Chapter 1
The Evolution of Family Dispute Resolution and the Need for Online Family Dispute Resolution in Australia

Abstract Although dispute resolution has a long and rich documented history, the growth of out-of-court settlements and alternative dispute resolution (ADR) processes in Australia has been a recent development with family dispute resolution (FDR) services younger still. This chapter overviews the history of FDR in Australia to contextualise the development of online family dispute resolution (OFDR). As an extension to the already accessible Telephone Family Dispute Resolution service, OFDR offers the added value of multi-media engagement and innovative online tools to assist in easing the process of mediation for all stakeholders. From the introduction of the Family Law Act in Australia in 1975 to the 2006 Reforms, informal dispute processes are becoming recognised as fertile ground to deliver services via the use of advanced technologies. This chapter presents evidence as to the value of ADR in family law to mitigate issues concerning increased service demand, strained court resources, and the avoidance of emotionally taxing adversarial approaches. History shows a trend toward making services more efficient and effective, resulting in a natural progression to OFDR. Australia is currently at the forefront of OFDR advancement to accommodate their diverse and dispersed population.

1.1 Introduction

The general trend towards alternative forms of settling disputes has a substantial history and trajectory. The evolution of the ADR process and precursors; negotiation, arbitration and mediation, stem from pre-historic Shaman through the European Law Merchant to present times (Barrett and Barrett 2004).

Methods of dealing with disputes are enacted across nations today and these are often grounded in long standing social and religious belief systems of previous societies. Similarly, modes of dispute resolution we create in contemporary society will be expressed in various forms among future generations and societies. One major development in recent history is that of the World Wide Web and this particular innovation has changed how humans relate and do business and as a
consequence also manage disputes. Taking just one platform for Alternative Dispute Resolution (ADR)—the family law context—this book proposes that not only is ADR valuable because of its traditional benefits such as: lower cost; greater speed; more flexibility in outcomes; less adversarial; more informal; solution rather than blame-oriented and privacy, but because it can involve large numbers, spread across many countries and in high demand, the diverse application will result in the rapid development of alternative methodologies to deliver ADR—specifically online.

This chapter begins with a brief history of the development of ADR and focuses specifically on the Australian manifestation of ADR in Family Law matters. There has been a focus on alternative dispute resolution in the Family Court of Australia from its inception in 1975. Initially, conciliation and counseling were employed. It was not until the late 1980s that mediation began to be used.

After establishing the credentials for ADR, we move to discuss different ways of delivery and specifically, explore telephone and online methodologies for dispute resolution focusing particularly on family conflicts. Next, we consider a case study of telephone family dispute resolution and our main focus of online family dispute resolution. We share our learning from a pilot of establishing an online family dispute resolution service, which substantiates its promise. Finally, we present evidence to suggest the likely increase in demands for online approaches to ADR given the widely dispersed parties in disputes together with an increasing uptake and preference for online services for a sizable proportion of the client population now and into the foreseeable future.

1.2 Historical Development of Alternative Dispute Resolution

The substantial history of ADR has been documented by many scholars. Among them, Lodder and Zeleznikow (2010) argued that the resolution of disputes is one of the earliest forms of human endeavour. Citing examples from Moses who supposedly descended from Mount Sinai with the Ten Commandments and the six hundred and thirteen laws that can be found in the Torah, the authors present evidence of codification of ADR in ancient societies. These instructions, not only provided a context and laws for how Jews live their life, they also gave guidance on the way in which disputes could be resolved. Nonetheless, dispute resolution practices predated Jewish and later Christian societies.

The long tradition of litigation is characterised by formal and legal safeguards that ensure Judges are impartial and independent, and procedural fairness is part of the espoused guarantee. Of particular importance is the assurance of confidentiality particularly for businesses and where cases with public profile can have adverse implications for persons or corporate entities involved in a dispute.

An arguable turning point in the development of modern alternatives to litigation was when National Conference on the Causes of Popular Dissatisfaction with the...
Administration of Justice, held in April 1976, took place. The USA Chief Justice at the time, Warren Burger, encouraged the exploration and use of informal dispute resolution processes. At that time, Sander (1976) introduced the idea of the Multidoor Courthouse. Since 1976, Alternative Dispute Resolution has become the preferred form of dispute resolution in most common law jurisdictions. Galanter (2004) claimed:

In the federal courts, the percentage of civil cases reaching trial has fallen from 11% in 1962 to 1.8% in 2002. In spite of a five-fold increase in case terminations, the absolute number of civil trials was 20% lower in 2002 than it was 40 years earlier.

In writing about the Vanishing American Trial, Galanter argued that whereas litigation in the United States had increased, the number of trials decided by US judges had declined drastically. Two of the reasons for this phenomenon were noted as being related to the average trial’s duration becoming longer and more complex and litigants were adopting alternative forms of Dispute Resolution.

