

PART I — INTRODUCTION

1 LEGAL ETHICS

1.1 Introduction

Legal ethics consists of an examination of the behaviour and responsibilities of lawyers. A legal ethic is a normative scheme applied to regulate their conduct. Legal ethics is an enquiry distinct from the content of legal rules and principles; it is not the ethics of law. Rather, it is the ethics of professional lawyers in practice.

Ethics is normative. It entails consideration of how lawyers *ought* to behave, and evaluation (by reference to normative criteria) of how they *do* behave.

1.1.1 What is Ethics?

An ethic is a framework against which actions and character may be evaluated.

- **Action:** what does it mean to do the right thing in a particular situation?
- **Character:** what does it mean to be a good person?

1.1.2 Sources of Legal Ethics

There are several sources of legal ethics:

- Pragmatic
 - Professional conduct rules
 - Provisions regulating legal practice
 - Legal obligations in tort, contract, etc
- Abstract
 - Normative philosophy as applied to the behaviour of lawyers

Three normative frameworks arise out of these sources:

- ▶ Personal (the subjective views of the lawyer)
 - Family
 - Friends
 - Faith
 - Politics
- ▶ Professional (the objective framework of lawyers' ethics)
 - Role of lawyers
 - Professional conduct rules (admission, disciplinary codes, fiduciary duties, obligations under contract and in tort)
 - Practices and customs
 - *Legal Practice Act*, Professional Conduct and Practice Rules ('PCPR')
- ▶ General (broad ideas about ethics)

- Justice
- Social and environmental responsibility
- Harm-avoidance

These different approaches to legal ethics are frequently in conflict.

1.1.3 Analytical Framework

The following three-stage process is suggested for analysing ethical issues:

- 1 Identification**
What is the ethical issue?
- 2 Application**
What ethical standards and principles are applicable?
- 3 Implementation**
What practical measures will be undertaken to resolve the issue?

Any ethical enquiry must start with identification of the relevant issue. It must proceed with principled analysis of that issue. The results of that analysis must be mediated by practicality and implemented in a realistic way.

1.2 Example of Ethical Dilemma: 'McLibel'

In 1990, McDonald's served five writs of libel upon volunteers involved in the United Kingdom activist group responsible for publishing a document entitled 'What's Wrong With McDonald's?'. McDonald's demanded that they retract their allegations and issue an apology, or they would proceed with the defamation action.

(See <http://www.mcspotlight.org/case/trial/story.html> for details.)

- Would you take on this case for McDonalds? Would you work pro bono for the plaintiffs?
 - Unrealistic to expect total and unwavering compliance with any universal normative code in a professional environment characterised by outcome-driven processes and many external constraints on behaviour
 - One may attempt to displace ethical responsibility onto any number of sources – the government, the court, or the marketplace – for the failures of the adversary system: ultimately, a barrister can't refuse on the basis of personal opinion
 - Many justifications for taking on the case involve displacing responsibility by reference to one's inability to make changes to one's conduct (eg, where acting for McDonalds is compelled by one's employer or financial situation)
- What considerations do you think are relevant in making the decision?
 - Acting for McDonalds may be an opportunity to resolve the dispute amicably or add a normative dimension to their approach they may not otherwise have been considered
 - Of course, it is also unrealistic to expect that unrepresented, untrained plaintiffs be treated respectfully at all times by the court and the other party
 - Consider human rights arguments: entitled to equal representation, necessary for the adversarial system to function properly

- A tacit awareness of what is and is not possible in relation to advice given to McDonalds (which must be commercially sensible), supported by ethical analysis to guide the evaluation of options and their consequences

See also the *Gunns Pty Ltd* conspiracy action against environmental protesters:

- Greens' media release <<http://www.greens.org.au/mediacentre/mediareleases/senatorbrown/141204a>>;
- Supporters of the defendants <<http://www.mcgunns.com/>>;
- Greg Barns' opinion piece <<http://www.theage.com.au/news/Opinion/Say-what-you-will-this-is-not-about-free-speech/2004/12/20/1103391697956.html>>

1.3 Four Approaches to Legal Ethics

Parker sets out a conceptual framework for analysing the ethical response of legal practitioners to moral issues arising in their work. Four genres of ethic are set out, each capable of providing normative guidance. They are also able to be combined and reformulated. As Luban and Milleman argue:

*Moral decision making [sic] involves identifying which principle is most important given the particularities of the situation...*¹

Most situations requiring an ethical response on the part of lawyers may be analysed according to the following four questions:

- 1 Ought legal ethics differ from other classes of ethic on account of lawyers' special role in society?
- 2 How ought lawyers and clients consider and respond to ethical issues?
- 3 How rigidly ought a lawyer enforce or evade law at the expense of justice?
- 4 Ought a lawyer prioritise their relationship with their client over that with law and justice?

