

ALTERNATIVE DISPUTE RESOLUTION IN THE MILITARY CONTEXT

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You have undertaken to cheat me.
I won't sue you, for the law is too slow. I'll ruin you.¹

I INTRODUCTION

Alternative Dispute Resolution ('ADR') provides several models and methodologies that assist parties in reaching amicable agreements for mutual interests.² ADR has been stated as being:

The preference for harmony over conflict, for mechanisms that offer equal access to the many rather than unequal privilege to the few, that operate quickly and cheaply, that permit all ... to participate in the decision making rather than limiting the authority to professionals, that are familiar, rather than esoteric, and that strive for and achieve substantive justice rather than frustrating in the name of form.³

Within the Australian military context, the 2005 Report of the Senate Inquiry into the Military Justice System⁴ in paragraph 6.7 states as follows:

The Directorate of Alternative Dispute Resolution and Conflict Management is responsible for facilitating the provision of dispute resolution service across the ADF.⁵

That ADF Directorate of Alternative Dispute Resolution has developed a comprehensive training program designed to inform the Defence community about the benefits of using alternative conflict management processes and

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- 1 Letter from Cornelius Vanderbilt to Charles Morgan and Cornelius Garrison, 1853 from <www.brainyquote.com/quotes/quotes/c/corneliusv139191.html> at 10 September 2005. The recipients were the managers of the Accessory Transit Company, which operated steamships between New York and Nicaragua. They had abused a Power of Attorney to take control of the company from Cornelius Vanderbilt while he was on vacation at sea. Within a few months he had set up a new, rival company providing services to Panama, cut prices drastically to undercut his former business, and bought back enough stock to retake control over Accessory Transit in much less time than legal proceedings would have taken.
 - 2 Eg, negotiation, mediation, co-mediation, mini-trials, conciliation, independent expert appraisal or determination, private judging and case appraisal.
 - 3 Richard Abel, *The Politics of Informal Justice* (1982) 310.
 - 4 Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The effectiveness of Australia's military justice system* (2005) [6.7].
 - 5 Submission P16 to Senate Foreign Affairs, Defence and Trade Committee, Parliament of Australia, Canberra, 23 February 2004, 46 (Chief of the Defence Force).

provides training in the necessary skills to employees, managers and practitioners in alternative dispute resolution.⁶ Requests for access to ADF dispute resolution services are made through the Complaint Resolution Agency ('CRA'),⁷ the Defence Equity Organisation ('DEO'),⁸ Commands, Commanders and Line Managers and Personnel Managers at all levels.⁹

Previously, the Joint Standing Committee on Foreign Affairs, Defence and Trade, Report on Military Justice Procedures, 1998, had directed the Australian Defence Organisation ('ADO') to consider the value, use and training of ADR. The ADO response to this direction agreed to greater emphasis on ADR and mediation techniques, in the resolution of discrimination and other unacceptable behaviour.¹⁰

It is in that context that this paper has as its central theme the greater role that ADR can take within the ADO. In developing this theme, this article discusses the limitations of ADR and identifies it as a useful mechanism that can assist dispute resolution in certain military circumstances, but confirms that it cannot be mandatory or compulsory. Reference is made to the efficiencies that are inherent within the concept of ADR. In particular, reference is made to the limitations of ADR as a possible alternative to current disciplinary law procedures within the military. This article refers to these limitations in the context of breaches that will potentially and have occurred in accordance with the *Defence Force Discipline Act 1982* (Cth).

This paper also discusses the broader application of ADR within the ADO as to the resolution of contractual and personal injury disputes. Reference is made to the implementation of ADR methods by the United States Government. In this context, the legislative implementation of ADR within the US Defence Department is referred to. The US implementation has resulted in economic and time benefits with regards to contractual disputes involving the US Defence

6 See Noni Cadd and Helen Marks et al, 'Dealing with Conflict Within the Military: an Evolving Model for Managing Conflict and Promoting Good Working Relationships Among Defence Employees' (2002) *Australian Dispute Resolution Journal* 146.

7 If a member is not satisfied with a redress of grievance outcome, he or she may request that a complaint be referred to the appropriate Service Chief or delegate through the Complaint Resolution Agency for a decision. In addition, members who hold a rank of warrant officer and above may refer their complaint to the Chief of Defence Force, through the Complaint Resolution Agency, for further action. See <<http://www.defence.gov.au/news/raafnews/editions/4621/career/story01.htm>> at 12 September 2005.

8 As a result of the Defence Reform Program, the DEO was established in August 1997. The Defence Equity Organisation is responsible for promoting the principles of equity and diversity in Defence through the development of appropriate policies and strategies. Its mission is to inform, educate, encourage and ensure that equitable policies, processes and practices form an integral part of doing business in Defence as the basis for a fairer and better work environment. The formation of the DEO has provided scope for review and rationalisation of activities associated with equity and diversity, including awareness training, unacceptable behaviour incident reporting, the management and resolution of complaints and Equity Adviser networks. The DEO is also responsible for the development and management of the Workplace Equity and Diversity Plan. See <<http://www.defence.gov.au/equity/equityindefence.htm>> at 12 September 2005.

9 Submission P16 to Senate Foreign Affairs, Defence and Trade Committee, above, n 5, 46.

10 See Defence Instruction (General) PERS 35-3, *Discrimination, Harassment, Sexual Offences, Fraternisation and Other Unacceptable Behaviour in the ADF*, 21-3.

Department and civilian contractors. The application of these principles in the Australian military environment is considered.

II DEFINITION OF ALTERNATIVE DISPUTE RESOLUTION

ADR has been described by Lord Donaldson of Lymington¹¹ as a:

PR man's dream. It conjures up visions of a factor 'X' which will do for dispute resolution what it is said to have done for washing powders and petrol. The truth is there is no 'X' factor. Indeed I rather doubt whether there is any such thing as ADR. It is simply an umbrella term or 'buzz word' covering any new procedure or modification of old procedures which anyone is able to think up.¹²

Despite this apparent scepticism towards the usage and methodology of ADR, within certain Australian jurisdictions, such as Queensland,¹³ ADR has grown in both its usage, success and acceptance. However, what does ADR offer to the ADO?

In determining this question, it is first necessary to consider ADR's character, advantages and disadvantages, by reference to the adversarial system of justice.¹⁴ His Honour the Chief Justice of Australia¹⁵ has described the adversarial system as being:

based upon the assumption that justice is most likely to be achieved as the outcome of a contest in which ... each opposing party is presented by a professional advocate, learned in the law, and operating within the constraints and disciplines of an organised profession whose members owe a duty not only to their clients but also to the court. The essential role of the advocate in an adversary system is to present the client's case to its best advantage, to cut down the opponent's case, and to endeavour by all legitimate means to persuade the tribunal to a view of the facts and the law most likely to result in a decision in favour of the client.¹⁶

The adversarial system utilises an independent referee as the final arbiter of disputes.¹⁷ The adversarial system, of course, has its limitations, including the

11 Lord Donaldson of Lymington is a former Law Lord. He was Master of the Rolls from 1982 to 1992 and now sits as a Crossbench peer in the House of Lords.

