ADR Processes: Connections Between Purpose, Values, Ethics and Justice

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ADR processes are now used extensively in Australia to resolve disputes in courts and tribunals. In addition, government departments see ADR as an important tool in improving access to justice for ordinary citizens. However, what justice means in different ADR contexts may differ. One possible explanation for the divergence of views on justice and ethics in ADR practice is the fact that practitioners come from different professional backgrounds and disciplines and also use a range of processes. Also, while some processes have clearly stated normative purposes under enabling legislation and Charters, others do not. There are also industry-scheme ADR processes with normative purposes beyond individual disputes. Drawing from empirical research, this paper begins to explore the relationship between process purpose, underlying values and ethical responsibilities that arise for a range of ADR practitioners working in different fields and the potential of those processes to promote substantive and procedural justice.

I INTRODUCTION

Alternative dispute resolution (ADR) processes including mediation, arbitration, conciliation and early neutral evaluation are now used extensively to resolve disputes in courts and tribunals, between businesses and individuals, consumers and retailers, employees and employers and between health service providers and patients to name a few.1 The benefits of ADR to individuals, government and society at large are numerous. For individuals the opportunity for self-determination in a non-adversarial environment is most salient and for both individuals and government, the costs usually associated with dispute resolution are significantly reduced when non-adversarial processes are used.2 Other benefits of ADR processes include time savings, relational benefits and case management benefits for courts.3 ADR in Australia has grown exponentially since the 1970s and has undergone significant transformations over the years; as

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1 See generally Tania Sourdin, Alternative Dispute Resolution (Lawbook Co, 5th ed, 2016); Productivity Commission, Access to Justice Arrangements, Inquiry Report No 72 (2014) Vol 1, 283-309. This is an international trend with similar developments in New Zealand, Canada and the United States.

2 Sourdin, above n 1, 37-38.

3 The Australian Productivity Commission noted the lack of quantitative data on the benefits of ADR. See generally Productivity Commission, above n 1.
King et al noted, it has been ‘enthusiastically championed, criticised, modified [and] regulated’. 4

Despite the significant role that ADR plays in civil law disputes there is little scrutiny of the justice quality of ADR practices and processes or evaluations of ethical practice and justice within ADR.5 The widespread use of ADR processes and the number of practitioners from various disciplines using a range of processes means there is incredible variability and diversity in the practice of ADR. With the exception of arbitration and mediation,6 the regulation of ADR processes and professionalisation is still nascent. A potential difficulty with attempting to regulate different variations of ADR processes is accommodating the flexibility in processes that is seen as a positive characteristic of ADR. Regulation is likely to become more complex.7 Even where agreed standards exist, ethical issues still arise due to competing and sometimes conflicting values.8

This article reports on a project that begins to identify and explore ethical issues arising for a range of Australian ADR practitioners. The project examined the current state of ethics in various ADR processes including availability of codes of conduct and regulating bodies, types of ethical issues that arise in different contexts of ADR and whether such issues are specific to professional contexts. In addition, similarities and

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4 Michael King et al, Non-Adversarial Justice (Federation Press, 2nd ed, 2014) 95. See also Sourdin, above n 1.
8 See Noone and Akin Ojelabi, above n 5.
differences in relation to how ethical and practical issues across different ADR contexts are addressed are explored. Drawing from this empirical research, this article discusses the relationship between the purpose of an ADR process, its legislative basis and underlying values, the practitioner’s ethical responsibilities and ethical issues that arise for ADR practitioners working in different fields. It also examines the potential of ADR processes to promote substantive and procedural justice.

II RESEARCH METHOD AND GOALS

An ADR ethics symposium was held in June 2015 where academics and ADR practitioners from a variety of ADR practices and organisations gathered to identify and discuss ethical issues that arise for ADR practitioners. Follow-up interviews were conducted with nine ADR practitioners and organisational leaders engaging them in an in-depth discussion on justice, ethical issues and how they are addressed in their area of ADR practice. Interview participants were selected based on their leadership roles within ADR organisations. Participating organisations, all located in Victoria Australia, include the Small Business Commissioner, Mental Health Complaints Commissioner, Health Services Commissioner, Disability Services Commissioner, Energy and Water Ombudsman, the Victorian Equal Opportunity and Human Rights Commission, the Victorian Ombudsman, the Accident Compensation and Conciliation Service and the Dispute Settlement Centre of Victoria. La Trobe University Faculty Human Ethics approval for the project was granted in November 2014.

Interview participants were asked to identify the ADR processes used by their organisations, the discipline in which they practice, the values underlying their organisation’s process, the ADR practitioner’s ethical responsibilities, available codes or guidelines on ethics, the ethical issues encountered in practice and tips for addressing them, procedural and substantive justice and areas for improvement, safeguards and strategies to ensure an ethical process. A thematic analysis of interview data was undertaken using NVIVO, a qualitative and mixed-method research software. Research themes explored include justice, ethical responsibilities, process, the role of ADR practitioners, ethical dilemmas, relevance of codes and legislation and ADR quality and quality assurance. This article focuses on the findings relating to process purposes, values, ethical responsibilities and justice.

