision making models need to be considered, though they are closely connected with decisions about the referral process, especially who decides, and about the goals of the court's ADR program:

- Consumer (or party) choice is one possible model. An emphasis on consumer preference is consistent with a general deregulation ideology which has become influential in Australian government and public service. (National Alternative Dispute Resolution Advisory Council (NADRAC), 2001: 148-151).
- Another model is a risk management approach which attempts to identify the risks associated with ADR, then to ensure referral processes reduce these risks as much as possible. This is reflected in the notion of screening, rather than matching.
- A third model is a "presumptive" approach, which assumes a certain ADR process will be used, "absent compelling indications to the contrary" (Sander and Goldberg, 1994: 66). Gray calls this "categorical screening" (1993: 92-93).
- Informed clinical judgment (Astor, 2001: 31; Astor and Chinkin, 2002: 278), which incorporates reflective practice, feedback, and information about

outcomes (Astor, 2001: 33-34), is the basis on which service providers perform the sometimes complex intake functions which are seen to be essential to good professional ADR practice (National Alternative Dispute Resolution Advisory Council (NADRAC), 2001; Payget, 1994).

- Another approach, perhaps uniquely suited to judges, is the instinctive or intuitive synthesis, which is said to be the basis of sentencing decisions, which incorporates lists of factors and constraining rules but does not compel any mechanistic application (Brown et al, 2003: 1437-1439).

## **2.6 The research question reframed**

This project began with the goal of establishing specific criteria, or identifying key features about disputes, disputants or ADR programs, supported by empirical research, which will indicate whether ADR is or is not likely to be effective and therefore whether a court should refer a matter to ADR. The very complexity of this task indicates that such criteria are not likely to exist, except at a very high level of generality or in a very specific context which closely duplicates the particular features in which the empirical research was done. This view is confirmed by the researchers themselves who caution against generalising from one study context to other settings (Brazil, 2002: 720; Delaney and Wright, 1997: paras 115, 116; Howieson, 2002: para 46).

Nonetheless, there may be some value in a checklist approach, at least for limited purposes. Both Wade and Sourdin, along with many others, ultimately support some use of checklists. Wade states that "... as long as ... reservations are emphasised, a checklist has potential ..." (2001: 262). Sourdin points out that "referral criteria can be important as a way of guiding referral decisions and ensuring that such decisions are consistent" (1997: 24). Criteria also may provide some predictability for when a court is likely to make a referral. Perhaps most important in the court context, criteria can provide grounds on which a party can persuade a court to make a referral or create a basis for a party to oppose a referral, especially in a system where referrals are automatic, with an opportunity to object.

The most appropriate approach to court referral must acknowledge that no one set of generally applicable criteria can be empirically validated. Just as with standards for ADR services (National Alternative Dispute Resolution Advisory Council (NADRAC), 2001), there is no single list of criteria or model checklist that will apply to all courts across a range of jurisdictions and contexts. Each court/tribunal must develop its own referral process and criteria, in light of its own program goals, jurisdiction and case mix, potential ADR users, local legal profession and culture, internal resources, and external service providers (Astor, 2001: 36).

This report will, therefore, be directed towards identifying the areas in which a court must make its own decisions: ADR program goals, referral processes, decision-making models and criteria. Existing research will be analysed to provide guidance for courts to develop their own successful ADR referral practices.

The next chapter will discuss in greater detail the conclusions about ADR effectiveness which can, and can not, be drawn from empirical research.

## CHAPTER 3

### DEFINING AND MEASURING "SUCCESS"

#### 3.1 Introduction

If a court is to make an ADR referral, it will only wish to refer cases where there is a reasonable prospect of success. Before any referral criteria can be established, it is therefore necessary to develop a way to identify whether an ADR process is successful.

There are many possible aspects or dimensions in which an ADR process could be called successful. For this reason, the term "successful" is itself problematic. Some analysts prefer the word "effective" as better reflecting the range of possible positive results from ADR (Boulle, 1996b: 12-14; 1996a: 11). Regardless of the terminology, the starting point for any discussion must depend on the goal[s] the referral to ADR seeks to achieve, so that outcomes can be measured against those goals. (David, 1994: 44)

#### 3.2 Goals

There are many possible goals which a court-connected ADR program might have, and some are listed below. Different stakeholders may have different goals as well and these goals may be complementary or they may conflict. Resnik and Hensler both distinguish judicial preference for settlement from party preferences (Hensler, 2002: 82-86; Resnik, 2002). For example, a court may want to reduce a crowded list to reduce public costs; the parties may want to save their money, but are less concerned with public cost (Nelson, 2002: 10, citing Brazil, 1999). A related, but different, distinction is that a successful referral, from the court's point of view, may not be the same thing as a successful outcome of the ADR process to which the referral was made. If the matter stays out of the court's caseload, this may be a successful referral, even if the parties and the ADR provider are unhappy with the ADR process and outcome. The court's own goals may be internally inconsistent. Faster settlements may not save much money, if it means greater costs are incurred earlier in the litigation process.

Hilary Astor gives many examples of goals which a court-connected ADR referral might include (2001: 5):

- Reduce delay, clear lists, reduce the backlog of court/tribunal
- Assist in management of cases (which implies a question about the objectives of case management)
- Reduce cost (to parties; court; government; taxpayer)
- Are appropriate to the needs of the case/parties
- Are responsive to personal as well as business needs
- Produce fair, equitable outcomes in all the circumstances

- Achieve party satisfaction
- Produce enduring agreements
- Preserve ongoing relationships between the disputants
- Protect the interests of vulnerable third parties
- Preserve and, if possible, increase party respect for and confidence in the justice system
- Encourage parties to use alternative methods in the future
- Encourage parties to use ADR earlier, including pre-filing
- Achieve moral education/transformation
- Educate/encourage/respond to needs of legal profession
- Change the legal culture

Another similar list focuses slightly more on process features rather than outcomes (Brazil, 1999: 725-726; Nelson, 2002: 9, citing Brazil): (dot points added)

- [A] desire to reduce cost and delay,
- to bring greater uniformity to case management,
- [To] establish judicial control of cases,
- [To] eliminate unnecessary discovery, and
- [To] create a system of accountability for judges and cases.
- . . . .
- [I]ncreasing the rationality, the fairness and the civility of the disputing process
- [E]xpanding the information base on which parties make key decisions in litigation and settlement;
- [R]educing parties' alienation from the justice system;
- [E]xpanding parties' opportunities to act constructively and creatively;
- [H]elping parties understand and vent emotions, and
- [E]xpanding the parties' tools for dealing with the psychological, social and economic dynamics that always accompany, and sometimes drive litigation.

Another way to think about goals is to identify the values which a referral to ADR can promote (Boulle, 1996a: 11):

- *Process*: the extent to which the parties are satisfied with the mediator's conduct of the mediation and their experience of

the process and its fairness.

- *Efficiency*: the extent to which the process is cost-and time-effective and maximised the value of the outcome.
- *Empowerment*: the extent to which the mediation educates the parties about constructive problem solving and equips them to deal with disputes in the future.
- *Effectiveness*: the extent to which the mediation achieves a settlement outcome.
- *Durability*: the extent to which the mediation outcome endures over time.
- *Relationship*: the extent to which the mediation process increases understanding and improves the relationship between the parties.

Although there are many possible goals which a court-connected program might have, court-connected programs in Australia rarely state their goals in a systematic way, nor do they articulate specific or distinctive goals for the particular court in light of its particular context. Legislation or rules which establish court-connected ADR programs rarely state anything beyond a desire to increase the likelihood of settlement. (See Chapter 8 and Appendix)

An essential step which Australian courts must take in developing valid ADR referral processes and criteria is to identify the goals which the referrals are to achieve, so that success can be recognised and measured.

### **3.3 Measures of success**

Once the goals of the referral process have been established, it is then necessary to decide whether those goals are met. If success is determined by whether the referral met its goals, what measures are available to determine if the goals are met? (Astor, 2001: 2-3)

It is important to be very specific about what outcomes are evidence of achieving those goals, if we are to draw any lessons for referral from research about success (Elix, 2003). These outcome measures may, in turn, be able to be linked to an analysis of what factors caused the success or failure. Henderson points out that "the choice of a measure for mediation outcome may very well shape the range of variables put forth to explain mediation settlement" (1996: 121). To be more specific: "if outcome is defined as rate of settlement, then the explanatory variables used to explain outcome should differ from those used to explain outcome when outcome is defined as rate of compliance. Few studies recognise this issue." (Henderson, 1996: 124)

There are relatively few widely used success measures. The most frequently used include (Henderson, 1996: 121, citing Kressel and Pruitt, 1989): (Dot points added)

- [U]ser satisfaction
- [R]ates of compliance
- [R]ates of settlement
- [N]ature of agreements
- [E]fficiency
- [I]mprovement in the postdispute climate

A more elaborate set of measures was developed by Whiting which attempts to capture both qualitative and quantitative features (emphasis added):

In order to determine the success rates of mediated cases, the definition of mediation success was operationalised into three scientifically measurable parts or stages. Each part of the definition considered a different aspect of mediation success, and the parts combined served as a cumulative measure of success.

To meet the first criterion of the three-part definition, the mediation had to have produced a *written agreement* to which all the concerned parties consented. This definition was not concerned with whether the agreement qualified as a good agreement or whether the disputants believed that it was a satisfying agreement; rather, the only aspect of concern was whether the parties reached an agreement. To meet the second criterion of mediation success, any agreement reached had to have been *substantially followed* by all of the parties. This definition considered the fact that an agreement not followed is, in actuality not an agreement at all and so cannot be the product of a successful mediation.

To meet the last criterion of mediation success, both parties had to have reported either that *they won or that there was no winner or loser* in the dispute. This definition of success considered the idea that in a successful mediation, both parties reach at least their bottom-line goals, and therefore, that a successful mediation produces a win-win outcome or, at least, be one in which both parties believe they did "okay". (1994: 251-252)

In spite of the potential for more sophisticated measures of success, the actual measures used in evaluative research tend to be quite limited. The most frequently used are:

- settlement rates
- satisfaction (both for its own sake and as a proxy for quality of outcome)

This limited choice of outcome measures reflects, in part, the difficulty of empirical research in this area, including the difficulty of undertaking research over long periods of time. This difficulty is equally true of research into civil litigation generally, which has not generally been subjected to the same degree of evaluation.

### **3.4 The complexity of empirical research**

Empirical research is difficult for several reasons (Caspi, 1994; Keilitz, 1993b: 50; Kressel and Pruitt, 1989: 400-401; McKillop et al, 2003; Sourdin, 1996: 203-205). One writer explains several complexities:

Legal system processes have been likened to a 'leaky funnel': only a small proportion of those who enter remain until the end. Consequently, cases with different points and times of exit have to be monitored and compared. A second, frequently encountered, problem is that of 'local legal culture': practices in a particular legal community may be idiosyncratic so that the data emanating from the relevant institutions cannot be understood without reference to those practices. Thirdly, even if a sufficient number of cases and institutions can be studied to overcome these problems, it is not clear what criteria should be used to evaluate 'effectiveness', given that different participants will have different expectations and goals. (Ogus et al, 1990: 58)

Additional complexities are introduced when research attempts to compare results across different courts and different legal systems.

Empirical research evaluating court-connected ADR tends to focus on two aspects. One emphasises features which appear to be more objective or quantitative and capable of being expressed in numbers such as settlement rates, cost savings or time savings. The other aspect of evaluation focuses on more qualitative or intangible features, such as satisfaction, fairness, and the substantive justice or merits of the outcome.

#### **3.4.1 Settlement rates, cost and time**

A very frequently used measure of success is settlement rates. However, actually tracking cases and quantifying settlement is much more difficult than it may appear, as the "leaky funnel" metaphor suggests. Andrew Cannon gives a detailed description of the methodological issues in a relatively small scale, focussed mediation pilot scheme (Cannon, 1997).

In addition, settlement rates per se may not tell us anything about the ADR program; the cases that settled might well have settled anyway, as most do. As trial rates are so low, it is very difficult to show any statistically significant reduction in trial rates as a result of ADR (Keilitz, 1993b: 43).

The massive Rand project produced only fairly tentatively stated results: "early case management can save time, but tends to raise costs, an early trial date tends to

save money and time, and a relatively early discovery cut off tends to save time" but "mediation and early neutral evaluation seem not to have had any impact ... [on] cost and delay" (Garth, 1997: 106; Kakalik et al, 2000).

Concentrating on settlement fails to value other positive outcomes short of full resolution such as reducing issues in dispute or aiding discovery (Elix, 2003; Hann and Baar, 2001: 13; Macfarlane, 2002: 266-268, 279-280). Settlement rates are also criticised as they do not, in and of themselves, give any information about the quality of settlement (Galanter and Cahill, 1994). There is no evidence that higher rates of settlement indicate a better process or outcome (Kelly, 1996: 375). Indeed, very high settlement rates may involve dissatisfied parties, who felt pressured (Kressel and Pruitt, 1989: 397, 400-401).

Another weakness of settlement rate as the only success measure is that it does not measure the durability of the outcome. If an agreement is not followed, it is not really an effective settlement and may lead to further disputes in court or in another forum (Whiting, 1994: 251).

### **3.4.2 “Qualitative” evaluation**

Evaluation of less tangible or qualitative features such as satisfaction or fairness of process or outcome is also difficult, for several reasons (Garth, 1997: 108).

- Some of the claimed intangible benefits of ADR simply may not be susceptible of empirical measurement (Australian Law Reform Commission, 1997: para 9.34).
- Attempts to develop measures of fairness have struggled with the need to measure both internal and external factors (Menzel, 1991). An external assessment of fairness may lack validity, as an external observer will not know what a disputant’s full motivations are (Wissler, 1995: 353). However, a user's purely subjective assessment of fairness may be based on insufficient information about entitlements or alternatives.
- Evaluation of fairness raises the question of whether ADR outcomes, especially in court-connected processes, should reflect outcomes based on legal rights, even if they may not precisely mirror court results (Hanycz, 2002: 19-20; Nolan-Haley, 1996).
- A related concern is whether ADR procedures "systematically favour one set of participants over others..." (Keilitz, 1993a: 5). To answer this concern, evaluation of ADR must also address the long term impact (Wade, 1998: 114), with special attention to outcomes for particular disadvantaged groups (Access to Justice Advisory Committee, 1994; LaFree and Rack, 1996).

Satisfaction is often treated as an equivalent or a proxy for less tangible benefits of ADR, as a party's expression of satisfaction appears to be based on a complex mix of process and outcome factors (Boulle, 1996a: 256-257; Sourdin, 1996: 208). (See discussion below on research into perceptions of fair process.) Satisfaction is usually measured simply by asking ADR participants if they were satisfied with the process and/or the outcome, or with other specific features. Indeed, a leading Australian research team argues that satisfaction is "the only relevant and certainly the only practical criterion by which the quality of non-adjudicated outcomes can be evaluated" (Delaney and Wright, 1997: 9).

In contrast, others have criticised satisfaction as an inherently "ambiguous" value (Singer, 1995). It is argued that party satisfaction alone can not be an adequate measure for the quality of a court-connected process, which has a distinctive public responsibility for enforcement of rights (Hensler, 2003; Kressel and Pruitt, 1989: 396). Expressions of satisfaction are very likely to involve some degree of comparison, even if implicit and uninformed, between the ADR process and outcome and what is thought would have happened had the dispute been litigated or resolved in some other way. However, parties may believe they are well informed when assessing outcomes, but they may be unaware of the choices available or their legal entitlements.

### **3.4.3 Comparative evaluation**

Often, the question being addressed in court referrals to ADR is a comparison between litigation (whatever that may include) and ADR (whatever that may include). A valid comparison requires baseline information about courts, which may be inadequate or non-existent, or a control group, which can be difficult to establish (Sourdin, 1996; Wade, 1998: 114). There is a lack of clearly articulated indicators of civil justice generally which could be used as benchmarks against which ADR is measured (Australian Law Reform Commission, 1998: paras 2.50-2.68).

Comparisons of adjudication and ADR sometimes fail to consider the impact of settlement negotiated by lawyers, so that cases resolved through ADR may have resolved anyway through conventional negotiation (see Clarke, S. H. and Gordon, 1997).

### **3.5 Empirical research and court referral**

In spite of the difficulties identified above, there is a very substantial amount of valuable research, mainly in the US, involving court based ADR programs, especially family mediation and mediation in general civil cases. The bibliography to a 1993 US symposium on court-connected ADR runs to over 100 research reports (Keilitz, 1993c), and there have been many more since then (see Australian Law Reform Commission, 1998: Appendix D). The main findings of this research are summarised in the next chapters.

This report reviews and analyses this research literature on ADR, with a particular focus on empirical evaluations of court-connected ADR programs in general civil disputes, including small claims. Some of the very large body of research on family

mediation is considered, as is some research on other specific dispute areas such as environmental, community and industrial disputes. Most studies are from the US and Australia, with some from Canada.

The research discussed throughout this report attempts to answer questions about the effectiveness of ADR programs and to identify key factors that lead to improved results, in whatever form. Much of this research is of very high quality conducted by skilled, thoughtful researchers. Nonetheless, there are several obstacles which make it difficult to draw general or widely applicable conclusions from this body of research.

Researchers sometimes reach conclusions that link certain qualities with positive outcomes — eg, that settlement rates were more or less frequent for disputes or disputants with certain features. However, the number and complexity of the many variables make it very difficult to draw reliable general conclusions when the large mass of often conflicting research results is reviewed. It is also not possible to identify and isolate all possible variables when discussing the results of any particular research project. Research conclusions necessarily concentrate on a few factors or variables or qualities and may not specifically isolate certain other variables, though these features may be indicated in a description of the process. Studies are rarely specific about features not found to affect success, but these null findings can also be significant, as they may confirm or challenge conventional assumptions about ADR or litigation.

There has been no attempt in this report to re-analyse the research reports to discern additional conclusions. For example, a research study might indicate whether the ADR practitioner was court-employed or privately paid or a volunteer, but not analyse this as a possible factor in the outcome of the ADR process. There has been no attempt to compare research reports to see if it is possible to discern any significance in these unstudied factors.

Another significant issue is research design. Some research is very explicit about research method, such as using random allocation to enable comparison or control. Some research relies exclusively on interviewee's subjective beliefs about likely effects, such as cost savings, where other research attempts to develop more objective measures. Evaluation may be conducted by the court itself as part of the operation of an ADR program or it may be independently funded and managed.

In general, this report discusses the conclusions drawn by the reported research, without an express evaluation or comparison of research design. At the same time, greater emphasis is put on Australian research and on those research projects which appear to use better methodology and whose conclusions seem more reliable.

Another obstacle to drawing general conclusions from research is variation among ADR models used in different settings, and inconsistent use of terminology. The difficulty with labels for different ADR processes has been widely discussed. Comparisons of a particular process in different settings may really be comparing very different processes, even if both are denominated "arbitration" or "conciliation" or "mediation" (Garth, 1997: 112; Kressel and Pruitt, 1989: 401; National Alternative Dispute Resolution Advisory Council (NADRAC), 2001: 7-10). One

significant area of inconsistent terminology is with "mediation" in the US and Australia. US research involving mediation rarely distinguishes between evaluative and facilitative mediation, and court-connected mediation in the US often means evaluative mediation (Hensler, 2001). In comparison, in Australia, the distinction between evaluative and facilitative mediation is more strongly emphasised, and it also appears that facilitative mediation is more widely used. Where an evaluative process is used, it may be more likely to be labelled as early neutral evaluation rather than mediation.

General research results can only provide limited guidance for referral in particular cases. Research results are generalisations; they indicate only what is likely to happen in a particular case but are not certainties. It is important to note that the positive findings summarised below need to be considered carefully. Even when there are high rates of settlement or satisfaction, in the order of 60-80%, there were still 20-40% who did not "succeed". Within this group there may still be some benefit from ADR or it may be that these cases should not have been referred to ADR.

As Folberg et al commented:

[f]or cases in which settlement ... is highly unlikely, mandatory ADR would appear inappropriate ...; but we suggest that any seeming impossibility of settlement be viewed sceptically, because most cases do not proceed to trial and because ADR is designed specifically to enhance the settlement potential of seemingly irresolvable cases (1992: 391).

Even if settlement is not achieved, unpromising cases may gain some benefit from referral to or involvement in an ADR process.

Another consequence of the complexity of factors is that there will often be contradictions. Some factors will suggest possible success while other factors will suggest success is not likely.

Although it is important to be cautious about generalisations or comparisons, it is still possible to draw some valuable, reliable conclusions about the importance of specific features of particular programs from well run evaluative research. Research may not provide clear or consistent criteria in terms of specific case or party characteristics which are indicators of success, but reviewing this research will be valuable to a court making referral decisions. By analysing particular features of the successful programs, including referral practices and criteria, and comparing those to a specific program an Australian court is operating or developing, some guidance about maximising program success may be discerned. These conclusions can then be used to guide Australian courts in planning, managing and evaluating their own ADR referral practices.



## CHAPTER 4

### ADR RESEARCH FINDINGS

#### 4.1 Introduction

The major areas of empirical research involving court-sponsored ADR in the US and Australia are divorce/family mediation and mediation in general civil matters (often small claims), or the US federal courts. Some, though not all, of this research involves a comparison of the ADR process under consideration with litigation in the court from which the referral was made. Much of the empirical research appears to ask two questions about ADR:

1. Does ADR work?
2. Does ADR work better than litigation?

The summaries below are divided in that way though, as noted above, any question about whether something works must include, at least implicitly, a consideration of goals and purposes. As pointed out by an experienced ADR policy advisor, the answer to the question "Does a spade work?" depends on what you want it to do (McEwen, 1999). Consistent with the limited articulation of goals and outcome measures in many court-connected programs, much of the research summarised below expresses conclusions in terms of party satisfaction, time/cost savings or settlement rates.

Commentators, including Bryant Garth, have raised significant criticisms about the value of these questions. "There is a tendency ... to place too much emphasis on empirical research as ... a device for the evaluation of solutions to particular problems." This can result in "false expectations and ... disappointment that is ... unjustified" (Garth, 1997: 131). This warning is reflected in the directions of recent empirical and policy research. More recent ADR research appears to be directed towards analysing users' perceptions of ADR in line with key elements of the psychology of procedural justice (see below), or raising policy questions about the role of ADR in the courts apart from efficiency claims. Two leading scholars, McEwen and Wissler (2002: 131) argue that, as so few cases actually go to trial in any civil jurisdiction, the significant comparison, which is rarely studied, is between ADR and unassisted lawyer-negotiated settlements.

