Using Alternative Dispute Resolution to Save Time[1]

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Abstract

Issues that are related to the impact of delay in respect of resolution of disputes have been partly responsible for the introduction of ADR in Australia and around the world. Often ADR processes are considered to save both time and cost, particularly when they prompt or support settlement. However, the extent to which ADR does save time is unclear, partly because there is a lack of data in respect of the civil justice system and delay in general. Recent initiatives to support earlier pre-court filing ADR are often untracked and court and tribunal systems do not usually measure pre litigation activity nor delay from the date that the dispute arose. Rather, delay and timeliness tends to only be measured from the date any court or tribunal proceedings commenced.

Research has suggested that an important factor in shaping perceptions about whether the system or processes used to resolve a dispute are 'just' or 'fair' is linked to whether the time taken to resolve or settle the dispute was 'too long'. There are also issues about the timing of ADR referral and the limited studies in respect of timing suggest that perceptions of all those involved in a dispute can vary in terms of whether the time spent was 'reasonable'. That is, lawyers, disputants, judges and ADR practitioners may all consider whether or not the time taken was appropriate in different ways and clearly some disputants and others may benefit from extending the time taken (from a tactical or financial perspective).The use of triage approaches at an earlier point in the life cycle of a dispute are intended to produce more timely outcomes and can assist in assessing what is 'reasonable' in the context of a particular dispute. These approaches are becoming more relevant as ADR is increasingly utilised outside the litigation system.

Introduction

Past research shows that the time taken to deal with a dispute is, *a*, and in many cases, *the* critical factor in determining whether or not people consider that the justice system is just and fair.[3] Although substantive and procedural justice factors are important in shaping perceptions, if it takes too long for a dispute to be resolved, the damage that results from delay may never be remedied and people may consider the system and processes to be unjust. Apart from increased cost, delay can have negative

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3 T. Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009),) 117–118; T. Sourdin, *Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts* (Monash University, Melbourne, 2012), pp. 127–147, available at http://www.civiljustice.info/ (accessed 15 October 2013).

business and health impacts.[4] It is partly because of the issues concerning the impact of delay in respect of dispute resolution that in Australia, and around the world, that alternative dispute resolution (**ADR**) processes have been introduced. Apart from producing more integrative outcomes, often ADR processes are considered to save both time and cost – particularly when they prompt or support settlement.

However, the extent to which ADR does save time is unclear, partly because there is a lack of data in respect of the civil justice system (which extends beyond formal courts and tribunals). For example, the relationship between pre-action processes and systems, courts and tribunals is often unexplored. Although today ADR is often a pre-condition to the commencement of proceedings, courts may have little information about how long this process took, what forms of ADR were used or whether or not ADR produced a narrowing of issues or promoted the timely resolution of disputes.

As noted in the recent report by the Australian Centre for Justice Innovation (**ACJI**) at Monash University on timeliness,[5] delay is generally measured within systems by examining the time taken for a dispute to progress from a point of filing or referral to resolution. That is, the time taken for the matter to progress from the filing of some type of documentation to finalisation within a court, tribunal or via an ADR process. It is rare that time is ever measured from the date that the cause of action arose (for example, an injury or breach of contract). Some recent reforms focused on ADR consider this longer time frame and the life cycle of a dispute more wholistically, and new proposals by ACJI to enhance timeliness are partly directed towards better data capture and reporting across the justice sector.

Obligations to Support More Timely Dispute Resolution

The issue of measurement of delay is significant because many recent innovation areas that are directed at supporting ADR remain unevaluated. For example, in an attempt to promote timely and more cooperative cultures within the justice system, obligations have been imposed on disputants and litigants to encourage 'reasonable' or 'genuine' behaviour. However, because of the way in which delay is currently measured, there is little guidance about how useful these approaches are.

These types of initiatives are sometimes focused on reducing tactical approaches that may increase delay. In other situations, the more recently articulated obligations are focused on early dispute resolution, before court or tribunal proceedings commence. Often these obligations or requirements specify steps or actions that must be taken before court processes can issue and may focus on early diversion of disputes to ADR.

