

**THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN  
ADMINISTRATIVE DISPUTES**

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A paper presented to:

SYMPOSIUM ON  
“GUARANTEE OF THE RIGHT TO ACCESS TO THE ADMINISTRATIVE  
JURISDICTION”  
ON THE OCCASION OF THE 10TH ANNIVERSARY OF THE  
SUPREME ADMINISTRATIVE COURT OF THAILAND

9 March 2011

Bangkok, Thailand

# THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN ADMINISTRATIVE DISPUTES

## Abstract

*In Australia, alternative dispute resolution (ADR) is increasingly being used in courts and tribunals for the just, quick and cheap resolution of administrative law disputes. This article outlines, firstly, some of the main categories of administrative disputes, secondly, ADR processes and, thirdly, how these ADR processes can be and have been used to resolve, in whole or part, these categories of administrative disputes.*

## INTRODUCTION

In Australia, alternative dispute resolution (ADR) is an accepted part of the civil litigation process and there are many court-annexed ADR programs.<sup>1</sup> There is a growing tendency for courts and tribunals to direct or refer parties to one or more ADR processes, with or without the parties' consent, and even for judicial officers and registrars to conduct the sessions.<sup>2</sup> Mediation, in particular, has been adopted in civil disputes as a viable alternative to costly and high-risk litigation.<sup>3</sup> Legislation has even been introduced to make mediation mandatory in the resolution of certain types of disputes.<sup>4</sup>

However, ADR is not exclusively associated with private legal disputes. Statutory complaint bodies, such as the ombudsman offices, are now able to engage in ADR in performing administrative reviews. State and Federal administrative tribunals also use ADR extensively in merits review proceedings. The Land and Environment Court of New South Wales has been undertaking continued experimentation and research into ways of achieving a just, quick and cheap resolution of disputes in many areas of its jurisdiction, including the review of administrative decisions.

The rationale for these programs is the saving in time it takes to dispose of matters brought before the courts, reducing the workload of the court, and the savings in costs for litigants. ADR tempers the rigidity of the formal legal system,<sup>5</sup> and most legal processes combine aspects of both formal adjudication and consent-based processes.<sup>6</sup> Judges frequently incorporate ADR into case management, either in the form of judicially supervised ADR or judicial referral to an appropriate ADR process to ensure that parties exhaust every possible alternative to a court hearing.<sup>7</sup>

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<sup>1</sup> King M, Freiberg A, Batagol B and Hyams R, *Non-Adversarial Justice* (Federation Press, 2009) p 88.

<sup>2</sup> French B, "Dispute Resolution in Australia – The Movement from Litigation to Mediation" (2007) 18 ADRJ 213, 220.

<sup>3</sup> French, n 2 at 214.

<sup>4</sup> In NSW there is mandatory mediation in farm debt disputes, retail tenancy disputes, strata disputes, and common law work injury damages claims: *Farm Debt Mediation Act 1994* (NSW), Pt 2; *Retail Leases Act 1994* (NSW), s 68; *Strata Schemes Management Act 1996* (NSW), s 125; *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 318A.

<sup>5</sup> Warren M, "Should Judges be Mediators?" (2010) 21 ADRJ 77, 80.

<sup>6</sup> Warren, n 5 at 80; King, Freiberg, Batagol and Hyams, n 1 at 90.

<sup>7</sup> King, Freiberg, Batagol and Hyams, n 1 at 91.

While an agreement between the parties might be the most efficient way of resolving a dispute, settling a matter in its entirety is not the only possible outcome of an ADR process.<sup>8</sup> There may be important issues, that while peripheral to the legal dispute, may be resolved in mediation.<sup>9</sup> ADR processes can improve the efficiency of a formal court hearing by helping to clarify and narrow the issues that are in dispute in order to reduce the length of a hearing.<sup>10</sup>

However, in some circumstances ADR is simply inappropriate for resolving legal disputes, for example, where parties wish to test a statutory provision or legal precedent in judicial review proceedings, or where mediation may result in an outcome that is not in accordance with the law. Courts and judges can only adapt and evolve “within the constraints of the common law, statute, as well as legal and constitutional principles.”<sup>11</sup> Therefore, there is a limit upon the extent to which ADR can be used to resolve administrative disputes.

In this article, I will outline first some of the main categories of administrative disputes, secondly, ADR processes and, thirdly, how these ADR processes can be and have been used to resolve, in whole or part, these categories of administrative disputes.

## **TYPES OF ADMINISTRATIVE DISPUTES IN THE COURTS**

Administrative disputes resolved by the courts may be grouped into four categories: merits review of administrative decisions; appeals against administrative orders; judicial review of the exercise of legislative and executive powers and functions; and civil enforcement of laws. The differing nature of these administrative disputes has implications for the appropriateness and application of ADR.

Merits review involves the re-exercise by the court of the administrative power previously exercised by the original governmental decision-maker. The court has the same functions and discretions as the original decision-maker. The appeal is by way of re-hearing and fresh evidence or evidence in addition to or in substitution for the evidence given on the making of the original decision may be given on the appeal. The decision is deemed to be the final decision of the original decision-maker and is to be given effect accordingly.

The administrative power the subject of merits review commonly involves determination of an application for some form of authorisation, such as a permit or licence. On the merits review appeal, the court redetermines the application on the evidence before the court and according to the law that applies at the time of the hearing. The court makes the correct decision (if there is only one decision available on the applicable facts and law) or preferable decision (if there is a range of decisions available on the applicable facts and law).

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<sup>8</sup> Downes G, “Alternative Dispute Resolution at the AAT” (2008) 15 AJ Admin L 137, 138.

<sup>9</sup> Kinchin N, “Mediation and administrative merits review: An impossible goal?” (2007) 18 ADRJ 227.

<sup>10</sup> Parry D, “Revolution in the West: The Transformation of Planning Appeals in Western Australia” (2008) 14 LGLJ 119, 131.

<sup>11</sup> Warren, n 5 at 84.

