Speech to the Australian Disputes Centre's ADR Address 2019

Gun licences, child protection and disciplining doctors

…. What role has ADR to play?

THE HON. JUSTICE JUDY HUGHES

Resolving disputes in ways that avoid some of the recognised disadvantages of adjudication is the core business of a super-tribunal like the South Australian Civil and Administrative Tribunal where I perform my day to day duties. In addition to being charged with the task of adjudicating disputes in ways that are designed to make the law accessible, SACAT and other tribunals like it are empowered and encouraged to use alternatives to adjudication.

Tonight I would like to contribute to an important conversation that is aimed at ensuring that the benefits of alternative dispute resolution are maximised in administrative law processes. Administrative decision-making and review are areas of tribunal work in relation to which it is challenging to articulate the role and contribution that can be made by alternative dispute resolution. Chief Justice Grant of the Northern Territory alluded to this difficult in his address for the ADC earlier this year.[1] I pick up that thread within his Honour's address.

Before I embark, I must issue a significant disclaimer. I hold no ADR qualification. I am not trained and accordingly I claim no depth of expertise in the theory or practice of alternative dispute resolution. But I am a strong supporter of the view that ADR offers some significant benefits to participants and the community that are not offered by adjudication, and therefore I am keen to explore its capabilities.

Further, this is an audience of widely differing experience in ADR practice. I am pleased to have school students, Members of Parliament, experienced mediators and

[1] Chief Justice Michael Grant, "The Interaction between the Courts and Alternative (or Assisted) Dispute Resolution" ADC Inaugural NT ADR Address, 30 May 2019.

judicial officers in the audience. With such a diverse group, I can only promise to disappoint you all in my attempt to offer something to each of you.

Firstly, some parameters need to be put around the discussion.

When I refer to alternative dispute resolution, I am acutely aware that it is a term that embraces a range of activity. Without setting out those activities in a list, one end of the spectrum might be described as a mandated process in which two parties who are well on the path to an adjudication by a court or tribunal are directed to attend at a meeting to determine whether they can resolve their dispute before the adjudicated hearing. A person who is usually an adjudicator takes off his or her adjudicating hat temporarily and conducts discussions with two parties, separately and/or together, in which they share their frank opinions about the prospects of success of each of the parties. The parties are encouraged to compromise in order to avoid the cost of the imminent adjudication process, which might include orders to pay the other side's costs.

The other end of the spectrum, perhaps, is a voluntary process in which the parties to a dispute retain a significant degree of control over the scope of the issues to be resolved. A facilitator provides the parties with opportunities to decide and articulate their desired outcomes, which may bear close or no resemblance to the outcome that an adjudication may deliver.[2]

I am using the term "ADR" in a general, broad sense covering all forms of dispute resolution outside adjudication such as conciliation, mediation, online guided agreements and care circles. Since the 1980s, ADR has been used with increasing frequency to avoid the cost and delay that has been associated with litigation, and to enable people to exert greater control over the terms of the outcomes of their negotiations.[3] The benefits of ADR over adjudication are well-recognised by those present, and will only be briefly canvased. ADR strives towards outcomes that are created or at least endorsed by both parties and not imposed by a third party. The endorsement of the outcome by the parties can have enduring benefits. Such outcomes are more likely to influence future behaviour. They

[2] M Noone, 'ADR, Public Interest Law and Access to Justice: the need for vigilance' (2011) 37 Monash Uni Law Review 57 at 64.
[3] R Charlton, 'Mediation – My First Ten Years: 1982-1992' (2019) 29 ADRJ 189 at 189, 193.

contribute to social inclusion. It is the equivalent to therapeutic jurisprudence in sentencing. ADR can also be cheaper to the parties and the State.

