# The future of Alternative Dispute Resolution*

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For centuries, negotiated settlements, mediation and arbitration have been used to resolve disputes.[1] They take as their starting point the freedom of the parties to reach an agreement about how the dispute ought to be resolved, in lieu of seeking a decision from a court. As the late Sir Laurence Street pointed out, this does not mean that they are 'alternatives' to the courts.[2] They still rely on the courts being prepared to recognise the underlying agreement as valid and enforceable. Of course, by and large, courts have been prepared to do so, whether by applying common law principles in relation to agreed settlements or the more recent and increasingly elaborate legislative architecture in relation to arbitration.[3]

I would venture to say that the long history and continued vitality of these forms of dispute resolution suggests that we should not be too worried about their future. Nor should we be too concerned about the possibility that they might usurp the role of the courts.[4] Our system of law recognises that the administration of justice does not prescribe an inflexible or invariable standard of justice. So long as a minimum of procedural fairness is observed, the law empowers the parties to a dispute to seek to define *their own* standard of justice which may then be enforced through the courts. Far from undermining the administration of justice, it upholds it by encouraging the parties, who presumably have their own best interests at heart, to reach agreement on a solution which they both regard as just.[5]

Thus, I think that the more important and interesting challenges for dispute resolution lie elsewhere. To be sure, there is scope to tinker with the rules which govern mediations and arbitrations, and to come up with new variations on old ideas. But, much as with litigation itself, while these changes may be significant to well-resourced parties who can afford to invoke these processes regularly, they will mean little for the vast majority of people in New South Wales who cannot.[6] If we are to take a balanced view of dispute resolution, its future, and the relationship which it will have with the courts and the legal profession, then we also need to consider what options are available to this group to resolve their disputes and how they are being utilised.

Perhaps the most significant feature about the disputes to which the members of this group are a party is the fact that litigation will usually not be a realistic option. While they may often find themselves in situations where they have a grievance with another party, it would be rare for them to be willing to suffer the time, expense, and uncertainty of litigation in order to vindicate their legal rights. However, the fact that there is little chance that litigation will be commenced also means that it may be difficult to bring the other party to the negotiating table, other than voluntarily. As a practical matter, there may be no incentive to reach an agreement, or to use an agreed method of dispute resolution, when there will be no sanction for not doing so. Consensual dispute resolution largely depends upon being conducted in the 'shadow of the court'.

The problems which occur when there is no incentive for one party to resolve a dispute can be seen as a symptom of a lack of 'access to justice', affecting not only the most disadvantaged members of our society, but anyone for whom the costs of legal advice and litigation are unaffordable relative to their income.[7] When the costs of litigation are high, it not only deprives these people of their ability to seek to resolve their disputes through the courts, but also through forms of consensual dispute resolution dependent upon the implicit threat of litigation. We can, and do, try to solve this problem by making sure that litigation in the courts is 'just, quick and cheap',[8] by allowing claimants to group together in class actions to share costs, or by providing legal aid and pro bono support to those who most need it.

However, I do not think that these are the only solutions, although they are the most well-established and understood. They each presume that justice is something which can only be achieved, or is best achieved, by enforcement of legal rights through the courts, whether directly as the result of a favourable judgment, or indirectly by supplying an incentive for the parties to a dispute to resolve it on their own terms. But we know that this presumption is not necessarily accurate. In recent decades, we have seen a proliferation of different dispute resolution options, such as statutory tribunals and industry-led complaints bodies, which are designed to provide justice even in the absence of any possibility of litigation.

Broadly speaking, these new options supply an incentive for the parties to resolve their dispute without needing to rely on courts for their enforcement.[9] Thus, it could well be said that they have a better claim to being truly 'alternative' forms of dispute resolution than those which have traditionally been described using that label. But, more importantly, I think that they pose some challenging questions about the future of dispute resolution in New South Wales.