Most negotiations in law are conceivably conducted in the shadow of the Law so that bargaining in legal domains mimics the probable outcome of litigation. Mnookin and Kornhauser (1979) introduced the bargaining in the shadow of the trial concept. By examining the case of divorce law, they contended that the legal rights of each party could be understood as bargaining chips that can affect settlement outcomes. Similarly, Bibas (2004) noted that some scholars treated plea-bargaining as simply another case of bargaining in the shadow of a trial. Indeed, according to Cooter et al. (1982) Bargaining in the Shadow of the Law for civil cases dominates the literature on civil settlements.

1.2.1 Global Adoption of ADR in Family Law

Though the trend away from having decisions made by judges is increasingly the norm in civil and criminal law, it is especially so in Family Law. This section will provide a brief overview of the historical socio-cultural and legal developments toward mediation in family law across the globe.

U.S.A. The United States boasts one of the earliest formal services for family dispute resolution (FDR). California established the first ‘court-connected conciliation service’ for marriage disputes in 1939 and the Los Angeles Court offered a form of pre-mediation divorce counselling in 1995, however widespread acceptance and awareness of family mediation did not occur until the 1970s (Brown 1982; Milne et al. 2004). Of note was the development of the Family Mediation Centre in Atlanta,

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1 According to the United States Department of Justice, the term multi-door courthouse describes courts that offer an array of dispute resolution options or screen cases and then channel them to particular alternative dispute resolution processes. See www.usdoj.gov/adr/manual/Part3_Chap1.pdf last accessed June 24 2008.
Georgia in 1974 by O.J. Coogler. As the first private family mediation centre in the U.S., it signaled a growing awareness of the importance of offering alternative dispute resolution solutions that were non-adversarial (Milne et al. 2004). For a comprehensive overview of the historical developments of family mediation services in the U.S., the reader is directed to Brown (1982). Despite having a formidable lead in the development and implementation of FDR, there have been critiques about the lack of consistency between the states for mediator standards and family laws, which has implications for the practice of cross-border mediation (González Martín 2015).

**British Columbia** Canada also saw a rise in family mediation in the 1970s and 1980s, with 1984 being a particularly influential year (Boyle 2013). Both the Mediation Development Association of British Columbia and Family Mediation Canada were established, and the Law Society of British Columbia developed a set of conduct and practice rules for family mediators. The Family Justice Services Division was created in 1996 and came to offer mandated pre-education sessions (‘parenting after separation’) for disputing families before they entered the family court system. More recently, a new Family Law Act was enacted in 2013 to further support ADR for family dispute resolution, with a specific emphasis on ensuring the ‘best interests of the child’.

**Europe** In 1998, the Council of Europe adopted Recommendation No R (98) 1 of the Committee of Ministers of the Council of Europe on Family Mediation (Pali and Voet 2013). This recommendation promotes the preferential use of family mediation, guiding principles for practice, and the regulation of mediation, particularly in the area of divorce matters and custody cases of children. Further mediation principles were elucidated in 2004 through the European Code of Conduct for All Mediators, which included family disputes. European countries are not homogenous and therefore differ in their responses to family disputes and their application of family mediation, although it is recognized that all countries have adopted some ADR (Pawlowski 2007). For a discussion on the specific differences in FDR history between European countries, the reader is referred to Pawlowski (2007) and Casals (2005).

**Hong Kong** ADR was introduced in 1985 with the Hong Kong International Arbitration Centre (Sullivan 2005). Despite concerns about integrating mediation into the cultural climate of Hong Kong where divorce carries social stigma and shame, ADR has been viewed positively by the public in managing family disputes. In fact, ADR has been considered as being consistent with cultural beliefs and values, as mediation is child-focused and family oriented, and facilitates agreement with dignity and cooperation.

**The Hague Convention** The Hague Convention on the Civil Aspects of International Child Abduction (1980) aims to return children involved in cross-border parental abduction (González Martín 2015). It relies on the collaboration between
contracting states, of which there are currently 85.\(^2\) The Hague Convention demonstrates a child-focused perspective by emphasizing the prompt resolution of the issue in order to reduce distress and disorder in the child’s life. Mediation is also endorsed as a useful tool in aiding the peaceful return of the child, which has been outlined both in the Guide to Good Practice on Mediation and the 1996 Hague Child Protection convention (Pali and Voet 2013). However, there are differences in uptake and adherence between contracting states (Zdenek 2014).