12 Mark McConnell, 'Alternative Dispute Resolution – A Challenge for Scots Lawyers' (1992) 37 *Journal of the Law Society of Scotland* 355, 355.

13 It is now an integral part of the Queensland court system. In the Supreme Court of Queensland, ADR takes two forms: i. Mediation – where a trained mediator helps the parties come to a negotiated agreement; and ii. Case appraisal – where a case-appraiser assesses the merits of the case and reaches a decision of the kind that a court could make (for example, that one party must pay the other a certain sum of money). Which process is used depends on which is more likely to be successful in the particular case. Approved mediators and case appraisers are trained professionals approved by the Supreme Court. The Registrar of the Supreme Court keeps a register of approved mediators and case appraisers, which outlines their areas of expertise and their fees. If all parties agree, a mediator who is not approved under the Rules can be used. See <<http://www.courts.qld.gov.au/practice/adr.htm>> at 12 September 2005.

14 The adversarial system of justice is a method of conflict resolution, where the legal representatives of the parties present a case to an impartial third party, in accordance with rules of evidence and procedure. The third party has the power to impose an authoritative determination, with orders, that are enforceable.

15 Anthony Murray Gleeson was appointed Chief Justice of the High Court of Australia in May 1998.

16 Murray Gleeson, 'Extra-Judicial Notes' (1998) 17 *Australian Bar Review* 11, 11.

17 See Maxwell Fulton, *Commercial Alternative Dispute Resolution* (1989) 84–98.

imposition of orders by an independent third party upon the parties to the proceeding.¹⁸

By contrast, ADR is a participant-orientated process which is non-judicial and can be utilised in a broad spectrum of disputes.¹⁹ ADR has been defined as:

a process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues, in order to develop opinions, consider alternatives and reach consensual settlements that will accommodate their needs. Mediation is a process which emphasises the participants' own responsibilities for making decisions that affect their lives.²⁰

Just as in the adversarial system, neutral third parties are often fundamental to the system and methodology of ADR, in that they guide and facilitate compromise, despite not being able to impose a decision.²¹ It is the participants of ADR who are required to make the decision, rather than the independent third party. It has been stated that the core benefit of mediation is the:

capacity to reorient the parties to each other, not by imposing rules on them, but by helping them to achieve a new shared perception, ... that will redirect their attitudes and dispositions towards one another.²²

Therefore, ADR is a participant-orientated procedure where there is an empowering of the parties.²³ This empowerment is a benefit to the ADR process, despite the responsibility that it places upon the parties.

The adversarial system is limited by the matters that are placed before the determining body and by jurisdictional limits. Further, the courts are limited in their ability to supervise outcomes. ADR circumvents these limitations to the extent that the parties govern their own agreements.

The advantages and disadvantages of ADR are often ventilated. The advantages are regularly cited as efficiency-related (cost, speed and privacy).²⁴ Litigation within the adversarial system has the potential to be a very expensive process.²⁵ The ADR process has a hidden advantage, in that parties are often hesitant and reticent to progress and finalise a matter within the adversarial system, due to cost implications.²⁶

One of the challenges that has confronted ADR in the Australian jurisdictions has been that it has integrated itself into the current adversarial litigation process

18 Stephen Goldberg, Eric Green and Frank Sander, *Dispute Resolution* (1985) 92.

19 See William Smith, 'Much to do About ADR' (2000) 86 *American Bar Association Journal* 62.

20 Gay Clarke and Iyla Davies, 'ADR – Argument For and Against the Use of The Mediation Process Particularly in Family and Neighbourhood Disputes' (1991) 7 *Queensland University of Technology Law Journal* 81, 81.

21 Clare Brown, 'Two-Way Street, Sir Laurence Street and Others Talk About ADR, an Exciting Alternative to Costly Time Consuming Litigation' (October 1990) *The Australian Way*, 27–9.

22 Lon Fuller, 'Mediation – its Forms and Functions' (1970–71) 44 *Southern California Law Review* 305, 327.

23 Sarah Eaton, 'Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes' (1990) 103 *Harvard Law Review* 1086, 1092.

24 Major Sherry Wetsch, 'Alternative Dispute Resolution – An Introduction for Legal Assistance Attorneys' (2000) *The Army Lawyer* 15, 15.

25 See Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (1992) 30.

26 *Ibid* 30–1.

as an additional step.²⁷ In other words, ADR has been used as a concluding step undertaken prior to trial or final hearing, but after many or all of the other steps in the normal litigation process. The cost implications within the adversarial system also tend to follow the successful party, even if that success is only slightly greater than that of the losing party.²⁸ Further, there is great uncertainty associated with placing factual and/or legal arguments before an independent third party determining body. In contrast, ADR provides some commercial and financial certainties to the parties.

Although in the last few years the adversarial system has undergone changes that have resulted in increased efficiency in the resolution of conflict, previously, adversarial litigation was characterised by delay.²⁹ The simplification of civil procedure rules has, to some extent, alleviated the time taken in preparation for hearing, although ADR has the potential to provide 'express' conflict determination. Perhaps the following quote is indicative of the potential problems associated with the adversarial system:

The arguments are expected to be long and complicated but the one thing everyone agrees on is that [the Barrister] is on a pretty good wicket. Estimates of his daily rate vary between bucketloads (\$15,000) and truckloads (\$25,000). [The client] has already spent roughly \$40 million on the matter and has put aside another \$27 million this year.³⁰

In summary, there is the possibility for ADR to provide a shortened resolution method in order to avoid such delays.³¹ The procedural mechanisms associated with the adversarial process and the formalised and potentially strict rules of procedure can and still do circumvent arguments based purely on substance.³² ADR allows for adaptations to be made to meet the individual needs of the parties and the circumstances of a particular matter.³³ Further, the parties are at liberty to identify and select a third party to facilitate the process. The practicalities of the process, that is, the venue, timing, participants, as well as the secrecy and/or privacy, can be determined by the parties.³⁴ Of particular significance is the ability of the parties to avoid 'form' arguments and to be able to focus on the substantive issues in question. The effectiveness of ADR has meant that the adversarial system has adopted and modified itself to take into account the methodology and practical advantages, to some extent, that have been utilised within the ADR system.³⁵

27 See, eg, Uniform Civil Procedure Rule 1999 (Qld) ch 9.

28 There are some exceptions to this rule, for example, if the defendant makes an offer to settle and the plaintiff obtains a judgment that is not more favourable to the plaintiff, the defendant is entitled to their costs: *Supreme Court of Queensland Act 1991* (Qld); *Uniform Civil Procedure Rules 1999* (Qld), r 361.