By number of filings, they already form one of the largest jurisdictions in the state,[10] and the disputes that they deal with are much closer to the everyday lives of a majority of the population than those which come before the courts. Over time, there has also been a gradual expansion in the types of disputes falling within their jurisdiction. Their prominence as a means of dispute resolution raises a number of fundamental questions. Foremost among them is whether these forms of dispute resolution are 'fit-for-purpose'. Do they have the characteristics necessary to play such an integral role in the administration of justice? Are they efficient? Are they fair? If they are, then what does this mean for the role of the courts and the legal profession in our justice system in the future?

These questions are not new, and I do not pretend to have suddenly stumbled upon the answers. But it seems to me that they do deserve some attention as part of a discussion

about dispute resolution. To that end, I would like to take a closer look at two of these jurisdictions, the long-standing residential tenancies jurisdiction of the New South Wales Civil and Administrative Tribunal (NCAT), and the more recent financial complaints jurisdiction of the Australian Financial Complaints Authority (AFCA).

**Residential tenancies**

The origins of the separate residential tenancies jurisdiction in New South Wales are usually traced to the recommendations made in the Second Main Report of the Commission of Inquiry into Poverty by Professor Ronald Sackville in 1975,[11] which itself drew upon the recommendations made in an earlier research report prepared for the Commission by Professor Adrian Bradbrook.[12] The Report recommended that a single tribunal be established in each state to replace the 'bewildering' array of existing state courts and tribunals which could hear tenancy disputes,[13] and that each tribunal be empowered to provide 'speedy hearings, free as far as possible from the formal rules of procedure and evidence'.[14]

No action was taken to implement this recommendation in New South Wales until the *Residential Tenancies Act 1987* (NSW) was passed some years later, which established the Residential Tenancies Tribunal.[15] Despite the delay, the rationale for a single tribunal remained unchanged from the time of the Report,[16] and was focused on the delay, expense, and inconvenience of having tenancy disputes determined by a court, which would also often lack specialist knowledge about those disputes.[17] In particular, the reform was motivated by concern for the position of tenants, whose financial circumstances were often thought to be such that they would be intimidated from pursuing legitimate claims.[18]

The Report did not refer to any published data to support this view, but a more recent investigation into matters involving tenancy disputes filed in the Waverly council area in Sydney suggests that these concerns might have been justified.[19] The investigation found that, prior to the establishment of the Residential Tenancies Tribunal, the only matters filed in the Waverly Local Court and its predecessor Court of Petty Sessions were applications for recovery of possession filed by landlords.[20] Even while jurisdictional limitations might have played a role in generating this suspiciously lopsided statistic,[21] it hardly seems plausible to suggest that tenants were pursuing their own claims in any great numbers in the District or Supreme Courts with any regularity. By contrast, shortly after the Tribunal was established, it began dealing with a substantial number of claims by tenants in addition to claims by landlords.[22]


Thus, there should be little doubt that the establishment of the Residential Tenancies Tribunal, alongside the associated reforms to the substantive law in relation to residential tenancies, was seen to provide a more accessible and appropriate forum for the resolution of disputes between landlords and tenants.[23] I think this largely remains the perception today. NCAT, the current successor to the Tribunal, continues to hear a significant number of residential tenancy disputes,[24] and none of the submissions to a recent statutory review of its functions suggested that it ought to be deprived of this jurisdiction in favour of a court.[25] Does NCAT have the characteristics necessary to play such a role in our judicial system?

This might seem to be an easy question to answer in relation to proceedings for the recovery of possession. NCAT is the *only* forum in which landlords can commence these proceedings,[26] and has the power to make orders for possession and to issue writs for possession executable by the Sheriff in the same manner as a court.[27] This creates a clear incentive for both landlords and tenants to participate in the proceedings before NCAT, which might also include an opportunity for conciliation.[28] In this respect, the cheaper, more informal and quicker procedure for dispute resolution offered by NCAT[29] is set up as a mandatory alternative to that offered by the courts for those landlords seeking to recover possession of premises subject to a residential tenancy agreement.

Similar comments may be made in relation to proceedings seeking the payment of compensation by both landlords and tenants.[30] If NCAT makes an order for payment of an amount, then upon registration of that order in a court, it becomes enforceable as if it were a judgment of that court.[31] Although it is not mandatory to commence this type of proceeding in NCAT, its more streamlined procedure still offers clear advantages to those landlords and tenants who do so and thus ensures that it remains an attractive alternative to commencing proceedings in the courts.

