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Working it out

Your guide to dispute resolution

Contents

What is ADR?

1

Alternative dispute resolution (ADR) includes a range of different ways of settling disputes. In ADR, an impartial person, such as a mediator, helps people involved in a dispute to resolve their issues. ADR is an 'alternative' to going to a court or tribunal and having the outcome decided by a judge or magistrate. ADR is also sometimes known as 'appropriate dispute resolution' because such processes are no longer considered an alternative, but are often the best, most appropriate way to resolve a dispute.

Most courts use what are called 'adversarial processes', involving intense competition between lawyers representing clients. General rules of law and accepted legal principles are applied to reach a decision or settlement. The emphasis is on finding a winner rather than identifying what people want out of their dispute. In ADR, you take control of your dispute and decide how you want to deal with it.

ADR has become a part of some formal legal processes. In certain cases it can be compulsory for people to attend ADR sessions when their case goes to court, although it is not compulsory to settle the case through ADR. For example, the Administrative Appeals Tribunal may refer a dispute to ADR before it can be heard in court. In other cases ADR is optional. For example, neighbourhood disputes about a fence or noise

tend to be dealt with by agencies that use voluntary mediation.

ADR is not suitable for all disputes. For example, if one person has a source of power over the other, this may make fair and reasonable negotiations difficult, even with a mediator present.

Important terms

'Dispute resolution practitioner' or mediator

A dispute resolution practitioner is an impartial person who helps the people in a dispute to resolve it. For simplicity, in this book the term 'mediator' is used even though the person working with you may have another title, such as conciliator or arbitrator. These roles are similar, and where there are important differences in procedures these are explained in the text.

Party or parties

This refers to you and the other person or people you are in dispute with. For simplicity, this booklet describes disputes where there are only two parties. In practice, ADR can be used in disputes involving any number of people.

Mediation

An independent dispute resolution practitioner, a mediator, may direct or be involved in the dispute resolution process in various ways, for example by talking to each of the parties separately, but they do not suggest or impose a solution on people. Their main role is to help the parties discuss the problem in a reasonable way to allow them to find their own solution. Mediation may be either voluntary or compulsory.

Conciliation

Conciliation is similar to mediation, except that a conciliator can also give advice. A conciliator might suggest a way to settle the dispute, and even the terms of a settlement. Conciliation may be more formal than mediation, but it can still be voluntary.

Arbitration

An arbitrator imposes a solution on the parties. It is like the parties hiring a judge to listen to both sides of the dispute and then make a decision for them. This booklet does not deal with arbitration in any detail; it is much the same process as in a court and is only called 'alternative' because it happens outside the court.

Preliminary, pre-hearing or compulsory conferences

These are used by courts or tribunals to try to resolve some disputes, and you and the other party can be ordered to attend. Even if there is no settlement during the conference, you may be able to at least clarify what the main issues are in the dispute. The court officer who conducts the conference will not make a ruling but may suggest a solution.

Is ADR right for you?

You may have complained about someone, or someone may have complained about you. Each of you may feel the other started the dispute. You might think that the person who complained is simply a troublemaker. You may be reluctant to spend time trying to resolve the dispute but, if a complaint is made, the dispute is your problem too – whether you like it or not. You need to resolve it the best way you can.

Before we consider the advantages of ADR, it is worth remembering that ADR is not always the right choice. ADR usually requires you to make some kind of compromise. One of the parties may fear that they will be bullied into an agreement. Also, some issues (those involving violence or those that might lead to law reform) concern people other than the disputing parties and are probably better heard in a public court hearing.

The advantages of ADR

ADR saves time and money

Settling a dispute through ADR is generally cheaper than going through the courts because you do most of it yourselves. ADR services are often provided free (although hiring a private mediator can be expensive). ADR can also be quicker than the legal process because the two parties control the negotiations, and do not have to wait for courts and lawyers.

ADR is flexible and informal

ADR processes are less formal than court, so you can negotiate matters that would not be dealt with by courts, such as changes within an organisation. For example, a complaint about hospital charges may be resolved by a change in billing policy.

ADR puts you in control

Although you may be represented by a lawyer, during ADR you largely run the negotiations. You work out an agreement rather than having a decision imposed on you. There are fewer rules and procedures in ADR, which means that the process is simpler and less threatening.

ADR is confidential

The acts of parliament controlling ADR services require confidentiality so that people can negotiate openly and safely. This means that you must not reveal anything said during ADR negotiations to anyone outside the process. The mediator and anyone else present during negotiations (such as relatives or advisers) also have to keep all information used in the discussions confidential.

If you are concerned about the confidentiality of some information you wish to use during negotiations, discuss this with the mediator. If you are using a private mediator, they should provide a mediation agreement that includes a confidentiality clause at the start of the mediation.

(*See* 'Setting ground rules', page 15, for suggestions about protecting confidentiality.)