29 See Astor and Chinkin, *Dispute Resolution in Australia*, above n 25, 33.

30 'Grandest lawyers' picnic of them all', *Sydney Morning Herald* (Sydney), 13 September 2005 <<http://smh.com.au/articles/2005/09/12/1126377256751.html>> at 15 September 2005.

31 Gay Clarke & Iyla Davies, 'Queensland Mediation – Initiatives, Schemes and Services' (1995) 15 *The Queensland Lawyer* 135, 135–6.

32 Jenny David and Pat Cavanagh, 'Taking the Plunge' (1990) 25 *Australian Law News* No 10, 31.

33 Fulton, above n 17, 84–98.

34 Fulton, above n 17, 92–3.

35 See, eg, *The Supreme Court of Queensland Practice Direction No 3 of 2002: Commercial List Commercial List*.

III ALTERNATIVE DISPUTE RESOLUTION WITHIN THE AUSTRALIAN DEFENCE ORGANISATION

Australian Defence Force Publication 202 ('ADFP 202') provides in Chapter 3 for ADR within the Australian Defence Force ('ADF'). That publication creates a framework for the usage of mediation and conciliation within the ADF. It lists in paragraph 3.4 the advantages of ADR.

This document provides a methodology for the resolution by mediation of disputes within the ADF. The mediated resolution of disputes can be achieved utilising this methodology, prior to the development of matters in a disciplinary or administrative sense within the ADF. There is the provision for professional resolution occurring informally, which identifies a mutually agreeable solution relevant to the concerns potentially raised by parties. At present, the employment of ADR techniques within the Australian Defence Organisation has been predominantly for the resolution of administrative grievances.³⁶ The ADR process may assist by fostering self-regulation and a reduction in costs. It has the potential to 'cross-fertilise' standards and practices within the ADF. As the publication notes, it may therefore achieve the potential of public confidence in the independence and effectiveness of complaints within the system.³⁷

Predominantly, the ADO has utilised ADR as a means of assisting Commanders at unit level and Managers to resolve complaints if they deem the circumstances suitable for its usage.³⁸ Commanders and Managers are therefore encouraged to use the ADR process in matters particularly of discrimination, harassment, sexual offences and other unacceptable workplace and/or social behaviour.³⁹ These general methodological guidelines do have exceptions, allowing for matters that warrant to be referred to the Service Police for a *Defence Force Discipline Act 1982* (Cth) investigation.⁴⁰

ADR, in that it requires support from the participating individuals or organisations within the ADF in the form of technical and other information and advice concerning the practices, has limitations. Therefore, the application of ADR is only effective in certain matters. It is in those matters where the participants are amenable to the systematic use of ADR that it will be an effective system for achieving public confidence in the independence of complaint resolution.

36 *Australian Defence Force Publication 202*, Administrative Inquiries Manual (2000) [3.1].

37 See <www.aph.gov.au/Senate/committee/FADT_CTTE/miljustice/report/c10.pdf> at 13 September 2005.

38 A unit is a group of tasking elements which is capable of independent operations, generally commanded by a Lieutenant Colonel or equivalent, though smaller units can be commanded by a Major or equivalent.

39 Defence Instruction (General) PERS 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*.

40 *Australian Defence Force Publication 202*, above n 36, [3.14].

Within the ADF there is a separate Directorate operating independently of the Defence Legal Service⁴¹ formally overseeing the independence of the process.⁴²

The underlying theory behind the usage of ADR is that a Commander or Manager is able to use a mechanism and methodology that allows for the earliest and simplest resolution. Therefore, costs in both personal 'energy' and in a 'financial sense' are potentially reduced.⁴³ Therefore, it can be argued that ADR within Defence provides an effective self-assessment of the system, as opposed to military tribunals under the *Defence Force Discipline Act 1982* (Cth). Particularly, this is because ADR strategies give a person the opportunity to deal with issues causing the 'problems' or 'risk'. There is the potential for diversionary action at an early stage to alleviate problems that, if left un-treated, could not only lead to misconduct or un-professional conduct or disciplinary action thereby damaging the individual's reputation, but also damaging the reputation of the ADF as a whole.

ADR is often combined with professional counselling, in that disciplinary matters of course are often associated with personal social problems such as alcohol or drug dependency, marital break-up, over-work, stress or other problems. The confidential nature of ADR, which is discussed below, may assist in that regard, not only with the immediate member, but potentially also with their related family members.

It has been noted that employment-based ADR can give disputants an 'illusion' that action has been taken to resolve their grievances and reduce the likelihood of implementation of the required reforms.⁴⁴ This argument is one as to the trivialisation of disputes by ADR. Presently ADFP 202 requires a statistical return within the ADF as to the outcome of an ADR process. This in itself has the potential to create conflict, in that the report or the matters included within it may be challenged by a participant. It has been identified that this system is potentially open to abuse.⁴⁵ Further, ADR management and powers of review and discretion are not as clearly defined by ADFP 202 as they could be. The clear identification of potential remedial action processes has not effectively been undertaken by ADFP 202.

41 The Defence Legal head office is located in Canberra. Officer representatives are posted to most major commands, formations and organisations around Australia. Defence Legal is constituted by Permanent and Reserve Navy, Army and Air Force legal officers (with the exception of legal officers posted to the Office of the Judge Advocate General). Defence Legal also includes all Defence civilian legal officers, paralegal officers and staff from the Directorates of Freedom of Information and Classified Archival Records Review. Defence Legal is a national specialist integrated legal organisation. As a part of the Corporate Services Infrastructure Group, it provides legal and other support to all Services and Groups in Defence. See <<http://www.defence.gov.au/legal/>> at 13 September 2005.

42 Its actions are potentially subject to external review as well.

43 See Astor and Chinkin, above n 25, 14.

44 David Fraser, 'It's Alright Ma, I'm Only Bleeding' (1989) 14 *Legal Service Bulletin* 69, 69–71.

45 Ibid.

IV LIMITATIONS

Amongst ADF members, particularly non-legal officers, ADR is viewed as a potential challenge to discipline and morale within the Service, in conflict with the methods outlined by the *Defence Force Discipline Act 1982* (Cth). In this regard, it is important to articulate the ADR processes within the ADO, in order to confirm the truth or otherwise of this view.

