



**NSW LAW WEEK 2008
ALTERNATIVE DISPUTE RESOLUTION AT THE AAT**

**The Hon. Justice Garry Downes AM
President of the Administrative Appeals Tribunal**

OPENING REMARKS

1 and 2 April 2008

It is with great pleasure that I welcome you to this Law Week forum on alternative dispute resolution at the Administrative Appeals Tribunal. The Tribunal is delighted that so many practitioners have been able to make the time to attend the forum. It offers an excellent opportunity to provide information about the ADR options available within the Tribunal and to explore with practitioners how they may be used to best effect.

As many of you will be aware, the use of alternative dispute resolution has been an integral part of the Tribunal's case management approach for a considerable period of time. Only a relatively small proportion of applications lodged with the Tribunal proceed to a full hearing. For example, in 2006-2007, only 19% of applications were finalised by way of a decision of the Tribunal following a hearing on the merits.

From its inception, the Tribunal has had the power to hold conferences with the parties. In most applications, one or more conferences are conducted by a Conference Registrar or Tribunal member trained in ADR.

Mediation was formally introduced into the Act as an ADR option in 1993. Since 1998 conciliation has been compulsory in applications in the workers' compensation jurisdiction where the applicant is represented.

The provisions of the AAT Act dealing with ADR processes were revised in 2005. The range of ADR options mentioned in the Act was expanded beyond conferences and mediation. ADR processes are now defined in section 3 of the Act to mean procedures and services for the resolution of disputes including conferencing, mediation, conciliation, neutral evaluation, case appraisal and other procedures or services specified in the regulations. Arbitration and court procedures or services are specifically excluded. I note that no additional ADR procedures or services are currently specified in the regulations.

An Alternative Dispute Resolution Committee comprising members and staff was established within the Tribunal to look at the use of ADR in light of the amendments. While the Tribunal had experience in relation to conferences, mediation and conciliation, case appraisal and neutral evaluation were not as well known. The Committee has been examining what is involved in the different processes and how they may best be applied in the Tribunal context.

One of the Committee's first tasks was to develop process models for each of the different types of ADR. Each of the process models follows a consistent pattern. It sets out a definition of the process and then provides a range of information relating to the conduct of the process including:

- the stage of the proceedings at which the process is likely to be undertaken;
- a description of the way in which the process will proceed;
- the role of the person conducting the process as well as the role of the parties and their representatives; and
- what is likely to occur at the conclusion of the process.

We will hear more about the different process models during this session.

The process models will encourage the development of a shared understanding of the nature of the different processes, particularly in relation to case appraisal and neutral evaluation. They will also assist to ensure that ADR processes are conducted in a consistent way across the Tribunal.

I hasten to add that the process models are not intended to be followed slavishly. While the processes are to be conducted within the framework of the relevant model, the precise way in which an ADR event will proceed is a matter for the person conducting the process to determine in the context of the particular matter. The focus will be on adopting a process that is effective for its purpose.

The process models set out how the different types of ADR will be conducted but they do not indicate when a particular process should be used. This is a question for the Tribunal and practitioners involved in Tribunal proceedings.

It is important to acknowledge two matters at the outset in relation to this issue. Firstly, conferencing will continue to be the central component in the Tribunal's pre-hearing process. Conferences provide an effective forum for exploring the possibility of reaching an agreed outcome while ensuring that applications progress towards resolution. The Tribunal and practitioners should seek to maximise the potential use of conferences for this purpose.

Secondly, there is no expectation on the part of the Tribunal that every application will be referred to another form of ADR after the conference process. While this may be appropriate for some types of cases such as the compulsory conciliation in the workers' compensation jurisdiction, the general approach is that an application should be referred to another ADR process if it is likely to assist in moving the application towards resolution in an efficient and effective manner.

The Tribunal is keen to ensure that further ADR processes are not simply an obligatory extra step in the process. They will not be appropriate in every

case. The aim of the Tribunal is to use ADR processes to facilitate the early resolution of matters in a cost effective manner. They should not add unnecessarily to the costs of the parties.

That said, the Tribunal and practitioners should be actively considering during the pre-hearing process whether another form of ADR may be suitable to use in a case. For example, it may be helpful to hold a conciliation or mediation to explore the issues in dispute in a matter in the presence of the applicant and a person from the decision-making area of the agency. The potential to settle a matter may be enhanced by having a Tribunal member with relevant subject matter knowledge conduct a neutral evaluation and give an opinion on a particular factual or legal issue that is in dispute.

The ADR Committee has developed a set of guidelines which are designed to assist the Tribunal and parties in considering these issues. The guidelines set out a range of considerations to be taken into account in deciding whether to refer a matter to an ADR process. They also identify factors that may favour a particular form of ADR. We will hear more about the content of these guidelines during the course of this session.

Given their relatively recent genesis, the process models and the referral guidelines are necessarily works in progress, particularly in relation to case appraisal and neutral evaluation. The Tribunal deals with a wide range of matters and a broad range of people. Experience over time will inform the further development of these documents and, in particular, a more nuanced understanding of when particular forms of ADR may be most effective.

To this end, the ADR Committee will be monitoring the use of ADR. This may involve the Tribunal seeking feedback from regular users about their experience of particular types of ADR. Comments and suggestions are also welcome in relation to the process models and referral guidelines.

In conclusion, it is important to remember that ADR processes can be used for a range of purposes. While the primary goal may be to attempt to reach

an agreed outcome in a matter, ADR processes can also help to clarify and narrow the issues that are in dispute between the parties. Settling a matter in its entirety is not the only possible outcome of an ADR process.

The use of ADR processes can have significant benefits for the parties, as well as for the Tribunal. They can reduce the costs that the parties and the Tribunal incur in relation to a proceeding either by bringing a dispute to a conclusion earlier than would otherwise have been the case or reducing the length of a hearing. They can also provide a forum that is less daunting for some parties than a formal hearing.

I would encourage you to become familiar with the ADR options available at the Tribunal and be open to considering whether another type of ADR process may be suitable in a particular case. It is only by using the different ADR processes that we will develop our knowledge and understanding of the circumstances in which they can be used effectively as part of the review process.

This forum is an important part of ensuring that ADR processes are used to greatest effect at the Tribunal. I would like to take this opportunity to acknowledge and thank our speakers and the Tribunal staff who have been responsible for organising today's session.