ADR may help you deal with your emotions

People can sometimes feel very emotional about the issues in their dispute. You may feel angry, anxious or fearful, and the dispute can affect your work, health and relationships. It can also take up a big part of your life. ADR allows you to deal with this emotion far better than in more formal court hearings, because you can talk about your dispute in your own way. There are usually no rules about what the parties can say during the negotiations, as long as it is relevant to the dispute, respectful and reasonably polite.

ADR can help you maintain relationships

The other party may be a neighbour, a business client, your employer, or someone else with whom you will have an ongoing relationship. You are much more likely to be able to maintain the relationship after a relatively informal ADR process than after a battle in court.

ADR helps both sides avoid embarrassment

During ADR you are encouraged to find the best solution without trying to harm the other person. ADR allows for differences to be respected and for you to understand other points of view. For example, if an employer has made unintended yet demeaning comments about an employee's racial background, an ADR settlement could be negotiated which requires the employer to apologise and take cultural awareness training. In this way a humiliating public court hearing is avoided.

ADR is time well spent

Some argue that, if you are going to end up in court anyway, ADR will waste your time. However, for most ADR processes you will need to gather information to support your case, just as you would do to prepare for a court or tribunal hearing. So it is time well spent, especially as the chances of settling your dispute in ADR are very high.

Assessing your dispute

2

Sometimes people have unreasonable ideas about what results can be gained from ADR. To help you think about what would be a realistic and fair outcome, there are several important questions you need to ask yourself before and during any negotiations.

Will you negotiate?

Both parties need to be willing to negotiate. There is little point starting any negotiation when one or both of you have made up your minds beforehand and are not ready to consider other points of view.

If neither of you is willing to negotiate, a mediator may be able to change this but you need to think carefully about whether it is worth continuing, and possibly seek outside advice. Even if it seems you are both unwilling to negotiate, it might still be useful to talk, just to clarify some of the points in dispute before you begin other legal proceedings.

Negotiating in good faith

Both parties need to negotiate in good faith.

The features of good faith negotiation include:

- prompt responses to the other person
- doing anything you undertake to do promptly
- making sure that the people who represent you have the authority to negotiate meaningfully or settle the dispute, otherwise you are wasting the other person's time.

Negotiating in bad faith

Negotiating in bad faith can make relationships worse. If one or both of you is not prepared to show good faith then perhaps you are not ready for ADR. You may be negotiating in bad faith if you do any of the following without reasonable explanation:

- refusing to negotiate or agree on comparatively trivial matters such as the venue for a meeting
- postponing meetings or other negotiations unnecessarily
- using ADR as a 'fishing expedition', to find out the strength of the other party's case, without any real intention to negotiate
- refusing to honour an agreement
- using ADR as a delaying tactic
- changing position just as an agreement is about to be reached
- contacting the other person directly without the mediator's approval
- seeking publicity about the dispute without the other person's approval.

There is no point in negotiating without a clear and carefully considered outcome in mind. Take the time you need to decide what you want, otherwise you may be rushed into agreeing to a settlement you later regret.

Do you know what you want?

Ask yourself what you hope to achieve. This may be:

- a formal apology
- to prove a point of principle
- to ensure this sort of thing never happens again
- a good financial result
- to settle the dispute as quickly as possible so you can get on with your life
- to preserve the relationship with the other person in the dispute.

Make a list of what you want, in order of importance, and then talk it through with a trusted adviser. Be prepared that the outcome you want may change once you start ADR and hear more from the other party.

Once you have decided what you want out of ADR, remember that there is a difference between your legal rights, which courts deal with, and your interests (what you want), which generally can only be dealt with by negotiation in ADR.

Have you assessed your argument?

Believing you are right is not the same thing as having a strong argument. It is very important to assess your position so that you can be realistic about the best possible outcome. It may help to do this with your advisers and the mediator.

Throughout the negotiations you need to step back from the dispute, put your feelings aside and think carefully about the strength of your position. It is not in your interest to argue a point without a good reason.

If you understand the strength of your position you will be better placed to negotiate than if you simply rush in without thinking. You will also be clearer about how much you are willing to compromise.

How strong is your argument?

You will need to gather and carefully assess the available information and evidence (for example, papers, records, photographs, receipts or witnesses, including opinions from experts). You must then decide what evidence is relevant to your dispute, possibly with the help of an adviser.

Because the rules of evidence that apply in courts do not apply in ADR, and because of the confidential nature of ADR, any information or evidence that directly relates to the dispute can be discussed. The fact that you may not be able to use the same material or evidence in a court or tribunal does not mean you can't use it in ADR.

Remember that whether your argument is strong or weak, it is not only legal arguments that help resolve a dispute in ADR.

Because ADR is flexible, it often allows for strong moral or emotional arguments (such as, 'I never realised you were that upset…'), as well as logical or rational arguments, even if they may not be allowed in a court.

If you are not sure whether you can assess your argument unemotionally, ask someone you trust to help you, or consult your lawyer.