The obligations may include:

- the need to disclose information or documents in relation to the cause of action;
- the need to correspond, and potentially meet, with the person or entity involved in the dispute;
- undertaking some form of ADR in good faith; and

4 G. Grant, M. O'Donnell, M. Spittal, M. Creamer and D. Studdert, 'Relationship between Stressfulness of Injury and Long-Term Recovery' (2014) 71(4) *JAMA Psychiatry* 446-453.

5 ACJI, *The Timeliness Project: Background Report* (ACJI, Monash University, Melbourne, October 2013), available at http://www.civiljustice.info/timeliness/24/ (accessed 5 June 2014).

- conducting genuine and reasonable negotiations with a view to settling without recourse to court proceedings.[6]

Obligations have promoted extensive ADR use outside the court and tribunal system. Various reports have attempted to track and comment on this vast alternative system, such as the *Alternative Dispute Resolution in Victoria: Supply Side Research Project* research report,[7] which explored the organisation of the supply of ADR services in Victoria. Often these arrangements require the set up of External Dispute Resolution (**EDR**) processes as well as Internal Dispute Resolution (**IDR**).

ADR service providers were broadly defined in the report and included the complaints-handling sector that may be industry-based or government-supported (for example, Consumer Affairs Victoria (**CAV**)). The report also tracked ADR but not timeliness, although it was noted that there may be 'referral loss' as pathways into ADR may not be clear for some disputants (for example, in terms of CAV options and options to go to the Victorian Civil and Administrative Appeals Tribunal (**VCAT**)). The impact on timeliness within the court system after ADR use in the sector is usually unknown. It is sometimes assumed that only smaller consumer disputes progress through these processes; however, the Supply Side Report noted that more complex disputes pass through EDR systems, as well as independent mediation and arbitration and can be resolved prior to court or tribunal entry.

Within Australia, there are a number of EDR providers that include conciliation and advisory bodies, financial ombudsman services (**FOS**) and other industry and family dispute resolution service providers. Reporting about ADR processes, timelines used and frameworks varies extensively across this sector. Some providers have extensive reporting requirements; for example, schemes such as FOS have been required under the Australian Securities and Investment Commission (**ASIC**) regulatory regime to report annually under a range of indicators and are also required to have independent qualitative and quantitative reviews every five years. In the more regulated schemes that are external to courts, timeliness is often also measured by reference to time standards and disputant perceptions of reasonableness.

Apart from obligations to use ADR before commencing court or tribunal processes, obligations can also include requirements to act in particular ways if litigation is commenced. The obligations placed on various stakeholders through legislative reform, court-based initiatives and other reforms are often directed at fostering a culture that supports timely dispute resolution and finalisation. However, the lack of systemwide data means that the impact of these obligations and the interplay between pre-court filing and post-court filing ADR activity is often unmeasured or poorly linked with other justice indicators, such as the increased cost of complying with obligations.

6 Australian Law Reform Commission, *Discovery in Federal Courts, Consultation Paper No 2* (Commonwealth of Australia, November 2010), 160, citing Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008), 109; M. Legg and D. Boniface, 'Pre-action Protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39.

7 C. Field, *Alternative Dispute Resolution in Victoria: Supply Side Research Project – Research Report* (Chris Field Consulting Pty Ltd, Melbourne, 2007).

Impact of ADR

Despite the lack of clear data across the system relating to timeliness, ADR appears to play an important role in achieving timeliness in the resolution of disputes across the civil justice sector, partly because it may support earlier dispute resolution. However, the way in which ADR is used and the frequency of ADR use is untracked across the system. For example, more often than not, if an ADR process has not been used in the pre-action area, ADR will be used once proceedings commence in a court or tribunal (and may be used more than once). Resolution rates appear to vary, although even where a settlement does not occur at an ADR process, recent research in respect of family dispute resolution and tax disputes by ACJI suggests that early ADR events will often prompt settlement (either before, during or after an ADR session) or will narrow the range of issues that progress to any litigation process.