III ADR PROCESSES AND JUSTICE

According to the now defunct National Alternative Dispute Resolution Advisory Council (NADRAC), ADR is:

[A]n umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues

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between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.¹⁰

Initially, the ‘A’ in ADR referred to ‘alternative’; however, with the institutionalisation of ADR, the ‘A’, as seen in NADRAC’s definition, also refers to ‘assisted’ but it has more recently come to be understood as ‘appropriate’.¹¹ This acknowledges disputes need to be matched to the most appropriate dispute resolution process available. A subtle but important issue in determining whether an ADR process is ‘appropriate’ is that of the quality of ADR processes. Policy-makers, recognise the need for ‘appropriate training for mediators’, and establishment of ‘screening processes to identify parties whose disputes are unsuitable for mediation’.¹²

An ADR process refers to a series of actions/interventions/steps taken either by the disputing parties or a third party to assist parties to clarify issues in a dispute or to arrive at a settlement or resolution of a dispute.¹³ NADRAC classified ADR processes into three categories: facilitative, advisory and determinative, while also recognising that processes may be combined.¹⁴ ADR processes include conciliation, mediation, arbitration, early neutral evaluation and hybrid processes liked arb-med and med-arb.¹⁵

Although NADRAC’s definition of ADR, when the process involves a third party, suggests that the third party must be impartial, impartiality is not a requirement in all ADR processes. In some processes used by research participants, third parties may be required to act according to legislative objectives or promote particular norms in the dispute resolution process.¹⁶ In exploring ethical and justice standards of ADR processes, a key question is the extent to which the distinct purposes of an ADR process determine the ethical responsibilities of third parties and facilitate justice. A related question concerns the type of justice that is promoted through the process.

Justice in ADR has been the subject of academic controversy. There are divergent perspectives around the connection between justice and operation of ADR processes.¹⁷

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¹¹ King et al, above n 4, 96.
¹⁴ NADRAC, above n 10, 8.
¹⁵ Ibid 4-8.
ADR processes. For example, research examining justice in mediation found that mediators have different understandings and approaches to issues of justice and ethics in mediation.18

One explanation for the divergence of views on justice and ethics in ADR practice is that practitioners come from different professional backgrounds and disciplines and use a range of processes. Also, while some processes have clearly stated normative purposes under enabling legislation and charters that go beyond individual disputes, some do not. In addition, while some ADR processes, such as mediation, have established codes of conduct and accreditation processes, this is yet to occur in most other processes.

The objectives of an ADR process are critical to assessments of ethical and justice quality. Often these objectives and underlying values are derived from relevant legislation and charters. Common objectives identified for ADR processes are to resolve disputes using a fair process which achieves acceptable and lasting outcomes while also using resources efficiently.19 A widely accepted objective, as noted by NADRAC, is to ‘resolve or limit disputes in an effective and efficient way’ using a fair procedure and achieving ‘outcomes that are broadly consistent with public and party (including third party) interests.’20 NADRAC also noted that these objectives may vary depending on the process and the nature of the dispute and concluded that ‘when considering quality and performance there is a need to differentiate processes and to compare like with like.’21

In addition to the need to compare like with like, there is also the overarching issue of the broad objectives of the institution within which the ADR process exists. As Tyler notes:

Rather than using traditional or idealized trial-based systems of dispute resolution as criteria against which to evaluate alternative dispute resolution programs, it may be more reasonable to define a set of desired attributes for a dispute resolution program and to compare any program to those abstract standards. Rather than beginning with existing procedures, such an effort would ask what goals the justice system is seeking to achieve and then examine the ability of different procedures to achieve those goals.22

Tyler addresses evaluation at a macro-level, based on the objectives of the justice system in which those processes operate, but at a micro-level, there

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18 Noone and Akin Ojelabi, above n 5.
20 Ibid.
21 Ibid 81.
are specific process objectives which also determine the ethical responsibilities of practitioners. Questions about justice may be answered through a consideration of process objectives at both the macro and micro-levels. Two different ADR processes in the justice system would be expected to meet the macro policy objectives of that system, but each process would also have its own standards and expectations. For example, the level of neutrality expected of the third-party practitioner, which would also go to determine their ethical responsibilities, may differ. Although purpose and values may give rise to different ethical responsibilities for different ADR practitioners, some ethical responsibilities may be common to all: for example, the responsibility to do no harm in any ADR process.

Baruch Bush’s exposition on ADR addresses variations that may lead to complexity in defining ADR quality. He advocates for a ‘goal furtherance’ approach to measuring quality rather than a process approach because the goal-furtherance approach measures quality based on whether it meets the desired end thus avoiding variations in definitions of quality.

Although ADR processes have the common goal of dispute intervention, the manner of intervention and the desired outcome of interventions differ. While some processes are directed solely at reaching a settlement, others are focused on assisting parties to clarify the issues in conflict and possibly reach a resolution at the end of the process. Also, some processes are aimed at achieving larger public interest goals (often articulated in governing legislation), while some are limited to the specific dispute between parties. An evaluation of ethical and justice attributes of processes requires a consideration of all the objectives of processes and the systems and institutions in which they are located and utilised. It is a complex task.