It is only in limited circumstances that ADR has been used within Defence to resolve conflict between members and the victim in criminal matters. This is a little understood area of ADR conflict resolution.⁴⁶ The rationale for mediation between the criminal and an individual runs 'squarely' against the nature of criminal crimes; that is, that they are actions by the Crown or State against an individual for an offence against society.⁴⁷ This system is founded on the promotion of the idea that offenders direct responsibility for their wrong to the individual against whom they have offended, and in so doing reduce the anger, fear and frustration suffered by victims.⁴⁸ There is an academic analysis that says there are collateral benefits in ADR in military criminal matters, in that the offender, with the human factors of their crime considered, is then able to deviate from the possibility of repeat offending and it will promote in the offender concepts of justice and fairness.⁴⁹ In particular the NSW Police Force has a 'Restorative Justice' ADR program of this type.⁵⁰ Britain also has police units that have adopted similar procedures.⁵¹ However, it goes without saying that there are numerous arguments against the enforcement of laws normally done by the State or Crown by the utilization of mediation.⁵²

In addition to the matters referred to above, there are additional problems related to the application of ADR to the military justice system. The system of military discipline is there to enforce a code of provisions relating to unacceptable conduct by service personnel, quite separately from the civilian system. The issue of crimes related to property or violence within the military is similar to crimes within the civilian community, in that the offender has the potential to be statistically known more so than in the civilian environment. Mediation in civilian matters can be distinguished from other types of ADR in that the victim and offender are often strangers.⁵³ For example, within the Royal

46 See Amy Greenspan (ed), *Handbook of Alternative Dispute Resolution* (2nd ed, 1990) 227.

47 Ibid, 228–9.

48 Ibid 238.

49 Ibid 236.

50 Laurence Newell, *A Role for ADR in the Criminal Justice System?* (1999) Australian Institute of Criminology <<http://www.aic.gov.au/rjustice/newell/pngnlc.pdf>> at 14 September 2005.

51 ABC Television, 'And Justice for All', *Australian Story*, 18 May 2000, <http://www.abc.net.au/austory/archives/AustoryArchivesIdx_Thursday18May2000.htm> at 14 September 2005.

52 Stephen Goldberg, Frank Sander and Nancy Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes* (2nd ed, 1992) 92.

53 See Greenspan, above n 46.

Australian Navy the victim and offender may be serving on board the same ship, and within the Royal Australian Air Force they may be aircrew together.⁵⁴

For all the reasons set out above, the applicability of ADR to the Defence Force is limited. In particular, it has limitations as to its suitability for the maintenance and retention of military justice. Bentham's⁵⁵ concepts of positivism as codified law and utilitarian theory, whereby the law serves the greatest number, means that ADR has limited application to criminal law. This is understandable, in that ADR promotes the individual and the ability to cater for the relevant interests of parties.⁵⁶ This is not to say that ADR does not have relevance to the ADF, it is just that its applicability is limited. It has the capability to be utilised in a modified form in specific circumstances, such as restorative justice.

V PERSONAL INJURY CLAIMS

Despite the statements made above as to the applicability of ADR to criminal matters and disciplinary matters within the ADF, it does have potential with regards to personal injury claims. There is a need to broaden the scope and methodology of ADR within the Defence Force as to things such as housing entitlements, allowances, pensions, employment disputes and career management. By reference to the application of ADR to personal injury disputes, the ability to broaden the scope of ADR as to these other matters can be examined. ADR has had tremendous success in the civilian realm, with regards to personal injury actions. The majority of personal injury disputes are now settled before going to trial, many utilising ADR techniques.

A member of the ADF who suffers personal injury is required to use normal channels of litigation. For example, a Defence member who suffers personal injuries as a result of a Defence medical practitioner's negligence may settle the matter with the Commonwealth. The Commonwealth may intentionally settle at a greater price to ensure that a precedent unfavourable to it is not recorded.⁵⁷ There is also the potential for compensation under statute to be given; however, the damages awarded are usually less. In that scenario, the parties are required to waive their rights to further claims for damages against the Commonwealth.

54 Defaulters parades, stoppage of leave, and restrictions of privileges when ordered may be observed by the victims of the crime, and the offender would normally in the course of military punishment, been seen by the victim which would personalise the process.

55 Jeremy Bentham (1748–1832) advocated a codification of the law, so all could determine what the law was at any given time. His theory noted laws should strive to be utilitarian and he saw little purpose in the value of individual rights and morals to determine the law: see Margaret Davies, *Asking the Law Question* (1st ed, 1994).

56 ADR is more akin to Dworkian theory, in that individual rights are to be treated with respect and denied a separation between morals and law advocated by positivists like Bentham: see Raymond Wacks, *Swot Jurisprudence* (5th ed, 1999) 120.

57 Settlement of this nature would generally see the Commonwealth succumbing to the quantum of damages requested by the defendant. To date, the plaintiff has been seeking compensation for 6 years and spent approx A\$10 000 in legal expenses.

There is of course potential for Service personnel or Commonwealth Public Servants to have a negative perception of the ADO as a result of these mechanisms applied by the Commonwealth. The 'ripple' effect of this throughout the Australian community can be quite significant. ADR provides a mechanism whereby there is the opportunity to resolve these disputes on terms which are 'positive' to the participant, or at least at the participant's discretion. In this regard, it has been stated that ADR results in many disputes being settled.⁵⁸ Further, ADR directly benefits the ADO by resolving disputes quickly and on terms that are mutually agreeable to the parties. It has been stated that.

The ADR process ... increases rates of settlement and provides an impetus for the early resolution of litigation, ... unscientific assessments [of ADR] have provided at least in part the foundation for extending and expanding ADR services.⁵⁹

The ADO should welcome the growth of ADR as an additional method of solving disputes. The extra benefits that ADR provides, including cost effectiveness, disputant satisfaction, the understanding and ownership of resolution by those involved, have the additional advantage of increasing the benefits of ADR to the ADO.

VI CONTRACTUAL DISPUTES

ADR has not been effectively used within the ADO, with regards to contractual disputes. The ADO has a substantial equipment and capital procurement program each financial year, in the order of A\$2.5 billion or more. The Defence Material Organisation ('DMO')⁶⁰ is continuously engaged in ongoing contractual disputes. It uses standard contractual clauses to provide a precedent-based contractual system.⁶¹

The DMO's standard contracts include clauses 12.1.1 and 12.1.2 of what is known as 'Smart 2000',⁶² which authorises the use of alternative dispute resolution prior to the commencement of any court proceedings.

58 The Australian Commercial Disputes Centre claimed it has reached a 100% success rate and costs 5% of comparable court resolutions: see Astor and Chinkin, above n 25, 50 and Lawrence Boulle, *Mediation; Principles Process and Practice* (1996).

59 Gay Clarke and Iyla Davies, 'The Role of Mediation and Case Appraisal in the Resolution of Personal Injury Disputes Arising From Motor Vehicle Accidents', (October 1997) *Accident Investigation, Reconstruction, Interpretation and the Law*, 169–74.

60 The DMO is part of the Department of Defence and in 2005/2006 it will spend A\$7.2 billion on acquiring and sustaining military equipment and services. The organisation employs 6500 people working in 50 locations nationally and internationally. The DMO is involved in many of the largest and most demanding projects in Australia: see <<http://www.defence.gov.au/dmo/about/index.cfm>> at 12 September 2005.

