



NADRAC
NATIONAL ALTERNATIVE DISPUTE
RESOLUTION ADVISORY COUNCIL

**THE RESOLVE TO RESOLVE —
EMBRACING ADR TO IMPROVE ACCESS
TO JUSTICE IN THE FEDERAL JURISDICTION**

A Report to the Attorney–General



September 2009

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The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent body charged with providing policy advice to the Commonwealth Attorney-General on the development of alternative dispute resolution (ADR) and with promoting the use and raising the profile of ADR.

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ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

08/9844

13 JUN 2009

The Hon Justice Murray Kellam AO
Chair
National Alternative Dispute Resolution Advisory Council
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Dear Justice Kellam,

I am interested in the question of how to encourage greater use of alternative dispute resolution (ADR) in civil proceedings.

I am concerned about the barriers to justice that arise in the context of civil court and tribunal proceedings. It is very important to encourage parties to civil proceedings to make greater use of ADR to overcome court and tribunal barriers to justice.

I am currently in the process of considering a range of measures aimed at increasing accessibility to justice.

I would like NADRAC to enquire into and identify strategies for litigants, the legal profession, tribunals and courts to remove barriers from and provide incentives to ensure greater use of appropriate dispute resolution options as an alternative to civil proceedings and during the court or tribunal process. I also ask NADRAC to provide advice on initiatives government might take to support the recommended strategies, including legislative action.

In carrying out this reference, NADRAC should specifically consider:

- a) whether mandatory requirements to use ADR should be introduced
- b) other changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process
- c) the potential for greater use of ADR processes and techniques by courts and tribunals to enhance court and tribunal process, including by judicial officers, and
- d) whether there should be greater use of private and community based ADR services and how to ensure that such services meet appropriate standards.

I would expect NADRAC to consult closely with appropriate agencies and organisations in conducting this inquiry as stated in its Charter, particularly the Civil Justice Division of the Attorney-General's Department which is currently exploring a range of access to justice issues.

I would be grateful if NADRAC could complete its report by 30 September 2009. The action officer in my Department is Alison Playford on 02 62506669.

Yours sincerely

Robert McClelland

Executive Summary

Chapter 1 – Introduction

In the years since NADRAC was established, ADR has expanded into a large, highly diverse and innovative field. Consumers, lawyers and other stakeholders have a greatly improved, though still imperfect, appreciation of the benefits of ADR. Many stakeholders expressed a welcome understanding of the value of ADR. However, it was also evident that while there are numerous ADR innovations, ADR remains significantly under utilised in many areas, and its overall use can be patchy and idiosyncratic. There is still very limited knowledge of ADR among the broader Australian community. Even where there is awareness of ADR, there appears to be a limited appreciation of different ADR processes, which is demonstrated by significant inconsistencies in how processes are described and understood.

NADRAC developed the following principles to guide its enquiry:

- except where ADR processes are inappropriate, judicial determination of disputes should be regarded as a last resort
- people involved in civil disputes should be encouraged to first attempt to resolve their own disputes using facilitated ‘interest-based’ dispute resolution processes
- litigants and their lawyers should be encouraged to use ADR processes to resolve, limit or manage their disputes, at all stages of the litigation process, and
- barriers or disincentives in the civil justice system to the voluntary use of ADR should be removed.

NADRAC’s focus was on the needs of consumers of civil justice services, and the public interest in the delivery of civil justice, in the federal arena. However, it also took account of other relevant interests and perspectives.

The scope of the reference is large. For that reason, NADRAC decided to confine the area of enquiry. NADRAC was aware when it commenced its enquiry that there were significant deficiencies in the available empirical evidence concerning the use of ADR in the federal civil justice system. Its report is based on its own work and expertise developed over 14 years, available research and commentary, and contributions from interested organisations and individuals.

Chapter 2 – Encouraging Greater Use of ADR

Encouraging greater use of ADR is a matter of particular interest to the Attorney-General as demonstrated by his reference to NADRAC. Chapter 2 proposes strategies to address that issue.

NADRAC considered mandatory pre- and post-filing ADR requirements, noting that there is sometimes confusion about what is meant by mandatory ADR. NADRAC also considered a range of changes to cost structures and civil procedures that may encourage greater use of ADR, including varying court fees to provide greater incentives to use ADR. However, NADRAC was unable to identify significant costs or procedural changes (ie post-filing) that would provide an incentive, while at the same time avoid potential injustice (for example, in those cases where ADR is inappropriate and court proceedings are necessary).

Instead, NADRAC proposes the introduction of a legislative regime which would apply, primarily, to pre-filing ADR. This regime would impose an obligation on prospective litigants to take genuine steps to resolve disputes before court (or, as appropriate, tribunal) proceedings are commenced. NADRAC proposes that this regime would involve guidelines, specific exceptions, requirements on legal practitioners, obligations on parties, and the conferral of power of courts to make various orders, all of which will encourage greater consideration and/or utilisation of ADR.

NADRAC proposes that adverse costs orders be available where a party has not taken genuine steps to resolve a matter, and that such costs orders include costs incurred before the commencement of proceedings. However, at this stage NADRAC is cautious about the use of adverse costs orders, or the imposition of conduct standards, in relation to behaviour which takes place within ADR processes. NADRAC's caution is based on various factors, including the potentially detrimental impact on confidentiality of such processes and the risk of generating a disproportionate amount of satellite litigation.

Chapter 3 – Towards National ADR Principles

NADRAC sees strong arguments for the consistent application of some ADR principles in federal, state, and territory legislation. NADRAC considers that a more uniform approach to ADR and articulation of the core principles relevant to different ADR processes may assist policy and law makers in developing better policy and improving ADR legislation. NADRAC looked at the possibility of an ADR Act as a vehicle for achieving these objectives, but on balance was unable to recommend it at this stage. Whilst there are arguments in favour of reflecting core ADR principles in a dedicated ADR Act (ie specific legislation of general application) there are also significant arguments in favour of federal courts and tribunals having largely self-contained legislative regimes, including distinct ADR provisions.

Instead, NADRAC proposes that a National ADR Protocol be developed and widely promulgated. Such a Protocol would serve to promote ADR, elucidate its core principles, explain the differences between various ADR processes, and provide other information that will be helpful to relevant stakeholders (members of the public who are in dispute, their advisers, ADR practitioners, courts, tribunals, and policy makers). The chapter emphasises the need for more consistent use of ADR terminology, noting that inconsistency could undermine the further development of ADR.

NADRAC proposes that the Attorney-General's Department, in accordance with its current policy responsibility, take a leadership and coordination role in advising on federal ADR policy, including the development of ADR legislation and program initiatives.

Chapter 4 – Public and Professional Awareness of ADR

A significant barrier to the use of ADR is the widespread lack of knowledge and understanding of ADR amongst the public at large, disputants and professionals. Many people in Australia do not know about or do not fully understand ADR. That may result in suspicion, confusion, unrealistic expectations, and/or dissatisfaction. Strategies to overcome these problems are discussed in this chapter, including how to increase the visibility of ADR, and how to make high-quality information about ADR readily available. The merits of an online-based central information gateway, complemented by a telephone helpline, are considered.

The role of professionals in raising awareness of ADR is also considered. NADRAC discusses measures to require or encourage professionals to provide timely and accurate information or advice concerning ADR processes. Finally, the chapter discusses how the level of awareness within the professions may be increased. NADRAC makes proposals with respect to the education of law students, legal practitioners, the judiciary, tribunal members, and other professionals. NADRAC also proposes that courts and tribunals prominently provide information about ADR on their websites, and ensure that their staff has the information and training necessary to inform disputants about appropriate ADR services.

Chapter 5 – ADR Services

NADRAC considered the provision of ADR services and how services are provided within and outside the court and tribunal system. NADRAC concludes that the key issues in relation to ADR service delivery are their quality, cost, accessibility and availability. NADRAC is of the view that a robust ADR system should incorporate a mix of pre-commencement and post-filing ADR services, available within and outside courts and tribunals. NADRAC discusses multi-option approaches to provision of services, including the multi-door courthouse and community-based dispute resolution centres. While a dispute resolution centre model has some attractions, NADRAC acknowledges that it would be likely to be resource intensive. Instead, NADRAC proposes initiatives to support the development of strong community and private ADR services capable of assisting disputants to resolve disputes early without recourse to the courts.

Chapter 5 also addresses online dispute resolution (ODR). NADRAC regards ODR as an important addition to the existing ADR field and a valuable mechanism to overcome many barriers that exist in relation to the use of ADR. The chapter canvasses the current spectrum of ODR and notes that this is an expanding area that will impact upon economic and other dispute systems and result in a more globalised delivery of dispute resolution services. After identifying some of the benefits and some unresolved issues concerning ODR, NADRAC recommends the Federal Court run an ODR pilot which could serve as a model for other future ODR pilots by the Federal Government and others.

Chapter 6 – Supporting Quality ADR

The quality of ADR processes and the protection offered to consumers of ADR services have been longstanding matters of concern to the Australian Government, as reflected by NADRAC's Charter. Chapter 6 addresses two very significant issues – fostering better data collection, evaluation and research, and the development of ADR standards. With the exception of the family law arena, there is very little comparable empirical data concerning the provision and use of ADR. This problem is not confined to ADR and is a problem for the civil justice system more generally.

Evaluation, research and evidence-based policy and program development all depend upon the availability of sound quantitative and qualitative data. Without them it is impossible to fully assess existing ADR services and build upon them, whilst ensuring that they meet appropriate standards. Existing data collected by courts and tribunals (of the type that measures input and output of case management systems) provides only limited information about only some performance objectives. What is collected by one court or tribunal may not be comparable with what is collected by another.

The chapter discusses the development of standards for mediation in Australia, which resulted in the commencement of the National Mediator Accreditation System (NMAS). NADRAC considers that, as a general rule, federal courts, tribunals and other bodies should now only use or refer matters to mediators who meet the NMAS standards. Of course, family law ADR practitioners would also need to meet the family law accreditation requirements. The development by the Attorney-General's Department of the Family Dispute Resolution Practitioner Accreditation Standards is also discussed. NADRAC is of the view that, when discussing standards and quality issues, it is necessary to distinguish between different types of ADR processes. NADRAC proposes that it is timely to consider the potential for a standards framework for advisory dispute resolution similar to that which has now been developed for mediators. NADRAC also proposes that further consideration be given to the issues of confidentiality and non-admissibility of things said and done in ADR, together with the question of whether ADR practitioners should have immunity from suit.

Chapter 7 – Better Court Processes Using ADR Techniques

Chapter 7 deals with ways in which court and tribunal processes could be further enhanced to make them more time and cost efficient. It discusses case management in federal courts and tribunals, including the recent decision in *Aon Risk Services Australia Limited*. The chapter considers the range of techniques that courts already adapt from ADR processes to enhance their functions, including family consultants, the less adversarial trial, and expert evidence management. NADRAC considers that other ADR techniques might also be appropriate for some civil proceedings. These include case management conferencing.

Chapter 7 also considers judicial dispute resolution and judge-led mediation. Both appear to be a current international trend. NADRAC notes that some confusion exists about the concept of judge-led mediation and identifies serious questions that arise from the specific nature of the mediation process, the role of the judge, and their specific judicial

skills. NADRAC expresses the view that judges should not mediate except in exceptional circumstances. Where judges do mediate they should be NMAS accredited, and the judge concerned should not go on to hear the matter. NADRAC proposes that case management courses be developed for the judiciary which focus on ways in which judges can identify matters suitable for referral and appropriate ADR techniques and processes to which to refer matters.

Chapter 8 – Use of ADR by the Federal Government

In Chapter 8, NADRAC considers the use of ADR by the Federal Government and notes the potential for the Government to continue to play a leadership role in increasing the use of ADR in Australia. The chapter suggests that confusion about the interpretation of the Legal Services Directions (LSDs), especially the meaning of the phrase ‘meaningful prospect of liability’, appears to be creating a barrier to the use of ADR by agencies, and that clarification of the requirement would address this barrier.

The potential role of chief executives of Commonwealth agencies in ensuring that their agencies adopt appropriate dispute management strategies and practices is considered. The chapter suggests that agencies should be required to establish dispute management plans that are consistent with the model litigant rules. It also suggests that the LSDs could impose more specific obligations on agencies in relation to the use of ADR, and that agencies should generally be required to include dispute resolution clauses in their contracts.

The discussion canvasses difficulties that arise from the fact that ADR services are not legal services for the purposes of the LSDs, and suggests some ways by which the Government could provide increased support for agencies using ADR. In relation to the federal compensation schemes, the chapter considers whether the schemes should be amended to make clear that they may be accessed without a claimant first exhausting avenues for legal redress.

Chapter 9 – A Model ADR Clause

At Chapter 9, NADRAC discusses the benefits that appropriately drafted dispute resolution clauses can offer. Also, the chapter warns that poorly drafted clauses can lead to protracted and complex legal disputes concerning their interpretation or effectiveness at a later stage. NADRAC concludes that it should provide a model clause as a template that may be used voluntarily, either fully or partially in a contract, or as a starting point for further negotiations.

Schedules

Four schedules are included in the report. They elaborate in more detail some of the issues canvassed earlier in this report. The schedules deal with domestic arbitration (Schedule 1), conduct obligations in ADR (Schedule 2), confidentiality and admissibility issues in relation to ADR (Schedule 3), and pre-action protocols introduced by the Woolf reforms in England and Wales (Schedule 4).

Recommendations

NADRAC makes the following recommendations:

Chapter 2 – Encouraging Greater Use of ADR

Pre-action requirement

2.1 Legislation governing federal courts and tribunals¹ require genuine steps to be taken by prospective parties to resolve the dispute before court or tribunal proceedings are commenced.

Pre-action guidelines

2.2 Legislation require prospective litigants to have regard to the following pre-action guidelines in determining what genuine steps may be appropriate.

Pre-action requirement for prospective applicants

A prospective applicant must, unless impracticable, take genuine steps to resolve a dispute before commencing proceedings in a federal court or tribunal by:

- considering whether the dispute may be resolved at an early stage by discussion of the issues with the prospective respondent either directly or in a process facilitated by another person
- sending to the other prospective party at the earliest opportunity a notice of dispute which clearly but briefly outlines the issues in dispute, references any pertinent information or documents (including information as to whether the prospective applicant is insured and whether the prospective litigation is to be funded or supported by a third party), attaches copies of any documents considered necessary for resolution *and only those documents*, offers to further discuss the dispute and proposes how that discussion will be conducted ie in writing, by telephone or in person or by using an appropriate ADR process
- where an offer to use an ADR process is accepted by the prospective respondent or respondents, quickly agreeing on the identity of the ADR practitioner and the terms of his or her appointment and agreeing with the ADR practitioner the rules applicable to the ADR process (if any), and minimum attendance eg agreement to attend at least one session
- where the dispute does not resolve by correspondence, direct discussion or use of an appropriate ADR process, sending to the prospective respondent a notice of intention to proceed with the application, specifying the legal issues in dispute, the orders to be sought, any further relevant documents and again offering to negotiate

¹ NADRAC understands that this recommendation will not necessarily apply to all tribunals or all types of proceedings in tribunals. Judgments will need to be made about the applicability of NADRAC's recommendations to particular tribunals and particular types of matters within tribunals.

- attempting to negotiate or authorising a representative(s) to negotiate a settlement of the legal case whether directly with the prospective respondent or in a process managed by a third person, and
- if the dispute does not resolve, considering whether a different ADR process may be preferable to litigation such as conciliation, early neutral evaluation or arbitration and, if so, offering to participate in such a process.

Pre-action requirement for prospective respondents

Each prospective respondent to an application for orders from a court or tribunal must, unless impracticable, take genuine steps to resolve the dispute as soon as possible by:

- on receipt of the notice of dispute, considering whether the dispute may be resolved at an early stage by discussion of the issues with the prospective applicant either directly or in a process facilitated by another person
- responding to the notice of dispute at the earliest opportunity identifying any disagreement as to the issues in dispute, referencing any pertinent information or documents (information includes whether the prospective respondent(s) are insured and whether any prospective litigation is to be funded or supported by a third party) not mentioned in the notice of dispute, attaching copies of any additional documents considered necessary for resolution *and only those documents*, indicating a willingness to further discuss the dispute and proposing how that discussion will be conducted ie in writing, by telephone or in person or by using an appropriate ADR process
- where an offer to use an ADR process is accepted, suggesting an appropriate ADR practitioner or practitioners, and when agreement is reached as to the appropriate practitioner, quickly agreeing with the ADR practitioner and the prospective applicant the terms of his or her appointment, the rules applicable to the ADR process (if any), and minimum attendance eg agreement to attend at least one full session
- where the matter does not resolve by correspondence, direct discussion or use of an appropriate ADR process, responding to the prospective applicant’s notice of intention to proceed, identifying any disagreement as to the legal issues in dispute, the orders to be sought, any further relevant documents and agreeing to continue to negotiate
- attempting to negotiate or authorising a legal representative(s) to negotiate a settlement of the legal case whether directly with the prospective respondent or in a process managed by a third person, and
- if the dispute does not resolve, considering whether a different ADR process may be preferable to litigation such as conciliation, early neutral evaluation or arbitration and, if so, offering or agreeing to participate in such a process.

Exceptions

2.3 Legislation set out factors that may be taken into account by prospective litigants in determining the application of the guidelines including urgency, undue prejudice, safety, security, the subject matter of the dispute, public interest factors and whether the dispute is essentially the same as has been previously before the same court or tribunal.

Available court orders

2.4 Legislation provide that where a prospective party considers that the other party has not provided the information necessary to enable the dispute to be resolved, the court or tribunal may order that the information be provided.

2.5 Legislation provide that where prospective parties cannot agree on a dispute resolution practitioner to conduct an ADR process, an application may be made to the court or tribunal for an order, nominating either (i) an ADR practitioner within the court or tribunal to conduct the ADR process at a fee commensurate with a fully recoverable ‘user pays’ service or (ii) a body outside the court or tribunal that will nominate an appropriate practitioner.

Adverse costs orders

2.6 Legislation empower courts and tribunals² to make an adverse costs order against a party, whether successful or not, if the party has not taken what the court or tribunal considers to be genuine steps to resolve the matter before commencing proceedings. The court or tribunal would have regard to compliance by the parties with the steps set out in clause 2.2 in making such an order.

2.7 Legislation provide that the costs covered by such an order may be calculated from the date of the first notice of dispute or from the time the claimant otherwise advised the other prospective party of the claim.

Powers of courts and tribunals

2.8 Legislation provide that federal courts and tribunals³ have the power to make rules or give directions about steps that prospective parties to proceedings in that court or tribunal must take before commencing particular kinds of proceedings, including mandatory attendance at any appropriate ADR process.

2.9 Legislation ensure that judges or tribunal⁴ members may, at any time during court or tribunal proceedings, order a party to attend a facilitative or advisory ADR process without the parties’ consent. The parties’ consent would continue to be required for determinative processes such as arbitration.