In this paper the ADR processes adopted in the participant organisations and their relationship with justice are explored in the context of their specific purposes, values and ethical responsibilities.

IV Research Findings on Process Purpose, Values, Ethics and Justice

This section presents data on process purpose focusing on the type of process, whether or not the process has a legislative basis and the underlying values, as well as the role envisaged for the practitioner in the process. As noted above, these are important considerations in determining practitioners’ ethical responsibilities and whether justice is achieved.

23 Carrie Menkel-Meadow, ‘Are there Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons From International and Domestic Fronts’ (2009) 14 Harvard Negotiation Law Review 195, 198. ‘Do no harm’ is listed as one of the principles that should guide mediators and identified as a principle for Dispute System Design (DSD), a field of ADR.

ADR processes used by participant organisations include mediation, conciliation, investigation and conciliation, investigation and some with broad terms such as ‘dispute resolution’. The nine participating organisations described seven ADR processes used in dispute intervention (Table 1). These are mediation, shuttle telephone negotiation, informal DR, informal telephone DR, investigation, conciliation and arbitration. Of the nine participants, seven were legislation-based providers, one was a government ADR service-provider and one was an industry scheme. Conciliation was the most used ADR process followed by informal ADR. As defined by participants, informal ADR is the process by which practitioners take various steps to assist parties to have a better understanding of the dispute without entering the dispute into a formal DR process. It may include gathering and exchanging information and investigation. In some cases the processes differed in nomenclature rather than substance.

### Table 1: Type of process used by participants

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<thead>
<tr>
<th>Process</th>
<th>Organisations' Use of ADR Processes</th>
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<tbody>
<tr>
<td>Arbitration</td>
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<tr>
<td>Shuttle Negotiation by Phone</td>
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<td>Mediation</td>
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<td>Informal DR</td>
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<td>Informal Telephone ADR</td>
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<td>Investigation</td>
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<td>Conciliation</td>
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A Process Types

ADR processes used by participant organisations were governed by legislation (14 relevant Acts). These legislative-based ADR schemes included the Small Business Commissioner (SBC) (5), Mental Health Complaints Commissioner (MHCC) (1), Health Services Commissioner (HSC) (1), respectively.

25 For description of industry schemes see Productivity Commission, above n 1, Ch 9.
27 Mental Health Act 2014 (Vic).
ETHICS IN ALTERNATIVE DISPUTE RESOLUTION

(2) Victorian Equal Opportunity and Human Rights Commission (VEOHRC) (2), Victorian Ombudsman (VO) (1), the Disability Services Commissioner (DSC) (1) and the Accident Compensation and Conciliation Service (ACCS) (2).

Generally legislation provides for the establishment of the office of the Commissioner and makes provision for dispute resolution services to be provided with statutory responsibilities imposed on the ADR practitioner. For some, the overarching purpose is to ensure the legislative objectives are promoted or given effect in any dispute resolution process. Consequently, although the organisation’s ADR process may have underlying values of fairness and impartiality as between the parties, the ADR practitioner cannot be entirely neutral because they have overriding responsibilities pursuant to relevant legislation.

For example, under the Mental Health Act 2014 (Vic) a DR Officer must promote the well-being of consumers of mental health services and identify potential service improvement in the ADR process. The MHCC also has the power to conduct a formal investigation into serious complaints where there may have been a breach of the Act. A similar responsibility is set out under the Health Services (Conciliation and Review) Act 1987 (Vic) for ADR practitioners in the office of the HSC with a requirement to promote the overall quality of health services in Victoria. The DSC also investigates and conciliates complaints under legislation with the purpose of reaffirming and strengthening the rights and responsibilities of persons with disability.

Dispute resolution by the VEOHRC must be consistent with the objectives of the Equal Opportunity Act 2010 (Vic). These include elimination of discrimination, sexual harassment and victimisation, promotion of the right to equality, achievement of substantive equality and resolving related disputes in a timely and effective manner.

Under the Small Business Commissioner Act 2003 (Vic), the SBC must encourage fair treatment of small businesses in business to business transactions and mediation of disputes involving small businesses extend to providing preliminary assistance, including giving advice so that parties are fully aware of their rights and obligations under the law. In

30 Ombudsman Act 1973 (Vic).
31 Disability Act 2006 (Vic).
33 Mental Health Act 2014 (Vic) s 244(5).
34 Health Services (Conciliation and Review) Act 1987 (Vic) s 1.
35 Disability Act 2006 (Vic) ss 1, 16.
36 Equal Opportunity Act 2010 (Vic) s 3.
38 Ibid s 85. A similar provision appears in the Owner Drivers and Forestry Contractors Act 2005 (Vic) s 34(1).
addition, the *Retail Leases Act 2003* (Vic) provides that the scheme is to enhance fairness and certainty of retail leasing agreements between landlords and tenants.\(^{39}\) In contrast, however, under the *Farm Debt Mediation Act 2011* (Vic), which is also administered by the SBC, a mediator is not permitted to provide advice in relation to the law or encourage a party to reserve or establish legal rights.\(^{40}\)

The Office of the Victorian Ombudsman (OVC) is not primarily a dispute resolution body under the enabling legislation as their goal is to protect the public interest by investigating the actions of government agencies.\(^{41}\) However, their practice is to use an informal dispute resolution process to resolve less serious matters.