61 Smart 2000 is the current suite of contractual clauses used by the DMO, replacing DEFPUR 101.

62 Smart 2000 is an integral part of the acquisition reform process currently underway in Defence. By changing the approach to acquisition and contracting, the DMO aims to achieve improved industry relationships, better value for money for both Defence and industry, and most of all, effective defence capabilities for Australia's future: see Department of Defence, *Smarter Defence Contracting Announced* (2000) <<http://www.defence.gov.au/media/2000/3151000.doc>> at 13 September 2005.

In the United States the Department of Defence has used ADR as a way of reducing Defence spending and promoting the downsizing of defence procurement programs.⁶³ It has been stated that:

One consequence to be expected is the temptation in both the government and the private sector to pursue disputes more doggedly. Now, more than ever, a lost contract can mean the difference between survival and dissolution for many contractors.⁶⁴

For these reasons, there is a great pressure when government is involved to seek restitution by both parties in a Defence contractual dispute. The competitiveness of the litigation environment prevents the resolution of disputes between the parties and undermines the integrity of future business relationships between the parties.⁶⁵ Modern resolution of contractual disputes has none of the romance of 'Hollywood' depictions.⁶⁶ The traditional approach of looking at issues in terms of rights and rules has been altered. In contrast, ADR's advantage is that it asks, and to some extent requires, individuals to view disputes through the 'lens of human relations'.⁶⁷ That is, it allows the parties to the dispute to maintain a working relationship.

ADR provides a mechanism by which parties to commercial disputes can preserve future business relationships and develop a consensual resolution.⁶⁸ Further, the parties to the dispute remain in control of the process, as it is not decided by a disassociated third party.

Since contracts are the life blood of [a company], when disputes arose under such contracts resolution of those disputes was too important a task to be left in the hands of third party. ... viable solutions could only come out of the parties on efforts.⁶⁹

Contracts and capital expenditures remain at the core of ADO activity. In the United States, for example, the United States Air Force has used ADR in approximately 100 contractual controversies, with a 93% settlement rate. Further, it has resolved two major contractual disputes with claims of more than US\$190 million and US\$500 million using ADR.⁷⁰

Whilst the propensity for litigation in the United States is arguably greater than that in Australia, it is self-evident that cost savings to Defence through ADR warrants its further consideration when contracting. ADR has the potential to provide the ADO with valuable assistance in the resolution of contractual disputes. Although there are some inherent differences in the application of ADR within litigation between Australia and the United States which should be

63 United States Congress, *After the Cold War: Living With Lower Defence Spending* (1992) 524.

64 Stanley Dees, 'The Role of Procurement Lawyers in the Era of Reduced Defence Spending' (1993) 141 *Military Law Review* 199, 199–201.

65 Eaton, above n 23, 1086–1091.

66 Carolyn Kleiner and Harrison Rainie, 'ADR Programs Are on the Rise' (1999) 126 *U.S. News & World Report*, 90.

67 *Ibid.*, 92.

68 Goldberg, Green and Sander, above n 18, 152.

69 Fulton, above n 17, 109.

70 Jeffery Senger, 'Turning the Ship of State' (2000) 79 *Journal of Dispute Resolution* 79, 79, 84.

considered in implementing a broader ADR program within the ADO, it has potential and should therefore be considered.

VII COMPARISON BETWEEN THE US AND AUSTRALIAN SYSTEMS

There are significant differences between the application of ADR in the United States and in Australia. These differences must be noted, as it should not be thought that ADR is a 'cure-all' within Australia. The United States Federal government has implemented several instruments, which have called for the adoption of broad ADR options for all Federal Courts.⁷¹ The ADR concept was formally introduced into the US Federal Court system as a pilot project and goal of the *Civil Justice Reform Act 1990*.⁷² Subsequently, the US introduced the *Administrative Dispute Resolution Act 1996*,⁷³ which required federal agencies to look at their mission, to see where ADR might be effective, and implement programs.⁷⁴

Consequently, the United States Department of Defence then directed its various services to implement ADR practices where applicable to 'foster increased use of ADR techniques, identifying and eliminating unnecessary barriers to ADR use'.⁷⁵ 'The Secretary of the Air Force has recognised the success of these programs and codified them in formal agency procedures. It is now official Air Force policy to use ADR to the maximum extent practicable.'⁷⁶

Australia has not followed an identical approach to the adoption of ADR. Legislation, by directing the use of ADR at a Commonwealth level has been developed in an ad hoc approach.⁷⁷ The further usage of ADR techniques is still being developed in the ADO. There are ongoing directions for the studies of the employment of ADR within the ADO.⁷⁸ In contemplating the implementation of a broader ADR policy, the ADO needs to consider the effects of making the ADR process mandatory or voluntary.

71 Eileen Hoffman, 'The Impact of the ADR Act of 1998' (1999) 35 *Trial* 30, 30.

72 28 USC §§ 471–82 (1994). Amendments to Federal Rule of Civil Procedure 16(c)(7) authorised the use of 'extra-judicial procedures' to resolve disputes in 1983, but most federal court ADR systems did not emerge until the 1990s.

73 5 USCS §§ 571–85.

74 Barbara Zanotti, AFLSA/JACR 'Alternative Dispute Resolution in the USAF' (1999) *Pentagon Briefing Paper*, Arlington, Virginia. Article with author.

75 Department of Defence Directive 5145.5, April 1996, quoted in Zanotti, above, n 74.

76 Senger, above n 70, 79, 84.

77 Tom Altobelli, 'ADR Legislation - Some Recent Developments' (1996) 3 *Commercial Dispute Resolution Journal* 1, 9.

78 Commonwealth, *Rough Justice: An Investigation into Allegations of Brutality in the Army's Parachute Battalion: Joint Standing Committee on Foreign Affairs, Defence and Trade*, Report No 99 (2001) 25.

VIII MANDATORY OR VOLUNTARY?

Mandatory mediation has been implemented by some Commonwealth legislation.⁷⁹ However, it has been criticised by academic commentators.⁸⁰ These critics argue that compulsory mediation requires the disputants to settle coercively.⁸¹ The argument is that legislation such as that which exists in Queensland⁸² compromises the integrity of the ADR process, in that it forces disputants to mediate or utilise other ADR processes.⁸³ Parties that enter into agreements to mediate with their consent generate their own remedies and are more likely to abide by the result of the mediation or process if secured through mutual agreement.⁸⁴ It has been noted that:

[Mediation is] a voluntary process ... *Voluntary* refers to freely chosen participation and freely made agreement.⁸⁵

This definition of mediation notes the voluntary nature as an essential element of the process at both the beginning and the conclusion, and therefore as being a fundamental condition of the process, which should not be compromised.⁸⁶

In the alternative, it has been argued that 'most legal practitioners are not going to use the ADR process unless they are forced to'.⁸⁷ This argument is based upon the concept that parties are reluctant to utilise the ADR process unless it is mandatory. As a mandatory process, ADR often becomes a further step in the litigation timeline.⁸⁸ However, statistical evidence suggests that mandatory ADR achieves settlement rates at similar levels to those of voluntary ADR.⁸⁹ Having regard to the fact that the Commonwealth government has indicated a preference for mandatory mediation,⁹⁰ it would be advantageous for the ADO to utilise the process.

