

Principles of ADR

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This paper was prepared and settled jointly by the members of ADRAC.

ADR is founded on ideas – it is intrinsically ideological. The ideas which underpin ADR are neither scientific nor inert – they comprise an unmistakably value-laden set of principles.

Together, the principles and values which inform ADR can arguably be described as a philosophy.

Some, perhaps many, of the philosophical underpinnings of ADR may be controversial, contestable, still-evolving, and subject to change. That may not be a bad thing. It may even be a strength in some respects.

But is there, as things presently stand, a fundamental set of well-recognised principles which infuse ADR? What values do these principles express? Does it matter? If so, how?

An oft-cited principle/value is rejected

It is important at the outset to deal with one value or principle which is sometimes said to underpin ADR: namely, litigation is a bad thing.

ADRAC strongly rejects that proposition. It is not so much a value or a principle as a platitude. It is neither worthwhile nor accurate. It sets ADR in opposition to litigation, whereas ADRAC considers that ADR and litigation are complementary parts of an

integrated dispute resolution spectrum. Indeed, ADRAAC unreservedly supports the availability (and use) of litigation as the lynchpin of the rule of law and a constant and indispensable companion of all forms of justiciable dispute.

A formulated set of principles

In 2011 NADRAC formulated a set of National ADR Principles as follows:

1. People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
2. Disputes should be resolved in the simplest and most cost effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
3. People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
4. People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
5. People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
6. Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
7. Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

It may be that these principles can be improved upon in various respects, but they seem to capture a number of worthwhile organising propositions.

What values do these principles reflect?

Organisations have had variable success in trying to identify the core values which inform their philosophy and operations. Is there a single overarching value at play? How are tensions between different values to be resolved?

If one takes the National ADR Principles developed by NADRAC, they appear to express the importance of the following values:

- personal responsibility (Principle 1)
- proportionality (Principle 2)
- participation, and effort (Principle 3)
- informed choice (Principle 4)
- fairness (Principle 5)
- quality and accessibility (Principle 6)
- stakeholder confidence (Principle 7).

It is possible to combine a number of these values to arrive at the following four core values:

- personal responsibility - based on the ability to make informed choices
- proportionality - between dispute and process
- fairness and integrity - as to process (query as to outcome)
- public confidence.

Are there core values missing from this list? If so, what principle(s) derive from the value(s) which are missing? And, as indicated by the last value identified above, is ADR essentially about the provision of a *process* which is fair, or an outcome which is fair, or both? And whose assessment of 'fair' is to be applied in any instance: is it to be evaluated from the perspective of the law, society, or the participants?

Why it matters?

Formulating the essential principles and values underpinning ADR, as perceived by DR practitioners and other stakeholders, is important for at least two reasons: **first**, it goes to the 'identity' of ADR – what ADR is; **secondly**, it affects how ADR operates.

A household consists of a group of people who share a space loosely, but who may have little in common. A home is something different, a place where relations are transacted on the basis (partly) of an intimately shared set of core principles and values. These principles and values may not avoid or quell conflict, but they add character and cohesion – in short, they help create a distinctive identity.

Does ADR in Australia presently have a home, a recognised identity? Or is it at the 'household' end of the spectrum, a conglomeration of loosely connected processes?

The principles and values which underpin ADR should be capable of articulation, internally and externally. Indeed, whilst it is axiomatic that, in the field of dispute resolution, 'one size does not fit all', there is much to be said in favour of every ADR process commencing with a statement of a common set of 'organising' principles and values. Transparency, accountability, and integrity all support that proposition.

As things presently stand, is a core set of values a reality, or spectral?

If one were to take the four values identified above as fundamental, they may help answer various unresolved questions about how ADR operates, or ought to operate.

For instance:

- the value of personal responsibility supports, arguably, the notion that an obligation of good faith is owed by participants in ADR processes
- the value of proportionality arguably supports flexibility, including as to the role of the DR practitioner; this value may also work against 'fixed' notions such as 'mediations should never be advisory'. However, the values of transparency and fairness seem to require that the role of DR practitioner must be transparent at all times

- the values of fairness and integrity arguably support the propositions that DR practitioners should be accountable for what they do, and should not enjoy a blanket immunity
- finally, and perhaps most controversially, the values of integrity and 'public confidence' arguably support the need for some sort of cohesive external accountability or regulation of ADR.

ADRAC welcomes input into these issues.