The EWO operates as a gas, water and electricity industry scheme.\(^{42}\) It is the EWO’s responsibility to ‘receive, to investigate and to facilitate the resolution’ of relevant complaints and disputes.\(^{43}\) Under the scheme the EWO can assess what is fair and reasonable and make recommendations, they are also required to be independent from participating organisations.\(^{44}\)

The ACCS is an independent service that provides DR services for resolution of workers’ compensation disputes.\(^{45}\) ACCS Conciliation Officers must have ‘regard to the need to be fair, economical, informal and quick’ and in line with the objectives of the Act, ‘make all reasonable efforts to conciliate in connection with a dispute and to bring the parties to agreement’.\(^{46}\) The objectives of the Act include reducing the incidence of accidents and diseases in the workplace, providing for the effective occupational rehabilitation of injured workers and their early return to work, ensuring appropriate compensation is paid, establishing incentives that are conducive to efficiency and discouraging abuse. The overall goal is ‘to improve the health and safety of persons at work and reduce the social and economic costs to the Victorian community of accident compensation’.\(^{47}\) The ACCS Conciliation Officer may make recommendations for resolution as considered appropriate.\(^{48}\)

The DSCV is a government agency that provides mediation services across a range of disputes including community/neighbourhood disputes,

\(^{39}\) *Retail Leases Act 2003* (Vic) s 1.

\(^{40}\) *Farm Debt Mediation Act 2011* (Vic) s 21(2).

\(^{41}\) *Ombudsman Act 1973* (Vic) s 13.


\(^{43}\) Ibid cl 3.


\(^{45}\) *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 273.

\(^{46}\) Ibid s 293.

\(^{47}\) Ibid s 10.

\(^{48}\) Ibid s 294.
for claims under $40,000 and personal safety intervention order disputes at the Magistrates’ Court of Victoria. DSCV uses a facilitative mediation process under the National Mediator Accreditation Scheme (NMAS) Practice Standards. Mediators are prohibited from evaluating or advising on merits or determining outcomes.

As illustrated, the various purposes and objectives of relevant legislation determine, to a large extent, the type of DR practices adopted by each organisation, and the roles and responsibilities imposed on ADR practitioners. Representatives of five out of the seven organisations with legislation-based ADR processes were clear about their roles as furthering the objectives of applicable legislation in carrying out their dispute resolution functions. The only participating industry scheme, the EWOV, also had clear objectives under its Charter including determining disputes on the basis of what is fair and reasonable in accordance with the law and industry practices.

This comment by the MHCC participant illustrates how legislation creates overarching responsibilities:

We describe it as being an advocate for the Act, so we’re fair and impartial but not neutral because the questions that we have to ask the service are framed by the requirements of the Act and asking them to account for the service that they provided. So we may be asking more questions than the person [complainant] has identified themselves because of that obligation.

The ADR processes used by these organisations are often so flexible as to not fit into common definitions of ADR. The role of third parties may vary from traditional descriptions of practitioner responsibilities. At the MHCC, the practitioners can go beyond the individual dispute to address systemic issues. In contrast to what is generally expected in facilitative mediation MHCC practitioners cannot be neutral in relation to content.

There are also variations within processes. For example, mediators with the SBC are expected to be proactive in helping generate options and find solutions, based on their expertise in the subject matter area.

As noted by the SBC:

We don’t follow the passive facilitative model. All the mediators are accredited, they all understand the model, but I think because we only deal with commercial disputes between businesses, the mediators ... are more proactive, more creative ... keener to help the parties move forward, rather than sitting back and asking the parties what they think ...

I hate to use the word [the mediators are a little], more forceful ... they’re not breaching those boundaries of giving legal advice or commenting on the decision, particularly in joint session – they don’t do that. But I think fleshing out and actively seeking viable options they do quite a lot.

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49  *Magistrates’ Court Act 1989* (Vic) s 108; *Family Violence Protection Act 2008* (Vic); *Personal Safety Intervention Orders Act 2010* (Vic).
50  Mediator Standards Board, above n 6, Pt III cl 2.
51  Ibid cl 10.2.
The possibility of a conflict between the NMAS Practice standards and legislative frameworks is addressed in cl 1.3 of the NMAS Practice Standards:

Where a mediator practises under a legislative framework and there is a conflict between a provision of the Practice Standards and a provision of that framework, the legislative framework will override the Practice Standards to the extent of any inconsistency.\(^{52}\)

A problem created by this tolerance is that where mediators are permitted to act outside the practice standards without applicable legislative practice standards (aside from the objectives of the relevant legislation) their ethical responsibilities may become ambiguous and subject to various interpretations. Similarly, where ADR practitioners use dispute resolution processes for which no regulatory scheme exists and practice standards are unclear, the ethical responsibilities become unclear. For example, conciliation is the most widely used process by participant organisations however there are no agreed ethical guidelines for conciliators.