Currently, mediation for administrative issues at unit level is undertaken by mutual agreement of the parties and with the Commanding Officer's consent. The use of ADR in broader matters such as compensation and contractual disputes could be mandatory, prior to the parties seeking litigation before a tribunal or court.

79 See, eg, *Family Law Act 1975* (Cth) and *Federal Court of Australia Act 1976* (Cth), amended by *Courts (Mediation and Arbitration) Act 1991* (Cth).

80 Gina Hughes, 'The Institutionalisation of Mediation: Fashion, Fad or Future?' (1997) 8 *Australasian Dispute Resolution Journal* 288.

81 *Ibid*, 288.

82 See, eg, *Uniform Civil Procedure Rule 1999* (Qld) ch 9.

83 Tom Altobelli, 'Mediation: Primary Dispute Resolution 1996: Mandatory Dispute Resolution in 2000?' (1997) 11 *Australian Journal of Family Law* 55, 55.

84 Eaton, above n 23, 1086, 1092.

85 Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (2nd ed, 1996) 19.

86 Gary Smith, 'Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not' (1998) 36 *Osgoode Hall Law Journal* 847, 847.

87 Hughes, above n 80, 288, 289.

88 Eaton, above n 23, 1086, 1094.

89 Craig McEwan and Richard Maiman, 'Small Claims Mediation in Maine: An Empirical Assessment' (1981) 33 *Maine Law Review* 237, 237, 252.

90 Hughes, above n 80.

IX AGREEMENTS TO MEDIATE

It is important to consider how the ADO would incorporate ADR processes into its contracts and other agreements, so that parties are bound to use ADR processes. In this regard, some jurisdictions in Australia have incorporated ADR or case management methodologies as an integral part of their litigation and adversarial system.⁹¹ However, the ADO is not operating in an environment that normally requires the implementation and incorporation of ADR programs as part of its operating procedure.

In contractual matters, the ADO could enhance the current 'Smart 2000'⁹² contract by including a compulsory dispute resolution clause as a core element to its contract. The Australian Commercial Dispute Centre ('ACDC')⁹³ has promulgated a model dispute resolution clause that could be incorporated into all ADO commercial contracts.⁹⁴ Rather than recommending that all disputes are to be settled by ADR, the ACDC recommends that clauses in agreements stipulate a process in the event of a dispute, whereby the parties to the contract agree to follow an acceptable method that may include ADR. For example, the clause details distinct phases in the settlement of a dispute, starting with the parties attempting mediation and progressing through expert determination onto conclusion.⁹⁵

The incorporation of ADR clauses into contracts has the advantage of establishing a mechanism for getting to the negotiating table.⁹⁶ Proponents of using ADR clauses suggest:

It is much easier to negotiate an agreement on using alternative dispute resolution at a time when the parties are on friendly terms, when they don't have an actual dispute and when they're working to reach agreement on the substantive terms of the deal.⁹⁷

In a positive environment, the parties have armed themselves with the tools to resolve possible conflict. Additionally, parties can implement the process quickly and prevent greater economic losses. The disadvantage of incorporating ADR clauses into contracts is that they may be too specific, trapping the parties into a procedure that may be inappropriate for the circumstances.⁹⁸ However, if a clause

91 See, eg, *Family Law Act 1975* (Cth), amended by *Courts (Mediation and Arbitration) Act 1991* (Cth) s 53a; *Federal Court Rules* (Cth), Order 72; *Supreme Court of Queensland Act 1991* (Qld); *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW).

92 See above n 62.

93 The ACDC is an independent, not-for-profit organisation established in 1986, to advance in Australia the practice and quality of alternative dispute resolution services, such as mediation, conciliation and arbitration: see <<http://www.acdcld.com.au>> at 14 September 2005.

94 See Astor and Chinkin, above n 25, 301.

95 See Astor and Chinkin, above n 25, 302.

96 Michael Pryles, 'Dispute Resolution Clauses and Contracts' (1990) 1 *Australian Dispute Resolution Journal* 116.

97 J Freund and M Millhauser, 'ADR, A Conversation' (1989) *The National Law Journal* 1, 1, 4.

98 See Astor and Chinkin, above n 25, 198.

is too broad it may lack a causal link between the dispute and the ADR clause and may not be enforceable.⁹⁹

The following have been noted as the considerations for drafting a successful mediation clause:¹⁰⁰

- (1) The clause should be clear, comprehensive, certain and complete;
- (2) It should specify the procedures to be adopted by the parties in commencing and participating in a dispute resolution; and
- (3) Participation in the process should be a condition precedent to court or arbitration.¹⁰¹

The courts have held agreements to mediate to be enforceable if appropriately framed.¹⁰² Consequently, dispute resolution clauses should be adopted into ADO contracts as core criteria, in order to maximise the benefits attainable through ADR.

An alternative to the incorporation of dispute resolution clauses into contracts for large projects is the formation of a Dispute Resolution Board ('DRB'), as part of the project.¹⁰³ The DRB consists of a party of neutrals who are given the authority of the parties to convene to hear disputes relating to the project. The DRB has greater familiarity with the project through regular contact and in the event of a dispute can generally identify the cognate issues very quickly and resolutions are rapid, so losses to productivity are minimised.¹⁰⁴ Formation of a DRB incorporates a simple dispute resolution mechanism into the contract without having to deal with issues of an arbitration clause being too broad or specific. The DRB is empowered by the original contract and separate terms of reference. The disadvantage of a DRB is they have on-going costs throughout the life of project.¹⁰⁵ Unlike a standard mediator who deals with the dispute when and if it occurs, the DRB is constantly monitoring the project for potential disputes.

X CONFIDENTIALITY

The confidentiality and admissibility as evidence of communications between the parties to ADR processes is an important issue. For mediation and ADR generally to develop within the ADO, it is necessary that confidentiality of process be ensured. It is relevant and pertinent to discuss the procedural

99 See *Public Authorities Superannuation Board v Southern International Developments Corporation Pty Ltd* (Unreported, Supreme Court of NSW, Smart J, 19 October 1987).

100 Patrick Mead, 'ADR Agreements: Good Faith and Enforceability' (1999) 10 *Australian Dispute Resolution Journal* 40, 46.

101 *Scott v Avery* (1856) 10 ER 1121: the clause was held not to oust jurisdiction from the court, the clause merely postponed the rights of the parties to take action until after the dispute resolution was completed, but did not prohibit the parties from having recourse to the courts.