A number of tools are available with which to answer these questions. Abstract ethical theories are one source of guidance:

- **Deontological ethics** (eg, Kant) are rule-based; the *method* used at least as important as the outcome it procures
- **Teleological ethics** (eg, Bentham, utilitarianism) evaluate acts by reference to their consequences; if the *end* is attained (eg, maximising public good), the act is right
- **Virtue ethics** (eg, Aristotle) evaluate acts by reference to the character or virtue of the actor; they examine the *motivation* for acting

However, it can be difficult to apply abstract moral theories to everyday situations in legal practice. They also fail to answer broader questions about the nature of legal ethics (eg, question

¹ David Luban and Michael Milleman, 'Good Judgment: Ethics Teaching in Dark Times' (1995) 9 *Georgetown Journal of Legal Ethics* 31, 39.

1 above). A more critical moral foundation is necessary to evaluate and develop current approaches to legal ethics: ethical practice exists in a ‘reflective equilibrium’ with moral theory.²

For these reasons, Parker has packaged several commonly applied ethical frameworks into four ‘bundles’ of values reflected in common ethical practices in law. They can be analysed in several ways:

- **Moral pluralism** – all four are true and suitable in different circumstances
- **One alone** – only a single normative paradigm is of any value; the others are inherently inconsistent/wrong
- **Complementary** – no single scheme alone is true; any moral system must be regulated by reference to others (eg, a legal code)

Ethical Framework	Social Role of Lawyer	Relationship to Client and Law
Adversarial Advocate Traditional approach	<ul style="list-style-type: none"> ▪ Adversarial partisanship ▪ Loyalty and non-accountability ▪ General ethics do not apply ▪ Role defined by adversary framework 	<ul style="list-style-type: none"> ▪ Duty to advocate client’s interests to maximum permissible extent ▪ Assumption that where both parties represented, the truth will emerge
Responsible lawyer Trustee of the law/court	<ul style="list-style-type: none"> ▪ Facilitates justice ▪ Public interest ▪ General ethics inapplicable ▪ Role defined by spirit of the law 	<ul style="list-style-type: none"> ▪ Duty to integrity of law ▪ Law must work fairly and not on procedural grounds ▪ Integrates justice with obligations to the client
Moral Activist Agent for justice	<ul style="list-style-type: none"> ▪ Seeks law reform ▪ Promotes substantive justice ▪ General ethics applicable ▪ Social theories of justice form basis for evaluation 	<ul style="list-style-type: none"> ▪ Duty to improve justice by promoting public interest and client counselling ▪ Not confined to the adversarial system; consider substantive justice
Ethics of Care Relational legal practice	<ul style="list-style-type: none"> ▪ Social role irrelevant ▪ Relationships to client/community paramount ▪ General ethics applicable ▪ Character, virtue and relational ethics are important to lawyers/clients 	<ul style="list-style-type: none"> ▪ Duty to preserve relationships/avoid harm ▪ Law and lawyers derivative from relationships ▪ Lawyers should evaluate conduct by reference to its effect on interpersonal relationships

² Damian Grace and Stephen Cohen, *Business Ethics: Australian Problems and Cases* (2nd ed, 1998) 9.

1.3.1 Adversarial Advocate

Primary characteristics:

- Lawyers should advance client's partisan interests to the very boundary of what is permitted by law
- 'Amoral' approach (general moral theory irrelevant: basis for conduct is the social role of lawyers)
 - Predicated upon lawyers' social roles, not any abstract conceptions of morality or justice
- Principle of partisanship:³ lawyer should do all for the client that the client would do for themselves if they had the lawyer's knowledge
- Principle of non-accountability: lawyer not morally responsible for means or ends of representations so long as both are lawful
 - Justification: if lawyer was morally responsible for the client's actions, he may not be willing to represent the client as extensively
- Lawyers must resolve ambiguity in law and their own ethics in favour of the client
- The lawyer's role is to advance autonomy in complex legal system

Advantages:

- Most applicable to criminal defence advocates, who must protect the accused from the allegations of the state
 - Justification: libertarian
 - Courts stand between citizens and governments
 - This is commonly criticised as an 'institutional excuse'
- This ethical framework can sometimes compel representation for a client who, on account of their background or actions, would be otherwise unable to find a lawyer

Disadvantages:

- Least applicable to state prosecutors, who should be 'ministers of justice'
- Ill-equipped to deal with moral issues arising out of representing client interests against other private interests
 - The axiom of this ethical framework – that it is necessary to protect individuals from the state apparatus – is often inapplicable
- A lawyer's duty to the client outweighs the moral quality of their or their client's actions
 - To judge the client would be presumptuous; it would deny them their rights to justice by trial in court
 - The truth is supposed to be revealed in court
- Injustice is encouraged by the exploitation of loopholes; moral reticence contributes to the degeneration of law
 - Lawyers must stretch all legal and factual interpretations to favour their clients
 - '[M]aintaining the integrity of rights-guarding procedures is more important than obtaining convictions or enforcing the substantive law against its violators'
- The cost of litigation is increased by 'excessive adversarialism' as both parties fight litigation to the end
 - Effectively, this raises the cost of truth: lawyers can sometimes act as an impediment to justice and the court

³ David Luban, *Lawyers and Justice: An Ethical Study* (1988) 7.

- Spawns procedural pathologies
 - Withholding (or destroying) evidence
 - Aggressively cross-examining truthful witnesses, etc

Menkel-Meadow's critique:

- A culture of adversarialism has distorted how we solve human problems
- As a legal ethic, adversarialism is outmoded, inconsistent, inefficient and unjust
- It entails a central role for lawyers, whose defining characteristic is partisanship
- Professional rules may place some limits on this partisan function, but as a concept it marginalises other conceptions of lawyers (as planners, problem solvers, advisers, etc)
- Proposes an alternative model, which obliges lawyers to:
 - Inform the client about all possible methods of resolving a dispute
 - Promptly communicate all proposals
 - Not misrepresent or conceal facts or law
 - Not deceive others
 - Not agree to a solution that they know will cause substantial injustice to the opposing party
 - Not do any harm
 - Treat parties as they would wish to be treated themselves
 - Respect a lawyer's golden rule
- Argues for 'an ethics of practice that would seek to solve problems rather than "beat the other side" by tenaciously advocating one single "truth"'
- A 'solution-seeking lawyer' rather than a 'partisan gladiator'

Examples:

- Lord Brougham's 1820 defence of Queen Caroline before the House of Lords
- An advocate 'knows but one person in all the world, ... his client'
 - 'he must not regard the alarm, the torments, the destruction which he may bring upon others'
 - He must 'save that client by all means and expedients, and at all hazards and costs to other persons'
- Cab rank rule: barristers compelled to accept any brief any their area of practice, if available and client able to pay
 - Barristers are seen to owe duties of loyalty to the client; to take instructions from them and press their case
 - If available, a barrister must take on a case and pursue all arguable defences for his client, regardless of moral implications

Modern manifestation:

- *McCabe v British American Tobacco*: Victorian Supreme Court held that Clayton Utz (acting for defendants) advised destruction of documents favourable to plaintiff; defendant had misled plaintiff about the 'document retention policy'
- Chief executive partner of Clayton Utz: '[m]oral judgments have no place in the advice a lawyer gives'
 - He said a lawyer might advise on the 'appropriateness' of different strategies, but it was wrong for a lawyer to make moral judgments. 'We don't take a moral stance and it's not up to us, as advocates for a client, to take a moral stance. Ultimately that comes to a decision by the client, not the lawyer.'

1.3.2 Responsible Lawyer

Primary characteristics:

- Lawyers' ethics are influenced by their social role, but the content that role is defined by the lawyer's role as 'officer of the court and guardian of the legal system'
 - A responsible lawyer still has duties to their client, but overriding these is a duty to maintain the integrity of law and do justice according to it
 - It may sometimes be so that a lawyer will act against his client's interests in defending the legal system from injustice or exploitation
- A lawyer's job consists of the '*public* administration of justice', even in private disputes
- His obligation is to keep the system 'working fairly and with integrity'
- 'Loyalty to the fair process of law is primary and constrains lawyer behaviour on behalf of clients'⁴
- A lawyer must preserve the social good (consequentialist) but must also follow rules of procedure (deontological)
- A lawyer mediates the client's wishes with the substance of the law
 - Would not argue any technical or legally insubstantial points just to benefit their client
- Personal moral beliefs are generally irrelevant: the responsible lawyer looks to ethics inherent in their role as officer of the court and law
 - Justice is not pursued according to an external standard but instead promotes the 'basic values of the legal system' ('legal justice')

