

The 2023 Intensive Conference

“Staying ahead of
the game”

Conference papers

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TRENDS IN ALTERNATE DISPUTE RESOLUTION



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Debra Parker
Director



In the beginning

Development and History of Alternative Dispute Resolution

Family Dispute Resolution – ALRC

Counselling and Conciliation were introduced by the Family Court of Australia when it was established in 1976.

- FDR services are now provided by many family law institutions.
- Increasingly sophisticated approaches.
- Requires the use of FDR before court action and filing.
- Exceptions are provided in family violence.
- FDR Communications are confidential



Where we are now....

Current Climate of Mediation in Australian Family Law:

- Persons who have a parenting dispute about matters that may be dealt with by an order under Part VII of the Family Law Act, must make a genuine effort to resolve that dispute by family dispute resolution before filing a parenting application for a Part VII order to the Court (see section 601(9) for exceptions to this requirement).
- The federal government also subsidises FDR services which are offered by a large number of community-based services so that FDR through these agencies, while not free, is modestly priced and generally with a sliding fee scale based on income.

Source: <https://www.fccoa.gov.au/fl/family-dispute-resolution>



Since 1 September 2021

“The overarching purpose of the family law practice and procedure provisions in the Federal Circuit and Family Court of Australia Act 2021 (Cth) (the Act) is to facilitate the just resolution of dispute: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible. This overarching purpose is reinforced in the Court’s new Central Practice Direction - Family Law Case Management.”

Enhanced judicial registrar resources in family law

- Emphasis on Senior judicial registrars, judicial registrars and deputy registrars to triage and case manage all family law matters – high frequency of duty lists and interim hearings. Allow judge to focus on complex interim applications and final hearings.

Since 1 September 2021 - continued....

Pre-action procedures

- The pre-action procedures previously contained in Schedule 1 to the Family Law Rules have been retained and enhanced – now must be complied with prior to filing a family law application in the Court.

Dispute resolution in the new case management pathway

- Significant emphasis is placed on providing dispute resolution opportunities to litigants to assist them in resolving, or better identifying, the issues in dispute. The Court's expectation is that, where it is safe to do so, parties will avail themselves of every opportunity to participate in dispute resolution.

Source: <https://www.fcfta.gov.au/news-and-media-centre/changes-fcfta>

Filings and workload: snapshot

In 2021-22 in family law:

Original jurisdiction – **97,500** applications filed

- 13,200 applications for final parenting or property orders
- 20,000 interim applications
- 16,000 applications for consent orders
- 46,000 divorce applications

Appellate jurisdiction: **400** appeals

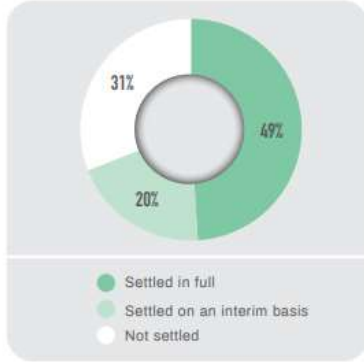
In general federal law:

- **2,500** applications filed
 - Fair work
 - Bankruptcy
 - Consumer law, administrative law, human rights, IP

In migration:

- **4,500** applications filed

Family law settlement rates

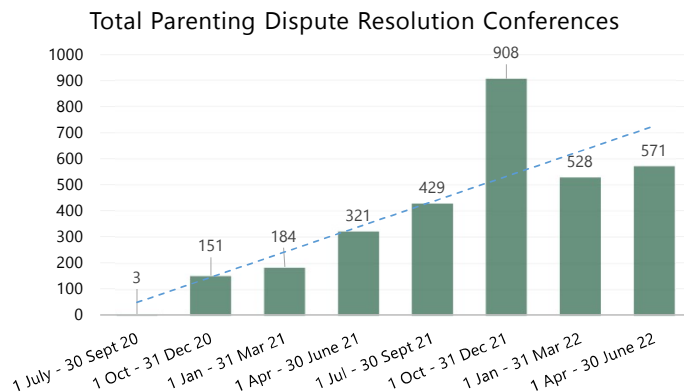


Total dispute resolution conferences conducted and percentage settled on a final basis, 2021-2022.

Overall, 54.4% of all dispute resolution conferences conducted in the 2021-2022 resolved matters on a final basis.

Source: <https://www.fccoa.gov.au/fccoa-annual-reports/2021-22>

Dispute Resolution Conferences



67% increase in the number of dispute resolution conferences held in parenting matters between April and June this year compared to last year.

55% average settlement rate on a final basis

Is it time to remove the “A” in ADR?