Conciliation can include facilitating a discussion or negotiation between the parties.\(^{53}\) The difference between mediation and conciliation was highlighted by one of the participants: ‘Mediators … tend not to become involved in the process. They drive the process, they facilitate the parties speaking with each other, but tend not to advocate on behalf of the legislation, which is what we do.’\(^{54}\)

While it may be argued that legislation-based processes with specific purposes and underlying values better promote substantive justice because of their normative values as outlined in respective Acts, practice standards which regulate the conduct of the practitioner in those processes would help resolve ethical dilemmas that arise in specific contexts.

C  Flexibility of Process, Ethics and Justice

A core factor in ensuring that ADR processes deliver justice to parties including procedural and substantive justice is the appropriateness of process based on the nature of the dispute and characteristics of the parties. For example, where there is significant power imbalance between the parties, the process and ethical responsibilities that attach should cater to the parties’ needs in this regard. For most participating organisations, having a spectrum of ADR processes available enables them to intervene in disputes based on the parties’ needs and circumstances to achieve process and legislative objectives. In addition, it enables efficiency in terms of managing available resources:

52  Ibid cl 1.3.
54  Health Services Commission participant.
It’s a multi-staged process with a strong emphasis on ensuring that customers and their company are able to resolve the complaint together, without our involvement except if that doesn’t work … We’ll go through if we can – if it’s straightforward – a sort of a shuttle negotiation. … But the … more complex issues would come in for an investigation, which is where we get more into the conciliation process.\textsuperscript{55}

Dispute assessment to determine appropriateness are important for the DSC in ensuring that the process delivers legislative objectives: ‘When someone makes a complaint, we’ve got three roles … we can assess the complaint and then we can decide to either conciliate if it’s appropriate or investigate if it’s necessary.’\textsuperscript{56}

The HSC’s scheme is a voluntary process with success depending on flexibility of process to meet parties’ needs:

We ascertain the issues that we need to resolve. We first of all ask the provider whether they’re willing to participate in our conciliation process … it’s important that they come to that process voluntarily. We will work with the complainant around the issues, clarify the issues, put those issues to the provider and then determine whether in fact both parties are willing to meet or what type of resolution process we’re likely to step into. So sometimes it will mean shuttle negotiation. Sometimes it will mean a meeting. It just depends on the types of issues and whether the parties are willing to sit in a room face to face.

For the MHCC, an individualised approach is taken based on the circumstances of each case:

So the statute gives us quite a deal of scope in terms of how we apply ADR … As a new organisation we are still designing our ADR practice and the approach we’ve taken is to very much individualise our approaches for each circumstance as to whether we’re dealing with a complaint in the oral space or a more formal process.

The overall goal for most participants was to try as much as possible to resolve the dispute using a process customised to meet the parties’ needs:

[The process] is [very] flexible. So one matter would not be treated the same as another. It would be dependent upon the parties in how we progress. Most times it would be a face to face conciliation but we would do telephone and … shuttles and … whatever creatively we can do to move the position to resolution.\textsuperscript{57}

Also, for organisations with responsibilities relating to addressing systemic and public interest issues, the flexibility of using informal dispute resolution to prevent and achieve timely resolution of disputes in a resource efficient manner is highly valued. Also relevant is the practitioners’ level of competency:

But it really came down to technique, in the end. It was how [to] make our staff as highly skilled communicators and negotiators as they can be. As preventative – you know if there are issues that are embryonic that come to the office and we can speak directly to those without the need for

\textsuperscript{55} Energy and Water Ombudsman (Victoria) Participant.
\textsuperscript{56} Disability Services Commission Participant.
\textsuperscript{57} Victorian Equal Opportunity and Human Rights Commission Participant.
it to go further, then that’s a win for everyone. And we still capture those complaints so we can monitor them for systemic interest but we haven’t spent a lot of time on them either.\textsuperscript{58}

For the HSC, informal dispute resolution which may take place on the phone, via email or face to face after initial assessment is used to seek information from parties and may also involve getting the parties to talk to each other before commencing a more formal process: ‘There is a bit of informal resolution that happens. We seek to ask questions of individuals and maybe ask questions of providers and facilitate them talking to each other.’\textsuperscript{59}

It is important to note here that investigation may occur within a dispute resolution process in one case but for others, it is an entirely separate legislative process used depending on suitability. Some participants discussed its usefulness for information gathering within a case. For example, the EWOV explained the purpose of the investigative process is to conciliate an outcome: ‘So we are gathering information through the investigative process I suppose in order to conciliate an outcome.’

