

# **Contemporary Justice Service Delivery – ADR Project – an initiative of the Victorian Department of Justice**

**by Nicole Cullen**

## **Introduction**

An ADR project was initiated in November 2005 by the Victorian Department of Justice (the Department) pursuant to which the Department has conducted significant research into the ADR industry in Victoria.

The Department held an ADR Strategic Planning Conference on 22 June 2007 and the research findings were presented and their strategic implications were discussed with the ADR organisations that participated in the research. The conference was attended by providers of ADR services in Victoria including Ombudsmen, Courts, Tribunals, External Dispute Resolution Schemes and other ADR Centres.<sup>1</sup> Key issues under discussion included the challenges facing both the users and the suppliers of ADR services including public awareness of ADR services, service standards, performance management of ADR services, efficiency and costs.

## **Research reports**

The research results are contained in number of reports issued by the Department to the project participants and to the community

- ADR in Victoria: Supply-Side Research Report dated 26 February 2007
- ADR in Victoria: Community Survey Report 2007
- ADR Supplier Survey 2006

Copies of these reports are available online at [www.justice.vic.gov.au](http://www.justice.vic.gov.au) (click on “about us” and “our goals”)

## **Research Methodology**

The Department used a number of different research methods in undertaking its review of the supply and demand sides of the ADR industry. These included qualitative and quantitative surveys of consumers and ADR services, interviews with opinion leaders and experts and a literature review.

The community survey was conducted between 14 March and 3 April 2007<sup>2</sup>. Telephone numbers were randomly drawn from the White Pages and a total of 502 people completed the survey. Of these, 352 were from the Melbourne Metropolitan area and 150 were from regional areas. 49% were male and 51% were female. The age of respondents ranged from 18 to over 60 years of age. 12% spoke a language other than English.

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<sup>1</sup> LEADR was represented at the conference by Nicole Cullen, a member of the Victorian Executive of LEADR.

<sup>2</sup> The survey was conducted by market research company Ipsos Australia Pty Ltd

A second survey was conducted with 500 owners or operators of Victorian small businesses.<sup>3</sup>

The ADR service providers falling within the scope of the project included

- Statutory and government agencies and regulatory bodies with an ADR role
- Industries that have in place their own ADR schemes
- Community dispute resolution providers
- ADR processes operated by courts and tribunals
- Commercial ADR providers such as lawyers and members of the Institute of Arbitrators & Mediators who charge a fee for their services.<sup>4</sup>

The 18 suppliers included in the research were a cross section of the key suppliers of ADR services in Victoria; there was no intention to create an exhaustive, all inclusive list.

### **Key findings**

Some of the key findings of the research were<sup>5</sup>;

- Victorians have a strong capacity for self directed dispute resolution – most people will try to resolve a dispute themselves before involving a third party.
- Awareness of the suppliers of ADR services is variable. Referral between ADR schemes is a significant feature of the sector.
- The financial and emotional costs associated with serious disputes are high.
- The incentives to use ADR are cost, ease, speed of resolution and access to experts. Conversely, the cost and time involved in dealing with an ADR supplier are seen as disincentives.
- 11 of 18 ADR Schemes do not apply mandatory mediation requirements for mediators.
- There are different uses by ADR Schemes of key terms like mediation, conciliation and adjudication and variation in the reporting by Schemes, making sector performance difficult to assess.

Some of the strategic implications resulting from the research include;

- The absence of dispute resolution skills in the community can be a factor in the spread and persistence of disputes that fragment communities.
- There is potential for improvement of access to ADR services.

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<sup>3</sup> Small business is defined as a business with fewer than 20 employees. At this time of writing, this report was not yet available.

<sup>4</sup> LEADR held a watching brief in relation to the research project and was recognized in the Supply Side Research Report as undertaking “education, training and promotion of ADR within the legal profession”.

<sup>5</sup> For full details of the survey findings, see the reports produced by the Department.

- The cost in terms of time and money of dispute resolution imposes a significant burden on the community and potentially discourages attempts at dispute resolution.
- Consolidation of ADR Schemes offers cost efficiencies, but is limited by the need for specialisation.
- National accreditation standards would bring about changes for the majority of the ADR sector.
- There are opportunities for improved communication on the performance of the ADR sector.

### **Incidence of Disputes**

The Community Survey Report estimates that 35% of Victorians had at least one dispute in the last 12 months.

There were around 3.3 million disputes among Victorians of which approximately

- 1.8 million involved a business or government
- 1.5 million involved family, neighbourhood or the community
- The most prevalent dispute categories were “electricity, water, gas or phone (8%) family (6%) and neighbours (5%)

### **Cost of Disputation**

The cost to Victorians of dispute resolution is substantial. The Report estimates that the cost of attempts to resolve serious disputes was \$2.7 billion<sup>6</sup>. The costs are not only financial. 87% of serious family, neighbourhood and association disputes involve high or very high emotional costs and 91% of serious consumer disputes involve high or very high emotional costs.

### **Using Third Parties to Resolve Disputes**

The research shows that Victorians have a strong capacity for self directed dispute resolution. Only 15% of all disputes involving Victorians were resolved with assistance from a third party<sup>7</sup>. A relatively low proportion of family, neighbourhood, and association disputes involved third parties (16%).