Obligations on legal practitioners

2.10 Legislation require legal practitioners to provide a prospective party to proceedings in federal jurisdiction with:

- information about the requirement to take genuine steps to resolve the dispute before commencing court or tribunal proceedings

2 NADRAC understands that a power to award costs has been conferred on some tribunals but not on others, or by reference to particular categories of matters before tribunals. NADRAC understands that this recommendation may not be appropriate for all tribunals.

3 This recommendation will not apply to the circumstances of some tribunals, such as the National Native Title Tribunal. It is intended that it be applied to tribunals only as appropriate.

4 As per footnote 3.

- information about the services available outside the court or tribunal which may assist the person in resolving the dispute
- information about the advantages of resolving the dispute without commencing court or tribunal proceedings and the benefits of ADR processes
- an estimate of the lawyer’s costs
- an estimate of the costs of other parties for which the litigant may be liable if unsuccessful in the proceedings, and
- an estimate of the timeframe for proceedings, including for its commencement and conclusion.

Obligations on parties

2.11 Legislation require parties to a proceeding in a federal court or tribunal to lodge with the court or tribunal a statement:

- that they have taken genuine steps to resolve the dispute before commencing the proceedings
- that they have considered the services available outside the court or tribunal which may assist them to resolve the dispute, or issues in dispute
- that they obtained advice about estimated costs, costs exposures and timeframes for the proposed proceedings
- setting out what ADR processes they have engaged in, if any, and
- if they have not attended an ADR process, or taken other genuine steps to resolve the dispute, the reasons why they did not do so.

Chapter 3 – Towards National ADR Principles

3.1 A national ADR Protocol be developed and widely promulgated to inform the Australian community about the importance and advantages of ADR in the federal civil justice system, the overarching principles common to individual ADR processes, consistent descriptions of commonly used ADR processes, and appropriate conduct in different ADR processes for disputants, practitioners, professional advisers and persons who attend in a supporting role.

3.2 The Attorney-General refer to NADRAC the task of preparing the ADR Protocol.

3.3 The Attorney-General’s Department take a leadership and coordination role in advising on federal ADR policy, including in the development of legislation and ADR program initiatives.

Chapter 4 – Public and Professional Awareness of ADR

Increasing public awareness of ADR

4.1 The Federal Government fund a website and telephone helpline to provide information about the federal civil justice system including federal and state government funded ADR service providers. (This initiative should be developed in consultation with other relevant Federal Government initiatives, such as Family Relationships Online, the Family Relationships Advice Line, and state government initiatives such as Law Access NSW.)

Increasing disputants awareness of ADR

4.2 Federal courts and tribunals:

- prominently provide on the home page of their websites and in other publications information about ADR, including information that may assist the parties to resolve their disputes privately or without recourse to courts and tribunals, and
- ensure their staff have adequate current information and training about the range of ADR services available, to enable them to inform disputants about appropriate ADR services.

Increasing professional awareness of ADR

4.3 The Attorney-General write to the Council of Chief Justices, the Law Council of Australia and state/territory legal professional bodies urging that admission, practising certificates and continuing legal education requirements for lawyers include dispute resolution skills and knowledge.

4.4 The Attorney-General and the Minister for Education write to the Vice-Chancellors of Australian universities urging that knowledge of ADR and negotiation skills be a part of all undergraduate courses whose graduates may be regularly required to manage conflict, in particular, law, business, commerce, psychology, education, health and social welfare.

Chapter 5 – ADR Services

ADR services

5.1 The Attorney-General support initiatives to encourage a diversity of ADR services both inside and outside courts and tribunals, with a view to developing accessible and effective community-based and private ADR services.

Online dispute resolution

5.2 The Attorney-General's Department work with the Federal Court to establish a pilot ODR platform to assist resolution of disputes. (The platform could provide a model for other ODR pilots by the Federal Government and others.)

Chapter 6 – Supporting Quality ADR

6.1 Federal courts and tribunals, and other bodies funded by the Federal Government to provide ADR services, collect and publish comparable data using uniform criteria and benchmarks as to the use and performance of ADR processes both before and after proceedings are commenced.

6.2 The Attorney-General:

- request that NADRAC develop uniform criteria for the collection of data about the use, and qualitative benchmarks for measuring the performance, of ADR services, and
- propose to the Standing Committee of Attorneys-General (SCAG) a national adoption of those criteria and benchmarks.

6.3 Federal courts, tribunals and other bodies funded to provide ADR services:

- evaluate their ADR services including periodic independent review, and
- include the results in their annual reports.

6.4 The Attorney-General implement initiatives to:

- address the significant and longstanding lack of comparable data, evaluation and research about ADR in the federal civil justice system, and
- ensure that future ADR policy is built upon a strong evidence base.

6.5 As a general rule federal courts and tribunals, and other bodies funded by the Federal Government, should only use or refer matters to mediators who meet the minimum requirements of accreditation under the NMAS or other higher standards specified in legislation.⁵

6.6 The Attorney-General ask NADRAC to advise on the development of a standards framework for advisory ADR processes similar to the standards framework developed for mediators.

6.7 The Attorney-General ask NADRAC to report on:

- the need for confidentiality and non-admissibility in different ADR processes; and
- the need for immunity from suit for ADR practitioners.

Chapter 7 – Better Court Processes Using ADR Techniques

7.1 The Attorney-General propose to the National Judicial College of Australia that it design and deliver case management courses for judges covering the ways in which judges could identify suitable matters for referral to ADR, and suitable ADR techniques and mechanisms.

5 Mediators who wish to issue section 60I certificates under the *Family Law Act 1975* need to be accredited under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*. Only accredited practitioners are afforded the confidentiality and admissibility protections under that Act.

7.2 Except in exceptional circumstances, judges should not mediate and, if they do so, they should not hear the case. Moreover, any judge who mediates should be accredited under NMAS.

Chapter 8 – Use of ADR by the Federal Government

The Legal Services Directions – ‘meaningful prospect of liability’

8.1 The Attorney-General amend the LSDs to clarify the criteria for settlement and, in particular, the meaning of the words ‘a meaningful prospect of liability’.

Use of accredited mediators

8.2 The Attorney-General amend the LSDs to require agencies to use mediators accredited under the NMAS, unless approval to use other mediators is obtained from the Attorney-General or his or her delegate.

8.3 The Attorney-General’s Department assist agencies to find accredited mediators and other ADR practitioners who are independent of the agencies and experienced in government disputes.

Dispute Management Plans

8.4 The Attorney-General amend the LSDs to require agencies, unless an exemption is obtained, to develop and regularly review dispute management plans that require appropriate use of ADR.

8.5 The Attorney-General ask NADRAC, in consultation with the Office of Legal Services Coordination (OLSC), to prepare a model dispute management plan that could be used to assist agencies to comply with their obligations under the directions.

8.6 The Attorney-General amend the LSDs to require agencies to include in their reports to OLSC details of their dispute management plans.

Support for agencies

8.7 The Attorney-General’s Department:

- provide information to agencies about ADR – using both a dedicated webpage and an enquiry line, and
- assist agencies to manage their significant disputes using ADR where ADR is assessed as likely to assist.

8.8 The Attorney-General amend the LSDs to require agencies to have an appropriate form of dispute resolution clause in government contracts wherever possible.

ADR and Federal Compensation Schemes – CDDA and Act of Grace

8.9 The Attorney-General write to the Minister for Finance and Deregulation requesting that the Compensation for Detriment caused by Defective Administration (CDDA) Scheme and the Act of Grace Scheme be amended to make it clear that they can be accessed by claimants who have not exhausted all avenues of legal redress.

Chapter 9 – A Model ADR Clause

9.1 The Attorney-General widely promulgate and promote the use of dispute resolution clauses, particularly by government agencies, noting that a model clause prepared by NADRAC for consideration of parties will be placed on the NADRAC website.

Chapter 1: Introduction

- 1.1 In preparing this report, NADRAC was pleased to discover that, in the years since NADRAC was established, ADR has expanded into a large, highly diverse and innovative field. Consumers, lawyers and other stakeholders have a greatly improved, though imperfect, appreciation of the benefits of ADR. Many stakeholders expressed a welcome understanding of the philosophy and promise of ADR in contributing to a fair and just society and civil justice system.
- 1.2 However, it was also evident that while there appear to be numerous ADR innovations, ADR remains under-utilised in many areas and its use can be patchy and idiosyncratic.
- 1.3 NADRAC's impression is that while awareness of ADR has significantly increased amongst stakeholders in the civil justice system, there is still very limited knowledge among the broader Australian community. Even where awareness of ADR is high, there appears to be quite limited understanding of the differences between ADR processes, which is demonstrated by significant inconsistencies in how processes are described.
- 1.4 During its enquiries, NADRAC raised and considered comprehensively the issues set out in its reference and discussed in the paper that it released on 26 March 2009 (the Issues Paper). NADRAC also considered broader issues relating to ADR. Certain issues featured more prominently during NADRAC's enquires than other issues. The more prominent issues, such as the need to ensure the quality of ADR services and the need to improve early access to ADR services, are addressed in NADRAC's report and recommendations, in addition to other strategies designed to encourage greater knowledge about and use of ADR.

Background to the report

About NADRAC

- 1.5 NADRAC was established in 1995 as an independent body responsible for providing the Attorney-General with policy advice on the development of ways of resolving or managing disputes without a judicial decision. NADRAC's Charter provides that it:
 - ... is an independent advisory council charged with:
 - providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving or managing disputes without the need for a judicial decision, and
 - promoting the use and raising the profile of alternative dispute resolution.
- 1.6 NADRAC's Charter is at Attachment A.

Civil proceedings reference

- 1.7 On 13 June 2008, the Attorney-General wrote to NADRAC requesting that it enquire into and identify strategies to remove barriers and provide incentives for greater use of ADR as an alternative to civil proceedings and during the court or tribunal process. The letter of reference asked NADRAC to provide advice on strategies for litigants, the legal profession, tribunals and courts as well as initiatives the Government might take, including legislative action.
- 1.8 In particular, NADRAC was asked to consider:
 - whether mandatory requirements to use ADR should be introduced
 - changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process
 - the potential for greater use of ADR processes and techniques by courts and tribunals, including by judicial officers, and
 - whether there should be greater use of private and community-based ADR services and how to ensure that such services meet appropriate standards.
- 1.9 NADRAC understands that its recommendations arising from this inquiry will be an important contributor to the Attorney-General's access to justice agenda.
- 1.10 NADRAC was requested to consult broadly in conducting the enquiry and to complete its report by 30 September 2009.
- 1.11 A copy of the letter of reference is at the front of the report.

NADRAC's approach

Guiding principles

- 1.12 To assist its work on the reference, NADRAC developed the following principles as a guide:
 - except where ADR processes are inappropriate, judicial determination of disputes should be regarded as a last resort
 - people involved in civil disputes should be encouraged to first attempt to resolve their own disputes using facilitated interest-based dispute resolution processes
 - litigants and their lawyers should be encouraged to use ADR processes to resolve, limit or manage their disputes, at all stages of the litigation process, and
 - barriers or disincentives in the civil justice system to the voluntary use of ADR should be removed.

Stakeholder interests

- 1.13 NADRAC also carefully considered the perspective from which it should undertake its enquiry. It is aware that there are a wide range of stakeholders in the civil justice system that have different interests and perspectives. For example:

- members of the public who find themselves in dispute may simply want their dispute resolved as quickly and fairly as possible
 - the business sector may want their disputes resolved as quickly as possible provided that their commercial interests are fully protected or even advanced
 - government, taxpayers and courts may focus on minimising or streamlining court and judicial processes and workloads
 - the legal profession and judiciary may seek to protect processes that maintain procedural fairness and focus on the resolution of disputes according to law, and
 - ADR practitioners may have very different interests and perspectives depending upon the type of process they provide and where and how it is provided – for example providers of facilitative, interest-based community mediation services are likely to have a different perspective to private commercial arbitrators.
- 1.14 NADRAC concluded that its primary focus should be on the needs of the consumers of civil justice – ie the disputants – and the broad public interest in the delivery of civil justice. At the same time it recognised the need to consider each of the above interests and perspectives to ensure that the recommendations were workable.

Indigenous issues

- 1.15 NADRAC determined that specific issues relating to indigenous dispute resolution are not the focus of this enquiry as they had been considered by NADRAC elsewhere and are the subject of a recent report to NADRAC by the Federal Court of Australia.⁶

Family dispute resolution

- 1.16 NADRAC also took the view that its enquiry should not focus on ADR in family law parenting matters.⁷ This decision was taken because of the fairly recent and extensive reforms of provisions relating to family dispute resolution.⁸ However, NADRAC has not excluded the use of ADR in family law property matters from consideration.⁹

Type of ADR processes covered

- 1.17 NADRAC is well aware that determinative and predominantly rights-based processes, like early neutral evaluation, case appraisal and arbitration, raise different issues from facilitative interest-based processes like mediation, and that advisory processes again have their own issues. Thus, NADRAC was cautious about whether it would be possible to consider fully all the issues raised by the reference in relation to every type of ADR process.

6 NADRAC, *Indigenous Dispute Resolution and Conflict Management*, 2006; and J Pope, T Bauman (ed) 'Solid work you mob are doing' – *Case Studies in Indigenous Dispute Resolution and Conflict Management in Australia*, Report to the National Alternative Dispute Resolution Advisory Council by the Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project, NADRAC, 2009.

7 See Part VII *Family Law Act 1975*.

8 See *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

9 See Part VIII *Family Law Act*.

- 1.18 On balance, and considering time constraints, the many differing ADR processes, and the impending review of the domestic and international arbitration regimes, NADRAC decided that its primary focus should be on facilitative and advisory processes.
- 1.19 However, NADRAC has been mindful of the important role determinative processes like arbitration play in the civil justice system. NADRAC would not want its decision not to deal with them in detail to be interpreted as a lack of appreciation of this important role.
- 1.20 Rather, in NADRAC's view, determinative processes warrant separate and full consideration. NADRAC has canvassed some issues in relation to arbitration in a schedule to this report. In particular, it is pleased to see that state and territory commercial arbitration legislation is currently being reviewed under the aegis of the Standing Committee of Attorneys-General.¹⁰ Similarly, the Commonwealth Attorney-General's current review of the *International Arbitration Act 1974* is expected to result in improvements to the framework for international commercial arbitration. NADRAC looks forward to seeing the outcome of the SCAG review, and hopes that it will significantly invigorate the use of commercial arbitration in an Australian domestic context.

Application of recommendations to tribunals

- 1.21 Some of the recommendations that NADRAC makes in the report apply both to federal courts and tribunals. As already noted, the Attorney-General's reference to NADRAC asked it to consider strategies for both courts and tribunals. However, there are many different types of tribunals. Some are general merits review, some are special interest tribunals. NADRAC recognises that tribunals are usually established with the object of making decisions that are fair, just, economical, informal and quick.¹¹ Thus, the objectives of tribunals may already be similar to those for most ADR processes.
- 1.22 It might be argued that on that basis there is no value in requiring potential parties to tribunal processes to undertake additional ADR processes before commencing tribunal proceedings. NADRAC sees the merit of those arguments.
- 1.23 On the other hand, tribunals are not inexpensive. To an objective lay observer some tribunal proceedings may seem little different to court proceedings. Accordingly, NADRAC considers that it is appropriate to require potential parties to such tribunal proceedings, particularly government agencies, to take active steps to resolve disputes before and/or during tribunal proceedings. Such attempts might involve greater attention to internal dispute resolution processes, using ADR techniques such as more open and direct communications. In selected cases it could involve the use of an external ADR practitioner.

10 See Schedule 1 – Domestic Arbitration.

11 See, for example, s 2A *Administrative Appeals Tribunal Act 1975*.

- 1.24 Nevertheless, NADRAC would like to make it clear that where its recommendations refer to tribunals, that does not necessarily mean all tribunals or all types of proceedings in tribunals. Judgments will need to be made about the applicability of NADRAC's recommendations to particular tribunals and particular types of matters within tribunals.

Empirical evidence

- 1.25 Finally, NADRAC was well aware when it commenced this enquiry of the significant and longstanding lack of comparable empirical data about the use of ADR within the civil justice system.
- 1.26 The recommendations that NADRAC makes in this report are therefore based on:
- NADRAC's own work and expertise developed over the last 14 years
 - available research and commentary, and
 - submissions and evidence of a very large number of organisations and individuals.

Format of report

- 1.27 NADRAC recognises that the report is a comprehensive one and that some readers will prefer to select specific chapters to read rather than reading from start to finish. For that reason NADRAC has written each chapter so that it can be read independently of the other chapters. As a consequence, those readers who do choose to read from start to finish, or to read a number of chapters at a time, may notice some information is repeated. NADRAC hopes that those people will understand the reason for, and forgive, any such repetition.

The Issues Paper, submissions, consultations and acknowledgements

- 1.28 NADRAC released its Issues Paper on 26 March 2009. It received over 60 submissions from Commonwealth and State government departments and agencies, ADR providers, courts, tribunals and individuals. A list of submissions is at Attachment B.
- 1.29 The report includes many references to and quotes from the submissions. The submissions referred to in the report are available on NADRAC's website at www.nadrac.gov.au.
- 1.30 A list of the people and entities who were consulted is at Attachment C.
- 1.31 NADRAC would like to thank the many people and organisations — including judges, lawyers, service providers, government agencies, and industry and community organisations — who contributed their time, experience and expertise during NADRAC's consultations.

1.32 In addition to the people who participated in the consultations and the people who made submissions, many people from many organisations contributed their valuable time and expertise to the process of informing NADRAC in its enquiries. NADRAC would like to thank all of these people who shared their specialised knowledge about matters relevant to the report.

Chapter 2: Encouraging Greater Use of ADR

Introduction

2.1 The Attorney-General's introductory comment in his letter of reference to NADRAC stated:

I am interested in the question of how to encourage greater use of alternative dispute resolution (ADR) in civil proceedings.

2.2 He went on to note that he was concerned about barriers to justice that arise in the context of civil court and tribunal proceedings. He expressed the view that it was important to encourage parties to make greater use of ADR.

2.3 The Attorney-General asked NADRAC to enquire into and identify strategies for litigants, the legal profession, tribunals, courts and government that will remove barriers, and provide greater incentives, to use ADR both before proceedings are commenced and during the litigation process. He specifically asked NADRAC to consider:

- whether mandatory requirements to use ADR should be introduced, and
- other changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers.

The need for greater use of ADR

2.4 As noted in the introduction to this report, NADRAC was pleased to discover the increasing uptake of ADR processes within federal civil disputes and more broadly. NADRAC was encouraged by the operation of several innovative ADR programs, including the Takeovers Panel and Victoria's Small Business Commissioner. The industry ombudsmen or external dispute resolution (EDR) schemes continue to resolve hundreds of thousands of consumer complaints, and there are many longstanding ADR programs, such as the State governments' dispute resolution programs, that continue to offer reliable mediation services at no or minimal cost. New businesses aimed at resolving larger commercial disputes are regularly established.

