

## Mapping the ADR Landscape – a conceptual approach to access to ADR

By Nadja Alexander

Access to ADR can be conceptualized in a number of ways. Some commentators focus on the court or the legal profession as a central access point for disputes.<sup>1</sup> While this may seem natural for lawyers and judges, such an approach fails to account for the vast majority of disputes – approximately 80% - that never see a lawyer let alone a court.<sup>2</sup> Similarly, other commentators focus on private or community-based applications of ADR as well as transactional applications of mediation such as contract negotiations.<sup>3</sup> Still others analyse ADR from the perspective of particular stakeholder groups such as industry, insurers, minority groups, women, ADR institutions and the justice system.<sup>4</sup> However the big picture of how ADR is accessed and moreover how it is operationalised is important. The introduction of ADR and in particular mediation has created new opportunities for a number of professions, including law. For lawyers mediation is an opportunity not only to provide qualitatively and quantitatively better service to existing clients, it is also an opportunity to capture some of the 80% market that would not traditionally seek out the assistance of a lawyer. From this perspective, it is valuable to consider the range of ways in which disputants and disputes access ADR.

In setting the parameters to understand access to ADR, it is useful to begin with the one theme that has continued to dominate and define discussions, debates and developments in the ADR movement. The **diversity-consistency** theme refers to a tension between the need to embrace diversity in practice through flexibility and variety in ADR processes and programs on one hand and the need to establish consistent and reliable measures of quality in ADR service provision on the other. The future of the ADR landscape will depend on how the diversity-consistency debate develops and, in particular, how it manifests itself in terms of two factors:

the nature of distribution of ADR services i.e. degree of centralization or decentralisation, the nature of input from government and the marketplace i.e. degree of (de-) regulation of ADR services including the degree of government financial support for ADR services.

The more centralized, regulated and government funded an ADR service, the more likely it is to move towards consistent practice rather than encourage experimentation. Conversely, a decentralized, deregulated user pays marketplace model is more likely to encourage innovation and diversity. Of course, these are two extreme examples and

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<sup>1</sup> See, for example, E Gray, “Multi-Door Courthouse” in S Kelitz (ed), *National Symposium on court-Connected Dispute Resolution Research*, State Justice Institute 1993, L Finkelstein, “The DC Multi-Door Courthouse” (1986) 69 *Judicature* 305.

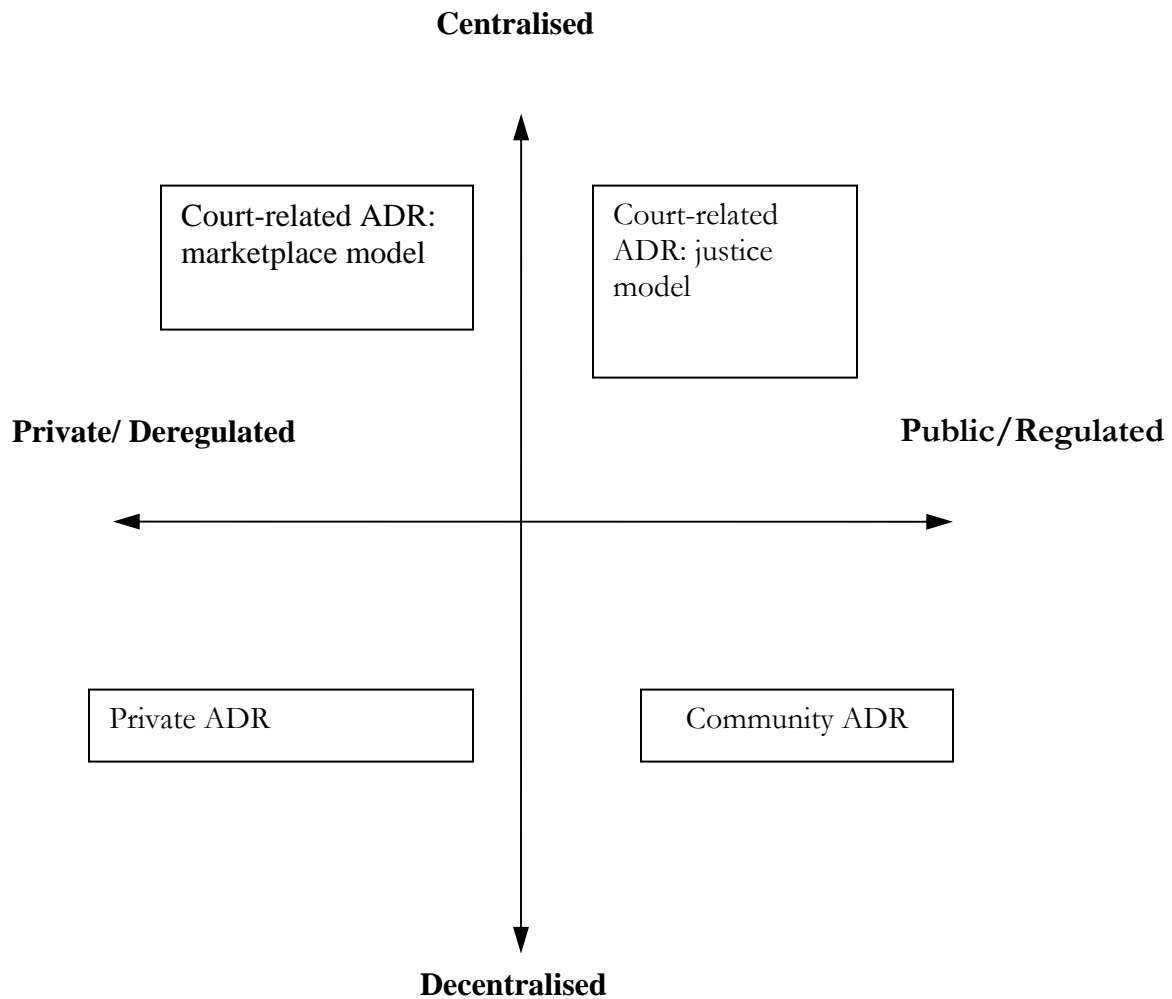
<sup>2</sup> Astor/Chinkin, *Dispute Resolution in Australia*, Sydney 2002, 47-48.