Advantages:

- The responsible lawyer resolves ambiguities in favour of the effective enforcement of substantive law
- No loopholes or technical/procedural rules are used to excuse wrongdoing
- Though advocating the client's interests, they also represent the law and must help clients comply with its mandates
 - Desirable that lawyers be independent from the state but also autonomous from clients and other private interests
- In being slightly more divorced from their clients' interests, responsible lawyers are able to 'moderate their clients' tendency to extract the maximum advantage from the legal system'
 - This has the potential to reduce the extent to which legal outcomes are skewed in favour of resourceful parties
- Lawyers do not impose arbitrary and limited interpretations of law onto unwilling clients; instead, they 'creatively combine technical skill, a sense of social and legal responsibility, and the vigorous pursuit of clients' interests'
 - This involves 'creative forms of compliance' with law that aims to minimise losses to the client while upholding the purposes of the law
- Offering advice about how law would evaluate the moral character of clients' conduct is beneficial to those clients
 - It enables them to better understand how the law is likely to deal with their behaviour and offers another perspective against which to determine the best course of action

Disadvantages:

⁴ Alvin Esau, 'What Should We Teach? Three Approaches to Professional Responsibility' in Donald Buckingham et al, *Legal Ethics in Canada: Theory and Practice* (1996) 178, 178–9.

- There is a danger that lawyers do not adequately serve their clients' interests
 - To this extent, the 'responsible lawyering' and 'adversarial advocate' approaches are in conflict
 - It remains a challenge for lawyers to balance their duty to their clients with their duty to the court (integrity of law)
- However, it is clear that 'loophole-exploiting' legal practices cannot be sustained by law because they are destructive of it
- Like the 'adversarial advocate' ethical scheme, responsible lawyers have limited abilities to critique and step outside the bounds of existing law, or to assess it by reference to an external standard (eg, social justice)
 - An essentially conservative ethic

Example:

- In-house counsel for large multinational corporations
 - Who aren't 'overly opportunistic, smart and technical'
 - Who look 'for fair solutions to problems rather than just technical ones'
 - Who consider the question of whether an act 'could be perceived to be right or wrong' in law
 - Who recognise that overtechnical legal practices are ultimately 'to our detriment in the long run'

1.3.3 *Moral Activist*

Primary characteristics:

- Lawyers should abide by ordinary teleological systems of ethics
 - They should do good according their personal philosophy
- Encourages lawyers to form their own views about justice and the ethical content of their clients' conduct and proposed acts
- Lawyers cannot escape moral accountability by solely advocating their clients' interests:
 - 'Moral activism ... involves law reform – explicitly putting one's *phronesis*, one's savvy, to work for the common weal – and client counselling'
 - **Reform:** acts not confined by the legal system; it can and should be changed to make it more justiciable; lawyers should thus use legal practice 'to change people, institutions and the law' so that they better serve justice
 - **Counselling:** discussing the moral content of a client's acts with them and negotiating what will be done about it
- A lawyer may have to withdraw from a case where the client insists on acting in an immoral fashion according to the lawyer's beliefs
- It is important that a lawyer also consider changing their position to agree with the client; they may have to modify their moral stance

Advantages:

- Where law is unjust, a moral activist is not confined to abiding by it or instructing their client to abide by it (unlike a responsible lawyer, who must nevertheless act in accordance with the spirit of the law)
- If a lawyer believes their client's cause is just, they will do everything they can to ensure their success (just like an adversarial advocate), even to the extent of

exploiting loopholes and the limits of the law; however, they will not do so if they believe it would be unjust

- Successful application of the current legal system is partially dependent on moral activists willing to act for clients unable to afford or obtain the aid of other kinds of advocates

Disadvantages:

