

A Useful Tool: A Guide to ADR

Alternative Dispute Resolution by Tania Sourdin, Lawbook Co., Sydney, 2002, 183 pp, appendices 185–281 pp, index 283–295 pp.

Laura Cameron BA (Qld), LLB Student, T.C. Beirne School of Law, University of Queensland

Clients expect lawyers to be informed about ADR (Alternative Dispute Resolution) processes. Clients expect lawyers to be able to give advice about managing and avoiding disputes not just ‘fighting’ them.¹

Alternative Dispute Resolution is a useful tool to acquire knowledge about the important field of dispute and conflict resolution that occurs outside, or in conjunction with, formal litigation. As the above quote indicates, ADR skills are important for lawyers but Tania Sourdin also directs this book at all those involved, or with an interest in, ADR. This broad focus is necessary because it reflects the underlying flexible characteristics and objectives of ADR. ADR is a range of processes that has the potential for application across the full range of problems inherent in the domestic and international community, from neighbourhood disputes to commercial matters.²

The logic behind ADR is that processes that promote self-determination and that respond to and acknowledge human qualities have an impact on the effectiveness and durability of conflict outcomes.³ The possible reduction in the time and cost associated with litigation is another benefit. Sourdin notes that such processes are not new but that their incorporation into dispute resolution practices in a range of areas has been gaining momentum in Australia over the last thirty years.⁴

Sourdin provides a broad and comprehensive coverage of issues related to ADR including different methods and their evolution, necessary skills, the objectives of the different ADR processes, the role of ADR in and outside the court system, the concept of multi-option civil justice, the principles for designing effective dispute resolution systems, the role of technology and ADR and future trends.

The first chapter provides a basic history of theory, definitions and a broad overview of issues including research and the placement of ADR within the community and courts. Importantly, Sourdin notes that ADR has a range of meanings and applications. While ADR is often recognised as dispute resolution processes that are ‘alternative’ to traditional court proceedings, or as a synonym for ‘mediation’, this is not necessarily the case. Moreover, it is apparent that ADR-type processes are gaining currency as a dispute resolution system in their own right. In the Family Court the term ‘primary dispute resolution’ (PDI) has been adopted since ADR processes are used to resolve 95% of matters without recourse to litigation.⁵

Sourdin examines the different processes encompassed by the term ADR. In reference to the classification by National Alternative Dispute Resolution Advisory Council (NADRAC), Sourdin investigates facilitative, advisory and determinative ADR processes. Whilst she recognises that variation exists, the terms represent a graduating degree of formality, flexibility, involvement of the parties in determining outcomes, the focus on facilitative or adjudicative skills, procedural requirements and confidentiality requirements.

1 Tania Sourdin, *Alternative Dispute Resolution*, Lawbook Co., Sydney, 2002 at 94.

2 Note 1 at vii.

3 Note 1 at vii.

4 Note 1 at vii.

5 Family Court of Australia, Response of the Family Court of Australia to the Attorney-General’s Department Paper on ‘Primary Dispute Resolution Services in Family Law’, Family Court of Australia, 1997 at 7 quoted in Note 1 at 2.

Facilitative (ranging from negotiation to mediation) processes have the least formal requirements, advisory processes have an intermediate level of formality (ranging from conciliation to expert referral) while determinative processes (ranging from expert determination to arbitration) have the most formal requirements.

Chapter three is a useful discussion of necessary ADR skills and techniques to improve skills as well as a reminder that practical experience is the most effective way to develop ADR skills. The different interaction required by the third party in facilitative, advisory and determinative processes are explored.

Chapter four outlines the broad dispute resolution objectives and relates ADR objectives to the objectives of the litigation system. Varying objectives are noted for facilitative, advisory and determinative processes. Sourdin has noted the complementarity of the litigation and ADR systems in achieving proposed objectives.

Sourdin then identifies, in chapter five, ADR processes related to courts and tribunals through a survey of different Australian jurisdictions and with reference to New Zealand approaches. She notes that the growth of ADR use in courts and tribunals is undoubtedly due to the support from the judiciary and lawyers. Within this section, key issues are noted such as the appropriate level of involvement of judges in ADR and the issue of mandatory referral of proceedings to ADR processes.