#### 4.2 Does ADR work?

##### 4.2.1 Family mediation

Extensive research involving family mediation, including Australian research, appears to conclude:

- "Mediation research across countries indicates that clients reach agreement in divorce mediation between 50% to 85% of the time." (Kelly, 1996: 375; Pearson, 1994: 60 (50-75%))

- "[Nearly] all studies of divorce mediation in all countries and settings indicated that client satisfaction with both the mediation process and outcomes is quite high, in the 60% to 85% range." (Kelly, 1996: 377; Pearson, 1994: 63)
- "Satisfaction with mediation was higher among those who reached agreement than among those who did not." (Kelly, 1996: 378)
- "Positive features of mediation for clients in custody mediation centre around the ability to communicate to the other spouse in a contained setting, and include the opportunity for parents to express their viewpoint, talk about the children, have their concerns taken seriously and hear helpful ideas from mediators about parenting issues and plans. Clients in general give mediators high ratings for their impartiality, sensitivity and skill." (Kelly, 1996: 378)
- "Small but more short-lived increases in co-operation and improvement in communications following custody mediation." (Kelly, 1996: 379)

The overall conclusions about divorce mediation, as summarised by Pearson, are not especially striking:

Clearly, the research does not lend empirical support to the more extreme fears of unfairness and imbalance voiced by mediation critics. At the same time, the research also fails to support many of the hopes and claims made by mediation reformers. (1994: 80)

#### 4.2.2 Mediation generally

NADRAC summarises the mediation research as follows:

The research literature on mediation suggests that rates of agreements seem to be consistent across diverse forms of mediation and service types (about 50-85%), and that there is high client satisfaction rate with mediation. Mediation appears to work best where there are multiple (rather than single) issues. Outcomes are at least as positive for mandated as for voluntary referrals. There is low awareness of ADR, and low uptake of voluntary ADR. The long term impacts, substantive fairness and overall cost effectiveness of mediation are unclear. (National Alternative Dispute Resolution Advisory Council (NADRAC): para 27)

Wade (1998: 115 (citations omitted)) summarised mediation results generally, emphasising that the positive results are linked to high quality well-resourced programs:

There are now many surveys in Australia and various states of the United States of America, which consistently show that highly trained, debriefed, *problem-solving* mediation services (especially

in family and workers compensation disputes), staffed by well-paid mediators, who use an intake process, are consistently successful in that they have moderate to very high:

- (a) levels of settlement;
- (b) durability of settlements [the "stickability" factor];
- (c) customer satisfaction in that the customers would use the service again, and would refer friends;
- (d) customer satisfaction in that the customers say: "I was listened to", "I had a sense of control". (In the United States, these are sometimes referred to as the "dignity factors".)
- (e) numbers of settlements which were in the range of objective outcomes as advised by the parties' lawyers; and
- (f) preservation [and even restoration] of the disputants' ability to talk to one another in the future.

Kressel and Pruitt (1989 (citations omitted)) also summarise mediation research in generally positive terms:

- Disputants [perceive] that mediation affords them a measure of control and privacy and, at least for complainants, gratification at being able to state their own position (1989: 396).
- The evidence on rates of compliance with mediated agreements is generally favourable (1989: 396).
- Mediation is usually unable to alter dysfunctional patterns of relating (1989: 399).

#### **4.3 Does ADR work better than litigation?**

A summary of some of the major research findings shows the difficulty of drawing reliable, empirically based conclusions with enough specificity to guide a particular referral decision, though some broad generalisations may be possible (Brazil, 2002, citing Shack). One rather upbeat, though still tentative, summary of the research into US court based ADR programs states: (emphasis added)

Two decades into ... court ADR program development, experimentation, research and scholarly commentary[, w]e now know that well-run ADR programs *may* reduce cost and time, that ADR is satisfying and fair for *most* participants and that good ADR can cost money. (Bergman and Bickerman, 1998: ii)

The usual ADR process in court-connected programs is "mediation" in some form, and that term will generally be used when it is the term used in the program description. Often there is insufficient information about the process in the research reports to be confident of how similar or different these "mediation" processes were.

To summarise the research discussed below: Participants in family mediation fairly consistently reported greater satisfaction with mediation over adjudication, with some evidence of cost savings for participants. Research is contradictory 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 generally positive, though there is relatively little research specifically on ENE.

#### **4.3.1 Mediation in family cases**

It seems clear that participants in family mediation report significantly greater satisfaction than those who litigate their divorce or custody dispute. "With few exceptions, study after study concludes that mediation is consistently favoured as compared with adversarial interventions" (Pearson, 1994: 63). Users of mediation reported high levels of satisfaction with mediation, in contrast to the dissatisfaction reported with "the adversarial legal system" (Pearson and Thoennes, 1989: 27-28).

There is some evidence of cost benefits for participants in mediation, but the benefits for the courts are less clear. Several studies found that "mediation ... was significantly less expensive" than an adversarial process (Kelly, 1996: 376), and other research reported significant evidence that mediation will reduce legal fees (Pearson, 1994: 62). Pearson, reviewing divorce mediation research, found that "compulsory mediation programs ... have been found to be highly cost effective and helpful to courts" (Pearson and Thoennes, 1989: 27-28), but elsewhere notes that there is "little impact on the courts' overall workload" (Pearson, 1994: 61).

On the question of whether outcomes differ in any significant way between family mediation and litigation, the research appears contradictory. One writer summarised the research as indicating that

mediation results in more joint legal custody; [there are] higher rates of compliance with mediated agreements, when compared with agreements reached in the adversarial process [and] mediation clients are significantly more satisfied than adversarial comparison groups. (Kelly, 1996: 376-378)

In comparison, another research summary reports that (Pearson, 1994: 66-68, dot points added):

- "some studies find evidence of generosity in mediation agreements, ...others reveal the opposite".
- "early evaluations revealed a tendency for joint custody...more recent evaluations fail to find distinct custody outcomes".
- "regardless of forum, children tend to live with their mothers".
- "visitation patterns are fairly consistent across forums".
- "child support guidelines have generally introduced ...

consistency in child support awards...[and] [t]he evidence on ... amounts [ordered] in different forums is mixed."

- "property division and alimony awards in mediated and non-mediated agreements reveal that they are comparable and reflect prevailing legal norms."
- "[some] studies find short-term improvements in compliance and (71) relitigation for those who mediate, [but] ... (72) it may be safest to conclude that while mediation is not more effective than adjudication in promoting long-term compliance and preventing relitigation, mediated agreements are no more unstable than those originating from judicial forums or lawyer conducted negotiations."
- "While mediated agreements resemble non-mediated ones in most respects, they typically contain more detail about visitation arrangements and avoid the use of vague, reasonable visitation orders that often bring parents back to court (81)."

Ultimately, Pearson (1994: 80) concluded that "... mediation outcomes resemble those generated in other forums and share many of the same weaknesses".

#### **4.3.2 Mediation in general civil cases**

The research results for mediation compared to litigation in civil cases can only be described as mixed and contradictory. Evaluation of some programs showed positive results, at least in terms of reported satisfaction. However, as Deborah Hensler has pointed out, "... knowing that litigants are 'satisfied' with mediation tells us little about *preferences*. ... Litigants might be even more satisfied with a different procedure if it were offered ..." (2002: 83-84, emphasis added).

Most evaluations showed no impact or mixed results on settlement rates or time or cost savings. It does not appear to be possible to discern consistent or significant differences between those programs which claim to produce successful results and those which do not.

The largest US research evaluating the impact of ADR (mediation and early neutral evaluation) on courts (Kakalik et al, 1996) found virtually no program effects:

We found no strong statistical evidence that the mediation or neutral evaluation programs, as implemented in the six districts studied, significantly affected time to disposition, litigation costs, or attorney views of fairness or satisfaction with case management. The only significant outcome is that these ADR programs appear to increase the likelihood of a monetary settlement. (1996: 53)

However, others argue that in three districts not studied by the Rand team, there was evidence of time and cost savings (Bergman, 1998: 287 n249). One issue raised by these challenges to the Rand research is that the impact of facilitative rather than evaluative mediation was not measured.

In a significant reanalysis of data from several studies of court-connected mediation, Deborah Hensler concluded that whether facilitative or evaluative mediation was used made no difference in time or cost savings, though lawyers and judges believed that evaluative mediations were effective at achieving settlement (2001: 258).

Clarke and Gordon measured a court-sponsored mediation program for general civil claims in North Carolina which "... was intended to make civil litigation ... less costly to both litigants and the court system, more efficient and more satisfactory to litigants" (1997: 336). They concluded that the program did not meet these goals. Costs were not reduced; satisfaction with mediation was no greater than with conventional settlement, though those who settled, whether via mediation or otherwise, were more satisfied than those who went to trial.

They also concluded that the mediated cases would have settled anyway, as the frequency of trials was not reduced. However, Clarke and Gordon also noted that their research results differed from similar research in Florida and Maine, which did claim some reduction in judicial workloads.

Wissler's study of court-connected mediation of civil cases in Ohio concluded that

virtually all cases in the mediation and non-mediation groups were settled or dismissed. Few cases went to trial (3% of mediation cases and 2% of non-mediation cases) ... The length of time between when cases were filed and when they terminated did not differ for cases randomly assigned to mediation versus non-mediation ... it was not likely that mediation had a substantial impact on court caseloads. Nonetheless, the courts felt that mediation had reduced docket time, staff time and judicial time. About half of the attorneys thought mediation reduced their client's costs ... " (2002: 668-672)

Positive results are reported in the evaluation of the Ontario mandatory mediation program which concluded that mandatory mediation in general civil cases led to significant reductions in time to disposition, reduced costs, with a high proportion of complete settlements and considerable satisfaction expressed by parties and their lawyers (Hann and Baar, 2001: 2).

Another positive evaluation of a mandatory mediation comes from Florida's circuit courts (jurisdiction in claims over \$5,000). Based on interviews with attorneys, the evaluation found that "(1) cases sent to mediation settled more rapidly than cases that went through the traditional judicial process (2) respondents felt that mediation was less costly than typical case processing and (3) respondents believed the process was fair and provided greater access to justice" (Press, 1998: 55-56,

citing Schultz). However, a report of a mandatory ADR program in Minnesota found that it "may have had some impact on rate of settlement, but little [or no] effect on the [monetary] terms of settlement" (Welsh, 1998: 215).

Two writers who have each analysed several studies consistently reported mixed findings (Keilitz, 1993a; Kressel and Pruitt, 1989), although it does appear that "[b]oth litigants and attorneys find mediation to be fair and satisfactory" (Keilitz, 1993a: 7-9):

- "Mediation has mixed effects on case disposition time." (Keilitz, 1993a: 7-9)
- "There is evidence that cases that get to mediation reach settlement more quickly than comparable cases that follow the traditional adversarial approach." (Kressel and Pruitt, 1989: 398)
- "Two jurisdictions showed some reduction in the workload of the court, depending on how that workload is measured" [number of court appearances, numbers of motions or hearings]. (Keilitz, 1993a: 7-9)
- "There is mixed evidence on whether mediation reduces trial rate." (Keilitz, 1993a: 7-9)
- "There is also little evidence that mediation has had any appreciable effect in reducing court backlogs." (Kressel and Pruitt, 1989: 398)
- "Settlement rates at mediation vary, and the reports do not always reflect the impact of mediation on ultimate settlement." (Keilitz, 1993a: 7-9)
- "There is some evidence that mediated agreements involve more compromise and more equal sharing of resources than adjudicated agreements; [but] this pattern is hardly uniform." (Kressel and Pruitt, 1989: 398)
- "Litigant costs: The research on this issue is limited and broad conclusions cannot be drawn from it." (Keilitz, 1993a: 7-9)

Studies in the context of court referral sometimes addressed the perceptions of the plaintiffs or defendants. One Australia study found plaintiffs were more satisfied with mediation and thought it was fairer than trial or arbitration, but pre-trial conferences drew the highest fairness/satisfaction rating. However, these findings may relate less to the nature of the process than to timing (Delaney and Wright, 1997: paras 45-46). Those whose cases took less time to resolve were more satisfied, and the cases which resolved at pre-trial conferences resolved most quickly. Clarke and Gordon's research in the US suggests that defendants were less satisfied with settlement than with trial, probably because defendants were more likely to have to pay money at settlement, whereas at trial there was at least a possibility of no payment at all (1997).

In Australia, Sourdin and Matruglio (forthcoming) found that "half the plaintiffs in mediation saw both sides" as being successful [while over a quarter] saw the

defendant as being successful". By comparison 84% of the defendants saw both sides as being successful ..." (forthcoming: 24). Though just over half of plaintiffs and defendants found the outcome to be the same as expected, the remaining plaintiffs were more likely to find the result worse than expected, while more of the remaining defendants reported the outcome was better than expected. Process satisfaction was essentially similar between plaintiffs and defendants.

#### 4.3.3 Small claims and mediation

Research on mediation in small claims matters is generally slightly more positive than that for general civil claims, with various researchers reporting that mediation performs better on various qualitative criteria (Wissler, 1995: 351), is more successful (Cannon, 1997), and appears to be more satisfactory (Keilitz, 1993b: 24-26).

Other main points which emerge from research comparing mediation to small claims procedures tend to be mixed or contradictory: (dot points added)

- Two studies confirmed savings for the court, one of which also reported savings for litigants. (Gray, 1993: 97)
- One of these studies also found that "small claims mediations may take approximately twice as long as trial". (Gray, 1993: 97)
- "Mediation appears to be more satisfactory than the small claims court process". (Keilitz, 1993b: 24-26)
- Two studies that examined court workloads found that judicial and courtroom time was reduced, but in one study this savings was offset by the cost of the program. (Keilitz, 1993b: 24-26)
- "[M]ore compromise was involved in cases that reached mediated agreements". (Keilitz, 1993b: 24-26)
- "[P]laintiffs were more likely to receive part of their claim in mediation, but less likely to receive the entire claim" but this may relate to "defendants' willingness to concede partial liability before mediation rather than to mediation itself". (Keilitz, 1993b: 24-26)
- "[M]ediation improves compliance with the outcome, but ... estimates of the amount of improvement [vary]". (Keilitz, 1993b: 24-26)
- "[U]nderlying non-legal problems were more likely to be brought up ... [but there was] little evidence that mediation dealt effectively with underlying problems". (Keilitz, 1993b: 24-26)

However, research involving small claims cases in the UK found a preference for adjudication over settlement among parties, and that settlement was usually prompted by lawyers (Baldwin, 1999: 17).

#### **4.3.4 Arbitration compared with litigation**

A comparison of arbitration, "judicial track" and settlement in the Sydney District Court reported very positive results (Davidson, 1995: 218-219):

- "Statistical data established the smaller civil claims dealt with by arbitration are disposed of more than twice as expeditiously as matters in the judicial track and slightly more quickly than the median time to settlement generally."
- "Questionnaire responses overwhelmingly confirmed that this was also the perception of legal practitioners."
- . . .
- "Statistical data disclosed a dramatic decline in the active pending caseload in recent years and further that by far the most successful method of disposal of cases was by means of the arbitration schemes. Furthermore, the statistics disclosed an ongoing reduction in the median disposal time of matters determined by judicial hearing (consistent with the decline in the active pending caseload)."
- "The rate of re-hearings of arbitration decisions was quite low (11 per cent) and did not, in any substantial way, seem to be adversely impacting on the delay or backlog of matters awaiting hearing before a judge."
- "Practitioners were of the view that more than 50 percent of cases dealt with by an arbitration award would have proceeded to a judicial hearing in the absence of arbitration. Hence the arbitration schemes would seem to be diverting a large number of cases which otherwise would be contributing to congestion in the general list."

Davidson concluded that litigant and court costs were reduced, based on estimates that party costs for trial would be \$1000-\$3000 or more, and court costs for arbitration were 25% of trial costs: (dot points added)

- "The perception of legal practitioners was that a majority of litigants had a positive attitude to the arbitration process and were satisfied with the procedures and outcome."
- "The quicker disposal time and less traumatising nature of the arbitration hearings seemed also to contribute significantly to litigant satisfaction."
- "There is some evidence therefore that this objective is also being met, albeit the fact that only 32 percent of awards were

considered by practitioners to be fair and reasonable and that some litigants had concerns about bias and level of control of the process suggest some further research may be required."

In contrast, a summary of results in 13 court-annexed arbitration programs in the US and Canada produced much less clear conclusions (Keilitz, 1993b: 41-43): (dot points added)

- "[T]he evidence is mixed on arbitration's effect on the pace of litigation".
- "Research has not clearly shown that arbitration results in cost saving".
- There is limited research information on court costs and the data that exists does not show reduced costs.
- "Litigants and attorneys generally think that both the arbitration process and its outcomes are fair and satisfactory".
- Challenges to the arbitration result, whether called an appeal or a rehearing tend to fall between 40 to 60 percent, but range from a low of 9 percent to a high of 83 percent.
- "[W]hether arbitration reduces trial rates remains an open question".

A recent study of arbitration in the US noted that several US federal courts which had adopted mandatory arbitration programs had made arbitration voluntary and it was rarely used when available, as it was not regarded as effective (Lynch, 2002).

#### **4.3.5 Case evaluation/early neutral evaluation compared with litigation**

In general, early neutral evaluation appears to provide slightly more positive evaluation results, when compared to litigation. In the US, a comprehensive analysis of an early neutral evaluation (ENE) program in a US District Court concluded:

Overall, our data reveals that the ENE program works. Its designers effectively responded to specific problems that tend to result in increased costs, fees, time and dissatisfaction with the litigation process. For cases that went through the court system without ENE, those negative factors remained. Participants who went through ENE were pleased with their experience in almost two-thirds of the cases. Attorneys and parties reported net savings that exceeded total costs by more than ten to one. The ENE process shortened the pendency time in about half of the cases assigned to the process. (Rosenberg and Folberg, 1994: 1536)

In addition, information gained from the ENE session was regarded, by lawyers and litigants, as leading to a fairer resolution.

An evaluation of "Michigan mediation", which appears to be a highly structured form of case evaluation, suggested that 15-50% of disputes were directly settled by accepting the "mediation award" but that cases settled earlier as a result of the process, which saved time and money (Bergman and Bickerman, 1998: 133-134).

Research in Missouri into an "early assessment program" showed a number of benefits listed below, but also illustrated the difficulties of generalising research from one context to another. The report indicates that the program was designed to resemble early neutral evaluation but rapidly became "a fairly classic form of mediation" (whatever that might mean).

- "earlier case resolution". (Stienstra, 1998: 261)
- "about two thirds of lawyers reported litigant cost savings, and the savings they reported were greater than the increased costs of those who reported such increases". (Stienstra, 1998: 262)
- "Encouraging more realistic party attitudes". (Stienstra, 1998: 264)
- "aiding lawyer evaluation of their own and the other side's case". (Stienstra, 1998: 264)
- "greater party involvement in settlement" (Stienstra, 1998: 264, 267).

Not all the research is positive, however. The Rand research cited above found that, like mediation, ENE did not significantly affect delay, costs or satisfaction. A review of a California study and a Massachusetts study of case evaluation reported that "there is some evidence that case evaluation reduces case processing time", that "settlement rates were not reported", "research does not indicate whether case evaluation reduces cost" and some parties and litigant reported better understanding of factual and legal issues, but this was not consistent across case types (Keilitz, 1993c: 13-14).

#### **4.3.6 Other ADR processes compared with litigation**

An elaborate analysis of conciliation of child disputes in the UK compared different models of conciliation and found that "in general, conciliation of all types reduced the number of disagreements between the parties and generated settlements which the parties regarded as satisfactory – agreements were reached in 71 per cent of the cases and of these 74 percent were described as satisfactory" (Ogus et al, 1990). Nevertheless, the author concluded that "on *economic* grounds alone" the increased cost of providing conciliation was not sufficiently offset by cost savings to the public or the parties" (1990: 74) and identified "the policy question" as "whether the other benefits which accrue from conciliation can be shown to justify the additional cost ... Whether these resources should be made available is a matter for political ... judgment". (1990: 74).

#### **4.3.7 Unsupported settlement negotiations and ADR**

The practical reality is that, with or without ADR, most civil cases settle short of trial, through unassisted lawyer settlement negotiations. Some research attempts to compare ADR with case resolution via settlement negotiation.

In New South Wales, Davidson found that arbitration resolved cases only slightly more quickly than settlement. Sourdin and Matruglio reported that the median amounts received by plaintiffs in the NSW 2002 settlement week varied significantly. Plaintiffs who settled before a matter was even listed for ADR received the least, and those who settled after being listed for arbitration (but before arbitration) the most. In contrast, plaintiffs whose matters were listed for mediation but settled before participating did much better than those who resolved the case through mediation or via arbitrator's award. Those whose cases were judicially determined received the highest award (Sourdin and Matruglio, forthcoming: 91-92).

In the UK, Baldwin found a preference for adjudication over settlement (Baldwin, 1999: 17). A review of US research found some suggestion that parties were less satisfied by settlement processes in which they were not directly involved, but this was contradicted by other research which found no difference in party evaluation of several dimensions of satisfaction or fairness (McEwen and Wissler, 2002: 141-142).

#### **4.4 Research generalisations**

An American judge with extensive ADR experience commented that

reliable generalisations across the entire field are wholly inaccessible because there is such a diversity of program character and quality and ... in the character and quality of the studies. To assess the potential value and impact of court programs with some degree of confidence, we need to focus on specific programs whose characteristics we understand and or studies conducted with high levels of social science professionalism. (Brazil, 2002: 100-101)

Program diversity, and hence the inability to generalise, is reflected in the many process differences in different programs. These process variations introduced factors which are not usually isolated for study and, indeed, could not easily be studied, but may have a substantial impact on outcomes.

Some of these process variations are discussed in the next chapter.

## CHAPTER 5

### REFERRAL PROCESS ISSUES

#### 5.1 Introduction

There are many factors driving the desire for referral criteria in court-connected ADR programs. One particular concern is that the person making the referral decision is not able to make "wise referral decisions" (Astor and Chinkin, 2002: 278) and so may need the guidance which referral criteria might provide. Thus, an important preliminary issue in developing criteria for court referral to ADR is to consider who will make the referral.

To give fairly extreme examples, a court will not need referral criteria if ADR is automatically required as a pre-condition to the court's processes. Similarly, no referral criteria are needed if ADR is left entirely to party choice. In these situations the suitability determination is left entirely in the hands of the service provider's intake process.

This section identifies a large number of process issues. Three are discussed in detail: who should refer; the timing of the referral; and to whom the dispute is referred. The possible responses to these questions will significantly affect the kind of formal or explicit criteria a court might need as part of its ADR referral program. The importance of local legal culture must be recognised as well (Plapinger, 1998: ii).

#### 5.2 Who refers?

Astor and Chinkin (2002: 278) argue that "whoever selects cases for ADR should have": (dot points added)

- "extensive experience of the jurisdiction and its case characteristics..."
- "comprehensive understanding of all forms of ADR available through the court"
- "ADR training ... [involving] more than a brief introduction"
- "clear understanding of the strengths and weaknesses of all ADR processes"
- "good judgment", and
- "commitment to using ADR (in appropriate cases)"

If referral criteria include characteristics of the parties or the dispute, then whoever makes the referral will need to be informed about these dimensions as well.

In a court-connected program, those who are most likely to be making referral decisions are judicial officers, court staff and the ADR provider.

### **5.2.1 Judicial officers**

Judicial officers will vary greatly in their understanding of and attitudes towards ADR (Brazil, 2002: 124). Some research suggests that judges and lawyers have been sceptical of ADR, at least in part reflecting a legal culture derived from professional training and experience in the civil litigation system of adversary adjudication or competitive legal negotiation (Hensler, 2002; Zariski, 1997). Other research (Resnik, 2002) suggests that judges have a strong commitment towards avoiding adjudication and favouring settlement, as reflected in rules of court and case management policies and practices, on the basis that that a negotiated resolution will lead to a less costly and better substantive outcome for litigants. This attitude is expressed in the view that a bad settlement is better than a good trial. Some judicial officers may lack sufficient direct experience of ADR to make appropriate referrals (Sourdin, 1997).

On the other hand, judicial officers may have relevant skills developed through case management, and their knowledge of settlement patterns within their court's case mix can be valuable for ADR referral decisions (Astor, 2001: 31).

Judicial officers bring authority to the referral process, which may be important if parties or their lawyers are reluctant to use ADR (Astor and Chinkin, 2002: 278). However, Ogus concludes that effective conciliation of child disputes in the UK (defined as reduced conflict, lasting and satisfactory agreements through satisfactory process) was least likely to be achieved in a court-connected program with high judicial control.