2.5 However, NADRAC is not convinced that there is sufficiently broad acceptance of ADR across the civil justice system. For example, it heard reports that there is still some resistance to ADR amongst some members of the legal profession. It seems that there is still a practice amongst some lawyers of commencing legal proceedings to show that their client is serious about the potential for litigation, rather than assisting their clients to focus on opportunities to resolve the dispute at an early stage.

- 2.6 NADRAC is of the view that early use of ‘interest-based’ mechanisms (such as mediation in commercial matters) could assist disputants to resolve disputes in a way that better meets their needs. In some matters other processes (such as early neutral evaluation or arbitration) may be appropriate at an early stage.

Mandatory ADR

- 2.7 There is sometimes confusion about what is meant by mandatory ADR. It seems to be used broadly to mean any or all of the following:
- a statutory requirement to use ADR as exemplified in section 60I of the *Family Law Act 1975 (Cth)* in relation to parenting matters
 - a requirement in court rules to use certain processes exemplified in the Commonwealth’s *Family Law Rules 2004*¹²
 - where ADR is integrated into court or tribunal processes and is a requisite element of certain proceedings, as exemplified by the conferencing process used in the AAT, and
 - an order by a judge to use an ADR process made without the consent of the parties. Provision for such orders is already made in the legislation of many courts including the federal and family courts.¹³
- 2.8 It may also be understood as applying at different times. The term may be used to mean a requirement to use ADR:
- before legal proceedings are commenced, often referred to as ‘pre-filing’, ‘pre-action’ or ‘pre-issue’ eg the family dispute resolution requirements for parenting matters in the *Family Law Act*
 - after legal proceedings are commenced but before hearing, often referred to as ‘post-filing’ or ‘post-issue’ eg the compulsory conciliation conferences conducted by some courts and tribunals soon after filing, or
 - after a hearing has commenced, again often referred to as ‘post-filing’ or ‘post-issue’ eg where a judge adjourns a matter and orders the parties to attempt to resolve the matter using an ADR process.
- 2.9 A mix of all the above is possible. For example, the *Family Law Rules* require each prospective party in property matters to make a genuine effort to resolve the dispute before starting a case by participating in dispute resolution.¹⁴ Nevertheless, once property matters are commenced the parties are required to attend a case assessment conference, and possibly a subsequent conciliation conference,

12 R 1.05 *Family Law Rules 2004* requires prospective parties to comply with pre-action procedures which include, in property cases, participating in dispute resolution such as negotiation, conciliation, arbitration and counselling, see paragraph 1, Part 1, Schedule 1.

13 s 53A (1A) *Federal Court of Australia Act 1976* regarding mediation and s 13C *Family Law Act 1975* which allows a court to make an order on its own initiative that the parties attend family dispute resolution.

14 *ibid.*

with a registrar. In addition, the judge may order the parties to attend an ADR process outside the court after the hearing has commenced.¹⁵

- 2.10 When discussing mandatory ADR, it is important to clarify what this concept involves.

Pre-action protocols

- 2.11 Sometimes a mandatory requirement to use ADR before commencing proceedings is referred to as a ‘pre-action’ protocol. However, this may cause confusion, because the term ‘pre-action protocol’ is more frequently understood to mean a set of pre-filing requirements such as:
- specific requirements with respect to initial correspondence
 - a requirement to disclose specific types of information
 - a requirement for legal representatives to consult and attempt to reach a settlement, and
 - mandatory ADR.
- 2.12 Pre-action requirements are discussed in more detail below.

Views expressed in submissions

- 2.13 Some of the submissions that NADRAC received advocated mandatory ADR as a means of achieving cultural change. One submission said:

My experience with mediations conducted under the Retail Leases Act 2003 [Vic] which is now quite extensive, is that the pre-issue compulsory mediation procedures under this Act have been very successful and have shown that there is a real value in pre-issue compulsory mediations.

I have found that parties who would otherwise be unwilling to participate in a mediation participate very fully, effectively and genuinely in compulsory mediations after they have overcome their initial resistance.¹⁶

- 2.14 However, the majority of submissions did not support the imposition of any uniform legislative requirement to use ADR. There was acceptance of some integration of ADR into court and tribunal processes, and of the existing power of judges to order parties to ADR without their consent.
- 2.15 Some submissions indicated that mandatory ADR may be appropriate for some types of legal disputes but not for others. However, there was little guidance on which types of dispute would or would not be amenable to ADR.

¹⁵ The general power of the Family Court to make any order in a property matter which it thinks necessary to do justice (s 80(1)(k) *Family Law Act 1995*) may be broad enough to cover an order that the parties attend an ADR process.

¹⁶ Mr Michael Redfern, Consultant, Russell Kennedy, Submission, p 1.

NADRAC's view

Mandatory pre-action ADR

- 2.16 In principle, in appropriate cases, NADRAC is supportive of a mandatory pre-action requirement to attempt ADR. This view is based on the premise that the more ADR is used successfully and is seen to provide benefits that cannot be achieved in litigation, the more receptive disputants and their lawyers will be to its use. As noted in the submission quoted above, even where the parties or their legal advisers are initially reluctant to attend, they can still find the process to be a useful one. Contrary to early fears about the impact of loss of voluntariness, compulsion to *attend* does not seem to damage the process or necessarily deter the participants from engaging with it.¹⁷
- 2.17 However, NADRAC acknowledges that some types of disputes are not amenable to or likely to benefit from ADR.
- 2.18 NADRAC considers that courts and tribunals are well placed to identify those types of matters where a pre-action requirement to use a specific ADR process or processes would be desirable, and the types of ADR that are most appropriate in those cases. As noted above, the Family Law Rules already require prospective parties in property matters to participate in dispute resolution before starting a case.¹⁸ Accordingly, it is appropriate for courts and tribunals¹⁹ to have the power to make rules specifying types of matters in which prospective litigants should first attempt ADR. If a court or tribunal does not have sufficient power to make such rules, NADRAC is of the view that it should be empowered to do so.
- 2.19 However, NADRAC considers that a requirement for prospective litigants to undertake some genuine steps to resolve a dispute before commencing proceedings, including considering different ADR processes, would be appropriate. This issue is discussed further below.

Mandatory post-filing ADR

- 2.20 NADRAC supports the provision by courts and tribunals of mandatory post-filing ADR processes (other than determinative processes) where courts and tribunals consider it effective and just to require them.
- 2.21 NADRAC also supports a judicial discretion to order parties to attend any of a wide range of facilitative and advisory types of ADR processes.²⁰ If a judge forms the view that a matter may be capable of being resolved more quickly and with better outcomes by using a particular ADR process, then it is desirable for the judge to have power to order the parties to attend such a process even if the parties do

17 However, it is noted that mandatory standards of participation, such as good faith requirements, raise different and more complex issues which are discussed later. See Schedule 2 – Conduct Obligations in ADR.

18 Subject to exceptions see R 1.05(2), Part 1.2.

19 NADRAC is aware that many tribunals do not currently have a rule-making power. Consideration should be given to allowing them to make such rules or some equivalent power.

20 Such processes may include amongst others mediation, conciliation, case appraisal and early neutral evaluation.

not consent.²¹ Even where the parties are reluctant to participate in ADR, judges will frequently see an opportunity to resolve a matter in a more acceptable, less expensive or quicker way by using an appropriate ADR process. Many judges report that where they order parties to attend mediations without consent, the parties satisfactorily resolve their disputes in that process.²²

- 2.22 Judges are increasingly becoming involved at a much earlier stage in the case management process, which enables them to undertake an early post-filing assessment of the suitability of a matter for referral to ADR. A good example is the 'fast track' process in the Federal Court.²³
- 2.23 Constitutional restraints may limit the ability of the Commonwealth to give judges the power to order parties to undertake binding private arbitration or other determinative processes.²⁴ Section 53A of the *Federal Court of Australia Act 1976* provides that judges may order mediation without the consent of the parties but that they may only order arbitration with the parties' consent. Provisions that have similar effect are included in the *Family Law Act 1975*²⁵ and the *Federal Magistrates Court Act 1999*.²⁶ Similarly, the power of the President of the Administrative Appeals Tribunal (AAT) to direct that a proceeding or any part of a proceeding be referred to an ADR process does not include arbitration.²⁷

Changes to cost structures and civil procedures

- 2.24 NADRAC has considered a range of changes to cost structures and civil procedures that may encourage greater use of ADR. These include ideas such as varying court fees to provide greater incentives to use ADR both before and after action is commenced. NADRAC was unable to develop a formula that would achieve the desired encouragement and at the same time avoid injustice in those cases where ADR is inappropriate and court proceedings are necessary.

Adverse costs orders

- 2.25 NADRAC also considered adverse costs orders against parties that do not take appropriate steps to try and resolve matters before filing or before a judicial hearing in the proceedings.

21 Such a discretion requires that judges and tribunal members have sufficient knowledge of different ADR processes and when they are appropriate. This issue is discussed in Chapter 7 – Better Court Processes using ADR Techniques.

22 See, for example, submission by the Hon Justice A M North, Federal Court of Australia, to the Parliament of Victoria Law Reform Committee *'Inquiry into Alternative Dispute Resolution and Restorative Justice'* (Sub No 37, 5/3/2008).

23 An initial directions hearing (the 'Scheduling Conference') presided over by a judge is set down not less than 45 days from the date of the filing of the application or earlier in urgent matters. See further Chapter 7 – Better Court Processes using ADR Techniques.

24 Compelling resolution by arbitration may require interposing an independent exercise of the judicial power of the Commonwealth to achieve finality. See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Luton v Lessels* (2001) 210 CLR 333.

25 See s 13E (arbitration), s 13C (family dispute resolution) *Family Law Act 1975*.

26 See s 35 (arbitration), s 34 (mediation) *Federal Magistrates Court Act 1999*.

27 See s 34A Administrative Appeals Tribunal Act 1975.

The power to make costs orders

2.26 NADRAC considers that it is appropriate for federal courts and tribunals to have the power to make adverse costs orders in both of those circumstances. NADRAC is of the view that the Family Court already has those powers.²⁸ It is doubtful whether the Federal Court has power to make such orders in relation to pre-filing conduct of the parties. NADRAC notes that the amendments to the Federal Court Act proposed in the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* will make it clear that the Federal Court does have such power in relation to proceedings which have been commenced before it. NADRAC understands that a power to award costs has been conferred on some tribunals but not on others, or is referred by reference to particular categories of matters before tribunals. Accordingly, NADRAC understands that this recommendation may not be appropriate for all tribunals.

Confidentiality of ADR processes and admissibility of communications

2.27 While NADRAC is supportive of adverse costs orders against parties who do not take appropriate steps to resolve their disputes, it cautions against the use of adverse costs orders in relation to conduct in ADR processes.²⁹ Most ADR processes are regarded as being confidential and this is seen as one of the significant attractions of ADR relative to open court proceedings.³⁰ Some level of confidentiality may be provided by statute. Where it is not, it will usually be addressed in the ADR agreement.

2.28 In addition, it is generally not considered appropriate to disclose in later court or tribunal proceedings statements made and information provided in some ADR processes. Thus, for example, the Commonwealth's *Evidence Act 1995* provides that communications made during settlement conferences are inadmissible in later proceedings.³¹ As NADRAC has said previously:

In some situations, there may need to be exceptions to this rule to prevent either harm or injustice, but those exceptions also need to be carefully specified. Legislation should provide a general rule that evidence of matters disclosed in ADR is inadmissible, qualified by those exceptions considered appropriate by policy-makers.³²

2.29 NADRAC continues to be concerned that cost hearings not be used to open up confidential ADR proceedings to reveal private information, admissions, apologies and the like which were intended to be kept confidential. For this reason, NADRAC has concerns about the imposition of standards of conduct, such as good faith or genuine effort, in confidential ADR processes.

28 A note to s 60I(8) *Family Law Act 1975* suggests that the Family Court has a power to award costs against a party in relation to family dispute resolution although that is not specifically addressed in s 117 *Family Law Act 1975*, conferring power to award costs.

29 See Schedule 2 – Conduct Obligations in ADR and Schedule 3 – Confidentiality in ADR processes.

30 For a discussion of confidentiality and non-admissibility see NADRAC, *Legislating for alternative dispute resolution: A guide for policy-makers and legal drafters*, November 2006, pp 11-12.

31 This is a codification, with some modification, of the common law's 'without prejudice' privilege for settlement negotiations. See s 131 *Evidence Act* discussed at Schedule 3 – Confidentiality of ADR processes.

32 For a discussion of confidentiality and non-admissibility see NADRAC, *Legislating for alternative dispute resolution: A guide for policy-makers and legal drafters*, November 2006, p 12.

- 2.30 The need for confidentiality of ADR processes will depend upon the particular type of process. Confidentiality may not be possible or desirable in some ADR processes. For example, in large multi-party processes conducted under the aegis of a court (eg native title mediations) confidentiality may not be realistically achievable or desirable. Representatives of the parties at those disputes may need the ability to talk freely to their constituency about the proceedings. Providing confidentiality in some court processes may be at odds with the notion of public justice. In the federal context, court-ordered arbitrations of disputes within judicial power are subject to review by a court. Therefore, non-admissibility may not be possible even if the arbitrator and the parties agree to maintain confidentiality.

Views expressed in the submissions

- 2.31 Only a small number of submissions expressly addressed the issues of costs sanctions and ADR. The views in those submissions that did raise it were mixed.

NADRAC's view

- 2.32 NADRAC considers that courts and tribunals should have power to make an adverse costs order against a party, whether that party has been successful or not, if the party has not taken what the court or tribunal considers to be genuine steps to resolve the matter before commencing proceedings. NADRAC understands that the costs covered by such an order may presently only date from the date of commencement of action (or shortly prior to). NADRAC is of the view that such an order should be capable of taking effect from the date of first correspondence in the dispute.

Pre-action requirements

- 2.33 There are different views about when ADR is appropriate and how much work needs to be done to prepare for it. Some people take the view that there is one time when a dispute is 'ripe' for resolution and that a certain amount of preparation must be done for that to be so.
- 2.34 Another view is that interests-based ADR processes are more concerned with what the parties need and want from a resolution than an analysis of what they may be entitled to at law, and can therefore be undertaken earlier and with less preparation. The Australian Law Reform Commission (ALRC) has said:

Generally, the Commission was told that there is no optimal time for ADR referral which would cover all cases. It is possible for ADR processes to be prescribed too early in the history of the dispute – before the parties are ready to settle – or too late, when significant litigation costs may have been incurred and there are limited monetary or personal cost savings to make settlement through ADR attractive for parties.³³

33 Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system*, Report No. 69, Sydney, 2000, para 6.64.

- 2.35 More recently, the Victorian Law Reform Commission (VLRC) has recommended prescriptive statutory ‘pre-action protocols’ be introduced setting out the conduct persons in dispute are expected to follow when there is a prospect of litigation.³⁴

Experiences with pre-action protocols

- 2.36 The evidence about the success of such ‘pre-action protocols’ is mixed. In part, this may reflect the ambiguity of the term and the wide range of different requirements that may be covered by it. As the VLRC said:

[...] there is insufficient evidence to fully assess the impact of the various pre-action procedures. The limited data available suggests a significant decrease in the number of civil actions commenced in those jurisdictions where the newer pre-action procedures have been introduced. ... it would seem that the substantial decrease in the volume of civil litigation before the higher courts in England and Wales is in large measure due to the impact of the pre-action protocols.³⁵

- 2.37 However, there is also evidence that in the United Kingdom (UK) the costs for litigants are still very high and delays are being experienced in getting *to* court rather than whilst in court.³⁶ In the Technology and Construction Court’s recent decision in *Roundstone Nurseries Ltd v Stephenson Holdings Ltd*, Justice Coulson observed:

There are two aspects of the Pre-Action Protocol process and/or ADR, and the relationship between them and any parallel court proceedings in the TCC, which seem regularly to give rise to difficulties. One is the time that the parties allow the process to take. These delays significantly increase the costs incurred during the pre-action period which, because of the inevitable ‘front-loading’ caused by the Pre-Action Protocol itself, are regarded by many as high enough already.³⁷

- 2.38 It appears that there has been no significant growth in the use of ADR, particularly mediation. While more cases are settling, it seems to be settlements negotiated by solicitors after considerable work has already been done by them to comply with the requirements of the pre-action protocols. As a result, it may be that the pre-action protocols have significantly increased the costs for those litigants whose cases would previously have settled prior to action being commenced.³⁸ Legal work that previously may not have been undertaken until after proceedings had been commenced, may now be initiated as soon as the prospective litigant approaches their solicitor.

- 2.39 If ADR is not being used then prospective litigants are missing out on the advantages that ADR processes can offer. For example, interest-based processes like mediation empower the disputants to speak for themselves, reach outcomes

34 Victorian Law Reform Commission, *Civil Justice Review: Report*, Report No 14, Melbourne, 2008, Recommendations 1-13.

35 Victorian Law Reform Commission, *Civil Justice Review: Report*, Report No 14, Melbourne, 2008, p 133.

36 The English pre-action protocols are dealt with at greater length in Schedule 4 – Lord Woolf Reforms in the United Kingdom – Pre-Action Protocols.

37 *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC), para 1.

38 See for example the comments made by Lord Justice Jackson in R Jackson, *Review of Civil Litigation Costs: Preliminary Report*, May 2009, p 1.

that best meet their needs and interests, and to own the agreed outcome. There are suggestions that mediated agreements have greater longevity than court orders and higher levels of satisfaction. For example, research into the use of mediation in family disputes indicates that there are higher compliance rates and less re-litigation for disputants using mediation versus litigation.³⁹

Views expressed in the submissions

- 2.40 A range of views were expressed in submissions about possible pre-action protocols. However, there was limited discussion of exactly what such pre-action requirements would include. Many submissions did not raise the issue. Others tended to support the view that disputes could often be resolved early with minimal legal preparation. One submission said:

The view I held up until the coming into effect of the Retail Leases Act 2003 [Vic] was that it was desirable that proceedings be commenced and at least minimal pleadings and interlocutory procedures be completed before it was desirable to proceed with a mediation so that parties have a fairly clear idea of the case brought by each and the documentation and evidence relevant to the issues in dispute.

...

