Dispute avoidance and resolution in the Australian construction industry – part 1

by Peter M. Trainer*[1]

Introduction

For many in the construction industry the words 'Alternative Dispute Resolution' (ADR) still mean binding arbitration. This is a sad indictment on the inertia that exists when the construction industry is faced with change. The reality is that the term 'ADR' has moved far beyond its original use as referring to arbitration and mediation, the traditional dispute resolution 'alternatives' to the formal judicial process. The inertia of the last 10 years is, however, starting to disappear.

It is argued in many quarters that the term 'alternative' in relation to dispute resolution is no longer appropriate or has at least become a less accurate term. Klug[2] points out that alternative dispute resolution, which was once a radical approach to the resolution of commercial disputes, is fast becoming accepted practice.

The area of dispute resolution and avoidance in the construction industry is in a constant state of flux. Ever since the advent of non-traditional options of project delivery in the 1970s, the need for dispute resolution techniques has increased rapidly. Today there are many techniques available to resolve or diffuse any conflict

BEd, BConMgt (1st Class Honours).

[1] Peter Trainer is the Associate Director of Structures and Housing in the Building Division of Standards Australia. This paper item is directly from his thesis as part of the Bachelor of Building Construction through the University of Newcastle and in conjunction with the University of New South Wales. The thesis sets out the results of a study into dispute avoidance and resolution in the Australian construction industry. The study consisted of a comprehensive literature review, a survey to quantify the attitudes and perspectives of the dispute resolution practitioners in Australia, an analysis of the survey results which included a comparison to the American experience and a review and tabulation of the dispute resolution clauses in 34 of the more common standard forms of contract that have been in use in Australia since 1965. The objective of the thesis is to establish whether dispute resolution techniques and usage trends in the Australian construction industry are similar to those identified by the American surveys; to determine whether dispute resolution clauses in the standard form of contracts used in the Australian construction industry have been drafted to reflect industry needs and practice; and to predict the future use of dispute resolution techniques in the Australian construction industry.

[2] Klug, M. 'ADR: Trends and directions in commercial disputes' – *Australian Dispute Resolution Journal*, Vol. 8, No. 3, (August 1997), p.172.

that has or may arise. The effectiveness of such techniques is always a subject of much debate and not enough data collection and research has been done to quantify the techniques in terms of their effectiveness. The subject area will always be topical. There are advocates and critics for all the models and techniques developed to address contractual disputes.

About the survey

While it is generally accepted that the attitudes and perspectives of the participants in dispute resolution techniques are generally known, little research has been done to quantify these attitudes and perspectives. Literature search uncovered very little data and the only major survey of this type was conducted by the Institute of Arbitrators in 1994 for the American Barristers Association (ABA). Unfortunately none of the Australian data was recorded separately, but rather it was incorporated into a database with all other data.

In order to quantify the attitudes and perspectives of the practitioners in the field of dispute resolution, a questionnaire survey of the key personnel was carried out. The survey was circulated to members of the Institute of Arbitrators who were practising Graded Arbitrators. The survey was primarily of a 'tick-box' type where a number of options were provided, although the respondent was always given the chance to answer 'other' if the tick boxes provided didn't cover their answer.

The survey was based closely on that used in the 1994 ABA survey. The ABA survey was 'Australianised' by including some of the more commonly used ADR techniques in the list of options. Many of the questions in the ABA survey were not relevant for the Australian construction industry and accordingly left out.

A total of 248 surveys were sent out together with a covering letter, two return-addressed envelopes, one for the returned survey, the other for the detachable form for receiving a copy of the survey results. Of these 248, 136 responses were received, representing a response rate of 55 per cent.

The survey was split into five areas covering –

- Construction ADR experience.
- Perceptions of ADR.
- Information about the respondents.
- Substantive ADR expertise.
- ADR skills training.

Also included was a question asking if the respondent was aware of any other such survey of the Australian construction industry dealing with dispute resolution.

Survey sample composition

The survey sample comprised accountants, actuaries, architects, general contractors/builders, building consultants, contract administrators, engineers, lawyers, property consultants/valuers and quantity surveyors.

The sample was aggregated according to industry area overlap into the groups given in table 1.

Table 1: **Aggregated Sample Composition**

Respondents	*Number of responses*	*% of responses*
Architects[3]	23	18.3
General contractors	10	7.9
Building consultants[4]	21	16.7
Engineers	21	16.7
Lawyers	48	38.0
Others[5]	3	2.4
Total	**126**	**100**

Qualifications of the respondents

Eighty-eight per cent of the respondents had completed tertiary education with 72 per cent holding a bachelor's degree, four per cent a master's degree, 15 per cent a diploma and one per cent some other qualification. The details of the qualification levels of the respondents are given in table 2.