- Lawyers may become involved in politicised law reform activities; they may represent clients purely for the purposes of social and legal change, reducing their client's interest to being merely the subject of a test case – the opportunity for reform rather than the interest at stake
- The participation of individual clients 'is almost subordinated to the bigger cause' (eg, class action or constitutional challenge)
 - Example: lawyers representing MV Tampa asylum seekers; PILCH organised lawyers to act for the asylum seekers, who ran their case in the absence of instructions from the refugees (it wasn't possible to communicate)
- Because moral activists seek to persuade their clients to do the morally right thing, the lawyer may lead their client into legal trouble (eg, by admitting liability for an industrial accident to the families of those involved)
- Arguably anyone should be entitled to legal representation (ie, the chance to prove their case is worthwhile to a court without having to first prove themselves to their lawyer)
 - Moral activism turns lawyers into pre-emptive adjudicators of their client's worth
 - Moral activists may act against or irrespective of the law and may not give due credence to their client's procedural rights
- Though not necessarily a criticism, moral activism places the lawyer's belief in a potentially flawed conception of justice above the client's own interests
 - Some may describe this arrangement as shifting too far away from the client's needs
 - Other professionals certainly aren't obliged to act to such scrupulous standards, despite purporting to hold everyone to the same standard

Example:

- Lawyers representing indigenous clients in native title claims
- Lawyers representing asylum seekers *pro bono*
- Lawyers who represent only clients whose causes are deemed the subject of injustice, such as legal aid workers

Modern manifestation:

- Legal aid workers

1.3.4 *Ethics of Care*

Gilligan views the ethics of care as a distinctly female ethic; she describes it as contextual (as opposed to universal), relational (as opposed to concrete), pragmatic (as opposed to principled), needs-based (as opposed to rank-based) normative framework. It prioritises harm-avoidance over equality and abstract moral reasoning.

Shaffer likens it

*not [to] representation but [to] ministry; it rests not on loyalty but on fidelity, not on contract but on covenant... [I]t makes relationships central.*⁵

According to Parker, an ethics of care can influence legal practice in three distinct ways:

- Encourages a **holistic view** of clients' problems (listen to and discuss concerns and their implications)
 - In determining an appropriate legal strategy, considers non-legal and non-financial consequences
 - Incorporates non-legal forms of advice, such as counselling
 - Centralises normative issues affecting the lawyer-client relationship

- Uses dialogue about ethics to encourage **lawyer-client participation** in the legal process
 - Lawyers must ensure clients make informed choices by communication the consequences, costs and uncertainties associated with each option
 - Lawyers must listen to a client's broader concerns so as to better craft a solution resonant with external preferences
 - Fully informed, authentic consent is necessary for action: parties are equally responsible for decision-making (rather than a lawyer telling the client what to do)

- Explores non-adversarial solutions to disputes that preserve relationships and adopt a **preventative, problem-solving approach**
 - May lead to the recommendation of non-litigious ADR
 - More emphasis on compromise and creative problem-solving
 - Conduct in Court should be premised on good faith (reduction in intimidating tactics; respect for the other party)
 - Transactions with the client are more likely to be conducted in a 'collaborative, preventive' manner

Legal professionals are increasingly realising the value of 'client care': effective communication is necessary for preventing complaints and public disenchantment with law and lawyers.

Primary characteristics of the 'ethics of care' when applied to legal practice:

- Care for the client and their relationships
 - As concerned with the ethics of the client as with the ethics of the lawyer
 - Interdependent
- Mutual trust and respect
- Considering the implications of acting for a client on the lawyer's on relationships
- Doing what is in the best interests of the client
 - 'Best interests' are to be judged according to their network of relationships and moral qualities
- Discussing problems with the client and identifying all possible ways to resolve them

Problems:

- Might preserve relationships or client needs at the expense of social injustice

⁵ Mark Weisberg, 'Integrating Personal and Professional Lives: An Essay on Thomas Shaffer's *On Being a Christian and a Lawyer*' (1984) 9 *Queen's Law Journal* 367.

2 RESOLUTION OF DISPUTES⁶

2.1 Conceptual Framework

When faced with a dispute, there are several ways its parties can resolve it. In order of increasing activity, these are:

- Avoidance (“Lumping It”)
- Negotiation
- Advice
- Mediation
- Conciliation
- Arbitration
- Adjudication
- Litigation
- Force



‘Formal justice’ characterises those methods of dispute resolution which form part of the formal justice system (courts, tribunals, etc). Disputes resolved in this way comprise the vast minority of all disputes. Formal justice includes alternative dispute resolution (‘ADR’).

‘Informal justice’ describes other, community-based methods of resolving disputes. The outcome of these processes is often non-binding.