Overall ...conciliation appears to be most effective when it is disassociated from the judicial process. [T]he pressure from persons in 'authority' to reach speedy settlements, the often unduly narrow focus on a single disputed issue and the clients' confusion between the different processes taking place at the court all inhibited the success of conciliation. (Ogus et al, 1990: 74)

Judicial officers also have the ability to make decisions under conditions of uncertainty, which must incorporate and reflect a wide range of explicit and implicit factors. As is repeatedly pointed out, in this paper and in other research, the referral decision is difficult, complex, and inherently uncertain. These are the kinds of decisions judicial officers make every day. Perhaps the clearest example of this is sentencing, which is done on the basis of an intuitive or instinctive synthesis of many factors (Brown et al, 2003: 1437-1439).

### **5.2.2 Court staff**

Referral by a suitably trained non-judicial officer enables ADR referral supported by at least some of the authority of the court. A non-judicial court staff member is also more likely to have (or to be able to acquire and maintain) current ADR skills and knowledge than a judicial officer, whose primary commitment must be to the skills and knowledge of adjudication and substantive law.

Although the role of court staff is not isolated as a specific factor in research studies, the importance of trained court staff with specific responsibility for the ADR program, which may include formal referral, is mentioned in a range of contexts (Bickerman, 1998; Cannon, 2002; Kloppenberg, 2002; Shusterman and Burrows, 1998; Smoyer, 1998; Stienstra, 1998: 268-271).

Brazil argues strongly that court-sponsored ADR should be provided in-house by trained neutrals who are not judicial officers. This model enables the court to monitor the quality of the program, to ensure that the ADR program maintains public trust and respect and provides basic elements of procedural fairness. Similar reasons support the referral decision being made within the court by suitably trained and experienced staff.

In its advice to the Attorney-General regarding ADR in the Federal Magistrates Court, NADRAC emphasised the need for a trained and competent ADR assessor. NADRAC also pointed out that a specialised non-judicial officer would be less expensive than a judicial officer (National Alternative Dispute Resolution Advisory Council (NADRAC), 2001).

A court staff member who makes ADR referral decision is often referred to as a "gatekeeper". John Braithwaite has suggested a more positive metaphor for this role: "pathfinder" (Family Court of Australia, 2002: 62). Certainly, many litigants approaching courts, especially those who are unrepresented, will need guidance about ADR as well as about litigation processes.

### **5.2.3 The ADR provider**

Even if a court makes a referral on a considered basis, good service providers must have an intake process which makes an assessment for suitability for their own service. Even in services which, for some reason, lack a significant intake process, part of the ADR process will inevitably involve an ongoing, if implicit, decision of suitability, as the provider retains the power to terminate the process.

As discussed above, selection of disputes for ADR must involve significant understanding of ADR combined with an ability to assess aspects of the dispute and the parties. A good intake process would include consideration of all these elements.

US research suggests that service providers, especially community mediation services which depend on court referrals for sufficient business, may accept unsuitable referrals (Coy and Hedeon, 1998). There is no explicit suggestion of this in the research involving Australian ADR services.

### **5.2.4 The disputants (and/or their lawyers)**

See discussion of disputant "choice" in Chapter 6.

### **5.3 When should courts refer disputes to ADR?**

The timing of referral to ADR has been the subject of much discussion, some of it based on speculation, intuition or wishful thinking; more on some degree of clinical experience, and relatively little on empirical research. Although it is widely believed that timing does (or should) affect outcome (and/or satisfaction), the existence or direction of any relationship is unclear. One commentator argues that mediation should be considered at the point of several key events: before filing suit; after the answer/defence is filed; before expensive discovery; before intensive trial preparation; just before trial; after trial; and before appeal notice; as there are different "tactical, strategic, ... competitive, ... resolution oriented and collaborative" reasons at each stage (Cooley, 1996).

When we ask what it is about timing that is thought to affect outcome/success, we find that timing is likely to be a proxy for other factors which link to the likelihood of settlement or satisfaction. For example, early referral may be seen as likely to lead to greater cost savings and/or to full settlement as positions have not hardened, or later referral may be seen as more effective because parties have greater information about the dispute and the alternatives. The more useful questions do not relate to timing per se, but to other factors such as emotional readiness to negotiate or settle, or information needs, and the dispute should be assessed directly on these qualities. A more useful concept which incorporates these elements is that of "ripeness" (Astor and Chinkin, 2002: 280; Sourdin, 2002: 110-113).

However, even in the heavily studied field of divorce mediation, there are no clear indications of when a dispute or disputants may be "ripe" for an ADR process. There are several models of the emotional stages of the divorce process: bereavement, where emotions progress along a linear path of steady improvement; cyclical, where emotions vary in intensity and type, involving love/anger/sadness; and initiator status, in which feelings are significantly different depending on whether a party is the initiator of the break up (Bickerdike and Littlefield, 2000: 182). Each of these models would suggest different timing for effective ADR referral.

Timing is also significant as many factors can change over time, so that a dispute that is not amenable to one or another form of ADR at one stage may become more amenable at another time, or vice versa. This dynamic quality is well recognised by service providers and users of ADR services, who at least implicitly make continuous assessments of suitability in deciding whether to continue to participate in the process or to withdraw.

To sum up the research, it appears that parties (and their lawyers) can be satisfied with ADR which takes place at any stage (Rosenberg and Folberg, 1994) though rapid resolution is sometimes linked with greater satisfaction (Delaney and Wright, 1997). In general, empirical research does not consistently link likelihood of success (settlement/satisfaction) with referral at any specific stage of the litigation process. Earlier referral which leads to settlement may be more effective at reducing costs (Hann and Baar, 2001: 9), but may have a lower settlement rate. It seems to be accepted that there is no automatically right or wrong time for referral; however, a

system of automatic referral at a certain stage in the litigation process will inevitably result in some inappropriate referrals (Astor, 2001: 34).

The procedural points at which court-based ADR referral will be considered include pre-filing referral, referral before or after discovery, and the use of ADR after trial.

### **5.3.1 Pre-filing**

The Magistrates Court of South Australia has a program which allows a claimant to present a "final notice of claim" to the potential defendant, along with an offer of court-sponsored mediation, in advance of filing a formal claim. Legislation in many areas requires some form of ADR as a precondition to accessing courts or tribunals. For example, the *Retail Leases Act 1994* (NSW), *Native Title Act 1993* (Cth) and *Equal Opportunity Act 1984* (SA).

### **5.3.2 Before or after discovery**

Pre-trial referral to ADR can come at any time, but it is usually triggered by case flow management deadlines or events and is often related to discovery. The desire to refer matters to ADR before discovery reflects the belief that discovery abuse is a significant cost in civil justice (Australian Law Reform Commission, 2000: para 6.67).

ADR before discovery raises concerns of principle. Discovery, or lack thereof, can mean unequal information which may affect power balance and the fairness of the outcome. There are also practical concerns, that parties may be less ready to negotiate candidly or not be prepared for settlement (Henderson, 1996: 121). In some cases, discovery may be needed to assess the likely trial outcome, as a precondition for settlement. At the same time, ADR can provide information itself, or make the discovery process more effective by indicating more precisely where further information is needed (Senger, 2000a: 10).

Some research suggests that ADR is much more likely to result in settlement if it is held after some discovery. Henderson's analysis showed that "if discovery had not occurred, settlement was nearly twice as likely not to occur. If discovery occurred, whether document discovery or full discovery, settlement was far more likely to occur" (Henderson, 1996: 146-147; Keilitz, 1993b: 46; Senger, 2000a). Wissler's research into an Ohio court-sponsored mediation program found that "cases were more likely to settle if mediation was held sooner after the case had been filed" and that the "likelihood of settlement was not related to the status of discovery" (2002: 676-677). Research also suggests that cost savings are greater if ADR is earlier (Senger, 2000b: 28; Stienstra, 1998: 267-268).

Lawyers appear to prefer ADR after at least some discovery. Henderson found that many lawyers "thought [that] mediation [would be] appropriate where discovery had been completed and the case was ready to go to trial" and that "more than half ... would prefer discovery in "most" or "all" cases" (1996: 129). Lawyers in other studies express similar attitudes. (Keilitz, 1993b: 46; Macfarlane, 1995: 50; 2002:

262-263, 280-282; Rosenberg and Folberg, 1994: 1518; Stienstra, 1998: 267-268). However, lawyers may also regard ADR as appropriate even when no discovery has occurred (Henderson, 1996: 129; Stienstra, 1998: 267-268). In one study, lawyers expressed the view that discovery before mediation can have a "harmful impact", though a significant minority of lawyers expressed concern about the appropriateness of early mediation in some cases (Hann and Baar, 2001: 78).

What is not clear is whether a lawyer's views about the need for discovery vary depending on the type of dispute. For example, Henderson's research involved lawyers in the construction industry. With Rosenberg and Folberg's ENE research, there was some difference in the timing of sessions by type of dispute, with trademark actions having ENE sessions earliest (1994: 1518).

Views about the need for discovery may also differ depending on the type of ADR process. Keilitz's review of court-annexed arbitration programs states that "the general consensus from the research indicates that earlier referral, after a reasonable time to complete some discovery, increases the effectiveness of arbitration" (1993b: 46). Rosenberg and Folberg's research involving ENE found that approximately 60% of lawyers and parties felt that the ENE session was held at an appropriate time, regardless of when it was held (1994: 1517).

Another aspect of the relationship between ADR and discovery is whether the use of ADR itself impacts on discovery. One review of a large number of US studies observed that "the studies tended to find no impact of mediation on the amount of discovery, although a few studies noted reduced settlement" on the basis that discovery was needed in order to ensure a case was ready to mediate (Wissler, 2002: 694 n238). However with ENE, there was some difference in what was actually considered in the ENE session, depending on timing. Early ENE sessions might have considered discovery; later ENE may have been more directly settlement oriented.

### **5.3.3 Post-trial/pre-appeal**

Structured, court-based post-trial ADR programs are rare in Australia, but they are more common in some US jurisdictions (Hanson and Becker, 2002: n3; Opekin, 2001: 52-56).

In pre-appeal programs in the US circuit courts of appeal, ADR conferences often occur before lengthy written submissions are filed, on the assumption that incentives for settlement, and cost-savings, are highest at that point, and that even if no settlement is achieved, some progress on some issues can be made (Hanson and Becker, 2002: 169; Scanlon, 2002).

A review of a US state court appellate mediation program found that the settlement rate increased from 42 to 58 percent, settlements were reached more quickly, and 77% of the nearly 200 lawyers surveyed supported the settlement conference program (Keilitz, 1993a: 27-30). Evaluation of another state court appellate mediation program reported a 29% settlement rate, but noted that "there is no available industry standard against which to assess this figure" (Hanson and

Becker, 2002: 173). Lawyers who were surveyed reported very positive views about the program, even if their case did not settle (Hanson and Becker, 2002: 176-179). The research concluded that there were cost savings for the court, based on the somewhat dubious assumption that all the cases which settled at mediation would not have otherwise resolved, and would therefore have entailed lengthy written submissions, oral argument and a written court judgment (Hanson and Becker, 2002: 179-180).

In examining divorce mediation, Burrell (1994) found that post-judgment mediations among parents who wished to vary custody and visitation involved less stress for parents and greater likelihood of agreement, than those whose cases were pending.

#### **5.4 Referral to whom? Who is the ADR service provider?**

Court referral to ADR can involve many different ADR providers:

- ADR may be provided by a judicial officer (Burns, 1998; Cannon, 2002; Sourdin, 2001: 190-193; 2002: 94-97)
- ADR may be provided by non-judicial officers employed by the court (Cannon, 2002; Hensler, 2003: 128)
- ADR may be provided by an external organisation or individual (Family Court of Australia, 2002),
  - nominated by the court
  - chosen by the parties from a court-accredited list
  - chosen by the parties

The policy issues raised by these alternatives are discussed at length by Astor (2001: 8-13).

In-house programs have considerable policy and practical advantages. On one view, court-sponsored ADR programs must be in-house, to ensure that courts meet their obligations to provide public justice and to maintain their legitimacy (Brazil, 1999: 747; Hensler, 2003). Judges interviewed as part of the Missouri early assessment program stressed the need for high quality in a court-annexed program which is easier to provide if there is court control. In-house programs avoid the concerns expressed in one US study that service providers, especially community mediation services, who are dependent on court referrals for sufficient business may accept unsuitable referrals (Hedeem and Coy, 2000). If there is a dedicated staff member providing ADR, scheduling is easier, which can contribute to ADR success.

The impact of who conducts the ADR process is not clear.

- The Ontario evaluation found that "mediations were significantly more likely to result in complete settlement if the mediator was selected by the parties, rather than assigned by the coordinator" (Hann and Baar, 2001: 12).

- Research in the US comparing sitting judges as mediators with private judge-mediators concluded that there was less time available in the public setting and the stronger focus was on settlement, whereas the private judge mediators had more time (Burns, 1998).

Another dimension to the question of who provides the ADR service is the professional background of the provider. One study suggested that lawyer mediators were less likely to act to equalise power imbalances than were social work mediators (Hanycz, 2002, citing Albert). Other research, reviewing divorce mediation, found no consistent differences when lawyer mediators were compared with social work mediators (Pearson, 1994: 74)

Whether the service provider/practitioner is in-house or external, it is essential to be clear about the provider's ability to reject an unsuitable referral. Even with the most careful analysis by the court and court authority to compel some degree of party participation, some matters will simply be unsuitable for an ADR service or practitioner. A decision by a practitioner not to provide an ADR process will need to be respected by the court referral process. An example of a legislative provision which makes this clear is s 32(1) of the *Dispute Resolution Centres Act 1990* (Qld) which expressly provides that the Director “may decline to consent to the acceptance of any dispute for mediation . . . .”

## **5.5 Other process issues**

There are many other process issues which will impact on court referral to ADR, and on the need for and nature of any referral criteria. The discussion below touches on a few of these.

### **5.5.1 How much is referred?**

It seems clearly accepted practice, supported by legislation in some jurisdictions, that courts may refer either an entire dispute to ADR or only some aspects of the dispute. Determining what parts of a dispute to refer raises the same issues that have been discussed throughout this paper, and is one of the significant complexities in the whole question of appropriate court referral.

### **5.5.2 How great is the court's involvement in the referral decision?**

The allocation of disputes to ADR can be linked to court processes in many different ways, requiring very different levels of court involvement or action:

- ADR may be a precondition to access to a court or tribunal so that the court may only be required to assess if any pre-condition is met or if any exceptions to the precondition are met.
- ADR may be mandatory or presumptive — all matters, or all within a certain category, are referred (Sander and Goldberg, 1994). Such a referral may allow for some exceptions or for parties who object to opt out. The

effect is that ADR is compelled unless there is a good reason not to.

- Allocation to ADR may be random or arbitrary — every odd numbered case (see Stienstra, 1998: 255; also Wade, 1998: 114) with or without an opt out provision for party objections or other exceptions.
- ADR allocations may require only a minimal eligibility determination.
- ADR allocation is done after assessment according to criteria to screen out clearly unsuitable matters.
- Allocation is done after assessment according to criteria to "match" to an ADR process with the greatest likelihood of "success".

### **5.5.3 Content of court referral orders**

One of the few essential features for successful ADR which emerges from the research is the attendance of a person with authority to bind the actual party (Bourdeaux, O'Leary and Thornburgh, 2001; Hann and Baar, 2001; Rosenberg and Folberg, 1994: 1536-1537). Any court referral to ADR should include an appropriate rule or order to ensure all necessary participants are involved in the ADR process.

### **5.5.4 What information is available in making the referral decision?**

Characteristics of the parties, the case or the context are often thought to be significant in assessing appropriateness of ADR. Whether such information is needed will vary with the basis of the referral.

If referral is automatic or presumed, with or without an opt-out provision, then relatively little party or case specific information is needed for the first instance referral decision. If, however, the referral is to attempt a more sophisticated matching in the hopes of maximising success, then more information will be needed. Possible information sources include pleadings or other material filed with the court such as affidavits, or specially prepared material such as questionnaires or interviews (David, 1994). Generating and evaluating this information will demand resources from the parties to provide it and from the referring person to read and analyse it.

This need for party/case/content information underlines the importance of party choice, as much of the information will be known to the parties, though parties may lack accurate information about ADR.

### **5.5.5 Who pays for the cost of ADR, including the referral process?**

Careful referral to ADR demands resources — training of staff, time to learn about the parties and their dispute (Astor and Chinkin, 2002: 278). Sourdin (2002: 105) points out that an elaborate "intake, diagnosis and referral process can resemble

a mediation process". If the court is undertaking a complex referral process, then at least some of the cost will be borne by the court.

Who pays for the ADR process itself is often determined by who is providing the service. Services provided by a judicial officer or court staff usually do not incur a specific fee. External mediators may be unpaid volunteers, or their cost may be partly subsidised (by the court or government), or parties may have to pay full professional fees.

A related question is the extent to which ADR costs are recoverable as part of litigation costs. Part of the ADR process itself may include an agreement as to costs, but where ADR has not led to an agreement, or where costs are still contested, it appears that there is no consistent law or practice in this area. In most jurisdictions it would be in the discretion of the court (for example, *Federal Court of Australia Act 1976* s 43).

### **5.5.6 Feedback**

Rosenberg and Folberg found that those conducting early neutral evaluation sessions wanted feedback, at least in the form of the actual case outcome, whether eventual settlement or trial, and on what terms (1994: 1528). A similar point is significant for court referrals, especially if the referral is made by a judicial officer or court staff member who has no further contact with the matter. In order to make wise referral decisions, the outcome of previous decisions must be known, including some information which attempts to identify reasons for the outcome. In this way, those referring disputes from court to ADR will have some basis for assessing the accuracy of their predictions about suitability.

## **5.6 Referral process and criteria**

Before referral criteria can be developed, it is necessary to establish who will be making the referral and when the referral decision is made, and who the potential ADR service providers are. The role of the service provider's intake procedures and the ability of an ADR practitioner or service provider to refuse an unsuitable referral need to be clarified.

Many of these questions, however, need not be resolved if the ADR participation is entirely voluntary and is initiated by the parties themselves. The role of party choice is considered in the next chapter.

## **CHAPTER 6**

### **DISPUTANT "CHOICE"**

#### **6.1 Introduction**

There has been considerable debate about the role of party choice in ADR processes. (For a thoughtful analysis, see Astor and Chinkin, 2002: 269-274.) Many have argued that consensual participation is the fundamental assumption of most ADR methods (Howieson, 2002: paras 10-11 and references there) and a key source of its legitimacy (Astor, 2000: 73). The claimed basis for ADR effectiveness and legitimacy is that parties voluntarily participate in good faith with a common desire to resolve their dispute (Astor, 2000). At the same time, it is well recognised that, without encouragement or even compulsion, few litigants (and their lawyers) will use ADR (Macfarlane, 2002: 299-301; Pearson, 1994: 27; Zariski, 2000: para 3).

The question of party choice has significant implications for a court referral program. A court-ordered referral to ADR may be contested in various ways (see discussion of cases in Chapter 8). If a party strenuously objects to a referral, and is willing to litigate about the referral itself, that will generate another level of costs and delay. The dispute about referral can itself impact on suitability for ADR.

Real distinctions between choice, voluntary participation and compulsion can be hard to discern in actual ADR programs (Hedeed, 2002; Mack, 1995: 136-137). The truly consensual nature of many ADR processes is somewhat doubtful, since choices of dispute resolution processes are always made under more or less drastic constraints. Even where participation is formally voluntary, one party may be motivated or pressured into ADR by the other party, by legal advisers, by financial constraints or by a perceived judicial or institutional expectation of participation. For some parties, the choice is ADR or nothing (National Alternative Dispute Resolution Advisory Council (NADRAC), 1997: para 9.55). In light of these factors, it may not be especially useful to draw a sharp conceptual distinction between voluntary and compelled participation.

What may be more significant is participation in good faith. One reason why there is concern about compulsory referral to ADR is that the compelled party may not participate in good faith, and so the process will not be successful and may even be harmful, by increasing costs and delay or enabling misuse of confidential information. Nonetheless, concern about possible bad faith does not seem to deter courts from making compulsory referrals under a statutory power to refer without consent (see cases discussed in Chapter 8). When making referrals over an objection, courts emphasise to parties the need for appropriate participation.

#### **6.2 Does compulsory referral make a difference to success?**

Empirical research is simply contradictory and inconclusive on the impact of compulsory referral on success. In her study of Ohio ADR programs, Wissler found that:

cases were more likely to settle if they entered mediation at the judge's own initiative or at a party's request than if they were randomly assigned to mediation. (2002: 676)

She then summed up the state of the US research:

[However] the findings of other civil mediation studies ...are mixed. Two studies found no differences in settlement rates between mandatory and voluntary referral (Estee, 1987: 51; Kakalik et al, 1996: 53) ... In two other studies, ... the rate of settlement appeared somewhat higher in cases that entered mediation voluntarily rather than by random assignment (McEwen, 1992; Stienstra, Johnson and Lombard, 1997: 244)

Other studies have found links between voluntariness and greater success. Evaluation of the Ontario court-connected mediation program found that cases where parties selected the mediator were most likely to achieve complete settlement. Kressel and Pruitt found (1989: 403) that labour mediation is most successful if requested by both parties (see also Keilitz, 1993a: 11; Senger, 2000b: 27). Another researcher attempted to compare the intensity of coercion and found some evidence that greater coercion meant cases were slightly less likely to settle, where those whose referral was less coercive were slightly more likely to settle (Hedeem, 2002: 17).

In contrast, several studies have found that voluntariness did not impact on settlement (Brett, Barsness and Goldberg, 1996: 259; Smoyer, 1998: 32-33), nor did initial party interest impact on satisfaction (Rosenberg and Folberg, 1994: 1539). There are similar findings for divorce mediation where agreement rates, satisfaction and willingness to recommend the process to others are comparable for mandatory and voluntary participants (Pearson, 1994: 73).

Although it is accepted that voluntary participation, in and of itself, is not essential to ADR, positive or informed expectations may enhance the likelihood of success.

Participants who expected ENE to be something substantially different from what it actually was were among the most dissatisfied with the process. Lack of coordination between the evaluator and the court cause some dissatisfaction. (Rosenberg and Folberg, 1994: 1536)

### **6.3 When given a choice, what do parties choose? Why?**

In Australia, the AC Nielsen research about family mediation suggests that most people simply didn't know about mediation (AC Nielsen, 1998). In 1995 17% indicated they had heard of family mediation; in 1998 18%. Of those who were aware of it, 16% said they would not be willing to use family mediation, and 52% of those said that they preferred to resolve their problems themselves or not involve other people. Of the 70% who indicated they would be willing to use family mediation, the most frequently expressed reasons were that it would be better than

court, less stressful/traumatic, assist with communication, provide an objective, third party view and be cheaper.

Interviews with litigants who declined mediation in minor civil actions (small claims) in the Magistrates Court in SA revealed that:

Those who declined did so because they believed they were entitled to succeed in full and saw no reason to compromise or their assessment was that the other side was unreasonable, obsessive or it had become a matter of principle (about half). The rest said they were willing to mediate but the other side was not. Those who chose mediation did so because they saw it as less terrifying, less antagonistic, good business to be seen as flexible, amicable, honest and several also because it saved time and the cost of preparing for trial, which they would have discussed with their lawyers. It is clear that some were very pleased to have the opportunity to resolve the dispute away from lawyers and outside the trial process. (Cannon, 1997)

Brett, Barsness and Goldberg's research, involving ADR through private ADR providers in the US, found that parties selected arbitration over mediation when they thought settlement was unlikely and the cases turned on issues of fact or law (1996: 266).