It is less clear that the same could be said about proceedings which seek orders which are not for the recovery of possession or the payment of compensation.[32] NCAT has no power to enforce such orders of its own motion. While contravening such an order will render a person liable to a civil penalty at the suit of the responsible minister or their delegate,[33] there is no easy way for a person aggrieved by the contravention of the order to do so short of instituting proceedings for contempt in the Supreme Court.[34] Since this is unlikely to be realistic in most cases, there may often be no real incentive to comply with such orders. Needless to say, this reduces the efficacy of NCAT as a forum to resolve disputes relating to residential tenancies, and may allow unscrupulous landlords and tenants to get away with conduct which should not be tolerated.

However, whether NCAT has the characteristics necessary to resolve residential tenancy disputes does not only depend upon whether it has the appropriate powers to resolve them. It also depends upon the *procedure* which it adopts to resolve them. Again, to start with, it might seem to be an easy question to answer. While they are more informal and speedier, hearings before NCAT remain adversarial and are resolved by applying strict legal rules, except where legislation expressly permits a wider discretion.[35] The similarity with court hearings no doubt made these reforms more acceptable to stakeholders at the time they were introduced, and overall, I think it is clear that the additional flexibility within an otherwise fairly traditional model is regarded as an advantage.

At the same time, I think we need to bear in mind that familiarity can sometimes be a disguise for complacency. There is always the possibility that a more informal and speedier procedure could lead to a party being treated unfairly. Yet, conversely, there may be circumstances where a continued insistence on an adversarial procedure works an injustice despite the advantage of flexibility. The correct balance may be difficult to find, and perhaps must depend more on the instinctive assessment of an experienced practitioner than any prescriptive rule. But the ultimate goal remains the same: to ensure that the procedure does not fall so far away from the standards which we expect so as to be incapable of adequately performing its important role in the administration of justice.

Whether or not this is in danger of occurring may be a matter of legitimate debate. But it is a debate which is worth having, and it is a debate which is enriched by viewing it through the lens of dispute resolution. This perspective suggests that what appears to be important in determining whether it is appropriate for a particular forum to play a role in the administration of justice is the nature of the dispute which it aims to resolve, including the parties, their relationship with each other, and the type of remedy which is sought. For residential tenancy disputes, it is the latter which has been central to defining NCAT's role. It is natural to not deviate too far from the procedure followed by courts when the remedies sought will still be the same as those granted by courts. In these circumstances, this may well be the best way of resolving disputes efficiently and fairly.

## Financial complaints

An interesting contrast is provided by the financial complaints jurisdiction of AFCA, which aims to achieve many of the same goals, but does so in quite a different manner. Its origins lie in the industry-led ombudsman schemes which emerged over the course of the 1980s and 1990s as a result of pressure by consumer groups for a more effective means of dispute resolution.[36] Initially, these schemes were largely voluntary.[37] However, a process of change was initiated in 1997 when, as part of a broader inquiry into the financial sector, the Wallis Committee recommended the introduction of a single licensing regime for all providers of financial services.[38] As ultimately enacted in 2001, a statutory condition of a licence under this new regime was that the licensee be a member of an 'external dispute resolution' scheme approved by ASIC.[39]

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While ASIC initially approved a number of overlapping schemes operated by not-for-profit public companies covering different areas of the financial services industry,[40] the legislation was amended in 2018 to provide for the approval of a single scheme covering all financial services licensees.[41] The amendments were made pursuant to the recommendations of a review into external dispute resolution in the financial system made the preceding year.[42] The review had recognised the importance of consumer-focused external dispute resolution to the proper operation of the financial system,[43] and had recommended the amalgamation with the aim of increasing efficiency and flexibility, as well as reducing consumer confusion and unnecessary technicality.[44]