In addition, investigation is a process used to identify systemic issues to be addressed. For the EWOV, the investigative process is an opportunity to consider the parties’ positions, work out next steps and assess what a fair and reasonable outcome should look like. Based on this, a recommendation is made to the parties:

We do fair and reasonable assessments as a step in the process which is looking at … what good industry practice looks like, what the laws and codes require, … technical expertise brought … [and], what is the most fair and reasonable outcome. So that’s where we would probably get into a sort of recommendation phase without calling it a recommendation per se. If the customer doesn’t accept what we think is fair and reasonable, we do have a process to finalise the investigation on the basis that there’s a fair and reasonable offer on the table and we’re going to close the complaint because there’s nothing left to investigate and we haven’t been able to conciliate an outcome. If the company doesn’t agree with whatever we’ve decided is a fair and reasonable outcome, we can go to a binding decision, which I suppose is moving more into the arbitration model. But we haven’t done it since 2003.

For the ACCS, it is important to recognise that the ADR process provided is not the only avenue to have a dispute resolved. An assessment of the nature of the dispute and characteristics of parties may mean that ADR is not a suitable process and parties should be free to take the dispute to a more appropriate forum:

The other thing that’s very important is that we’re not there to deny people the opportunity of going to court if that’s the sort of matter that it is. We’re not just there to create a resolution for the sake of it. We’re there to assist the parties to outline what the issues are and sometimes those issues are best dealt with by a court and conciliators aren’t there to prevent or stop that.\textsuperscript{60}

\textsuperscript{58} Victorian Ombudsman Participant.
\textsuperscript{59} Health Services Commission Participant.
\textsuperscript{60} Accident Compensation and Conciliation Service Participant.
Having a flexible process which suits the specific needs of parties and the specific nature and characteristics of a dispute is about fairness (justice), efficiency and proportionality:

I think people have realised you can’t sort of have a methodology that’s very scientific and just rehash it every time … it doesn’t work. So it’s again going back to that sense of fairness and proportionality – it’s this sort of problem, so what approach does it require, which is a very ADR approach.61

Only two of the participants specifically use mediation in their dispute intervention: the SBC and the DSCV. As noted above, there are variations in the mediation styles used by both organisations and for the SBC the style of mediation reflects the applicable legislation.62

The relationship between process, underlying values, ethical responsibilities and justice in relation to participant organisations’ ADR processes are based predominantly on legislation or constitutive instruments, and, at the DSCV and SBC, applicable mediation practice standards. In this section, the participants’ dispute resolution values are examined and linked to ethical responsibilities and questions of justice.

For the SBC, underlying values include competency, effectiveness, impartiality, avoiding conflicts of interest, good faith participation, self-determination (empowerment), efficiency, affordability, informality of process, flexibility, creativity, non-adversarialism, confidentiality and procedural justice.63 These values arise from applicable legislation and the NMAS Practice Standards.

Empowering the parties, it’s efficient, it’s affordable. It highlights our role, the mediator’s role being neutral, an informal but a structured process, flexibility … creative, non-adversarial, confidential … I mean they’re all accredited under the national accreditation system, and that has its values and ethical conduct and behaviours in there, which they would all abide by. They certainly don’t go beyond any of that.64

In relation to competence, mediators engaged by the SBC are required to be highly skilled to guard the process and with respect to some legislation, to be experts in the subject area of the dispute in addition to their skills as mediators.65 Also, ‘in their role they’re expected to ensure the integrity of the process – so there’s a level of competence; they’ve got to be accredited – impartiality, avoiding conflicts of interest, procedural fairness, parties’ right to self-determination.’66

However, these values may conflict, and mediators often engage in a balancing act. For example, party self-determination may conflict with the need to be pro-active mediators who can suggest options to parties. Being

61 Victorian Ombudsman Participant.
62 See above n 23.
63 Mediator Standards Board, above n 7 cls 2.2, 7, 9, 10.1(c).
64 Small Business Commissioner Participant.
65 See, for example, Farm Debt Mediation Act 2011 (Vic) s 20 (3)(b); Retail Leases Act 2003 (Vic) s 84(3). The latter provides that the mediator must be experienced in retail premises leases.
66 Small Business Commission Participant.
experts in the subject matter also means that mediators can encounter parties they have had dealings with in the past raising the need for disclosure to avoid perceived or real conflict of interests. Where such matters are not dealt with carefully, parties may allege mediator bias. These competing values create ethical conundrums for ADR practitioners.

For the HSC, the underlying values are impartiality, fairness (equity), transparency, accountability, confidentiality and mindfulness. Impartiality can be explained as follows:

So in terms of the underlying values in the ADR processes that we use, the things that spring to mind for me are impartiality, although that’s becoming a contested term in the ADR space … it’s true to say that we don’t advocate for any party. We advocate for our legislation.

There can be a conflict between the duty to advocate for the Act, personal values and the widely accepted values of ADR: ‘That difference between having a personal vested interest because of your own morals and ethics and the professional role [of] advocating for the Act and the rights of the person, so it’s not just an impartial third party in that way.’

It’s impartial, it’s fair and it’s timely and cost free – and we’re very much advocates for the legislation. That means that we’re experts in the law. That we can provide that information to either party or both parties – we must do that – to ensure that they’re informed of their rights and obligations under law and can make an informed decision of what the risks are to each other’s client and can persuade them or give them the full information of whether they do want to continue with resolution.