1.3 Appropriate Dispute Resolution in Australian Family Law

From the perspective of Australian history, the origins of ADR can be traced back thousands of years ago to the Aboriginal and Torres Strait Islander communities who engaged in dispute resolution practices among themselves (Spencer and Hardy 2014). After European invasion, the Commonwealth Constitution in 1901 lay the groundwork for dispute resolution, which was later documented more thoroughly in the Commonwealth Conciliation and Arbitration Act 1904 (Cth). With this Act came the establishment of a Commonwealth Court to resolve workplace disputes.\(^3\)

ADR did not begin to gain traction in Australia until the 1970s when the courts began to be perceived as restricting access to justice. As such, ADR was proposed as an alternative pathway to restoring justice for disputants (French 2007; Akin Ojelabi 2010). Further developments in the growth of ADR occurred in 1980 when Community Justice Centres were established in New South Wales to deliver dispute resolution services (French 2007; Spencer and Hardy 2014). These Centres are now retrospectively viewed as early adopters of ADR techniques.

It was around this time that an interest in ADR for family disputes began to flourish. McIntosh et al. (2009) have noted the adverse social, educational, and mental health effects of divorce on children. However, they have also identified various protective factors such as low parental conflict and amiable co-parenting. Therefore, it is crucial that separating families have access to a dispute process that minimises distress for all involved. Where court-led approaches were adversarial and emotionally taxing for separating families, ADR was considered as an effective and efficient alternative that has the ability to reduce hostility between disputing parties.

The concept of secular, fault-based divorce (introduced in England in 1857 by the Matrimonial Causes Act 1857 (UK) 20 & 21 Vict, c 85) found their way into the laws of the Colonies and then those of the Australian States. The Matrimonial Causes Act 1959 (Cth) provided a list of 14 predominantly fault-based grounds on which divorce might be granted. In 1975, the Whitlam government introduced a new

\(^2\)https://www.hcch.net/en/states/hcch-members last accessed 20 May 2020.
\(^3\)See Spencer and Hardy (2014), p. 5 for a comprehensive timeline of developments in Australian ADR.
Family Law Act (FLA). The legislation, which came into effect in January 1976, introduced no-fault divorce and espoused a holistic approach to dispute resolution, with the setting up of a specialist family court complete with court-attached conciliation and counselling (Nicholson and Harrison 2000). The best-known feature of the Act was the introduction of no-fault divorce. The approach allowed for a divorce to be granted independently of the institution of proceedings and recognised that both parents have rights and responsibilities over their children after separation, unless a court orders otherwise. This requirement for both parents to care for their children led to the need for parents to continue having a relationship following their divorce.

The Family Law Act (1975) provided that a marriage may be dissolved on the application of one party who is able to prove that the parties have been separated for at least 12 months, the marriage being considered to have broken down irretrievably. No remedies are available for ‘good’ or ‘bad’ behaviour.4

Section 60CA of the Family Law Act 1975 (Cth) states that, “in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.” As Crowe and Toohey (2009) say “In practical terms, the paramountcy principle aspires to discourage an excessively adversarial approach to parenting agreements, thereby alleviating some of the harm that children suffer as a result of parental conflict.”5 Bagshaw (1999) says “The Family Law Reform Act 1995 (enacted on June 11, 1996) makes counselling, conciliation, and mediation the preferred methods of dispute resolution in family law in Australia (in particular where there are disputes over children), shifting the focus away from court-imposed solutions. The term primary dispute resolution (PDR) is used in preference to alternative dispute resolution (ADR) to convey the message that these methods are to be the principal dispute-resolution methods in family law matters.”6

In sum, in Australia, mediation—generally facilitative mediation—has been used to handle disputes in the family arena for about twenty years.7 The ‘family arena’ generally comprises property or child-related disputes arising between parents, whether married or not, and whether the parties have lived together or not. Such disputes may also involve other people, related to the children or who have cared for the children; however, the overwhelming majority of disputes mediated are couple-related.

The typical approach to mediation expected the couple enter mediation voluntarily. However, this is not the situation in Australia today: at least one meeting with a specialist family dispute resolution practitioner is mandatory before lodging an

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4Much of these two paragraphs are taken from Nicholson and Harrison (2000), p. 763 and p. 764.
5At p. 392.
6At p. 390.
7Although there was a focus on alternative dispute resolution in the Family Court of Australia from its inception in 1975, conciliation and counseling were initially employed and it was not until the late 1980s that mediation began to be used.
application for a parenting order in the Family Court of Australia. The reasons for the change are complex. Certainly, a major factor in the past two decades has been the marked increase in the breakdown of family relationships, resulting in excessive workloads for courts dealing with family matters. Arguably, economic drivers have also played a significant role for at least two reasons. First, because of the limitations in the number of available judges and funding to the courts; and, second, because of the cost to the public purse of court action for matters which can be dealt with more expeditiously and cheaply by other means. Also influential is evidence that points to a major emotional cost to the family of court action; a situation seemingly incompatible with the ‘best interests of the child’ principle which theoretically governs family court actions. Finally, the success of voluntary dispute resolution has convinced decision-makers that mediation is a superior alternative to adjudication for the majority of family conflicts, whether undertaken voluntarily or not. As such, ADR is not only appropriate for family disputes, but it is also well suited to the Australian context in which a culture of ADR has clearly developed over the last few decades.