‘Indigenous ordering’ occurs where individuals resolve the dispute themselves without reference to others or external processes.

⁶ Rosemary Hunter, 'Institutions, Institutional Structure and Sources of Law' (2001).

As a result of alternative dispute resolution techniques, only a small percentage of cases ever get to litigation. This is often because the cost of litigation exceeds the cost of compliance with the other party's demands (or the giving up of one's own demands).

2.2 Adversarial Litigation

2.2.1 Evaluating Adversary Justice

Why People Choose	Why They Don't
<ul style="list-style-type: none"> ▪ Negotiating Tactic ▪ Seek Final Decision ▪ Seek Change in Behaviour ▪ Seek Apology ▪ "Matter of Principle" ▪ Desperation 	<ul style="list-style-type: none"> ▪ Perceived Cost ▪ Lack of Knowledge ▪ Lack of Advice ▪ Lack of Trust ▪ Alienation from Legal Institutions and Processes

2.2.2 Failings of the Adversary System

Case study: stolen generation

Adversarial System	Administrative Tribunal
<ul style="list-style-type: none"> ▪ Win or Lose ▪ Result May Depend on Technical Issues ▪ Daunting to Many Deserving People ▪ Insensitive to Needs of Indigenous People ▪ Time Delays 	<ul style="list-style-type: none"> ▪ Informality ▪ Simplicity ▪ Non-Adversarial Environment ▪ Support Services ▪ Sensitivity to Victims ▪ No Rules of Evidence

Arguably, ADR is more suited to delivering justice to indigenous groups than the adversarial system.

2.3 Other Forms of Dispute Resolution

ADR refers to processes other than judicial determination in which an impartial person assists those in a dispute to resolve the issues between them

*National Alternative Dispute Resolution
Advisory Council (NADRAC)*

ADR can be defined as 'alternative', 'assisted' or 'appropriate' dispute resolution.

Advantages	Disadvantages
<ul style="list-style-type: none"> ▪ Availability: can arrange at short notice ▪ Speed: usually delivers quick results ▪ Effectiveness: high settlement rates ▪ Ownership: parties retain greater control ▪ Relationship management ▪ Party satisfaction ▪ Larger range of outcomes ▪ Reduced costs 	<ul style="list-style-type: none"> ▪ Lack of precedent (e.g. public policy issues) ▪ Risks of violence or harassment ▪ Requires parties to negotiate on own behalf ▪ Concerns relating to confidentiality ▪ Concerns relating to enforcement of agreements

2.3.1 *Negotiation*

See below [3.1].

2.3.2 *Mediation*

Parties negotiate with the assistance of a neutral third party to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement

The mediator has no advisory or determinative role.

See further below [4.1].

2.3.3 *Conciliation and Facilitation*

Facilitative approaches include facilitation, mediation, and conferencing.

2.3.4 *Expert Determination*

Expert determination or appraisal is an advisory process. It may involve a mini-trial of sorts, or just an early neutral evaluation.

- A third party carries out investigations and provides advice or recommendations to parties
- The expert opinion can be on part or whole of the dispute
- The expert assumes a role similar to that of judge

2.3.5 *Arbitration*

Arbitration is a determinate dispute resolution processes. Such processes grant a disinterested third party the power to determine the dispute. The parties can generally choose to enter into the arbitration, but must accept its outcome.

- A third party makes an award that is binding upon the parties
- The arbitral award is enforceable like a judgment of a court

2.3.6 Hybrid Processes

Other processes, such as ‘med-arb’ (mediation-arbitration), combine aspects of multiple ADR forms.

2.4 Implications for Legal Practice

ADR is now mandated by the rules of many Australian courts – both appellate and first-instance:

- Supreme Courts (New South Wales, Victoria, Queensland, South Australia, Tasmania)
- District and Magistrates’ Courts
- Specialist Courts (Land and Environment Court NSW, VCAT)
- Federal Courts (Federal Court, Federal Magistrates’ Court, Administrative Appeals Tribunal, National Native Title Tribunal)

ADR is also supported as a voluntary process, and is increasingly commonplace:

- Where agreed by contract prior to dispute (eg, construction contracts)
- Where agreed following a dispute but prior to litigation
- Referral to voluntary ADR processes is provided by most courts and tribunals

Current trends indicate that the rate of mandatory referrals is increasing. New multi-door dispute resolution and multiple-stage ADR are being used. New technologies (eg, those enabling online mediation) are gaining popularity.