ADR is also recognised as having disadvantages. It is essentially a private activity. The ability of the parties to control the process carries with it a risk that power imbalances will not be addressed. Confidentiality of process denies the public a view of the resolution of wrongs, and produces no jurisprudence to guide the community's conduct.[4]

The other primary concept in this discussion is that of administrative law processes. Similarly, there is a broad range**.** Relevant to this discussion are the applications brought to a decision-making body like SACAT for a decision, sometimes referred to as an exercise of executive power, that relate to an individual but has a public interest dimension. The decision-maker is required to make factual findings and apply a statutory test to arrive at a decision. I am excluding from this discussion the role of ADR in judicial review, to which attaches a further and different set of challenges.[5]

An example of this at SACAT is the determination of an application by a person for the changing of a child's surname against a statutory test that requires that the Tribunal be satisfied that to direct the Registrar of Births Deaths and Marriages record the change of name is "in the child's best interests".[6]

I propose to consider whether this sort of decision is amenable to ADR.
An alternative example of an administrative law process is one in which SACAT performs a review function of a decision already made by a Government authority. For example, the Registrar of Firearms makes a decision to cancel a person's firearms licence. The person disagrees and seeks a review of that decision by SACAT. The Tribunal is required to determine whether the original decision-maker has properly applied the statutory criteria, including whether the licence-holder is fit and proper to hold a licence.

[4] M Noone, 'ADR, Public Interest Law and Access to Justice: the need for vigilance' (2011) 37 Monash Uni Law Review 57 at 65, 79.
[5] For a discussion of this, see Hon Justice Brian Preston, 'The Use of Alternative Dispute Resolution in Administrative Disputes', a paper presented on 9 March 2011 to a symposium on "Guarantee of the Right to Access to the Administrative Jurisdiction".
[6] *Births, Deaths and Marriages Act 1985*, s 25(3).

I propose to consider whether this sort of decision is amenable to ADR. This type of decision is similar to those in the disciplinary arena in which the Tribunal is called upon to make or review a disciplinary sanction with respect to a person who is said to have fallen below the professional standard expected of them in the performance of their regulated employment.

The first of those examples involves an exercise of the Tribunal's original jurisdiction. In other words, the Tribunal is the primary decision-maker. The second occurs in its review jurisdiction, where the Tribunal is re-considering a decision made by another person or body.

What these processes have in common – whether they are in the original or review jurisdiction of the Tribunal – is that they call upon the Tribunal to apply statutory tests and reach outcomes according to law and, it is to be hoped, in accordance with the principles of good administrative decision-making.

In order to ascertain how ADR can contribute to administrative law processes I propose to consider some of the obvious challenges, and see whether and how they might be overcome.

As a spoiler alert, though, I observe that a challenge to reaching a final resolution in an ADR process is a party's fixed view. Dislodging fixed views is perhaps one of the key skills of an ADR facilitator. Unrepresented individuals can find it difficult to conceive of a fact-finding body reaching a set of facts that is different from the propositions that the person believes to be true. One of the suggestions that I make today is that in a process involving an individual and a public official, the additional challenge lies in dislodging from the public official the idea that the process for reaching an outcome might be different from that the official contemplates.

ADR performed by an adjudicating body is usually a limited sort of ADR

The first matter to recognise is that most administrative law disputes relate to rights that arise under legislation, and are challenged under legislation. This means that the freedom of the parties to create their own solutions is limited.

Contrast the change of name application and the gun licence cancellation with a dispute between neighbours over an overhanging tree. A tree dispute could potentially be resolved in an infinite variety of ways, limited only by the will and creativity of the neighbours. A dispute about an administrative law decision tends not to be amenable to such creativity because one of the parties, the decision-maker, is limited in the actions it can take by the functions it is required to perform under legislation. The legislation is also likely to limit the sorts of outcomes that can be reached.

In relation to our example of whether a child's name should be changed, the dispute has already been framed in a very specific way. The applicant can only achieve the outcome he or she wants by persuading the Tribunal to making an order to change the child's name.