Using witnesses

Some ADR processes allow the use of witnesses or experts. If you are relying on witnesses or experts to support your position, you need to assess their evidence or opinions carefully and unemotionally. If their evidence is unlikely to impress a court this may weaken your position during ADR negotiations. (*See* also 'Experts', page 33.)

Will you compromise?

If you are unwilling or unable to compromise, then ADR may not be suitable for you. Any settlement will usually involve some compromise by both parties. If you do not wish to compromise, your dispute might be better heard in court.

Dealing with emotions

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Most people involved a dispute will become emotional during the negotiations. The level of emotion will depend on many factors, such as the relationship between you and the other person, the subject of the dispute and your personalities.

The emotional venting of the problem or complaint is often an essential part of the resolution of a dispute. It may be a part of the resolution and should not be dismissed as 'just being emotional'.

Expressing emotions

During ADR you should feel free to express your reasonable feelings and opinions. A mediator will encourage people to express their feelings. However, if the other person is very loud or aggressive and you feel intimidated by their behavior, you could:

- tell the mediator how you are feeling, preferably when the other person is not present
- write a note to the mediator during the meeting or
- ask for a short break in the meeting.

What if I become too emotional?

Even if your feelings are justified, angry behaviour doesn't help the negotiations. You can explain how the dispute has affected you, but try not to insult the other party. If the people around you advise you that your level of anger or emotion is unreasonable, you may need to think carefully about how objective you are about the dispute.

You could be so overcome by anger or emotion that you cannot express yourself clearly during negotiations. If you feel you need help controlling your emotions, or if the other person objects to the level of emotion, then you may need to:

- take time out from the meeting, or ask the mediator to adjourn the meeting, while you collect your thoughts
- ask the mediator or other people involved in the negotiations, such as your family, whether you are being reasonable; they may be able to help you explore why you feel the way you do
- explain why you are being highly emotional (especially when the other person is asking what all the fuss is about); this may help validate your point of view
- involve a mediator if you are negotiating without one
- ask an appropriate person to represent you during any negotiations that could result in you becoming too emotional.

Will you meet or use shuttle diplomacy?

During most ADR processes you are usually expected to meet to discuss your dispute and negotiate. Sometimes it is possible, if you both agree, to negotiate through the mediator without the need for a meeting. You put your argument to the mediator who puts it to the other person. The other person then responds, again through the mediator. This is called shuttle diplomacy. Although this is not as effective as a meeting, it may be your only option for continuing the negotiations.

With this arrangement it is best to put any complicated arguments to the mediator in writing, to avoid confusion. The mediator can advise you on the advantages and disadvantages of the different processes.

Negotiating without a mediator

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Sometimes it is not necessary to involve a mediator because, with a little guidance and common sense, people can resolve disputes themselves. Certain ADR services require you to try to resolve the dispute yourself first. But the more serious or complex the dispute, the more likely it is that you will need help.

What help is available?

Some workplaces have established procedures for dealing with disputes. Some ADR services offer dispute counselling to help you through the process. First, try to agree how the negotiations will be organised. This needs to be done with tact and patience because if you cannot agree on this, you are unlikely to get any further.

Setting ground rules

Whether you decide to set up a meeting, or to negotiate in another way, you need to agree with the other party the rules for negotiation. For example:

- who can attend meetings?
- what is the role of each person present?
- where should meetings be held?
- how will you decide what behaviour constitutes bad faith?
- when will you withdraw from the negotiations if, for example, you perceive that the other person is negotiating in bad faith? It is best to make this decision in advance so that you can cope better if negotiations get out of hand and you get flustered.

- what conditions apply to the negotiations? A confidentiality agreement could be prepared, possibly with legal help and signed by both parties, or you could agree that the negotiations are 'without prejudice', which means they cannot be used in court.

What if one party is too emotional?

As a mediator will not be involved, you need to consider how you will respond if a party becomes unreasonable and difficult. If people express their feelings at the beginning of a meeting, ADR negotiations often run more smoothly. You need to be prepared for this and for things you may not wish to hear. Give each other time to speak before you reply. However, if one of you is likely to become so emotional that negotiations become too difficult, it is better to involve a mediator.

What if one party has trouble communicating?

If one of you does not speak English well or has some kind of disability that affects communication, you may need a professional interpreter to make sure communication is clear. An interpreter who is a friend or relative may be too close to be acceptable to both parties.

Should you communicate in writing?

If you are writing to the other party, consider whether you can communicate clearly and avoid the temptation to express your anger or frustration. Some people prefer to communicate in writing but it can cause problems. What you write can be misunderstood, read with a closed mind, or not even read at all. However, as a starting point, it can be useful to clarify the points of both parties by writing them down.

What if one party has a lawyer?

If the other party is represented by a lawyer, or has one advising them, you will need to think carefully about seeking legal advice yourself. (*See* 'Ensuring equal and fair negotiations', page 24.)