It is difficult to track ADR as it can be used as a result of a court referral, contract, legislation, private agreement, regulatory scheme, standard, obligation or through agreement. The ADR landscape is also vast. ADR has been used in immigration, tax, medical, injury, estate, commercial, construction, family, workplace, property, administrative law, planning, environmental and other categories of dispute. ADR takes place through a myriad of EDR schemes in the banking, retail lease, financial and health sector as well as through specialist conciliation and state-based services and in the private sector.

The impact of this vast ADR system on timeliness and activity in the court and tribunal sector is less clear than the impact of ADR on settlement and dispute activity that takes place in the external ADR environment. This is partly because many available court statistics regarding the period before and after the introduction of extensive ADR arrangements are somewhat questionable. Many court and tribunal IT systems relied on limited, and at times inaccurate, technologies into the 1990s. Considering court and tribunal statistics can also be an unreliable marker as increased ADR use has been coupled with significant legislative changes that have limited litigation in some areas (for example, in the personal injury area) and increased litigation in others (wills and estates).

However, in the early 1980s, a 'litigation explosion' had been forecast, and numerous court-led ADR initiatives (for example, the Spring Offensive and the portals scheme) undoubtedly cleared backlogs within courts. It would seem that a combination of factors diverted this 'explosion', and many would suggest that ADR was one of the most important. The continuing use of ADR has also meant that many civil matters currently commenced within courts and tribunals are likely to be resolved through an ADR process and in a faster time than through a fully litigated hearing. However, the use of time standards to measure timeliness has meant that questions about the reasonableness of any delays, or whether ADR processes could have occurred at an earlier time, may be obscured by reporting, which tends to focus on the percentage of cases resolved within a 12- or 18-month period (rather than more sophisticated reporting that links timeliness to case and litigant characteristics and process interventions).

Court and Tribunal Processes

Many innovations that have been developed in the court and tribunal system to deal with delay are linked to changing trends in case management and more managerial approaches to judging, while others have been oriented towards changing hearing processes so that the time taken in a hearing process is reduced. Some of these changes have utilised ADR by blending case management and litigation with ADR

processes and may consider delay in the context of setting timetables.

These processes vary across jurisdictions, and some are integrated into the judicial hearing process. However, it remains unusual for Australian judges to conduct 'mini trials' or to mediate (as is the case in some overseas jurisdictions). Commonly, judges will use an 'add-on process' in some jurisdictions and may consider delay issues when they do so. For example, in New South Wales (NSW), in the past it was relatively common to use a 'referee' to determine an aspect of a dispute (and in some cases most issues in dispute). In NSW, in *Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd*,[8] Smart J stated that when deciding whether to refer a question to a referee, the matters that will generally require consideration are (*our emphasis*):

(a) the suitability of the issues for determination by a referee and the availability of a suitable referee;

(b) **the delay before the court can hear and determine the matter and how quickly a suitable referee can do so …**;

(c) **the prejudice the parties will suffer by any delay**;

(d) whether the reference will occasion additional costs of significance or is likely to save costs;

(e) the terms of any reference including the issues and whether they should be referred for determination or inquiry or report.[9]

There are some ADR programs that are more closely linked to the judicial process that have been used in Australian courts and are focused on reducing delay. For example, the County Court of Victoria trialed Judicial Settlement Conferences in WorkCover serious injury applications, being informal conferences held in a courtroom before a County Court judge, with the parties' representatives present. The court reported that, at 30 June 2012, approximately 30 per cent of the cases conferenced had settled at the Judicial Settlement Conference or within the following 60 days.[10] This is an example of how court-assisted ADR has in the past, to some extent, helped to resolve some cases and reduce delay in having hearings listed.

Some judicial officers find this an effective way to improve timeliness once proceedings have commenced; however, overall, judicial intervention in the settlement process is still somewhat controversial and this controversy may have prevented a clearer focus on issues relating to timeliness. In Victoria, a number of issues have been raised as difficulties in the context of judges participating in ADR. The role of the mediator has been seen as requiring different skills from those required for adjudication, and there has been conjecture about whether or not judicial mediation is a constitutionally valid exercise of judicial power under the *Commonwealth Constitution*. In Victoria, judicial immunity and immunity from giving evidence now flow through from the bench to a range of ADR processes, including mediation, in which judges may participate.[11]

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8 *Park Rail Developments Pty Ltd v R J Pearce Associates Pty Ltd* (1987) 8 NSWLR 123.