[Since the Act] I have found that parties appear to be more willing to negotiate genuinely and effectively at the pre-issue stage and it seems to me that this is probably a result of the fact that proceedings have not been issued and, effectively, a contest commenced, lawyers have not had the opportunity to develop the adversarial attitude which is usually a part and parcel of the litigation process and which, inevitably, colours the parties' view of the matters in dispute. As a result, the parties appear to be less antagonistic and appear still to be on reasonable terms with one another which can be used to advantage in the mediation process, the legal costs incurred are relatively small as a result of which there is less concern to maintain a position in order to justify the expense incurred and the parties appear to be more genuinely concerned to resolve their disputes.⁴⁰

- 2.41 Another submission pointed out that:

Davies says: "Parties, and especially their legal advisers, are often reluctant to settle early if there is some realistic possibility that relevant information in the possession of other parties may materially affect the outcome of the case. So early mutual disclosure of relevant information is likely not only to make early settlement fairer but also to increase the rate of early settlement"⁴¹

39 Kelly, J, *Family & Conciliation Courts Review*, volume 34 (3) July 1996.

40 Mr Michael Redfern, Consultant, Russell Kennedy, Submission.

41 Mr John Walker, IMF, Submission. The IMF submission cites G Davies, *Civil justice reform: Some common problems, some possible solutions*, (2006) 16 *Journal of Judicial Administration* 5. See also G Davies, *A Blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale*, (1996) 5 *Journal of Judicial Administration* 201.

2.42 The Law Institute of Victoria said:

The LIV cannot comment in detail on pre-action protocols in the absence of an opportunity to consider specific draft protocols. The LIV expresses a general concern that pre-action protocols can impose a costly barrier to entry to litigants, and that the protocols may impact upon the fundamental democratic right of a citizen to take a claim to Court.

NADRAC’s view

2.43 NADRAC considers that each of these perspectives has some foundation.

In particular, it is of the view that careful consideration must be given to the imposition of requirements that involve a great deal of work being done by the parties or their solicitors at an early stage in the dispute. There are two reasons for that:

- any such requirements will impose potentially significant additional costs on those disputants (who may have been able to resolve their dispute without meeting those additional hurdles),⁴² and
- the preparation and advancement of legal arguments and the costs incurred in doing so may harden positions and make disputes more difficult to resolve.

2.44 Nevertheless, consistent with the guiding principles adopted by NADRAC, it considers that it is appropriate for prospective litigants to:

- consider whether the dispute can be resolved at an early stage by discussion of the issues in light of the needs and interests of the disputants, potentially with the assistance of a mediator or other ADR practitioner, and
- if the dispute cannot be resolved early, do the work necessary to develop any legal claim or defence and to attempt to settle the matter on that basis (whilst still considering whether any ADR process might assist to resolve the matter).

2.45 NADRAC considers that it is possible to develop some pre-action requirements that limit early costs but still encourage prospective litigants to take genuine steps to resolve their disputes before court or tribunal proceedings are commenced. This proposal is discussed at greater length below.

Genuine steps requirement

2.46 NADRAC proposes that the legislation governing federal courts and tribunals require prospective litigants to take genuine steps to resolve their dispute before court or tribunal proceedings are commenced.⁴³ Time limits in public law and other matters may need to be extended to enable this to occur.

42 See *Roundstone Nurseries Ltd v Stephenson Holdings Ltd* [2009] EWHC 1431 (TCC), para 1. R Jackson, *Review of Civil Litigation Costs: Preliminary Report*, Report, May 2009, p 1.

43 Some submissions, notably those from the Australian Government Solicitor and the Law Institute of Victoria raised doubts about the constitutionality of the imposition of mandatory pre-action requirements. NADRAC suggests that constitutional advice be sought on the issue.

The meaning of genuine steps

- 2.47 NADRAC is not aware that the phrase ‘genuine steps’ has been used before in the law of civil procedure either in Australia or in other countries. Nevertheless, NADRAC considers that it is a phrase that can usefully be given its ordinary meaning in the circumstances of any particular dispute.

Other formulations?

- 2.48 NADRAC considered other formulations such as the ‘genuine effort’ formula used in the Family Law Rules.⁴⁴ However, NADRAC considers that the reference to ‘effort’ is a much more subjective concept. It may be misinterpreted as applying a standard of conduct to some ADR processes that is inappropriate, particularly in confidential interest-based processes. If misinterpreted in that way, it may destroy the confidentiality of those processes. It may also open the door to further satellite litigation about the conduct of the parties in costs hearings.
- 2.49 In any event, NADRAC considers that while it is appropriate to require parties to take genuine steps to resolve a dispute, including attending ADR, it is inappropriate (and probably impermissible) to require a person to make concessions or compromise.⁴⁵
- 2.50 Using mechanisms such as ‘genuine effort’ or ‘good faith’ requirements may pressure disputants to make concessions in order to avoid later costs penalties. That may do injustice in those cases where:
- there is a significant power imbalance between the participants
 - one of the participants is financially disadvantaged, or
 - a participant has a very strong case and is justified in not compromising their position.
- 2.51 Some ADR processes, particularly mediation, are founded on the principles of self-determination and free agreement making. Participants must have the ability to say *‘I’ve given you a fair hearing and have listened to what you’ve had to say, I cannot agree for the reasons I’ve outlined and I continue to believe that my position is justified. I therefore propose to terminate the process.’* The important consideration is that the disputant has attended the process and has shown their commitment by staying for a reasonable period to listen to the other participant and to put their own view.⁴⁶

⁴⁴ See Part 1.2, R1.05 *Family Law Rules 2004*.

⁴⁵ In a similar vein, the Full Bench of the Australian Industrial Relations Commission once said that while it could make an order for the parties to meet at a specified time, it could not make an order for the parties to negotiate in good faith once they were there (see *Asahi Diamond Industrial Aust Pty Ltd v Automotive, Food Metals and Engineering Union* 1995 AILR 3-040 (1 March 1995, Print L9800)).

⁴⁶ These issues are discussed at greater length in Schedule 2 – Conduct Obligations in ADR – good faith, genuine effort and other formulations.

Exceptions

- 2.52 Perhaps the only situations where a requirement to take genuine steps to resolve a dispute may be problematic are in those cases which need to go to court or which are simply not capable of resolution. NADRAC proposes that the legislation address those situations by setting out some factors that may be taken into account by prospective litigants in determining the application of the guidelines in the circumstances of their particular dispute.
- 2.53 Factors which would be appropriate to consider include:
- the urgency of the matter
 - whether a prospective party would be unduly prejudiced by having to take such steps
 - whether the safety of a person or the security of any substantial property would be compromised, and
 - whether the dispute is essentially the same as one that has already been considered by the same court or tribunal.
- 2.54 NADRAC also recognises that some classes of matters may not be amenable to resolution without a court or tribunal process. One example is judicial review of many administrative decisions (the subject matter of the dispute may often mean it is inappropriate to require genuine steps to be taken to resolve it).

Guidelines

- 2.55 To assist prospective litigants, courts and tribunals to establish what ‘genuine steps’ may involve, NADRAC proposes that legislation should include guidelines to which prospective litigants and the court/tribunal should have regard.
- 2.56 The aim of the guidelines would be to ensure that:
- consideration is given to whether the dispute can be resolved early by discussion of the issues either directly or by using an interest-based dispute resolution process such as mediation
 - early notice of a dispute is provided without immediately focussing on legal action
 - pertinent information is provided while avoiding the exchange of copious amounts of irrelevant information at significant cost
 - where ADR is to be used, prospective litigants understand their obligation to quickly agree on an ADR practitioner and reach a joint agreement with that practitioner that includes a commitment to attend at least one session of ADR
 - before commencement of proceedings, a notice of intention to proceed with an application to a court or tribunal is sent to the respondent party which clearly sets out the legal issues in contention, the orders to be sought, and offers to negotiate a legal settlement either directly or in a process facilitated by a third person, and
 - the prospective litigants continue to consider whether any ADR process may help resolve the dispute, or at least narrow the issues in dispute.

Provision of information – court order

2.57 NADRAC proposes that a prospective party be able to apply to a court or tribunal for an order requiring that any necessary information be provided. This will help ensure that prospective litigants can get any information that is essential to resolve a dispute, without requiring or fostering the costly exchange of too much information. The statutory provisions dealing with ‘preliminary discovery’ could be amended to relax circumstances in which an order for limited discovery can be made.

Appointment of ADR practitioner – court order

2.58 NADRAC is aware of reports that even where disputants or parties agree to attempt ADR, they often find it difficult to agree on a practitioner.

2.59 However, NADRAC understands that there are many mediators, conciliators and arbitrators available, the majority of whom are competent. In part, the difficulty may reflect a lack of knowledge about the ADR market and how to go about finding a suitable practitioner. This issue is addressed later in the report.⁴⁷

2.60 NADRAC is of the view that there is a need for a mechanism to overcome such an impasse when it arises. One way of doing this would be for legislation to allow prospective litigants who cannot agree on an ADR practitioner to apply to the court or tribunal for an order that will resolve the situation.

2.61 There are at least two ways in which a court or tribunal could address the issue. First, the court could make an order nominating an ADR practitioner from within the court or tribunal who could conduct the ADR process on a fully recoverable ‘user pays’ basis.⁴⁸ Secondly, the court could make an order nominating a body outside the court or tribunal that will in turn nominate an appropriate practitioner.

2.62 NADRAC recognises that the second option has some drawbacks and could place courts and tribunals in the difficult position of being accused of favouritism by appearing to prefer one service provider over another.

2.63 Nevertheless, NADRAC considers the proposal worth pursuing. First, the biggest market for ADR is for mediation. The industry, with the support of the Federal Government, is in the process of setting up a National Mediator Standards Body. It does not seem unreasonable that courts and tribunals may be able to enter into appropriate referral arrangements with that body. Also, as the ADR field develops, it is expected that similar bodies will emerge for other ADR processes that can be used for similar purposes.

2.64 Secondly, pending any arrangements with such peak bodies, it should be possible for courts and tribunals to enter into some arrangements with existing service providers in their local areas that will enable the courts and tribunals to make such orders without being accused of favouring any particular organisations.

47 See Chapter 4 – Public and Professional Awareness of ADR.

48 That would avoid the need to nominate a private practitioner or organisation, and possible accusations of favouritism or bias, whilst ensuring that the service provided by the court or tribunal does not undercut and therefore distort the private market for the service.

Obligations on legal practitioners

- 2.65 Many studies have highlighted the importance of lawyers as gatekeepers to the justice system, including access to ADR, courts and tribunals.⁴⁹ It is important that lawyers fully inform their clients of all the available options for resolving their dispute and, in particular, of the benefits that ADR services may offer.
- 2.66 In particular NADRAC proposes that lawyers should be required to inform their clients about the:
- requirement to take genuine steps to resolve the dispute before commencing court or tribunal proceedings
 - private and community-based services that may help them resolve their dispute
 - advantages of resolving their dispute voluntarily, if possible, and the benefits of ADR
 - lawyer’s own likely costs and the likely costs of other parties for which the client may be liable if unsuccessful, and
 - likely timeframe for any legal proceedings.
- 2.67 Most lawyers are trained about the legal process but may not have any, or any extensive, training about ADR. Accordingly, this new requirement must be supported by more and better training for legal practitioners.⁵⁰

Obligations on parties

- 2.68 NADRAC is also of the view that a mechanism is needed to ensure that prospective litigants have been informed, or have found information, about the likely costs and timeframe of litigation, and have considered ADR as an option.
- 2.69 NADRAC therefore proposes that the parties themselves should be required to provide a statement to the court or tribunal as to whether they:
- have taken genuine steps to resolve the dispute before commencing the proceedings
 - have considered the services available outside the court or tribunal which may assist them to resolve the dispute, or issues in dispute, without recourse to the court
 - understand the benefits of various ADR processes, and
 - have obtained advice about estimated costs, costs exposures and timeframes for the proposed proceedings.
- 2.70 In addition, the statement would ask parties to inform the court or tribunal about what ADR processes they have engaged in, or if they did not, why not.

49 See discussion in H Genn, *Solving civil justice problems: What might be best?*, 2005, Scottish Consumer Council Seminar on Civil Justice.

50 In that context, see NADRAC’s recommendations at Chapter 4.

- 2.71 The statements provided by the parties would then be available to be used:
- by the court /tribunal when considering making an order for the parties to attend an ADR process
 - by the court/tribunal for other case management purposes
 - by the court/tribunal when making costs orders, and
 - for the purposes of research, particularly research on the level of awareness of litigants about litigation and ADR, the types of ADR engaged in, and the reasons why ADR is not used.
- 2.72 The statements should provide a useful research tool to build up information about different ADR processes and why they are or are not considered appropriate in particular kinds of matters.
- 2.73 Information provided to new parties in courts and tribunal proceedings would need to be developed to inform the parties about the requirement to provide the statement and the uses to which it may be put. Litigants should be informed that any information which they consider confidential should not be disclosed as it may be revealed in a later court or tribunal process.

Recommendation 2.1 – Pre-action requirement

The legislation governing federal courts and tribunals⁵¹ require genuine steps to be taken by prospective parties to resolve the dispute before court or tribunal proceedings are commenced.

Recommendation 2.2 – Pre-action guidelines

The legislation require prospective litigants to have regard to the following pre-action guidelines in determining what genuine steps may be appropriate.

Pre-action requirement for prospective applicants

A prospective applicant must, unless impracticable, take genuine steps to resolve a dispute before commencing proceedings in a federal court or tribunal by:

- considering whether the dispute may be resolved at an early stage by discussion of the issues with the prospective respondent, either directly or in a process facilitated by another person
- sending to the other prospective party at the earliest opportunity a notice of dispute which clearly but briefly outlines the issues in dispute, references any pertinent information or documents (including information as to whether the prospective applicant is insured and whether the prospective litigation is to be funded or supported by a third party), attaches copies of any documents considered necessary for resolution *and only those documents*, offers to further

51 NADRAC understands that this recommendation will not necessarily apply to all tribunals or all types of proceedings in tribunals. Judgments will need to be made about the applicability of NADRAC's recommendations to particular tribunals and particular types of matters within tribunals.

- discuss the dispute and proposes how that discussion will be conducted ie in writing, by telephone, in person, or by using an appropriate ADR process
- where an offer to use an ADR process is accepted by the prospective respondent or respondents, quickly agreeing on the identity of the ADR practitioner and the terms of his or her appointment and agreeing with the ADR practitioner the rules applicable to the ADR process (if any), and minimum attendance, eg agreement to attend at least one session
 - where the dispute does not resolve by correspondence, direct discussion or use of an appropriate ADR process, sending to the prospective respondent a notice of intention to proceed with the application, specifying the legal issues in dispute, the orders to be sought, any further relevant documents, and again offering to negotiate
 - attempting to negotiate or authorising a representative(s) to negotiate a settlement of the legal case whether directly with the prospective respondent or in a process managed by a third person, and
 - if the dispute does not resolve, considering whether a different ADR process may be preferable to litigation such as conciliation, early neutral evaluation or arbitration and, if so, offering to participate in such a process.

Pre-action requirement for prospective respondents

Each prospective respondent to an application for orders from a court or tribunal must, unless impracticable, take genuine steps to resolve the dispute as soon as possible by:

- on receipt of the notice of dispute, considering whether the dispute may be resolved at an early stage by discussion of the issues with the prospective applicant, either directly or in a process facilitated by another person
- responding to the notice of dispute at the earliest opportunity identifying any disagreement as to the issues in dispute, referencing any pertinent information or documents (information includes whether the prospective applicant was insured and whether any prospective litigation is to be funded or supported by a third party) not mentioned in the notice of dispute, attaching copies of any additional documents considered necessary for resolution *and only those documents*, indicating a willingness to further discuss the dispute and proposing how that discussion will be conducted ie in writing, by telephone, in person, or by using an appropriate ADR process
- where an offer to use an ADR process is accepted, suggesting an appropriate ADR practitioner or practitioners, and when agreement is reached as to the appropriate practitioner, quickly agreeing with the ADR practitioner and the prospective applicant the terms of his or her appointment, the rules applicable to the ADR process (if any), and minimum attendance eg agreement to attend at least one full session
- where the matter does not resolve by correspondence, direct discussion or use of an appropriate ADR process, responding to the prospective applicant's notice of intention to proceed, identifying any disagreement as to the legal issues in dispute, the orders to be sought, any further relevant documents, and agreeing to continue to negotiate

- attempting to negotiate or authorising a legal representative(s) to negotiate a settlement of the dispute whether directly with the prospective respondent or in a process managed by a third person, and
- if the dispute does not resolve, considering whether a different ADR process may be preferable to litigation such as conciliation, early neutral evaluation or arbitration and, if so, offering or agreeing to participate in such a process.

Recommendation 2.3 – Exceptions

The legislation set out factors that may be taken into account by prospective litigants in determining the application of the guidelines including urgency, undue prejudice, safety, security, the subject matter of the dispute, public interest factors, and whether the dispute is essentially the same as has been previously before the same court or tribunal.

Recommendation 2.4 – Available court orders

The legislation provide that where a prospective party considers that the other party has not provided the information necessary to enable the dispute to be resolved, the court or tribunal may order that the information be provided.

Recommendation 2.5

The legislation provide that where prospective parties cannot agree on a dispute resolution practitioner to conduct an ADR process, an application may be made to the court or tribunal for an order, nominating either i) an ADR practitioner within the court or tribunal to conduct the ADR process at a fee commensurate with a fully recoverable ‘user pays’ service or ii) a body outside the court or tribunal that will nominate an appropriate practitioner.

Recommendation 2.6 – Adverse costs orders

The legislation empower courts and tribunals⁵² to make an adverse costs order against a party, whether successful or not, if the party has not taken what the court or tribunal considers to be genuine steps to resolve the matter before commencing proceedings. The court or tribunal would have regard to compliance by the parties with the steps set out in clause 2.2 in making such an order.

Recommendation 2.7

The legislation provide that the costs covered by such an order may be calculated from the date of the first notice of dispute or from the time the claimant otherwise advised the other prospective party of the claim.

52 NADRAC understands that a power to award costs has been conferred on some tribunals but not on others, or by reference to particular categories of matters before tribunals. NADRAC understands that this recommendation may not be appropriate for all tribunals.

Recommendation 2.8 – Powers of courts and tribunals

The legislation provide that federal courts and tribunals⁵³ have the power to make rules or give directions about steps that prospective parties to proceedings in that court or tribunal must take before commencing particular kinds of proceedings, including mandatory attendance at any appropriate ADR process.

Recommendation 2.9

The legislation ensure that judges or tribunal⁵⁴ members may, at any time during court or tribunal proceedings, order a party to attend a facilitative or advisory ADR process without the parties' consent. The parties' consent would continue to be required for determinative processes such as arbitration.

Recommendation 2.10 – Obligations on legal practitioners

The legislation require legal practitioners to provide a prospective party to proceedings in federal jurisdiction with:

- information about the requirement to take genuine steps to resolve the dispute before commencing court or tribunal proceedings
- information about the services available outside the court or tribunal which may assist the person in resolving the dispute
- information about the advantages of resolving the dispute without commencing court or tribunal proceedings, and the benefits of ADR processes
- an estimate of the lawyer's costs
- an estimate of the costs of other parties for which the litigant may be liable if unsuccessful in the proceedings, and
- an estimate of the timeframe for proceedings, including for its commencement and conclusion.