89% of Victorians said they will mostly/always try to resolve a dispute themselves, while some took self directed dispute resolution to an extreme. 12% see ADR<sup>8</sup> as a step to be taken after their own efforts have failed and 9% see ADR as a last resort.

The emotional costs of disputes involving third parties was higher with 41% rating the emotional costs as very high compared with 28% of those who did not use a third party.

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<sup>6</sup> For a detailed explanation of the calculation of costs see the Community Survey Report 2007

<sup>7</sup> A third party was described in the survey as a mediator, lawyer or ombudsman

<sup>8</sup> For the purposes of the project, ADR refers to a process for resolving a broad range of disputes without recourse to the courts.

However, experience with third parties did have a positive effect on Victorians - the Report concluded that the majority of those that used a third party to resolve their disputes believe they got a better outcome than they could have achieved on their own and they also felt more confident in attempting to resolve disputes after using ADR.

### **Public Awareness of ADR Services**

A list of ADR services was read out to the 502 respondents and they were asked to indicate whether they had heard of any of them or had ever contacted these services to help them handle a dispute.

Several ADR services have a high recognition among Victorians:

- Consumer Affairs Victoria (92%)
- The Victorian Equal Opportunity & Human Rights Commission (89%)
- Ombudsman Victoria (73%)
- Telecommunications Industry Ombudsman (65%)

Relatively lower recognition was found for:

- Dispute Settlement Centre Victoria (16%)
- Financial Industry Complaints Service (25%)
- Relationships Australia (37%)
- Energy & Water Ombudsman Victoria (42%)

Addressing the conference, Penny Armytage, Secretary, Department of Justice suggested that the potential of services to provide access to ADR may not be being recognised. Barriers to access need consideration – time and cost are still seen as barriers to access and there should be analysis of what motivates people to use the services. It was noted that there is a high level of referral between the various ADR Schemes and Centres.

### **Enablers of Using ADR Services**

Respondents were asked an open ended question about factors that might encourage them to use alternative dispute resolution services. The top three factors mentioned were:-

- cheaper than court procedure/legal advice/VCAT or tribunal procedure (37%)
- easier than going to court/handling myself/easily accessible services (24%)
- quicker than taking it to court/handling myself (16%)

Other factors that could encourage Victorians to use a dispute resolution service included:

- expert agencies are well placed to understand the dispute/specialised/relevant service (12%)
- not being able to resolve dispute/work it out myself/reach agreement (12%)

In summary, “cheaper, easier and quicker” are all factors that motivate Victorians in their choice of dispute resolution service.

59% of Victorians did not see any advantage in taking a dispute to a court or tribunal.

## **Performance of ADR Schemes**

The Supplier Side Survey Report provides significant detail on the different processes and procedures of the 18 different ADR Schemes under consideration.

It was concluded that there is variation in reporting and no common performance indicators between the ADR Schemes, making comparison between Schemes very difficult. Compounding the issue is that different Schemes use terms such as mediation, conciliation, adjudication differently.

Some parts of the sector are reaching maturity whilst others are yet to reach that stage. Consolidation in the financial sector is occurring at the same time as new Schemes are being set up, ie the Postal Industry Ombudsman. Careful consideration should be given before more Schemes are established as existing Schemes may be able to offer relevant services.

## **Supply Side Research Report Recommendations**

The author of the Supply Side Research Report, Professor Chris Field, made certain recommendations:

- As part of best practice strategy, the regulation, facilitation or self regulation of agreed definitions of ADR and ADR processes may be warranted.
- There may be a role for government to work with ADR suppliers to address “referral loss” and to consider pre-litigation ADR referral.
- There may be a role for government to provide “umbrella” ADR awareness programs and to work with ADR service providers to increase awareness of ADR services. To the extent that the government is a significant funding provider for ADR, the lack of evaluation of the effectiveness of spending on consumer awareness by ADR providers appears to be undesirable. There may be a need to consider the particular needs of certain populations.
- It would be very difficult to create one central access point for ADR that “covers the field”.
- A whole of government checklist of matters to consider when establishing a new ADR service should be considered
- There may be an important best practice role for government in relation to developing standards for training, qualification and accreditation of ADR practitioners as well as standards for ADR services. Careful consideration needs to be given before mandating a move towards quality standardisation, to ensure that the benefits of standardisation are not outweighed by greater compliance and other costs.
- The development of comprehensive key performance indicators for ADR services should be considered.
- Providing access to affordable ADR services for low income or vulnerable consumers is an obvious area for government support, however there may be a case for greater utilisation of cost recovery where the users of ADR services are in different circumstances.
- It would be sensible to consider whether some industries could provide greater support for ADR services.

## **Summary and next steps**

The development of private and public ADR services in Victoria is strongly supported by the Victorian Government and the conduct of this research by the Victorian Department of Justice reflects the government's view of the importance of ADR as "the way of the future." The research that has been undertaken by the Department provides a map of the supply of ADR services in Victoria and as such, is a significant step forward for the maturing ADR industry.

The ADR project is overseen by a Project Board comprising the Executive Directors of Courts, Consumer Affairs, Legal & Equity and Corporate Services and is chaired by the Executive Director of Consumer Affairs. The next steps in the project will be determined by the Project Board in conjunction with the Minister. LEADR will continue to keep members informed and invites any comments from Members in relation to this Project.