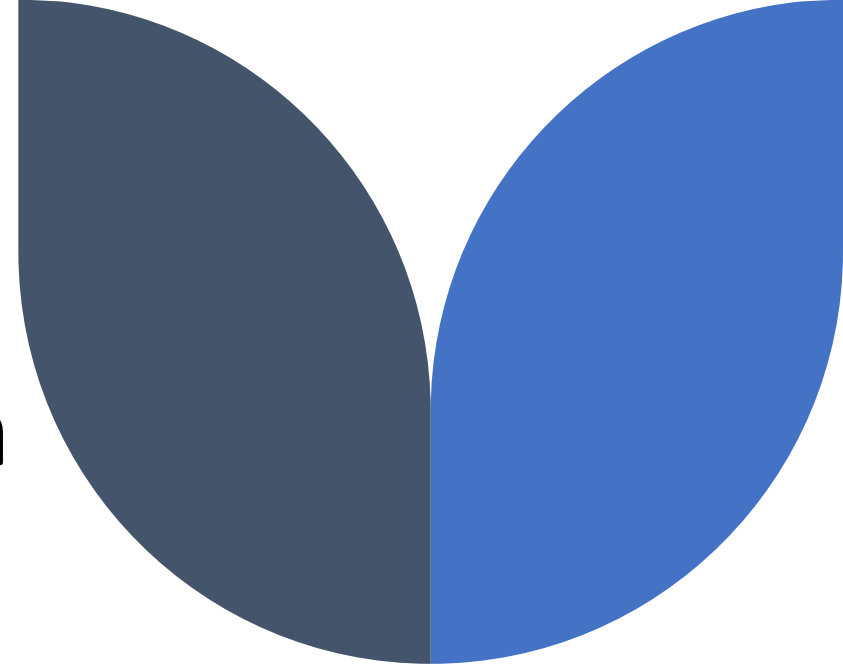


Civil Litigation and Dispute Resolution

The basics you need to know



Topics

What is Alternative Dispute Resolution

What is ADR?

Negotiation

Mediation

Conciliation

Arbitration

Litigation

What is Alternative Dispute Resolution

- ❖ Every year in NSW, lots of people sort out legal issues without going to court. This includes all types of problems, from small money matters or arguments with neighbors, to big business disagreements.
- ❖ These ways of fixing conflicts are known as alternative dispute resolution, or ADR. This section has details to help you figure out the best way to handle your own dispute.



What is ADR?

Alternative dispute resolution, or ADR, is a way of solving disagreements without going to court. It involves someone neutral who helps the people involved to find a solution on their own. Instead of a judge or a magistrate making the decision, the people in the dispute work it out together with this helper.

- ❖ Negotiation
- ❖ Mediation
- ❖ Conciliation
- ❖ Arbitration



Negotiation

What is negotiation?

- ❖ Negotiation is when you and someone else try to solve a disagreement on your own by coming to an agreement. If it's a legal issue, reaching an agreement this way means **you won't have to get a court or tribunal** to decide for you. You can negotiate by talking directly with the other person, sending them a letter, or both.
- ❖ You can start **negotiating at any time**—right when the issue comes up, before you think about taking legal action, or even if you've already started a court case. You can negotiate to resolve the whole issue or just a part of it. There's no single right way to negotiate and no set outcome you should expect. What you end up with will depend on what you and the other person decide together.

Negotiation

Why try negotiation?

- ❖ Benefits of negotiating:
 - ❖ The problem is resolved faster than going to court
 - ❖ It costs less to resolve the problem
 - ❖ The process is less stressful
 - ❖ You get an outcome you may not be able to get at court, such as an apology.
- ❖ When negotiation is not appropriate:
 - ❖ If there has been violence or threats of violence
 - ❖ When one of the parties involved will not agree to negotiate
 - ❖ Where you need a court order to protect you or to make the other party do something or stop doing something.
- ❖ **Note:** if you are not sure if negotiation is the right choice. Please contact us.