Under certain legislation, a regulatory agency may issue administrative orders to persons. These orders may be of a prohibitory nature (to cease undertaking specified action or conduct) or of a mandatory nature (to undertake specified action or conduct). Examples of such administrative orders may be found in much environmental legislation.<sup>12</sup>

The legislation may grant the person to whom an order is given the right to appeal to a court against the order.<sup>13</sup> The appeal is usually a rehearing on the merits. The court determines the matter afresh and may affirm, vary or discharge the order.<sup>14</sup>

Judicial review involves the review by a court with supervisory jurisdiction of the legality of the exercise of legislative and executive powers and functions. Judicial review does not permit a court to consider the merits of administrative actions. It stands in contrast to merits review. The right to seek judicial review may be derived from the common law (in common law countries) or statute (in civil and common law countries where there is codification of judicial review of administrative action). The types of administrative conduct and decisions able to be reviewed, the grounds of review, the intensity of review and the remedies available will vary depending upon the source and the terms of the right of judicial review.

Judicial review is a means of enforcement of the law: the court reviews legislative and executive action or inaction of government to ensure that it is within constitutional and legal boundaries. Courts can also enforce compliance with the law by persons other than the government. Civil proceedings may be brought to remedy and restrain breaches of laws. The breach may involve a failure to comply with a statutory obligation to do or not to do something under the statute or a failure to comply with an administrative order issued under the statute. Civil proceedings to enforce compliance are usually brought by the regulatory agency or governmental body responsible for administering the statute. However, non-governmental organisations or members of civil society with a legally sufficient interest to have standing may also be able to bring civil enforcement proceedings.

The court usually has a broad discretion to grant such relief as the court thinks fit to remedy any proven breach. For example, in NSW under a variety of environmental statutes, any person may bring civil proceedings to remedy or restrain breaches of the statute and the Land and Environment Court may grant such order as thinks fit.<sup>15</sup>

## **TYPES OF ADR USED IN THE COURTS**

There are many dispute resolution processes used by courts to resolve disputes. Adjudication of litigation is the dispute resolution process traditionally used by courts. Its traditional and pervasive use has led to it being seen as the primary dispute resolution process, with all other processes being termed as alternative. Hence, the

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<sup>12</sup> For example, under the *Native Vegetation Act 2003* (NSW), the relevant regulatory agency can issue stop work orders (s 37) and directions to undertake remedial work (s 38) in relation to the clearing of native vegetation.

<sup>13</sup> For example, s 39 of the *Native Vegetation Act 2003* (NSW) allows a person to appeal to the Land and Environment Court of New South Wales.

<sup>14</sup> *Land and Environment Court Act 1979* (NSW), ss 17, 39.

<sup>15</sup> See, for example, ss 123 and 124 of the *Environmental Planning and Assessment Act 1979* (NSW).

reference to alternative dispute resolution. However, increasingly, courts are offering and actively promoting a wide range of dispute resolution processes. The goal is to find the dispute resolution process that is appropriate for the particular type of dispute: what is described as “fitting the forum to the fuss”.<sup>16</sup> The availability and manner of screening, diagnosis and referral of disputes to the appropriate dispute resolution process varies between courts.

ADR can be facilitated by the body of procedural law regulating civil litigation in the courts. Protocols can encourage ADR before and after commencing action.<sup>17</sup> For example, in NSW, the *Civil Procedure Act 2005* has recently been amended so as to require parties to civil proceedings to comply with pre-litigation requirements prior to commencing proceedings, including taking reasonable steps to resolve a dispute by agreement or clarifying and narrowing the issues in dispute. Compliance is verified by the filing of dispute resolution statements by the parties.<sup>18</sup> The court’s procedural rules could facilitate ADR after proceedings have been commenced. For example, the court’s practice notes could create a presumption in favour of referring matters to ADR unless the parties demonstrate a reason to the contrary.<sup>19</sup>

The procedural law regulating civil proceedings commonly imposes a duty on courts to give effect to the overriding purpose of the civil procedural law which is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.<sup>20</sup> In order to further the overriding purpose, proceedings are to be case managed by the court with the object of achieving the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of available judicial and administrative resources and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable to the parties.<sup>21</sup>

Most courts these days implement differential case management. This involves applying different case management techniques to different types of disputes. It provides more than one route for disputes through the court system. Through differential case management, the court may facilitate dispute resolution.<sup>22</sup>

Case management conferences provide opportunities for the court and the parties to identify issues, areas of agreement and disagreement, and possible solutions for the resolution of the dispute. Case management conferences involve facilitative dispute resolution.

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<sup>16</sup> Sander FEA and Goldberg SB, “Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure” (1994) 10 *Negotiation Journal* 49 at 50.

<sup>17</sup> As to pre-action protocols see Legg M and Boniface D, “Pre-action protocols in Australia” (2010) 20 *JJA* 39.

<sup>18</sup> Part 2A of the *Civil Procedure Act 2005* (NSW) introduced by Schedule 6 of the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW).

<sup>19</sup> Preston BJ, “The Land and Environment Court of New South Wales: Moving towards a multi-door courthouse - Part II” (2008) 19 *ADRJ* 144 at 149.

<sup>20</sup> See, for example, *Civil Procedure Act 2005* (NSW), s 56(1), (2).

<sup>21</sup> See *Civil Procedure Act 2005* (NSW), s 57(1).

<sup>22</sup> See Spencer D, “Judicial mediators: is the time right? – Part I” (2006) 17 *ADRJ* 130 at 133-134.

Indeed, in the State Administrative Tribunal of Western Australia, the Tribunal adopted the term “facilitative dispute resolution” which involves active case management through directions hearing, mediations and compulsory conferences: see Parry D, “The use of Facilitative Dispute Resolution in the State Administrative Tribunal of Western Australia – Central rather than Alternative Dispute Resolution in Planning Cases” (2010) 27 *EPLJ* 113 at 117.

Where expert evidence is to be called at the hearing of the proceedings, the court may give directions to facilitate dialogue and consensus between the experts on issues in their area of expertise. In NSW, the courts have power to direct joint conferencing by the parties' experts and the production of a joint expert report to the court on the issues on which the experts agree, the issues on which they disagree and the reasons for their disagreement. This dialogue between peers can facilitate resolution of the dispute.

Turning to more formal, consensual processes of dispute resolution, courts commonly use conciliation, mediation and hybrid process such as conciliation–arbitration or mediation–arbitration.

