

# The ADR Committee

Members of the New South Wales Bar Association Alternative Dispute Resolution Committee 2020, whose practices encompass a wide cross-section of jurisdictions, were asked the following questions by the Chair of the Committee, Mary Walker:

**Q1**

Why did you gravitate towards ADR as a practice area?

**Q2**

How do you see the future of ADR at the NSW Bar?



**The Hon Stephen O’Ryan QC**

**Q1** After I retired from the Bench I gravitated to ADR because it was an obvious area of activity for a former judicial officer who wanted to remain working in the law. As well, I was encouraged to do so. What is my interest in ADR? My interest in ADR is mediation and arbitration. In the area of law with which I have experience I am concerned to see that ADR is promoted and undertaken given, inter alia, the cost, delay and uncertainty of an outcome by judicial adjudication.

**Q2** In the area of family law with which I have experience, given there is unlikely to be any adequate resourcing of the relevant courts, ADR should become the primary method of dispute resolution.



**Greg Laughton SC**

**Q1** To answer your question, why have you gravitated to ADR?, my practice has always been civil and much of it was commercial: ADR processes such as mediation have always been part of the process. Many commercial contracts contain dispute resolution clauses such as expert determination and escalation clauses moving from dispute committees to mediation to arbitration with the result that ADR has become an essential part of my practice. What is my interest in ADR? As the prevalence of

ADR has grown, my interest in ADR has grown with it.

**Q2** To my observation, the number of contracts containing ADR clauses is increasing steadily. Clients expect that an attempt will be made to informally resolve disputes, well before the dispute reaches court in order to:

1. minimise costs; and
2. maintain confidentiality.

ADR in that respect is becoming more prevalent. It is important for lawyers with civil practices, in particular, to become well versed in all of the ADR processes.

**Stephen Walsh QC**



**Q1** In the early 1990s, the courts conducted a spring offensive by judges to mediate resolutions to deal with long lists of cases. The result was exceptionally effective. I, and others, chose to train as a mediator in 1993 and thereafter continued my practice as a barrister and mediator. If a mediation did not resolve, the mediator’s role was to continue to mediate the litigation process to limit the issues, processes and ultimately the length of the trial. The benefits were obvious and consistent with my duty as an Officer of the Court.

**Q2** The Future? My view is that all barristers should be trained in a broad range of ADR processes, including arbitration, mediation, expert determination and hybrid processes to give clients a range of processes to suit their needs. Less time spent in courts is already entrenched for most barristers and many will not survive if they do not embrace ADR. It also gives a great option for those barristers who do not want, or are not asked, to be a judge in later years.



**Max Kimber SC**

**Q1** I gravitated to ADR because by the time I had been at the Bar for 10 years, I realised that Abraham Lincoln was correct when he said:

*'Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and a waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.'*

As was retired US Supreme Court CJ, Warren E. Burger when he said:

*'Traditional litigation is a mistake that must be corrected. For some disputes, trials will be the only means, but for many claims trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for really civilised people.'*

My interest in ADR is based on my conviction that healthy disagreements turn into unhealthy conflicts because people are not effective communicators and hence try to avoid or ignore conflict for too long, manage it very poorly when they do confront it and then too readily outsource it to lawyers to try and litigate it. Hence, I am increasingly interested in training people in listening and acknowledgement, working at the facilitation end of the dispute resolution spectrum, and encouraging the use of ADR processes before considering litigation.

**Q2** As to the future of ADR, I have no doubt that the views expressed by Abraham Lincoln and Chief Justice Burger will eventually, if not soon, become the conventional wisdom and that people will increasingly seek to have their disputes resolved either by or with the assistance of third parties, other than the courts and better still, endeavour to resolve their disputes without the intervention of any third party at all.



**John Fernon SC**

**Q1** In the field of building and construction disputes, my practice area, ADR is ingrained. As an alternative to court or tribunal proceedings, clients may be advised to attempt to resolve their dispute by way of settlement conferences, mediation, binding or non-binding expert determination or arbitration. Experience is required to be able to confidently advise clients in relation to these options. In the case of settlement conferences and mediations, the stage at which the dispute will be amenable to settlement by those methods is an important consideration. Often such conferences take place in conjunction with mediation. The identification of disputes which could be determined by expert determination also requires experience, and it will also be necessary to advise clients as to the limited circumstances in which such determinations, if they are intended to be binding, can be challenged. A practitioner who recommends that a dispute be resolved by arbitration will need to be familiar with the Commercial Arbitration Act and the practice and processes of arbitrations.

**Q2** The future of the Bar requires that barristers are equipped for alternative dispute resolution. Disputes are inevitable in commercial and other relationships. Courts provide for the public adjudication of disputes. However, the nature of modern litigation, its complexity and cost puts reasonable resolution of disputes beyond the means of many. Courts have finite resources and court processes are not in the control of the parties. Dispute resolution procedures provide different options for parties to resolve their disputes to a public court adjudication. An essential skill for ADR is the identification of a path to agreement. Attractive features of ADR are resolution of a dispute that is consensual rather than imposed, and private rather than public. The parties can be in control of the process. Resolution can occur at any time and avoid the costs of litigation.