Recommendation 2.11 – Obligations on parties

The legislation require parties to a proceeding in a federal court or tribunal to lodge with the court or tribunal a statement:

- that they have taken genuine steps to resolve the dispute before commencing the proceedings
- that they have considered the services available outside the court or tribunal which may assist them to resolve the dispute, or issues in dispute
- that they obtained advice about estimated costs, costs exposures and timeframes for the proposed proceedings
- setting out what ADR processes they have engaged in, if any, and
- if they have not attended an ADR process, or taken other genuine steps to resolve the dispute, the reasons why they did not do so.

53 This recommendation will not apply to the circumstances of some tribunals, such as the National Native Title Tribunal. It is intended that it be applied to tribunals only as appropriate.

54 As per footnote 3.

Chapter 3: Towards National ADR Principles

Introduction

- 3.1 As noted above, NADRAC's consultations and enquiries have confirmed that ADR has become a large, highly diverse and innovative field. However, it is also apparent that knowledge about some fundamental principles of ADR, and the distinctions between different types of ADR, is fairly limited. While it may be used extensively in some areas, its overall use is often patchy and idiosyncratic. Also, there is evidence of ongoing inconsistent use of terms like 'mediation' and 'conciliation' to describe widely different processes.
- 3.2 This chapter seeks to address that issue and make recommendations for the development and implementation of mechanisms that should help foster a more sophisticated understanding and use of ADR processes, both within the court system and outside it.

ADR in legislation

- 3.3 There is now a vast array of different legislation that deals with the use of ADR processes in different areas. At the federal level this includes: the Commonwealth's *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999*, the *Family Law Act 1975*, the *Administrative Appeals Tribunal Act 1975*, the *Native Title Act 1993*, the *Fair Work Act 2009*, the *Corporations Act 2001* and the *International Arbitration Act 1974*. This legislation deals with ADR, and sometimes particular processes like arbitration and mediation, differently. If one includes state and territory legislation, the differences are multiplied.
- 3.4 Some differences may be necessary to reflect subtle or profound differences in the various contexts of disputes covered by the legislation.⁵⁵
- 3.5 NADRAC considers that there is a strong argument for the consistent application of some ADR principles in federal, state, and territory legislation. In particular, it seems to be time to accept that some ADR processes, such as arbitration and mediation, have reached a level of maturity that requires their fundamental principles to be acknowledged, irrespective of the field of dispute. ADR processes that have not reached that level of maturity may nevertheless benefit from a degree of consistency in legislation to ensure they have a stable environment in which to develop further.

55 See *Native Title Act 1993* as amended by the Native Title Amendment Bill 2005.

- 3.6 A more uniform approach to ADR, and the core principles relevant to different ADR processes, would assist policy and law makers in developing better policy and improving ADR legislation. It would also assist consumers, referrers, evaluators, researchers and policy makers to make more informed choices based on sufficiently consistent and accurate information.
- 3.7 In addition, a more uniform approach could assist with identifying specific fields of endeavour that may require different approaches. NADRAC considers that where a field of dispute appears to demand a particularly unique form of dispute resolution, it would be better to acknowledge that and develop something specific as opposed to borrowing concepts from arbitration, conciliation or mediation. NADRAC is aware of several examples where this has been done to great effect.⁵⁶
- 3.8 Importantly, this is not a call for greater regulation. NADRAC simply calls for greater sophistication in how legislation deals with ADR. To increase consistency, and achieve greater sophistication, NADRAC has considered whether any principles may be collated into a single document such as an ADR Act or an ADR Protocol.

An ADR Act

- 3.9 An ADR Act could draw together principles common to individual ADR processes, providing a central legislative vehicle for a coherent and consistent ADR framework.⁵⁷

The possible content of an ADR Act

- 3.10 An ADR Act could provide for such matters as:
- pre- and post-filing requirements requiring disputants, legal representatives, courts and tribunals to take genuine steps to resolve disputes, using ADR whenever appropriate
 - consistent descriptions of ADR processes
 - certain minimum training and accreditation requirements for third parties⁵⁸
 - any general requirements with respect to the use of, or referral to, particular categories of ADR practitioners
 - appropriate general confidentiality, privacy and inadmissibility requirements⁵⁹

56 For example, the Takeovers Panel is a novel statutory form of ADR developed for a distinct dispute resolution problem (see www.takeovers.gov.au, visited 21 September 2009). The Takeovers Panel is described as a ‘peer review body that regulates corporate control transactions in widely held Australian entities...’ For a detailed discussion of the Takeovers Panel, its *modi operandi* and its powers, see the High Court’s decision in *Attorney-General (Cth) v Alinta Limited* (2008) 233 CLR 542. Other examples are the industry ombudsmen or External Dispute Resolution (EDR) mechanisms developed to provide an alternative to court actions over consumer complaints.

57 As opposed to market-contract and self-regulatory approaches. See in relation to regulating mediation: N Alexander, *Mediation and the Art of Regulation*, (2008) 8 (1) Queensland University of Technology Law and Justice Journal 1.

58 See Chapter 6 – Supporting Quality ADR.

59 See Schedule 2 – Conduct Obligations in ADR.

- any appropriate conduct requirements for participants, professional advisers and people who attend in a supporting role in different ADR processes⁶⁰
 - cost provisions, including provision for adverse cost orders for failure to take genuine steps to resolve disputes, or
 - general obligations on courts and tribunals to assist with increasing the awareness of ADR, such as obligations to inform clients about ADR processes.⁶¹
- 3.11 An ADR Act could also set out nationally consistent admission requirements for lawyers and other professionals who may be trained in ADR.⁶²
- 3.12 An ADR Act could promote the integrity of differing ADR processes at the federal level by setting out definitions to be applied consistently across the entire statute book. However, to account for specific fields of endeavour that may require different approaches, any such Act would need to be an Act of general application that remains subject to specific provisions in other laws dealing with particular subject matters.
- 3.13 The object of an ADR Act would be to develop and protect some core ADR principles while acknowledging the need for particular pieces of legislation to depart from them where appropriate.

ADR legislation – an example and international trends

- 3.14 The *Mediation Act 1997 (ACT)* includes provision for competency standards, registration, confidentiality, admissibility and immunity.
- 3.15 Internationally, mediation legislation, in particular, has been gaining momentum for quite some time. In 2001, the United States of America *National Conference of Commissioners on Uniform State Laws (Conference)* acknowledged that mediation has ‘become an integral and growing part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.’⁶³ Focussing on promoting candour in the mediation process (by providing rules on the issues of confidentiality and privileges in mediation), the Conference drafted the *Model Uniform Mediation Act (UMA)* and recommended its adoption by the States. The UMA was amended in 2003 to include the *UNICTRAL Model Law on International Commercial Conciliation*. The Prefatory Notes to the UMA proffer four reasons championing this approach, including that the UMA is able to:

60 The inclusion of a ‘good faith’ (or similar) obligation as a rule of conduct may have unforeseen consequences. Good faith obligations may lead to a possible loss of confidentiality of ADR processes. Enforcing good faith obligations may require courts to inquire into the parties’ conduct, thus reducing or even eliminating confidentiality. See Schedule 2 – Conduct Obligations in ADR. See also Schedule 3 – Confidentiality in ADR processes.

61 See Chapter 5 – ADR Services.

62 Although such requirements may be better placed in specific legislation relating to the professions concerned. See Chapter 4 – Public and Professional Awareness of ADR.

63 Prefatory Notes to the *Uniform Mediation Act (As amended)*, available at <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm> (viewed 13 September 2009).

- increase the predictability of confidentiality and privilege in state jurisdictions
- assist with increased cross-jurisdictional mediation
- bring certainty in relation to confidentiality, privilege and admissibility of communications and increase candour in mediation, and
- simplify a complex subject matter.⁶⁴

3.16 The UMA seeks to do so by applying:

[...] a generic approach to topics that are covered in varying ways by a number of specific statutes currently scattered within substantive provisions. [...] Uniformity of the law helps bring order and understanding across state lines, and encourages effective use of mediation in a number of ways.⁶⁵

3.17 The UMA has been adopted by a number of US States.⁶⁶

3.18 A similar trend is discernable in the European Union (EU). Several member states, including Slovakia⁶⁷ and Austria,⁶⁸ implemented national Mediation Acts in the early 2000s. In 2008, the EU promulgated the EU Mediation Directive 2008/52/EC.⁶⁹ The *Directive* sets forth mediation principles that should apply to mediation in cross-border disputes. It seeks to ensure a predictable legal framework applicable to such disputes and to enhance the European internal market.⁷⁰ However, the *Directive* also envisages that Member States may apply the basic principles to their national mediation processes. Several member states, such as Germany, are considering the introduction of national mediation laws.

3.19 Other countries have comprehensive ADR Acts that cover a wider range of ADR processes, including mediation, arbitration and conciliation. One example is the ADR Act promulgated in the Philippines.⁷¹

Other legislation of general application

3.20 There are other examples where general principles or rules on particular topics have been codified with a view to drawing them together in a central document. Examples include the Commonwealth's *Judiciary Act 1903* or *Evidence Act 1995*.

64 *ibid.*

65 *ibid.*

66 11 US jurisdictions have adopted the UMA, including the District of Columbia, New Jersey and Illinois. Four States are currently in the process of adopting it. See the National Conference of Commissioners on Uniform State Laws' UMA fact-sheet, available at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (viewed 13 September 2009).

67 Slovak Republic, Act No. 420/2004.

68 Austria, Bundesgesetz über Mediation in Zivilrechtssachen, BGBl. I Nr. 29/2003, available at [http://www.mediatorenliste.justiz.gv.at/mediatoren/mediatorenliste.nsf/ContentByKey/VSTR-7JRVHG-DE-p/\\$file/2003a029.pdf](http://www.mediatorenliste.justiz.gv.at/mediatoren/mediatorenliste.nsf/ContentByKey/VSTR-7JRVHG-DE-p/$file/2003a029.pdf) (viewed 13 September 2009).

69 European Union, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF> (viewed 13 September 2009).

70 See Recitals 7 and 8 of the *Directive*. The *Directive* is a regulatory framework.

71 A copy of the Philippines ADR Act can be found at <http://www.pdrci.org/web1/ra9285.html> (viewed 17 September 2009).

Both statutes make rules with respect to proceedings before federal courts. The *Acts Interpretation Act 1901 (Cth)* is another example of an act of general application, specifying the rules and principles relating to statutory interpretation. It seems at least conceivable to design an ADR Act of general application, like the Evidence Act or the Acts Interpretation Act, without seeking to impose greater regulation on the use and development of ADR processes.

Some arguments against an ADR Act

- 3.21 It needs to be acknowledged that implementing high level consistent ADR provisions in one generic statute would have several disadvantages.
- 3.22 A 'one-size-fits-all approach' may be inappropriate for ADR. A fine balance may have to be struck and (overly rigorous) attempts to legislate may destroy effective ADR processes that are working well.
- 3.23 It has been noted that different laws have different provisions in relation to ADR, and so doing enables flexible and targeted provisions to be included in the enabling legislation of federal courts and tribunals.
- 3.24 Legislative implementation could be regarded as a highly formalistic measure that is static and inflexible. Depending on what is included, it may be possible that legislative measures have the potential to contribute to greater formalism in, and legalistic treatment of, ADR processes.⁷²
- 3.25 Legislative provisions that conceive of ADR only in the context of settlement of legal actions may not permit or foster ADR outcomes that meet the needs of the parties (such as a simple apology or agreement for a party to take some action which a court could not order).
- 3.26 Even if it were desirable, a comprehensive codification of ADR processes may not be possible. It appears that ADR legislation would need to leave some aspects to self-regulation and development.⁷³ Also, such general legislation may inadvertently exclude some ADR processes or certain types of ADR service providers from its application.⁷⁴ This problem appears compounded where such legislation would be developed without appropriate consultation with the leading experts in the field.

Views expressed in the submissions

- 3.27 NADRAC's Issues Paper raised the question of whether it would be helpful to include certain broad principles and obligations relating to ADR in legislation, court rules or other subsidiary legislation. In response, the Australian Commercial Disputes Centre Limited noted the advantages of the flexibility of court rules.

72 See Schedule 1 – Domestic Arbitration.

73 N Alexander, *Mediation and the Art of Regulation*, (2008) 8 (1) Queensland University of Technology Law and Justice Journal 1, pp 9 – 10.

74 B Clark, R Mays, *Regulating ADR – the Scottish Experience*, Report [1996] 5 Web-Journal of Current Legal Issues, available <http://webjcli.ncl.ac.uk/1996/issue5/clark5.html> (viewed 13 September 2009).

3.28 The NSW Attorney-General’s Department provided a copy of its *ADR Blueprint (A Framework for the Delivery of ADR services in NSW)*. The Department noted the importance of ‘overriding purpose’ provisions in legislation:

The duty for parties and their legal representatives to assist the court to further the overriding purpose of the “just, quick and cheap resolution of the real issues in the proceedings” is entirely consistent with the greater use of ADR.⁷⁵

3.29 The Department noted that a ‘piecemeal’ approach has been adopted in relation to ‘overriding purpose’ provisions, with various statutory schemes in Australia adopting such provisions.

3.30 In its submission, the AAT stated:

[...] processes with respect to ADR represent a good model for the use of ADR. The Tribunal is always open to improvement and refinement of these processes within the current overarching legislative and procedural framework. The cost of any significant changes to the use of ADR (some of which would require legislative change) in the Tribunal context should be weighed carefully against the benefits of the existing system.⁷⁶

3.31 Similarly, the AAT emphasised that underlying ADR practices must be consistent.⁷⁷ The NSW Bar Association also supported greater consistency in relation to ADR related issues in legislation, court and tribunal rules and practice notes.⁷⁸

NADRAC’s view

3.32 NADRAC has considered whether to recommend the introduction of an ADR Act.

3.33 Generally, NADRAC considers that an ADR Act could provide a coherent ADR framework that would promote consistency across the ADR sector. Such a framework would provide a more stable legislative environment for the development of ADR into the future. It could foster greater resilience in ADR processes and help raise awareness of ADR amongst courts and tribunals, the legal profession and the general public. The ‘piecemeal’ inclusion of ADR provisions in different legislation at the federal and state levels supports that approach.

3.34 NADRAC suggests that legislation that includes high level ADR principles would not necessarily interfere with legislation that sets out specific ADR procedures and processes. Consistency in relation to high level ADR principles and concepts would not preclude diversity in relation to specific ADR systems and processes.

3.35 There are strong arguments in favour of courts and tribunals having largely self-contained and comprehensive procedural regimes, including their own ADR provisions tailored to meet the very different circumstances to which they apply.

⁷⁵ NSW Attorney-General’s Department, *ADR Blueprint Discussion Paper*, Discussion Paper, April 2009, Proposal 8, p 4.

⁷⁶ Administrative Appeals Tribunal, Submission, p 2.

⁷⁷ *ibid.*

⁷⁸ NSW Bar Association, Submission, p 2.

- 3.36 NADRAC members had diverging views on this issue. Accordingly, on balance, NADRAC concluded that it cannot recommend the introduction of an ADR Act at this stage.
- 3.37 However, NADRAC hopes that consideration will be given to encouraging greater uniformity in ADR legislation, particularly in the way it deals with recognised processes like arbitration, conciliation and mediation. It also considers that this issue would be worth revisiting as the ADR field develops.

An ADR Protocol

- 3.38 NADRAC considers it important that principles common to individual ADR processes are used consistently, including in legislation. An ADR Protocol could be a valuable tool to encourage greater consistency in the development of ADR.
- 3.39 Such a protocol would emphasise the importance of ADR in the civil justice system, including by stating principles relevant to the range of ADR processes. Developed in broad consultation with all stakeholders and widely promulgated, it could serve to inform government, professional ADR organisations, the judiciary, the legal and other professions, as well as disputants. Also, a Protocol could inform the Government as to whether an ADR Act may be appropriate at some stage in the future.

Principles and descriptions

- 3.40 An ADR Protocol could include principles such as the confidentiality of ADR processes, and some basic conduct requirements for disputants or their representatives.⁷⁹ In addition to stating various ADR principles, an ADR Protocol could draw together consistent descriptions of ADR processes as set out in the NADRAC *Glossary of Terms*.⁸⁰ NADRAC notes that the inconsistent use of ADR terms remains a significant issue of concern. This was mentioned in the vast majority of submissions that NADRAC received and is discussed further below.
- 3.41 An ADR Protocol could also provide guidance on the suitability of ADR processes in different circumstances. More specifically, an ADR Protocol may:
- raise awareness of ADR amongst court and tribunal staff, legal professionals, other professionals, the business community and the general public
 - emphasise the potential of ADR to assist disputants to resolve their disputes themselves in a way that best suits them
 - highlight the distinctions between ADR processes and how various processes can assist in differing circumstances
 - draw attention to the responsibility of disputants and their representatives to attempt to resolve their disputes themselves, and if a matter is being considered

⁷⁹ For a discussion of relevant issues see Schedule 2 – Conduct Obligations in ADR. See also Schedule 3 – Confidentiality in ADR processes.

⁸⁰ See NADRAC's *Glossary of Terms*, available at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_GlossaryofADRTerms_GlossaryofADRTerms (viewed 18 September 2009).

- by a court or tribunal, help ensure that finite court/tribunal resources are not expended inappropriately or unnecessarily
- foster realistic expectations of ADR services amongst potential users including disputants and legal professionals
 - provide information about issues such as confidentiality, non-admissibility, and the proper role of different ADR practitioners, including their conduct and any immunity from suit where it applies
 - provide information about the expected conduct of participants, legal professionals, other professionals and people who attend to support the participants in the process
 - provide information about the relationship between ADR processes and courts and tribunals and how agreements made in ADR processes can be enforced
 - address procedural, attitudinal and other barriers to greater utilisation of ADR
 - provide advice about how to identify high-quality ADR services and any recognised standards that should apply to them
 - raise awareness amongst private ADR providers of the need to evaluate their services and capture data that will support evaluation and research in relation to ADR, and
 - provide targeted information for indigenous, ethnic, non-English speaking, disabled and disadvantaged and marginalised groups, including publishing the Protocol in different languages.

Views expressed in the submissions

3.42 In its ADR Blueprint, the NSW Attorney-General's Department stated:

It may well also be desirable if there was a guide for people involved in civil disputes to provide some further guidance and assistance. A guide could assist people in understanding their rights and obligations and in highlighting the options for ADR.

The Guide could be developed by the Department of Attorney General and Justice, in consultation with the public and other stakeholders. The Guide would be made widely available, including to courts and tribunals where it could be given to people enquiring about how to start legal proceedings.⁸¹

NADRAC's view

3.43 NADRAC considers that an ADR Protocol that is promulgated widely would have significant value. The ADR Protocol could help promote consistency of legislation at federal, state and territory level.