Research into environmental disputes in the US finds that the parties who are potentially responsible for cleaning up environmental damage would choose ADR because of time and cost savings, better communication and flexible options for resolution. In contrast, the US Environmental Protection Agency (EPA) (the US federal governmental authority responsible for enforcing the law) appeared to take the view that using ADR was unnecessary if it had a strong case because ADR indicated weakness and could lead to a loss of control (Bourdeaux, O'Leary and Thornburgh, 2001). Other US research suggests that the defence was less likely to seek mediation than plaintiffs in personal injury and contract cases (Keilitz, 1993a: 11).

Sometimes a party expresses reluctance to mediate by saying that they want their day in court. This phrase has many possible meanings (Wade, 2001). If a desire for a day in court meant the dispute was a matter of principle, that would have different implications for an appropriate referral decision than if the party were expressing a preference for certain dispute resolution process features.

Another aspect of party choice, and the reasons for a party's willingness to participate in ADR, is the extent to which a party's attitude towards ADR indicates intent to misuse or abuse the process in some way, either by engaging in bad faith bargaining, or using the process to harass or maintain unwanted contact with another party. That is, a party who is willing to use ADR may not really be willing to settle.

It is also clear that lawyers' attitudes are significant in influencing party attitudes (Rosenberg and Folberg, 1994: 1541). Research in New South Wales and Ontario

found that lawyers gave similar reasons for opting out of ADR: referral was too early, before information was available; facts were too complex; legal issues were too complex; the defendant did not accept liability (which may link to a tendency of defence to be more negative about ADR generally); credibility was a central issue (Hann and Baar, 2001; Sourdin and Matruglio, forthcoming). Note that these may or may not be valid obstacles to a stable and satisfactory resolution. (See discussion in Chapter 7.)

#### **6.4 Party choice and court compulsion**

It is important to think carefully about *why* a party might choose or resist ADR, as this may impact on the appropriateness of a compulsory referral. If a party refuses because of fear of violence, that should not simply be overridden without careful intake procedures and measures to ensure personal safety. If a party refuses because they believe mediation isn't appropriate for a dispute about a fence, that may call for a different response from the court, to ensure that the party is well informed about what ADR actually involves and its potential value. Other factors which are thought to influence party choice — eg a desire for privacy — may not have the same significance for court referral, especially if some public interest is involved.

Another question which is raised by party choice is who is better placed to analyse the appropriateness of referral, especially when those factors relate to the case or party characteristics. Parties and their lawyers will have a more detailed understanding of their own dispute, context and needs, but they may not have sufficient understanding of ADR processes to make appropriate choices.

One feature of several court-annexed ADR programs is a requirement that parties and their lawyers meet and consider ADR, perhaps with a judicial officer or an ADR coordinator (Bickerman, 1998: 2; Cannon, 2002; Stienstra, 1998: 253; Welsh, 1998: 206-207). Such a process would enable parties and their legal advisers to make more informed choices about ADR. Such a discussion may also be part of the case flow management process, reflecting the often indistinguishable line between court ADR programs and case flow management events. However, this would entail time and cost for the court and the parties.

In spite of the reluctance or resistance expressed by lawyers, empirical research shows that those who are referred compulsorily to ADR do not generally express objections after the fact (Macfarlane, 1995: 72) nor do they opt out, if given the choice (Rosenberg and Folberg, 1994: 1538). However, acceptance of an ADR process does not necessarily mean that it is the preferred process (Hensler, 2002: 83-84).

Acceptance of an ADR program may be enhanced when cases are automatically assigned, as part of standard judicial practice (Shusterman and Burrows, 1998: 132-133). As Paplinger points out, local legal culture is crucial:

In some jurisdictions, mandatory referral of cases to ADR is considered inappropriate and problematic; in others it is standard and rarely discussed. In some jurisdictions, debate rages over the

propriety of party payment of mediators at court-set or market-set fees, while in other regions, particularly where there is a strong professional mediator presence, use and payment of outside neutrals at market rates is common and uncontroversial. And finally, in some courts, ADR is used successfully early in cases after limited discovery; while in other jurisdictions, settlement is considered impossible until full discovery is complete and cases are ready for trial. (1998: ii)

## **6.5 Choice, control, perceptions of procedural fairness and legitimacy**

Another significant aspect of party choice and voluntariness is the link between choice (or control) and disputants' perceptions of the fairness and legitimacy of ADR processes, including the referral process itself (Astor, 2000).

There is a very large and rapidly growing body of experimental social psychological literature and socio-legal research on the components of procedural fairness, as experienced by litigants (Tyler and Lind, 2001). Some of these process factors have been reflected in research evaluating ADR programs explicitly testing party satisfaction in light of these components (Delaney and Wright, 1997; Folberg, Rosenberg and Barrett, 1992; Howieson, 2002; Sourdin and Matruglio, forthcoming).

[S]ome of the factors that emerge from the Rand study as important to perceptions of procedural fairness are: (1) lack of bias, defined as a neutral's even-handedness in listening and paying attention to each side's evidence; (2) thoroughness, defined as the amount of attention given to the facts of the dispute; and (3) "dignitary values," defined as the degree of care neutrals accord the process. Participation does not seem to be valued explicitly by litigants.

A consistent finding across studies is that litigants want a chance to "tell their side of the story" – that is, to present their versions of the facts underlying the dispute. [The Rand findings] suggest that civil litigants do not simply want to tell their stories but also want to be heard. (Hensler, 2002: 95)

The results of these studies can provide guidance to a court developing a program of court referral, though the results of research are still somewhat contradictory.

Reasons given by participants for finding ADR processes satisfactory include qualities such as an opportunity to express a viewpoint, to state their own position and to have their concerns listened to and taken seriously (Kelly, 1996: 378; Kressel and Pruitt, 1989: 396) and a sense of control (Kressel and Pruitt, 1989: 396; Wade, 1998: 115). These are also the key qualities necessary for a perception of procedural fairness.

Some Australian research about plaintiffs in personal injury cases suggests a stronger preference for pre-trial settlement conferences and mediation over trial

(Delaney and Wright, 1997). Control, participation and understanding were linked to perceptions of fairness and satisfaction so that pre-trial conference and mediation scored much higher than arbitration or trial (Delaney and Wright, 1997: 84). Delaney and Wright point out that prompt resolution and positive outcome were significant to the plaintiffs (1997: 116-117). Possible explanations for this are that the conference and mediation cases resolved sooner and that plaintiffs will almost always get something in a negotiated outcome, where they may get nothing at a trial.

US research found that parties to an industrial dispute who developed their own mediation rules were more likely to settle than if external rules (such as those of the American Arbitration Association) were used (Bourdeaux, O'Leary and Thornburgh, 2001: 185; Henderson, 1996: 143). A study of multi-party disputes about cleanup of toxic waste sites involving the US Environmental Protection Agency found high degrees of satisfaction, regardless of outcome. The key factors were: perception of process and outcome control by the lawyers; having key stakeholders at the table; and communication within the process, enabling the parties to learn about or understand each other's interests.

The concept of legitimacy is closely related to procedural fairness. One study suggests that the element of choice – whether the request for ADR is joint, one party or compelled — may not itself be the key element but may actually be a marker for legitimacy as the key variable (Henderson, 1996: 107, citing McEwen and Maiman).

This raises the questions of what the sources of legitimacy are for court-sponsored ADR, and how a court's referral processes should be structured in order to maximise legitimacy.

Possible sources for legitimacy include:

- Specific statutory powers.
- The court's inherent cultural authority.
- Procedural fairness qualities, especially party control.
- Party initiation of ADR or at least consent.

Garth argues (1997: 117-118) that legitimacy depends on more than authority and refers to the procedural justice literature: "disputants grant legitimacy to processes that allow them to tell their stories to a respected neutral third party ...". Such a process is more satisfying and it also means "they are more likely to obey the law."

Howieson's research involving mediation in the WA local court confirms that "litigants' perceptions of *procedural* justice were significantly positively correlated with their evaluations of legitimacy, indicating that the higher the litigants rated the procedural justice of the conference, the higher they evaluated its legitimacy" (emphasis added). In contrast, "perceptions of *distributive* justice did not appear to have any effect on the litigants' evaluations of legitimacy" (2002: para 110). Lawyers presented a different picture than litigants: "lawyers['] ... perceptions of procedural ... and ... distributive justice had no effect on ... their evaluations of legitimacy" (2002: para 111) (emphasis added). Howieson suggests that lawyers'

positive views of court-sponsored mediation legitimacy derive directly from the court's authority.

Hensler summarises the legitimacy requirements as involving the key features of procedural fairness, as indicated by extensive socio-legal research: "the legitimacy people accord the courts — which is essential to a rule of law — is dependent on the courts offering the opportunity to resolve disputes on the basis of facts and law, using fair, thorough and dignified procedures to all who seek it" (2002: 95). She goes on to explain what a court ADR program should look like:

First, it would be a program that assumed that some civil lawsuits [or] disputes need and ought to be tried, because there is a legitimate dispute in these cases on the facts or law, because a dispute resolution system based on negotiation requires some adjudication to provide the "shadow of the law" that is necessary for efficient bargaining, and because there are values associated with public trials that are important to some litigants.

Second, a court ADR program that saw its primary role as providing fact-and-law based dispute resolution would look to lawyers, not mediators, to resolve most lawsuits before trial. It would be the responsibility of lawyers – not mediators – to help their clients understand their underlying interests and to choose among the range of options available for resolving disputes both outside and in court. When lawyers and their clients chose litigation, it would be the responsibility of lawyers – not mediators – to make realistic assessments of the strength of their cases.

Third, a court ADR program that accorded greater legitimacy to fair, thorough and dignified process and fact-and-law based dispute resolution would offer lawyers who were unable to achieve resolution in bilateral negotiation, and parties who wanted an opportunity for a hearing, a variety of dispute resolution options focusing on the facts and law pertaining to their dispute. These options would include evaluative mediation, non-binding arbitration, early neutral evaluation (ENE), summary jury trial-even old-fashioned judicial settlement conferences – as well as bench and jury trials. (2002: 97-98)

Any program of court referral to ADR, especially if it is compulsory, must be designed and managed with careful attention to the key features which citizens associate with fairness and legitimacy, as well as to substantive justice. If the court's referral process or the ADR program lacks essential elements of procedural fairness and does not deliver fair substantive outcomes, it may be perceived as unjust or illegitimate, and the legitimacy of the court itself may be undermined.

## **6.6 Court referral and party consent**

Party consent is sometimes regarded as an essential criterion for referral by a court to ADR. This attitude may be based on a view about the importance in

principle of voluntary participation, or it may reflect a belief that consensual participation is a necessary element for ADR success.

The empirical research does not support the conclusion that voluntary participation is essential. Parties who have been compelled to participate in ADR may still achieve outcomes they regard as satisfactory through a process they find fair. The empirical literature does not itself resolve the questions of principle or legitimacy. This is a policy decision.

In the next chapter, other factors which are often identified as important criteria for court referral to ADR are reviewed, in light of the empirical literature.

## CHAPTER 7

### SPECIFIC REFERRAL CRITERIA

#### 7.1 Introduction

"For the past twenty years legal scholars, social scientists and behavioural theorists have (with varying degrees of success) addressed why one mediation fails and another succeeds. Explanations for mediation effectiveness remain largely contradictory, especially in assessing the relative influence that one set of variables, over another set, has on settlement." (Henderson, 1996: 124)

A number of factors are regularly listed in the ADR literature which are thought to relate to appropriate ADR referral. However, it appears that there is relatively little research directly addressing the validity of many of the widely identified "criteria" for referral, and where there is research, it tends to be inconclusive or contradictory.

Criteria can be categorised along various dimensions. The most common is essentially *descriptive*, to identify features or characteristics associated with

- the parties,
- the dispute,
- the context.

However, the actual allocation of any given characteristic to a category is often contestable. For example, should some forms of "disability" be listed with party characteristics or context? Deafness is a quality which a person brings to the ADR process, but it is important to recognise that the quality is only significant in a context where there are no suitable facilities or where mediators and other disputants are not skilled in sign language (see National Alternative Dispute Resolution Advisory Council (NADRAC), 1997). Similarly, the way a factor is phrased can affect categorisation — "fear of violence" sounds like a party characteristic; "risk of violence" sounds contextual or like a feature of the dispute.

Another frequently used form of categorisation is to distinguish

- qualities that appear to make ADR success (however defined) more likely
- qualities that appear to be barriers to ADR success, or to make success less likely.

The contingent and dynamic nature of factors makes this categorisation inappropriate. A factor in a particular context may indicate that ADR is suitable. In another context, or at another time, that same factor may indicate that ADR is not suitable. For example, a history of an adversarial or litigious relationship may indicate entrenched positions or an inability to negotiate directly and so make a

facilitative process unsuitable; in other circumstances, parties with a litigious history may now realise the ineffectiveness of an adversarial approach and be ready to consider ADR (*Harrison v Schipp*).

It can be difficult to create a clear hierarchy among the factors, or to organise them to express accurately the ways in which some may be dependent on others or function as markers or indicators for each other. For example, power imbalance is frequently mentioned as a feature of significance, as is risk of violence. Should violence be analysed as a separate factor, or is it a particularly complex example of power imbalance? The issues of personal safety raised by fear of violence require distinct and visible attention. Some have argued that mediation is not possible where there is a history or fear of violence; others point out that making mediation unavailable may further disadvantage women who have been targets of violence (Astor and Chinkin, 2002: 349-355).

Not all factors are significant for all ADR processes. For example, capacity to negotiate for oneself may be important in a facilitative mediation where the party is unrepresented, but it may be less important for an arbitration with a lawyer acting for the parties. Some lists of criteria attempt this greater degree of refinement, by linking specific qualities as indicating suitability for one or another specific form of ADR or ADR process feature (Folberg, Rosenberg and Barrett, 1992; Sourdin, 2002: 109). A particularly specific claim relates to Early Neutral Evaluation:

ENE is likely to be particularly useful in cases where (1) the sides have very different assessments of the case based on different interpretations of the law or on different conclusions drawn from agreed-upon facts; (2) the case involves complex legal questions requiring considerable subject matter expertise to help clarify the issues for trial, or complex facts, requiring substantial organisation and development of discovery plans even after the case management conference; or (3) the litigants could benefit from the informal discovery provided by the parties' presentations and the evaluator's inquiries. (Rosenberg and Folberg, 1994: 1544)

Another way to look at criteria depends on who is using them. Criteria which a court might consider to be important are different from those which might inform party choice, though there is considerable overlap. Also, courts will always be primarily guided by any criteria in their legislation or rules of court, though these are quite minimal. (See Chapter 8 and Appendix)

A third method of categorisation is to distinguish matters of *principle* from features which indicate *likely success*. Some factors may indicate that ADR should not be used because it is unlikely that a resolution will be reached or because it will be an unsatisfactory process for these parties. Other factors may indicate that ADR should not be used as a matter of principle. For example, where there is a history of violence and intimidation between the parties, it may be possible to achieve a resolution, but it is inappropriate in principle to use facilitative ADR if one of the parties is at risk of further violence, feels inhibited from full participation in the process, or is under pressure to agree to the other party's proposals (Astor and Chinkin, 2002: 349-355). This distinction may be one explanation for the lack of

empirical research on several of the frequently listed criteria. Many of these criteria reflect conceptual features or matters of principle which were assumed by empirical research or were adequately, if impliedly, reflected by other features.

In the analysis below, possible criteria or factors for referral are categorised into three groups.

- first, matters of principle with little or no empirical research;
- second, factors which have been studied by empirical research but the results are too conflicting or contradictory to draw a valid or general conclusion; and
- third, areas where there does appear some consensus in the empirical research across a sufficient range of reliable studies to justify asserting a link between a quality or characteristic and some form of ADR "success".

## **7.2 Referral criteria based on principle**

Some factors which are thought to significantly affect whether a court should refer a matter to ADR, especially for facilitative processes, appear to be based primarily on essential principles necessary for an appropriate ADR process to take place at all, rather than on their impact on likely success. These include:

### **7.2.1 The capacity of the parties to participate safely and effectively on their own behalf**

This would seem to be an essential requirement in principle for mediation and other facilitative processes, where parties are expected to participate themselves, whether or not assisted by counsel. This factor is endorsed by a number of writers (Astor and Chinkin, 2002: 281; Australian Law Reform Commission, 1997; Payget, 1994: 195; Sourdin, 2002: 108). It is also an aspect of larger power (im)balance issues discussed below.

In *NAB v Freeman*, a mediated agreement was challenged on the basis that the party lacked the capacity to enter into the agreement. Although the party challenging the agreement was not able to establish, on the facts, the lack of such capacity, the court took evidence from the mediator and other participants about their observations of the party's capacity at the mediation. This decision implies that a failure by the mediator, or perhaps by a participant, to be aware of another participant's lack of capacity to enter into an agreement may cause the agreement to become unenforceable.

However, in *ACCC v Lux*, the intellectual disability of the parties was seen as a reason for mediation by the lawyers, as it might avoid the necessity of a court appearance by the vulnerable parties.

Capacity to negotiate is also a practical factor in the success of the process. One study of family mediation found that parents' mutual communication skills — problem solving, negotiation, decision making — correlated with mediation success (Burrell et al, 1994: 349).

### **7.2.2 Current fear of violence by a party**

This factor presents distinctive, complex issues as well as reflecting a more general concern about power imbalance and the ability of a party to participate effectively in an ADR process. Fear of violence is a concern in family mediation, but may be a factor in other areas, such as neighbourhood disputes, and has been the subject of much discussion. It is extensively considered by Astor and Chinkin (2002: 249-355), NADRAC (1997: 63-65) and Kelly (1996: 381-382). This is a complex issue which needs specific consideration in any referral decision. Regarding violence per se as an automatic reason not to refer to ADR is inappropriate, but processes to ensure safety from intake through to ADR sessions and after must be available.

### **7.2.3 An unmanaged mental illness or intellectual disability without appropriate advocacy**

This factor is an aspect of the more general question of a party's capacity to negotiate safely and effectively on their own behalf when required to do by the ADR process, or to state it more broadly, as the "ability to participate fully and fairly in the proceedings" (Coy and Hedeem, 1998) and of the more general contextual concern about power imbalances. However, it has received some separate treatment in the research literature. Coy and Hedeem argue that too often, community mediation services in the US screen out potential users who could participate in ADR and identify specific measures to assess what they describe as a minimal threshold for participation (1998: 121).

### **7.2.4 The existence and nature of any power imbalance, and the extent to which any power imbalance can be redressed**

It is widely accepted that if a power imbalance is too severe, ADR will be unfair as a matter of principle (Astor and Chinkin, 2002: 280; Clarke, G. R. and Davies, 1992; Payget, 1994: 195; Sander and Goldberg, 1994; Sourdin, 2002: 109) Severe power imbalance, especially access to resources, can also undermine the fairness of adversarial litigation. The core adversarial principle of party control assumes some degree of equality of power, and severe power imbalance can impact on adjudicated outcomes.

Interestingly, Bourdeaux et al found that in some US environmental disputes, the EPA, the apparently more powerful party, was reluctant to go to mediation (Bourdeaux, O'Leary and Thornburgh, 2001: 181-183). The EPA believed its case was strong and that it was likely to get less in mediation than in court. In contrast, the apparently weaker parties, who faced strong enforcement actions in court, wanted to go to mediation. There was a similar argument in *ACCC v Collagen*, in which the court characterised one party's desire for mediation as a desire to pressure the ACCC to reduce its enforcement demands. Other research suggests that a smaller power differential correlates with a greater likelihood of settlement (Kressel and Pruitt, 1989: 405).

### **7.2.5 Any relevant court orders which make ADR difficult (eg: a restraining order)**

This is not discussed in the empirical literature, but, like the matters listed above, it would be an obstacle to the effective use of any form of ADR which required party conduct inconsistent with the court order.

### **7.2.6 The relative costs of ADR and litigation, compared with the benefits of each**

Stating the criteria in this way recognises that ADR is not automatically less expensive or quicker than litigation (Clarke, S. H. and Gordon, 1997; Kakalik et al, 1996) though beliefs about cost benefit may be significant (Bourdeaux, O'Leary and Thornburgh, 2001: 181). That is, parties and lawyers may choose ADR in the belief that it will be cheaper and quicker whether or not this is confirmed by objective measurement. Some cases considering referral to ADR explicitly consider the expected length of trial, the expected length and cost of mediation and the impact of this on trial preparation and delay.

The difficulty is that ADR cost and time savings are usually achieved when the matter partly or fully resolves as a result of the ADR process and this is impossible to predict with certainty. In *Waterhouse v Perkins* [2001], the court implicitly recognised this problem and stated that "potential outcomes must be viewed positively when weighed against trial".

### **7.2.7 Cultural factors**

This is raised by commentators as affecting a party's ability to participate effectively and as an aspect of power imbalance impacting on the likelihood of parties reaching acceptable, fair agreements (Astor and Chinkin, 2002: 281; National Alternative Dispute Resolution Advisory Council (NADRAC), 1997; Sander and Goldberg, 1994: 54-55). LaFree explained part of his findings about the disadvantage experienced by Hispanic/Chicana/Chicano parties as related to the "strong family, relational, community orientation" of their cultures, which also can be characterised as 'high context' and collectivist ... and more likely to have 'face' needs for affiliation and honor" (LaFree and Rack, 1996: 790) which may affect their ability to participate effectively in forms of ADR which are not suited to their cultural needs.

### **7.2.8 The need for or possibility of more flexible resolutions**

Stating the criteria in terms of a need or potential availability suggest that this would be regarded as an issue of principle. Nelson proposed that in environmental disputes, courts are less able to account for future needs and the changing contexts (2002). As to whether the actual resolutions reached through ADR are different than court outcomes, the research is not clear. Kelly reported that mediated agreements in divorce are more specific (1996: 377). Kakalik et al (1996: 50) found that ADR programs were more likely to lead to a financial payment, but this may be true of settlement generally, compared to trial. In Australia, Sourdin and Matruggio (forthcoming) suggested that amounts recovered by plaintiffs in court cases may be

different in different processes, but did not determine whether more flexible results were achieved.

### **7.2.9 Public interest may require a formal public binding determinations, perhaps with an authoritative application of statute or case law**

It is widely accepted that in some circumstances, a non-public ADR process is unsuitable. This point is perhaps most famously made by Fiss (1984). Sander and Goldberg summarised the public interest argument against ADR (1994: 60):

- If it is a significant question of statutory or constitutional interpretation, the court should not encourage or assist settlement
- Consumer fraud allegations or similar claims may raise concern about the need to establish a precedent as well as to appropriately deter recurring violations, by generating a common public response rather than inconsistent and repetitive private ADR.
- Need for public sanctioning of dangerous or unacceptable conduct.

Another "public interest" type of concern is the impact on particular non-parties (Dawson, 1993: 175; Payget, 1994: 195; Sourdin, 2002: 108). Whether this indicates that a matter should or should not be referred to ADR will depend on which process is better suited to protecting third parties, if that is thought necessary.

The notion of public interest is reflected in the criteria adopted for some court-annexed programs in the US. For example, if a case which has been randomly allocated to the compulsory ADR track is found to have "an issue of national significance requiring a judicial decision", it will be excluded from the program (Stienstra, 1998: 255-256).