**Neil Jackson**

**Q1** I have for three decades practised in family law, initially as solicitor and later as a barrister. Throughout those many years, the family law jurisprudence has traditionally considered the importance of ADR. This includes the statutory requirement of conciliation conferences in property disputes, the statutory reliance on arbitration, and the requirement of parties to receive a Certificate from an Alternative Dispute Provider as a prerequisite to issuing parenting court proceedings. Family law is now very much a jurisdiction that revolves around ADR as a primary focal point. Regrettably this has come about, in part, due to the significant delays in the listing of court matters, and the increasing costs of contested litigation. I consequently see family law and ADR as representing such an interconnection in areas of law as to be moulded into one.

**Q2** I see ADR as playing an increasingly important role at the Bar, particularly in areas of complex legal disputes, where the mind of a specialist lawyer as a mediator and particularly as an arbitrator becomes essential. The court systems around Australia are increasingly very expensive as well as, at least in my area of family law, subject to significant delays. ADR is in my view the clear pathway towards an efficient and less expensive resolution of litigation disputes. It may be likely that in ten years from now, ADR will become almost an exclusive domain for civil litigation disputes.

## Why did you gravitate towards ADR as a practice area?

Q2

## How do you see the future of ADR at the NSW Bar?

### Steven Goldstein

**Q1** Having both experience and dual qualifications as a civil engineer and a barrister, ADR processes such as arbitration, mediation, expert determination and Dispute Avoidance Boards provide an opportunity for me to assist the parties in resolving building and construction disputes. I have found that the ability to avoid and/or resolve disputes using ADR processes, at an earlier stage of the proceedings, is often a much more satisfying outcome for everyone concerned.

**Q2** As clients look for cheaper, quicker and more efficient methods of resolving disputes, the adoption and usage of ADR processes in all of its forms will continue to increase. This will inevitably lead to an increase in workload for the Bar.



### Hugh Stowe

**Q1** Why have you gravitated to ADR? From a client perspective, the recognition that ADR can so often and so obviously deliver superior client outcomes for dispute resolution. From a personal perspective, while the professional satisfaction of traditional adversarial engagement can't be doubted, I also find the constructive and consensual engagement of mediation immensely rewarding. What is my interest in ADR? Mediation, with a particular interest in the development of theories and methodologies for the rational evaluation of the commerciality of settlement.

**Q2** What are your views as to the future of ADR? Bright, and getting brighter.



### Jodi Steele



**Q1** Clients, the profession and the courts have gravitated towards adoption of the suite of dispute resolution mechanisms which are now embraced in the concept of ADR. For example, government contracts now commonly feature expert determination as the primary or sole dispute mechanism (at least up to a substantial monetary limit). Banks, insurers and institutions, such as churches, have embraced mediation as a preferred dispute resolution mechanism because of cost saving, efficiency and confidentiality. Tiered dispute resolution clauses are commonplace in commercial contracts, usually commencing with executive negotiation, followed by one or other of mediation, expert determination or arbitration. Internationally, arbitration has become the chief form of dispute resolution between commercial parties because of confidentiality and the ability to enforce awards in other jurisdictions. The skills honed in practice at the Bar and in the courts – identification of the essential issues, precision, economy and persuasiveness, are equally well suited to be deployed in ADR procedures. What is my interest in ADR? As I act for a broad range of commercial clients, I find that employing appropriate ADR procedures is an essential and effective step in resolving disputes in accordance with my duties to both my client and the court. There is an important role for advocacy skills in these procedures, for example, in mediation for oral advocacy in particular, in expert determination for written advocacy and in arbitration, both written and oral. This is why engagement of the Bar in these procedures is useful and beneficial for clients.

**Q2** The employment, range and adoption of ADR procedures will continue to meet changes in the law, technology and commercial demands. Technology based dispute resolution mechanisms have begun to be used, including with online courts and virtual hearings and this will inevitably broaden and increase over time. The role of the Bar is to not only keep abreast of these changes but to be at the vanguard of developing expertise in these areas.

### Tom Davie

**Q1** To be an effective practitioner it is necessary to be aware of and be able to advise in relation to the whole range of dispute resolution techniques.

**Q2** As awareness grows of the whole range of dispute resolution techniques practitioners with experience of such techniques will be more in demand.



### Fiona Sinclair

**Q1** I see ADR as a win/win situation where all parties to a dispute may have to compromise but that compromise becomes an ultimate gain as it brings finality to the dispute, allows disputing parties to have some ownership in the outcome, minimises costs which can otherwise become excessive and allows parties to move on with their lives and businesses.