Under the amended legislation, it is still a statutory condition of a financial services licence that the licensee has to be a member of the new scheme approved by the responsible minister.[45] This scheme is to be known as the *AFCA scheme*, and the entity which operates the scheme is to be known as *AFCA*.[46] The entity which currently operates the approved AFCA scheme is the not-for-profit public company limited by guarantee called Australian Financial Complaints Ltd,[47] and as required by the legislation, its members are the financial services licensees. Upon becoming a member, a financial services licensee becomes contractually bound to abide by the rules established by AFCA for the resolution of customer complaints.[48] Similarly, when making a complaint, a customer agrees to be bound by the rules.[49]

These rules and the general approach taken by AFCA in response to complaints represent a very different form of dispute resolution from that followed by NCAT. The procedure adopted remains informal, with an emphasis on resolution by agreement,[50] but is more inquisitorial since AFCA has the power to compel production of information from the parties.[51] The parties still have an opportunity to see the material collected and to make decisions,[52] but the thrust of the investigation is still very much within AFCA's control. If, after AFCA has issued a 'preliminary assessment' and the parties still cannot agree, AFCA proceeds to a determination of a complaint,[53] then it must make its determination based on what it 'considers is fair in all the circumstances', with the relevant 'legal principles' being only one of the criteria to be taken into account.[54] 'Applicable industry codes or guidance', 'good industry practice', and previous determinations will also be relevant.[55]

This procedure differs markedly from that used in courts and NCAT, most notably due to the fact that 'fairness' is the ultimate touchstone for decision, and that the relevant legal principles will not necessarily be determinative. While we may have come to accept such a procedure as appropriate for financial complaints, perhaps through nothing more than long usage, it is more difficult to precisely pin down why this is the case. Certainly, given the jurisdictional limits under the AFCA scheme,[56] the types of matters raised in financial complaints may be no less serious than those which may arise in residential tenancy disputes in NCAT. Why do we regard a more inquisitorial approach appropriate for one type of dispute but not another?

Perhaps one of reason might be the unique consequences which follow from a determination by AFCA. Unlike NCAT, AFCA does not have the power to enforce its determinations against a financial services licensee directly. A licensee is only bound in contract to AFCA and the customer to comply with the determination, and in theory, a breach would need to be established in court to be enforceable. In this way, the consequences are less severe than those which may follow from an order by NCAT, although, at a practical level, a determination still creates an incentive for a financial services licensee to comply because a failure to do so may result in being reported to ASIC[57] or

expulsion from AFCA,[58] leading to a breach of a statutory condition of their licence.[59] No licensee is likely to bring this upon themselves willingly, but at the same time, the fact that there are no immediate consequences may mean they are prepared to accept voluntarily a less adversarial procedure.

In the end, whatever other reasons might be put forward, I think they all come back to the idea that the form of dispute resolution which is appropriate depends upon the nature of the dispute. Financial complaints arise in a very different market to residential tenancy disputes, where licensees are generally well-resourced corporations and complainants are individuals who may not be financially literate. When we come to ask whether the scheme which has been adopted by AFCA has the characteristics necessary to play the role which it does in our justice system, we must ensure that we bear these circumstances in mind.

## Conclusion

A short tour of the salient features of these two jurisdictions cannot hope to give a complete picture of how they operate, either in theory or in practice. Nevertheless, the contrasts between the two point to something significant: there is no reason to believe that a 'one size fits all' approach to dispute resolution, based on litigation in the courts, is the only possible means of administering justice. It may be appropriate, or even necessary, to modify the approach based on the particular features of that type of dispute. But, if this is the case, then is there any room for the role traditionally played by a court, applying a largely uniform standard of procedure to the disputes which are brought before it? Ought we to not instead create a range of tribunals and other decision-makers each tailored to address a particular type of dispute?

These are provocative and weighty questions, and I do not intend to attempt to supply the answers here. It suffices to say that I think courts will always have a role to play in defining a benchmark for the standard of justice which we expect to be applied in resolving disputes. However, we should guard against becoming inured to the idea that theirs is the only acceptable procedure to be applied. Where a different approach would benefit the parties to a dispute without compromising our basic standards of justice, we should be open to giving it a fair trial. BN

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## ENDNOTES

1 See T F Bathurst, 'The History of the Law of Commercial Arbitration' (Speech, Francis Forbes Society Australian Legal History Tutorial, 18 October 2018).