Settlement

If you reach a settlement or agreement and the parties do not sign the written agreement together, you will need a witness to each of the separate signatures. A written, signed and witnessed agreement is legally stronger than a verbal one and leaves less room for misunderstandings. If you have a witness, do not forget to explain to them about any confidentiality or other conditions of the settlement.

Do you need a lawyer?

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In general lawyers perform three roles in ADR:

1. Adviser – advising you so you can represent yourself
2. Representative – acting on your behalf in negotiations
3. Drafting terms of settlement.

Not all ADR services allow lawyers, or only do so under certain circumstances, so you may need to check with the mediator. Some ADR services discourage legal representation in meetings; others only discourage lawyers from speaking on your behalf.

Many lawyers understand and respect the ADR process and are perfectly comfortable with its rules. If your lawyer is not, you may want to change lawyers, especially if you genuinely wish to reach a settlement using ADR.

Some lawyers also have mediation training and can therefore act as an impartial mediator. In this role they must not provide legal advice.

When do you seek legal advice?

Generally you should seek legal advice only when the negotiations involve legal issues. The mediator may explain when legal advice is useful. You are free to seek legal advice at any stage during ADR; the decision is yours and you will be paying any legal fees.

There is a difference between legal advice and information about the law. If you only need some general information you may not need to speak to a lawyer. For example, in a planning

dispute, you might just need to know your local council's procedure for assessing planning and building applications. Council staff can supply this information, as can a conciliator (though not a mediator) if they have the relevant knowledge.

Lawyers are trained to identify legal issues in dispute, so you may want a lawyer to help you decide the issues for negotiation. They may also suggest certain questions to ask the other person. A lawyer's questions, however, can be legalistic and might antagonise the other person. You therefore need to check your lawyer's work and think carefully about its effect on the other person and the ADR process.

You may find that the other person has a lawyer in the background during the negotiations, because the mediator has not allowed them to have the lawyer speaking for them. If you find the other person is represented and you feel disadvantaged, raise this with the mediator at once.

Finding a lawyer

It is important to find a lawyer who will do what you ask – someone you can get along with and trust. You can 'shop around' for a lawyer and you do not have to stay with the first one you try.

If you decide to seek legal advice, find out which solicitors are expert in the area of law involved in your dispute. Try to get a personal recommendation. The Law Institute of Victoria has a referral service to help you find a suitable lawyer (first 30 minutes free). Free legal advice is also available through Victoria Legal Aid and community legal centres – *see* the services and resources section, page 43. Note: Legal aid assistance is generally limited to initial advice for the kind of disputes dealt with by ADR, except for family law disputes.

Dealing with your lawyer

Always give clear, concise instructions about what you want your lawyer to do for you. Sometimes written instructions are best. If you give open-ended, vague instructions your lawyer might not do what you want or might do more and charge you for the extra work.

If compensation is offered during ADR, and your lawyer advises you that you would get more in court, ask the lawyer what amount you could expect after all the fees, costs and expenses have been deducted from your compensation. If you are not satisfied with the answer, seek alternative advice.

Using a mediator

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Mediation services may be delivered in different ways: there is a wide range of ADR services, and mediators have different styles and levels of expertise. Nevertheless, it is reasonable for you to expect your mediator to follow certain rules.

The role of the mediator

The mediator's role is the same whether the process is voluntary or compulsory. The mediator helps you and the other person to negotiate. They are impartial and do not decide the outcome, but will do whatever they can, within reason, to help you to resolve your dispute, including:

- helping identify the issues in dispute
- organising the venue and the meetings
- helping you prepare for the meetings
- conducting the meetings
- ensuring equal and fair negotiations
- helping you make decisions during negotiations
- providing general legal information or other technical advice.

Helping identify the issues

The mediator will encourage and help you both to identify the issues, usually during the initial part of any mediation session. This may be an easy process when the issue is completely clear, such as a fencing dispute, or it may be the longest and most complicated part of the whole mediation process.

If someone has an unclear or hidden agenda it can confuse the real issues for negotiation. For example, at the beginning of negotiations, a sacked worker who claims they have been unfairly dismissed says they want their job back. Later, the sacked worker says they want compensation instead. The employer, having prepared for a reinstatement claim, is caught unprepared.

Even if you try to establish the issues early, new issues can come up during discussions. If so, the mediator should stop the proceedings and make sure you agree what the new issues are, and how they should be addressed.

Organising the venue and meetings

The mediator may consult you both on a suitable venue for the meeting. They will also check other arrangements such as wheelchair access, car parking, visual aids and room bookings. A court or tribunal will usually provide a venue and will not consult you.

Ensuring equal and fair negotiations

The mediator needs to make sure that neither person feels disadvantaged by the ADR rules and conditions. They must also make sure that one person does not try to threaten or intimidate the other.

Equal power and equal treatment

A mediator should treat you both equally. If there is an imbalance of power between you, the mediator needs to ensure the weaker person is not disadvantaged. For example, one person could overpower the other because they have more money, knowledge or status in the community, or because they have more experience speaking or negotiating.