Table 2: **Qualifications of the respondents (by percentage).**

Respondents	*Bach. degree*	*Master's degree*	*Diploma*	*Other*	*None*	***Total***
Architects	56	9	26	0	9	**100**
General contractors	30	10	0	0	60	**100**
Building consultants	38	0	29	4	29	**100**
Engineers	76	10	14	0	0	**100**
Lawyers	96	0	2	0	2	**100**

[3] Architects include Contract Administrators.
[4] Building Consultants include Quantity Surveyors.
[5] Others include Accountants and Property Consultants/Valuers.

Years in practice

Almost 70 per cent of all the respondents had been in practice for more than 21 years. It is interesting to note that whilst over 90 per cent of architects, general contractors, building consultants and engineers had been in practice for more than 21 years, the lawyers were spread reasonably evenly over different time spans. This indicates that lawyers in particular gain graded arbitrator status much earlier than other professions and reinforces the fact that the lawyers tend to control the arbitrator status in terms of dispute resolution practitioners. Details of the years in practice by profession are given in Table 3.

Table 3: **Years in practice in the construction industry (by percentage).**

Respondents	*0-5*	*6-10*	*11-15*	*16-20*	*21*	*Missing data*	*Total*
Architects	0	0	0	9	91	0	100
General contractors	0	10	0	0	90	0	100
Building consultants	0	0	0	0	95	5	100
Engineers	0	0	0	5	95	0	100
Lawyers	6	13	21	17	31	12	100

ADR skills training

The respondents were asked about the number of hours training they had received (in-house, external or self-taught) in a number of ADR techniques. The percentages were surprisingly low.

Only 47 per cent of respondents had received training in binding arbitration whilst 39 per cent had been trained in mediation. This was followed by 22 per cent in negotiation, 16 per cent in expert determination, 11 per cent in partnering, eight per cent in non-binding arbitration and seven per cent in early neutral evaluation. Only six per cent had been trained in mini trials or dispute review boards and three per cent had been trained in some other ADR techniques. Details of ADR skills training by profession are given in table 4. It is interesting to note that lawyers and architects had the highest level of multi-skilling followed by general contractors, building consultants and lastly engineers.

Table 4: **ADR skills training (by percentage).**

Respondents	*Binding arbitration*	*Non-binding arbitration*	*Mediation*	*Expert determination*	*Negotiation*	*Mini trials*	*Dispute review boards*	*Early neutral evaluation*	*Partnering*	*Other*	***Total****
Architects	56	3	42	20	23	4	6	7	7	6	174
General contractors	40	13	43	20	27	3	3	7	10	0	166
Building consultants	43	5	40	17	17	5	6	3	14	0	150
Engineers	43	6	27	11	14	2	8	2	8	2	123
Lawyers	46	11	42	12	26	9	5	9	11	3	174
All respondents	47	8	39	16	22	6	6	7	11	3	165

*The percentages don't add up to 100 due to multi-skilling of the respondents in different ADR techniques.

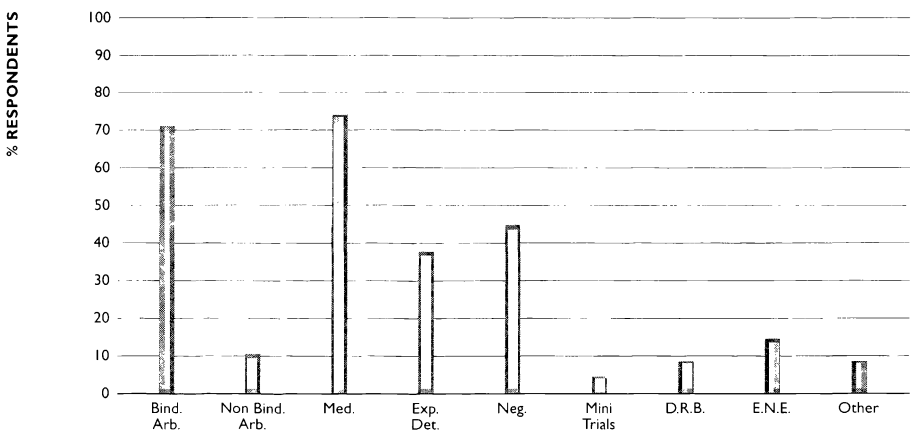
Construction ADR experience

The survey questionnaire posed a series of questions addressing issues such as how many times the respondent had acted as either a neutral, (i.e. acting as a facilitator) or in some other role, (e.g. legal counsel, consultant, expert, etc.) in an ADR technique over the past ten years, familiarity with ADR techniques in contracts and the effectiveness of ADR in a number of issues from both a neutral's and a party to the contracts perspective.

Question 1 asked the respondents how many times they have acted as a neutral in an ADR technique. The results are depicted in figure 1.

Over 70 per cent of respondents had acted in either binding arbitration or mediation. Expert determination and negotiation were the next most frequently used techniques with about 40 per cent participation. Other techniques such as non-binding arbitration, mini-trials, dispute review boards and early neutral evaluation all showed only about a 10 per cent participation rate.

Figure 1: Percentage of respondents who have acted as a neutral in an ADR technique.



When looking at specific industry sectors, the results do not tend to contradict the overall respondents' trends (see table 1).