Perpetua Kish
Principal Lawyer

5 Ways Lawyers can Think Differently about Dispute Resolution



- Has branding any type of dispute resolution that doesn't occur in court as an 'alternative' set up ADR to be at a disadvantage?
- Can we do better at shifting the focus from litigation to ADR, and thereby, provide more options and solutions to clients?



Labelling

Labelling dispute resolution options as alternatives can create misunderstandings and stereotypes, and may lead to the discounting of non-traditional methods.



Curiosity over Custom

- Do we allow habit to limit our imagination (and options)?
- Traditional and inflexible practices that lack creativity are a consequence of resisting change.
- Innovation, progress and better outcomes - come from curiosity.



The law should help and not hinder

Not all disputes about legal rights and duties must be resolved by reference to those rights and duties.



ADR and The Rule of Law

- On the one hand, ADR can offer an efficient and cost-effective way to resolve disputes, and can be particularly useful in contexts where traditional legal systems are slow and/or ineffective.
- On the other hand, is there a risk that ADR may be used to undermine the principles of the rule of law? Particularly if the ADR methods are not subject to regulation?

5

Is Court our Comfort Zone?

- Litigation may feel familiar and safe.
- Court may also be where lawyers can best employ their knowledge and skills.
- This confidence or ‘comfort’ may mean that the path to court is taken far too eagerly or prematurely.
- Court may form a large part of a lawyer’s identity.

We should also reflect on our own views about dispute resolution that we deem ‘alternative’:

- *Are we diminishing their value and utility because we consider them, on some level, inferior to Court?*
- *Do lawyers, by nature, prefer to defer to authority?*
- *Do we spend so much time at or in the shadow of the courts that we feel more comfortable there?*

To overcome these barriers, we first need to remove words that emphasise them.

It’s time to drop the ‘A’ in ADR.

Fair Work and Small Claims for Underpayment of Wages: ADR expansion

Richard Calver

The use of alternative processes in underpayment of wages
disputes at the same time as it reinforces the bias against
lawyers in the *Fair Work Act, 2009 (Cth)* (FW Act)

All workplace relations lawyers need to come to grips with the provisions of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)* (SJ Act).

From 1 July 2023 a change to the small claims process established by section 548 of the FW Act will occur, with the cap on small claims increasing fivefold to \$100,000

Monetary cap for small claims referred to in existing subsection 548 does not include any amount of interest that may be awarded under existing section 547.

There is also a change to the rule about costs in workplace relations matters: the SJ Act enables the court, in a small claims proceeding, to award a successful claimant any filing fees they paid to the court as costs, from the other party.

Employers may be able to be represented by a lawyer in a small claims proceeding under s548 where leave is granted by the court, a matter I canvass (with the relevant criteria for leave to be granted) in a paper that is available to participants.



AIFLAM Initiatives

Claire Naidu



CLAIRE NAIDU & Co



Mediation & Arbitration



Question: Introduction into Family Law in Australia



Mediation



Arbitration



Learning Opportunities



Peer Support



Conclusion



Getting Ahead of the Game: Mediation in Civil Litigation

Daniella Fiocco

The court may, by order, refer a proceeding, or any part of a proceeding, for mediation or neutral evaluation.

Court Procedures Rules 2006 (ACT), r 1179(1)

**Court Procedures Act 2004 (ACT),
s 5A**

The main purpose of civil procedure provisions is to facilitate the just resolution of disputes:

- (a) according to law; and
- (b) as quickly, inexpensively and efficiently as possible.

**Supreme Court Practice Direction
2 of 2014, paragraph 41.**

**Magistrates Court Amended
Practice Direction 2 of 2014,
paragraph 11.6.**

Unless the parties have already exhausted alternative dispute resolution processes or made their own arrangements, the Court will usually make orders to compel an appropriate form of alternative dispute resolution at the Listing Hearing.

Pleading Stage

- Pleadings
- Further and better particulars
- First directions hearing questionnaire

First Directions Hearing

Evidence Stage

- Discovery
- Expert evidence (liability and quantum)
- Interrogatories
- Notices for Non-party Production
- Affidavit evidence
- Notices to Admit
- Listing Hearing Questionnaire

Listing Hearing

Hearing Stage

- Subpoenas
- Court Book
- Hearing
- Delivery of judgement
- Cost submissions

Matters are often referred to mediation too late
in the litigation process.

Practitioners prepare matters for hearing,
but do not prepare matters for mediation.

1. Are the issues in dispute defined?
2. Do the parties have the evidence they need to assess the strengths and weaknesses of each parties' positions?



Questions

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