Negotiation

Preparing to negotiate

- ❖ it is a good idea to gather any documents or information you have about the problem. For example: written agreements, contracts or receipts, letters, emails, text messages and notes about any conversations.
- ❖ If the problem has been going on for a long time, you may also want to write a chronology, the list of event and the date on which they happened, from the first event to the most recent event.
- ❖ For some types of disputes, for example problems with neighbors or family members, you may not have any documents to bring.



Negotiation

- ❖ Think about what you want from the other person, for example
 - ❖ An apology
 - ❖ An amount of money
 - ❖ For them to stop chasing you for money, or accept a lesser amount
 - ❖ For them to return goods to you
 - ❖ To sort out the dispute so you can move on
 - ❖ Respectful communication in the future

Negotiation

- ❖ Be prepared to listen to what the other person wants or needs
 - ❖ Think about what the other people involved may want. Will they want something different or are there things you both want?
 - ❖ When you are negotiating, you may learn new information that could change your mind or help you to understand what the other person needs to come to an agreement. For example, if you learn that time is not important to the other person, you could offer to repay the money over a longer period of time.

Negotiation

- ❖ Consider ways to solve the problem: what is important to you
 - ❖ are you being realistic?
 - ❖ is what you want possible?
 - ❖ what does the other party want?
 - ❖ do you want the same thing?
 - ❖ can you compromise?
 - ❖ what's your bottom line?
- ❖ You and the other party may have to give up some things if you want to reach an agreement.

Negotiation

- ❖ Think about what might happen if you don't reach an agreement. For example, if you go to court:
 - ❖ you may want the other party to apologize, while this could be something you agree to, a court will not usually order an apology
 - ❖ you may get awarded less money than you expect or less than what is offered in negotiations
 - ❖ you may get ordered to pay your own costs and sometimes the costs of the other party.
- ❖ Think about your 'must haves' and your 'nice to haves'. Must haves are the things you refuse to give up and the nice to haves are the things you can do without.
- ❖ It may be a good idea to talk to someone you trust, who is not involved in the problem. They might come up with some new options for how to resolve the problem.



Negotiation

Tips for negotiating

- ❖ Don't be afraid to make an offer
- ❖ Understand your emotions
- ❖ Keep records
- ❖ Don't give up

Mediation

- ❖ Mediation is an informal way of solving a problem. At mediation, the people involved in a dispute come together with the help of a neutral person called a 'mediator' to try and settle the dispute.
- ❖ The mediator helps people understand the problem, talk to each other and come up with solutions. A mediator will not take sides and cannot give you legal advice.

Mediation

Where does mediation happen?

- ❖ Face to face, usually at a venue organized by the mediation provider (for example, their offices)
- ❖ With each side in a separate room and the mediator going between them (this is sometimes called 'shuttle mediation')
- ❖ Over a telephone conference call.

Mediation

When does mediation happen?

- ❖ After a court case is started
- ❖ During a court case
- ❖ After a decision is made in a court case (for example, because a party is going to appeal a court decision)
- ❖ Mediation may also help where a court has made a decision, but there are still problems between the parties
 - ❖ One of the parties is considering an appeal
 - ❖ One or both parties have not complied with the court decision
 - ❖ New issues have come up

Mediation

How much does mediation cost?

- ❖ Many type of mediation, for example mediation at Community Justice Centres, are free.
- ❖ If you are using a private mediator, the private mediator will charge you a fee.

Mediation

Why try mediation

- ❖ Pros:
- ❖ the people involved in a dispute decide the end result.
- ❖ more flexible than a court case and deal with a wider range of issues.
- ❖ quicker and cheaper than having a hearing in a court or tribunal.
- ❖ a good way to try to keep a good relationship where people need to get along in the future.
- ❖ What happens in mediation is usually confidential.

Mediation

Why try mediation

- ❖ Cons:
- ❖ An agreement reached in mediation cannot always be enforced.
- ❖ If your case goes to court after mediation, things you raised in mediation could tell the other side about weaknesses in your case.
- ❖ The other party does not have to give you information or documents that you want before mediation.
- ❖ The mediator cannot force everyone to come to an agreement.
- ❖ Where there is a public interest in the outcome of a case, it may be more appropriate for a court to make the decision.
- ❖ if one person is worried about the other person being violent or if there is a big power imbalance between the parties that will affect the ability of one side to negotiate on their own behalf.