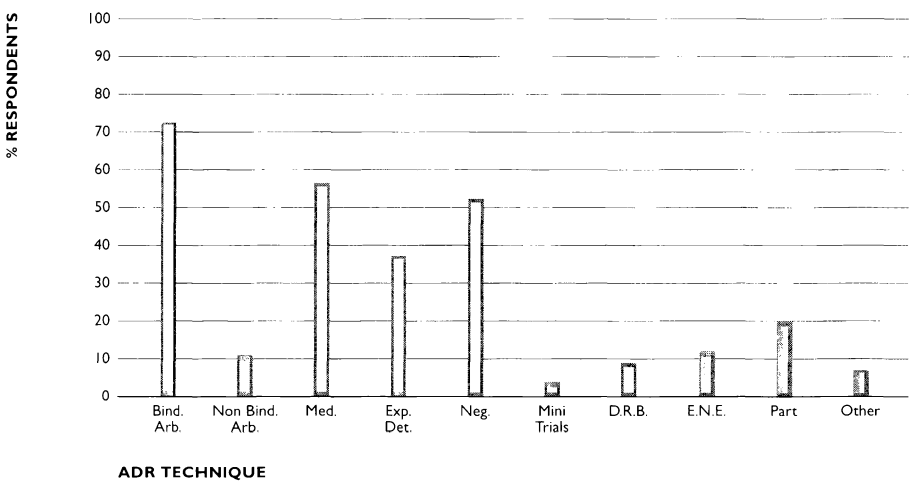
Table 1: **Percentage of respondents who have acted as a neutral.**

Respondents	*Bind. Arb.*	*Non Bind. Arb.*	*Med.*	*Exp. Det.*	*Neg.*	*Mini Trials*	*D.R.B.*	*E.N.E.*	*Other*
Architects	87	9	83	52	30	0	13	9	9
General contractors	80	20	80	40	50	0	10	20	0
Building consultants	90	10	86	62	62	10	5	29	10
Engineers	71	19	62	48	43	5	19	24	19
Lawyers	52	8	69	17	44	6	4	8	6
Total	**71**	**11**	**74**	**38**	**45**	**5**	**9**	**15**	**9**

Question two of the survey was very similar to question one, except it sought information about participation in ADR techniques when acting in some role other than a neutral (e.g. legal counsel, consultant, expert, etc.). Not surprisingly the results were very similar in all areas except for early neutral evaluation and partnering where participation rates were higher. Figure 2 shows participation rates for all respondents.

Whilst participation in mediation dropped to 56 per cent, involvement in negotiation stood at 52 per cent. Partnering featured in the ADR techniques with a 20 per cent involvement.

Figure 2: **Percentage of respondents who have acted in some other role in an ADR technique.**



When looking at industry sector participation, it is interesting to note that no general contractors had participated in mini-trials, dispute review boards, early neutral evaluation or partnering. Building consultants on the other hand had a much higher involvement rate in all these techniques, as well as a 86 per cent participation rate in binding arbitration. Generally, lawyers tend to feature significantly in binding arbitration (81 per cent), mediation (75 per cent) and negotiation (67 per cent). The participation rate of architects is notably lower than the other industry sectors across the board in all the ADR techniques. The results of the industry sector participation is given in table 2.

Table 2: **Percentage of respondents who have acted in some other role in an ADR technique.**

Respondents	*Bind. Arb.*	*Non Bind. Arb.*	*Med.*	*Exp. Det.*	*Neg.*	*Mini Trials*	*D.R.B.*	*E.N.E.*	*Part.*	*Other*
Architects	61	9	30	35	17	0	4	4	13	0
General contractors	40	20	40	30	50	0	0	0	0	20
Building consultants	86	10	67	33	52	10	24	24	29	14
Engineers	67	5	38	43	57	0	10	10	29	5
Lawyers	81	15	75	38	67	6	6	15	19	6
Total	**72**	**11**	**56**	**37**	**52**	**4**	**9**	**12**	**20**	**7**

Familiarity with ADR techniques

Familiarity with dispute resolution/avoidance techniques in contracts was covered by Question 3 of the survey. The technique respondents were most familiar with was binding arbitration (93 per cent) followed closely by mediation (91 per cent). Negotiation and expert determination were the next two with 83 per cent and 78 per cent respectively. Surprisingly, non-binding arbitration was the fifth most familiar procedure with 44 per cent. This was despite the fact that many respondents claimed that it was an American procedure that wasn't applicable under the Arbitration Act in force in Australia. The other techniques (mini-trials, dispute review boards, early neutral evaluation and partnering) all rated about 30 per cent. The results for all respondents appears in figure 3.