If the mediator cannot compensate for the disadvantage, mediation may not be appropriate. However, any disadvantage in ADR will usually be a greater disadvantage in a court. If you believe there is a power imbalance it is important that you tell your mediator. Mediators are trained to recognise and deal with cultural differences, and get professional interpreters to help communication, if needed.

Equal advantages

Mediators should make sure that no one is disadvantaged because they do not have a lawyer representing them, when the other party does. The mediator should make sure that you understand your legal position, including when and how you should seek legal advice.

Mediators should only allow one person's lawyer to take part in the negotiations directly if the other person has agreed to it. Generally, mediators will only allow a lawyer to become involved when legal issues are being discussed or clarified; others may work with lawyers to deal with the issues.

Equal information

Mediators should explain the rules and conditions of the ADR process to other people involved in the negotiations, such as lawyers and family members. They may ask for a verbal or written agreement from these people that they will respect and be bound by the ADR rules and conditions.

Equal dealings

Mediators must resist any attempts by one or both of you to form a relationship with the mediator behind the other person's back, or do anything that appears to compromise their role, such as accepting presents.

Equal support

Mediators should help you to write any communications as clearly as possible, without having any say about what is written or the decisions that went into it.

Equal time

Mediators should make sure you both have time to carefully read and consider documents about the settlement of a dispute and that you have the opportunity to get necessary legal, accounting, technical, planning or other advice.

Helping you make decisions during negotiations

The mediator will do this by helping you identify and explore your choices. It is not their role to give advice or make

recommendations. It is for you to decide at each stage in the negotiations what you are going to do, or how you will respond to the other person. Examples of this type of help include:

- explaining the choices open to you, such as having someone at a meeting who can give you moral support
- explaining when you may need legal advice
- exploring the future direction of negotiations
- making sure that any agreements between the parties are appropriately recorded, for example, by a memorandum of agreement
- recommending that you get legal advice about any agreement reached involving a child or someone who cannot represent themselves.

Where a court or tribunal has ordered you to attempt mediation, the mediator may be obliged to report the outcome to that court.

Providing general legal information or other technical advice

Conciliators (but not mediators) may be able to provide general explanations about the law or technical issues involved in your dispute. They should never give you definitive legal advice even if they are qualified to do so. In some ADR processes they may be expert in some of the issues in dispute, but they should not use their expertise to make rulings or decisions.

When and how to find a mediator

You may need to appoint a mediator, or one may be provided by the court or tribunal that will hear your dispute. In both instances you may still have some say in who they are.

ADR providers, such as those dealing with anti-discrimination, neighbourhood and health complaints, will assign a mediator to you. A court or tribunal will also assign or help you find a mediator where it is compulsory for you to undertake ADR.

You may wish to specify the gender or cultural background of a mediator, although the other person might disagree with you. This could be the first thing you need to negotiate about. The various ADR service providers have different policies on this

issue and you will need to discuss your wishes with them. Some services use 'co-mediation', where two mediators are present at meetings. All services work to allocate mediators so as not to disadvantage anybody.

If you decide to appoint a mediator yourselves, or a court requires you to, you need to agree on who you will appoint and how they will be paid. If you are involved in a compulsory or pre-hearing conference, the person facilitating this conference will be assigned to your case by the court or tribunal.

What to look for in your chosen mediator

Your mediator needs to be someone who:

- is completely honest
- can be supportive but always remains impartial
- is able to help you explore all your choices without trying to influence your decisions
- communicates well with you, and
- is able to listen to you and understand you.

Bias

The mediator must act impartially. Be wary of a mediator who is, or appears to be, influenced by their own values and opinions when conducting the negotiations. For example, if a mediator shows negative feelings towards your behaviour or views, or those of the other person, negotiations will suffer.

You may think that it is to your advantage if the mediator seems to disapprove of the other person. But remember, you are negotiating with the other person and not the mediator. If the other person loses confidence in the mediator and refuses to continue, you have an even bigger problem. You will need a new mediator and negotiations will be more complicated.

Speaking up

It is important to speak up, or ask, if you do not understand something. Do not feel that you will look foolish if you ask the mediator to explain the ADR process or what the other person has said or written.

You have less chance to resolve your dispute if you cannot establish a good relationship with the mediator or if you don't have confidence in them because they have not done a good job. You will need to address the problem – it is your dispute, so you may have to assert yourself.

What if you are unhappy with your mediator?

If you are not happy with your mediator and they are unwilling to address your concerns you may need to approach their superiors. The ADR service provider will have mechanisms to deal with this. You will need to ask about what procedure they follow, as there are no enforceable professional standards or complaint mechanisms specific to ADR services.

If your concerns are not satisfactorily addressed you can approach the commonwealth or state ombudsman (in the case of government agencies), or a legal ombudsman or legal professional body such as the Law Institute of Victoria (in the case of lawyers acting as mediators) – *see* Services and resources, page 43. If they cannot deal with your complaint they will be able to refer you to the appropriate agency.