Conciliation is:

“a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute and the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the parties to reach an agreement.”<sup>23</sup>

Mediation is:

“a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role with regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.”<sup>24</sup>

Hybrid processes blend two different types of dispute resolution processes. For example, conciliation-adjudication involves, first, conciliation but then, if the parties are unable to reach agreement in the conciliation, moving, with or without the parties' agreement (depending upon the statutory scheme), to adjudication by the court. This hybrid process is used by the Land and Environment Court of NSW. Conciliation in that court is undertaken pursuant to s 34 of the *Land and Environment Court Act 1979* (NSW) and is available for disputes in Classes 1-3 of the Court's jurisdiction (which involve merits review of administrative decisions). This section provides for a combined or hybrid dispute resolution process, involving, first conciliation then if parties agree, adjudication.<sup>25</sup>

The conciliation involves a commissioner of the Court with technical expertise on issues relevant to the case acting as a conciliator in a conference between the

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<sup>23</sup> National Alternative Dispute Resolution Advisory Council (“NADRAC”), *Dispute Resolution Terms*, (2003) at 5.

<sup>24</sup> NADRAC, n 23 at 9. See also *Civil Procedure Act 2005* (NSW), s25.

<sup>25</sup> For a comprehensive explanation of conciliation in the Court, see Preston BJ, “Conciliation in the Land and Environment Court of New South Wales: history, nature and benefits” (2007) 13 LGLJ 110.

parties.<sup>26</sup> The conciliator facilitates negotiation between the parties in an endeavour to achieve agreement as to the resolution of the dispute.

If the parties are able to reach agreement, the conciliator, being a commissioner of the Court, is able to dispose of the proceedings in accordance with the parties' agreement.<sup>27</sup> Alternatively, even if the parties are not able to decide the substantive outcome of the dispute, they can nevertheless agree to the commissioner adjudicating and disposing of the proceedings.<sup>28</sup>

If the parties are not able to agree either about the substantive outcome or that the commissioner should dispose of the proceedings, the proceedings are referred back to the Court for the purpose of being fixed for hearing before another member of the Court. In that event, the conciliation commissioner makes a written report to the Court setting out that fact, as well as stating what in the commissioner's view are the issues in dispute between the parties to the proceedings.<sup>29</sup> This is still a useful outcome, as it refines the issues and often will result in the proceedings being able to be heard and determined expeditiously and with less cost. Otherwise, anything said in and any documents produced for the conciliation are kept confidential and are not disclosed to the Court or the member hearing the proceedings.

Neutral evaluation is a process of evaluation of a dispute in which an impartial evaluator seeks to identify and reduce the issues of fact and law in dispute. The evaluator's role includes assessing the relative strengths and weaknesses of each party's case and offering an opinion as to the likely outcome of the proceedings, including any likely findings of liability or the award of damages.<sup>30</sup> The neutral evaluator's opinion is often the catalyst for the parties to negotiate a settlement. In the Land and Environment Court, the neutral evaluator is a commissioner of the Court. If the parties do not settle after the neutral evaluation, the proceedings are referred to a different resolution process, usually adjudication, conducted by a different member of the Court and the neutral evaluator's opinion is not disclosed to the Court, or the member hearing the proceedings.

Another process that can be used to assist in the resolution of a dispute is for the court to refer to a referee appointed by the court for inquiry and report by the referee, the whole proceedings or any question or questions arising in the proceedings.<sup>31</sup> The resolution of a particular question may assist the parties in otherwise being able to settle the proceedings.

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<sup>26</sup> *Land and Environment Court Act 1979* (NSW), s 34(2).

<sup>27</sup> *Land and Environment Court Act 1979* (NSW), s 34(3).

<sup>28</sup> *Land and Environment Court Act 1979* (NSW), s 34(4)(b).

<sup>29</sup> *Land and Environment Court Act 1979* (NSW), s 34(4)(a).

<sup>30</sup> NADRAC, n 23 at 6. See also *Land and Environment Court Rules 2007* (NSW), Pt 3 r 3.8(1).

<sup>31</sup> See, for example, the *Uniform Civil Procedure Rules 2005* (NSW), Pt 20 r 20.14.

## ILLUSTRATIONS OF USE OF ADR IN ADMINISTRATIVE DISPUTES

### Merits review appeals

#### *Overview of use of ADR in merits review*

Courts and tribunals exercising merits review of administrative decisions use a variety of ADR processes, often in a sequential and iterative manner.

Active case management through directions hearings and case management conferences provide an initial opportunity for the court to facilitate resolution of the dispute. The prospects of success for resolution of the dispute through case management will be enhanced if the presiding member has knowledge and experience of the type of disputes and the issues involved, as well as being trained in ADR techniques. This commonly occurs as many courts and tribunals engaged in merits review employ specialist members with such knowledge and expertise. The presiding member can use their specialised knowledge and experience to be proactive in identifying the real issues in dispute, suggesting solutions and facilitating dialogue between the parties to achieve consensus.

This process of proactive case management may be supplemented by the court or tribunal making directions for joint conferencing between experts and the production of a joint expert report to the court identifying the issues in which the experts agree, the issues in which they disagree and the reasons for any disagreement. Joint conferencing and report by the experts involves a problem solving approach and assists in resolution of the dispute between the parties.

Through the case management process, the court or tribunal can ascertain the appropriateness of the various dispute resolution processes for resolving the particular dispute. In particular, the court can ascertain the appropriateness of referral to a consensual dispute resolution process, such as conciliation or mediation, or a hybrid process, such as conciliation-arbitration or mediation-arbitration. Alternatively, it may be appropriate to refer the dispute to neutral evaluation. Referral to such dispute resolution processes is the next step after case management in a system of sequential dispute resolution.

If the dispute is not able to be resolved by the dispute resolution process to which the court refers the dispute, the dispute can be returned to the court for fresh diagnosis and referral to another dispute resolution process. Commonly, this will be adjudication by the court.

Collectively, therefore, the system of dispute resolution used by courts or tribunals for merits review disputes is sequential and iterative. It involves early and proactive intervention by the court to facilitate resolution of the dispute; diagnosis of the dispute so as to match the appropriate dispute resolution process to the particular dispute and referral to that process; monitoring of the progress of the dispute resolution process in resolving the dispute; and, if timely and complete resolution is not able to be achieved, adaptive management by re-referral to a different dispute resolution process.

The use of ADR in merits review appeals can be illustrated by reference to the practice of three courts and tribunals in Australia, the Administrative Appeals Tribunal (AAT), the State Administrative Tribunal of Western Australia (SATWA) and the Land and Environment Court of New South Wales.