Figure 3: **Percentage of respondents who are familiar with ADR in contracts.**

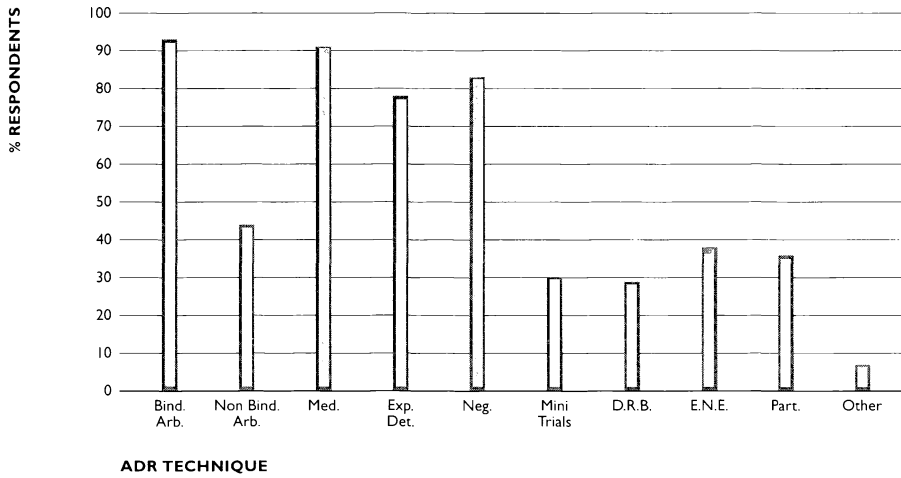


Table 3 gives an industry sector breakdown of the familiarity of the various ADR techniques in contracts. As a whole, not surprisingly, lawyers were far more familiar with all of the ADR techniques than any other industry sector, with over 90 per cent having experienced binding arbitration, mediation and negotiation and 85 per cent expert determination. 100 per cent of general contractors are familiar with mediation in contracts but only 10 per cent are familiar with partnering, despite the government's release of 'no dispute' in 1990. (No dispute was a report by National Public Works Conference and National Building and Construction Council which gave strategies for improvement in the Australian building and construction industry. It included a chapter on dispute resolution.)

Table 3: **Percentage of respondents who are familiar with ADR in contractual relationships.**

Respondents	*Bind. Arb.*	*Non Bind. Arb.*	*Med.*	*Exp. Det.*	*Neg.*	*Mini Trials*	*D.R.B.*	*E.N.E.*	*Part.*	*Other*
Architects	91	17	83	78	70	13	30	30	30	4
General contractors	90	50	100	70	80	10	30	40	10	10
Building consultants	90	48	90	71	81	29	29	29	38	10
Engineers	90	48	86	71	81	19	29	33	33	5
Lawyers	96	52	96	85	92	48	29	48	44	6
Total	**93**	**44**	**91**	**78**	**83**	**30**	**29**	**38**	**36**	**7**

Effectiveness of ADR processes

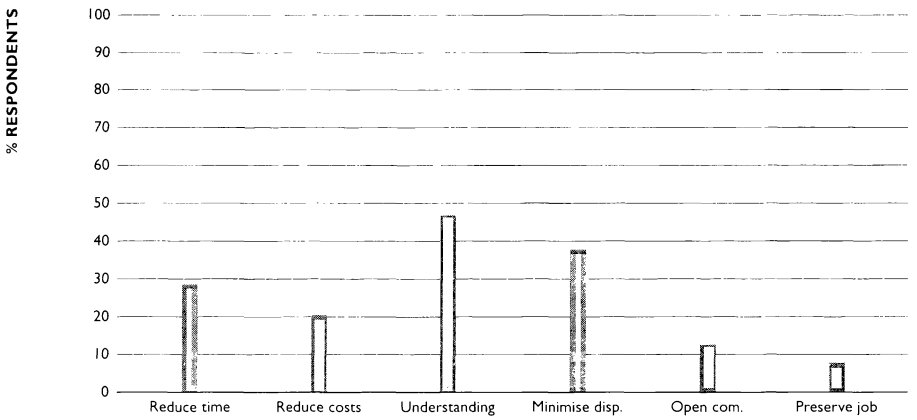
Question 4 of the survey asked respondents to rate the effectiveness, from a neutral's perspective, of each of the ADR techniques on the basis of six criteria:

(1) Reducing time necessary to resolve disputes.
(2) Reducing the costs of resolving disputes.
(3) Providing a more realistic understanding of the strengths and weaknesses of the parties' cases.
(4) Minimising further disputes.
(5) Opening channels of communication.
(6) Preserving or enhancing job relationships.

When looking at the results as a whole from a neutral's perspective, negotiation (39 per cent) is the most effective ADR technique followed by mediation (38 per cent), expert determination (27 per cent), then binding arbitration (24 per cent). The other four techniques, viz. mini-trials (six per cent), dispute review boards (seven per cent), early neutral evaluation (12 per cent) and partnering (nine per cent) all rated very low and were obviously not seen as effective from a neutral's point of view.

Binding arbitration is seen as being most effective in providing a more realistic understanding of the strengths and weaknesses of the parties' cases (44 per cent) and minimising further disputes (34 per cent), whilst preserving or enhancing job relationships (six per cent) and opening channels of communication (13 per cent) were the least effective aspects of the technique. Figure 4 gives the breakdown of effectiveness for binding arbitration.