9 Ibid 130.

10 County Court of Victoria, *Report of the Judges of the Court* (*2010–2011 Annual Report of the County Court*) (County Court of Victoria, Melbourne, 2011), available at http://www.countycourt.vic.gov.au/annual-reports (accessed 25 September 2013).

11 See Courts Legislation Amendment (*Judicial Resolution Conference) Act 2009* (Vic).

In some courts, there has been a clearer delineation of ADR process types and the type of judicial engagement to refocus attention on the issues relating to timeliness. For example, in the Magistrates' Court of Victoria, early neutral evaluation (**ENE**) has been introduced on a pilot basis and involves a magistrate hearing the parties in an informal setting and offering a non-binding evaluation of the dispute. The court has focused on disputes over $50,000, where a trial and adjudication are the likely outcome. Participation is mandatory and is aimed at encouraging the parties to find an early resolution of the matter.[12] In these schemes, judges are not mediating but evaluating, and arguably many judicial officers have more refined skills in the context of analysis and evaluation than in mediation.

However, in many cases within courts and tribunals, there is little or no judicial involvement in ADR. The ADR process is more frequently managed by an ADR practitioner who may be an associate judge, a mediator, a member of staff or a private ADR practitioner but not a judge. Often the ADR process can be triggered by a court or tribunal referral or parties in a dispute will choose to use a form of ADR. In many of these cases, there may be little, if any, reporting about the time taken in respect of an ADR process that has been managed by an external ADR practitioner and there is often no clear policy or approach regarding either the timing of ADR or the frequency of ADR events.

The Timing of Referral to ADR

In relation to court and tribunal referrals to ADR, different courts and tribunals adopt different approaches, with some opting for early ADR referral and others opting for late referral. Early referral may not be productive if the parties have not had enough time to investigate issues and obtain advice; however, it has been suggested that, when disputes are not subject to an early ADR process, they may take longer to resolve when a process is eventually used.[13] In addition, the longer a case is litigated may have an impact on the likelihood that ADR will result in a resolution. This is because 'adversarial' court-related processes may polarise disputant positions, increase costs and make disputants and lawyers more inclined to behave in an oppositional manner.[14]

One study, conducted by Justice Bergin in New South Wales, suggested that in certain types of cases (complex commercial) later referral was appropriate.[15] Other research outside the courts suggest that these matters can be resolved at an earlier time in the pre litigation environment.[16] Recent reforms in some jurisdictions such as Victoria have been focused on encouraging and requiring parties to exchange evidence at an earlier point in part because this may mean that earlier referral to mediation can take place.

12 Magistrates' Court of Victoria, Annual Report 2010–2011 (Magistrates' Court of Victoria, Melbourne 2011), 55, available at http://www.magistratescourt.vic.gov.au/publication/annual-report-2010-2011 (accessed 25 September 2013).

13 T. Sourdin, *Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, Melbourne, November 2012), 127–128, available at http://www.civiljustice.info/ (accessed 11 December 2012).

14 Ibid.

15 See Bergin J. at http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m670001l11/bergin_2012.10.19.pdf (accessed 25 September 2013).

16 Arbitration is frequently used in the complex commercial area and other strategies include the use of Dispute Resolution Boards and Advisors to assist in the prevention and resolution of disputes. There are also a number of schemes operating in the complex commercial area before litigation commences that may be partly government sponsored or industry regulated (for example in the oil and gas and telecommunications industry).

An important factor affecting the efficacy of ADR is said to be related to its timing and the 'ripeness' of the dispute for resolution. 'Ripeness' refers to the presence of factors that may make the parties more likely to reach agreement or may make mediation more appealing.[17] This might relate to emotional ripeness or the degree of clarity in terms of understanding about the issues; however, in somewhat dated research, Goldberg, Sander and Rogers have found it might not be necessary for all issues to be apparent to enable processes such as mediation to succeed.[18]