### *Administrative Appeals Tribunal (AAT)*

The AAT is a merits review tribunal which reviews on appeal by affected applicants exercises of administrative power by the Commonwealth of Australia. The AAT does not exercise the judicial power of the Commonwealth.<sup>32</sup> As such, the making and review of the merits of administrative decisions frequently involves the exercise of discretion, and the decision-making function of the AAT is to make the correct or preferable decision, not to determine the legality of the decision.<sup>33</sup>

The use of ADR is an integral part of the AAT's case management. According to the *Administrative Appeals Tribunal Act 1975* (Cth), in carrying out its functions, the AAT must pursue the objective of "providing a mechanism of review that is fair, just, economical, informal and quick."<sup>34</sup> The AAT has the power to hold conferences with the parties, which are conducted by a Conference Registrar or AAT member trained in ADR. On any application made to the AAT for review of an administrative decision, the President may direct that a conference be held between the parties, or direct that the proceeding or any part of the proceeding be referred to a particular ADR process.<sup>35</sup> ADR processes available to the court include mediation, neutral evaluation, case appraisal and conciliation.<sup>36</sup> The AAT has discretion in determining the conduct and effect of ADR processes. The President of the AAT is authorised to make directions about the procedure to be followed in ADR, the person who is to conduct the ADR process, and what will happen following the conclusion of an ADR process.<sup>37</sup> In the 2009-10 year, 82 percent of appeals to the AAT were resolved prior to the final hearing.<sup>38</sup>

Conferences are the centrepiece of the current AAT's pre-hearing program and they are an effective case management tool. They provide the AAT and the parties with an opportunity to clarify the issues in dispute, identify further evidence that may be required and explore prospects of settlement. Conferences serve the dual purpose of attempting to obtain an agreed resolution where possible and ensuring that appropriate steps are taken to prepare those matters which will not settle for hearing. The AAT holds at least one conference in every application, typically an application will have two conferences.<sup>39</sup>

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<sup>32</sup> Humphreys D, "Alternative Dispute Resolution Processes in the Administrative Appeals Tribunal (AAT) in the Light of Recent Amendments to the Administrative Appeals Tribunal Act 1975" (Paper presented at the Institute of Arbitrators and Mediators of Australia Conference, Canberra, 27-29 May 2005) at 2.

<sup>33</sup> Humphreys, n 32 at 3.

<sup>34</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.

<sup>35</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 34A.

<sup>36</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 3(1).

<sup>37</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 34C.

<sup>38</sup> Administrative Appeals Tribunal Annual Report 2009-10 at 24.

<sup>39</sup> Humphreys, n 32 at 5-6.

Where a settlement is reached between the parties, it can only be reflected in a new decision of the AAT if the AAT makes a positive finding that the decision is both within power and appropriate.<sup>40</sup> This ensures that the quick resolution of the dispute is secondary to the making of the correct or preferable decision.<sup>41</sup>

The AAT's Alternative Dispute Resolution Committee has developed a set of referral guidelines that are designed to assist the AAT and parties in considering whether a form of ADR may be suitable. The committee has also written a set of process models to ensure that ADR processes are conducted in a consistent way across the AAT.<sup>42</sup>

### *State Administrative Tribunal of Western Australia (SATWA)*

The SATWA was established on 1 February 2005 as a comprehensive and cohesive administrative review and civil tribunal for the State of Western Australia. The SATWA's jurisdiction is divided into four streams: commercial and civil; development and resources; human rights; and vocational regulation. Town planning and other land and water related administrative review and original proceedings are allocated to SATWA's development and resources stream. I will focus on this stream's use of ADR.

The SATWA has adopted the term 'facilitative dispute resolution' (FDR) instead of ADR. FDR in the SATWA principally involves active case management through directions hearings, mediations and compulsory conferences. Approximately three quarters of planning appeals in the SATWA are resolved without the need for a final hearing.<sup>43</sup>

A Class 1<sup>44</sup> directions hearing typically involves an interactive process conducted by a member to identify the key issues in dispute, discuss the merits of the application, and begin developing options for the resolution of the matter.<sup>45</sup>

The SATWA has the power to refer a matter to mediation without the consent of the parties.<sup>46</sup> The *State Administrative Tribunal Act 2004 (WA)* enables the SATWA to invite the respondent (usually a local council) to reconsider its decision at any time during the proceedings.<sup>47</sup> Often, after an applicant provides further information or clarification or amends a planning proposal through mediation, the SATWA invites the respondent to reconsider its decision at a specified meeting or by a specified date and adjourns the proceedings to a directions hearing to await the reconsideration.<sup>48</sup> If the respondent varies the decision or sets aside and substitutes a new decision and the applicant is content with the new decision and withdraws the

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<sup>40</sup> *Administrative Appeals Tribunal Act 1975 (Cth)*, s 42C.

<sup>41</sup> Humphreys, n 32 at 3.

<sup>42</sup> Downes, n 8 at 138.

<sup>43</sup> Parry, n 10 at 130; Parry, n 22 at 114.

<sup>44</sup> Class 1 planning applications are those planning review applications involving developments with a value of less than \$250,000 or single houses with a value of less than \$500,000, and subdivisions to create not more than three lots: *State Administrative Tribunal Regulations 2004 (WA)*, reg 10(1).

<sup>45</sup> Parry, n 22 at 117.

<sup>46</sup> *State Administrative Tribunal Act 2004 (WA)*, s 54(3).

<sup>47</sup> *State Administrative Tribunal Act 2004 (WA)*, s 31.

<sup>48</sup> Parry, n 10 at 132.

proceedings, the varied or substituted decision has legal effect. Respondents are often invited to reconsider their decisions in circumstances where the appeal is in relation to a deemed refusal; where the applicant has provided additional information or clarification since the decision; where the applicant has amended the application; where the factual or legal circumstances have changed since the decision was made; and where the SATWA has determined a preliminary issue that might affect the decision.<sup>49</sup> In most cases, the applicant is content with the respondent's varied or substituted decision and, with the consent of the respondent, applies for leave to withdraw the application.<sup>50</sup>

The SATWA tailors directions to maximise the prospects of success of the mediation or compulsory conference. For example, in a case concerning conditions, the member often directs the applicant to provide the respondent a statement of any alternative or additional conditions it would accept.<sup>51</sup> The SATWA has also recently adopted the practice of enabling parties jointly to request Class 2 planning applications to be referred directly to mediation, without having first to attend a directions hearing.<sup>52</sup>