Sometimes a compulsory or pre-hearing conference is required before you go to court. If the person conducting the conference is also the decision-maker in the tribunal hearing, and you are unhappy about this, you may be able to object to that person. If this concerns you, you need to ask about whether you have a say or not.

What will it cost?

Many ADR service providers have free in-house mediators although a tribunal, for example, will involve fees. Magistrates and local courts provide their own staff to conduct pre-hearing conferences and arbitration. This is a free service.

If you are required by a court to appoint a mediator you will need to pay. Fees vary depending on expertise and experience.

Retired judges, for example, may have higher fees. You have to decide what kind of expertise you need and what you and the other person are willing and able to pay. You then need to shop around, negotiate an acceptable fee and decide who will be responsible for paying the fee. (It is usually split equally.)

If you have a lawyer or other person representing you during ADR, you are responsible for their fees.

ADR meetings

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If you have a mediator, they may require or recommend that you meet the other person in their presence. A meeting is usually the quickest and easiest way for you to make your respective positions clear and then to explore the possible solutions.

There are too many different ADR service providers and processes to cover in detail here. You should discuss with the mediator the details of their meeting procedures so you know what to expect. Many mediators will explain the process at the start of the mediation meeting.

In some circumstances, you may wish to meet the mediator alone before an ADR meeting. This should be acceptable to most mediators and happens as a matter of course in some disputes, such as family disputes. This means that the other person will be given the opportunity to meet the mediator too, so there could be some delay.

Preparation

Be organised. You need to make sure that you are fully prepared and aware of all the relevant issues.

For example:

- what are the main issues for you?
- have you collected all necessary papers and records to help argue your case?
- have you thought about the dispute from the point of view of the other person?

You can prepare with the help of the mediator, a friend or a lawyer before ADR.

You should make and keep photocopies of all the written material you submit to the other person or the mediator. It is helpful to organise your questions and thoughts on paper before any meetings. This will help you to remember to raise all the issues and let you fully express what you want to say.

Who should attend?

There should be no surprises over who attends a meeting. The mediator should negotiate with all parties about who is attending and their role, and make sure everyone knows who is coming.

The following people might be present:

- friends or supporters
- interpreters
- institution representatives
- legal representatives
- experts.

Friends or supporters

Mediators will generally allow you to bring a friend or other support person to meetings as long as the other party agrees. A support person is there to give moral support, not to speak for you, and they need to understand that the meetings are confidential. They might take notes for you and remind you of any issues you forget to raise. Always remember that any decisions are made by you and not your supporter. Be careful who you choose as your supporter; they may express more anger and outrage than you are comfortable with.

Interpreters

People from non English-speaking backgrounds may sometimes need an interpreter. An interpreter can also help with communication when one of the parties has a disability.

The translating and Interpreting Service (TIS) offers interpreters for non-English speakers. This service may be free. Telephone: 131 450 www.immi.gov.au/tis

Organisation representatives

In some situations the other party may be an institution such as a business or a government department. A representative of the institution will need to be present. For example, if you complain about someone sexually harassing you, that person's employer may have to be present. This is because they share liability for allowing the incident to happen. You need to check that the representative has the authority to negotiate an agreement.

Legal representatives

You may want a lawyer to represent you, especially when confronting a large organisation, or an intimidating person. Although you know your complaint or point of view best – and the mediator should make sure that you are not intimidated in any way and are able to express your point of view clearly and completely – you may need some help to present your case well.

Experts

If you are claiming compensation or there are technical issues that need to be resolved (for example, whether a builder has acted negligently), you may wish to consult an expert. You may agree to involve the expert in the ADR meeting to get advice on the issues without the need for a formal written opinion, but you should check the costs involved.

Each of you may also seek your own expert opinions, which you may or may not decide to use during the ADR negotiations. Professional organisations, such as accountants associations, will refer you to members who are willing to provide opinions.

When there are written expert opinions for both parties in the mediation, you or the mediator will need to organise appropriate questions and material to be submitted to the expert. Both parties will have to agree about what is submitted.

The question of who pays the expert needs to be discussed. If one person pays, the other may be concerned that the opinion will be biased. For this reason you may agree to share the cost equally.

Remember that before agreeing to get expert opinion for use in the ADR process you both need to decide whether or not it will be useful outside the ADR process, for example, in a later court hearing.

Unexpected visitors

If the other party arrives at a meeting with someone you didn't know was coming, you can ask the mediator to stop the proceedings and discuss any concerns you may have. If the process is compulsory, you could ask for, or be offered, an adjournment while you organise someone to attend the meeting with you. If the process is voluntary and no agreement can be reached, you need to consider withdrawing from the process.

Beginning

Arriving at the meeting

You may be asked to wait in the same room as the other person. If this makes you uncomfortable ask for a separate room.