Mediation

When not to try mediation

- ❖ Mediation may not be right for every case. Even when mediation is meant to be compulsory (like Family Dispute Resolution) there are exceptions. For example, mediation may not be the right choice for you:
 - ❖ if there has been violence or threats of violence
 - ❖ if there is a big power imbalance between the parties in your dispute
 - ❖ when one of the parties involved will not agree to mediation
 - ❖ where you need a court order to protect you or to make the other party do something or stop doing something (and mediation cannot achieve this).
- ❖ **Note:** if you are not sure, please contact us.

Mediation

Think about the issues

- ❖ Take some time to think about the issues you want to talk about at mediation. Write them down. Think about each issue and why it is important to you.
- ❖ Some of the issues may be more important to you than others. Make a note of the issues that are more important to you.
- ❖ Think about what the other people involved in the dispute might say are the issues. Will they raise the same issues as you?

Mediation

Work out what you want

- ❖ Think about what you want to achieve from the mediation. For example, it might be important to you to:
 - ❖ Get a financial settlement
 - ❖ Sort out the dispute so you can move on
 - ❖ Maintain a relationship with the other party
 - ❖ Get an apology
 - ❖ Make sure what happened to you does not happen to someone else
- ❖ Think about what the other people involved in your dispute may want. Will they want something different? Are there things you both want?



Mediation

Think about the options for ending the dispute

- ❖ Be realistic. Is what you want possible?
- ❖ Think about what the other side may want. This may help you work out where your interests and theirs may be the same.
- ❖ Think about whether what you want would be possible if you had to go to court. For example, you may want the other party to apologize. While this could be something you agree to in mediation, a court will not usually order an apology. You may need legal advice to help you understand what you are likely to get if you went to court.
- ❖ It can be a good idea to talk to someone you trust, who is not involved in the dispute. They might come up with some new options for how to resolve the problem.

Mediation

Tips for mediation

- ❖ Understand your emotions
- ❖ Plan how to communicate
- ❖ Think about whether you need to take someone with you
- ❖ Gather all documents that are important to your case and the information that supports your case.

Conciliation

What is conciliation

- ❖ Conciliation is an alternative dispute resolution process where the people in dispute talk about their issues in an informal, private meeting with the aim of reaching an agreement.
- ❖ NCAT's conciliation process is closely linked to the hearing process, rather than as a separate step of dispute resolution. Parties are asked to attempt conciliation before the hearing can take place.

Conciliation

Advantages of conciliation

- ❖ Conciliation allows you to have control over the outcome of your dispute and is more likely to result in an agreement you both find acceptable.
- ❖ Conciliation gives you and the other party an opportunity to:
 - ❖ Tell your side of the story in a free and open discussion
 - ❖ Listen and get a better understanding of the other party's issues
 - ❖ Resolve the dispute mutually and quickly on the day.
 - ❖ Find a solution that makes sense to both of you.

Conciliation

Eight top tips for Conciliation

- ❖ Think about what you want
- ❖ Work out how you will negotiate
- ❖ Tell your side of the story
- ❖ Listen to the other person
- ❖ Focus on the issues, not the emotions
- ❖ Start negotiating
- ❖ Only agree to what you think is acceptable
- ❖ Ask for help if you're having problems

Conciliation

What to expect during conciliation

- ❖ The Tribunal Member will ask all parties to attempt to reach an agreement through conciliation. You will be directed to a conciliation room or area outside the hearing room.
- ❖ Conciliation gives you and the other party an opportunity to meet each other, discuss your issues and reach a compromise that meets both your needs.
- ❖ During the conciliation process, you are encouraged to:
 - ❖ Try to understand and respect each other's different points of view
 - ❖ Be prepared to negotiate.
 - ❖ Make a list of possible solutions
 - ❖ Only agree to what you think is fair

Conciliation

The conciliation process

- ❖ The role of conciliator is similar to that of mediators except that the conciliator may also:
 - ❖ Have special knowledge and give you some legal information
 - ❖ Suggest or give you and the other participants expert advice on the possible options for sorting out the issue in your dispute
 - ❖ Actively encourage you and the other participants to reach an agreement.
- ❖ The conciliar **will not**:
 - ❖ Take sides or make decisions
 - ❖ Tell you what decision to make, although they may make suggestions
 - ❖ Decide who is right or wrong
 - ❖ Provide counselling

Arbitration

What is arbitration

- ❖ Arbitration is an ADR process where the parties present arguments and evidence to an independent third party, **the arbitrator, who makes a determination.**
- ❖ Arbitration is particularly useful where the subject matter is highly technical, or where the parties seek greater confidentiality than in an open court.
- ❖ Arbitration may be voluntary, ordered by the court or required as part of a contract.