### *Land and Environment Court of New South Wales*

The Land and Environment Court of NSW (the Court) is a specialist superior court of record that enjoys the benefit of a combined jurisdiction within a single court. The Court has a merits review function, reviewing decisions of government bodies and officials in a wide range of planning, building, environmental, mining and other matters. In exercising its merits review function, the Court operates as a form of administrative tribunal. The Court also exercises judicial functions as a superior court of record. Judicial functions include civil enforcement, judicial review and summary criminal enforcement of a wide range of environmental laws. The Court also has appellate functions. It hears appeals against conviction or sentence for environmental offences from the Local Court of NSW and appeals (on questions of law) from the decisions of the non legal members (commissioners) of the Court in merits review proceedings.<sup>53</sup>

The Court offers a variety of dispute resolution processes, including adjudication, conciliation, mediation, neutral evaluation and reference to a referee. There are also informal mechanisms such as case management, which may result in negotiated settlement.<sup>54</sup>

The Court has both judges and commissioners. Commissioners are specialist members appointed because of their knowledge and expertise in disciplines of knowledge relevant to the types of dispute and issues involved in merits review proceedings that come before the Court. Commissioners are also trained in ADR.

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<sup>49</sup> Parry, n 10 at 131-132.

<sup>50</sup> Parry, n 22 at 122.

<sup>51</sup> Parry, n 22 at 118.

<sup>52</sup> Parry, n 22 at 118.

<sup>53</sup> For a description of the Court and its operation, see Preston BJ, "Operating an environment court: the experience of the Land and Environment Court of NSW" (2008) 25 EPLJ 385.

<sup>54</sup> Preston, n 19 at 145.

All full time commissioners, and a number of the part time commissioners, are nationally accredited mediators.

Commissioners can only exercise the Court's jurisdiction in merits review proceedings, not judicial review, criminal or other types of civil and appellate proceedings that are required to be heard and determined by a judge. Commissioners exercise jurisdiction by delegation or referral by the Chief Judge. They exercise the functions of the Court, in relation to merits review proceedings, of adjudication, conciliation, mediation or neutral evaluation. They also undertake case management of merits review proceedings. The registrars of the Court undertake case management at directions hearing and case management conferences and can also act as conciliators and mediators.

The Court applies intake screening, diagnosis and referral of proceedings to the appropriate dispute resolution process for the particular merits review proceedings. This occurs in a staged process: at the registry on or after filing of the proceedings, at the first return before the Court of any application commencing proceedings in the Court and at any case management or dispute resolution orientation session that might be directed by the Court. Collectively, these occasions and the persons who preside constitute the intake screening, diagnosis and referral unit of the Court.<sup>55</sup>

The screening, diagnosis and referral process in the Court is assisted by certain presumptions and protocols. The Court's Practice Notes, issued in 2007, create a presumption in favour of referring matters in Class 1-3 (which comprise the merits review proceedings in the Court) to conciliation, unless the parties demonstrate a reason to the contrary. The Court's Practice Note Class 3 - Valuation Objections contains a pre-action protocol (a protocol applying before court action is commenced). The parties are required to engage in mediation before commencing proceedings. Compliance is verified at the first directions hearing before the Court. The Court's Practice Notes for all Class 1-3 matters contain post-action protocols (protocols applying after court action is commenced). Parties are required to consider and report to the Court at the first subsequent directions hearing on the appropriateness of using the alternative dispute resolution processes of conciliation and mediation. The Court's Practice Notes are supplemented now by the recent legislative amendment of the *Civil Procedure Act 2005* (NSW) which imposes pre-action protocols on parties before commencing civil proceedings, which include merits review proceedings in the Court.

The Court screens, diagnoses and refers matters to the appropriate dispute resolution process, both in consultation with the parties but also by its own motion. For matters in Classes 1-2, involving environmental, planning, local government appeals and tree disputes, the registrar at the directions hearings performs this function. For matters in Class 3, which includes valuation objections and appeals concerning compensation for the compulsory acquisition of land, the task is performed by the list judge at the directions hearings. Parties can select what they consider to be the appropriate dispute resolution process and may, subsequently

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<sup>55</sup> Preston, n 19 at 147-148.

change their selection. This would involve referral back to the Court for re-referral to a different dispute resolution process.<sup>56</sup>

As a general rule, referrals should be made earlier after proceedings are commenced in the Court. Delaying referral to ADR processes increases delay and cost to parties and intransigence of parties (they become locked into their positions). Nevertheless, there needs to be information exposure, articulation of issues and preparation in order to maximise the prospects of ADR processes being successful. Hence, too early a referral can be counter productive.<sup>57</sup>

The intake processes used by the Court endeavour to achieve these goals of adequate information exposure, articulation of issues and preparation prior to the conducting of ADR processes. The Court's Practice Notes require parties to provide each other with information before matters are referred to ADR processes. This has the benefit of enabling parties to participate in these processes on an informed basis. For example, upon request, a respondent who is a public authority or public official is required to provide the applicant with access to the documents relevant to the applicant's application and the respondent's decision (if any) within 14 days of the request.<sup>58</sup>

The member of the Court presiding on the return of the application before the Court, whether a registrar, commissioner or judge, will make directions to ensure that parties are adequately prepared for the dispute resolution process. This can include directions for statements of facts and contentions; provision of further particulars; discovery of documents; provision of evidence that might assist the dispute resolution process; and the obtaining of requisite instructions and authority to negotiate and settle the dispute. A preliminary session might be directed to be held before a dispute resolution practitioner, such as a preliminary session with a mediator or a case management session with a commissioner.

Although, ordinarily, referral to appropriate dispute resolution processes will occur early after commencement of proceedings, it can occur at any time. Referral to an ADR process could occur at the hearing of litigation if this was considered by the parties and the Court to be productive, notwithstanding the late stage of referral. Multiple referrals can also occur at different times to different dispute resolution processes.<sup>59</sup>

Conciliation is the most frequently used of the ADR processes in the Court. Conciliation is undertaken in accordance with s 34 of the *Land and Environment Court Act 1979* (NSW) which is a hybrid conciliation-adjudication process. This process has been described earlier.

In late 2010, the *Land and Environment Court Act 1979* (NSW) was amended to provide for mandatory conciliation-arbitration to be conducted by the Court in relation to proceedings concerning development applications, or modifications of

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<sup>56</sup> Preston, n 19 at 148.

<sup>57</sup> Preston, n 19 at 150-151.