1.4 The 2006 Reforms to the Australian Family Law Act

In 2006, the Commonwealth government passed legislation (effective 1 July 2008) to make mediation a mandatory prerequisite for anyone seeking a parenting order with the usual exceptions for people in violent relationships or other situations involving gross power imbalances. Though the primary focus of family dispute resolution is to reach agreement, the method by which such agreements are reached can vary. For example, following assessment, the preferred approach may be one of mediation, conciliation, or judicial decision making. Notably, unlike industrial disputes, family disputes rarely use arbitration, though clearly such an approach is feasible. The increasing numbers of marital breakdowns, dispersion of families and technological innovations has transformed dispute resolution services to families. For example, though face to face remains an important mechanism for providing services, newer approaches including telephone dispute resolution and, online dispute resolution or a mix of each of these methods are proving invaluable. As a major step in the Family Law Reforms of 2006, the Australian government provided financial support to open a series of 65 family relationship centres. The centres were funded to provide information, advice, and dispute resolution to help people reach agreement on parenting arrangements without the need to go court. Parkinson (2013) claimed:

Family Relationship Centres formed the centrepiece of major reforms to the family law system in Australia which were introduced from 2006 onwards. They provide information and advice and offer free or heavily subsidised mediation of parenting disputes. They are an early intervention strategy to help parents manage the transition from parenting together to parenting apart in the aftermath of separation, and are intended to lead to significant cultural change in the resolution of post-separation parenting disputes. While Family Relationship
Centres have many roles, a key purpose is as an early intervention initiative to help parents work out post-separation parenting arrangements and manage the transition from parenting together to parenting apart. (p. 195)

The term mandatory mediation has often been used to describe the resolution of disputes regarding the care of children in Australia. However, the Family Law Act 1975 (Cth) uses the term Family Dispute Resolution which is defined as “...a process (other than a judicial process): a. in which family dispute resolution practitioners helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and b. in which the practitioner is independent of all of the parties involved in the process”. Parties who are seeking any court orders in relation to parenting are required to make a ‘genuine effort’ to resolve their disputes through Family Dispute Resolution prior to initiating court proceedings.

Brown and Marriott (1999) define mediation as

A facilitative process in which disputing parties engage the assistance of an impartial third party, the mediator, who helps them to try to arrive at an agreed resolution of their dispute. The mediator has no authority to make any decisions that are binding on them, but uses certain techniques and skills to help them to negotiate an agreed resolution of their dispute without adjudication.

The essence of Australian Family Dispute Resolution is that whilst the practitioner is impartial between the parties, she does have a very specific role—to safeguard the paramount interests of the child. In this capacity she is compelled, where necessary to offer advice about the care of children. A family dispute resolution practitioner (FDRP) will not encourage clearly unsuitable parenting plans—for example, she would advise against any plan that involves having the children move house on a daily basis.

For a matter regarding children’s interests to be raised in the Family Court of Australia, a party must attempt Family Dispute Resolution, if the parties are unable to reach an agreement during Family Dispute Resolution or have a practitioner decide that the case is not suitable for family dispute resolution, after assessing both parties. There are exceptions when there are long-term domestic violence issues, or mental health or positional issues.

Hence the process in Australia is described as Family Dispute Resolution rather than mediation. Given the very distinct differences between International Conflict Resolution and Family Dispute Resolution, we wonder if it is it even worthwhile considering the notions of readiness and ripeness to mediate in Family Dispute Resolution.

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8Family Law Act 1975 (Cth) s 10F.
9Family Law Act 1975 (Cth) s 60I.
10Family Law Act 1975 (Cth) s 60CA.
11Family Law Act 1975 (Cth) s 60CF and 60CG.
1.5 Delivery Options for Family Alternative Dispute Resolution

Australian family dispute resolution has undergone rapid transformation in the space of 20 years. Beginning in the 1980s, mediation was considered an alternative form of dispute resolution. Over the next 15 years, mediation became a primary approach to dispute resolution which has culminated to the current times as a compulsory first step by 2008, if parents cannot reach agreement on arrangements for their children. The transition has been rapid when compared with the gradual changes that typically characterize the common law. Mediation has proven an effective way of dealing with family relationships reducing time and cost from a pragmatic perspective. Importantly, a substantial body of research demonstrates the detrimental effects of conflict between parents on their children. Together, these outcomes of parental conflict provide logical justification for Government policy. The determination for compulsory dispute resolution before parents are permitted to lodge an application for a parenting agreement in the courts is established practice Australia.

A recent report by Armstrong (2010) stated that in 2008–09 almost 23,000 clients in government funded Family Relationship Centres (FRCs) were provided with family mediation. Non-FRC community based services offered mediation or FDR to about 7000 clients.