Figure 4: **Effectiveness of binding arbitration from a neutral's perspective.**



Mediation tended to be relatively even in terms of the effectiveness criteria with a slight favouritism for reducing time and reducing costs. Figure 5 depicts the effectiveness of each of the ADR aspects for mediation. Interestingly enough, mediation was rated as the most effective technique in terms of those ADR aspects, but it is a technique that is not utilised to any great extent in standard forms of contract.

Figure 5: **Effectiveness of mediation from a neutral's perspective.**

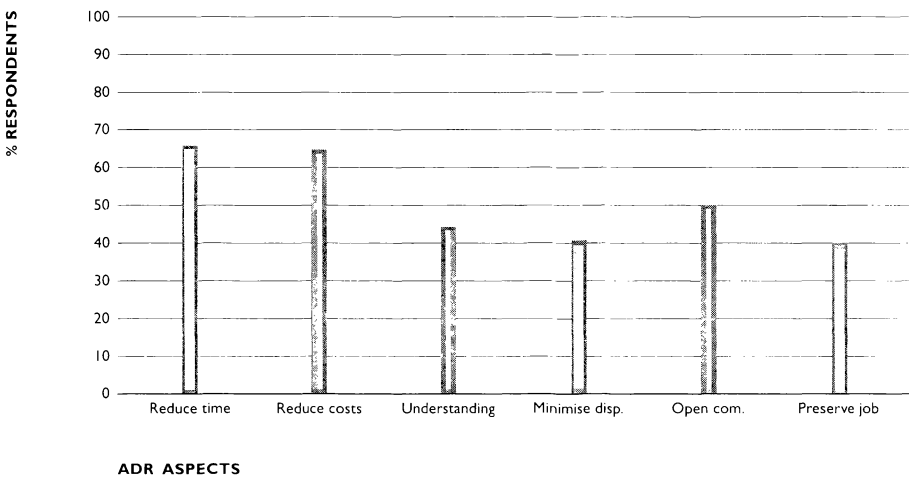
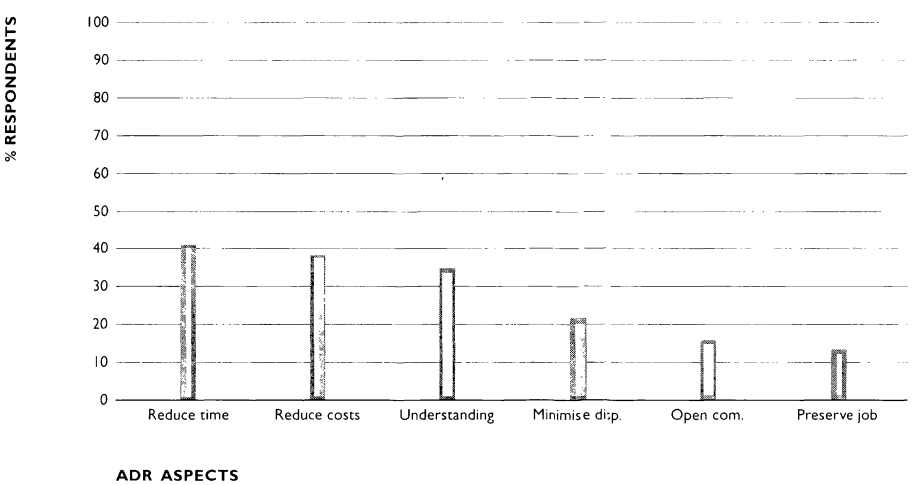


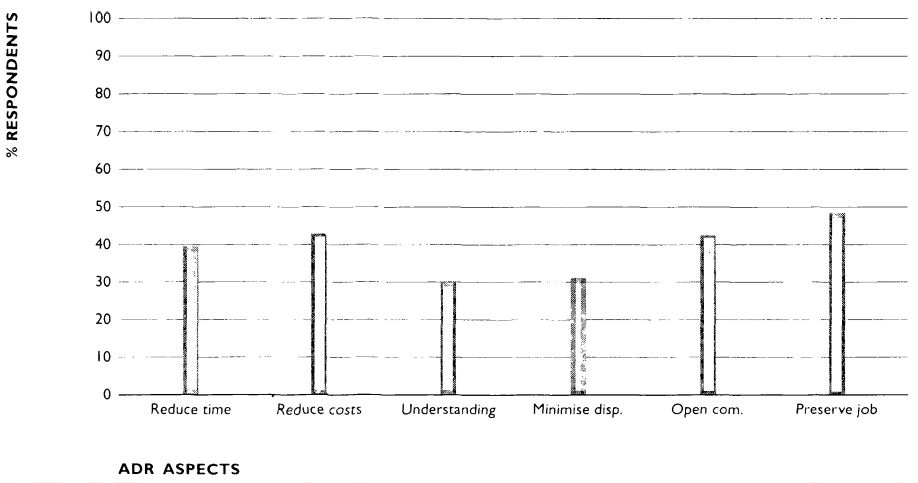
Figure 6: **Effectiveness of expert determination from a neutral's perspective.**



Expert Determination is also seen to be most effective from a neutral's perspective in terms of reducing time (41 per cent) and costs (37 per cent) involved in resolving disputes. It is seen as being least effective in preserving or enhancing job relationships. Figure 6 gives the breakdown of the effectiveness of different aspects for expert determination.