<sup>58</sup> Land and Environment Court of New South Wales, *Practice Note – Class 1 Development Appeals*, 14 May 2007, para 11.

<sup>59</sup> Preston, n 19 at 152.

development consents, for detached single dwellings and dual occupancies.<sup>60</sup> It is mandatory for the Court to refer these types of appeals to the conciliation-arbitration process (unless in the particular case the Court determines that such a course is inappropriate). In these appeals, if no agreement is reached in the conciliation phase, the commissioner who presides over the conciliation conference must move to the adjudication phase and dispose of the proceedings following a hearing or, if the parties consent, on the basis of what has occurred at the conciliation conference.<sup>61</sup>

The Court's ADR system has been developed and implemented since 2006. In that time, there has been a sustained and significant increase in the utilisation of conciliation for the resolution of disputes within the Court. Conciliation conferences have increased from 17 in 2005 to 632 in 2010.

Collectively, the Court's system for ADR, which includes the intake screening, diagnosis and referral process, active case management and conciliation, mediation and neutral evaluation, has succeeded in boosting the percentage of merits review proceedings able to be resolved without hearing and determination by the Court. In Class 1, essentially involving planning appeals, the percentage of matters resolved without hearing and determination by the Court has risen from 58% in 2006 to 70% in 2010. In Class 3, the percentage of matters resolved without hearing and determination for appeals concerning the valuation of land has risen from 60% in 2006 to 90% in 2010 and for appeals concerning the amount of compensation for the compulsory acquisition of land has risen from 63% in 2006 to 78% in 2010.

### **Appeals against administrative orders**

A person to whom a regulatory agency has given an administrative order may have the right to appeal against the order to a court. The court on the appeal may affirm, vary or discharge the order. These types of appeal involve a form of merits review. The ADR processes the Court can use are, therefore, those discussed above in relation to merits review proceedings.

In the Land and Environment Court, for example, appeals against administrative orders may be made under a variety of environmental legislation. One example is that, under s 121B of the *Environmental Planning and Assessment Act 1979* (NSW), a local council may make an administrative order in the circumstances specified in the Act. Notice of the proposed order must be given to the person, and that person must be given the opportunity to make representations as to why the order should not be given or as to the terms of or period of compliance for the order.<sup>62</sup> The person who gives the order is required by the Act to hear and consider any representations made.<sup>63</sup> A person on whom an order is served may appeal against the order to the Court.<sup>64</sup> Such appeal comes within Class 1 of the Court's jurisdiction and can therefore be resolved through conciliation under s 34 of the *Land and*

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<sup>60</sup> *Land and Environment Court Act 1979* (NSW), s 34AA inserted by the *Planning Appeals Legislation Amendment Act 2010* (NSW).

<sup>61</sup> *Land and Environment Court Act 1979* (NSW), s 34AA(2)(b).

<sup>62</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 121H.

<sup>63</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 121J.

<sup>64</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 121ZK.

*Environment Court Act 1979* (NSW).<sup>65</sup> The conciliation conference provides an opportunity for the parties, with the assistance of a commissioner, to discuss alternatives that can achieve the council's underlying objectives, in a manner that is consistent with the applicant's specific circumstances. The Court has had considerable success in the resolution of appeals against administrative orders without hearing and determination by the Court. For example, in 2010, 95% of all appeals against administrative orders in Class 1 of the Court's jurisdiction were resolved, without hearing, through ADR processes.

## **Judicial review**

The legislature makes legislation, both primary legislation (the statutes) and subordinate legislation (such as regulations and instruments made under statutes). The executive executes or implements the laws, both the legislation, and, in common law countries, the common law. Primarily, executing the law involves exercising powers given or discharging duties imposed by legislation. The courts may judicially review the legality of the exercise of powers and functions by the legislature and the executive. Review of the exercise of legislative powers and functions includes ascertaining whether the legislation is constitutional or the subordinate legislation is within the legal boundaries of the subordinate or delegated legislation making power. Review of the exercise of executive powers and functions includes ascertaining whether the executive action is within the power to be purported to be exercised or discharges the duty imposed by the legislation. The court can also review certain failures of the executive to exercise public duties required by legislation to be performed.

The nature of the powers and functions the subject of judicial review has an important influence on the appropriateness of the use of ADR to resolve the judicial review dispute.

As a general rule, the exercise of legislative powers and functions will be less amenable to the use of ADR than the exercise of executive powers and functions. The reason lies in the nature of legislative powers and functions. The exercise of legislative powers and functions changes the law by stipulating a rule of general application governing future conduct. It is likely to affect the public generally or a large group of persons and not to affect persons as individuals. It usually incorporates or has regard to wide policy considerations.<sup>66</sup>

This legislative nature makes it far more difficult for courts to use ADR to resolve disputes about the exercise of legislative powers and functions. The parties to the proceedings ordinarily would involve only one of the persons affected, the plaintiff in the proceedings, and the public body or official whose exercise of legislative powers or functions is the subject of challenge. The large number of persons affected by the exercise of the legislative power or function will not be joined as parties to the proceedings and will not be entitled as of right to participate in any ADR process conducted by the court. The likely wide policy issues involved, and the polycentricity of the issues, also are not conducive to the use of ADR by the court. Any attempt to

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<sup>65</sup> *Land and Environment Court Act 1979* (NSW), s 17(d).

<sup>66</sup> Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (4th ed, LawBook Co, 2009) p 76.

expand participation in the ADR processes conducted by the court to include the large number of stakeholders, and to address all of the wide policy issues, would result in a process and a timeframe that would be unacceptable to the judicial function and the just, quick and cheap resolution of the proceedings.

This is not to say that ADR is always incapable of being used in relation to disputes about the exercise of legislative powers and functions, only that it is apt to be inappropriate at the stage when the dispute has moved to the court in judicial review proceedings. ADR in the form of negotiated rulemaking or regulation negotiation has been used, and successfully, to formulate consensually arrived at legislative or regulatory recommendations to the decision-makers, in advance of the exercise of legislative powers and functions, so as to pre-empt the bringing of judicial review proceedings challenging a subsequent exercise of legislative powers and functions.