On the other hand, some commentators place importance on the 'extent of time pressure for resolution' as a factor influencing the appropriateness for mediation or some form of ADR.[19] This might be related to the idea that, sometimes, potential litigants will only become inclined to settle once they see how difficult the litigation process can be. Influential factors could include a realisation of the mounting cost and energy investment as litigation progresses, giving rise to an incentive to try to resolve the dispute. A study on intestate disputes highlighted the curvilinear relationship between when the mediation occurs and the duration of dispute.[20]

Avoidable delay, where ADR is concerned, might equate to a discussion around the timing of processes such as mediation, the parties' willingness to engage, or the court's readiness to refer to such processes and divert matters from litigation. It has been noted that 'bad' behaviour of participants in ADR processes can affect the timeliness of the resolution of a dispute. 'Bad behaviour' can incorporate delaying tactics or a willingness to 'take every point'. Delaying ADR or avoiding meaningful participation by litigants may be motivated by indecisiveness, desire for further information or a wish to extend litigation or antagonise the other party. In these cases, where lawyers are also involved, distinguishing the conduct of lawyers from the conduct of clients can be difficult, and sometimes the oppositional or adversarial inclination of the lawyer can contribute to delay.

It is partly for these reasons, that ADR may now be used with other case management interventions and requirements. A number of recent ADR initiatives have been implemented in the Supreme Court of Victoria that support the timing of ADR at various points, including:

- The Personal Injuries List moved towards the practice of providing trial dates at the first directions hearing, encouraging early ADR by providing a definite trial date to motivate parties' resolution efforts.[21]

17 International Institute for Conflict Resolution ADR Suitability Guide (including Mediation Analysis Screen), 2006, available at http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Tools/ADR%20Suitability%20Screen.pdf (accessed 25 September 2013).

18 S. Goldberg, F. Sander and N. Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes* (Little, Brown & Co, United States, 2nd ed, 1992) 353.

19 Sourdin, above n 13, 127-128.

20 P. Regan and A. Stam, 'In the Nick of Time: Conflict Management, Mediation Timing, and the Duration of Interstate Disputes' (2000) 44(2) *International Studies Quarterly* 239.

21 See Supreme Court of Victoria, Annual Report 2010–2011 (Supreme Court of Victoria, Melbourne, 2011), 61, available at http://www.supremecourt.vic.gov.au/home/library/supreme+court+of+victoria+2010-11+annual+report (accessed 25 September 2013).

- Increased intervention by associate judges, including conducting mediations, led to increased settlements, saving judicial time.[22]

However, studies in the past indicated that often there is little integration or consideration of delay when referring matters to ADR. For example, the Victorian Supreme and County Court mediation programs were evaluated in 2007, and the evaluation report in 2008[23] indicated that a large proportion of matters that were mediated (mostly by external mediators) were 'old disputes'. In that report, a distinction was made between 'case age' and 'dispute age'. It was noted:

> *Age of dispute*
>
> *2.65 There are a number of ways to measure the age of a dispute and its relationship to resolution that are relevant to examining the effectiveness of mediation in the Supreme and County Courts of Victoria.*
>
> *2.66 The first approach is to measure the age of the actual dispute, from the date the 'cause of action arose' to the date of mediation. This approach provides information on whether resolution was affected by the time that has passed since the event that caused the dispute occurred.*[24]
>
> *2.67 The second approach is to measure the 'case age', that is, how long the dispute has been in the Court system when mediation took place. This approach is useful in assisting the Courts determine at what stage in a dispute, mediation should be ordered.*
>
> *Dispute age at mediation*
>
> *2.68 In the Supreme Court, the median dispute age at mediation (time from when cause of action arose to first mediation) was 971 days (2.7 years).*[25] *In the County Court, the median dispute age at the time of the first mediation was 1,437 days*[26] *(4 years). County Court disputes tended to be older*[27] *than Supreme Court disputes at the time of mediation (this difference was statistically significant).*

22 Ibid 53, 70.

23 See T. Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Department of Justice, Victoria, Australia, April 2009), available at http://www.endispute.com.au/wpdl/Mediation%20in%20SC%20and%20CC%20of%20Victoria%20Research%20Report_251108.pdf (accessed 25 September 2013).