In a major addition to traditional family dispute resolution services, the Australian Family Relationships Advice Line (FRAL) provides the organisation of telephone dispute resolution for people assessed as more appropriate for the telephone medium than for face-to-face services. The Telephone Dispute Resolution Service (TDRS) was established through funding from the Federal Attorney General of the Australian Government in 2007 (Thomson 2009) and is based in Queensland, operated by Relationships Australia Queensland (RAQ) and has a service partnership with Relationships Australia (NSW). Potential clients cannot directly contact or self-refer to the TDRS; rather they need to be referred either through the Family Relationship Advice Line, a Family Relationships Centre, or any other government-funded Family Dispute Resolution provider.

On referral from FRAL or a FRC, clients discuss their requirements with TDRS staff and if appropriate register their dispute. Then, demographic details are recorded and advice given on the TDRS process and an intake appointment is scheduled. Such an approach arguably expedites the transition from first contact to agreement compared with the typical dispute resolution process at a FRC. Indeed, Fletcher (2008) quotes an average time of 94 days for men and 109 days for women from the time of initial interview to dispute resolution.13

12See http://www.familyrelationships.gov.au/Services/FRAL/Pages/default.aspx last accessed 30 August 2017.
13The time is longer for women as they are more likely to initiate the process and hence be the first party to be interviewed.
As Wilson-Evered et al. (2011) note, the service has experienced rapid growth with numbers increasing from 971 new registrations in the 2007/8 period to 3969 registrations in the 2008/9 period. In approximately 5% of cases at least one party identified as Indigenous and over 80% of calls are answered within 20 seconds (Thomson 2009).

Scheduling of the dispute resolution session is contingent on an assessment of the case by a senior practitioner. A series of screening and assessment questions are asked in line with the legal requirement for determining cases suitable for dispute resolution (Thomson 2009). As a percentage of family disputes involve domestic or family violence, the telephone approach is more feasible as couples disperse to avoid contact. Indeed, approximately 12% of cases involved issues relating to family violence or child abuse. Of note, given the increase in child abductions, the TDRS has seen a growth in referrals from the International Social Services including applications made under the Hague Convention on Civil Aspects of International Child Abduction.

Of the 2392 cases that were closed between 2008 and 2009, in 626—that is 26% of the cases—FDR was conducted. Of this number, full agreement was reached in terms of parenting agreements in 285 cases (45%), part agreement was reached in 193 cases (31%) and no agreement occurred in 148 cases (24%). In general, reporting suggests agreement is made between 75% and 85% of those cases referred to TRDS in the years since inception. The lower number represents current figures and is associated with the marked increase in cases being managed (Thomson 2009). In a report prepared for the Australian Family Court, the percentage of cases resolved through mediated agreements was 61% in 2004–5 and 60% in 2005–06.14

On average, 400 cases per month are referred to the TDRS indicating on the one hand, an increased demand for mediation that is not conducted in a face to face setting or, on the other, the dispersion of families across Australian and beyond, making face to face too expensive or impractical. The majority of family mediation or dispute resolution cases conducted since 2006 has occurred in FRCs (66%), the rest was provided by Legal Aid, lawyers and courts (10%), private counselling or mediation services (12%) and over the phone (2%) (Kaspiew et al. 2012).

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14 A discussion of the Australian Telephone Dispute Resolution System and the Online Family Dispute Resolution System can be found in Thomson (2011).
1.6 A Brief Introduction to the Potential of an Australian Online Family Dispute Resolution System

Online Dispute Resolution (ODR)\(^{15}\) is the use of technology to assist in dispute resolution. Unlike the case in traditional offline processes, ODR by its nature needs Information Technology (IT) to resolve the conflict: in the online environment communication is inherently electronic. So, the role of technology is pivotal, and the involvement of IT is essential. This observation led Katsh and Rifkin (2001)\(^{16}\) to introduce the notion of the fourth party. The identified that the following stakeholders can be identified in online dispute resolution:

- The two parties having the dispute;
- The independent third party (mediator, arbitrator, conciliator), and;
- The technology, referred to as a fourth party.

ODR is a concept developed circa 1996. At that time the focus was upon the resolution of disputes that originated online. The prevailing belief was that those disputes that originated on the internet would easily be resolved via the World Wide Web. For most of the past twenty years, ODR research has focused upon electronic commerce disputes. Only recently, has ODR focussed upon non-financial disputes and disputes that do not originate online.

A burgeoning interest in diversifying the use of ODR began with the 15TH ODR Conference, held in the Hague, Netherlands, 23–24 May 2016. It had as its focus Can ODR really help courts and enhance access to justice.\(^{17}\) Issues that were considered included:

1. The collection of information online;
2. The provision of online advice; and
3. The ability to request judicial intervention online, e.g. obtaining domestic violence intervention orders online.