Negotiation is seen as being most effective in terms of preserving or enhancing job relationships with a 48 per cent rating followed by reducing costs and opening channels of communication with about a 40 per cent rating. Figure 7 gives the full breakdown for negotiation.

Figure 7: **Effectiveness of negotiation from a neutral's perspective.**



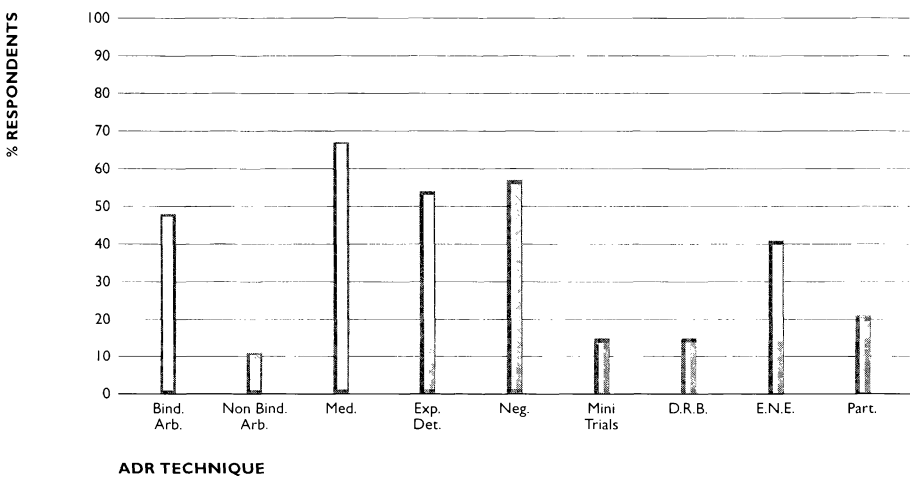
Question 5 was the last question dealing with construction ADR experience and effectiveness of ADR techniques. The question was almost the same as Question 4, but sought the answers from a party to the contract's perspective. Once again the ranking was very similar to that of Question 4, but noticeably the actual percentages were much lower. Negotiation returned 29 per cent, mediation 27 per cent, expert determination 14 per cent and binding arbitration nine per cent. These results show at least a 10 per cent overall lower rating for all techniques when taken from a contracting party's perspective. All other techniques rated well below 10 per cent in terms of effectiveness and there was a uniform low effectiveness rating for all criteria.

Perceptions of ADR

Questions 6 and 7 asked the respondents to give the preference as a neutral and as a contracting party to the increased use of ADR techniques over the next five years.

In terms of preference for increased use of ADR techniques from a neutral's perspective, mediation ranked first, with 67 per cent of respondents wanting an increased use of this ADR technique. This was followed by 57 per cent for negotiation, 54 per cent for expert determination, 48 per cent for binding arbitration, 41 per cent for early neutral evaluation, 21 per cent for partnering, 15 per cent for dispute review boards and mini-trials and 11 per cent for non-binding arbitration. Figure 8 gives the results for all ADR techniques.

Figure 8: **Preference as a neutral for increased use of ADR.**



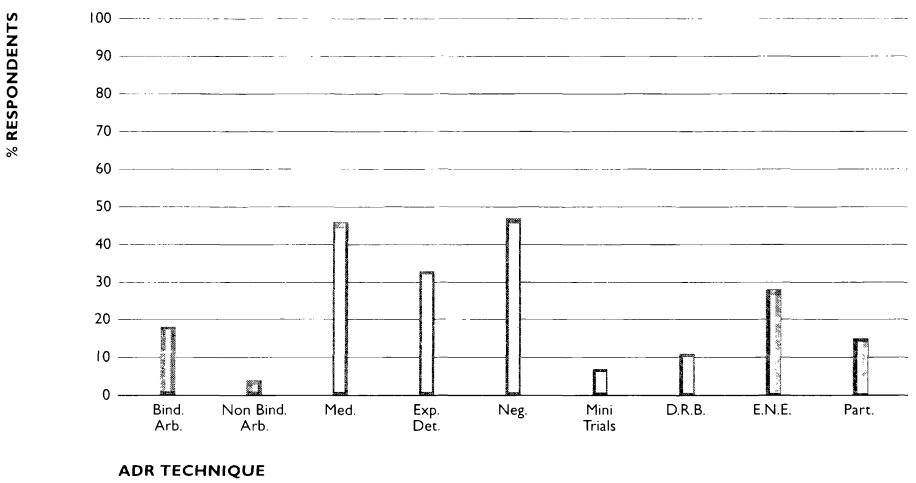
When looking at the results by industry sector, architects and building consultants would much prefer binding arbitration whilst lawyers ranked it fifth. Early neutral evaluation surprisingly ranked higher by most industry sectors than partnering, dispute review boards, mini-trials and non-binding arbitration. In fact, apart from lawyers, all the industry sectors ranked non-binding arbitration, mini-trials and dispute review boards at 10 per cent or under in terms of preference for future use. One of the main areas of interest is the high preference across the board for the future use of expert determination as an ADR technique. What is also surprising is the low preference by all industry sectors for the future use of partnering. Table 4 gives a full industry sector breakdown of Question 6 and Appendix F5 gives a graphical representation of that table.