24 Research suggests that the length of dispute affects the likelihood of resolution. For example, P. Regan and A. Stam, 'In the Nick of Time: Conflict Management, mediation Timing, and the Duration of Interstate Disputes' (2000) 44 (2) *International Studies Quarterly* 239; the 'cause of action' date was usually derived from the originating writ or motion in which the plaintiff described the history of the conflict.

25 (n=73; M=1256.36; SD=881.09; Median=971.00).

26 (n=97; M=1615.02; SD=1184.03; Median=1437.00).

27 (t(170)=2.37, p=.019).

Case age at mediation

2.69 In the Supreme Court, the median case age (time from when the matter was filed in court to the first mediation) at the first mediation was 324 days.[28] *In the County Court, the median case age at first the mediation was 260 days.*[29] *In summary, it took a similar length of time for cases to get to mediation in the two jurisdictions,*[30] *but County Court disputes were older when they were commenced in the Court.*[31]

In that report, it was noted that 'younger disputes' were more likely to be finalised at mediation, and recommendations were made that 'younger disputes' could be identified when proceedings were commenced and referred to mediation:

Does age influence mediation outcomes?

Recommendation: Some matters should be referred to mediation by the Courts at an earlier time.

Cases where the dispute arose less than one year before the proceedings were filed should be targeted for earlier mediation referral.

2.71 Table 2.8 outlines the results for younger and older Supreme and County Court disputes by mediation outcome (finalised at mediation; not finalised at mediation). The median (1,323.5 days) was used to split the groups. As can be seen from Table 2.8, younger disputes were more likely to be finalised at mediation and older disputed were less likely to be finalised at mediation. This difference approached statistical significance[32] *and the pattern of findings is similar to those of Sourdin and Matruglio,*[33] *who found that disputes in the NSW Supreme and District Courts that had a duration of three years or less at the time of mediation were more likely to resolve at mediation than disputes that were older than three years.*

28 (*n*=74; *M*=417.05; *SD*=387.11; Median=324).

29 (*n*=99; *M*=345.40; *SD*=278.00; Median=260.00).

30 The difference in time from originating motion to mediation in the Supreme and County Court was not statistically significant (*t*(171)=-1.42,*p*>.05).

31 Sourdin, above n 23.

32 (c2(1) = 3.03, p=.08) Continuity correction used for 2x2 table.

33 T. Sourdin and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (La Trobe University and the Law Society of New South Wales, Melbourne, 2004).

Table 1.1: Age of dispute at mediation by Outcome- 2009 Report[34]

Age of dispute at at mediation	Finalised at mediation		Not finalised at mediation		Total	
	n	*%*	*n*	*%*	*n*	*%*
<= 1324 days (3.6 years) – younger disputes	46	58.2	37	43.0	83	50.3
> 1324 days (3.6 years) – older disputes	33	41.8	49	57.0	82	49.7

The Development of Triage to Support Timeliness and ADR

Issues relating to timeliness and ADR referral have also been explored in the context of delivering better 'triage' models. Triage approaches can be used by a court, tribunal, scheme or disputants to refer disputes at the earliest possible time to the most appropriate form of dispute resolution. Often they can involve a discussion at the earliest possible time after a dispute has arisen to determine the most appropriate process to apply and the timeframe within which to resolve the dispute. The Integrated Dispute Resolution approach in the Administrative Appeals Tribunal (AAT) that was introduced in 2014 is oriented towards this approach and more effectively managing ADR interventions. Also, in September 2010, VCAT launched *Transforming VCAT*, a three-year strategic plan that included 77 new initiatives aimed at improving service delivery to the community.[35] The initiatives followed ongoing reform within that jurisdiction since its establishment. Initiatives that relate to improving efficiency were aimed at:

- optimising the benefits of ADR in the Guardianship List by identifying those cases appropriate for mediation and referring them earlier;[36]
- refining directions hearings and other pre-hearing processes in the Civil Claims and Domestic Building Lists to reduce waiting times for complex cases;[37] and
- creating a 'buddy system' between Registry staff and members to improve case management in the Residential Tenancies List.[38]

Triage is often associated with shorter conferences that can be focused on settlement, case management or referral to longer ADR processes. There may be recognition that sometimes in lower value disputes, ADR processes can replace triage and large scale referral to 'short form' ADR can be more effective.