A related factor is whether the dispute turns on a question of law. Research suggests that lawyers express concern that a case turning on an issue of law is not suitable for ADR. It is not clear if this objection is one of principle, that it would not be just or in the client's interest to settle before an authoritative legal determination was made, or a practical objection of unwillingness to resolve in light of uncertainty. Brett, Barsness and Goldberg's research found that the degree to which cases were regarded as turning on law was unrelated to rate of settlement. There was no evidence that cases which were similarly characterised in terms of reliance on law for resolution, and did go to mediation, were any less likely to settle in a way the participants regarded as satisfactory (1996: 267). This does not, however, answer the policy question. If a question of law is sufficiently important and unresolved, ADR may not be an appropriate process from the point of view of a wider public interest.

### **7.3 Referral criteria where empirical research is inconclusive or contradictory**

The factors discussed in this section have sometimes been the subject of extensive research, but the research has not produced clear generalisable results. These factors have not been shown to be clear barriers to effective ADR, nor have they been established as consistent or reliable indicators that ADR success is likely.

#### **7.3.1 Type of case — family, general civil, or specific civil**

Generally, it appears that the type of case as a variable does not consistently correlate with likelihood of success in those research studies which included different case types (usually as part of research involving a range of civil claims) (Hann and Baar, 2001; Kakalik et al, 1996; Rosenberg and Folberg, 1994; Wissler, 2002). Much research was in a single context, such as environment, family, or personal injury and found that ADR was or was not successful in that context. Thus, it is worth noting the case types in which research has been done, as that may help to assess the usefulness of the particular form of ADR for those cases to which the outcomes of that research are generalisable to other similar case types

There is some research which suggested different results according to case types, but it is not consistent. Macfarlane, in an analysis of the Ontario pilot, noted that wrongful dismissal cases were less likely to opt out of a court-sponsored mediation program, while breach of contract or negligence were more likely to opt out (1995). Another analysis of this program (Hann and Baar, 2001) found relatively high rates of settlement for wrongful dismissal, negligence and (in Ottawa) real property cases, with lower settlement rates for contract, commercial, medical malpractice and trust and fiduciary cases, and (in Toronto) real property cases (Hann and Baar, 2001: 6, 12). This research also identified that particular factors linked with success were types of damages, amount of damages, and admitted liability (Hann and Baar, 2001). Research in construction disputes found that admitted liability indicated ADR success on other issues (Henderson, 1996).

Research involving cases handled by the US attorney's office - a broad range of civil and administrative law disputes in which the US government is a party - found that ADR was most effective in medical malpractice and in tort, and least effective in employment discrimination (Senger, 2000b). Other research reported lower ADR settlement in medical malpractice and product liability cases, but there was no corresponding delay in disposition time (Keilitz, 1993a: 10-11). Other US research suggested that contracts and civil right cases showed the greatest time savings (Stienstra, 1998: 261).

The appellate ADR program, which covers civil cases in US Federal Courts where parties are legally represented, often excludes contested jurisdictional issues, immigration, social security and tax matters (Scanlon, 2002: 391).

### **7.3.2 A matter which is primarily a dispute of fact — or needs expertise or authoritative fact finding**

Some writers indicate that this factor suggests adjudication or a determinative process is more appropriate (Sourdin, 2002: 106, 110). Certainly lawyers claim that factual complexity or the centrality of a witness's credibility is a reason not to mediate (Macfarlane, 1995: 50, 51). Cannon suggested that a "clear factual background" indicates appropriateness for judicial mediation. However, Brett, Barsness and Goldberg's research suggested (1996: 266) this is not a significant factor in whether a case settles or whether the outcome is regarded as satisfactory by participants. Sander and Goldberg (1994: 56) also commented that a skilled mediator can facilitate resolution of the dispute without necessarily resolving the factual conflict.

This is not to say that facts don't matter. If there is insufficient information available, especially if one side is lacking significant information, ADR may be inappropriate as a matter of principle because of the power imbalance created by the information disparity. In some disputes, a question of fact can become a matter of principle to a party, with the principle being "I am right and you are wrong".

### **7.3.3 Amount in issue**

One study found that amount in issue does not correlate with time to reach settlement (Macfarlane, 1995: 15). A study of ENE in a US Federal District court found no relation between satisfaction and the amount saved in costs and the amount of damages sought (Rosenberg and Folberg, 1994: 1535). On the other hand, a different study found that, in the construction industry, "the larger the amount in controversy, the less likely the mediation would settle" (Henderson, 1996: 144).

This is an example of one of the many dimensions which can differentiate one case from another but can be difficult to isolate in an empirical study, or is not often specifically studied as the context in which a study takes place doesn't lend itself to variations. For example, a number of the research studies of ADR are in small claims courts, where the amount in dispute is limited. Similarly, much ADR research involves family disputes which do not usually consider the amount of property in issue as a variable.

### **7.3.4 Multiple/complex issues**

Although lawyers are reported to believe that complexity might be a reason to opt out of ADR (Macfarlane, 1995: 72; Sourdin, 2002: 96), studies are conflicting on the actual impact of this feature. One writer, in reviewing other research, asserted that the literature is unclear on this issue (Henderson, 1996: 112-113). Whiting's research (1992) was very clear that multi-issue disputes were more likely to be mediated successfully, and Pearson (1994: 65) suggested that dissatisfaction may be more likely in single issue divorce dispute. On the other hand Wissler found that settlement is more likely if there is less complexity and if liability is not (strongly) contested (1995). She also noted that admitted liability cases (which reduces the

issues in dispute) especially in small claims, resulted in greater compliance with agreements (2002: 675).

### **7.3.5 Multiple parties**

Studies in the environmental context, which are often multi-party, found that ADR can be successful (Kloppenber, 2002). Rosenberg and Folberg found that the presence of multiple parties did not affect satisfaction with ENE (1994: 1535). However, Hann and Baar (2001: 12) found that six or more plaintiffs or defendants were less likely to settle completely, while Henderson (1996: 115) stated that there is insufficient research.

As with other factors discussed in this section, the number of parties is a difficult feature to study. It is not often isolated as a variable, even in those few studies in a context of multi-party disputes with a sample size large enough to disaggregate the cases in this way.

### **7.3.6 Social characteristics (eg gender, race)**

In the early days of family mediation, there was considerable concern that women were being disadvantaged in mediation. Kelly's overview of divorce mediation indicated that there appeared to be no gender differences in satisfaction with mediation, which is quite high, and that outcomes, in terms of financial and child arrangements did not appear to differ from adjudicated results (1996). This, of course, begs the question whether they should differ (see LaFree and Rack, 1996). Pearson pointed out that although "divorce mediation does not appear to exacerbate the financial predicament of women and children following divorce, it does not appear to do a better job of protecting them..." (1994: 80).

Other research, mainly in family mediation, is consistent in finding no or very little difference in the reported experiences of women and men or along other demographic variables. Whiting (1994: 257) found that sex, age, education, and economic status had no significance either alone or in combination and Delaney and Wright (1997: para 52) found that gender, age, education, employment and income did not affect perception of fairness and satisfaction. However, they found that plaintiffs who spoke a language other than English at home were less likely to regard the process as fair and to be satisfied with the outcome. A discussion with some of these plaintiffs revealed concerns about communication and prejudice.

Pearson similarly summarised research as indicating "few differences in the reactions of men [and] women to the mediation experience" though women may be more apt to report feelings of "pressure, intimidation and coercion" whether in court or in mediation (1994: 64). Wissler also reported that there was no difference between men and women in their views of the fairness of mediation, but men "felt more pressured by the mediation to settle" (2002: 687-688). Sourdin and Matruggio (forthcoming) found no statistically significant gender differences in the type of process used to resolve claims brought by male and female plaintiffs.

However, other research indicates some differences, some favourable to women, others not. Marcus found no difference in the percent of family income women received in mediated compared with adversarial cases, but women in mediated cases received a greater percentage of assets, child support awards were greater and the children's' college education was more likely to be provided for (Marcus et al, 1999: 147). Men appeared to be more dissatisfied with adversarial process and outcome than women (Kelly, 1996). Wissler found that perceptions of pressure to settle did not differ by race, but "white parties were more likely to say the mediation process was fair" (2002: 687).

One significant study examined community mediation in New Mexico and found some ethnic, gender and cultural factors to be significant in outcomes for ADR and adjudication (LaFree and Rack, 1996: 788-790). Apart from its results, this research indicates the importance of examining particular features of a specific program in its actual social and cultural context:

[M]inority women received less as claimants in mediation and paid more as respondents in adjudication; minority men received less as claimants in adjudication and mediation; Anglo women received less as claimants in adjudication. ... [M]uch of the effect of ethnicity and gender on monetary outcomes disappeared when we added case-specific and repeat-player variables to the models. ... [M]inorities and women were less likely to be in either court or mediation as repeat players. They were less likely to be in collection cases and to be represented by attorneys; they were more likely to file as individuals and to be in private cases.

... [B]oth Anglo and minority respondents were more willing to legitimate the monetary claims for Anglo than of minority claimants. ... [A]nglo mediators were more likely to assume that monetary claims brought by Anglos were non-negotiable while claims by minorities were more open to non-monetary resolutions or negotiations that minimised monetary outcomes. ... [C]ompared with Anglo claimants, minority claimants generally defined their own goals in less stringently monetary terms.

While we found some evidence for disparate treatment of minority female claimants in mediation, we found no evidence that Anglo women were disadvantaged as claimants or respondents in mediated cases. In fact, Anglo females appear to have done fairly well.

#### **7.4 Empirically based referral criteria**

There is some reasonably consistent research which suggests that the following qualities may be significant facts in ADR effectiveness.

##### **7.4.1 The participation of a party or representative with authority to settle or to be bound by any outcome**

This is seen as essential to the effectiveness of ADR in leading to a resolution in a wide range of settings (Bourdeaux, O'Leary and Thornburgh, 2001: 184; Hann and

Baar, 2001: 16; Rosenberg and Folberg, 1994: 1522; Sander and Goldberg, 1994: 57-58). The presence of a party may also impact on satisfaction.

When one party appeared in person and the other side did not the party appearing in person tended to have a lower than average level of satisfaction with the process. (Rosenberg and Folberg, 1994: 1536)

Australian courts regard the power to order participation by a party with authority to settle as included in the power to refer to mediation: *Baulderstone Hornibrook v Dare Sutton Clark & Ors* [2000]; *Barrett v Qld Newspapers Pty Ltd & Brennan & Ruddiman* [1999]; *Kilthistle No 6 Pty Ltd et al v Austwide Homes Pty Ltd and Ors* [1997].

#### **7.4.2 Major, non-negotiable value differences**

One study found that labour disputes were more amenable to resolution if the issue is more concrete, eg pay, than principle, eg union recognition (Henderson, 1996: 111). Other research indicated that it is harder to agree in several contexts including labour (Hiltrop, 1989), international (Bercovitch and Jackson, 2001), community, or environmental, where the issue is one of principle, though some labour studies contradicted this finding (Kressel and Pruitt, 1989: 404).

This factor may be linked to intensity of the conflict (Brett, Barsness and Goldberg, 1996; Sander and Goldberg, 1994: 57).

#### **7.4.3 Intensity of conflict**

In some contexts intensity is a significant factor, and it may also be linked to the characterisation of the dispute as an issue of principle (Sander and Goldberg, 1994: 57). One research review found that, usually, the worse the relationship the less prospect there is for mediation success, but in other contexts "contentiousness of the relationship of the parties and the lawyers is not related to settlement" (Kressel and Pruitt, 1989: 402).

Some research into family mediation found that a high level of anger need not be a barrier to agreement but mediation was less likely to be successful (Kelly, 1996: 380), whereas other research indicated that, in the family context "more intense disputes are more likely to result in a mediated agreement" (Henderson, 1996: 109, citing Thoennes and Pearson).

Research involving observations of mediations in Victoria found that "couples who engage in high levels of contentious behaviour and low levels of problem solving and who exhibit high disparity in problem solving are less likely to reach successful outcome in mediation". This research also found that "antecedent anger clearly dominates all analyses, suggesting this variable has the largest impact on mediation process and outcome." They also found that a high degree of difference in the intensity of attachment is independently associated with no-agreement (Bickerdike and Littlefield, 2000: 192).

Another way that intensity of conflict may be exhibited is by significantly different or inflated expectations regarding the outcome. The term "jackpot syndrome" describes a party's expectation of receiving a very large outcome from a trial (Sander and Goldberg, 1994). An analysis of ADR cases in the US, from commercial ADR providers ENDispute, JAMS and AAA, found that this attitude indicated that a case was not likely to settle (Brett, Barsness and Goldberg, 1996: 262).

Another review of research found that disparity of positions was the most important obstacle to settlement (Wissler, 2002: 675).

#### **7.4.4 Concern for children**

Concern for children improved expectations about mediation and improved success. Mediators who shifted the parents' focus from concern about self to concern for children had greater success (Burrell et al, 1994). Other research also found that parents who are strongly focussed on their own needs and lack a genuine concern for children are less likely to settle (Pearson, 1994: 69-70, citing Kressel).

#### **7.4.5 Legal representation of the parties**

It seems clear that legal representation can be a significant factor in favour of and against successful ADR, depending on the attitudes, knowledge and skill of the legal practitioners (Astor and Chinkin, 2002: 281-282; Hann and Baar, 2001; Macfarlane, 2002; Rosenberg and Folberg, 1994: 1541).

Success was more likely if lawyers and clients accepted mediation (Kressel and Pruitt, 1989), and lawyer attitude was the most important factor in determining the parties' attitude (Rosenberg and Folberg, 1994: 1541). Lawyer cooperation during the ADR session made settlement more likely (Wissler, 2002: 680-681) and contributed to greater party and attorney perception that the mediation was fair (Wissler, 2002: 687-688). On the other hand, a lawyer's feeling of losing control over process and outcome was associated with failure to agree at mediation (Bourdeaux, O'Leary and Thornburgh, 2001: 85).

Rosenberg and Folberg (1994: 1521) found no relation between a lawyer's preparation for ENE and success (satisfaction, cost/time savings) but strong beliefs by lawyers and evaluators that preparation was important to success.

Sander and Goldberg pointed out that lawyer-client interests can diverge in relation to settlement and this may present an obstacle to ADR (1994: 58). This was also noted in *Harrison v Schipp* [2002], though the court took the view that this tension was commonplace and that lawyers were used to acting in the client's interests.

One way lawyers can limit ADR success is by objecting to the referral. Sometimes, objections reportedly raised by lawyers appear to be without foundation (Bickerman, 1998: 2). However, lack of information about mediation should not be a barrier to referral, as exemplified in the District of Columbia system in the US

which created a process to enable reasonably informed consideration by parties and the lawyers, and other court programs which require meetings to consider ADR (Cannon, 2002; Stienstra, 1998: 253; Welsh, 1998: 206-207).

Another aspect of the significance of legal representation is the concern for ADR suitability when one party is represented and the other is not. A program in the US District Court of the District of Columbia discourages unrepresented litigants from participating in ADR, because of the power imbalance (Bickerman, 1998: 4).

#### **7.4.6 Particular bundles or combinations of factors**

It may be that case types are not themselves predictive, as discussed above, but some of the bundles of features which recur in a particular case type may be. For example, there is much research about mediation in divorce and family matters, and some suggestion that family matters are more likely to be successful when referred to ADR; however, Whiting suggested 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; ADR in family disputes which involve a single issue between family members who will not have any ongoing contact are less likely to be successful. Similarly, factors affecting ADR success in environmental litigation involving the US Environmental Protection Authority may be valuable in considering the similar public interest objections to ADR brought up by the ACCC with its similar enforcement obligations.

#### **7.5 Practitioner skill**

It is beyond the scope of this paper to provide a comprehensive review of the research literature on specific ADR process features or third party interventions which appear to be linked to particular aspects of success. However, the research on court-connected processes sometimes examines ADR process features. From this limited consideration, it appears that practitioner behaviour and skill may have a more significant impact on success than any of the frequently identified criteria relating to party or case characteristics.

One review of US research literature concluded that settlement is more likely with a more experienced mediator (Wissler, 2002: 678-679), and a study of ENE concluded that the individual personal skills, attitude and behaviour of the evaluator were by far the most significant determinant of party satisfaction (Rosenberg and Folberg, 1994: 1536).

Reviews of studies of court-connected programs which addressed mediator or ADR practitioner behaviour show some consensus about the qualities that produce settlements and satisfaction (Henderson, 1996: 115; Kelly, 1996: 380-382; Pearson, 1997: 68-69; Rosenberg and Folberg, 1994: 1532):

- Effectiveness at facilitating communication, and listening
- Active in structuring the process
- A focus on feelings, relationship concerns, interests

- An emphasis on problem solving, creativity at generating options and solutions
- A greater number and variety of interventions (Carnevale, Lim and McLaughlin, 1989: 207; Henderson, 1996: 143)

There is, however, some research which was mixed or contradicted these results. There is research which found that whether an interest based or more adversarial process is used does not impact on settlement (Brett, Barsness and Goldberg, 1996; Hensler, 2002: 258). Other research indicated that a large number of assertive interventions by a mediator can lead to attorney or party "displeasure" (Carnevale, Lim and McLaughlin, 1989: 207).

Some research indicated that settlement is more likely, and there is greater satisfaction, if there is more time for the process (Henderson, 1996; Kelly, 1996: 380), while other research found that more time/more sessions did not impact on settlement (Kelly, 1996: 375).

There is also conflicting research on the impact of an ADR neutral recommending a particular settlement. Some research found this more effective at generating settlement, but other research reported that parties found this to be less fair, though lawyers' assessment of fairness were not affected (Wissler, 2002: 680-681, 684).

Nonetheless, there are limits to what even exceptionally skilled ADR practitioners can do:

Intensely conflicted disputes involving parties of widely disparate power with low motivation to settle, fighting about matters of principle, suffering from discord or ambivalence within their own camps, and negotiating over scarce resources are likely to defeat even the most adroit mediators. (Kressel and Pruitt, 1989: 405)

## **7.6 Criteria and court referral**

This review of the empirical literature demonstrates that there are relatively few criteria for court referral to ADR which can be empirically validated at a general level, though the validity of some features may be established for a limited specific context. At the same time, there are significant issues of principle which must be taken into account in making appropriate referrals to ADR.

In making referrals, courts are not wholly free to develop their own referral process and criteria. They operate within a legal framework of statute and case law, court rule and other regulation. These provide sources of authority for courts to refer matters to ADR, and may also articulate criteria to which courts must adhere. These are addressed in the next chapter.

## CHAPTER 8

### AUSTRALIAN COURT-CONNECTED ADR PROGRAMS\*

#### 8.1 The diversity of court-connected ADR programs in Australia

Perhaps the most striking feature of ADR and the courts in Australia is the wide variety of programs and referral practices. Court-connected ADR programs vary along virtually all of the dimensions which can be used to describe ADR programs and processes (Astor and Chinkin, 2002: 235-286; Sourdin, 2002: 81-100).

Indeed, it would be difficult to state with any real confidence which courts do and do not have ADR programs. Clearly, some courts such as the Family Court have well-established programs to provide ADR services and to refer parties to other ADR providers ([www.familycourt.gov.au](http://www.familycourt.gov.au); *Family Law Act 1975* (Cth)). At the other extreme, some courts do not appear to have any visible, structured or explicit ADR programs. However, as case flow management is often closely related to ADR (Astor and Chinkin, 2002: 237-242), the various preliminary case flow management conferences may incorporate some form of ADR process or referral.

ADR processes which are fairly widely used include processes called mediation, conciliation, arbitration, case appraisal, settlement conferences and settlement weeks. ADR may be conducted by court staff, judicial registrars, judges and magistrates themselves or by external ADR providers approved by the court and/or chosen by the parties. ADR may be free, partly subsidised or entirely at parties' expense, and ADR expenses may or may not be recoverable as costs. Court referral to ADR may occur at any stage of the litigation process, even before a formal claim is filed with the court. Rarely, legislation or rules will require referral to ADR for certain types of cases, with the possibility of non-referral for cases shown to be unsuitable. Party consent is sometimes, though not usually, expressly required. Referral criteria are rarely articulated.

Two brief examples of court-annexed ADR programs in Australia are given here, for illustration.

- The mediation program in the South Australian Magistrates Court is an example of an in-house program, offered without charge to civil litigants (Cannon, 1997). Parties are required to attend, in person or by telephone, at a directions hearing, as the first appearance in court. At this hearing, a magistrate or registrar explains the process of litigation and its cost implications and describes the alternative of mediation. If the parties agree to mediation, referral is made. The mediation is almost always conducted by the Director of Mediation Services, a court position created especially for this program. While the take up rate for the service was initially fairly low, about 50% of cases settled at mediation. In cases where mediation is adjourned to allow further private negotiation or clarification, a settlement rate of 75% may be more accurate.

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\* Much of this chapter is also being published in a forthcoming issue of *Law in Context*.

- In contrast, the New South Wales District Court has a program of mandatory arbitration of civil claims. Arbitrators are experienced legal practitioners, whose fees are "prescribed and ... moderate, are met by the New South Wales government." The arbitrator is first required to assist the parties to come to a settlement. The arbitration procedure is not prescribed, though the rules of evidence are to be applied. The arbitrator has the authority of the court, in order to determine issues and to make an award, which is binding, though subject to rehearing under certain conditions. Davidson concludes that this program has resulted in quicker resolutions, reduction in delay and backlogs for matters to be heard by the court, reduced costs for parties and the court and greater satisfaction for litigants (Davidson, 1995).

Further detail about the many different models of court-sponsored ADR in use in Australia can be found elsewhere (Astor and Chinkin, 2002: 235-286; Law Council of Australia, 2002; Sourdin, 2002: 81-100).

## **8.2 Statistics**

A potentially important source of empirical information about ADR in Australian courts is statistical data. Unfortunately, reliable, comparable statistics about court use of ADR and the outcome and impact of court-annexed ADR programs are simply not available. Statistics about some aspects of ADR are sometime included in a court or tribunal's annual report, but they are not consistent across jurisdictions or over time. The only national data collection appears to be NADRAC *ADR Statistics: Published Statistics on ADR in Australia* (April 2002).

In light of the many different programs, with many different features, which are reported in many different ways, it is simply not possible to compare information from court to court, or even within a court over time. For example, some courts report ADR referrals or orders, but not outcomes; others report the number of settlements but it is not clear how many were referred or what ADR processes were used. Even a statistical summary limited to the most basic measure — settlement rates — does not produce much useful information, as the referral practices are different, the processes are different, the measures of settlement are different (partial and full settlement may not be distinguished) and the point in time at which settlement is measured varies as well. Based on the NADRAC compilation, settlement rates in several courts with various ADR processes from roughly 1998-2001 appear to range from 50% to 80%. Beyond that, there is really no national statistical consensus which can be reliably drawn.

Clearly, one future research direction is to develop useful statistical measures within each court's own data collection and to make these measures comparable across jurisdictions.

## **8.3 The legal framework**

The main focus of this chapter is not to describe the actual programs, but to analyse the legal framework in which they operate. In particular, it will examine legislation, rules of court and judicial decisions to identify what guidance, if any,

these sources provide to courts in making decisions about referring a matter to ADR and to explore the understandings courts have about ADR, as reflected in the available case law.

#### **8.4 Legislation and rules of court**

Australian legislation and/or rules of court do not establish or impose criteria for "matching" for the most effective process and only rarely identify criteria for "screening" out unsuitable disputes or disputants. Some establish minimum eligibility standards, while others are limited to empowering the court to make a referral. Legislation sometimes, though not always, indicates whether party consent is required. (The Appendix summarises legislation, court rules and practice directions for the major courts and tribunals in each jurisdiction.)