Introductions

The mediator starts by introducing themselves and asking everyone else to do so. They will then set out the rules and procedures. They may also explain or restate the conditions for the negotiations, including any relevant legislation or laws. There should also be an opportunity for you to ask questions.

Middle

Once the meeting starts

You will both be asked to give your views of the complaint or dispute, perhaps with reference to a prepared statement. The mediator will then help you to clarify which issues are in dispute and to set an agenda for the rest of the meeting.

How formal and structured the meetings are depends on the approach of the ADR service provider and your attitude. Some people prefer to provide a formal set of questions or issues to be read out. Others prefer an informal discussion, relying on the mediator to keep it on track.

During the meeting

The mediator should make sure the seating arrangements do not give anyone an advantage. For example, one party should not be at the head of a table. You each should have the same opportunities to speak and be addressed in a similar way. Calling one party 'Professor' and the other 'Pat', for example, is not neutral.

The following examples will help you understand how you may feel during a meeting:

- You may feel that you are revealing too much, especially if the other person appears to be less ready to share information.
- You may feel that the other person is going on too much and is wasting your time with irrelevant details about their position and their emotions. However, this may be part of the solution to the dispute.
- If you do not understand something, or you are feeling uncomfortable for any reason, ask a question or stop the meeting so you can discuss your concerns with the mediator. Don't just sit there feeling overwhelmed and sorry for yourself.

Some positive approaches

Positive approaches which can advance negotiations include:

- remaining open-minded, friendly and positive
- respecting the other person's point of view
- using white boards, charts, or other visual aids to clarify technical explanations
- being 'devil's advocate', which can often clear the air. For example, one of you might raise an unexpressed, or opposing argument, which has been at the back of both your minds, by saying something like, 'Let's say for the sake of the argument that there is no settlement, then what would be the consequences?'
- using silence to come to what are often the real or underlying issues in a dispute. For example, there is often a 'crunch' moment during a meeting when some unpalatable

truth has been spoken. The natural inclination of polite people is to comment on an unrelated matter, such as the weather, to ease the tension. The pressure of silence may help the dispute move closer to resolution.

Some negative approaches

The mediator will try to prevent other negative approaches, such as:

- dominating the discussion to intimidate the other person
- 'railroading' the other person by proposing a settlement and insisting on agreement before they are comfortable with it or have a chance to seek advice
- rudeness, such as belittling the other person or sneering at their arguments
- shifting ground, including making extravagant or unreasonable claims so that you can fall back to your real or preferred position while appearing to be giving ground. For example, a builder's client might claim that the building agreement included the builder's offer to provide gold taps, when in fact there was no such agreement and the client just wants the builder to provide taps.
- claiming support from people who you cannot contact
- insisting on a venue for the meeting where the other person will be uncomfortable or feel intimidated
- seating the other party in an uncomfortable physical situation, such as opposite a strong light source, or placing yourself at the head of the table to appear to be chairing the meeting
- using technical or obscure language
- pretending to have a special relationship with the mediator
- bluffing about the consequences of failing to reach a settlement.

End

Walking out

It is important to know if, when and how you can withdraw from an ADR meeting. In most ADR processes, you can choose to stop the meeting at any time. In some situations you may not have the choice of withdrawing. You need to find out about this before any meeting.

After the meeting

An important part of the meeting can be a discussion each of you may have alone with the mediator immediately after the meeting. If only one of you wants to do this the mediator will tell the other person. You may or may not have reached an agreement. Not all ADR service providers encourage this kind of discussion.

Outcomes of ADR

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There are many possible outcomes to disputes. Hopefully you will have agreed on at least some of the issues in dispute, if not a complete settlement. If either of you are still unsatisfied you will need to decide whether to pursue the matter outside ADR.

Settlement by agreement

Here are some examples of steps which you can take to either formalise or enforce your agreement:

- You may have a discussion about all the issues, includes an explanation or an apology, and the complaint is withdrawn.
- You may agree on a solution to one aspect of the dispute, while other aspects remain in dispute. For example, an organisation may agree to change a policy or practice but not agree to pay you any compensation.
- One person may agree to stop doing something which they have been doing, or threatening to do. Alternatively, they may agree to do something.
- One person may agree to pay compensation, or refund fees, or provide something else of value. For example, instead of a payment, the agreement may involve making a building accessible to people in wheelchairs

A written agreement is legally stronger than a verbal one, so you may want to have a written agreement. You may want a lawyer to write or check this document.

When money or something of value changes hands, the payer will usually want the other person to sign a document which stops them from pursuing the same matter in the future

(sometimes called a release document). The payer will normally seek legal help about the wording of this document. The other person may also seek legal help.

A conciliator (not a mediator) should be able to advise you generally on any legal implications of a settlement. Your lawyer will be able to give more specific advice.

Status of agreements

Agreements reached in mediation can be legally binding. If you have any doubts or questions about the legal status of your agreement, talk with the mediator or your lawyer.