34 Referring to later age of case data in T. Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Department of Justice, Victoria, Australia, April 2009), available at http://www.endispute.com.au/wpdl/Mediation%20in%20SC%20and%20CC%20of%20Victoria%20Research%20Report_251108.pdf (accessed 25 September 2013).

35 VCAT, *Annual Report 2010/11* (VCAT, Melbourne, 2011), 7, available at http://www.vcat.vic.gov.au/sites/default/files/2010-11_complete_annual_report%5B1%5D.pdf (accessed 25 September 2013).

36 Ibid.

37 Ibid.

38 Ibid.

For example, the VCAT Short Mediation and Hearing Pilot, in which parties for claims less than $10,000 attend a shortened form of mediation prior to the scheduled hearing, resulted in higher settlement rates and in enhanced disputant perceptions of a more satisfying, fair, convenient and cost-effective process.[39]

Some triage approaches have developed outside court and tribunal areas and focus on party–lawyer triage in particular areas or through ADR that takes place in Collaborative Law. In those contexts, the pace of the dispute resolution process is determined by agreement between parties and lawyers and a series of ADR sessions that foster interest-based negotiation are scheduled to ensure that timeliness objectives are met. The initial meetings can involve setting timeframes, budgets and protocols within which the ADR process is conducted.

External triage and dispute management is also taking place outside of courts as government and industry understand that effective dispute resolution may require effective choices to be about the most appropriate process, practitioner and time frames for dispute resolution. Many of these approaches are directed at saving time not only by ensuring that more effective dispute processes are used (thereby prompting earlier settlement) but are also being used to prevent unnecessary delay in the context of parties arguing about who can conduct a process and within what time frame. Triage in this sense can enable earlier discussion about ADR without that discussion being conducted through a letter based negotiation and with a fuller understanding of potential options whilst considering commercial and other interests.

Conclusions

In terms of the timing of ADR processes, there are different views as to the best time for referral to ADR. It has been suggested that, in some cases, processes such as mediation will not work if they take place too early in a matter, primarily because disputants and others (stakeholders or representatives) might not understand the issues in enough depth to have a meaningful exchange about them. On the other hand, if ADR takes place too late, costs and other factors may have an impact on resolution. In addition, delay of itself can mean that even if resolution takes place, if it does so at 'too late' a time, disputants may not consider that justice has been served.

In respect of these perspectives, it may be that lawyers, disputants, judges and others (such as ADR practitioners) have different views about the reasonableness of delay or what constitutes a reasonable time to deal with a dispute. It may be, for example, that a lawyer in a dispute considers that there has been timely resolution via ADR if the matter has been resolved six months after court proceedings have commenced. A disputant who has been involved in the dispute for two years (including the 18-month period prior to filing with a court) may not take the same view.

Clearly, ADR is now used before court proceedings start as well as in court-connected programs, in an attempt to support the timely disposition of disputes. Many initiatives in this area appear to have been very successful. In some respects, these changes have been supported by recent innovations that have supported the change in status of ADR in many jurisdictions.

These changes have meant that ADR has moved from being an 'add-on' to the traditional court process to being seen as a primary means, if not the preferred means, by which matters are settled. This is in

39 Ibid 20.

contrast to a model of processes where courts are central to dispute resolution and where legal representatives negotiate settlement often without the direct involvement of clients and correspondence-based negotiation. Recent developments in the context of triage models are necessary partly because a focus on earlier ADR is more likely to result in earlier settlement where the ADR processes and practitioner are appropriate and useful for the disputants and the dispute.

However, although there are many examples of innovation in ADR across the sector and a number of examples of effective triage, there is little information about timeliness unless the ADR takes place within a scheme (rather than as a result of private referral) in the pre-action area. In addition, although courts and tribunals may report on 'in-house' ADR, as so much as ADR can be conducted by external practitioners, there is often little information about the time taken to attend and conduct the ADR and if disputants have a view as to whether the time taken was appropriate. In order to address issues of delay, more information needs to be collated, tracked and analysed to provide guidance to practitioners and others about how earlier, and more effective, dispute resolution can be supported and managed.