102 *Hooper Baillie Associated Ltd v Nation Group Pty Ltd* [1992] 28 NSWLR 194, 211.

103 Paula Gerber, 'Construction Dispute Review Boards' (1999) 9 *Australasian Dispute Resolution Journal* 1, 1.

104 *Ibid*, 16.

105 *Ibid*, 12: US figures on costs of DRB range from 0.04% – 0.51% of total contract costs.

protections currently afforded to ADR within the Australian jurisdictions, so as to provide a basis for their application to the ADO.

Section 53B of the *Federal Court of Australia Act 1976* (Cth) provides that evidence of anything said, or of any admission made, during mediation is not admissible in any court:

Admissions made to mediators

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:

- (a) in any court (whether exercising federal jurisdiction or not); or
- (b) in any proceeding before a person authorized by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

Section 53B of that Act therefore makes inadmissible in any court evidence of anything said at a conference conducted by a mediator in the course of mediating anything referred to a mediator in accordance with the *Federal Court Rules*.¹⁰⁶

Generally, many Commonwealth statutory provisions deny the availability of particular evidence to courts and tribunals.¹⁰⁷

Section 114 of the *Supreme Court of Queensland Act 1991* (Qld) states as follows and can be contrasted with s 53B of the *Federal Court of Australia Act 1976* (Cth), in that it contains an additional subsection (2):

Admissions made to ADR convenors

- (1) Evidence of anything done or said, or an admission made, at an ADR process about the dispute is admissible at the trial of the dispute or in another civil proceeding before the Supreme Court or elsewhere only if all parties to the dispute agree.
- (2) In subsection (1) — civil proceeding does not include a civil proceeding founded on fraud alleged to be connected with, or to have happened during, the ADR process.

106 See *Abriel v Australian Guarantee Corp* [1999] FCA 165 where the submissions of the respondents acknowledged that s 53B of the *Federal Court of Australia Act 1976* (Cth) had no direct relevance in that case, as the dispute between the parties which came before the mediator was not referred in accordance with the Federal Court Rules. Reliance there was placed on s 53B ‘by analogy’ at para [22].

107 See *Ombudsman Act 1976* (Cth) s 35(8); *Administrative Appeals Tribunal Act 1975* (Cth) ss 34A(7) and 66; *Prices Surveillance Act 1983* (Cth) s 43(2); *National Health Act 1953* (Cth) s 98E, especially s 98E(2)(b); *Merit Protection (Australian Government Employees) Act 1984* (Cth) s 84(5); *Taxation Administration Act 1953* (Cth) s 3C(3); *Disability Discrimination Act 1992* (Cth) s 127(2); *Radiocommunications Act 1992* (Cth) s 210(6); *Native Title Act 1993* (Cth) s 72(3) (repealed), s 181; *Family Law Act 1975* (Cth) s 19N as referred to in *John Kizon v Michael John Palmer* [1997] 21 FCA (Lindgren J).

Further, s 65 of the *Supreme Court Act 1935* (SA) states:

Mediation and conciliation

- (1) Subject to and in accordance with the rules of court, the court constituted of a judge may, with or without the consent of the parties, and a master or the registrar may, with the consent of the parties, appoint a mediator and refer a civil proceeding or any issues arising in a civil proceeding for mediation by the mediator. ...
- (3) A mediator appointed under this section must not, except as required or authorized to do so by law, disclose to another person any information obtained in the course or for the purposes of the mediation.
- (4) The court may itself endeavour to achieve a negotiated settlement of a civil proceeding or resolution of any issues arising in a civil proceeding.
- (5) A judge or master who attempts to settle a proceeding or to resolve any issues arising in a proceeding is not disqualified from taking further part in the proceeding but will be so disqualified if he or she is appointed as a mediator in relation to the proceeding.
- (6) Evidence of anything said or done in an attempt to settle a proceeding by mediation under this section is not subsequently admissible in the proceeding or in related proceedings.
- (7) If a case is settled under this section, the terms of the settlement may be embodied in a judgment.

Section 131(1) of the *Evidence Act 1995* (Cth) provides as follows:

- (1) Evidence is not to be adduced of:
 - (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
 - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

Section 131(2) of the *Evidence Act 1995* is also relevant. Section 131(2) contains certain limitations upon the operation of s 131(1). Section 131(2)(f) provides that s 131(1) does not apply if:

The proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue.¹⁰⁸

The statutory provisions above have been set out in great detail, to ensure that when consideration is given to the formal inclusion of confidential protection of ADR processes within the ADO, the relevant applicable provisions are taken into account.

¹⁰⁸ *Evidence Act 1995* (Cth) s 132, which casts particular obligations on a court in relation, materially, to s 131 might also be noted.

XI ENFORCING MEDIATION AGREEMENTS

If ADR is to develop effectively within the ADO then there must be provision made for the enforcement by statutory officer of agreements made therein. This area has created considerable case law. As with confidentiality above, it is necessary and worthwhile in this article to examine the enforcement of ADR agreements within the other Australian jurisdictions.

The enforcement of mediation-like agreements is not a recent development.¹⁰⁹ Differing views have been expressed in Australia and England as to whether a settlement agreement can be enforced in the original proceedings.¹¹⁰ It has been held that the Court can grant all remedies to which any of the parties appears to be entitled, so that as far as possible all matters in controversy may be finally determined and all multiplicity of proceedings avoided.¹¹¹

On this approach, in appropriate cases, a settlement agreement may be enforced on an application by motion in the original proceedings.¹¹² This is so, even though the settlement agreement may involve matters extraneous to the action, provided that the court is satisfied that the procedure is appropriate. Matters relevant to the court's consideration are the extent to which extraneous matters are involved, the nature of the issues to be determined, the extent to which questions of credibility are likely to arise, and whether pleadings and discovery may be desirable.¹¹³ This creates a potential problem for the enforcement of proceedings within the ADO context, in that often there will not be an existing proceeding in which an application or notice of motion can be made.

It is not the case that the enforcement of the settlement should not be dealt with in the original proceedings where there are substantial matters in controversy that go beyond the ambit of the proceedings as they were originally constituted, or where the interests of justice render the procedure inappropriate.¹¹⁴ Normally the relief that is granted to a party will be based on the orders sought in the relevant process. In matters that are pleaded, the relief should be founded on the causes of action pleaded.¹¹⁵ However, the effect of this rule is that it would allow a court or statutory officer in the ADO context, subject to jurisdiction, to grant any relief that it thinks appropriate to the facts as proved, even if such relief was not originally claimed. This rule allows the court to do justice in cases where the plaintiff has failed to properly claim relief that is

109 See *Eden v Naish* (1878) 7 Ch D 781.

110 In England the view has been taken that enforcement of the settlement generally requires new proceedings to be commenced (*Green v Rozen* [1955] 2 All ER 797; *McCallum v Country Residences Ltd* [1965] 2 All ER 264); unless the terms of the settlement agreement are embodied in an order and the proceedings have been stayed with liberty to apply: *E F Phillips & Sons Ltd v Clarke* [1970] Ch 322.