<sup>3</sup> See for example, S. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?* 19 OHIO ST. J. ON DISP RESOL 283 (2004).

<sup>4</sup> For example, on women see J Rifkin, “Mediation from a Feminist Perspective: Promise and Problems” (1984) 2 *Law and Inequality* 21, and H Astor “Feminist Issues in ADR” (1991) 65 *Law Institute Journal* 69. On ethnic minority group see, for example, G LaFree and C Rack, (1996) “The Effects of Participants Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases” 30 *Law and Society Review* 767.

unlimited shades of differentiation exist between them. The range possibilities for an ADR landscape are illustrated in the following diagram.

### The ADR landscape – access to ADR



The above diagram visually maps the ADR landscape. The vertical axis represents the nature of distribution of ADR services from centralized to decentralized. The horizontal axis represents the balance between private marketplace input and public/governmental input into ADR services in terms of regulation and financial and other support. The diagram identifies and characterizes the multiple access points to ADR. The four quadrants represent different structural trends that can be found in the ADR landscape.

Court-related ADR (represented by the two top quadrants) indicates a trend towards a centralized approach to ADR with the court as the central access point for ADR services. The primary distinction in court-related ADR programs is whether the provision of ADR services is considered to be (i) an integral part of the justice system and therefore a function of the court (the Justice Model) or rather (ii) an emerging private sector marketplace for dispute resolution (the Marketplace Model).

The typical features of the Justice Model are as follows. The parties are referred to ADR by the court. The ADR process usually takes part in the court building and by court-based ADR practitioners. The ADR practitioners are drawn from the judiciary, court personnel, panels of mediators attached to the court or an external community ADR organisation. The mediators are chosen and appointed by the court and the costs of the mediation are borne by the justice system. Examples of the justice model of court-related ADR in Australian practice can be found in the Queensland Commercial and Consumer Tribunal, the Family Court of Australia and the Administrative Appeals Tribunal.

The market place model represents a privatised form of court-related ADR, in which the court outsources ADR services. The ADR practitioners are typically external to the court and are members of a panel of court-approved ADR service providers, who set their own fees payable by the disputants. In other words, the marketplace model promotes a user-pays system. Where the user pays, the user has choice. Accordingly ADR services providers are selected from the court panel by the parties. In most cases, the parties are also free to agree on an ADR service provider who is not on the panel. Examples of the market place model of court-related ADR in Australian practice can be found in the Queensland and NSW Supreme and District Courts and most other same level state courts in Australia.

The lower two quadrants of the ADR landscape indicate a move away from the courts and away from centralization. The combination of a high degree of regulation and/ or government support with a decentralised approach is represented by the community ADR model. In the community ADR model, ADR is widely accessible through community-based ADR organisations and other community organisations such as refugee and women's shelters, government sponsored legal centres, legal aid and the police. ADR practitioners include volunteers, employees of community ADR organisations and freelance mediators engaged on a contract basis. Typically disputants do not pay for the service and where ADR services are not volunteered, the costs are carried by the government. Although there is a great variety in community ADR practice, most mediation models follow an interest-based or therapeutic approach. Examples of community ADR include the Community Justices Centres<sup>5</sup>, which are part of the various Australian State Departments of Justice.

The private ADR quadrant represents the combination of a decentralised and a private/ deregulated approach. Here ADR is offered by a range of private sector organisations and freelance ADR practitioners on a fee-for-service basis. Mediators represent a wide range of professions with a corresponding range of qualifications depending on organisational

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<sup>5</sup> In Queensland now called the Dispute Resolution Centre.

or industry requirements and standards. In this quadrant training and accreditation organisations flourish, specializing in a variety of ADR practice areas. Examples of private ADR providers include LEADR, ACDC, the Conflict Resolution Network and Mediate Today.

Countless variations of ADR practice can be found within the four quadrants. Australian ADR practice indicates a significant representation of ADR programs in each of the four quadrants – arguably a reflection of the continued experimentation in ADR processes and programs throughout the dispute resolution industry. Further, the relatively balanced distribution of ADR services indicates a broad range of access points to ADR. Such sustained diversity is essential for the continued attractiveness of ADR as an adaptable and innovative alternative to traditional court procedures.

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