Describing the legislation and rules of court in terms of what they do not do may appear to suggest that more elaborate legislative criteria or guidance are needed. To the contrary, legislation or rules of court cannot prescribe in detail for the complex mix of features which must be considered in the referral decision in any particular case. The real significance of legislative criteria is to indicate clearly when a court is empowered to make an ADR referral, especially if one or more parties object. More complex matching and/or screening should be undertaken by the ADR service provider at the point of contact with the disputants, in light of particular features about the dispute, disputants, and the available programs, among other factors (National Alternative Dispute Resolution Advisory Council (NADRAC), 2001).

##### **8.4.1 Screening out unsuitable cases**

The most extensive criteria are expressed in the Family Court Rules and in the *Native Title Act 1993*. Both are concerned with screening out unsuitable referrals, though they operate in quite different ways.

The Family Court (and the Federal Magistrates Court in family matters) can refer parties to mediation or arbitration, with their consent, (*Family Law Act 1975* s 19B, 19D, 19BAA). Order 25A of the Family Law Rules 1984 requires the following factors to be taken into account in a referral to mediation:

- the degree of equality
- risk of child abuse
- risk of family violence
- emotional and psychological state of parties
- whether mediation is being used as a delay or other tactic
- any other relevant matters

The *Native Title Act 1993* (Cth) is an interesting contrast, because it sets up a mandatory referral to the National Native Title Tribunal for mediation, with criteria

for the court to consider before deciding that there will not be mediation. The legislation creates a complex matrix of mandated (ss 86B, 86B(3)) and discretionary decisions (ss 86B(2), 86B(5)).

- The Federal Court *must* refer every application under s 61 to the NNTT for mediation as soon as practicable, after the time period specified in the s 66 notices (s 86B). (emphasis added)
- The Court *can* make an order that there be no mediation (s 86B(2)). (emphasis added)
- The Court *must* make an order that there be no mediation if the court considers that: (emphasis added)
  - mediation is unnecessary due to an agreement between the parties or for any other reason
  - there is no likelihood that parties will reach agreement on facts
  - sufficient detail has not been provided (s 86B(3)).
- The Court *must* take the following into consideration in deciding if there is to be no mediation (s 86B(4)): (emphasis added)
  - number of parties
  - number of parties with same agent
  - how long it will take to reach agreement
  - size of area
  - nature of non-native title rights
  - other relevant factors

It appears that the arbitration program for personal injury claims in New South Wales is also set up as a presumptive referral. The court is to make the referral, "...unless there is good reason", with no elaboration on what a "good reason" might be (Supreme Court of New South Wales: Practice Note 120, Alternative Dispute Resolution 13(5)).

#### **8.4.2 Likelihood of settlement and/or other benefit**

A more usual criterion for referral in legislation, rules or practice directions, is some consideration of the likelihood of settlement. For example, in the ACT, s 420(2) of the *Magistrates Court (Civil Jurisdiction) Act 1982* provides that:

[t]he Registrar shall undertake conciliation between the parties only if satisfied that there is a reasonable possibility of the parties settling the matters in dispute by this means.

Similarly, the *Magistrates Court (Small Claims Division) Act 1989* in Tasmania provides for conciliation if there is a reasonable possibility of settlement. The Northern Territory Supreme Court Rules 1987 provide that a judge or master may direct that a settlement conference be held, or may refer parties to mediation, if s/he is of the opinion that the matter is capable of settlement. The Environment, Resources and Development Court of South Australia can appoint a mediator if there is a reasonable likelihood of settling matters in dispute between the parties (*Environment, Resources and Development Court Act 1993* s 28B).

In addition to the provisions cited above, s 86B(5) of the *Native Title Act 1993* provides that the Federal Court can at any time refer parties to mediation if it thinks agreement can be reached. The Family Court must advise parties to seek mediation if it may help the parties resolve their dispute (*Family Law Act 1975* s 19BA). The Federal Court of Australia Notice to Practitioners on Assisted Dispute Resolution, 4, is relatively blunt, in providing that the court may "direct the parties to attend before a Registrar ... [to] satisfy the Registrar that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken ...".

In Queensland, the criteria for case appraisal also stress the likelihood of settlement in determining suitability of case appraisal for the dispute. In addition, the court is required to consider the benefits to the parties of continuing the litigation. The *District Court Act 1967* (Qld) (s 97(4)) and *Supreme Court of Queensland Act 1991* (s 102(1)) each allow the following factors to be considered "in deciding whether to refer a dispute to case appraisal":

- whether costs of litigating are disproportionate to benefit gained
- likelihood of appraisal producing compromise or abandonment of claim
- whether other circumstances justify an appraisal

The Western Australia Rules of the Supreme Court 1971 also recognise other benefits to parties, by directing parties to confer to narrow points of difference.

A number of New South Wales courts and tribunals have three very general criteria. A matter may be referred to mediation if:

- the court or tribunal considers the circumstances appropriate;
- the parties consent; and
- the parties agree on a mediator

(*Administrative Decisions Tribunal Act 1997* s 102(1); *Compensation Court Act 1984* s 38D(1); *Land and Environment Court Act 1979* s 61D; *Local Courts (Civil Claims) Act 1970* s 21L)

There is, however, no elaboration in the legislation or rules of what ‘appropriate circumstances’ (New South Wales) or ‘other circumstances’ (Queensland) might be.

### 8.4.3 Party consent

There has been considerable debate about the role of party choice in ADR processes, as indicated in Chapter 6. The question whether party consent is required for referral to ADR is frequently addressed in legislation. The New South Wales legislation summarised above specifically requires party consent, as does the *Family Law Act*.

Consent of parties is required for referral to

- arbitration by the Federal Court (*Federal Court of Australia Act 1976* (Cth) s 53A(1A));
- arbitration by the Federal Magistrates Service in non-family matters (*Federal Magistrates Act 1999* (Cth) s 35(3));
- arbitration or mediation by a master or registrar of the South Australia Supreme Court (*Supreme Court Act 1935* s 65(1));
- mediation by the South Australia Environment, Resources and Development Court (*Environment, Resources and Development Court Act 1993* (SA) s 28B(1)) and
- a special referee by the Victorian County Court (*County Court Rules of Procedure in Civil Proceedings 1999* s 34A.22).

In spite of the widely expressed view that voluntariness is an important precondition for successful ADR, many Australian courts have powers to refer matters to ADR with or without the consent of parties.

- The Federal Court can order mediation without party consent (*Federal Court of Australia Act 1976* s 53A), and the Court’s Practice Note 4 also enables a compulsory settlement conference. The Federal Magistrates Service, acting in non-family matters, can also refer to mediation without party consent (*Federal Magistrates Act 1999* s 34).
- In New South Wales, the *District Court Act 1973* (s 164A(1)) and the *Supreme Court Act 1970* (s 110K(1)) allow the court to refer matters to mediation or neutral evaluation if it considers the circumstances appropriate, with or without the consent of the parties.
- In the Northern Territory, the *Local Court Act 1989* (s 16(1)) empowers the court to refer matters to pre-hearing conference, mediation or arbitration and is silent on consent, as are the Supreme Court’s rules which authorise referral to mediation or settlement conference (*Supreme Court Rules 1987* 41.12 and 48.13).
- In Queensland, the District and Supreme Courts can require parties to attend to decide if the matter is to be referred to ADR, and there is power to refer to case appraisal, but no specific reference to party consent (*District Court Act*

1967 (Qld) ss 97-98; *Supreme Court of Queensland Act 1991* ss 102-103). The Uniform Civil Procedure Rules 1999 (319-320) require the court to give written notice to the parties of a referral, allow a party to object to the referral, and empower the court to make appropriate orders. These provisions imply that referral could be done over the objection of a party.

- In South Australia, the Supreme Court, District Court and Magistrates Court can refer all or part of a matter to mediation and appoint a mediator without the consent of the parties (*Magistrates Court Act 1991* (SA) s 27(1); *District Court Act 1991* (SA) s 32(1); *Supreme Court Act 1935* (SA) s 65).
- In Tasmania, Supreme Court Rule 518 provides for referral to mediation without consent, but there is apparently nothing specific in legislation beyond the authority to make rules.
- The Victorian Supreme Court, County Court and the Civil and Administrative Tribunal (VCAT) are all empowered to refer matters to mediation with or without the consent of the parties (Supreme Court Rules Chapter I – General Rules of Procedure in Civil Proceedings 1996 Rule 50.07; County Court Rules of Procedure in Civil Proceedings 1999 Rule 34A.21; *Victorian Civil and Administrative Tribunal Act 1998* s 88), while the *Magistrates Court Act 1989* s 108 provides for referral with consent.
- In Western Australia, District Court Rules 2 and 5 require parties to attend a pre-trial conference and to make a bona fide attempt to reach agreement. The effect of the Supreme Court Rules, especially 29 and 29A, appears to allow case management directions that would compel parties to attend a conference led by a mediator.

Of course, legislation and rules of court present only part of the legal framework in which courts make referral decisions. What is not clear from a bare summary of the legislation is the extent to which courts do make compulsory referrals. Similarly, the interpretation of the very general statements of eligibility for ADR referral, such as possibility of settlement or 'appropriate circumstances' is left very much to the courts to develop on a case by case basis.

## **8.5 Case law on court referral to ADR**

Judicial decisions on referral to ADR arise in the context of a request by one party, or an initiative by the court, to refer a matter to ADR over the objection of one or more parties. This case law interpreting the legislation and rules of court outlined above is an increasingly significant source of guidance to courts in making referral decisions.

The main point that emerges from these decisions is that courts will refer a dispute to mediation over the (sometimes very) strong objection of one (or more) parties. The touchstone of the referral decision appears to be the court's belief that there is some sufficient prospect of success, or to put it negatively, ADR (usually mediation) would not be hopeless even in the face of party objection and other apparent obstacles. Thus, the cases do not, in themselves, form a basis for developing general criteria for referral to ADR, either at the sophisticated level of matching or at the more basic level of screening. They do, however, provide

valuable insight into the attitudes and understanding of judges, parties and their lawyers about ADR.

In a frequently cited passage from *Remuneration Planning Corporation Pty Limited v Fitton* (2001), the court commented that:

This is an area in which the received wisdom has in my experience changed radically in a period of a few months. A short time ago there was general acceptance of the view adopted by Barrett J in *Morrow v Chinadotcom Corp* (2001), that there was no point in a mediation engaged in by a reluctant party. Of course, there may be situations where the Court will, in the exercise of its discretion, take the view that mediation is pointless in a particular case because of the attitudes of the parties or other circumstances and decline to order a mediation. However, since the power was conferred upon the Court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the Court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered. (para 3)

A review of the reported New South Wales cases confirms that by 2002, the Supreme Court ordered mediation in most of the reported cases even though one or more parties may have objected to the referral. However, a shift in point of view is not so apparent when cases outside New South Wales are considered. The willingness of courts in South Australia and in Queensland to compel parties to undertake ADR was well established before 2002 (*Hopcroft* (1998), *Baulderstone* (2000), *Barrett* (1999)). On the other hand, the reported Federal Court cases show less willingness than the state courts to compel ADR (*Kilthistle* (1997), *ACCC v Lux* (2001), *ACCC v Collagen* (2002), *Firebrace* (2000)). It is, of course, not certain that those matters which are reported are representative of the overall practice of these courts in making referrals in the face of party objection, as many pre-trial court orders are not reported.

In the passage cited above, the court also refers to a number of successful mediations where there was overt resistance at the time of referral. From the point of view of an external researcher, the actual outcome of court-compelled mediations is difficult to ascertain. One clear direction for additional research is to follow up cases in which a court ordered ADR over the objection of a party, to see if the matter is resolved without additional court involvement.

## **8.6 Objections to mandatory referral**

The New South Wales Supreme Court especially emphasises its discretion in a frequently quoted passage from *Higgins* (2002):

all of the cases point to the single conclusion that the Court's discretion under s 110K is very wide and the Court should approach an application for an order without any predisposition, so that all relevant circumstances going to the exercise of the discretion may properly be taken into account. (para 6)

Of course, the key issue is what "all relevant circumstances" are. Objections raised by the party resisting mediation (and sometime accepted by the court) may reflect beliefs about ADR that are not supported by empirical research or not shared by experienced ADR practitioners (Sourdin and Matruglio, forthcoming: 98). Alternatively, the objections may present valid concerns about likely obstacles to success, though such features are not necessarily fatal to mediation success. Such objections include:

- previous settlements attempts have failed (*ACCC v Collagen* (2002); *Rajski* (2003))
- the parties are a long way apart in their claims and negotiations (*Hopcroft* (1998); *Barrett* (1999))
- too many parties and/or lawyers (*Kilthistle* (1997); *Barrett* (1999))
- too many/too complex issues (*Kilthistle* (1997); *Hopcroft* (1998); *Barrett* (1999); *Rajski* (2003))
- factual dispute is central, complex facts, credibility is crucial (*ACCC v Lux* (2001); *Hopcroft* (1998); *Barrett* (1999))
- liability is contested (*Barrett* (1999))
- commercial rather than emotional or non-rational forces (*Morrow* (2001))
- mediation means additional cost and delay (*ACCC v Collagen* (2002); *Morrow* (2001))

Some of these matters may make mediated success less likely, but none would be an absolute barrier to a successful ADR process (Henderson, 1996; Macfarlane, 1995; Sander and Goldberg, 1994: 56; Wissler, 2002).

In resolving contested referral decisions, the courts sometimes recognise the value of a skilled mediator, who may be able to contribute to resolving the most difficult cases (*Barrett* (1999); *Waterhouse* (2001)). On the other hand, some courts have suggested that if settlement is possible, the parties will achieve it on their own (*Morrow* (2001); *Harrison* (2001)). In *Morrow*, the court argued that these are "commercial parties engaged in a commercial transaction. ... who are well aware of the potential benefits ... of mediation. If ... they do not see sufficient value ... "the court will not compel them to "pay ... lip service to it." (para 45)

## 8.7 Other referral factors

Other factors which courts have expressly considered in deciding whether or not to make a referral to ADR include the nature of the relationships between the

parties; timing, particularly the need for discovery; public interest and the likely or possible value to the court and/or the parties of an ADR process.

Several cases have emphasised the suitability of mediation in a dispute within a family or between those with close personal relationships, considering factors such as the advanced age of a party, the stress litigation would cause to the party and on the relationship and the possibilities mediation provides for reconciliation, compared to the continued bitterness likely with litigation (*Yoseph* (2002); *Higgins* (2002); *Singh* (2002); *Walhallow* (2003)).

In *ACCC v Lux* the court recognised that discovery may be needed, and specifically indicated that mediation was not to take place until the mandatory expert conference was completed. (See also *Kilthistle* (1997)).

Concern about public interest has been considered in two contexts: Australian Competition and Consumer Commission (ACCC) enforcement actions and defamation claims. In *ACCC v Collagen* the party objecting to mediation characterised the public interest claims as trivial, but the court felt that it could not conclude they were trivial, so, in combination with other factors, decided mediation would not be appropriate. In *ACCC v Lux*, the court ordered mediation, indicating that public interest concerns could be part of the mediated outcome. Similarly, the court in *Waterhouse* pointed out that public vindication needed to remedy a defamation claim could be part of the mediated outcome.

A different sort of public interest was recognised in *Barrett* as supporting an order for mediation: the need of other litigants to have access to scarce court time, as the court was only available on circuit for a few weeks a year and the proposed trial would occupy the court for virtually the entire circuit.

Several decisions recognise a range of advantages to ADR. Courts have acknowledged the attractiveness to the court of having a contentious complex case resolved elsewhere (*Waterhouse* (2001); *Rajski* (2003)). Mediation which results in progress short of complete settlement can still be worthwhile (*ACCC v Lux* (2001)). Perhaps most importantly, several courts have shown that they are aware that claims of cost and time savings for ADR are not automatic. Courts sometimes make very specific calculations in light of trial time predictions, mediation cost (including preparation effort as well as direct cost) and the current posture of the case (*Hopcroft* (1998); *Waterhouse* (2001); *Harrison* (2002); *Idoport* (2001); *Barrett* (1999); *Blake* (2001); *Yoseph* (2002); *Singh* (2002)). For example, in *Idoport*, mediation was ordered to take place during an already scheduled gap in the trial. The court in *Harrison* did not order mediation because of concern that it would vacate a very close trial date, leading to greater ultimate delay. Related to this is the significance of willingness to pay costs: in *Barrett*, the party seeking mediation was willing to pay the objecting party's share of the direct costs; not so in *Harrison*.

## **8.8 Related court powers**

Court decisions have also emphasised the breadth and variety of court powers in relation to ADR referral. Courts regard the power to refer to mediation, combined

with the court's inherent powers, as including power to make other orders needed to make mediation effective. This may involve compelling a party with authority to attend (*Kilthistle* (1997); *Barrett* (1999)) or excluding legal practitioners (*Rajski* (2003)). Courts have indicated the availability of sanctions including a stay of proceedings or striking out pleadings or even contempt of court, if a party indicates an unwillingness to participate (*Baulderstone* (2000); *Idoport* (2001); *Hopcroft* (1998)). In *Capolingua* (1991), costs were imposed by the Western Australian Supreme Court.

## 8.9 Good faith

Another aspect of a court's power to refer to ADR and party consent or resistance is the question of good faith. One reason for concern about referring a party to ADR who does not want to participate is that the party may not participate in good faith, and so the process will not be successful and may even be harmful, by increasing costs and delay. The only legislation specifically addressing this concern in the context of court-compelled ADR is s 110L of the *Supreme Court Act 1970* (NSW) which provides that "[i]t is the duty of each party ... " in a matter which is referred to mediation or neutral evaluation under s 110K " ... to participate in good faith ...".

In *Waterhouse* and *Idoport*, the court emphasised the statutory obligation of good faith participation as a justification for ordering mediation in the face of party objection. However, even in jurisdictions which do not have such a statutory obligation, the possibility of bad faith or reluctant participation does not appear to have discouraged courts from referring matters to ADR in the face of express opposition (*Baulderstone* (2000); *Barrett* (1999)).

In contrast to the relatively robust approach courts have taken to ordering ADR based on legislative authority, there has been some judicial disagreement within New South Wales about the court's power to order ADR pursuant to a contractual agreement. One leading judicial decision refused to enforce a contract clause which required ADR, in part on the basis that it is not possible to compel good faith negotiations (*Elizabeth Bay* (1995)). On the other hand, in *Aiton* (1999), an ADR clause was enforced. These two cases and related decisions (see also *Computershare* (2000); *Hooper Baillie* (1992), *NSW v Banabelle Electrical* (2002); and *Heart Research Institute v Psiron* (2002)) are not being considered in this paper as they are not directly related to the court's statutory power to refer a case to ADR; rather, they raise separate issues of when and how a court will enforce the parties' previous agreement, in light of legal arguments such as uncertainty in contract.

The limited attention to good faith in Australian legislation and court rules contrasts with the US where many states and federal courts have legislation or court rules mandating good faith participation (Lande, 2002: 78-82). There is also a body of case law developing which elaborates on the meaning of good faith in particular contexts (Lande, 2002: 82-87). At the same time, ADR good faith requirements have been strongly criticised (Brazil, 2002: 142-143; Lande, 2002: 87-109). Concerns include problems of definition, no evidence that bad faith participation is a problem, reduced confidentiality protection for what is said in mediation and a distortion of the mediator role.

## 8.10 Native title

Recent cases have begun interpreting the provisions of the *Native Title Act 1993*, describing the circumstances where mediation must or should not be ordered. In native title claims, the legislative framework is much more complex, as is the social, political and physical context in which the claims arise. For these reasons, the specific points about mandatory referral which arise when the native title legislation is interpreted may not have much applicability to court decisions compelling ADR on general civil matters. Nonetheless, native title is an important and growing area where courts are forced to decide whether to compel participation in certain forms of ADR, and a discussion of the legal framework in Australia would be incomplete without considering these cases.

As summarised above, the Federal Court *must* refer matters to mediation at a stated point in the process (s 86B) unless the circumstances in s 86B(3) exist, which describe when the court *must not* make a referral. The court also has *discretion* to order that there be no mediation (s 86B(2)) or to refer a matter to mediation at any time ‘if it thinks agreement can be reached’ (s 86B(5)).

- The mandatory referral under s 86B is conditioned upon a proper application and notice under s 66. If these preconditions are not met, the Court does not have power to order mediation under s 86B (*Adnyamathanha* (1999)).
- The discretionary power under s 86B(5) is only available if the court believes that the parties will be able to reach agreement. If the court has no information that parties will be able to reach agreement, then the court cannot order mediation under s 86B(5) (*Adnyamathanha* (1999)).
- At the same time, the court can be flexible in interpreting the statutory requirement in s 86B that mediation be ordered ‘as soon as practicable’. An order for mediation was properly delayed when the state had not yet developed certain policies about evidentiary requirements, and the claimants needed time to secure more funding (*Wadi Wadi* (2002)).
- In two cases, the Federal Court emphasised that the existence of an ongoing state government policy which sets priorities or creates a government-sponsored process for resolution of native title claims is not necessarily sufficient grounds for a court to delay ordering mediation, if the preconditions under s 86B are otherwise met (*Frazer* (2003); *Jones* (2003)).
- The *Federal Court of Australia Act 1976* (Cth) and the *Native Title Act 1993* (Cth) create overlapping statutory powers and duties with respect to referral to mediation. The Federal Court has held that the more specific provisions of the *Native Title Act* will take priority (*Adnyamathanha* (1999)).

## 8.11 Legislation and referral criteria

Most Australian courts now have legislation and/or rules of court which give explicit authority for the court to refer eligible matters to some form of ADR, and there is relatively little restriction on the ability of courts make such referrals. Many courts are able to refer disputes to ADR without party consent. At the same time, legislation or rules provide only minimal guidance to courts about appropriate

referral to ADR. This puts a significant responsibility on courts to make "wise referral decisions" (Astor, 2001: 30).

The most frequently used statutory factor appears to be likelihood of settlement, with some recognition of other possible benefits. The experience judicial officers have with the types of cases in their courts, and the usual negotiated or adjudicated outcomes, can enable them to make a reasonably informed assessment of whether an agreed outcome is likely, and perhaps even what that outcome is likely to be.

It is more difficult for courts to make sophisticated decisions matching individual cases to an ADR process for maximum likelihood of success, or screening out matters that are likely to be unsuitable for a particular ADR program. Legislation and court rules cannot realistically provide detailed guidelines. Decisions in particular cases require greater knowledge about the dispute, the disputants, the available processes and practitioners, and factors indicating success or failure, than would ordinarily be available to the court.

The reported decisions suggest that Australian courts are beginning to develop a broader understanding of the possibilities and limitations of ADR, within the framework of legislation and rules of court which can give only very limited guidance about suitable referral.

However, the apparent readiness of judges to refer even very unpromising disputes to ADR will need to be informed by reliable information about the outcomes of such referrals, the strengths and services of the available ADR programs and practitioners, and a respect for the decisions of service providers and practitioners about matters which are or are not suitable for their ADR processes.



## CHAPTER 9

### CONCLUSION: COURT REFERRAL AND RESEARCH

#### 9.1 Empirical research and referral criteria

This report initially attempted to answer the question: what are the key case or party characteristics or program features that lead to success, whether defined as timely settlement or greater satisfaction? As the review of research shows, there are significant limits to the conclusions which can be drawn from the very large body of empirical research which is available. The number and complexity of the factors make general criteria difficult to establish. The importance of local factors make any particular research findings difficult to generalise more widely, into other jurisdictions or other programs. As the summary of the Rand research states, the results are limited to mediation and early neutral evaluation "... as implemented in the ... districts studied..."(Kakalik et al, 1996: 53). This view is confirmed by researchers themselves who caution against generalising from one study context to other settings (Delaney and Wright, 1997: paras 115, 116; Hensler, 1988; Howieson, 2002: para 46).

