ADR as Barristers' Work: The Issues

1. In May, members of the NSW Bar circulated a memo objecting to the ABA's proposed Uniform Rules not including acting as an ADR principal (arbitrating, mediating, neutral evaluating, etc) as part of the definition of barristers' work. That memo was supported in the NSW and Victorian bars.

2. Surprisingly, that idea of inclusion was met with opposition from the ABA and a conspicuous lack of support from the executives of the Bar Associations in Victoria and NSW. It is surprising because that response was and is coming from bodies which ostensibly represent barristers.

3. In explaining the opposition, the President of the ABA has said that claiming ADR delivery as part of barristers' work in 2015 is "*ahistorical*", that is, it is contrary to history or context. Leaving aside any issue as to the relevance of history to current rule making, the NSW Bar rules dating from 1997 and the ABA's own model bar rules from 2002 to 2010, explicitly recited being an ADR principal as being barristers' work. Resolutions of the NSW and Victorian Bars in 2011 confirmed that position. Those resolutions were a restatement of an historic fact, not something made up at that time. In short, it is ahistorical not refer to ADR delivery as barristers' work.

4. The appeal to history is revealing. The ABA is apparently using the definition to try to hold back a tide that is running against it and assert that the proper role of barristers is as advocates.

5. The ABA has also said that ADR delivery cannot be explicitly "claimed" as barristers' work, apparently because it may cause "fusion". That is said against the background that the two major Australian bars have been asserting that fact continuously for nearly 20 years, and the ABA for 8 years, without anyone fusing.

6. The ABA also says that it does recognise the fact of and the importance of barristers practising as ADR delivery principals and the fact that some barristers exclusively do that. However, the ABA says, that is not something exclusively done by barristers. That is true. However, it is also true of **all** the work that the ABA does claim as barristers' work in its rules.

7. What the ABA does not explain is why the Australian bar will not state that which is manifestly true: barristers' work includes, and will increasingly include, being an ADR principal. That which is diminishing in significance for modern barristers is a life only spent as an advocate. Not to deal with that fact is to ignore reality to the detriment of the Bar and of the development of ADR.

8. In a rational universe there ought to be no opposition to the idea of inclusion, if only for the reasons that: (a) it is true as a matter of fact; (b) it is conducive to a proper engagement by the Bar with ADR delivery in the future; and (c) a substantial body of barristers do, or aspire to do, the work and those, and more, want it included. For example, 73 senior counsel in NSW have explicitly endorsed changing the Rules to include ADR delivery.

9. All those interested in correcting this omission need to address their concern to the ABA **and** the local bar associations. The **NSW Bar Council** meets on **16 July 2015.** Email to amcconnachie@nswbar.asn.au.

10. One matter of interest is the number and identity of parties who want to effect change. To assist keeping track of who is involved in this conversation, could you please copy any emails or correspondence to barristersrules@icloud.com, for records purposes only, not republication.

11. **The ABA addresses are:**

    - **Email**: mail@austbar.asn.au.
    - **Postal address:** Selborne Chambers, Lower Ground Floor,174 Phillip Street Sydney, NSW 2000.