Indeed, the prospective program for the 2020 International ODR Forum\(^{18}\) further built on this momentum by including themes such as:

1. The use of ODR in society, with an interest in family disputes;
2. Considerations of data privacy and data protection;
3. Sharing learnings and latest developments of ODR technology and the future of justice in ODR.

After two decades, the legal community is finally realising the potential for ODR to enhance Access to Justice. Chicago Kent College of Law teaches an *Access to

\(^{15}\)Also known as Technology Assisted Dispute Resolution, Technology Facilitated Dispute Resolution and Technology Based Dispute Resolution—see Wahab et al. (2012), p. 3.

\(^{16}\)At pp. 93–94.

\(^{17}\)See https://2016odr.wordpress.com/ last accessed September 13 2016.

\(^{18}\)Intended to be held in Dublin, Ireland on May 6–7, ODR 2020 was postponed due to coronavirus (COVID-19) pandemic. See https://odr2020.org/ last accessed 11 May 2020.
Justice and Technology subject in its JD program. Issues of ethics and governance are finally being considered (Ebner and Zeleznikow 2016) indicating that the field has become mature. Casanovas and Zeleznikow (2014) discuss how relational law, relational justice and regulatory systems be linked to the newer versions of ODR. Whilst there is a recently found interest in this topic amongst the legal community, academic discussions and research in this discipline first occurred at the birth of the internet—two decades ago—such as the third Annual Forum on Online Dispute Resolution held at the University of Melbourne Law School in 2004.

With the ready availability of personal computers and the development of the internet, inevitably Information Communication Technologies (ICT) have a role to play. Such technologies can be used to enhance negotiation decision-making in a number of ways. For example, first, information technology can be used to build decision support systems as in Family Winner or Asset Divider (to be discussed further in Chap. 2; Lodder and Zeleznikow 2010) to help decision makers or litigants to make better decisions. Second, computer systems, programs and the internet can be used to deliver legal or associated services to assist people in disputes who may not be able or chose not to ‘meet’ face to face for a host of pragmatic and emotional reasons.

The uptake of ODR by Australian governments and organisations was initially slow. In Conley Tyler and Bretherton’s review of existing ODR services in 2003, only 3.8% were identified as originating in Australia. NADRAC (2001) posited that the dominance of North American online ADR over Australia was the result of poor broadband infrastructure. The first Australian online ADR appeared in 2002 with the Department of Justice Victoria recognizing the potential of online-enhanced ADR for their services (Conley Tyler and Bretherton 2003). During this time, Conley Tyler and Bretherton suggested that Australia was in the ‘institutional’ phase of online ADR development, whereby governments and other formal institutions were beginning to recognise the advantages of integrating ODR into their services.

These days, Australia is leading the world in offering online methodologies for delivering dispute resolution services. In 2018, Victoria University in Melbourne hosted the ODR Conference (Online Dispute Resolution: The State of the Art Symposium) which provided a platform to showcase Australian initiatives in ODR. Given Australia’s vast continent, communications through technologies to deliver education, health care, scientific innovations and communication among

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19See http://www.kentlaw.iit.edu/courses/jd-courses/jd-seminars/access-to-justice-and-technology last accessed November 20 2016.

20See for example the roll-out of the Australian Government’s National Broadband Network theconversation.com/the-nbn-how-a-national-infrastructure-dream-fell-short-77780 last accessed 30 August 2017.

21https://www.odrmelbourne.com.au/ last accessed 19 May 2020.
parties have advanced at pace since the early times of ‘the school of the air’. Notably, geographical factors were a driving force for online ADR uptake, with few rural and remote physical services available and considerable costs incurred in the accessing of services by these communities (Sourdin and Liyanage 2012). Naturally, the dispersed population and the ever-increasing rate of divorce along with the need for containing costs has induced innovations in the conflict resolution space for both civilian and business customers.

The conditions for ODR success in Australia have also been assisted by an increased spread of internet and technology access across the country in both private and public environments over the last two decades (Sourdin and Liyanage 2012). Recent Australian Bureau of Statistics data show that 86% of Australian households in 2017 have access to the internet and that, of these households, 91% have access to computers and 91% have access to mobile phone devices. As such, the current generation have grown up with online environments and are comfortable and proficient in their use (NADRAC 2001). Sourdin and Liyanage (2012) posit that the dual effects of these technology advancements and family law changes make Australia ripe for OFDR.

