

# ADR Challenges for the Legal Profession

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Solicitor and mediator Karl Manning speaks with Tom Stodulka, QLD mediator and LEADR member, about his impressions of the evolution of ADR in Australia and the challenges facing the legal profession into the future.

**Karl Manning: Tell us about the evolution of ADR in Australia that you have witnessed and been a part of?**

Tom Stodulka: The Australian ADR movement has grown in the last thirty years inspired by luminaries such as Sir Laurence Street and many other great leaders in the field. It has received the support of Attorneys-General from both sides of politics such as Lavarch and Ruddock. The shift towards ADR has been like an ongoing wave, not just in family law and workplace disputes but also within industries like franchising, horticulture, banking and insurance, telecommunications, retail and residential tenancies.

What has this evolution meant for the legal profession?

Where the process has been successful, this evolution has meant that larger numbers of disputes have been resolved by ADR. No longer referred to just as alternative dispute resolution, the process is known as additional dispute resolution, effective dispute resolution, and primary dispute resolution. It has to work for clients by being more effective than litigation, less stressful and less financially draining.

**Karl: What comments can you make about the cultural shift toward ADR within the legal profession?**

Tom: Even though there are plenty of sceptics, ADR has brought about a cultural change within the legal profession and within the broader community. Collaboration is occurring at all levels and in an ever-increasing range of legal areas. Nonetheless, fear of the unknown, which is a common thing when change has come about, has prevented many lawyers from becoming fully involved with ADR. Space does not permit me to quote Machiavelli on the challenges of change but can be found in his book *The Prince* at page 51.

The cultural shift is about accepting that mediation is here to stay, because it is effective and is gaining acceptance amongst the wider community. My experience indicates that too often a matter will not be referred to mediation until it is court ordered, when clearly there was no reason why the matter could not have benefited from mediation much earlier. If the profession is to fully embrace the change, there is a lot more work to be done within academia, the Bar Association, and QLS. With accreditation and the National Standards, mediation has truly come into its own and is a stand-alone qualification and profession which extends well beyond a handful of retired judges and senior barristers.

**Karl: What are some of the more interesting or rewarding ADR matters that you have been involved with?**

Tom: The early ADR efforts within the ADF and the Aboriginal Tent Embassy negotiations were certainly interesting and challenging. However, it's not necessarily high profile matters that are most rewarding but those matters where early resolution of a dispute has meant an incredible amount to

the parties. I mediated an estate matter where one of the parties had a very ill family member and the party reflected that the early resolution of the matter was so critical in terms of their ability to give their family member the necessary support and time that was otherwise being consumed by years of litigation.

**Karl: What has been the benefit of working with new mediators?**

Tom: Lawyers are undertaking mediation training in increasing numbers. Many lawyers are also unhappy with a “take no prisoners” style of practice and are seeking a more collaborative area of practice. Make no mistake: being a good mediator requires talent, skill and practice. Working with and mentoring new mediators has enabled me to promote change among those who will be working in the system in the coming years. Often younger mediators become more receptive to changes in the established system to find new and innovative ways to assist people to reach an agreement whereas for more experienced litigators, their gravitas can be what they use to carry disputants across the line to settlement.

Indeed, it is the work I do coaching hundreds of mediation students, including retired judges and senior barristers which I find most enjoyable.

**Karl: Some lawyers express concern about a lack of litigation and precedent due to the amount of ADR diverting matters from court. Do you see a problem with a lack of jurisprudence in these areas?**

Tom: The point is to improve the whole system for the client. It is about exposing the wider community to a more user-friendly process that is less litigious, where people are more respectful to each other. There will realistically always be the cases which will find their way to court to ensure that jurisprudential integrity is protected. As with everything in life a balance needs to be found and if for the moment the pendulum has swung too far, that in itself gives us food for thought.

**Karl: Mandatory family law mediation within Australia was driven by government reform. Will the profession drive ADR changes throughout the balance of the legal industry, or will the government take further steps?**

Tom: The Commonwealth and State and Territory Governments have put themselves forward as model litigants, and in the main have supported ADR from a policy perspective. *The Civil Disputes Resolution Act 2011 (Cth)* now requires litigants to take “genuine steps” to resolve matters before they can be determined through judicial means. This demonstrates an acknowledgement by the government at Commonwealth level that earlier resolution of disputes where possible is an important part of the overall litigation process and Court system. The message has to get across the whole profession, not just the top end of town. Big companies and small clients alike want to get “in and out” of the legal system in a more efficient and less acrimonious manner, where it is appropriate.

How are we going to get past this point where many litigators see suggesting mediation as a sign of weakness?

The challenge lies before us all, please come on board for the ride and in the words of Sir Laurence Street ADR is additional dispute resolution, not alternative dispute resolution.

### *Karl Manning*

Karl is an experienced solicitor who works as a mediator and facilitator. His experience in law includes general, commercial, criminal, government, immigration and native title. During his career, he has worked in the private, community and government sectors. With extensive court and tribunal experience across many jurisdictions as a lawyer and advocate he now focuses his work on Alternative Dispute Resolution, conflict prevention and mediation. He is a nationally accredited mediator who keeps abreast of the latest developments in mediation practice.



### *Tom Stodulka*

Tom Stodulka is a nationally accredited mediator in Australia and Hong Kong. He is an FDRP and conflict resolution specialist in family law, workplace and commercial disputes, having conducted over 2500 mediations throughout Australia. He is a qualified supervisor, mentor, coach and assessor for the national mediator standards.