81 NSW Attorney-General's Department, *ADR Blueprint Discussion Paper*, Discussion Paper, April 2009, p 7. This is now the subject of a recommendation (Recommendation 2) in the NSW Attorney-General's Department's *ADR Blueprint Draft Recommendations Report 1: Pre-Action Protocols and Standards*, August 2009.

- 3.44 NADRAC believes that, at the very least, an ADR Protocol should include principles common to individual ADR processes as well as consistent definitions for commonly used ADR terms. In addition, a Protocol may inform disputants about ADR processes, what to expect of these processes, what might be expected of them, their advisers and the ADR practitioner during the ADR processes.
- 3.45 NADRAC proposes that an ADR Protocol be prepared in broad consultation with key stakeholders. This will help ensure acceptance and promotion of the ADR Protocol. NADRAC is able to prepare such a Protocol and to advise on strategies for its launch and ongoing promotion.
- 3.46 NADRAC is of the view that a comprehensive ADR Protocol will contribute significantly to the development of the ADR sector, and will set the groundwork for the future development of general ADR legislation. NADRAC also believes that consultation in relation to developing and adopting an ADR Protocol is likely to have a strong impact on understanding and acceptance of ADR as a tool in federal civil disputes.

Recommendation 3.1

A national ADR Protocol be developed and widely promulgated to inform the Australian community about the importance and advantages of ADR in the federal civil justice system, the overarching principles common to individual ADR processes, consistent descriptions of commonly used ADR processes, and appropriate conduct in different ADR processes, for disputants, practitioners, professional advisers and persons who attend in a supporting role.

Recommendation 3.2

The Attorney-General refer to NADRAC the task of preparing the ADR Protocol.

The role of the Attorney-General's Department

- 3.47 NADRAC considers that more could be done to encourage consistency in federal legislation and programs. NADRAC notes that the Attorney-General's Department already has responsibility for ADR policy under the Administrative Arrangements Orders. Accordingly, the Department is well positioned to take on a greater leadership role and encourage a more coordinated approach to the development of ADR policy, legislation and programs. Both the Cabinet and Legislation Handbooks could be amended to reflect the Department's role in this area.

Inconsistent use of ADR terminology

- 3.48 NADRAC has raised the inconsistent use of ADR terminology as a potentially significant barrier to the use and development of quality ADR services.
- 3.49 NADRAC has been highlighting this issue (and the problems that arise as a consequence of this lack of consistency) for many years. NADRAC has sought,

and continues to promote, a more consistent use of ADR terminology, including by releasing a *Glossary of Common Terms* in 2002.⁸² The call for more consistency has been echoed by commentators, researchers, practitioners and law makers who regularly identify inconsistency of ADR terminology as a significant problem for acceptance and further development of ADR. Recent reports, such as Victoria's *Inquiry into Alternative Dispute Resolution and Restorative Justice*,⁸³ also highlighted the issue.

Examples of inconsistency

- 3.50 Examples of the inconsistent use of ADR terminology exist at both federal and state level. NADRAC is aware that many services that are called mediation do not fit that definition. This inconsistency exists despite mediation having been described by NADRAC for many years (and having been defined more recently by the NMAS). In both federal and state legislation, mediation in particular is often used inappropriately to describe processes that bear little resemblance to the process defined by NMAS.
- 3.51 The ADR field has developed significantly over the last 15 to 20 years. That development has seen the emergence of a range of discrete and often very different ADR processes.⁸⁴ At the same time, it has resulted in the emergence of a framework of common principles relevant to particular ADR processes. The NMAS is a good example. In addition, broad principles that apply across the ADR sector (such as the distinctions between facilitative, advisory and determinative processes) are now fairly widely accepted in Australia. Common ethical and practice issues often arise from different forms of ADR processes.
- 3.52 NADRAC received evidence that certain principles common to individual ADR processes are used inconsistently, including in legislation at federal, state and territory level. It may be accepted that some specific fields of endeavour require different approaches. For example, the presence of multiple parties with different communications styles and a vast array of expectations could require a different legislative approach for native title disputes.⁸⁵ However, it would seem timely to provide some consistent and accurate guidance about different ADR processes. The ADR Protocol which NADRAC proposes could address that issue.

82 See NADRAC's Glossary of Terms, available at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_GlossaryofADRTerms_GlossaryofADRTerms (viewed 18 September 2009).

83 Victorian Law Reform Committee, *Inquiry into Alternative Dispute Resolution and Restorative Justice*, Final Report, May 2009.

84 T O Main, *ADR: The new Equity*, (2005) 74 University of Cincinnati Law Review 329, p 352. J R Sternlight, *Is binding arbitration a form of ADR?: An argument that the 'ADR' has begun to outlive its usefulness*, (2000) Journal of Dispute Resolution 97. P Tochtermann, *Agreements to negotiate in the transnational context – issues of contract law and effective dispute resolution*, (2008) Revue de Droit Uniforme 685, p 697.

85 J Sosso, *Good faith mediation in the National Native Title Tribunal*, (2006) 9(8) ADR Bulletin 144, p 145. See Schedule 3 – Confidentiality in ADR processes.

The effect of inconsistencies on the use of ADR

- 3.53 The inconsistent use of both ADR terminology and principles potentially affects consumers, referrers, evaluators, researchers, policy makers, courts and tribunals, all of whom need consistent and accurate information on ADR. As a result, it is likely that many disputes that could effectively be resolved through ADR are litigated in the courts and tribunals.
- 3.54 Possible flow-on effects may include:
- no awareness, or low awareness, of the diversity of ADR processes⁸⁶
 - misconceptions about the use of ADR
 - unrealistic expectations of ADR by potential users possibly resulting in disappointment, alienation, anger and/or unsuccessful ADR processes
 - underutilisation of ADR, or
 - inappropriate referrals to ADR.
- 3.55 The Californian *Foxgate* case demonstrates a potential problem.⁸⁷ In that case, the question arose as to whether a report prepared by a retired judge ‘mediator’ was admissible. The relevant Evidence Act afforded confidentiality to mediation processes. Thus, the matter turned on the question whether the process conducted by the judge ‘mediator’ was in fact a (confidential) mediation. The Court ultimately concluded, after having considered the particular circumstances of the matter, that the process was mediation. However, the Court expressly warned that a slightly different factual matrix could have resulted in a very different outcome. If so, the Court cautioned that a different level of confidentiality may have attached to the process, allowing the report into evidence.

Views expressed in the submissions

- 3.56 The submissions overwhelmingly supported the need for greater consistency in the use of ADR terminology. It was argued that such consistency is important to increase understanding, protect users from confusion and from coming to proceedings having different expectations of the process, and to improve awareness.⁸⁸ However, there was little support for legislated definitions of ADR processes.

NADRAC’s view

- 3.57 NADRAC considers that there are important reasons for pursuing consistent terminology. Common definitions or descriptions assist consumers, referrers, evaluators, researchers and policy makers by ensuring that they each have consistent and accurate information. Inconsistent terminology could undermine the further development of ADR.

⁸⁶ See Chapter 4 – Public and Professional Awareness of ADR.

⁸⁷ *Foxgate Homeowners Association v Bramalea California Inc.*, (2001) 25 P3d 1117 (California).

⁸⁸ Transport Industry Ombudsman, Submission No. 23, p 3.

3.58 NADRAC agrees with those submissions warning that inconsistent terminology could lead to unrealistic consumer expectations and dissatisfaction as well as inappropriate referrals. NADRAC is concerned that inconsistencies could also provide a significant impediment to meaningful research and evaluation, with the lack of such data potentially resulting in poor policy development.⁸⁹

Recommendation 3.3

The Attorney-General's Department take a leadership and coordination role in advising on federal ADR policy, including in the development of legislation and ADR program initiatives.

⁸⁹ See Chapter 6 – Supporting Quality ADR.

Chapter 4: Public and Professional Awareness of ADR

Introduction

- 4.1 The Issues Paper suggested that a widespread lack of knowledge and understanding of ADR amongst the public at large, disputants, and professionals might be a significant barrier to the use of ADR. A key strategy to overcome this barrier is to provide central players with easy access to meaningful and appropriate information about ADR. This chapter will deal with possible ways of increasing the awareness of:
- the public more generally
 - the disputants, and
 - the relevant professions.

Increasing public awareness of ADR

- 4.2 There appears to be a general need to increase the public's awareness of ADR. There seems to be a significant cross-section of the public that does not know what ADR is, or is suspicious of it. Many people are still ill-informed about how ADR processes may assist them with the resolution of their disputes. Others may be confused about the sheer number of services and providers. Apart from big business and government, many users of the civil justice system may be one-off users who have no previous experience to guide them. Some members of the public may have had previous experience with ADR and were not satisfied with the outcome. Their dissatisfaction may have a number of reasons, including that their matters were not resolved (adding to anger, frustration and further costs) or because participants agreed to outcomes because of extraneous influences (such as a mediator who could not sufficiently address power dynamics).
- 4.3 An important means of overcoming lack of knowledge, suspicion, confusion or dissatisfaction is the provision of high quality, easy to understand information. Increasing the public's awareness in that way may assist members of the public to:
- take a proactive approach to resolve their own differences
 - make informed choices and selecting for themselves the type of conflict or dispute resolution tools they consider appropriate for their circumstances
 - ask about the use of ADR when seeking professional advice to resolve their disputes
 - discuss proposed dispute resolution paths with their professional advisers, or
 - inquire about or even request different processes to resolve their dispute.

- 4.4 NADRAC's Issues Paper suggested a number of ways in which the public may be informed, including:
- promotional campaigns targeted at one-off or infrequent users
 - promotional campaigns targeted at regular and frequent users, or
 - a central, well publicised access point for information on ADR.
- 4.5 Other options may include imposing obligations on lawyers to provide information to their clients and imposing obligations on the courts to provide information to all prospective applicants.⁹⁰

Promoting ADR to increase public awareness

- 4.6 Promoting ADR to increase public awareness appears to be central to increasing the use of ADR. Information may be provided to the public at large prior to becoming disputants. Central to achieving more public awareness will be increasing the visibility of ADR within the community.
- 4.7 A number of strategies could achieve this, including:
- identifying specific groups who are particularly prone to disputes and providing them with targeted ADR information
 - using groups as 'seed groups' to demonstrate the success of ADR
 - preparing and hosting ADR events within communities
 - expanding the use of schools, for example through programs such as SCRAM⁹¹
 - the use of ADR role models or ADR ambassadors to give ADR a higher profile
 - involving community leaders in 'train the trainer' programs, or
 - creating and using 'shop windows' that advertise the use of ADR.
- 4.8 The creation and use of 'shop windows' may include using businesses, organisations and government agencies to promote the use of ADR. Of particular interest for such a promotional campaign would be gaining the support of those businesses, organisations and agencies that are frequent users of the civil justice system. For example, it may be worth considering creating a label that identifies an entity as one that uses ADR as its preferred dispute resolution method.⁹² Before it could carry the label, the organisation or agency would need to sign-up to a code of conduct or protocol which obliges them to fulfil certain requirements. This may include, for example, that entities above a certain size may have to train their complaints handling or legal staff in ADR. The implementation of such a scheme should be accompanied by appropriate mechanisms that encourage its uptake.

90 See Chapter 2 – Encouraging greater use of ADR, Recommendation 2.10.

91 SCRAM is an interactive role play competition that aims to promote and consolidate students' communication, negotiation and decision making skills. See for — Western Australia: www.scram.business.ecu.edu.au; — Northern Territory: www.cjc.nt.gov.au; — New South Wales: <http://www.lawsociety.com.au/community/forschools/scram/index.htm> (viewed 14 September 2009)

92 A scheme of this nature could be included in the proposed ADR Protocol – see the discussion of the ADR Protocol in Chapter 3.

- 4.9 The above strategies could significantly increase the visibility of ADR within the community, potentially triggering curiosity to learn more about ADR and leading to a better public understanding of it. ADR could become as familiar as litigation, thus overcoming problems such as those associated with the one-off or infrequent justice system user. Businesses, organisations, government agencies or seed groups would also be important first-contact points for the dissemination of appropriate information about ADR.

Making information educative

- 4.10 Any information disseminated to promote the use of ADR must also be educative. To achieve this, information should explain appropriately and correctly ADR processes and what benefits they can offer. This would include explaining how quality services can be identified. It may also be useful to explain what ADR processes cannot do, so that disputants do not develop unrealistic expectations. Some ethnic groups may need culturally appropriate information and education, including information in appropriate languages.
- 4.11 Such information may assist people in a number of ways. It could contribute to self-help skills by enabling people to make informed decisions to pre-empt conflict (for example, by offering easy-to-apply strategies that enable people to talk through their issues rather than escalating them). NADRAC notes that such information is already available from a number of outlets, including several conflict resolution or avoidance services. It is designed to assist members of the community to eschew interpersonal differences and increase their overall resilience by improving their conflict avoidance and resolution skills.⁹³
- 4.12 In addition, it would also enable people to appreciate the features and characteristics of different ADR processes, and appropriately assess their respective advantages and disadvantages in particular circumstances. It could also allow people to perform a certain level of self-screening, either with or without seeking professional help. If professional help is sought, such information would enable people to better discuss their options with advisers.

Easily accessible high-quality information

- 4.13 NADRAC has been concerned for a long time that for many members of the public, appropriate high-quality ADR information is still difficult to find. This problem was recently again highlighted in the Attorney-General's Department's report *A Strategic Framework for Access to Justice in the Federal Civil Justice System*.⁹⁴

93 See, for example, the Conflict Resolution Network, located at www.crnhq.org (viewed 14 September 2009).

94 Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report, 2009, pp 16 – 18, p 55.

4.14 Outside the courts, ADR services are decentralised and a myriad of ADR service providers offer a broad range of ADR services. To promote their services, ADR service providers currently use a spectrum of media, especially the internet, print media or flyers. In this environment, it is often difficult for people to find credible high-quality information. The problem is compounded because there are no national standards for the majority of ADR services which consumers and practitioners are able to use as an initial benchmark to assess the credibility and quality of the service.⁹⁵

Gateways to high-quality ADR information

4.15 There may be a number of ways to facilitate the provision of high-quality ADR information to the public.⁹⁶

4.16 First, the promotional campaigns referred to above are one possible way of achieving this result. Secondly, the provision of appropriate information at the point of service is another very important aspect which in many cases can lead to avoiding the escalation of differences. Thus, NADRAC generally approves of the ‘no wrong number, no wrong door’ approach for government agencies as recommended in the recent Attorney-General’s Department’s report *A Strategic Framework for Access to Justice in the Federal Civil Justice System*.⁹⁷ To be effective, this approach will require an appropriate level of commitment from agencies and the provision of adequate resources. NADRAC also notes that the effectiveness of this approach should be monitored and evaluated on a long-term basis.

4.17 NADRAC also considers that imposing obligations on courts and professionals to provide prospective clients with such information may be appropriate.⁹⁸

4.18 For those who do not use government agencies in the way envisaged by the above approach, or who are not yet inclined to seek professional help or the assistance of the courts, providing an online-based central information gateway would offer a convenient, easy to access, central source of information.⁹⁹ To increase user-friendliness, such a gateway should also feature an associated helpline. This model of providing information is not new in Australia and has been tested before.

95 The National Mediator Accreditation System applies now to the mediation sector. See Chapter 6 – Supporting Quality ADR.

96 The following discussion intersects with other discussions in this report. See Chapter 5 – ADR Services. Note, however, that the focus of this discussion focuses on accessing ADR information while Chapter 5 focuses on accessing ADR services.

97 Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report, 2009, pp 79 – 80.

98 See Chapter 2 – Encouraging Greater Use of ADR.

99 This strategy is also contemplated in other jurisdictions, such as the European Unions E-Justice Portal initiative. See for example, M Velicogna, *Justice Systems and ICT: What can be learned from Europe*, (2007) 3(1) Utrecht Law Review 129. For a more detailed discussion, see also European Commission of the Efficiency of Justice, *Use of information and communication technology (ICT) in European Judicial Systems*, Report, 2007.

Examples include *Family Relationships Online* and the *Family Relationships Advice Line*.¹⁰⁰ At state level, *Law Access NSW* or the Victorian *Dispute Resolution Advisory Service* may be referred to.¹⁰¹

- 4.19 NADRAC notes that establishing such a gateway and associated helpline would be in line with the Government's findings and conclusions in its recent report *Interacting with Government — Australians' use and satisfaction with e-government services*.¹⁰² With a society becoming increasingly accustomed to technology-mediated information provision, it would be a strong step towards increasing the awareness of ADR and, more broadly, the civil justice system.

Reaching a wide range of users

- 4.20 A comprehensive information gateway and associated helpline could be designed to satisfy the needs of a wide range of users. In particular, the special needs of one-off users, people in rural and remote areas, people from ethnic or non-English speaking backgrounds, the disabled and the financially disadvantaged should be considered in its design. It may be worthwhile to use these groups as benchmarks for developing the gateway's design features.
- 4.21 NADRAC understands that it is likely that a gateway would have to reconcile a number of often competing requirements and interests.
- 4.22 It would be desirable to provide a holistic national approach by tying together both federal and state information. This approach could make the gateway even more comprehensive in its content and contribute to avoiding competition between systems and thus potential confusion of their users.
- 4.23 The rising needs for specialised information may require that in the long-term, the online information available through the gateway may have to be made accessible using a wider range of technologies. Such needs may be generated by certain segments of the community. One impetus is likely to come from disadvantaged or marginalised communities. Another one may be further developments in technology that will make it necessary to expand the technological repertoire of a gateway to avoid, minimise or even eliminate other potential barriers to accessing information.¹⁰³ Thus, in addition to the helpline, it would be necessary to enhance

100 According to the website, 'Family Relationships Online provides all families (whether together or separated) with access to information about family relationship issues, ranging from building better relationships to dispute resolution. It also allows families to find out about a range of services that can assist them to manage relationship issues, including agreeing on appropriate arrangements for children after parents separate.' The Family Relationship Advice Line is a national telephone service established to assist families affected by relationship or separation issues. The advice line's details are included on the same website. See <http://www.familyrelationships.gov.au/> (viewed 23 September 2009).

101 Law Access New South Wales can be accessed via <http://www.lawaccess.nsw.gov.au/>. The Victorian Dispute Resolution Advisory Service is located at <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/The+Justice+System/Disputes/Dispute+Resolution/JUSTICE++Dispute+Resolution+Advisory+Service> (both websites viewed 24 September 2009).

102 This report was prepared by the Australian Government Information Management Office (AGIMO). It is available at <http://www.finance.gov.au/publications/interacting-with-government/docs/interacting-with-government-report.pdf> (viewed 20 September 2009). See also Chapter 7 – Better Court Processes using ADR Techniques.

103 For example, to overcome any remaining digital divide. See also Chapter 5 – ADR Services.

any gateway by adding other technology-mediated features to it, including email, voice-over-IP systems, SMS services and perhaps even online-based video conferencing applications. Also, a gateway could be expanded to offer assessment and referral services or other outreach programs.