As aforementioned, the Family Law Act 1975 (Cth) and the later 2006 Reforms have paved the way for family ADR, which in turn, laid the foundations for the TDRS. The success of the TDRS in Australia has demonstrated a public demand for alternative delivery modes of family dispute resolution services. It seems clear that a natural progression would be to investigate how family dispute resolution services could be enhanced by the capabilities of technology (Wilson-Evered et al. 2011). Indeed, as early as 2003 it was documented that the public were interested in accessing ODR (Conley Tyler and Bretherton 2003). In fact, the majority, if not all, dispute resolution service providers already utilize a form of technology in their practice (e.g., emailing clients, document sharing; Conley Tyler and McPherson 2006). Regarding readiness for OFDR, it appears that Australia as a nation has the technological capacity to support the development and implementation of such services, FDRPs have indicated readiness to adapt their practices (Casey and Wilson-Evered 2012), and potential consumers are ready (Conley Tyler and Bretherton 2003).

As Zeleznikow (2014) notes, family mediation can be well supported through the use of online tools, because

1. We can learn from many prior disputes,
2. They are generally micro in nature (compared to international disputes) and the disputants in conflict do not use agents.

To have a viable, comprehensive Online Family Dispute resolution we believe the following issues need to be more closely re-searched.

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22 See School of the Air http://www.australia.gov.au/about-australia/australian-story/school-of-the-air last accessed August 30 2017.
23 See https://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0 last accessed 19 May 2020.
1. Pre Family Dispute Resolution Education

- It is important to educate or make clear to parents about the impact of parental separation and dysfunctional parental conflict on the child/children
- It is important to promote positive cooperative co-parenting styles
- It is important to prepare parents for the mediation process—practically, emotionally, and cognitively
- It is important to direct parents to other resources, such as counselling and/or other parenting programs.

Pre Family Dispute Resolution education might include the provision of legal education such as appropriate legislation and cases; and the provision of workbooks, and videos to encourage appropriate behaviour during the dispute resolution process. This information will be made available to face-to-face and TDRS clients as well as OFDR users.

Our belief is that the provision of such services will diminish unreasonable behaviour, leading to less belligerent disputes, parents focusing more upon the interests of their children rather than their own desires and a quicker resolution of disputes.

2. Provision of Advice About Negotiation Strategies

Bellucci and Zeleznikow (2006) used the principles of cooperative game theory developed by Nash (1953) into their Family Winner system. The Family Winner software develops a strategy to decide which of the parties in a divorce gains particular items that have been valued by each party. The program uses game theory and a system of underlying rules (for instance, choose as the first item to distribute the one where there is the greatest difference, amongst the parties, in perceived value).

There is a dynamic rating of issues based on who wins the item and who loses. The program will distribute items to the party who values them the most and compensates the other by giving them extra points for the next item. Other useful facilities could include:

- Provision of advice about trade-offs via decision support system—Adjusted Winner
- Provision of full ODR service
- Evaluation
- International abduction conflicts

3. Governance of Online Family Dispute Resolution Systems

Ebner and Zeleznikow (2016) compare the governance of Online Dispute Resolution Systems to the Wild West. They argue that there is minimal governance of how such systems operate or the advice they give. The issue of trust is of paramount importance. And in the family domain, trust is of even more importance. In many cases, the couples seeking out dispute resolution services will have ruptured relationships of trust among themselves, so they need to be able to have confidence in the
system to which they present themselves. Who should parents trust, is a vital question:

- The Government,
- The Family Court,
- Non Government Organisations providing Family Dispute Resolution, or
- Private, for profit software providers.

1., 2., and 3. are important issues that will be discussed in later chapters.

References

Akin Ojelabi L (2010) Improving access to justice through alternative dispute resolution: the role of community legal centres in Victoria. Faculty of Law and Management, La Trobe University, Bundoora, Australia

Armstrong S (2010) Culturally responsive family dispute resolution in Family Relationship Centres: access and practice. Report for Family Relationship Centres at Bankstown, CatholicCare and Anglicare, Sydney

Bagshaw D (1999) Developing family mediation standards: an Australian experience. Confl Resolut Q 16:389–406

Barrett JT, Barrett J (2004) A history of alternative dispute resolution: the story of a political, social, and cultural movement. Jossey-Bass, San Francisco

Bellucci E, Zeleznikow J (2006) Developing Negotiation Decision Support Systems that support mediators: a case study of the Family_Winner system. J Artif Intell Law 13:233–271

Bibas S (2004) Plea bargaining outside the shadow of the trial. Harv Law Rev 117:2464–2547

Boyle KD (2013) A short history of family mediation in British Columbia. Paper prepared for Mediate BC Society. https://www.mediatebc.com/blog/a-short-history-of-family-mediation-in-british-columbia

Brown DG (1982) Divorce and family mediation: history, review, future directions. Concil Courts Rev 20:1–44

Brown HJ, Marriott AL (1999) ADR principles and practice, vol 13. Sweet & Maxwell, London

Casals MM (2005) Divorce mediation in Europe: an introductory outline. Electron J Comp Law 9:1–24