Not only has the dispute been framed in quite a binary way, if the ADR is provided by the Tribunal, it is constrained by legislation.

The *South Australian Civil and Administrative Tribunal Act 2013* provides for conciliation and for mediation[7]. Conciliation entails a Tribunal Member or delegated officer of the Tribunal conducting a confidential conference of the parties. After the conference the parties may seek to have any agreement reached between them converted into orders by the Tribunal, or if no agreement has been reached, they may seek an adjudication. What has been said at a conference, which is not recorded, is not admissible in the adjudication.[8]

Mediation under the Act entails a referral by the Tribunal to a person outside of the Tribunal to conduct a conference at the parties' cost, under a framework that is similar to that of conciliation. Importantly, in both cases, where the parties wish to have any agreement made the subject of an order of the Tribunal, the Tribunal[9]:

> (a) must not accept a settlement that appears to be inconsistent with a relevant Act; and
>
> (b) may decline to accept a settlement on the basis that the settlement may materially prejudice any person who was not represented at the conference but who has a direct or material interest in the matter.

[7] Sections 50 and 51.
[8] Sections 50(10) and 51(11).
[9] Section 50(11).

Jurisdiction

In *Stephenson v Return to WorkCover Corporation of South Australia*[10], the Full court recently observed that although the South Australian Employment Tribunal was empowered by the now repealed *Workers Rehabilitation and Compensation Act 1986* SA to conciliate a dispute that is an enlargement of the dispute that the parties have commenced for adjudication, the parameters of conciliation are not entirely at large. The Full Court determined that a consent order entered by the Tribunal following a conciliation must be one that is within the text and structure of the Act.[11]

A tribunal's ability to resolve an administrative law issue by ADR is constrained by its establishing legislation. A tribunal can do no more than the Parliament says it can do. If it strays outside those boundaries, its orders may be invalid. But further, a tribunal is arguably constrained in its choice as to the scope of the disputes it attempts to resolve. Depending on its establishing legislation, if it were to offer to resolve matters beyond the jurisdiction it is conferred for adjudication, it is open to an argument that it may be applying resources unlawfully.

Assuming that a matter is within jurisdiction, the parties can only conciliate and reach consent within the confines of their legislation. In relation to a change of name application, an applicant can only hope for orders that are not inconsistent with the *Births, Deaths and Marriages Act 1996* (SA). The Tribunal will not make an order that is inconsistent with the child's best interests, and it may have to undertake some level of enquiry of the parties following a conciliation, to ensure that it is satisfied of that.

In relation to whether a firearms owner's gun licence ought to have been cancelled, the Tribunal is constrained in its orders to those which are not inconsistent with the *Firearms Act 2015* (SA). The Tribunal therefore retains a role that significantly erodes the parties' ability to reach their own settlement, if they seek to have that settlement reflected in a Tribunal order.

[10] [2019] SASCFC 89.
[11] [2019] SASCFC 89 at 12 [44].

I have not identified any judicial consideration of the circumstances of that particular phrase, though the Chief Justice's discussion in *Stephenson v WorkCover Corporation* is instructive, noting that it may yet be the subject of further consideration in the High Court.

It is evident that the type of ADR process that is available by a tribunal to parties to an administrative law decision is at the "merits appraisal" end of the spectrum, and not the "creative solutions" end. But I am not convinced that this is sufficient reason that ADR should be side-stepped in these processes, simply because it may not be able to achieve the creative, party-led version of ADR. There can be a value to the parties "eyeballing" each other. That can lead to revelations about underlying aspects of the dispute that may be able to be responded to by the other party. Whether or not that reveals a dispute that is outside the tribunal's jurisdiction and how far the ADR facilitator can take those threads of the dispute, given the role that has been assigned to them under the legislation, will differ from matter to matter. But certain types of administrative law process routinely throw up issues that are not wholly expressed by the administrative law decision that has been made. In freedom of information matters, for example, it is often the case that it is not the information that is sought, but some other outcome that the applicant has chosen to pursue through a freedom of information application. In a change of name application, the ADR process may be the catalyst for some other negotiation between the applicant and the respondent regarding their roles as the child's parents. As indicated earlier, the constraints on the ADR process may be such that that these other threads of dispute cannot be pursued but a skilful facilitator, equipped with information about the constraints on them and where the parties might go next, could achieve outcomes that the parties seek. In my view, therefore, there will sometimes be a side-issue running alongside a seemingly dichotomous dispute between a decision-maker and the affected person, and it may be valuable to enable that to be explored within the limits of the requirement to arrive at outcomes that are not inconsistent with the relevant legislation.