General summaries of research findings do not provide a great deal of guidance for court referral in a particular case. Even when particular factors or criteria are linked with high rates of settlement or satisfaction (60-80%), that still leaves 20-40% who did not succeed and arguably should not have been referred to ADR. Also, the studies rarely give detail about features not found to affect success, though these null findings can be quite significant, as they may confirm or challenge conventional assumptions about ADR or litigation.

Even when research does identify a characteristic which appears to link to success, that is still only a generalisation and not necessarily a certain predictor in any given case. For example, research that suggests that multi-issue cases are more likely to settle does not necessarily ensure that a particular multi-issue dispute will settle, nor does it guarantee that a single issue dispute will not settle. Cases which look quite promising for ADR can turn out to be difficult. Similarly, even the most unpromising cases can sometimes be resolved effectively through ADR. Kressel and Pruitt summarise the extremely unpromising case:

Intensely conflicted disputes involving parties of widely disparate power with low motivation to settle, fighting about matters of principle, suffering from discord or ambivalence within their own camps, and negotiating over scarce resources are likely to defeat even the most adroit mediators. (1989: 405)

One experienced ADR practitioner commented that this sounded like a description of native title disputes, some of which have been successfully mediated.

Such extreme cases are, for most courts, relatively rare. Realistically, in light of the multiplicity of factors, any given case will have some features which indicate

likely success in ADR as well as factors indicating that success is not likely, leaving the referring court with the obligation to exercise judgment.

Some writers have suggested or attempted to develop a comprehensive list or taxonomy of features of ADR processes, which is linked with similarly comprehensive lists of characteristics of disputes/disputants/context, which is then related to outcomes based on empirical data. This approach is not likely to be useful, for several reasons. Few of the relationships are well enough established to permit definitive links, and the very large number of factors leads to a matrix which quickly becomes too complex, except perhaps for a complex computer program. As Hilary Astor pointed out: "These decisions are too complex for a 'tick a box' approach." (2001: 30)

## **9.2 Future research design**

The inability of existing research to establish clear general referral criteria raises the question of what additional research is needed. Within the empirical literature, many writers make suggestions about the need for better research design.

### **9.2.1 Better isolation of variables**

One suggested research direction is to isolate particular variables with greater clarity than previous research has done. (For example, see Bergman and Bickerman, 1998; Keilitz, 1993c: 31-33; Wissler, 2002: 690-703). A family mediation researcher indicated that research also needs to describe the process being studied along a number of dimensions, such as:

advice is given/not given; lawyers are present/absent; emotions are accepted/avoided; mediators are directive/nondirective, individuals/teams; sessions are sequential/marathon, caucus/joint, group/individual; law is presented/not presented. (Kelly, 1996: 383)

Another researcher suggested further research into judicial mediation, by looking at the following factors (Carnevale, Lim and McLaughlin, 1989: 207-208): (dot points added)

- Judges' time constraints
- Length of docket
- Case complexity
- Experience of attorneys
- Number of parties requesting assistance
- Cooperation of attorneys
- Attorney's absolute and relative competence
- Number of parties involved in the case

- Expertise of judge
- Extent of controversy
- Disparity of parties' strengths
- Recalcitrance of clients

Keilitz articulated 40 different potential research questions under several headings: the organisation of the dispute resolution program in the context of its relationship to the legal process; cost; case processing time; participant satisfaction; selection, training and retention of neutrals; and form and function of the dispute resolution processes (Keilitz, 1993a: 31-33).

### **9.2.2 Better research methods**

Other researchers point to methodological issues in research and suggest improvements. An example of this approach is the remark from the Rand study:

While we found that [ADR] programs have no major effect on time to disposition, litigation cost, satisfaction, or views of fairness, they may have smaller effects that could not be identified as statistically significant in the sample of cases we studied. Further experimentation and evaluation appears justified, which would look for effects that were not major enough to be statistically significant in our sample of cases. For example, one might use a well-designed random assignment experiment to further investigate possible reduction in time to disposition as a result of ADR. (Kakalik et al, 1996: 53 n15)

Wissler also noted that random assignment of cases to different dispute resolution processes will enable more realistic conclusions. In addition, she pointed out the need for clear identification of the processes used, statistical significance tests and longer term follow up, if valid conclusions are to be drawn. She also suggested that studies should be replicated to validate results (Wissler, 2002: 691-702).

### **9.3 Future research questions and directions**

Having reviewed the very extensive research already available, it is difficult to see how further research, even with significantly improved design or methodology, is likely to produce definitive evidence of factors which will be valid general predictors of ADR success.

Most outcome patterns are essentially comparable, for programs employing mandatory versus voluntary formats; those stressing confidentiality versus those in which mediators report to the judiciary; those that deal with custody and visitation issues versus those that also deal with financial issues; those that use volunteer or staff mediators versus those that contract with private mediators; and programs that utilise orientations versus those that do not. (Pearson, 1994: 81)

The more generalised or traditional questions: “Does mediation work?” or “Is mediation better than adjudication?” are recognised as oversimplifications (Kressel and Pruitt, 1989: 401) and of limited usefulness. The constraints on the ability of empirical research to provide definitive answers to the questions that have been asked are now relatively well recognised in the literature. For example, Brazil (2002: 120) points out that ADR proponents "... cannot be expected to be rescued, or buried, by definitive empirical studies."

The analysis of the existing research does, however, enable the identification of some potentially more useful research directions.

### **9.3.1 Bargaining in the shadow of ADR: Lawyer negotiation**

One feature that appears in some research studies is the phenomenon of cases that settle after being referred to or listed for ADR and before actual participation in ADR (Lynch, 2002; Macfarlane, 2002: 290; Sourdin and Matruglio, forthcoming). This can be regarded as a methodological problem as it prevents clear comparisons between ADR and litigation. However, it raises other research possibilities.

One question to study is the possibility of a significant positive impact of ADR referral. Referral to a fixed ADR process may impact on a lawyer's attention to resolution in the same way as an imminent trial date. The phenomenon of late settlement, at the courthouse door or on the courthouse steps, was one of the factors that led to the implementation of case flow management and the interest in court-annexed ADR. It may be that a significant outcome of court referral to ADR is not resolution through the ADR process itself but the incentive or motivation for parties and their lawyers to carefully evaluate the case and to engage in serious negotiation (Macfarlane, 2002: 296-298). Alternatively, lawyers may delay serious settlement discussions until after ADR, especially if the ADR is compulsory and non-binding, as the ADR process may provide guidance for settlement negotiations.

A second research direction is to compare ADR with unassisted lawyer negotiation, along some of the dimensions previously considered, such as cost or time or party and lawyer assessments of the process and the outcome (McEwen and Wissler, 2002: 142; Wissler, 2002: 693). This research will be demanding to design and conduct, but it will be asking a better question by comparing ADR with the reality of settlement, the dominant dispute resolution method in civil litigation (Hensler, 2003: 130).

### **9.3.2 Develop and provide reliable, specific information about particular local ADR programs to judicial officers and legal practitioners, including feedback on non-confidential aspects of specific cases which have been referred**

Feedback to referrers and judicial officers about the outcomes of their referrals is an important aspect of program design, which can be linked to research (Astor, 2001: 37).

At a very basic level, it would be useful to track the outcome of cases in which courts have justified referral to ADR over sometimes strenuous objections. The judgments themselves note that there is judicial knowledge of the success of mediations to which one or more parties objected. It would be valuable to know how often such referrals are successful, in any sense, and how often they are not. As has been pointed out by Regina Graycar in another context, how judges "know" things can be quite problematical (Graycar, 1995).

Related to this is the question of statistics within each court and nationally. The development of nationally agreed conventions for measuring and reporting ADR referrals and outcomes should become an urgent part of the larger task of civil justice statistical measurement.

Astor also suggests the possibility of further research on Australian lawyers' understanding of ADR and support for it (see, for example Zariski, 2000), though she also cautions that it may be more valuable to devote resources to developing more accurate beliefs (2001: 37). Macfarlane's research in Canada observed that "many lawyers hold a relatively unsophisticated, incomplete and unproblematic conceptualisation of mediation" (Macfarlane, 2002: 277).

### **9.3.3 Carry out narrowly focussed evaluation of specific programs against clearly articulated goals, in light of local context**

Very concrete evaluation, which should be an integral part of the ongoing management of ADR referral and ADR service provision, will provide valid information for judges, practitioners, potential ADR users and policy makers. "In general, courts should shape programs that reflect the needs and the capacities of the communities in which they are situated" (Pearson, 1994: 82). Any research aimed at developing valid case criteria in a specific local context, especially screening or exclusionary factors, must involve consultation within the court and tribunal, to take into account "its particular needs and case characteristics" perhaps "with the assistance of ADR experts ... [and] mediation training" (Astor, 2001: 34). The significance of local context and legal culture is clearly demonstrated in the evaluation of the Ontario mandatory mediation program which found several differences between Ottawa and Toronto (Hann and Baar, 2001; Wissler, 2002: 250-251).

There is a very considerable lack of research on the impact of racial, ethnic, socio-economic and cultural diversity on the experiences of ADR participants and the outcomes of ADR processes (Kelly, 1996). As LaFree's work demonstrates, useful research on these crucial issues can only be done in a very particular context (LaFree and Rack, 1996). One limitation on this research in the Australian context is the ability to generate a large enough number of cases adjudicated, referred to ADR and using ADR to produce statistically valid results (see Sourdin and Matruglio, forthcoming: 19, 21, 24, 39, 40, 70, 79, 84 for an example of this problem).

### **9.3.4 Make visible and share the expert clinical knowledge of experienced skilled effective ADR referrers and practitioners**

In 2001, NADRAC undertook an informal survey of courts, tribunals and major ADR service providers asking about the criteria they used for referral or for assessing suitability for the ADR processes available through their court or program (2001). Very few had clearly articulated written criteria, and those that did tended to reflect issues of principle or factors that made a dispute or disputants clearly unsuitable for the program available. At the same time, it is clear that there is a significant body of clinical experience and knowledge among practitioners which is not being effectively recorded and shared.

Research which makes visible "the experience and intuitions of judges, registrars and tribunal members in particular jurisdictions ..." as well as service providers and individual practitioners would be an important research focus (Astor, 2001: 35). One way this can be done is to identify those who are especially effective at making wise referral decisions and analysing their approach to referral.

### **9.3.5 Develop a greater understanding of effective ADR practice**

Some of the research reviewed identified the importance of mediators and their skills and methods. For example, LaFree's research found that who the mediator was correlated strongly with racially disparate outcomes. A related question, which is a matter of theory and policy, as well as a potential empirical inquiry, is the question of how mediators can be assisted to mediate appropriately when there is a significant power imbalance (Kelly, 1996: 380-382; LaFree and Rack, 1996: 793).

### **9.3.6 Support policy research**

Not all research needs to be empirical. Policy analysis and research are important as well. For example, LaFree notes the need for policy analysis on the question whether mediation is supposed to replicate court outcomes. If enforcing rights is important, then comparing ADR outcomes to adjudicated results is a valid measure of quality, but such a policy may limit the possibility of other outcomes for which mediation is valued (LaFree and Rack, 1996: 793). Astor (2001: 40-41) has also indicated the need for policy research, such as developing mechanisms for dealing effectively with mediator misconduct, in light of requirements of confidentiality and immunity protections (Kressel and Pruitt, 1989).

Other areas of policy research include the role of good faith participation, especially in mediation (Brazil, 2002; Lande, 2002) and the impact of ADR on the judiciary and judicial behaviour. Garth (1997: 111) notes that the Rand research did not directly ask what were the implications for a judicial officer of a referral of a case to someone else. Such a referral ought to result in a savings of time for the judge, but how is that judicial time used (1997: 111)?

The need for good research about the civil justice system as a whole as well as ADR processes has been noted (Australian Law Reform Commission, 1997; Kressel and Pruitt, 1989: 401). The lack of a benchmark or industry standard is a recurring

problem in ADR research (Hanson and Becker, 2002: 173; Van Epps, 2002: 632-633). Whether the number and type of civil trials has fallen significantly needs to be examined for Australia, as has been done in the US (American Bar Association, 2003). If civil trials are vanishing, the significance of this for court referral to ADR must be considered.

The central policy research question is put by Della Noce (2002: 556):

[C]ourt-connected mediation programs ... are at a crucial ... stage of confronting their limits and re-examining their own claims. If research does not sustain case management efficiency claims, what is the real value of maintaining court-connected mediation programs? If there are values beyond case management [what are the] programs and policies that will achieve these values?"

#### **9.4 Conclusion**

The introduction to this report posed a question: Is it possible to establish specific criteria, or to identify key features about disputes and/or disputants, supported by empirical research, which will indicate whether ADR success is or is not likely (whether success is defined as timely settlement or greater satisfaction) and therefore when a court should refer a matter to ADR?

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.

The most frequently used statutory criterion - likelihood of settlement - requires a complex analysis of the pending case, as well as broad knowledge of a range of similar cases. This is, however, an assessment which judicial officers may be well suited to making.

Nonetheless, there may be some value in articulating more particular factors, at least for limited purposes. Criteria are thought to enable predictability or consistency. Perhaps most important in the court referral context, criteria can provide grounds on which a party can persuade a court to make a referral or a basis for a party to oppose a referral. This is especially important if the decision-making model chosen is "presumptive", where referral is automatic unless the matter is clearly unsuitable.

Such an automatic or presumptive approach may be attractive to courts, as it relieves them of many referral decisions which they may not be especially well equipped to make in individual cases. However, an automatic or presumptive process will shift the decision to a less visible location, and it would be necessary to ensure that the decision maker is sufficiently skilled and resourced if the court's obligation of ensuring a fair and just process is to be met.

Although empirical research does not directly provide a checklist, it does provide guidance about features that have been found to be successful or problematic in other locations. It would be possible to develop a framework for referral processes and criteria, in much the same way as NADRAC developed a framework for standards (NADRAC, 2001), which would assist courts and tribunals in developing their own referral process and criteria.

This report, along with Hilary Astor's *Quality in Court Connected Mediation Programs* (2001), provides a starting point in developing such a framework, as does the considerable literature on dispute system design. This report identifies many of the dimensions which a court-connected program must address, starting with goals and the meaning of "success" and going through process questions, including the significance of party consent, as well as evaluating many potential criteria.

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 it will not produce a 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 program goals, jurisdiction, case mix, potential ADR users, local legal profession and culture, internal resources, and external service providers (Astor, 2001: 36).

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*Walhallow Aboriginal Corp Inc v Walhallow Local Aboriginal Land Council* [2003] NSWSC 545 (16 June 2003)  
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## Legislation

*Administrative Decisions Tribunal Act 1997* (NSW)  
*Compensation Court Act 1984* (NSW)  
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*Dispute Resolution Centres Act 1990* (Qld)  
*District Court Act 1967* (Qld)  
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## APPENDIX

### SUMMARY OF LEGISLATION, REGULATION, RULES OF COURT, PRACTICE DIRECTIONS

This section summarises legislation, regulations, rules of court and practice directions for Commonwealth, State and territory tribunals relating to referral of matters to ADR. Rather than reproduce the full text of all legislation, specific provisions have been summarised or paraphrased. The underlined text indicates guidance for appropriate referral, including party consent. This summary is drawn largely from Duncombe and Heap *Australasian Dispute Resolution Update* 35 (October 2003). The references in brackets are to Duncombe and Heap.

#### Commonwealth

##### *Administrative Appeals Tribunal Conciliation Conferences Direction*

- Conciliation Conference [15.88] – compulsory conciliation conference “... where matter has not settled, unless ... the matter is one where a conference should not be held (e.g. ... only involves a point of law).”

##### *Family Law Act 1975*

- **14(a)** The object of Part III is to encourage people to use ‘primary dispute resolution’ (ADR) to resolve matters (15-828) [15.1300]
- **14C** Judges are to consider the reconciliation of parties from time to time.
- Judge is to assess possibility of reconciliation from the attitude of the parties or the evidence in the proceedings. Judge can adjourn proceedings so parties can consider reconciliation (15-830) [15.1303]
- **14F** The Court must decide whether to advise parties about primary dispute resolution methods (15-831) [15.1306]
- **16A(1)** If the court considers it in the best interests of the parties or their children they must direct either or both of the parties to attend counselling (15-834) [15.1330]
- **16B(1)** If the court considers counselling will improve the relationship of parties to a marriage or between parties to a marriage and their children they can advise parties to attend counselling (15-834) [15.1331]
- **16C(2)** The court must decide whether to advise parties to attend counselling for marital breakdown (counselling to assist parties to adjust to the consequences of marital breakdown) (15-834) [15.1332]
- **19B** Family Court may refer any or all of the matters in dispute for mediation with the consent of the parties (15-836) [15.1420]
- **19BAA** Federal Magistrates Court may refer any or all of the matters in dispute for mediation with the consent of the parties (15-837) [15.1420/2]
- **19BA** The court must advise parties to seek mediation if it considers it may help the parties to resolve their dispute (15-838) [15.1421]
- **19D** The court may refer any part VIII proceedings to arbitration with the consent of the parties (15-838) [15.1440]

- **19E** The court may make necessary orders to facilitate private arbitration between the parties (on request of the parties) (15-839) [**15.1450**]
- **62B** The court can advise parties about counselling to adjust to consequences of orders (15-851) [**15.1570**]
- **62F** The court can make an order at any stage of the proceedings directing parties to attend conference with child counsellor or welfare officer (15-853) [**15.1610**]

*Family Law Regulations 1984*

- **63(1)(d)** Information must be provided to parties regarding mediation, including that mediation may not be appropriate for all disputes, particularly where one party is threatened by another party with violence (15-926) [**15.1730**]
- **67C** Part VIII proceedings with respect to property to which an approved maintenance agreement under section 87 of the Act applies, cannot be arbitrated. (15-931) [**15.1752/10**]

*Family Law Rules 1984*

- **Order 24 1(1)** The court or Registrar can order parties to attend a conciliation conference (15-1023) [**15.1820**]
- **Order 25A, Division 2, 4** Parties to a dispute request mediation must attend interview with court mediator to determine whether dispute can be mediated (15-1033) [**15.1980**]
- **Order 25A, Division 2, 5** The following must be taken into account during the interview: (15-1033) [**15.1990**]
  - the degree of equality
  - risk of child abuse
  - risk of family violence
  - emotional and psychological state of parties
  - whether mediation is being used as a delay or other tactic
  - any other relevant matters

*Federal Court of Australia Act 1976*

- **53A** The court can refer proceedings to arbitration only with the consent of parties or mediation with or without the consent of the parties (15-1121) [**15.220**]

*Note to Practitioners: Assisted Dispute Resolution*

- **1** Pilot Program on the use of court annexed early neutral evaluation (15-1211) [15.2300]
- **4** Pre-trial settlement conference – parties can be required with or without consent to attend before a registrar to satisfying him/her that all steps have been taken to achieve a negotiated outcome (15-1212) [15.2330]

*Practice Note No 8 – Assisted Dispute Resolution*

- Parties can request, or courts can refer proceedings to ADR (15-1221) [15.2430]

*Federal Court Rules*

- **Order 10, 1(2)(g)** The court can order that proceedings be referred to a mediator or an arbitrator
- **Order 10, 1(2)(h)** The court can order that parties attend before a registrar to satisfy him/her that all steps have been taken to achieve a negotiated outcome
- **Order 10, 1(2)(i)** The court can direct parties to attend a case management conference to consider quickest and cheapest way of conducting proceedings (15-1321) [15.2500]
- **Order 78, 3A** The court can direct a registrar to exercise a power of the court including power to refer applications to the National Native Title Tribunal for mediation (Schedule 4, Item 7) (15-1325) [15.2605]

*Federal Magistrates Act 1999*

- **22** The court must consider whether to advise parties about primary dispute resolution processes (15-1351) [15.2632]
- **23(1)** If the Federal Court considers that primary dispute resolution processes may help parties to resolve their dispute it must advise parties to use these processes (15-1352) [15.2634]
- **25(1)** Officers of the Federal Magistrates Court must advise parties about primary dispute resolution processes (15-1352) [15.2638]
- **26(1)** The court can refer proceedings to conciliation with or without consent of parties (15-1353) [15.2640]
- **34(1)** The court can refer proceedings (other than family law or child support proceedings) to mediation with or without consent of parties (15-1355)[15.2656]
- **35(1)** The court can refer proceedings (other than family law or child support proceedings) to arbitration with the consent of parties (15-1356) [15.2658]

*Federal Magistrates Court Rules 2001*

- **23.02** Matters must be assessed for suitability for mediation by primary dispute resolution providers or the Primary Dispute Resolution Coordinator (15-1370) [15.2674]

*General Insurance Enquiries and Complaints Scheme: Terms of Reference*

- Scheme operates on two levels. First, Consumer Consultants provide advice and assistance in encouraging resolution of complaints. Second, disputes can be referred to a Panel, referee or Adjudicator who can make binding determinations. (15-1511) **[15.2800]**
- **8.8** If fraud is alleged IEC (Insurance Enquiries and Complaints Ltd) shall refer these disputes to a referee for determination (15-1526)
- **9** Where insurer alleges fraud, IEC shall refer the dispute to a referee (15-1527)

*Native Title Act 1993*

- **86B** The Federal Court must refer every application under section 61 to the NNTT for mediation as soon as practicable. (15-1722) **[15.3210]**
- **86B(2)** The court can make an order that there be no mediation (15-1723)
- **86B(3)** The court must make an order that there be no mediation if the court considers that
  - mediation is unnecessary due to an agreement between the parties or for any other reason
  - no likelihood that parties will reach agreement on facts
  - sufficient detail has not been provided (15-1723)
- **86B(4)** The court must take the following into consideration in deciding if there is to be no mediation
  - number of parties
  - number of parties with same agent
  - how long it will take to reach agreement
  - size of area
  - nature and extent of non-native title rights
  - any other relevant factor (15-1723)
- **86B(5)** The court can at any time refer to mediation if it thinks agreement can be reached (15-1724)

*Superannuation (Resolution of Complaints) Act 1993*

- **27** The tribunal must try to settle complaints by conciliation (15-1745) **[15.3300]**

## **Australian Capital Territory**

*Magistrates Court (Civil Jurisdiction) Act 1982*

- **419** Conferences are held in the following circumstances
  - in accordance with a direction by the Registrar under 416(2)
  - in an application for common boundaries determination
  - in accordance with a restoration order
  - in accordance with an order of the Small Claims Court
  - in other circumstances provided by ACT law (15-2061) **[15.4100]**
- **420(1)(b)** Conference objectives are to assist parties to reach an agreement by conciliation (15-2062) **[15.4110]**

- **420(2)** Registrar shall undertake conciliation between the parties only if satisfied there is a reasonable possibility of the parties settling the matter in dispute by this means (15-2062)

## New South Wales

### *Administrative Decisions Tribunal Act 1997*

- **99(1)** The tribunal can refer matters for mediation or neutral evaluation if parties have agreed (15-2209) **[15.4900]**
- **102(1)** The tribunal can refer matters for mediation if
  - the tribunal considers the circumstances appropriate and
  - parties consent and
  - parties agree on mediator or neutral evaluation (15-2210) **[15.4930]**

### *Compensation Court Act 1984*

- **30(2)** Court can refer proceedings for arbitration (15-2611) **[15.6600]**
- **38D** Court may refer matters (other than criminal proceedings) for mediation or neutral evaluation if
  - the court considers the circumstances appropriate and
  - the parties to the proceedings consent and
  - the parties to the proceedings agree on the mediator or evaluator (15-2613) **[15.6680]**

### *Consumer, Trader and Tenancy Tribunal Act 2001*

- **54(1)** It is the duty of the tribunal to promote conciliation (15-2651) **[15.6800]**
- **55(1)** The tribunal may conduct a preliminary hearing with the parties (15-2651) **[15.6805]**
- **59(1)** The tribunal may refer a matter for mediation or neutral evaluation if it considers the circumstances appropriate (15-2653) **[15.6830]**

### *District Court Act 1973*

- **63A(1)** The court may refer an action for determination by an arbitrator
- **63A(2)** The court shall consider the preparations for trial
- **63A(3)** The court shall not make a referral order if cause is shown why the action should not be referred
- **164A** The Court may refer any proceedings before it (other than criminal) for mediation or neutral evaluation if the court considers the circumstances appropriate, with or without the parties consent
- **164A(2)** If the parties cannot agree on a mediator or evaluator the Court may appoint one (15-2812) **[15.7030]**

### *Farm Debt Mediation Act 1994*

- **12(1)** Authority is to institute arrangements for the accreditation of mediators (15-2917) **[15.7390]**
- **12A(1)** If a farmer and creditor agree to enter into mediation..., the farmer must nominate a mediator.