If the agreement is binding, you could still end up in court if you or the other person breach your agreement. The person who breaks an agreement may be ordered to comply with it and pay compensation and costs.

Here are some examples of what may happen after the agreement:

- A release document will stop future court proceedings about anything covered by the agreement in the release document.
- If your agreement is broken, it can be enforced by a tribunal or court. For example, if the other person does not remove the window that overlooks your rear courtyard, which they agreed to do in mediation, a tribunal or court may enforce the agreement.
- An agreement reached in ADR within a tribunal or court, such as a planning or discrimination matter, can become an order of the tribunal or court. This may make enforcement of the agreement easier.

Both of you need to recognise that by agreeing to a settlement, such as a compensation payment, the understanding is that you are satisfied. This does not mean the problem, such as an injury or loss, will go away. You will often still have to grieve, and you may have difficulties in coming to terms with the ongoing problem, or feel a sense of anti-climax. No compensation or other settlement will fix this. You may need to seek professional counselling.

If no agreement is reached

You may have withdrawn from mediation dissatisfied but unwilling to continue the dispute. Many ADR service providers will see your dispute as settled or resolved, even if there is no agreement, because you have chosen not to pursue it any further.

During some ADR processes, the mediator can decide to stop the negotiations, if they believe the process has gone as far as it can. If you are thinking of withdrawing because you are dissatisfied with the other person's conduct, you should always discuss this with the mediator before making your decision. You may be reacting to what looks like negotiation in bad faith, when in fact there are good reasons for the conduct of the other person. Each ADR service provider will have its own policy for dealing with these situations.

If there is a stalemate between you and the other person, and one of you wishes to withdraw, the mediator will have strategies to re-start the negotiations, especially if you are close to settlement.

Dissatisfaction with the mediator may also be a reason for withdrawing before any agreement is reached.

Withdrawing

You can withdraw from non-compulsory ADR processes at any time. It is usually best to keep it simple by telling the mediator, or the other person, or both, verbally or in writing. Sometimes mediation agreements require anyone wishing to withdraw from ADR to tell the other person in writing. Try to resist the urge to 'have the last word' or 'fire a parting shot', especially if you have an agreement, as you may rekindle the dispute.

However, withdrawing is not always easy. One person may wish to withdraw because they feel that the most important issues are settled, the other may want to keep negotiating because of emotions such as grief or anger. If you are involved in this difficult situation, you should discuss your position and your choices with the mediator.

Continuing the dispute after ADR

You have the right to go to a court or tribunal hearing if the ADR negotiations do not result in a settlement. You might need legal advice about this step.

Compulsory ADR

If a court or tribunal has ordered the mediation, the case may automatically go to a court hearing, so you will not be able to withdraw unless you have satisfied the requirements of that process. You are usually required to make a serious attempt at negotiating. The pressure to settle during ADR is often increased by the fact that a formal hearing date has been set.

Services and resources

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The following list of Victorian organisations, while not comprehensive, provides a starting point for getting more information about ADR, or finding a lawyer, mediator, or ADR service provider.

Dispute Settlement Centre of Victoria
A good place to start is the Dispute Settlement Centre of Victoria. Funded by the government, it provides ADR services free of charge. It also offers dispute counselling to help you through the steps involved in resolving a dispute yourself.

T 9603 8370
T 1800 658 528 (toll free for regional callers)
www.justice.vic.gov.au/disputes

Victorian Bar
The Victorian Bar runs a dispute resolution scheme to help people resolve disputes without full-scale litigation.

T 9225 6930
www.vicbar.com.au

Victoria Legal Aid
Victoria Legal Aid can give general legal advice, and can refer you to the ADR service provider best suited to your problem. These services are free.

T 9269 0120
T 1800 677 402 (toll free from rural areas)
www.legalaid.vic.gov.au

Federation of Community Legal Centres
Community legal centres can give general legal advice, and can refer you to the ADR service provider best suited to your poblem. These services are free.

T 9652 1500
www.communitylaw.org.au

Law Institute of Victoria
The Law Institute of Victoria can provide you with names of lawyers with mediation accreditation. They can also refer you to specialist lawyers, or lawyers in your locality, and they also deal with complaints against lawyers.

T 9607 9311
www.liv.asn.au

Ombudsman Victoria
If you wish to make a complaint about an ADR services provided by a state government agency, court or tribunal, contact Ombudsman Victoria.

T 9613 6222
T 1800 806 314 (toll free from regional areas only)
TTY 133 677 or 1300 555 727
www.ombudsman.vic.gov.au

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First published 1999

Written by Louise Kyle and Keith Jackson

ISBN: 978 1 876045 72 2

Accurate at December 2009.

Victoria Law Foundation
Level 5, 43 Hardware Lane
Melbourne Vic 3000 Australia
DX491 Melbourne
T 03 9604 8100 F 03 9602 2449
contact@victorialawfoundation.org.au