The VEOHRC will provide information on what is required to prove a case within the adversarial court system as well as the outcomes in similar cases but will not evaluate the claim for the parties because that goes against the impartiality required of the practitioner. This creates an ethical dilemma; the practitioners need to be careful about language used and recognise when they are pushing the boundaries: ‘It’s a risk for our impartiality … So it’s dancing that conciliators’ dance in and out of the dispute, adding information that may be of benefit. But putting it in a way that we’re not showing any bias or perceived bias.’

The VO operates by values similar to ADR values of impartiality (also referred to as neutrality and independence), procedural and natural justice all to promote public interest. For the VO, these values must be assessed contextually:

I think when it comes to ethics, it has to be tied to a context. It’s really hard to speak of it in an absolute sense. We do have, I guess some absolutes that govern the way we conduct ourselves at the ombudsman: ‘serving the public interest’. That is probably our guiding principle and we’ll always act in accordance with that.

67 A case involving exactly these issues were discussed in the interview with the Small Business Commissioner. Ethical dilemmas and how parties resolved them will be the subject of another academic article arising from this project.

68 Dispute Settlement Centre Participant.


70 Ibid.
For the MHCC, the values are not strictly ADR values, but those that arise from the intentions of parliament: ‘Well we’ve adopted a set of values to inform our practice but we’re also established under ... the legislation – to be accessible, supportive, responsive and timely ... So there are four areas that guide our practice in terms of how we approach our work.’

In addition to this, the MHCC also adheres to the principles under the Act which are to ensure processes are recovery-oriented and improve services. These two principles underpin the MHCC’s ADR interventions and should be reflected in the outcome. The MHCC is not neutral regarding legislative objectives:

We’re fair and impartial but not neutral because the questions that we have to ask the service are framed by the requirements of the Act and asking them to account for the service they provided ... we can’t be neutral. We describe our process as being an advocate for the Act so we’re not an advocate for the individual or the service, but we’re bound to look at issues through the lens of the Act so we can’t be neutral.

For some organisations, party autonomy, not only in relation to outcome, but also participation in the process, is an important value. Parties are empowered to engage with the process and the system through provision of relevant information:

Conciliation is there to allow people to have their say and to do that in a way that might not be possible through a court process, ... But it’s also there to try to help them reach a better understanding of what the issues are, a better understanding of what the possible scenarios might be and to allow them to make informed choices about how they want to run the thing themselves. It’s not just purely about an outcome. It’s also about opening up a discussion about the system, if you like and how the system operates and how they might deal with it better and how they might make better choices themselves.71

For the DSC, the issue of capacity and party autonomy is critical. Regardless of powers that may be exercised under the Act, party autonomy and empowerment is an underpinning value of their process. They recognise the transformative power of non-adversarial dispute resolution through modelling of conduct and relevant skills useful for parties in their future interactions:

We’ve always taken the approach that dispute resolution ... allows people to come up with solutions and resolutions for themselves and we’re facilitating that ... it allows us through our process to model good communication and good practices to both sides as they’re going through our process ... It’s very empowering when there’s a deep listening that’s built in and we’re encouraging and modelling ... from a sector where people can be very vulnerable, that can be very powerful for them.

Another DSC value which certainly creates ethical responsibilities for practitioners is fairness:

So our ethical responsibility is to acknowledge ... and work with the fact that there is a power imbalance ... I’d like to be able to say everything is

71 Accident Compensation and Conciliation Service Participant.
dealt with equally, it’s not. It’s about fairness. It’s about the fact that you’ve
got to be respectful of both parties and you know when you’re acknowled-
ing what they want to achieve, but it’s not equal; it’s what’s fair. We deal
with people where one side may need a lot more and … a creative approach
and different ways to communicate and work – to get them to the point of
engaging in our process … as opposed to a service provider who knows our
process well … So it’s about respect, it’s about fairness, equality in terms
of rights but not necessarily in terms of our input and effort.

The DSC practitioner will do what they can to ensure a party is able to
participate effectively and negotiate a good outcome but the practitioner
is not expected to advocate on behalf of a party even where that party is
clearly disadvantaged due to their limited capacity to understand and
participate in the process. This can create an ethical dilemma for the
ADR practitioner:

[When there’s such an imbalance [or] someone who’s had such a traumatic
experience, for example, or lack of services or something [and] it’s not a
service that they’re either entitled [to] or can realistically be achieved, but
would be something that would really make a difference in that person’s
life … you’re kind of in danger of … acting as an advocate.72

For the DSCV, the key underlying value is to do no harm:

We don’t make the dispute worse … it’s the usual clichés around empower-
ing people to have control of their own solutions. They have to be liveable
outcomes … all the issues around procedural fairness and being clear that
parties are able to fully participate and understand the process … we work
hard to address any power imbalances … in terms of assessing suitability,
we are really clear about what’s unsuitable, but we don’t create barriers
for access to ADR either. So that where we can, we balance out issues; so
if it’s an issue around mental health or cognitive capacity that there are
ways to work around [we] support people or work with people … trying to
be inclusive.

