

## Seminar 1, 2 - Introduction to dispute resolution and Court Adjudication

### **Astor and Chinkin, 'Litigation and Alternative Methods: a false dichotomy'**

- ADR has been adopted into the formal justice system and made the relationship between litigation and ADR more complex
- The benefits and drawbacks of formal and informal processes should be recognised and deliberately used for the benefit of each
- Seldom that cases make it to court- tip of pyramid

### **Moore, 'Approaches to Managing and Resolving Conflict'**

- There is a continuum of conflict management/resolution approaches, of increasing coercion and win/lose outcome
  - Private decision making (avoidance, negotiation, mediation)
  - Private third party decision making (arbitration, administrative decision)
  - Legal (public) (court)
  - Extra-legal coercion (nonviolent direct action, violence)

### **Legal Need Survey**

#### Consequences of legal problems

- Income/financial strain
- Stress related illness/ill health
- Relationship breakdown

## Seminar 3 - ADR

### Facilitative vs determinative processes

#### How can the courts refer parties to mediation?

Rules	ss	The Rule
CDRA	s4-10	Describe the Genuine Steps and impose duty on lawyers to advise clients of requirements
	s11,12	Court may consider the genuine steps statements when exercising powers and awarding costs
FCR, Part 28	28.01	Parties must, and the Court will, consider options for alternative dispute resolution, including mediation, as early as is reasonably practicable. If appropriate, the Court will help implement those options.
	28.02(1)(a)	the proceeding or part of the proceeding be referred to an arbitrator, mediator, or some suitable person for resolution by an ADR process
SCR (no pre-lit)	50.07(1)	At any stage of a proceeding the Court may, with or without the consent of any party order that the proceeding or any part of the proceeding be referred to a mediator
CPA	s66(1)	A court may make an order referring a civil proceeding, or part of a civil proceeding, to appropriate dispute resolution.

### Victoria - no pre-litigation requirements

#### Law Institute of Victoria Limited, Professional Conduct and Practice Rules, 2005

- Duty to the court is pre-eminent, before the duty to the client
  - Weaker provisions to inform client about ADR

- 12.3 “practitioner must where appropriate inform the client about the reasonably available alternatives”
- Strong provisions about frankness and honesty in court
  - 14.3 “practitioner will not have made a misleading statement to a court simply by failing to correct an error”

#### Role of the Lawyer

- Obligated to seek mediation as a precondition to litigation
- Obligated to swear on reasonable grounds of success
- Ongoing obligation to file a ‘proper basis certification’ (CPA s42)
- Overarching obligations certification (CPA s41)
- Must advise on appropriate method of dispute resolution (CDRA, s9)
- Susceptible to sanctions

#### **Zuckerman, ‘Justice in Crisis: Comparative Dimensions of Civil Justice’**

- Access to justice as isolation from legal processes
- Justice has 3 dimensions which are in tension- truth, time and cost

## Seminar 4 - Litigation and ADR

Llewellyn, 'Dealing with the Legacy of Residential Schools Abuse in Canada'

- ADR in the shadow of the law- adopts same assumptions as law
  - Sacrifices justice for the sake of peace
  - Is a contested concept
- Restorative justice - concerned with restoration of relationships
  - Offers a lens that challenges the formal, corrective justice/ADR framework
  - Making the wrongdoer worse off does not necessarily create a just outcome
  - Ought to involve all those with a stake

Cubillo v Commonwealth

- Demonstrates limitations of court system- claim couldn't be brought on rules of evidence

<u>Advantages</u>	<u>Disadvantages</u>	Issues with mediation	Restorative justice elements
Confers legitimacy and authority (vindication), satisfaction on points of principle	High cost	Focus on settlement problematic, emphasises individual dispute, not broader relationships/ issues	Always context specific
Equality before law, neutralise power imbalances	Uncompromising, polarizing	Ignores extent they might be improved or worsened as a result of the means and method of settlement	Seek to address unequal/unjust distribution of power
Appropriate to clarify rights and entitlements	Limited party involvement	Private character of mainstream adr: problem again with \$\$\$\$	Public
Decision (enforceable, precedential)	Slow, protracted		Offers communities opportunity to heal themselves
Public forum (catharsis, public interest)	Damaging to relationships		Should be gov't funded
Consistent	Addresses only substantive issues, may not adequately or appropriately address or remedy		Incorporate harms that have no legal analogue
System is familiar and known	Arduous, stressful/traumatic (process, cross examination)		Empower them to design a plan for the future
Benefits even if you lose? (Satisfaction, publicise a grievance, smear a name?)	Inhibits compromise, entrenches positions		
Develop precedent	Burdens of proof prevent claims being brought		

## Seminar 5 - Negotiation

### Major Elements or Principles of Interest-Based Negotiation

Similarities between Fisher and Ury's interest-based model and Mediation (per Bobette Wolski)

Element	Description	Similar to mediation?
Separate the people from the problem	Disentangle people/substantive problems Neutralises F and U's 3 main categories of people problems- communication, perception, emotion	Commitment to process and procedure
Identify interests, not positions	To better understand context for negotiation 'Interests' can be substantive, procedural, relational/psychological or principled Categories of interests: mutual/shared, complementary, neutral, conflicting	Mediator identifies issues, forms agenda, decodes and summarises interests in neutral terms
Generate several creative options	Major advantage over litigation Generate before you evaluate Generate options which meet the needs of all parties Guideline for negotiation Draws on de Bono	Mediator helps work through issues to develop options, connect components of ideas to reduce ownership
Use objective, external standard for legitimacy	'Powerful persuasive tool' Issues: - Objective standard can be own dispute - Those with the power to create doubt can undermine objectivity in their favour (White) - You choose your own source of rightness (de Bono)	Mediator can assist to determine criteria/standard

### Positional and Interest-Based negotiation

Underpinned by notions of whether people are empathetic or self-interested

#### **Core Elements**

<b>Positional</b>	<b>Interest-based</b>
Competitive	Cooperative
Claim value, resources distributional	Create value, resources non-distributional
Focus on outcome, demand solution	Focus on process, create solution
Focus on positions/rights	Focus on interests, problem solving
Inflexible	Flexible
Emphasis substantive, useful in 'one-off' or non-relational bargaining, distrust	Addresses non-substantives (relationships), useful for relational bargaining

#### **Positives**

<b>Positional</b>	<b>Interest-based</b>
Simple and efficient	Tends to produce more satisfying outcomes from shared solutions and buy-in
	Well adapted to mediation procedure

	Allows preservation of relationships
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**Criticisms**

<b>Positional</b>	<b>Interest-based</b>
Positionality entrenches positions, inflexible, only compromise comes from impractical starting points (F and U: claim to split the difference on single issues, flies in the face of not adopting a distributive approach, encourages low/high starting points)	Ignores realities of hard, distributional bargaining <ul style="list-style-type: none"> <li>• Mutual gain not always possible</li> <li>• Often critical single issues at stake</li> </ul>
Unconcerned with non-substantives like relationships, psychology (though often relationships are irrelevant between parties)	Major issues with ‘objective criteria,’
Emphasis on individual gain	Naively assumes convergent interests lie behind all divergent positions
only satisfies substantive goals if you win	Vulnerable to exploitation
Lower satisfaction from compromising rather than developing solutions	Impossible in situations of conflict or distrust
	Oversimplifies positional negotiation - assumes predatory tactics will win negotiation, where they may destroy it
	Can be time-consuming, complex
	Fisher and Ury: ignore cultural nuance, odd views about ‘threats’ vs warnings, and ‘full disclosure’ vs ‘deliberate deception’, undervalue ‘compromise’ and ‘concession’