It will not always be the case though, that there is scope for one or both parties to have an epiphany. It is quite likely that the gun-owner wants his or her gun licence so the firearm can be used. Not all matters lend themselves to creative solutions.

I want to turn now, to the arguments about whether exploration of the scope and solutions in an administrative law process should be undertaken and consider the good

arguments that exist as to why it is appropriate that there be some caution in using ADR in relation to administrative law matters.

Confidentiality

The ability of the parties to keep confidential their discussions in an ADR process, and not to be held to the positions advanced in those discussions in any subsequent adjudication, is a significant barrier to the use of ADR in administrative decision-making processes**.**

One of several essential elements to good administrative law decision-making is transparency. To the extent that the decision requires conformity to legislative requirements by a public official, it is important that the public and public authorities with an oversight function can question, probe and analyse the process. Indeed, this goes beyond the mere principle of enforceable rights. If a public official records his or her processes, those records are liable to be compelled by an authority with a review or oversight role such as an ICAC or parliamentary committee or a court. The documents might be subject to freedom of information. The tension between a legislative right not to yield up such documents, as is often contained in legislation that creates ADR processes, and other legislation that confers rights on bodies such as ICACs to compel, or rights that vest in bodies such as parliamentary committees, is a real and complex one.

The way in which this is likely to play out as a barrier to the use of ADR is in a reluctance on the part of public officials to agree to participate in processes that are said to be confidential. Such officials are likely to be unable, or uncertain as to whether they are able, to make promises of confidentiality. They may even be confident that they cannot.

That is capable of resolution in my view. Rather than blanket undertakings of confidentiality, a narrower undertaking concerning reliance in any adjudication on the assertions made during the ADR process should suffice to confer the freedom needed by the parties to make concessions as part of exploring potential outcomes. The parties will also need to bear in mind that the Tribunal may require information from them in order to make an order in terms proposed by the parties.

The decision is either right or wrong and in any event, it has been made

There is likely to be a more fundamental objection underpinning a public official's objection to engage in a confidential exploration of options in ADR. That objection arises from the idea that if the public official entertained the possibility of an alternative decision

to the one that had been made, that decision ought not have been made until the alternative had been ruled out. This can be illustrated with an example.

If the Nursing and Midwifery Board has formed the view that a nurse's conduct in accessing her neighbour's medical records at the hospital at which she works, when she was not providing care to the neighbour, constitutes professional misconduct, the Board's view may be that this conclusion is not amenable to ADR. If the decision was not properly reached, that outcome should not be revealed in ADR. It should be revealed by an adjudication in an open hearing. If, on the other hand, the decision was properly reached, it would be wrong to deviate from it by private negotiation. This is because the legislature has conferred on the Board the role of gathering the necessary evidence and making an appropriate decision. An appropriate decision is one that takes into account the sorts of things that the affected person will say in an ADR process, and has presumably already said when they exercised a right to make a submission about the proposed decision before it was made.

There is some force to this argument.

SACAT's enabling legislation sets out some of those principles[12] as being:

- Independence in decision-making
- Natural justice and procedural fairness
- High-quality, consistent decision-making
- Transparency and accountability in the exercise of statutory functions, powers and duties.