Chapter six explores the topic of multi-option civil justice. This is the notion of generating awareness of a broad range of dispute resolution options, whether the public are referred to the most appropriate process by a service outside the court or as part of a court referral system.

Chapter seven investigates the role of ADR in the community, in organizations and in particular, within businesses. She discusses specific legal issues, which are not settled, that arise in ADR in this area.

Chapter eight discusses the development of dispute systems with reference to important recently developed standards. Sourdin notes that dispute systems must be flexible but at the same time be capable of being regulated. This tension is reflected in the definitions of ADR processes, education, training and accreditation of ADR practitioners and practice standards.

Sourdin investigates the role of technology on ADR (chapter nine), through the evolution of video and teleconferencing and internet communication and concludes that these options broaden the scope for ADR. Nevertheless, technology can also lead to increases in disputes owing to the nature of modern communication devices and a lack of understanding about norms of other cultures at the same time as communication with other cultures has increased.

Sourdin finally analyses future trends in terms of social trends, technology and the evaluation of ADR practices. Sourdin notes that the changing role of ADR is affected by societal changes including increasing emphases on relational communication approaches. Conflict resolution processes can also change societies to focus on *resolution* rather than *settlement*. Sourdin makes a range of methodological recommendations in order to consistently evaluate ADR processes. Unfortunately parts of this chapter are unclear. A discussion of changes to ADR in the business and litigation sectors is included under the section heading of Technology but does not appear to relate to technology.

The topics reflect a balance between practical and theoretical issues and this is probably due to the range of practical and academic ADR experience of the author. Various themes emerge. Sourdin's concern for refining the application of, and testing the impact of ADR, is evident in the book and is no doubt based on her research and policy formulation experience including involvement in the Australian Law Reform Commission and various ADR bodies and committees. There is a focus on the role and development of ADR in Australia which enhances the relevancy of the book to Australian audiences. This is constantly placed within a broader context of overseas practices. Another important theme

is the changing relationship of ADR and judicial processes. Sourdin acknowledges positive separate roles for each process and also appropriate linkages that are evolving. Sourdin is also keenly aware of the possible ramifications of the 'institutionalisation' of ADR and the effect on the informal and flexible nature of ADR and its focus on broadly-defined outcomes (*resolution* rather than *settlement*).⁶ Sourdin, in agreement with Professor Jennifer David, hopes that 'ongoing cycles of ADR will produce new empowering ADR processes in response to institutionalisation' which will maintain ADR flexibility.⁷

The book incorporates many useful features. The organization and writing style is mostly clear and concise which enhances the worth of the book as a reference tool for busy practitioners. The contents of each chapter are tabulated at the outset and headings divide the contents appropriately. Within each section, important definitions and concepts are highlighted. Moreover, there is a comprehensive index which helps improve access to the information. The six appendices are also thoughtful additions and provide further suggested reading and useful material from Australia and abroad, a range of practical exercises to enhance ADR skills, a mediation and evaluation information kit by the New South Wales Law Society, possible contractual clauses designed to implement dispute resolution processes in the event of a dispute between parties, the professional code of conduct for mediators (2001) and proposed standards for the training and accreditation of ADR practitioners by NADRAC. As indicated, the book is a comprehensive but concise effort to address the important issues regarding ADR and the guidance, in the appendices, for further information on this topic is helpful for placing this book within a broader practical and theoretical framework.

The author has successfully pitched the book to a range of people who could be interested in ADR, including practitioners, lawyers and students. While the discussion is focused on ADR in a domestic context, the analysis would also provide an interesting perspective to someone with a primary interest in international dispute resolution. Sourdin aims to introduce concepts and skills and to map issues occurring within the ADR area.⁸ This has been achieved in a sophisticated manner whilst still being clear and concise.

6 Note 1 at 82 and 183.

7 Note 1 at 183.

8 Note 1 at vii.