Casanovas P, Zeleznikow J (2014) Online dispute resolution and models of relational law and justice: a table of ethical principles. In: Casanovas P, Pagallo U, Sartor G, Ajani G (eds) AI approaches to the complexity of legal systems. Springer, Heidelberg, Berlin, pp 54–68

Casey T, Wilson-Evered E (2012) Predicting uptake of technology innovations in online family dispute resolution services: an application and extension of the UTAUT. Comput Hum Behav 28:2034–2045

Conley Tyler M, Bretherton D (2003) Developing an online mediation culture: the fourth generation of online ADR. Paper presented at the 2nd Asia Pacific Mediation Forum, Singapore, pp 1–19

Conley Tyler MH, McPherson MW (2006) Online dispute resolution and family disputes. J Fam Stud 12:165–183

Cooter R, Mark S, Mnookin R (1982) Bargaining in the shadow of the law: a testable model of strategic behavior. J Leg Stud 11:225–251

Crowe J, Toohey L (2009) From good intentions to ethical outcomes: the paramountcy of children’s interests in the Family Law Act. Melb Univ Law Rev 33:391–414

Ebner N, Zeleznikow J (2016) No sheriff in town: governance for the ODR field. Negot J 32:297–323
Fletcher R (2008) Mothers and fathers accessing family relationship centres. Fam Relationships Q (Australian Institute of Family Studies) 10:3–5
French B (2007) Dispute resolution in Australia – the movement from litigation to mediation. Australas Disp Resolut J 18:213–221
Galanter M (2004) The vanishing trial: an examination of trials and related matters in state and federal courts. J Empir Leg Stud 1:459–570
González Martín N (2015) International parental child abduction and mediation. Anuario Mexicano de Derecho Internacional 15:353–412
Kaspiew R, De Maio J, Deblaquiere J, Horsfall B (2012) Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases. Australian Institute of Family Studies, Melbourne. https://www.ag.gov.au/Publications/Documents/ArchivedFamilyLawPublications/CFDR%20Evaluation%20Final%20Report%20December%202012.PDF
Katsh E, Rifkin J (2001) Online dispute resolution: resolving conflicts in cyberspace. Jossey-Bass, San Francisco
Lodder A, Zeleznikow J (2010) Enhanced dispute resolution through the use of information technology. Cambridge University Press, Cambridge
McIntosh J, Burke S, Dour N, Gridley H (2009) Parenting after separation: a position statement prepared for The Australian Psychological Society. The Australian Psychological Society, Melbourne
Milne AL, Folberg J, Salem P (2004) Divorce and family mediation: models, techniques, and applications. Guilford Publications, NY
Mnookin R, Kornhauser L (1979) Bargaining in the shadow of the law: the case of divorce. Yale Law J 88:950–997
Nash J (1953) Two person cooperative games. Econometrica 21:128–140
National Alternative Dispute Resolution Advisory Council (2001) On-line ADR: background paper. Department of Finance and Administration, Canberra
Nicholson A, Harrison M (2000) Family law and the family court of Australia: experiences of the first 25 years. Melb Univ Law Rev 24:757–783
Pali B, Voet S (2013) Family mediation in international family conflicts: The European context. Leuven Institute of Criminology, Leuven
Parkinson P (2013) The idea of family relationship centres in Australia. Fam Court Rev 51:195–213
Pawlowski R (2007) Alternative dispute resolution for Hague Convention child custody disputes. Fam Court Rev 45:302–321
Sander F (1976) Varieties of dispute processing. Charted Institute of Arbitrators, London
Sourdin T, Liyanage C (2012) The promise and reality of online dispute resolution in Australia. In: Abdel Wahab MS, Katsh E, Rainey D (eds) Online dispute resolution: theory and practice. Eleven International Publishing, The Hague, pp 471–498
Spencer D, Hardy S (2014) Dispute resolution in Australia: cases, commentary and materials. Thomson Reuters, New South Wales
Sullivan PL (2005) Culture, divorce, and family mediation in Hong Kong. Fam Court Rev 43:109–123
Thomson M (2009) Annual report of the telephone dispute resolution service to the attorney general. Relationships Australia, Queensland
Thomson M (2011) Alternative modes of delivery for family dispute resolution: the Telephone Dispute Resolution Service and the online FDR project. J Fam Stud 17:253–2157
Wahab MSA, Katsh ME, Rainey D (2012) Online dispute resolution: theory and practice: a treatise on technology and dispute resolution. Eleven InternationalPub, Portland, OR
Wilson-Evered E, Macfarlane D, Zeleznikow J, Thomson M (2011) Towards an online family dispute resolution service in Australia. Mob Technol Confl Manag:125–138
Zdenek C (2014) The United States versus Japan as a lesson commending international mediation to secure Hague abduction convention compliance. San Diego Int Law J 16:209–261
Zeleznikow J (2014) Comparing the Israel – Palestinian dispute to Australian family mediation. Group Decis Negot J 23:1301–1317