But it need not lead to a blanket opposition to the use of ADR in respect of decisions made by public officials. Often not all of the evidence is available when the decision is made. The nurse may have been provided with an opportunity to respond in writing to a proposed decision. The nurse may not have responded. She may not have conveyed all of the things that are advantageous to her by way of an explanation. An ADR process is an opportunity to explore these things. And it is often an opportunity that is far less forbidding

[12] SACAT Act 2013, s 8(1).

than an interview or an adjudication. This is particularly useful when the affected person is unrepresented or vulnerable in some way.

In some cases – perhaps many - the public official will have no "room to move". There may be uncontested evidence of an event which disentitles the person from the licence or job. For example, the person may have been convicted of an offence which the relevant legislation says means that they are not entitled to have a licence. The affected person may misunderstand the lack of discretion that the public official has. It is difficult to see the function of ADR here except to explain that fact – a matter that could equally be done in a directions hearing. But where there are disputed facts or where there is a discretion, there may be an argument for enabling an ADR process to go ahead to explore whether there is any decision other than the decision that has been made, that could meet the needs of both parties.

A decision-maker on a review may also consider that they are *functus officio* – the term that encapsulates the notion that their role has been fulfilled and the issue now cannot be revisited by that person. It is for that reason that the SACAT Act and legislation establishing other similar tribunals contains a power on the part of the Tribunal to invite a decision-maker to reconsider his or her decision at any point in a proceeding.[13]

These disputes have a public interest component not amenable to private agreement

One of the most significant barriers to the use of ADR in the sorts of processes I have identified above is the argument that they are inherently unilateral functions. The content of administrative law decisions cannot be traded or negotiated.[14] A person invested with responsibility to make a decision affecting another person's rights makes such a decision. It has been performed in accordance with the statutory requirements, including any exercise of discretion that may attach to the decision-making process. That function is exercised lawfully or not, as the case may be. The process for the decision-making has been established in order for the community to be assured of the lawfulness and appropriateness

[13] The Hon Justice Garde, former President of VCAT, signalled this as a contributor to the increased amenability of administrative review to ADR process in his AIAL address of 26 February 2014 entitled 'Alternative Dispute Resolution – Can it work for administrative law?'.

[14] N Kinchin, 'Mediation and administrative merits review: An impossible goal?' (2007) 18 ADRJ 227 at 232 citing P Green, 'Mediation and public Law' (1997) NZLJ 407 at 407.

of the decision. That is usually because although the decision affects one person directly (the gun owner, the nurse, the child), it also affects the community and some principle of community protection or interest is at stake. Unlike the dispute about the overhanging tree, there is a public interest issue at stake.

Penalties are a special case

The courts have determined that the imposition of a penalty is a matter for the Court, not the parties. Disciplinary sanctions have the same relevant characteristics as criminal penalties. In *R v Honeyman*[15], the Full Court of the Supreme Court of South Australia recently restated the principles that it had laid down in *R v Nemer*[16] in which the Court said:

> In sentencing an offender the court must act according to law. The court must reach its own conclusion on the factual basis on which sentence is to be passed, and must exercise its own judgment and discretion in arriving at the appropriate sentence. As has been said, the court exercises its power and makes its decision acting in the public interest. The Director of Public Prosecutions has a duty to assist the court in the sentencing process. In the discharge of that duty the Director puts submissions to the court, but those submissions are merely matters to be considered by the court, to be given such weight as they deserve. The court is not bound in any way by the submissions of the Director, nor is the Director's attitude to a given case a matter that should influence the court: The court must make its own decision, acting according to law and in the public interest. ***In particular, the court is not bound by any agreement or arrangement reached between counsel for the offender and the Director in the course of the sentencing process. The court's sentencing discretion is to be exercised in the public interest; it cannot be fettered by a plea bargaining agreement.***

What we can take from this is that in an administrative law process the tribunal will not merely endorse the parties' proposed resolution of the matter. The Tribunal in its original or review jurisdiction must fulfil its role and reach its own decision. Such an order is not properly described as a 'consent order' because it is not a record of a contract between the parties given enforceability by the tribunal's endorsement. I commend you to the discussion of this by the Chief Justice in *Coast Protection Board v Carramatta Holdings Pty*

[15] [2019] SASCFC 24.
[16] (2003) 87 SASR 168 at [28]-[29] (Doyle CJ).