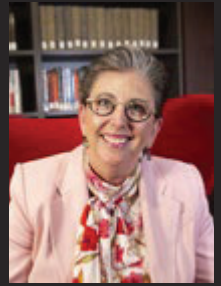
**Q2** ADR will continue to develop and evolve especially as it facilitates the just, quick and cheap resolution of the real issues as identified by s 56(1) of the Civil Procedure Act 2005 (NSW) thus advancing the overriding purpose of the rules of the Courts in this state. The greater use of technology will also assist the delivery and efficiency of ADR.



### Louise Mathias

**Q1** I gravitated towards ADR as I strongly believe in assisting clients and lawyers to resolve disputes in the most cost effective, timely manner and with the least amount of damage possible. Over time, I have further focussed my practice area on ADR as I feel that ADR is best suited to my own ideologies, values, personality, professional and personal skill sets. I have the opportunity to utilise all of my skills in ADR practice, as a consequence: this requires multilayered skills to be an ADR expert. ADR is where I can best display a wide variety of skills. I find it fulfilling combining the legal and human skills in ADR, in a collaborative environment where facilitative negotiations are supported. I get the greatest sense of accomplishment in assisting others resolve disputes through mediation where it's a win/win for all involved.

**Q2** It is predicted that ADR will become mainstream in the not too distant future, the same as litigation is seen now. It is not whimsical to state there are going to be major changes in legal practice, changes are already occurring and will continue that will impact upon barristers. ADR becoming mainstream will create many opportunities for ADR practitioners at the Bar. However, ADR practitioners at the Bar need to recognise the need to continually improve to be multiskilled legal expert ADR practitioners. Barristers need to become dispute resolution specialists.



### Wilson Chan

**Q1** A large majority of matters now settle in ADR or are forced into ADR at some stage during litigation. It is also a common method of dispute resolution found in cross jurisdictional matters. I thought that I had to possess some degree of competency in this area to provide a valuable overall service to the client.

**Q2** ADR is the preferred means of dispute resolution in international trade and commerce for large countries such as China. China actively encourages the use of ADR as part of its Belt and Road trade project. We may see an increasing number of cross border matters with Asia being dealt with in that manner. The Bar should possess and sharpen the skills for ADR so that we remain relevant and competitive on that international front.



### Navid Sedaghati

**Q1** ADR can be an effective and efficient way of resolving disputes, and at times a forum through which, compared to the alternatives, the relative power imbalance between parties could be better addressed. Furthermore, with respect to one of my core areas of practice, domestic and international commercial law, ADR is a

fabric of the dispute resolution landscape, whether one likes it or not. Domestic commercial disputes of value tend to go through a mediation process before progressing to litigation in the court system, while international commercial disputes with cross jurisdictional issues tend to go through a mediation, followed by an arbitration, then the domestic court system of countries for enforcement. So, after around two decades of involvement with ADR, it is second nature. I can't recall if I ever made the decision to intentionally gravitate towards ADR, even though a long time ago as an undergraduate at University, I undertook ADR elective subjects as part of my law degree. Due to the areas of law which I practise in, including as a solicitor prior to the Bar, my involvement in ADR has organically developed.

**Q2** In the short term it is difficult to see any major changes in the ADR trend in NSW. I can see the current trend by the courts to use ADR, especially mediation as a way of managing their workload, continuing in the foreseeable future. I also see the same trend towards ADR continuing in the non-court dispute resolution forums including tribunals. Over the years I have extensively read the varying views on the potential for technological interruption in the dispute resolution system of developed countries. In the short term, can I see parties in a high value commercial dispute or a complex building and construction law dispute, having their barristers replaced by a form of artificial intelligence (AI) and or agreeing for their dispute to be determined by an AI Arbitrator? I can't see that in the short term. In the long term, anything is possible.

### Mark Darian-Smith

**Q1** I gravitated to ADR as a favoured practice area because very often the courts can be too blunt an instrument to achieve the best outcome for my clients. My clients are usually empowered by their participation in ADR processes in a way they simply cannot be in court.

**Q2** All upside I would have thought. Navigating the ADR landscape in all its varied forms should be an integral part of the skill-set of any good barrister and a growing source of work for the Bar. The ADR field should not simply be abandoned to solicitors as so often occurs now (although I did not mind that happening when I was a solicitor myself).



### Mary Rebehy

**Q1** Non-adjudicated outcomes allow the parties to reach their own solutions and provide a sense of empowerment. I like the idea of working with people so they can control their own outcomes with minimum damage.

**Q2** ADR is the future of the Bar either as ADR practitioners or representatives for parties in ADR processes. It is difficult to think of a jurisdiction that has not either made ADR compulsory as part of the litigation track or encourages some form of ADR prior to a final hearing. Even in criminal law, the use of conferencing as a form of therapeutic justice has been used with great success. ADR is the way forward.