Table 4: **Percentage of respondents who, when acting as a neutral, would prefer the use of ADR techniques to increase.**

Respondents	*Bind. Arb.*	*Non Bind. Arb.*	*Med.*	*Exp. Det.*	*Neg.*	*Mini Trials*	*D.R.B.*	*E.N.E.*	*Part.*
Architects	61	4	48	43	43	4	17	22	4
General contractors	30	10	90	50	50	0	10	40	0
Building consultants	71	0	67	57	71	5	10	48	19
Engineers	43	14	62	71	67	0	14	43	33
Lawyers	38	17	73	50	54	35	19	46	29
Total	**48**	**11**	**67**	**54**	**57**	**15**	**15**	**41**	**21**

Question 7 was almost the same as Question 6, except that it sought the answer from a contracting party's perspective. The results are presented in figure 9. The results are about 10 per cent lower on average than those from a neutral's perspective which would tend to indicate a lower acceptance or appreciation of ADR techniques generally from a contracting party's perspective. Also, the ranking of the individual techniques was slightly different when analysed from a contracting party's perspective. Negotiation had the highest preference with 47 per cent followed by mediation (46 per cent), expert determination (33 per cent) and early neutral evaluation (28 per cent). A gap of preference occurs and binding arbitration (18 per cent), partnering (15 per cent), dispute review boards (11 per cent), mini-trials (seven per cent) and non-binding arbitration (four per cent) form a secondary grouping of preference.

Figure 9: **Preference as a contracting party for increased use of ADR.**



The trends by industry sector match those of the total respondents. General contractors have a much higher preference for the increased use of ADR techniques generally whilst lawyers and architects have a more even spread of preference amongst the techniques. As with Question 6, non-binding arbitration and mini-trials have, by far, the least preference across all industry sectors. Negotiation is the most favoured technique by architects (39 per cent), lawyers (44 per cent), building consultants (57 per cent), whilst mediation was most preferred by general contractors (70 per cent) and engineers (57 per cent). Table 5 lists the industry sector responses and Appendix F6 graphically details the same responses.

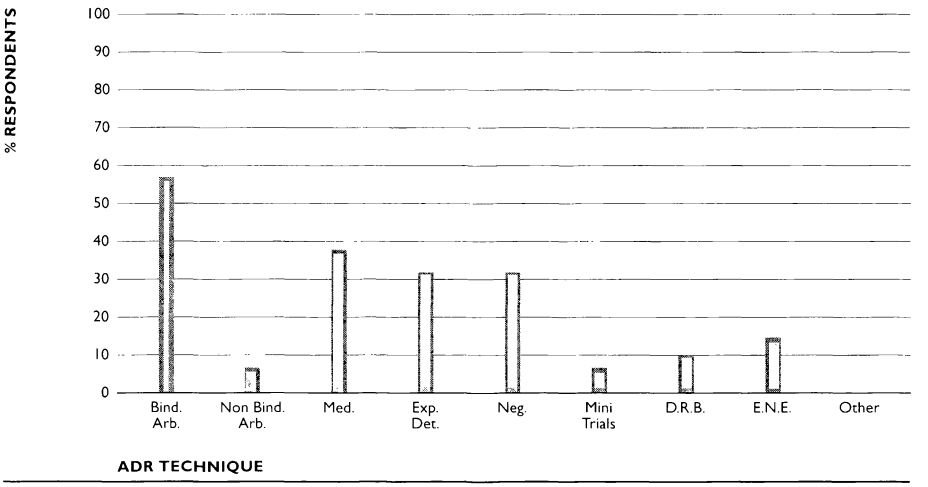
Table 5: **Percentage of respondents who, when acting for a party, would prefer the use of ADR techniques to increase.**

Respondents	*Bind. Arb.*	*Non Bind. Arb.*	*Med.*	*Exp. Det.*	*Neg.*	*Mini Trials*	*D.R.B.*	*E.N.E.*	*Part.*
Architects	17	4	30	30	39	4	22	22	13
General contractors	40	0	70	60	60	0	20	30	10
Building consultants	33	0	48	38	57	5	10	24	14
Engineers	10	10	57	38	48	0	5	38	19
Lawyers	10	4	42	25	44	15	8	29	17
Total	**18**	**4**	**46**	**33**	**47**	**7**	**11**	**28**	**15**

Contract provisions

Question 8 of the survey asked respondents to indicate which ADR techniques should be required in a contract. The majority (57 per cent) of respondents still felt that binding arbitration should be in contracts even though it was not the first preference of the respondents (refer Questions 6 and 7). Mediation (38 per cent), expert determination (32 per cent) and negotiation (32 per cent) formed the second group whilst early neutral evaluation led the final group with (15 per cent). Dispute review boards, mini-trials and non-binding arbitration all rated 10 per cent or below. These results are presented in figure 10.