Ltd[17]. It is an order of the Tribunal that is made on the basis that the parties' proposition is consistent with the legislative requirements and the Tribunal's independently reached decision as to the proper order to make.

Voluntariness of participation is questionable in the face of a definitive outcome

A central concept of ADR is that it is a voluntary process. Even though there is within the range of ADR activities, a "compulsory conciliation", the closest it comes to compulsion is the obligation on parties to use 'best endeavours' to reach an agreed outcome before referral to hearing. Where two people have a dispute over an encroaching tree canopy, there is significant scope for the parties to approach the resolution of their dispute in a voluntary way. Administrative decision-making and review, on the other hand, does not so easily fit that template. If a teacher's registration has been suspended for misconduct, there is an outcome already. One party has already imposed its decision. There is less scope for the teacher and the decision-making Board to approach the question of the appropriate response to the teacher's conduct in a voluntary way. Even where the decision is the subject of an application for a review, the adjudicative process has been triggered and the voluntariness of any subsequent attempt to resolve the matter has been severely compromised. An adjudicated decision looms.

However, if the parties are open to revisiting the decision, an adjudication is not inevitable. Depending on the breadth of the ADR mechanism and the jurisdiction of the decision-maker, the range of possible outcomes may be considered in an ADR process.

I venture to suggest that the agility of the officers of the decision-maker to consider alternatives and quickly revisit decisions based on the new information that may come to light during an ADR process, is perhaps the real barrier to success. It will take an adept facilitator or conciliator to assist a decision-maker to be equipped to revisit a decision during a one or two hour ADR process, when that decision may be the result of several approval processes and legal advice, back in the office of the decision-maker.

[17] (2015) 122 SASR 409.

Success in practice

SACAT has recently assumed responsibility for a raft of disciplinary jurisdiction and equal opportunity matters. The latter have had a strong history of successful resolution through ADR and there is no reason to think that this will change. In fact, I am pleased to say that a couple of quite protracted equal opportunity matters have recently settled in conciliation. The experience is that equal opportunity matters, notwithstanding that they have a public interest element, are often able to be resolved by orders proposed by the parties and made by the Tribunal.

Conclusion

The forum for challenging many sorts of administrative law decisions is a tribunal created by statute. Some forms of ADR are never going to be achieved by a tribunal. A tribunal is bound by its enabling legislation and even if that is broadly cast, it is likely that the parties will not be empowered to completely control the scope of their discussions. That scope is likely to be limited by the Tribunal's adjudication jurisdiction or something close to it.

Further, with an adjudication looming in the near distance, it is arguable that any tribunal ADR lacks some of the true voluntariness that makes ADR valuable. The erosion of the benefit is increased when the ADR process is subject to mandated time-frames. Those time-frames may of course be contributing to a separate, important aim of a tribunal, namely to provide a fast and cost-effective process for the parties.

But, with those qualifications acknowledged, it is my view that ADR can, and should, play an important role where an administrative decision is sought to be made or reviewed by a tribunal. The need for transparency and accountability in decision-making where the public interest plays a role is not a complete barrier to such processes. There is scope for exploration by the parties as to whether the decision has been properly made or is necessary.

Just as ADR practitioners have been putting their skill to the task of dislodging individuals from their attachment to the facts as they see them, those practitioners, when dealing with administrative law processes, will need to put that skill to the task of dislodging

public officials from their attachment to a process that they may consider is the one required to reach an outcome under the relevant legislative framework.