Access at reduced costs

4.24 To reduce or minimise any costs associated with the development of a gateway, already existing online platforms may be a useful starting point. For example, NADRAC is aware that the previous government initiated an online-project called *Australian Law Online*.¹⁰⁴ This webpage was intended to provide a central access point to law and justice related information and services from all levels of government. Specific online useability and accessibility principles were applied to maximise the webpage's ease of use. Its express objective was:

[...] to provide Australians with ready access to clear, understandable, user-friendly information about the Australian legal system and the government organisations that are part of the Australian legal system.¹⁰⁵

4.25 *Australian Law Online* operated primarily as a gateway or 'signpost'. It directed users to law and justice related information and services that are provided by government and selected non-government organisations.¹⁰⁶ Even though the project did not continue (perhaps because of funding considerations), it may be worth reinvigorating the project for the purpose of providing the public with high-quality ADR information.

Views expressed in the submissions

4.26 The majority of submissions NADRAC received supported the notion of increasing public awareness of ADR. Some suggested that the public has only a cursory understanding of ADR. One submission noted that the Federal Government could adopt ADR awareness strategies similar to those it successfully used in the family law area.¹⁰⁷ However, one submission cautioned that achieving consistency should be the primary goal before public awareness can be raised.¹⁰⁸

4.27 A significant number of submissions supported the development of an easily accessible information point ('one-stop-shop') from where people may draw high-quality information about ADR. One submission suggested developing an existing service to:

104 See <http://www.australianlawonline.gov.au/accesspoint> (viewed 20 September 2009).

105 See 'About this webpage' located on Australian Law Online, available at <http://www.australianlawonline.gov.au/accesspoint> (viewed 20 September 2009).

106 *Australian Law Online* formed part of the previous government's Customer Focussed Portals Framework. This framework was an initiative of the Australian Government's Online Strategy. This strategy was originally overseen by the *National Office for the Information Economy* (NOIE). The framework aimed to make the Government's web presence more customer-focused. Since April 2004, NOIE's tasks and functions were transferred to the *Australian Government Information Management Office* (AGIMO). *Australian Law Online* was decommissioned on 31 January 2009.

107 National Legal Aid, Submission, p 5.

108 Administrative Appeals Tribunal, Submission, p 4.

[...] Establish an appropriate national e-mail address for practical legal advice & guidance [that] will be promoted by Government and legal bodies and be placed in appropriate public places that can provide “free” access to the Internet such as State & Local Government offices, Courts and libraries.¹⁰⁹

- 4.28 However, some raised concerns about a possible marginalisation of certain groups and noted that some parts of the population need specifically tailored solutions to account for disabilities, language barriers or cultural differences.

NADRAC’s view

- 4.29 NADRAC is of the view that the current difficulties surrounding the access to information about ADR is a significant barrier to its use. It is important to provide people with easily accessible, clear, and meaningful information. This will enable people to make informed choices about their conflict or dispute and the way they want it resolved. It will also enable people to discuss the kind of dispute resolution process recommended to them.
- 4.30 Under its Charter, NADRAC is charged with promoting the use and raising the profile of ADR in Australia and the region and has a longstanding interest in increasing the public awareness of ADR. NADRAC supports appropriate measures, government or private, that achieve increasing public awareness.
- 4.31 NADRAC is of the view that the Government should establish an online based information gateway and associated help line to provide extensive information about the federal civil justice system. This website should also include information concerning federal and state government funded ADR service providers.
- 4.32 To avoid duplication and foster national consistency, the website should be developed following consideration of a range of similar initiatives including, for example, Family Relationships Online, the Family Relationship Advice Line and state and territory initiatives such as LawAccess NSW.

Recommendation 4.1

The Federal Government fund a website and helpline to provide information about the federal civil justice system including federal and state government funded ADR service providers. (This initiative should be developed following consideration of other relevant Federal Government initiatives, such as Family Relationships Online and the Family Relationships Advice Line, and state government initiatives such as Law Access NSW).

¹⁰⁹ Mr Peter Foster-Bunch, Submission, p 1.

Increasing disputant awareness of ADR

- 4.33 Where a person seeks professional assistance to resolve a dispute, the professional or ADR service provider may be the person's first exposure to ADR and ADR-related information. Thus, they assume a key role in increasing disputant awareness of ADR. Those who may assume this key role could include for example:
- private legal practitioners
 - the courts and tribunals
 - other professionals such as architects, social workers or health professionals
 - private companies who specialise in providing for-profit ADR services
 - government agencies specialising in the provision of ADR
 - government funded community organisations, or
 - industry/ombudsmen schemes.
- 4.34 Considering the importance of this role, it appears timely to introduce appropriate measures that require or encourage the provision to disputants of information or advice concerning the full range of methods or processes that are available to resolve their dispute.

Incentives and conditions

- 4.35 One option may be to introduce incentives for professionals and ADR service providers that encourage the provision of ADR information or advice. Incentives could take a number of different forms, including financial incentives (whether direct or indirect) or bonus schemes that reward professionals for providing information. Such incentives may be particularly successful in relation to private companies. ADR service providers such as government-funded agencies may also be encouraged to provide ADR information and advice by imposing appropriate funding conditions.

Imposing obligations

- 4.36 Another option could be the imposition of obligations to provide information about ADR processes and services to disputants. Such obligations could be introduced as statutory obligations (either into existing legislation or a dedicated ADR Act) that require legal (and other professionals) to provide appropriate ADR information and advice. Such obligations could also take the form of Practice Directions issued by the courts. Some overseas jurisdictions may provide suitable examples.¹¹⁰

¹¹⁰ For example, Hong Kong's Direction No. 9 of *Practice Direction No. 31 on Mediation* (which will come into force on 1 January 2010), will require legal representatives to certify that they explained to their clients: (1) the availability of mediation to resolve the dispute, (2) the cost positions of mediation when compared to litigation; (3) the Practice Direction itself. See Practice Direction 31 on Mediation which will come into force on 1 January 2010. The certificate is Appendix B, Part II of the Practice Direction.

- 4.37 NADRAC was informed that legal professional bodies of some jurisdictions already impose some form of obligations on their members. NADRAC also understands that some legal professional bodies in other jurisdictions may be considering the imposition of similar obligations.
- 4.38 NADRAC is not aware whether other professional bodies, for example those governing architects or psychologists, would consider similar professional requirements.¹¹¹
- 4.39 NADRAC has already made a recommendation with respect to a legislative requirement on members of the legal profession to fully inform their clients about ADR in chapter 2.

Increasing professional awareness of ADR

- 4.40 The legal profession, including law students, legal practitioners and the judiciary have a central role in informing members of the public about, and referring them to, ADR. Also, they assume a central role in referring disputants to appropriate ADR processes. To do so effectively, they need to understand the principles underpinning different processes and their appropriate role and conduct in ADR processes.

Law students

- 4.41 NADRAC understands that only a few law schools in Australia offer significant education about ADR as part of their core curricula for law students. Often, ADR seems to be incorporated into civil procedure or litigation subjects as a short component only. ADR is generally portrayed as an adjunct to litigation.
- 4.42 The specific skills required in ADR processes should be taught at an early stage of the degree process. Students should learn how their role in an ADR process differs from that of an advocate in court or tribunal proceedings. Law schools may have to consider changing their curricula to have a less adversarial focus. The curricula should include instruction on negotiation skills, representation, support and advocacy suitable for ADR processes. This requires a good understanding of ADR processes, their underlying theories and purposes and how they differ from adjudication in a court or tribunal.

Legal practitioners

- 4.43 To provide meaningful ADR information and refer clients appropriately to the ADR process most suited to the resolution of their dispute, legal practitioners need a broad understanding of the range of ADR services available and their particular benefits. Training students aspiring to become lawyers in ADR will be a major step towards ensuring that such information can be conveyed.

111 See Chapter 2 – Encouraging Greater Use of ADR, in particular Recommendations 2.10 and 2.11 of this Report.

- 4.44 NADRAC's Issues Paper noted that it remains uncertain how deep the understanding of ADR currently exists within the profession. There may be some disincentives for the legal profession to engage in ADR. The adversarial culture of the legal profession might not be conducive to referral to ADR. In addition, some lawyers may fear ADR will take business away from them.
- 4.45 Legal practitioners may need more encouragement to increase their knowledge about ADR processes, and to improve their ADR skills. NADRAC acknowledges that the law societies and bar associations have offered ADR seminars and continuing legal education courses and these appear to have been taken up willingly by many legal practitioners. NADRAC encourages these bodies to continue advocating ADR strongly as a dispute resolution option. However, it may also be necessary to make the successful completion of ADR courses a pre-condition for retaining a practising certificate.

Court staff and the judiciary

- 4.46 NADRAC's Issues Paper noted that the courts play an important role in informing the public about ADR and referring disputants to ADR.¹¹² To fulfil this role, court staff and judges need to have a broad understanding of the range of ADR services available, and the particular attributes and benefits of the full range of ADR processes.
- 4.47 To maintain and enhance this understanding, court staff and judges may need ongoing further education. However, as Professor Mack observed, there is little empirical evidence on which courts can rely to develop criteria to assist with this task.¹¹³
- 4.48 NADRAC understands that the Victorian Government is trialling an initiative of placing ADR experts from the Victorian Dispute Settlement Centres in courts to assist them in their referral role.
- 4.49 Other ways in which court staff and judicial awareness of ADR might be further enhanced could include specific judicial ADR education programs or more ADR training for court staff.¹¹⁴ Options may include in-house court training programs as well as secondments between courts and large ADR organisations.

Other relevant professions and work areas

- 4.50 The legal profession is not the only profession to have a key role in providing the public with meaningful information and referring appropriate matters to ADR.

112 See also Chapter 5 – ADR Services.

113 See K Mack, *Court Referral to ADR: Criteria and Research*, Report for the National Alternative Dispute Resolution Advisory Council and the Australian Institute of Judicial Administration, 2003. See also Chapter 6 – Supporting quality ADR.

114 See Chapter 7 – Better court processes using ADR Techniques.

- 4.51 Other professionals that are regularly confronted with conflict and disputes include architects, engineers, planners, psychologists, social workers or accountants. Specific education and training in ADR processes and techniques at university level could provide a sound working knowledge of ADR and negotiation skills. Courses that might offer such training could include business, commerce, psychology, education, health and social welfare. To maintain the knowledge, professionals may also require specifically tailored continued education.
- 4.52 On that basis, NADRAC considers that these professionals could refer appropriate disputes to ADR. This could apply equally to business associations and consumer organisations which, after appropriate and ongoing training, may also be well positioned to refer disputes to ADR.

Views expressed in the submissions

- 4.53 There was some agreement with the proposition that ADR is underutilised and the majority of submissions that addressed this issue expressed support for imposing obligations on legal professionals to provide information concerning ADR options to their clients. One submission did not support further legislated obligations (at state and federal level) and referred to the evident commitment to ADR displayed by all lawyers in that state.¹¹⁵
- 4.54 There was general agreement that universities could do more to educate and train aspiring lawyers in ADR. This agreement was usually coupled with support for making the completion of ADR subjects an admission requirement.
- 4.55 Some submissions stated that more could be done to increase the awareness of legal professionals in ADR. Suggestions included that legal professionals receive more and better ADR training. However, the Victorian Bar did not support the introduction of CLE/CDP requirements relating to ADR.
- 4.56 There was broad support for ADR training and/or education for court and tribunal staff. Some submissions also expressed support for the training and education of members of the judiciary.

NADRAC's view

- 4.57 NADRAC supports measures that achieve increased awareness amongst disputants. This would include statutory measures requiring legal professionals to advise clients of ADR options. NADRAC also supports expanding such obligations to encompass other professionals and ADR service providers. NADRAC also considers that ADR service providers should provide information to disputants that enable them to help themselves.
- 4.58 NADRAC is aware that many courts and tribunals already provide information on ADR on their websites. However, NADRAC is also aware that this information is not always placed in prominent and/or intuitive locations on their websites.

¹¹⁵ The Victorian Bar, Submission, para 54.

- 4.59 NADRAC is of the view that more professional development is needed. NADRAC believes that better training at universities is required and that ADR must be elevated from a mere adjunct to civil procedure or litigation subjects to being taught as a full course. An ADR course should be a compulsory core subject that is a prerequisite for admission.
- 4.60 NADRAC also believes that other professions should also have basic ADR training as part of their curricula. These professions often have exposure to people in conflict. They could become important gateways for the dissemination of information about ADR, and could play an important role in the referral to appropriate ADR processes.

Recommendation 4.2

Federal courts and tribunals:

- prominently provide on the home page of their websites and in other publications information about ADR, including information that may assist the parties to resolve their disputes privately or without recourse to courts and tribunals, and
- ensure their staff have adequate current information and training about the full range of ADR services available, to enable them to inform disputants about appropriate ADR services.

Recommendation 4.3

The Attorney-General write to the Council of Chief Justices, the Law Council of Australia and state/territory legal professional bodies urging that admission, practising certificate and continuing legal education requirements for lawyers include dispute resolution skills and knowledge.

Recommendation 4.4

The Attorney-General and the Minister for Education write to the Vice-Chancellors of Australian universities urging that knowledge of ADR and negotiation skills be a part of all undergraduate courses whose graduates may be regularly required to manage conflict, in particular, law, business, commerce, psychology, education, health and social welfare.

Chapter 5: ADR Services

Introduction

- 5.1 There is a vast range of ADR services provided within the civil justice system, both outside and within courts and tribunals. The kind of ADR processes provided varies greatly. Differences can be identified based on jurisdiction, location, the way in which services are provided, their quality, and how enmeshed processes are in the litigation process.¹¹⁶
- 5.2 After litigation is commenced in federal courts and tribunals, most ADR services are provided by those courts and tribunals. Consequently, in the federal context, private and community-based ADR services are largely confined to dealing with matters before proceedings are commenced.¹¹⁷ This chapter will deal with both situations in turn.

ADR services – outside the court and tribunal system

- 5.3 Industry, government, private organisations and individuals have developed an array of dispute resolution processes and systems to encourage the early and effective resolution of disputes outside the court and tribunal system. These processes are responsible for the resolution of many disputes that would otherwise result in litigation.
- 5.4 In addition, ADR processes and skills are used increasingly as an adjunct to community, government and organisational decision-making. ADR may not be focused only on dispute resolution or management. Rather, the processes can be used to plan further action and assist in ‘interest-based’ decision-making. Such processes support better decision-making, particularly where continuing relationships are concerned. This development has been particularly important in the environmental and workplace decision-making areas.
- 5.5 The growth in ADR processes outside the litigation system in Australia has emerged in four main areas – the community, family, environmental and business sectors.

116 As a very general observation, early mediation is likely to be more facilitative and interest-based. Mediation practiced shortly before or after proceedings have commenced is more likely to be interventionist and rights-based. The latter may be better understood as ‘facilitated settlement negotiation’ than ‘mediation’ as described under the National Mediator Accreditation System.

117 That also appears to be the case in Western Australia. However, the situation may be different in some states and territories. For example, NADRAC understands that while the Supreme Court of Victoria mediates some disputes, large numbers of disputes are referred for mediation to the Victorian Bar.

Who provides the services outside the court and tribunal system?

- 5.6 In federal civil disputes (excluding family law matters), most ADR services are undertaken by private practitioners, limited government providers (for example in the workplace dispute areas) or industry ombudsmen schemes, (known as Enterprise Dispute Resolution schemes or EDR). In federal family disputes, most ADR services are provided by government funded community organisations, Legal Aid or private ADR practitioners. In the states and territories, government agencies and government funded community organisations provide many of the ADR services in family and smaller civil disputes. However, in larger civil disputes the courts, industry based ADR schemes and/or the private sector provide most ADR services.

The issues

- 5.7 There are four main issues in relation to the provision of private and community-based dispute resolution, they are: quality, cost, accessibility and availability.

Quality

- 5.8 The quality of ADR services provided outside courts and tribunals can vary considerably. Issues relating to the quality of ADR services are dealt with in greater depth at Chapter 6.¹¹⁸

Accessibility and availability

- 5.9 Private and community-based ADR services may be more accessible and tailored to particular needs (for example in the environmental and workplace areas).¹¹⁹ Arguably, supporting such services can assist to preserve the integrity of both the courts as an adjudicative forum and of ADR as an alternative forum for private and consensual resolution of disputes.¹²⁰ In addition, greater availability of high quality and inexpensive ADR in the community may encourage more disputants to attempt ADR before commencing legal proceedings.¹²¹

Costs

- 5.10 References to costs may mean different things to different stakeholders in the justice system.
- 5.11 References to costs may relate to the costs to the state of providing services, including both court services and government funded or subsidised community services. The relative cost to the State of providing court services versus funding or subsidising community-based ADR services will depend upon the type of processes

118 See Chapter 6 – Supporting Quality ADR.

119 See Chapter 4 – Public and Professional Awareness of ADR.

120 The importance of preserving the role of the courts as an adjudicative forum essential to the functioning of Australia's representative democracy has been recently highlighted by the Chief Justice of Australia, The Hon Chief Justice R French. See The Hon Chief Justice R French, *The State of the Australian Judicature*, Speech, 36th Australian Legal Convention, Perth, 18 September 2009.

121 See Chapter 4 – Public and Professional Awareness of ADR.

provided, when those services are provided in the path to litigation, the context of the dispute, and whether there may be any savings in court and tribunal expenses as a result of resolving or minimising disputes earlier. Further research would be required to throw light on this question, including potentially the establishment and evaluation of a pilot program. In the family law arena, the Federal Government has made a significant commitment to funding or subsidising community-based family dispute resolution for separating parents. When combined with a mandatory requirement to use those services, it appears that this approach has reduced the number of parenting matters being commenced in the Family Court and Federal Magistrates Court.¹²²

- 5.12 When costs refer to the private costs incurred by individual disputants or litigants, they may be understood in the broadest sense, including fees charged by ADR practitioners, loss of personal time, associated legal costs and the emotional costs resulting from stress.
- 5.13 Private ADR services can vary greatly in terms of the fees paid to the ADR provider (which may be related to the amount in dispute) as well as the preparation and venue costs charged out by the provider. Some services are provided free or operate at a very low ADR service provision cost. Most EDR schemes, for example, charge no fees to a consumer. Similarly, state and territory government mediation services provide mediation at little or sometimes no cost.
- 5.14 Other ADR services funded under the Family Relationship Services Program by the Federal Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs (known as family dispute resolution or FDR) provide some limited free services, but otherwise apply a sliding scale of fees subject to a client's income. However, compared to some private services, the fees are generally very low.
- 5.15 ADR fees charged by an ADR practitioner can range from less than \$1,000 to \$15,000 per day and are often shared by the parties. The highest fees tend to be charged by 'persons of note', usually senior members of the bar or retired judges. These are often advisory and arbitral forms of dispute resolution, and include hybrid processes. Often, there appear to be no direct correlations between the fees charged and the quality of the service provided.
- 5.16 Apart from any fees, preparation and venue costs, consumers may also incur legal costs if they consult a lawyer, receive legal advice and/or are supported by a lawyer at the ADR process. There will also be some personal time costs and most likely some personal stress involved. Relative to litigation, the legal costs, personal time and stress costs to disputants appear to be quite low (the more so the earlier ADR is attempted).