111 See *Darling Downs Investments Pty Ltd v Ellwood* (1988) 18 FCR 510.

112 See *Roberts v Gippsland Agricultural & Earthmoving Contracting Co Pty Ltd* [1956] VLR 555, 557, 562–7.

113 See *General Credits (Finance) Pty Ltd v Fenton Lake Pty Ltd* [1985] 2 Qd R 6, 9–10. See also *Darling Downs Investments Pty Ltd v Ellwood* (1988) 18 FCR 510; *McLaren v Schuit* (1983) 33 SASR 139.

114 See *Phillips v Walsh* (1990) 20 NSWLR 206, 210.

115 See *Bacon v Mount Oxide Mines (In Liq)* (1916) 22 CLR 490, 517.

appropriate to the case as pleaded, or where the evidence that has emerged at trial does not correspond to the particulars as pleaded.¹¹⁶

If the compromise is repudiated by a defendant, the plaintiff may elect between enforcing the compromise or accepting the repudiation. In the latter case, the original cause of action revives and may be enforced.¹¹⁷

A remedy in damages is not sufficient and specific performance of the agreement may be obtained. The party seeking to enforce must be willing and able to comply with the contract.

In this context, s 22 of the *Federal Court of Australia Act 1976* (Cth) empowers the Federal court to enforce a settlement and may assist the ADO. Section 22 states as follows:

The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.¹¹⁸

In *Darling Downs Investments Pty Ltd v Ellwood*,¹¹⁹ the Court gave the following summary of their views:

- (a) Section 22 of the *Federal Court of Australia Act* must be construed as having an effect analogous to s 24(7) of the English *Judicature Act*.
- (b) Section 24(7) and its Australian counterparts have been held to include, amongst other remedies, orders enforcing compromises of suits; and
- (c) Section 22 should also be read as including such orders within its ambit.¹²⁰

The Court did not accept an assumption on which they thought *Pallas v Finlay*¹²¹ had been argued, namely, that the order sought 'was only justifiable, if at all, under the accrued jurisdiction'.¹²² Rather, their Honours founded jurisdiction to enforce the settlement on s 22 of the *Federal Court of Australia Act 1976* (Cth), treating the claim to enforce the compromise as a claim 'properly brought forward ... in the matter'. That is not the same thing as relying on s 22 as a source of jurisdiction. It could be argued though that s 22, although providing the procedural mechanism, does not confer jurisdiction solely.¹²³ However, s

116 See *Dare v Pulham* (1982) 148 CLR 658.

117 See *Buseska v Sergio* (1990) 102 FLR 157.

118 In *Darling Downs Investments Pty Ltd v Ellwood* (1988) 18 FCR 510 ('Darling Downs'), the parties to a claim for damages under the *Trade Practices Act* agreed to compromise the proceeding on the basis that the respondent promised to pay A\$77 500 'all up' to the applicant. It was conceded that the original proceeding had never been discontinued or otherwise terminated. The respondent reneged on the settlement. The applicant successfully moved for judgment for an amount of A\$57 500, representing the sum of A\$77 500 promised less A\$20 000, which the respondent had in fact paid under the settlement. The respondent's appeal was dismissed by majority (Pincus and Einfeld JJ, Fisher J dissenting).

119 (1988) 18 FCR 510

120 *Darling Downs* (1988) 18 FCR 510, 526.

121 (1985) 61 ALR 220.

122 *Darling Downs* (1988) 18 FCR 510, 522.

123 See *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.

39B(1A)(c) of the *Judiciary Act 1903* (Cth) was not in force when *Darling Downs* was decided.¹²⁴

Finally, s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) confers jurisdiction on the Federal Court in matters falling within s 76(ii) of the *Australian Constitution* (subject to exceptions in criminal matters). As a result, common law claims arising in the Territories fall within the jurisdiction of the Federal Court, even if not part of the Court's accrued jurisdiction. This may be of assistance also in the ADO context.

XII CONCLUSION

ADR as a process has advantages to the ADO. These advantages warrant its continued use and future development within the ADO. However, the development of ADR will require careful legislative drafting and implementation. Without effective mechanisms incorporated into the legislative instruments, ADR will simply join other challenged defence legal processes. The ability to enforce ADR agreements within the ADO needs to be clearly articulated. ADR processes should be protected by strict confidentiality and privacy provisions.

Ideally, legislation and or directives similar to the US Defence Department would be the best means of future ADR facilitation. However, until the enactment of supporting legislation, as in the United States, the ADO has the ability to adopt internal processes to capture the advantages to be derived from ADR. Firstly, by expanding the use of ADR to be used in the resolution of personal injury disputes and compensation claims. The ADO will capture opportunities to save on litigation costs and reduce negative perceptions of the community towards the ADO on compensation issues. Secondly, the ADO can make ADR a compulsory element of all defence procurement contracts, by stating clearly the dispute resolution processes to be incorporated, prior to proceeding with any litigation arising from the contract. Alternatively, larger projects could incorporate a DRB, which would have familiarity with the project and be authorised to resolve conflicts on behalf of the parties to the contract. Of course, in some matters these changes have already occurred.

124 In *Reid v Interarch Australia Pty Ltd* [2000] FCA 1328, Hely J enforced a compromise of a claim to damages for misleading and deceptive conduct under ss 52 and 82 of the *Trade Practices Act*, expressed in a Deed of Settlement, on the motion of the second applicant in the original proceeding. The Deed provided that in return for releases, the respondents jointly and severally agreed to pay a specified sum of money to the second applicant. The respondents in that case conceded that Darling Downs established that the Court had power to entertain the motion in the existing proceeding, but submitted that it should not do so in the exercise of its discretion, because it raised issues foreign to those raised in the proceeding. His Honour disagreed, noting at [24] that in *Phillips v Walsh* (1990) 20 NSWLR 206, McLelland J had said that a court should not enforce a compromise on motion in the original proceeding if 'substantial matters in controversy are involved beyond the ambit of the proceeding as originally constituted, or where, in the interests of justice, disposition of the matter on a summary application is inappropriate'. Justice Hely entered judgment for the second applicant against the respondents in accordance with the Deed of Settlement for A\$50 000.

Lastly, whilst some areas for the development of ADR have been identified, it is not a panacea for all legal functions within the ADO. Generally, ADR would not be considered suitable for application to military disciplinary proceedings. Subsequently, the use of ADR in military disciplinary proceedings would require exceptional grounds.

ADR provides an additional option that can be utilised for dispute resolution within the ADO. It should be developed and solidified carefully so as to allow for its usage in appropriate circumstances. For the reasons as stated above there are disputes within Defence that would benefit from structured alternative resolution methods.