In the United States, negotiated rulemaking has been encouraged within agencies by the *Negotiated Rulemaking Act 1990*. The process brings together representatives from stakeholder groups, such as regulated industries, trade associations, public interest groups and unions, to participate in drafting the proposed regulations. The process is usually facilitated by a mediator. The objectives of this participatory form of law making are to enhance public approval, improve the quality of the rules and regulations by the input of a wide range of expertise and decrease the incidence of litigation.<sup>67</sup>

Negotiated rulemaking has particularly been used in the United States with a view to achieving consensus between stakeholders and the government as the terms of regulations proposed to be made under various environmental statutes, such as clean air and clean water legislation.<sup>68</sup> The United States Environmental Protection Agency, for example, routinely makes standards and regulations relating to environmental protection. Frequent litigation about the adequacy of these standards has occurred and ADR, in the form of negotiated rulemaking, has been used in an effort to avoid such litigation.<sup>69</sup> These regulation negotiations are complex, protracted and involve many stakeholders.

Disputes involving the exercise of executive powers and functions are more amenable to the use of ADR compared to the exercise of legislative powers and functions. Here too, however, the nature and effect of the executive power or function challenged, the grounds of challenge, the number of persons affected and the availability and nature of remedies available will influence the appropriateness of the use of ADR by the court.

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<sup>67</sup> Pritzker D, "Rulemaking by Consensus: Negotiated Rulemaking in the United States" (1995) 2 CDRJ 217; Astor H and Chinkin C, *Dispute Resolution in Australia* (2nd ed, LexisNexis Butterworths, 2002) pp 106-107.

<sup>68</sup> Grad FP, "Alternative Dispute Resolution in Environmental Law" (1989) 14 *Columbia Journal of Environmental Law* 157 at 162-168; Adler PS, "Mediating Public Disputes" in Fowler RJ (ed), *Proceedings of the NELA and LAWASIA International Conference on Environmental Law* (June 1989) 101 at 105; Roberts J, "Environmental mediation: dispute resolution or dispute management?" (1993) 4 ADRJ 150 at 155; Lyster R, "Should we mediate environmental conflict?: a justification for negotiated rulemaking" (1998) 20 *Syd L Rev* 579 at 587-588.

<sup>69</sup> Fowler RJ, "Environmental dispute resolution techniques – what role in Australia?" (1992) 9 EPLJ 122 at 123, 127.

Executive decisions that have wide application and impact on a large group of persons, involve wide policy considerations and the public interest and are polycentric, are less appropriate and less manageable for resolution by ADR conducted by the court.<sup>70</sup>

The grounds of challenge may also influence the appropriateness of ADR. Judicial review grounds have been grouped into the three broad heads of illegality, irrationality and procedural impropriety.<sup>71</sup> Illegality occurs where the decision-maker fails to understand correctly the law that regulates the decision-making power or fails to give effect to it. Irrationality occurs where the decision-maker disregards relevant considerations, considers irrelevant considerations or makes a manifestly unreasonable decision. Procedural impropriety occurs where the decision-maker fails to observe basic rules of natural justice and fails to act with procedural fairness towards the person who will be affected by the decision or fails to observe statutory procedural requirements regulating the exercise of the decision-making power.<sup>72</sup>

This threefold classification involves a distinction between substance (illegality and irrationality) and procedure (procedural impropriety). It is a distinction between “the conclusion upon which a public body has seized and the process by which that conclusion has been reached”.<sup>73</sup> Judicial review on the grounds of procedural impropriety (such as breach of the rules of natural justice) will usually be more amenable to ADR than on grounds of illegality and irrationality because of the focus on procedure rather than substance. The dispute on grounds of procedural impropriety may be more focussed and will not raise, or require the balancing of, broader policy questions. Such a dispute is also more likely to affect a narrower group of persons.

Exercises of executive powers and functions that concern a particular person are more amenable to ADR than ones that affect larger groups of persons. For example, a decision of government to issue an administrative order to a person to take or to cease taking some action, or to revoke or vary some form of authorisation, such as a licence or permit held by the person, involves a narrow class of affected persons. The issues raised will also be narrower and their resolution has less ramifications for law and policy.

The prospects of success of ADR will also be influenced by the availability and nature of a remedy which is capable of resolving the dispute between the parties. The executive power, the exercise of which is challenged, may be one which is able to be exercised from time to time. Hence, the repository of the power may be able to re-exercise the power to give effect to a negotiated agreement of the parties.

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<sup>70</sup> See Preston BJ, “Limits of Environmental Dispute Resolution Mechanisms” (1995) 13 Aust Bar Rev 148 at 174; Horn L, “Mediation of Environmental Conflicts” (2005) 22 EPLJ 369 at 370-372, 376, 383-384; French, n 2 at 249.

<sup>71</sup> See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 310 per Lord Diplock.

<sup>72</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410-411.

<sup>73</sup> Fordham M, “Surveying the Grounds: Key Themes in Judicial Intervention” in Leyland P and Woods T (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997) p 188. See further Preston BJ, “Judicial review of illegality and irrationality of administrative decisions in Australia” (2006) 28 Aust Bar Rev 17 at 19-20.

Alternatively, there may be an alternative power which could be exercised to give effect to the negotiated agreement.

An illustration of the use of ADR in judicial review proceedings can be drawn from the field of planning law.<sup>74</sup> A landowner may apply for and be granted a development consent to carry out development on their land. A neighbour may be adversely affected by the development in some way. The neighbour may bring judicial review proceedings challenging the validity of the development consent. The neighbour's real concern is with the merits of the decision to grant the consent but the statute may not grant the neighbour a right of appeal on the merits. Because of the requirements of judicial review, the neighbour is forced to frame the challenge in terms of the legality of the decision. Nevertheless, ADR would permit the developer and the neighbour to discuss the merit issues. A solution may be able to be achieved by modifying the development so as to address the neighbour's merit concerns (such as to prevent invasion of privacy). This solution may be able to be implemented by the developer making a new application to the relevant government authority to modify the development consent so as to achieve the agreed outcome. The neighbour could agree to support the modification application. The government authority could approve the modification application. Thereupon, the neighbour would discontinue the judicial review proceedings because the consent the subject of the challenge has been modified to the mutual satisfaction of the developer and the neighbour.

ADR may also be usefully employed in relation to the choice of remedy if a judicial review challenge were to be upheld by the court. Depending on the nature of the judicial review challenge, the court usually has a discretion whether to grant relief, and if so as to the terms of the relief. This discretion may arise because the remedies are equitable (such as declarations and injunctions) or because of the terms of the statutes that apply to judicial review decisions. For example, in NSW, the Land and Environment Court has a discretion, instead of declaring invalid a development consent found to have been granted in breach of the applicable statute, to make an order suspending the operation of the consent and specifying terms compliance with which will validate the consent (without alteration or on being regranted with alterations).<sup>75</sup>

The exercise of discretion by the court in framing the remedy that is appropriate for a proven breach of the law is more amenable to ADR processes than the prior determination of whether there has been a breach of the law.