Arbitration

About the arbitration process

- ❖ Arbitration can be a much more formal and structured process than mediation or conciliation. In some ways it is more similar to court, because at the end of the session the arbitrator makes a binding decision.
- ❖ The main difference between arbitration and other forms of ADR
 - ❖ The people in dispute need to agree before the process that the arbitrator's decision will be **binding and enforceable**.
 - ❖ There is a much greater need to produce evidence or facts
 - ❖ There may be one arbitrator or a group of arbitrators to hear your dispute
 - ❖ The arbitrator may be a specialist in the subject matter of the dispute or have legal qualifications
 - ❖ At the end of the process the arbitrator will make a decision for the parties.

Arbitration

About the arbitration process

- ❖ If an arbitrator makes a decision you are not happy with, you may be able to appeal to a court or other higher authority. However, this may be difficult and require you to point to particular problems with the decision, such as it being biased or unfair.
- ❖ If you have questions about the binding nature of arbitration, you should contact us and get legal advice.

Arbitration

When is arbitration suitable?

- ❖ Arbitration can be particularly useful where mediation or conciliation have not led to an agreement or if you want a process where a decision is made for you, but is confidential and generally cheaper and quicker than going to court.

Arbitration

What role do lawyers or expert play?

- ❖ Lawyers are often involved in arbitration and may represent the participants. Experts may also attend to give evidence for the arbitrator to consider.

Civil Litigation

What is civil litigation

- ❖ Litigation is the formal process of resolving disputes through the courts. Essentially, it is a means by which one party can attempt to enforce or defend its legal rights against another party.
- ❖ Litigation is often misunderstood as another term for ‘lawsuit’, but a lawsuit is typically only one part of a litigation case. In fact, many other activities can be included before, during or after a lawsuit to enforce a party’s legal rights.

Civil Litigation

- ❖ Litigation can be very long, complex, and expensive but must follow certain steps. Generally speaking, for a matter to proceed through the courts or tribunal process, it needs to start with one party filing either a statement of claim or an originating process.
- ❖ Whether the case is heard in a court or tribunal is determined by the proposed cause of action, relevant statutes and the monetary limits applied to the courts and tribunals in each jurisdiction.

Civil Litigation

The Courts

- ❖ In NSW, there are various levels of courts, each handling different types of cases based on their seriousness or complexity:
 - ❖ Local Courts: Handle less serious cases, such as minor criminal offences and civil disputes up to a certain value.
 - ❖ Small Claims Division: Handles disputes for claims up to AUD \$20,000.
 - ❖ General Division: Deals with claims ranging from above \$20,000 up to \$100,000.
 - ❖ District Courts: Deal with more serious criminal matters and larger civil disputes.
 - ❖ Can deal with civil claims up to AUD \$750,000.
 - ❖ Has unlimited jurisdiction in personal injury cases.

Civil Litigation

The Courts

- ❖ Supreme Court: The highest state court, handling the most serious and complex cases.
 - ❖ Handles cases involving larger amounts, typically over AUD \$750,000, with no upper limit.
 - ❖ It also deals with cases that require greater expertise or involve more complex matters, regardless of the amount of money involved.
- ❖ Federal Courts and High Court: Deal with matters under federal law, with the High Court being the highest court in Australia.
 - ❖ The Federal Court does not have a monetary limit on the claims it can hear.
 - ❖ High Court's role is to provide ruling on matter of law that have broad implication for the country.

Final words of advice

- ❖ Litigation is a big decision.
- ❖ Try ADR first. If you need help, please contact us.
- ❖ If you need go to the court, please contact us and get legal advice

Thank you