Figure 10: **Percentage of respondents who would require the use of ADR techniques in contracts.**



When analysing by industry sector, architects and engineers had binding arbitration way out in front and gave a very low rating for all other techniques. General contractors and building consultants also had binding arbitration out in front but gave a much more even and higher distribution to the other ADR techniques. Lawyers on the other hand felt that mediation should be required in contracts much more than any other techniques. Once again there was almost uniform non-approval for non-binding arbitration, mini-trials, dispute review boards and early neutral evaluation. The results by industry sector appear in table 6.

Table 6: **Percentage of respondents who would require the use of ADR techniques in contracts.**

Respondents	*Bind. Arb.*	*Non Bind. Arb.*	*Med.*	*Exp. Det.*	*Neg.*	*Mini Trials*	*D.R.B.*	*E.N.E.*	*Other*
Architects	70	9	30	30	17	9	9	22	0
General contractors	60	10	40	40	50	0	0	20	0
Building consultants	57	0	29	43	38	5	19	24	0
Engineers	71	10	24	24	33	0	14	5	0
Lawyers	44	8	52	29	31	10	6	13	0
Total	**57**	**7**	**38**	**32**	**32**	**7**	**10**	**15**	**0**

ADR techniques in contracts

Question 9 of the survey asked the respondents to indicate which ADR techniques have appeared in contracts that they have used. Not surprisingly, 89 per cent of all respondents indicated that they have used a contract that contained binding arbitration. Mediation was second on the list with 69 per cent of respondents advising that they have used a contract containing that technique. Next came expert determination and negotiation with 44 per cent. As with the trends in other questions the other ADR techniques don't seem to have appeared very often in contracts used by the respondents. Dispute review boards polled 17 per cent followed by early neutral evaluation 13 per cent, non-binding arbitration 11 per cent and mini-trials four per cent. Five per cent of respondents indicated that they had used a contract with some other ADR technique. The results for all respondents appears in figure 11.

Figure 11: **Percentage of respondents who have used contracts containing ADR clauses.**

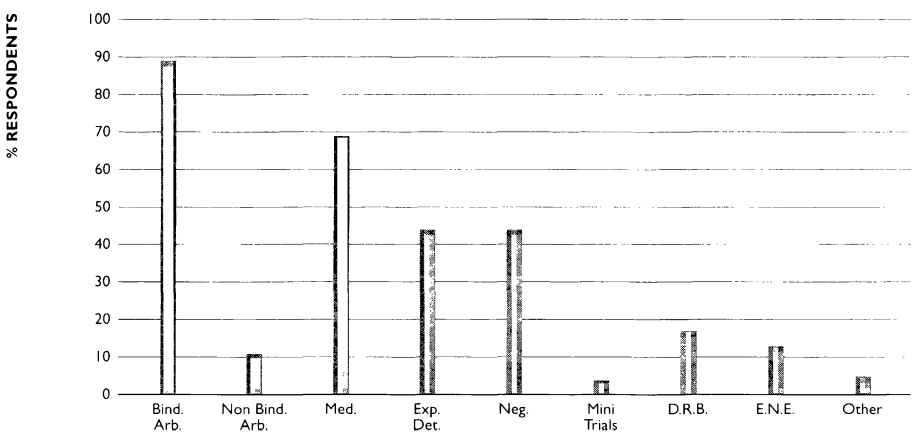


Table 7 gives the results by industry sector. Those results mirror very closely the results of all respondents and there appears to be no industry bias to the past use of contracts which contain any particular ADR technique.

Table 7: **Percentage of respondents who have used contracts which contain ADR clauses.**

Respondents	*Bind. Arb.*	*Non Bind. Arb.*	*Med.*	*Exp. Det.*	*Neg.*	*Mini Trials*	*D.R.B.*	*E.N.E.*	*Other*
Architects	91	0	48	35	30	0	0	13	4
General contractors	90	30	80	30	50	0	0	20	0
Building consultants	100	10	81	48	38	5	29	19	0
Engineers	100	14	71	48	57	5	24	14	10
Lawyers	77	10	71	48	46	6	21	8	6
Total	**89**	**11**	**69**	**44**	**44**	**4**	**17**	**13**	**5**

Currency of ADR clauses

An opinion was asked for in Question 10. That question made the statement that dispute resolution clauses in Australian Standard forms of contract lag behind the current practice of resolving disputes in industry. Respondents were then asked if they agreed or disagreed with the statement. 58 per cent of all respondents agreed with the statement. All industry groups had about a 60 per cent agreement rate, except architects where only about 40 per cent agreed. The results for this question appear in figure 12.

Figure 12: **Percentage of respondents who agree that standard forms of contract lag behind current industry practice.**