## **Civil enforcement**

Civil enforcement proceedings focus on an individual's alleged lack of compliance with a statutory obligation. Because of this narrow focus, civil enforcement proceedings are more amenable to ADR processes. Civil enforcement proceedings are primarily brought by government agencies. For example, in NSW, local government regularly brings proceedings under the *Environmental Planning and*

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<sup>74</sup> The illustration is based on the facts in a judicial review case, *Walsh v Parramatta City Council* (2007) 161 LGERA 118; [2007] NSWLEC 255. The parties there did in fact negotiate a settlement, but unfortunately the settlement fell over and the Court was required to adjudicate the dispute.

<sup>75</sup> *Land and Environment Court Act 1979* (NSW), s 25B.

*Assessment Act 1979* (NSW) seeking a prohibitory injunction (that the person cease carrying out development in breach of the Act) and possibly also a mandatory injunction (that the person remedy any environmental damage done in carrying out development illegally).

However, civil enforcement proceedings may also be brought by non-governmental organisations or members of civil society with a legally sufficient interest to have standing to bring such proceedings. Such direct citizen action to remedy or restrain breaches of the law overcomes administrative inactivity in enforcement and is an alternative to seeking mandamus to compel the relevant administrative agency to enforce compliance with the law.

Often in civil enforcement proceedings, the question of liability (whether there is a breach of the legislation) is not seriously in issue. The real issue concerns the remedy that should be granted. This issue is more amenable to ADR.

The breach of the law may be able to be cured for the future by the wrongdoer making application for statutory authorisation, such as a development consent, to undertake the wrongful conduct. For example, a person who carries out development without obtaining consent under the applicable legislation could make application for consent to carry out that development. The consent authority and the person carrying out the development could negotiate the terms of the development that should be the subject of the application for consent; the information that should be submitted in support of the application; the timing for making the application; the necessity for and the timing of any appeal by the person against the consent authority's determination if consent is refused; and whether the person can continue carrying out the development, and if so, the terms on which they can carry out the development whilst these processes of application and appeal are being pursued.

If injunctive relief is appropriate, ADR can be used to negotiate the terms of such relief. This is especially appropriate where mandatory injunctive relief, such as orders to remediate environmental harmed caused by the breach of law, is to be granted.<sup>76</sup>

Where the statute empowers the court to impose civil penalties for breach, ADR can be used by the parties to negotiate the amount of the civil penalty. The court is not bound by the parties' agreement and may impose a different penalty. Nevertheless, there is benefit in the parties reaching a negotiated settlement. This occurred in *Minister for Environment Heritage and the Arts v Rocky Lamattina & Sons Pty Ltd* (2009) 167 LGERA 219; [2009] FCA 753. The applicant brought proceedings to civilly enforce the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act") in relation to the respondents' conduct in clearing native vegetation contrary to the Act. The parties negotiated a settlement as to the amount of the civil penalty that should be paid by the respondents. Mansfield J of the Federal Court of Australia noted that:

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<sup>76</sup> See, for example, the types of mandatory orders made by the Court in *Great Lakes Council v Lani* (2007) 158 LGERA 1; [2007] NSWLEC 681 for the restoration of the environment harmed by breaches of environmental statutes in clearing native vegetation and endangered ecological communities.

“It is in the public interest for the Court to make orders in litigation concerning the EPBC Act on the terms that have been agreed between parties so as to encourage parties to assist the applicant in investigations and achieve negotiated settlements. The Court has recognised that, in addition to savings in time and costs, there is a public benefit in imposing agreed pecuniary penalties where appropriate as parties would not be disposed to reach such agreements where there are unpredictable risks involved.”<sup>77</sup>

However, the Court noted that its role was not simply to accept and adopt the position agreed between the parties. The Court must consider for itself the appropriateness of the negotiated settlement.<sup>78</sup> In that case, the Court considered the amount agreed by the parties was too low and did not reflect the objective gravity of the conduct involved. The Court imposed a civil penalty in an amount double to that agreed by the parties.<sup>79</sup>

Courts can facilitate resolution of civil enforcement proceedings through mediation. In the Land and Environment Court, civil enforcement proceedings have been referred to mediation,<sup>80</sup> both by court mediators<sup>81</sup> and external mediators agreed to by the parties. Parties to a civil enforcement proceedings have also been able to negotiate settlements by themselves. The settlement rate is high. 82% of civil enforcement proceedings in 2010 were resolved without a hearing and determination by the Court. This figure has remained relatively constant over the last 5 years. This indicates the appropriateness of ADR for the resolution of civil enforcement proceedings.

## CONCLUSION

Increasingly, litigation is perceived as neither inevitable nor superior as a dispute resolution process. Litigation may be required to initiate proceedings in the court, but other dispute resolution processes may be employed to resolve the whole or part of a dispute. In recent history, Australia has seen an expansion in the frequency and variety of ADR processes within administrative tribunals and courts. No doubt it is hoped that more matters will be resolved at an earlier point of time, with less expense to the litigants and the court system.

However, ADR is not a panacea, and its use in administrative disputes should not undermine the overriding function and goal of administrative law to maintain government accountability. In some circumstances ADR is simply inappropriate, for example, where the dispute raises issues of public concern, such as ecologically sustainable development, and where the parties wish to test a statutory provision or establish a legal precedent. The challenge for the future will be to introduce new processes, and refine existing processes, in order to build on the existing high rate of settlement, without adding to the costs of the parties or detracting from the public confidence in the justice system.

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<sup>77</sup> *Great Lakes Council v Lani* (2007) 158 LGERA 1; [2007] NSWLEC 681 at [63].

<sup>78</sup> *Great Lakes Council v Lani* (2007) 158 LGERA 1; [2007] NSWLEC 681 at [64].

<sup>79</sup> *Great Lakes Council v Lani* (2007) 158 LGERA 1; [2007] NSWLEC 681 at [66], [79], [80].

<sup>80</sup> *Civil Procedure Act 2005* (NSW), s 26.

<sup>81</sup> Commissioners or registrars (who are nationally accredited mediators).