2 Sir Laurence Street, 'The Court System and Alternative Dispute Resolution Procedures' (2018) 29 *Australasian Dispute Resolution Journal* 85, 88. This is a republished version of a speech delivered in 1989.

3 *International Arbitration Act 1974* (Cth); *Commercial Arbitration Act 2010* (NSW).

4 See, eg, Owen M Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073; cf T F Bathurst, 'Making ADR Work in a #fakenews World' (Speech, ADR Masterclass, 11 August 2018) [14]–[16].

5 Of course, this may not be possible in the case of contracts of adhesion, where one party may not have any real choice about the dispute resolution mechanism which is used. If this causes injustice, relief may be possible under the *Contracts Review Act 1980* (NSW).

6 See, eg, Productivity Commission, *Access to Justice Arrangements* (Report No 72, 5 September 2014) vol 2, ch 19; Law Council of Australia, *The Justice Project* (Final Report, August 2018) 26.

7 The Productivity Commission estimated that only 8 per cent of households would satisfy the income and assets tests for legal aid, resulting in difficulties for 'the majority of low and middle income earners' in meeting legal costs: see Productivity Commission, *Access to Justice Arrangements* (Report No 72, 2014) 20.

8 *Civil Procedure Act 2005* (NSW) s 56

9 While there may have earlier been some room for debate about whether a body such as NCAT is a 'court', this question has been resolved in New South Wales by *Attorney-General (NSW) v Gatsby*(2018) 99 NSWLR 1. By contrast, on no view is a body such as AFCA a 'court'.

10 According to their most recent annual reports, NCAT and AFCA (in New South Wales) received 68,388 and 14,163 applications respectively in the 2018–19 financial year. This is comparable to the civil jurisdiction of the Local Court, which received 78,069 applications in the 2018 calendar year: see Local Court of New South Wales, *Annual Review 2018* (2019) 19.

11 Ronald Sackville, 'Law and Poverty in Australia' (Second Main Report, Commission of Inquiry into Poverty, October 1975) ('*Sackville Report*'). See Brendan Edgeworth, 'Australian Residential Tenancy Law 40 Years After the Sackville Report: A Multi-Level Snapshot' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas, *Law and Poverty in Australia: 40 Years After the Poverty Commission* (Federation Press, 2017) 119.

12 Adrian Bradbrook, 'Poverty and the Residential Landlord-Tenant Relationship' (Law and Poverty Series, Commission of Inquiry into Poverty, 1975).

13 *Sackville Report* (n 11) 91.

14 Ibid 92.

15 South Australia and Victoria enacted laws implementing this recommendation in 1978 and 1980 respectively: see Andrew G Lang, *Residential Tenancies Law and Practice: New South Wales* (Law Book Co, 2nd ed, 1990) 2–3.

16 This appears from a comparison between the *Sackville Report* (n 11) and the second reading speech for the Residential Tenancies Bill 1987 (NSW): see New South Wales, *Parliamentary Debates*, Legislative Council, 1 April 1987, 9732–5 (Deirdre Grusovin, Minister for Consumer Affairs).

17 *Sackville Report* (n 11) 91.

18 Ibid; see also Bradbrook (n 12) 5–6.

19 Brendan Edgeworth, 'Access to Justice in Courts and Tribunals: Residential Tenancies in New South Wales (1971–2001)' (2006) 31 *Alternative Law Journal* 75.

20 Ibid 76.

21 Bradbrook (n 12) 5.

22 Edgeworth, 'Access to Justice in Courts and Tribunals' (n 19) 76.

23 Edgeworth, 'Australian Residential Tenancy Law 40 Years On' (n 11) 122–6.

24 In the Consumer and Commercial Division of NCAT, there were 30,203 'tenancy' applications filed in 2018 – 19 compared with 68,388 total applications in the same period: see NCAT, *Annual Report 2018–19* (2019) 27 (Table 2), 35 (Table 4). This represents approximately 44% of all applications in NCAT.