#### *Health Care Complaints Act 1993*

- **12(1)** Before determining whether to investigate a complaint or refer the complaint for conciliation, commission must consult with the appropriate registration authority (15-3012) **[15.7740]**
- **13(2)** If the commission and /or appropriate registration authority think complaint should be referred to conciliation, it can be referred with the consent of the parties (15-3013) **[15.7750]**
- **20** Complaints must be assessed before deciding on appropriate response, eg investigation, conciliation etc. (15-3013) **[15.7780]**
- **24(1)** The commission may refer a complaint to the Health Conciliation Registry for conciliation if: (15-3014) **[15.7790]**
  - the appropriate registration authority is of the opinion that the complaint should be referred
  - the complaint is not required to be investigated
  - the parties consent

#### *Land and Environment Court Act 1979*

- **34(1)** Where proceedings are pending, registrar shall arrange a conference between the parties unless otherwise directed by the Chief Judge
- **34(1A)** For claims for compensation for compulsory acquisition of land the registrar is to arrange a conference at the request of all parties (15-3311) **[15.8600]**
- **61D** The court may refer a matter for mediation or neutral evaluation if
  - The circumstances are appropriate and
  - The parties consent and
  - The parties agree on the mediator or evaluator (15-3324) **[15.8640]**

#### *Land and Environment Court Practice Directions*

- **13** Issues conferences will be conducted when affidavits have been filed. Purpose of issues conferences is to explore possibility of settlement (15-3411) **[15.8820]**

#### *Legal Profession Act 1987*

- **144(1)** The Commissioner may refer a consumer dispute for mediation
- **145** Participation is to be voluntary (15-3512) **[15.8910]**
- **160(1)(b)** When the Commissioner has completed review of a council's decision the commissioner may refer the matter to mediation (15-3513) **[15.8950]**

#### *Local Courts (Civil Claims) Act 1970*

- **21H(1)** The court may refer an action for determination by an arbitrator
- **21H(2)** The court shall consider the preparations for trial
- **21H(3)** The court shall not make a referral order if cause is shown why the action should not be referred
- **21L** A court may refer a matter to mediation or neutral evaluation if
  - it considers circumstances appropriate and
  - with consent of parties and

- parties agree on mediator or evaluator (15-3812) [15.9230]

*Retail Leases Act 1994*

- **74(1)** The Tribunal must not make an order unless it has used its best endeavours to bring the parties to a settlement
- **74(2)** The Tribunal may adjourn the hearing to enable the dispute to be referred to mediation (15-3915) [15.9490]

*Supreme Court Act 1970*

- **76B(1)** The court may refer money damages claims to arbitration
- **76B(2)** The court shall consider the preparations for trial
- **76B(3)** The court shall not make a referral order if cause is shown why the action should not be referred
- **110k** The court may refer any proceedings to mediation or neutral evaluation if it considers the circumstances appropriate, with or without the consent of the parties (15-4012) [15.9660]
- **110l** Parties must participate in good faith

*Supreme Court of New South Wales: Practice Note 104, Professional Negligence List*

- **13** At any conference hearing the court may consider whether the proceedings are suitable for mediation, direct the parties to confer on this question and, if appropriate for mediation, endeavour to secure the consent of the parties for referral to mediation (15-4314/17) [15.10226]

*Supreme Court of NSW: Practice Note 106, Common Law Division – Possession List*

- **12** At any Status hearing the court may consider whether proceedings are suitable for ADR, and endeavour to secure the consent of parties for referral to mediation or neutral evaluation (15-4314/20) [15.10227]
- **14** At the final status hearing the court explore the prospects of settlement by ADR or referral to a registrar for a final conference (15-4314/21) [15.10227]

*Supreme Court of NSW: Practice Note 118, Mediation*

- **2** In considering whether proceedings are appropriate for mediation, the court can refer parties to a registrar to discuss the appropriateness of mediation
- **3(a)** The court may refer parties to mediation with or without their consent. The mediator will be either agreed upon by the parties, or appointed by the court (15-4314/23) [15.10228]

*Supreme Court of NSW: Practice Note 120, Differential Case Management List*

- **11(e)** At a status conference it will be considered whether ADR is suitable (15-4314/30) [15.10236]
- **13(3)** If the matter appears appropriate for ADR the court will refer the matter (15-4314/31) [15.10237]
- **13(5)** Where proceedings involve claim in respect of personal injuries or death, the court will refer proceedings at the status conference for arbitration by a single arbitrator, unless there is a good reason not to (15-4314/32) [15.10237]

- **16** At a Final Conference the court explores the possibility of ADR (15-4314) [**15.10239**]

*Supreme Court Rules 1970*

- **Part 72C** Empowers the court to give directions in relation to mediation or neutral evaluation and requires all parties to state whether they consent to referral

*Workplace Injury Management and Workers Compensation Act 1998*

- **78(2)** Any party may refer the dispute to the Principal Conciliator for conciliation (15-4369) [**15.10465**]
- **292** A dispute referred for determination by the commission can be dealt with by expedited assessment (15-4386) [**15.10580**]
- **293(1)** Registrar may refer a medical dispute for medical assessment
- **293(2)** If dispute concerns degree of permanent impairment this aspect of the dispute must be referred for medical assessment (15-4387) [**15.10585**]
- **306** Registrar may deal with dispute by: (15-4388) [**15.10605**]
  - conciliation
  - directing a workplace assessment to be conducted
  - referring the dispute to the authority
  - making a recommendation

## Northern Territory

*Local Court Act 1989*

- **16(1)** The court can order that a proceeding be referred to a pre-hearing conference, mediation or arbitration (15-4511) [**15.11200**]
- **21(2)(j)** The rules of the court may provide for referral of proceedings to mediation or arbitration (15-4512) [**15.11220**]

*Local Court Rules 1998*

- **7.12** When a notice of intention to appear is filed, a Registrar must organise a conciliation conference (15-4611) [**15.11303**]
- **32.01** When a notice of defence is filed a Registrar must organise a conciliation conference (15-4612) [**15.11305**]
- **32.04(2)(a)** At a conciliation conference the court can conciliate between the parties
- **32.04(2)(b)** At a conciliation conference the court can refer parties to mediation (15-4614)
- **32.06(2)(a)** At a prehearing conference the court may conciliate between the parties
- **32.06(2)(b)** At a prehearing conference the court may refer the parties to mediation (15-4615) [**15.11330**]

*Small Claims Rules*

- **18.01(1)** The court may order that a prehearing conference be held (15-4641) [**15.11360**]

- **18.04(1)** At a prehearing conference the court may conciliate or mediate between the parties, or arbitrate the dispute (15-4643) **[15.11366]**
- **18.04 (2)(b)** At a prehearing conference the court may refer the parties to mediation (15-4643)
- **18.07** The magistrate or judicial registrar may arbitrate the dispute with consent of parties(15-4644) **[15.11372]**

*Supreme Court Rules 1987*

- **48.12(1)** A judge or master may direct that a settlement conference be held if s/he is of the opinion that a proceeding is capable of settlement (15-4711) **[15.11400]**
- **48.13** A judge or master may refer parties to mediation if s/he is of the opinion that the matter is capable of settlement (15-4713) **[15.11401]**

## Queensland

*Children Services Tribunal Act 2000*

- **83(1)** The tribunal may refer parties to ADR (15-4810/3) **[15.12005]**

*Commercial and Consumer Tribunal Act 2003*

- **117(1)** If the tribunal considers a dispute is suitable for mediation it can appoint a mediator to try and achieve a negotiated settlement (15.4955) **[15.12250]**
- **117(2)** the tribunal may consider whether mediation has previously been attempted and failed before deciding whether a proceeding is suitable for mediation

*Dispute Resolution Centres Act 1990*

- **30(1)** The director of a dispute resolution centre may decide that specified classes of dispute are or are not to be the subject of mediation sessions (15-5142) **[15.13630]**
- **31(1)** Attendance at and participation in mediation sessions are voluntary
- **32(1)** DRC Director may decline to accept a dispute for mediation

*District Court Act 1967*

- **97(1)** The court can require attendance of parties before it in order to decide whether the dispute should be referred to ADR (15-5213) **[15.14040]**
- **97(3)** The court may order a dispute to mediation or case appraisal
- **97(4)** The court can take the following matters into account in deciding whether to refer a matter to case appraisal: (15-5214) **[15.14040]**
  - whether costs of litigating are likely to be disproportionate to benefit gained
  - likelihood of appraisal producing compromise or abandonment of claim
  - other circumstances justify an appraisal

**98(1)** Parties must attend ADR

**98(2)** The court may impose sanctions if parties impede ADR process

*Industrial Court Rules 1997*

- **90(1)** Commissioner or magistrate may confer with parties to an industrial dispute and take whatever necessary steps to help parties resolve the dispute, to ensure all avenues of resolution have been explored, to facilitate conduct of arbitration, to help parties resolve outstanding issues, (15-5242) **[15.14520]**

*Supreme Court of Queensland Act 1991*

- **102(1)** The court can require parties to attend before it in order to decide whether the dispute should be referred to ADR (15-5724) **[15.15660]**
- **102(3)** The court may refer the dispute for mediation or case appraisal
- **102(4)** The court can take the following into account when deciding whether to refer to case appraisal
  - whether costs of litigating are likely to be disproportionate to benefit gained
  - likelihood of appraisal producing compromise or abandonment of claim
  - other circumstances justifying an appraisal
- **105(1)** A person may be subpoenaed to appear at a case appraisal by order of the Supreme Court
- **105(2)** A person cannot be subpoenaed to appear at mediation (15-5725) **[15.15690]**

*Practice Direction No 22 of 1991*

- **1** The court is implementing limited case management of part of the civil litigation of the court – damages claims arising from motor vehicle negligence and master-servant relationships (15-5813) **[15.15960]**
- **6** A Conference will take place within 90 days of service of the defendants statement at which the parties will comprehensively and genuinely explore the prospect of settling the case (15-5814)
- **10** In proceedings that have not been resolved within four months the parties will attend before the court to further explore possibility of settlement (15-5815)

*Practice Direction No 6 of 2000*

- **5** Cases on the supervised case list will be managed in such a way to that the minimum resources be used to achieve settlement (15-5826) **[15.159630]**
- **10** A party can seek to have a case placed on a supervised case list by writing the Manager justifying why the case should be placed on that list. It can then be decided by the manager whether the case be placed on that list (15-5826) **[15.15960]**

*Referring Order*

- Form for referral (15-5833) **[15.15970]**

*Practice Direction No 26 of 1999*

- **26** In some civil applications and appeals, mediation may be appropriate prior to the listing with the consent of all parties (15-58350) [**15.15980**]

*Uniform Civil Procedure Rules 1999*

- **319** The court can give written notice to the parties that the dispute is to be referred to ADR. A party may object to the referral within seven days stating the reasons for objection. The court may then require the parties to attend before it and make appropriate orders (15-5855) [**15B.15060**]
- **320** The court may refer a dispute to mediation or case appraisal if the parties apply, or otherwise (15-5855) [**15B.15070**]

## South Australia

*District Court Act 1991*

- **32(1)** The court may appoint a mediator and refer an action or any issues to mediation with or without consent of parties. A Master or Registrar may refer a dispute with the consent of parties
- **32(2b)** The court may itself try to achieve a negotiated settlement (15-6111) [**15.16300**]

*Practice Direction No 6*

- A pilot program was conducted by the Supreme and District Courts during 1998 where pending cases were referred for mediation at any stage of proceedings. It was expected that most referrals would emanate from status (conciliation) conferences or case evaluation conferences (15-6216) [**15.16450**]

*District Court Rules 1992*

- **56.03** The court or the registrar may convene a conciliation conference during which negotiations for settlement will take place (15-6312) [**15.16520**]
- **56.04** A case evaluation conference shall be held in every action during which one of the objectives is to conduct negotiations toward settlement (15-6313) [**15.16530**]
- **56.05** A pretrial conference shall be held in every action, one of the aims of which is to make a final attempt at negotiations (15-6314) [**15.16540**]
- **56A.01** Mediation may be conducted at any stage of proceedings at which a judge or master may be appointed mediator (15-6329) [**15.16650**]

*Environment, Resources and Development Court Act 1993*

- **28B(1)** If it appears to the court that there is a reasonable likelihood of settling matters in dispute between the parties, the court can appoint a mediator with the consent of the parties (16-6347) [**15.16680**]

*Environment, Resources and Development Court Rules 2001*

- **8.2.1** The following actions must be referred to a conference at first instance  
\* lists specific appeals under specific legislation (15-6359) [**15.16705**]

- **9.2.1** The court may appoint a mediator with the consent of the parties (15-6361) [15.16735]

*Environment, Resources and Development court (Native Title) Rules 2001*

- **4.3** Requests for mediation - deals with parties requesting the court to mediate between them, not the court referring them to mediation (15-6375)
- **8.1** Under the State Native Title Act the court is required to call a conference between parties to a native title dispute. A mediator is to preside over this conference (15-6376) [15.16757]

*Magistrates Court Act 1991*

- **27(1)** The court may appoint a mediator and refer an action or any issues arising to a mediator with or without the consent of the parties (15-6411) [15.16800] A Master or Registrar may refer with consent

*Supreme Court Act 1935*

- **65** The court may appoint and refer a civil proceeding or any issues to mediator with or without the consent of the parties (15-6531) [15.16950] A master or registrar may refer with consent

*Supreme Court Practice Directions: Practice Direction 12*

- At a status conference the court will explore the need for ADR (15-6612)
- At the case evaluation conference the court will review previous ADR orders and if necessary make further use of ADR (15-6613) [15.17000]
- At the pre trial conference the court will review previous ADR orders and if appropriate make further ADR orders (15-6614) [15.17000]
- The choice to use ADR will generally be left to the parties unless the court feels that it is in the interests of justice and commonsense to make a decision as to ADR (15-6615) [15.17000]
- **4(c)** If the court feels that the parties will benefit from conciliation it may arrange a conciliation conference, whether at the request of the parties or not. (15-6616) [15.17000]

*Supreme Court Rules 1987*

- **56.02** Conferences shall be held when and where the court directs (15-6714) [15.17310]
- **56.04** There are three types of conferences: status conference, case evaluation conference, pretrial conference (15-6715) [15.17330]
- **56.08(a)(i)** At a status conference it will be considered what ADR options should be pursued (15-6716) [15.17370]
- **56.08(b)** At a case evaluation conference it shall be considered the outcome of ADR options pursued and whether further ADR options are desirable (15-6717)
- **56.08(c)** At a pretrial conference it shall be considered the need for and/or conduct of final ADR options (15-6717) [15.17370]
- **56B.01** Rule 56 does not apply to "ex parte" proceedings, actions governed by Corporations law unless directed by the court, proceedings under the Inheritance Family Provisions Act, actions in the Land and Valuation Division, actions for possession under rule 65, actions under Rule 60 for

discovery, actions for Judicial Review, actions where appearances are not required, actions where the court directs (15-6729) **[15.17445]**

- **76.02** A judge or master may be appointed as a mediator (15-6731) **[15.17500]**
- **76.05** The court may refer issue/s to arbitration (15-6733) **[15.17530]**
- **76.06** a question can be referred to a referee specifying specific question/s (15-6735) **[15.17550]**

*Workers Compensation Tribunal Rules 2001*

- **Rule 13(6)** Upon receipt of a notice of dissatisfaction the Registrar shall refer the matter to a conciliation officer (15-6762) **[15.17695]**
- **Rule 16(8)** When a party is not ready to proceed at conciliation proceedings the conciliation officer may, among other things, refer the matter to arbitration or judicial determination (15-6764) **[15.17700]**

## Tasmania

### *Magistrates Court (Small Claims Division) Act 1989*

- **8(1)** The primary function of the magistrate is to bring parties sitting before it to a settlement (15-6911) [15.18200]

### *Magistrates Court (Small Claims Division) Regulations 1989*

- **9(1)** If at a conference a registrar believes there is a reasonable possibility of settling by conciliation, the registrar can seek to bring about an agreement between the parties (15-7012) [15.18420]

### *Supreme Court Rules 2000*

- **518** At any stage in a proceeding a judge, with or without the consent of any party, may order that the proceeding or any part of it be referred for mediation (15-7111) [15.18600]

## Victoria

### *County Court Act 1958*

- **47A** The court may refer civil proceedings to mediation or arbitration with or without the consent of parties (15-7311) [15.19200]
- **78(1)** A majority of judges may make rules -
- **78(1)(hc)** as to the reference of any question to a special referee or officer of the court for decision
- **78(1)(hca)** as to the reference of any civil proceedings to mediation or arbitration (15-7313)

### *County Court Rules of Procedure in Civil Proceedings 1999*

- **34A.21** At a directions hearing the court can refer a dispute to mediation or arbitration with or without the consent of parties (15-7512) [15.19415]
- **34A.22** At a directions hearing the court can refer a question to a special referee with the consent of the parties (15-7513) [15.19420]
- **50.07** Reference to mediation may be made at any time by the court (15-7514) [15.19450]

### *Magistrates Court Act 1989*

- **16** Chief magistrates and two or more deputy magistrates can make rules of court with respect to
- **16(fa)** the reference of civil proceedings to mediation (15-7811) [15.19700]
- **16(fb)** referral to a pre hearing conference (15-7812)
- **107(2)(b)** Magistrate or registrar may refer proceedings to arbitration at the request of the parties (15-7812) [15.19710]
- **108(1)** The court may refer proceedings to mediation with the consent of the parties (15-7813) [15.19715]

### *Magistrates Court Civil Procedure Rules 1999*

- **22.00** The court may refer a complaint to a prehearing conference (15-7911) [**15.19750**]

*Magistrates Court Practice Note - No 3 of 1995*

- Under the PORTALS scheme no matter will be listed for hearing without mediation or a prehearing conference first being conducted (15-7915) [**15.19850**]

*Magistrates Court Practice Note - No 1 of 1996*

- Prehearing conferences can be conducted by telephone where it is inconvenient for parties to attend in person (15-7917) [**15.19860**]

*Retail Leases Act 2003*

- **84(1)(a)** The Small Business Commissioner [may] make arrangements to facilitate the resolution by mediation, or by another appropriate form of alternative dispute resolution, of retail tenancy disputes (15-8012) [**15.19930**]
- **86(1)** Any or all of the parties to a retail premises lease may refer a retail tenancy dispute to the Small Business Commissioner for mediation (15-8014) [**15.19950**]

*Supreme Court Act 1986*

- **25(1)(e)** The court can make rules with regard to reference of questions to special referee or officer of the court (15-8122) [**15.20000**]
- **25(1)(ea)** The court can make rules with regard to reference of proceedings to mediation or arbitration (15-8122) [**15.20000**]

*Supreme Court Rules Chapter 1 - General Rules of Procedure in Civil Proceedings 1996*

- **50.07(1)** The court can refer proceedings to a mediator with or without the consent of the parties (15-8211) [**15.20100**]

*Victorian Civil and Administrative Tribunal Act 1998*

- **83(1)** The tribunal can require parties to attend compulsory conferences one of the purposes of which is to promote settlement of the proceeding (15-8223) [**15A.100**]
- **88** The tribunal may refer proceeding for mediation by a person nominated by the tribunal with or without the consent of the parties (15-8225) [**15A.150**]
- **Schedule 1, Part 7, 23** Presiding member at a compulsory conference can refer a matter to the Equal Opportunity Commission for investigation, negotiation or conciliation. (15-8228) [**15A.220**]
- **Part 19, 90** In a proceeding under a taxing Act for review of decision a member can only require parties to attend a compulsory conference with the consent of the commissioner.(15-8230) [**15A.280**]

*Victorian Civil and Administrative Tribunal Rules 1998*

- **4.10, 4.11** The Principal Registrar must give written notice of compulsory conferences and mediation (15-8241) [**15B.120**]

*Victorian Civil and Administrative Tribunal Practice Note*

- **9.1** VCAT has discretion whether or not to refer to mediation (15-8251) **[15B.200]**

## **Western Australia**

*District Court Rules 1996 – Order 5*

- **2** Parties are required to attend a pretrial conference (15-8611) **[15.21410]**
- **5(2)** Parties attending a pretrial conference must make a bona fide attempt to reach agreement on the matters in dispute between them (15-8612) **[15.21440]**

*Local Courts Act 1904*

- **106I(1)** Primary function of court is to attempt to bring parties to an acceptable settlement (15-8711) **[15.21600]**

*Rules of the Supreme Court 1971*

- **Order 29**
  - **2(1)** The court can at any time review the progress of proceedings and make orders that lead to the efficient and timely disposal of the proceedings (15-8811) **[15.21810]**
  - **2(1)(ra)** The court can refer to a mediator but not if the parties would be required to remunerate the mediator (15-8812) **[15.21810]**
- **Order 29A**
  - **3(2)(j)** Case management direction may direct parties to confer in order to narrow points of difference between them (15-8817) **[15.21844]**
  - **3(2)(k)** Case management direction may direct that a conference be conducted by a mediator as long as parties are not required to remunerate the mediator (15-8817) **[15.21844]**
  - **3(2)(m)** Case management direction may direct that experts confer in order to narrow points of difference between them (15-8817) **[15.21844]**
  - **6(5)(f)** At the status conference the registrar is to inquire into whether mediation is required (15-8818/2) **[15.21850]**
  - **7(4)(b)(c)** At the case evaluation conference the registrar shall inquire into whether a conference with a mediator is required and whether a conference between experts is further required (15-8819/3) **[15.21852]**
  - **8(3)(a)** At the listing conference the judge will inquire into whether the case can be settled (15-8819) **[15.21854]**
- **Order 31A**
  - **10** Expedited list judge may direct that the parties confer for the purpose of narrowing the points of difference between them (15-8828) **[15.21888]**
- **Order 65B**

- **3(1)(a)** Appeals Registrar may direct parties to an appeal to attend a conference with a mediator for purpose of narrowing points of difference between them but shall require the consent of the parties if the parties would be required to remunerate the mediator (15-8831) **[15.21904]**

*Supreme Court Act 1935*

- **167(1)(q)(i)** Rules of court may be made for the purpose of enabling and regulating mediation and providing for reference to mediation with or without the consent of parties (15-8913) **[15.22020]**