Since the DSCV uses facilitative mediation for ADR, the values outlined in
the NMAS Practice Standards apply, including impartiality and refrain-
ing from giving advice.73 Practitioners can find this difficult, where they
have a strong opinion about the issue or are aware of what a court outcome
might be, or what the parties’ legal rights are. The practitioners have to be
conscious of this so as not to breach their ethical requirements:

[Steering parties in a particular] direction – or give advice, you know legal
advice, advice about likely outcomes, their reality testing just crosses the
line and becomes somewhat directive. So that’s something that I think –
people have to understand their practice and where their limitations are
and where their weaknesses are, as well.74

Ethical dilemmas may arise from the obligation to remain impartial and
promote the legislative intent while also adopting a ‘do no harm’ approach:

There is a thought that keeping a complaint open or continuing to engage
with this person might actually be doing more harm than good. It might

72  Dispute Settlement Centre Participant.
73  Mediator Standards Board, above n 6, cls 2.2, 7.
74  Dispute Settlement Centre of Victoria Participant.
actually not be providing them with a resolution in which they are able to heal … we need to be mindful of whether in fact continuing on with our process is harming that complainant. So that’s what I mean by non-maleficence. Beneficence – above all do good and we’re sort of in the game for that sort of thing.75

The above quote challenges the centrality of party self-determination in ADR processes and poses a dilemma for the ADR practitioner in determining whether or not to promote absolute party self-determination in those circumstances.76 For the HSC, party autonomy is an important aspect of the ADR process but an approach to enhancing quality is to ensure that parties have sufficient information to improve their competency/capacity to make a decision.

The EWOV, which operates under an industry charter, identifies underlying values as independence, procedural and substantive fairness:

[I]t’s the fairness and independence, which … goes to our charter and what we’re here for … they’re probably the core values … you’re also managing the timeliness and the efficiency, but it is really around the fairness and the independence of the process. Independent of the scheme participant or member company, in particular.

EWOV DR practitioners’ ethical responsibilities are conceived in light of the underlying values derived from the charter; being clear about expectations; what can be offered and ensuring that outcome options are fair and reasonable.

At the EWOV, the practitioner’s goal is to assess what is a reasonable outcome in the circumstances and involve parties in deciding the final outcome. In the event that a party is willing to accept an outcome far below what is considered fair and reasonable, the ADR practitioner faces an ethical dilemma between allowing party self-determination and ensuring a fair and reasonable outcome. The ethical dilemma arising from competing values, empowering parties in support of party autonomy and how far to go in doing that and the other value of independence, is further highlighted:

[T]hat’s part of the complexity … we’re wedged into the system in effect as a consumer protection mechanism, but then you’re asked to be independent. But our whole point of being is – there was an identified need to give customers somewhere to go because companies may not always treat them in the way they should be.77

Locating ADR within industry and legislation-based schemes will create ethical dilemmas for practitioners who constantly have to balance competing values in their roles.78

75 Health Services Commission Participant.
76 See Noone and Akin Ojelabi, above n 5: Criteria for measuring the justice quality of mediation.
77 Energy and Water Ombudsman (Victoria) Participant.
78 Hon Bruce Billson MP, Minister for Small Business, Foreword, Benchmarks for Industry-Based Customer Dispute Resolution: Principles and Purposes (February 2015).
To a large extent, this dilemma is resolved based on the practitioner’s subjective view of what is objectively fair and reasonable in the circumstance. Research shows that when ethical dilemmas arise based on competing values, practitioners rely on their own value-system. The practitioner’s subjective view also determines the extent to which they would intervene to ensure that the outcome reflects what is objectively fair and reasonable.

V CONCLUSIONS

Despite the critical role that ADR processes have in resolving civil law disputes, there is remarkably little discussion of what constitutes ethical practice and justice. There is great variability and diversity in the context and practice of ADR. This article begins to map this phenomenon. The range of ADR processes utilised by various statutory and industry organisations is outlined and the overriding legislative imperatives on these processes is detailed. Drawing on interviews with key personnel at organisations using ADR processes, the research confirms that legislative purpose and underlying values significantly influence both the process and consequently the ethical responsibilities of ADR practitioners.

From data collected from interviews, it becomes clear that there is often an inherent tension between the obligations arising from the legislative objectives and the common understanding of ADR values. When ADR practitioners have specific responsibilities under legislation to ensure substantive justice like fair treatment, reasonable and fair outcomes, address systemic issues (such as discrimination or vilification) their obligations conflict with the concept of the ADR practitioner as a neutral third party who is concerned about procedural justice but not substantive justice. This clash of responsibilities can create dilemmas for ADR practitioners. Outstanding issues for future exploration are: What framework should be used to resolve the ethical dilemmas of ADR practitioners? Can there be a code of conduct that is applicable to the range of ADR processes? And to what extent does the manner in which ethical dilemmas are resolved affect the quality of justice of each process?

79 See Noone and Akin Ojelabi, above n 5.