25 The submissions are available at the following address: https://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/civil-and-administrative-tribunal-act-2013-statutory-review.aspx . At the time of writing, the statutory review remains unpublished: cf *Civil and Administrative Tribunal Act 2013* (NSW) s 92(3).

26 *Residential Tenancies Act 2010* (NSW) s 119.

27 Ibid s 83(1), s 121, s 187(1)(i). It seems fairly clear these powers permit NCAT to exercise judicial power: cf *Attorney-General (NSW) v Gatsby*(2018) 99 NSWLR 1, 26 [125]–[128] (Bathurst CJ).

28 See 'Conciliation', *NSW Civil and Administrative Tribunal* (Web Page) <https://www.ncat.nsw.gov.au/Pages/cc/Dispute_resolution/Conciliation_process/conciliation_process.aspx>.

29 *Civil and Administrative Tribunal Act 2013* (NSW) s 36(1), s 38(1).

30 See, eg, *Residential Tenancies Act 2010* (NSW) s 187(1)(c).

31 *Civil and Administrative Tribunal Act 2013* (NSW) ss 78(1)–(3).

32 See, eg, *Residential Tenancies Act 2010* (NSW) s 187(1)(a) (order restraining action in breach of agreement), s 187(1)(b) (order requiring performance of agreement) s 187(1)(e) (order requiring action to remedy breach), s 187(1)(h) (order requiring compliance with RT Act). Many of these orders would be wider in scope than those which could be sought from a court.

33 *Civil and Administrative Tribunal Act 2013* (NSW) s 77.

34 Ibid s 73(5).

35 See, eg, *Residential Tenancies Act 2010* (NSW) s 87(4)(b).

36 *Review of the Financial System External Dispute Resolution and Complaints Framework* (Final Report, 3 April 2017) 34 [3.3] ('*Ramsay Review*').

37 However, over time, some of the schemes for sectors for the financial services industry were made compulsory: see Australian Securities and Investments Commission, *Approval of External Complaints Resolution Schemes* (Policy Statement 139, 8 July 1999) 6 [PS 139.17].

38 Financial System Inquiry, 'Final Report', (Final Report, March 1997), cited in *Ramsay Review* (n 36) 34–5 [3.6]–[3.7].

39 *Financial Services Reform Act 2001* (Cth) sch 1 cl 1, inserting *Corporations Act 2001* (Cth) s 912A(1)(g). This provision only came into force in 2002: see *Financial Services Reform Act 2001* (Cth) s 2(2).

40 *Ramsay Review* (n 36) 35 [3.9].

41 *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) sch 1 cl 2, inserting *Corporations Act 2001* (Cth) pt 7.10A.

42 *Ramsay Review* (n 36) 10–12; see also Camilla Pondel, 'Legitimacy in Australia's Financial System External Dispute Resolution Framework: New and Improved or Simply New?' (2019) 42 *University of New South Wales Law Journal* 335.

43 *Ramsay Review* (n 36) 19 [1.2]–[1.3].

44 Ibid 119–20 [5.137]–[5.145].

45 *Corporations Act 2001* (Cth) s 912A(1)(g), s 912A(2), s1050(1).

46 Ibid s 761A (definitions of *AFCA* and *AFCA scheme*).

47 See *AFCA Scheme Authorisation 2018* (Cth) cl 5, made under *Corporations Act 2001* (Cth) s 1050(1).

48 *Constitution*, Australian Financial Complaints Ltd (at 1 March 2018) cl 3.2(g); *Corporations Act 2001* (Cth) s 140(1).

49 Australian Financial Complaints Authority, *Complaint Resolution Scheme Rules* (at 1 October 2019) r A.3.1.

50 Ibid r A.8.1.

51 Ibid r A.9.

52 Ibid r A.10.2.

53 Ibid r A.12.

54 Ibid r A.14.2.

55 Ibid.

56 Ibid r D.4.

57 *Corporations Act 2001* (Cth) s 1052E(1)(d).

58 *Constitution*, Australian Financial Complaints Ltd (at 1 March 2018) cl 3.4(a)(i).

59 *Corporations Act 2001* (Cth) s 912A(1)(g).