¹²² It appears that there has been a drop in the order of around 11% in applications for final orders in the Family Court and Federal Magistrates Court since the reforms were introduced. However, further research would be needed to firmly establish that the requirement to attend family dispute resolution before filing was a significant causal factor.

Court and tribunal provided ADR services

- 5.17 Most ADR services and systems that operate within federal courts and tribunals are staffed by court officers or employees. For example, the Federal Court's mediation service is staffed by registrars who act as mediators and are trained accordingly. NADRAC understands that the Federal Court's mediation services are provided in accordance with the National Mediator Accreditation Standards. State courts and tribunals offer a mix of arrangements with many services being provided by private ADR practitioners.
- 5.18 It is not known how many matters within federal courts and tribunals are dealt with by private ADR practitioners. For example, federal courts and tribunals may keep little or no information relating to external ADR provision and a matter that has been resolved by agreement (that may have been arisen as a result of external ADR) is unlikely to be the subject of any recorded reporting.¹²³

The issues

- 5.19 Issues in relation to court and tribunal provided ADR services are similar to those that emerge in private, industry and community-based ADR services and are related to quality, access to and availability of ADR services and costs.

Quality

- 5.20 The ADR services provided within courts and tribunals are often provided by court and tribunal officers or employees. Many officers or employees have received appropriate ADR training, some may not. Also, despite having received training, some may have a better understanding of dispute resolution practice and theory than others. Some may have a more natural aptitude for resolving disputes using ADR than others. In that sense, the issues do not differ significantly from those relating to private or community-based ADR service providers.
- 5.21 There is a view that courts and tribunals may provide ADR services to reduce caseloads by encouraging or persuading parties to settle matters. In this context, it has been suggested that ADR processes provided by courts and tribunals sometimes tend towards the advisory end of the spectrum. Of course that may sometimes be seen as an advantage. The persuasive authority of a judge is often cited as one of the advantages of judicial involvement in dispute resolution.¹²⁴
- 5.22 It is also said that many court processes are overly rights-based (that is facilitated settlement in the shadow of the law). Some court ADR processes may focus on representation by lawyers or even exclude parties from the negotiation at some points in the process.¹²⁵ Interest-based practitioners may argue that disputants in

123 See Chapter 6 – Supporting Quality ADR.

124 See Chapter 7 – Better Court Processes using ADR Techniques.

125 T Sourdin, *Mediation in the Supreme and County Courts of Victoria*, Report, September 2008. O Rundle, *Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases*, (2008) 8(1) Queensland University of Technology Law and Justice Journal 77, p 81.

those processes are not being empowered to resolve their own disputes, do not get much better outcomes than they would if they had proceeded with litigation and do not feel ownership of the outcome. They may question whether the outcomes would have the longevity suggested by research as being associated with facilitative, interest-based processes.

Accessibility and availability

- 5.23 Court and tribunal provided ADR services are fully funded by the Government from public moneys and are only available once disputants have committed to pursue the litigation pathway. Compared to private and community services, which may be underutilised, there may also be considerably fewer providers than within courts and tribunals.

Costs

- 5.24 Judges and tribunal members are generally highly paid. Similarly, registrars, who are usually qualified lawyers, are well remunerated when compared with many, if not most, community-based ADR providers. The cost of providing ADR services in courts and tribunals is therefore likely to be greater than the equivalent cost of providing ADR services outside them.

Multiple-option dispute resolution

- 5.25 NADRAC has previously noted that a robust ADR system incorporates a mix of pre-court and pre-tribunal and court and tribunal ADR services. Commenting on the Federal Civil Justice Strategy Paper, NADRAC noted that a strategy of:

[...] resolving disputes through the most appropriate process [...] reflects more recent thinking about designing dispute systems, namely that an array of dispute resolution options should exist, and that the system should enable the most appropriate option or options to be used at the right stage in each situation taking into account matters such as cost, timeliness, accessibility, fairness and effective and durable resolution.¹²⁶

- 5.26 This multi-option systemic approach supports external ADR service providers and ADR processes so that awareness levels about process-availability are raised. Brochures, websites, and government bodies such as NADRAC currently assist with this. Funded agencies that are located outside courts and tribunals are another form of support.

126 NADRAC, Federal Civil Justice System Strategy Paper Comments, Canberra, 2004 p 3.

The multi-door courthouse

- 5.27 Initially conceived as Dispute Resolution Centres,¹²⁷ the idea of the multi-door courthouse has been discussed for many years.¹²⁸ Essentially, it describes a court as a dispute resolution centre which provides assessment and referral services, a range of ADR services as well as adjudicative court processes.¹²⁹ The model assumes that the various mechanisms for directing parties to ADR that exist outside the court system are inadequate, and parties need guidance from the court to access the range of dispute resolution processes.¹³⁰
- 5.28 As a multi-door courthouse, a court would be a ‘centralised intake and diagnostic centre’¹³¹ where disputants can seek information, advice and the resolution of their disputes in one forum. This ‘one-stop shop’ character has been described as an advantage because it allows disputants to remain within the forum even if the initially chosen dispute resolution process fails. A further assessment and referral would direct these disputants merely through another ‘door’ in the same forum offering a different process.
- 5.29 It may be argued that ADR has gained an integral role in the justice system and should be used to a greater extent by courts and tribunals.¹³²
- 5.30 However, at least in Australia, it is considered that courts are not the appropriate fora for offering such a ‘one-stop-shop’. Courts exercising the judicial power of the Commonwealth fulfil a basic, yet fundamental role in society: they determine justiciable controversies according to law.¹³³ Their special role as the third arm of the Government and as an emanation of the authority of the State is pre-determined by the *Australian Constitution*.¹³⁴ In contrast, the majority of ADR processes aim to assist parties to determine their own disputes.¹³⁵ They are private and confidential processes which may result in interest-based outcomes.¹³⁶

127 The term ‘multi-door courthouse’ was coined later when Professor Frank Sander’s paper *Varieties of Dispute Processing* was re-published by the American Bar Association. See L J Finkelstein, *The DC Multi-Door Courthouse*, (1986) *Judicature* 305, p 305.

128 The concept of the dispute resolution centre was first suggested by Professor Sander at the 1976 Roscoe Pound Conference. See F Sander, *Varieties of Dispute Processing*, (1976) *Federal Rules Decisions* 79, p 79.

129 For explanation and history of the concept, see the Hon Justice B Preston, *The Land and Environment Court of New South Wales: Moving Towards a Multi-door Courthouse – Part I*, (2008) 19 *Australian Dispute Resolution Journal* 72. See also Australian Law Reform Commission, *Review of the Adversarial System of Litigation, ADR – its Role in Federal Dispute Resolution*, Issues Paper No 25, 1998, para 5.58.

130 See T Sourdin, *Alternative Dispute Resolution*, third edition, Thomson Reuters, 2008, p 276.

131 E Gray, ‘*Multi-Door Courthouse*’, Working Paper, National Symposium on Court Connected Dispute Resolution Research, 15 – 16 October 1993.

132 This development, it has been argued, resembles that of the development of equity and common law. See, for example, T O Main, *ADR: The new equity*, (2005) 74 *University of Cincinnati Law Review* 329, pp 398, 404.

133 See the discussion in *In re Judiciary and Navigation Acts* (1923) 32 CLR 455 at 265 – 267. See also The Hon Justice K Hayne, Justice of the High Court of Australia, *The Vanishing Trial*, Paper, Supreme and Federal Courts Judges Conference, 23 January 2008, Sydney.

134 As a result of the distribution of powers as envisaged by ss 1, 61 and 71 (or Chapters I, II and III respectively) of the Australian Constitution. See generally L Zines, *The High Court and the Constitution*, The Federation Press, 2008, pp 198, 208–218.

135 With the exception of some determinative processes such as arbitration.

136 See Schedule 3 – Confidentiality in ADR processes.

5.31 At the recent Australian Legal Convention in Perth, Chief Justice French stated:

[...] whether by constitutional rule or convention the courts that make up the Australian judiciary have a distinctive role to play which is essential to the functioning of our representative democracy. They are not merely providers in a market for dispute resolution services. It is in that context that in July I offered some cautionary observations in relation to the development of what have been called “Multi-Door Courthouses”.

My caution about the terminology of the “Multi-Door Courthouses” is that it raises the possibility that the judicial process can be viewed as one among a number of dispute resolution services. If the distinctiveness of the judicial function is blurred in that way, it is not too great a step to treating the courts as executive agencies.¹³⁷

The multi-option dispute resolution centre

5.32 A multi-option dispute resolution centre could provide a ‘one-stop shop’ for dispute resolution located outside the courts.¹³⁸ Such centres might offer disputants information and advice about managing their disputes. They could also be equipped to make referrals to appropriate ADR services or the courts. If appropriately resourced, such centres could also provide ADR services.

Views expressed in the submissions

5.33 NADRAC received evidence that some ADR services outside courts and tribunals are underutilised and have capacity to do more ADR work. This was particularly true of mediation but also of arbitration.

5.34 NADRAC received only a few submissions that addressed the utility of a multi-door courthouse. Those submissions which addressed the issue gave support (or at least qualified support) to the idea. For example, the Law Council of Australia stated that a multi-door courthouse could be an option to integrate ‘ADR within the court system and/or more efficient access to ADR via the court structure ...’¹³⁹ The Law Council also noted that achieving such integration ‘will require government commitment to funding’.¹⁴⁰

5.35 Not many of the submissions that NADRAC received specifically addressed the idea of dispute resolution centres. The Australian Commercial Dispute Centre (ACDC) noted the benefits that could flow from dispute resolution centres located outside the courts.¹⁴¹ In addition, IMF was supportive of the concept of a multi-door dispute resolution centre.¹⁴²

137 The Hon Chief Justice R French, Chief Justice of the High Court of Australia, *The State of the Australian Judiciary*, Speech, 36th Australian Legal Convention, Perth, 18 September 2009. Chief Justice French refers to his earlier speech *Perspectives on Court Annexed Alternative Dispute Resolution*, Speech, Multi-Door Symposium, Canberra, 27 July 2009.

138 In that scenario, the court would not be the hub. Rather, the court would become one of the ‘doors’ of the dispute resolution centre. This feature distinguishes this model from the model of the multi-door courthouse.

139 Law Council of Australia, Submission, para 15.

140 Law Council of Australia, Submission, para 15.

141 Australian Commercial Disputes Centre, Submission, p 5.

142 IMF Submissions.

5.36 Some submissions raised funded dispute resolution centres as a way of improving the quality and consistency of ADR. For example, the Western Australian District Court said:

Another barrier is the absence (at least in Western Australia) of commercial dispute resolution centres, offering ADR services, outside the courts. There are certainly mediators available and parties willing to use their services. What seems to be missing is some form of program to give the process institutional credibility. The four core elements of such a program would seem to be:

- Program sponsorship by the Government or a leading business organisation (such as the Chamber of Commerce) from which referred credibility can be derived.
- A purpose designed neutral venue.
- The selection or endorsement of a cadre of professional mediators (or other dispute resolvers).
- A fee structure which makes it cost effective for most levels of commercial dispute.¹⁴³

5.37 The Court referred to the Singapore Mediation Centre as an example of a successful commercial dispute resolution centre.

5.38 In relation to cultural barriers to the use of ADR services, the Western Australian District Court noted:

One cultural issue is perhaps a reluctance to use ADR processes outside the court as an alternative to court action where the lawyers are not able to negotiate a dispute. This could be removed by requiring pre-litigation conferral about ADR and/or formalising some of the ADR processes outside the court perhaps by the creation of mediation centres.¹⁴⁴

5.39 The Federal Court expressed the view that pre-filing access to its own ADR services would not be appropriate. It also suggested that ‘there may be a need for low cost and efficient ADR services in the community that disputants are aware of and can access.’¹⁴⁵

5.40 The Western Australian Dispute Resolution Association (WADRA) expressed the concern that professionals offering mediation services are not providing them in accordance with the National Mediator Standards under the NMAS. WADRA expressed the view that there ‘is a need for more mediation service providers staffed by properly trained and highly skilled mediators.’¹⁴⁶ It went on to say:

Community based organisations provide a grass roots conflict resolution service to a broad range of clients who would normally not be able to access the legal system. The funding that they receive is not sufficient to undertake this range of services or to extend their dispute resolution services to capacity build their client base.¹⁴⁷

143 District Court of Western Australia, Submission, pp 9–10.

144 District Court of Western Australia, Submission, p 10.

145 Federal Court of Australia, Submission, p 3.

146 Western Australian Dispute Resolution Association, Submission, p 8.

147 Western Australian Dispute Resolution Association, Submission, p 8.

- 5.41 In a similar vein, the Victorian Bar told NADRAC that there is a need for more appropriate dispute resolution venues in Melbourne. It said that the most valuable thing the Federal Government could do to support private and community-based mediation in Melbourne would be to provide a purpose-built mediation facility for mediators to use (presumably at minimal cost).

NADRAC's view

- 5.42 NADRAC considers that a better balance between private/community-based services and those offered by the courts and tribunals is essential to promote a healthy and robust ADR system.
- 5.43 Whilst NADRAC accepts that there may be arguments in favour of courts becoming a 'multi-door courthouse', NADRAC considers that courts should be a last resort: their role is the adjudication of disputes or controversies through impartial judges applying the law. NADRAC notes that this view accords with the view advanced in the recent report *A Strategic Framework for Access to Justice in the Federal Civil Justice System*.¹⁴⁸
- 5.44 Expanding the role of courts to include other functions, such as an expert assessment and referral function (or 'triage'), may damage the courts' image. Also, the concept of a 'multi-door courthouse' may be too narrow and could create confusion about the role of courts in determining justiciable disputes on the one hand, and the role of private dispute resolution on the other.
- 5.45 NADRAC notes that in this area, there also seems to be some confusion about the terminology. Many submissions did not specifically distinguish between dispute resolution centres or multi-door courthouses. NADRAC also noted this confusion during the consultations it conducted.
- 5.46 NADRAC supports the model of community-based dispute resolution centres. If resourced, such centres could be effective in resolving disputes early, saving costs for the disputants (and, in the longer term, the state). They would also provide an effective way to foster and evaluate the quality of pre-litigation ADR services. However, NADRAC is mindful that such centres would require significant funding to establish and maintain. There may be some savings in court and tribunal expenditure in the longer term.
- 5.47 NADRAC considers that, currently, it may be too ambitious to recommend the establishment of such a centre or centres. Nevertheless, it is timely to consider the coordination of private, community and court and tribunal ADR services and how quality ADR services can be supported in the future.
- 5.48 NADRAC considers that the Government should work to promote and support a diversity of ADR services both inside and outside courts and tribunals, with a view to developing stronger community-based and private sector provision of services

¹⁴⁸ Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report, 2009, p 68.

in the future. This approach promotes multiple options, and recognises the diverse needs of disputants, accessibility requirements, and the varied jurisdictional issues in the federal civil justice system.¹⁴⁹

Recommendation 5.1

The Attorney-General support initiatives to encourage a diversity of ADR services both inside and outside courts and tribunals, with a view to developing accessible and effective community-based and private ADR services.

Online provided ADR services

- 5.49 Online provided ADR services are a subset of technology mediated dispute resolution.¹⁵⁰ They are more commonly referred to as ODR.¹⁵¹
- 5.50 ODR is an important addition to the existing ADR field and a valuable mechanism to overcome many barriers that exist in relation to the use of ADR. A leading ODR expert commented recently that:
- Online collaborative tools can be of great value in developing agreements among individuals, in building consensus in groups, and even in using crowdsourcing to influence individual and group behaviour. Ideally, online resources will communicate standards and alert users in ways that will prevent disputes as well as resolve them.¹⁵²
- 5.51 Another leading ODR expert argued that ODR may have the potential to be an important measure to extinguish destructive social conflict.¹⁵³ ODR's versatility and flexibility can support conflict avoidance and may operate as a first-line dispute resolution process that potentially offers fast, simple and cost-efficient resolution.

The spectrum of ODR

- 5.52 ODR includes unassisted and assisted negotiation, mediation and arbitration. There is also an increased use of online-based technology support systems that assist in the resolution of disputes. Examples include the Federal Court's e-court, voice-over-IP discussion platforms, and the various online-based videoconferencing systems.

149 See also Chapter 2 – Encouraging Greater Use of ADR.

150 The concept of '*Technology Mediated Dispute Resolution*' is broader than ODR and includes other technologies that can be used for dispute resolution processes. See D A Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, (2006) 21 Ohio State Journal on Dispute Resolution 629, p 634.

151 For a brief overview covering the developments of the nomenclature in this area, see R McMahon, *The Online Dispute Resolution Spectrum*, (2005) 71 (3) Arbitration 218, pp 220-222.

152 E Katsh, Post to OSTP Thread, 29 June 2009 [9:11pm], available at: <http://blog.ostp.gov/2009/06/29/collaborative-problem-solving-and-alternative-dispute-resolution/>, viewed 29 August 2009.

153 C Rule, Post to OSTP Thread, 2 July 2009 [11:29pm], *ibid*.

5.53 More recently, advances in computer technology have allowed the emergence of complex automated dispute resolution systems.¹⁵⁴ Examples include systems that provide automated negotiation or ‘blind-bidding’ processes where ‘technology supersedes human interaction.’¹⁵⁵ Other systems use Artificial Intelligence (AI) directed at exploring the alternatives that may be available to disputants (thus narrowing issues and exploring differences between parties).¹⁵⁶

An expanding area

5.54 ODR continues to expand across private, community and government sectors.

5.55 Globally, areas where ODR is traditionally used include consumer disputes, especially disputes arising from e-commerce transactions. Companies such as eBay use ODR to resolve large numbers of disputes every year.¹⁵⁷ Internet domain name disputes are almost exclusively resolved online (under the *Uniform Domain Name Dispute Resolution Policy*) using a form of online arbitration.¹⁵⁸ This is also an example of a sub-class of intellectual property disputes that has effectively moved out of the courts completely.¹⁵⁹

5.56 Another area where ODR is increasingly used is large-scale international commercial disputes. Online-based technology support systems are used to store and share large volumes of documents which are instantly accessible worldwide.¹⁶⁰ They also allow communication between parties, counsel and arbitrators who are often located in different countries. It may be said that ODR has become, at least in some areas, a thriving industry.

5.57 ODR may have particular value in other areas too. For example, where a possible threat of violence exists between disputants, ODR may help all parties to participate meaningfully in the process and increase the parties’ safety overall.¹⁶¹ Also, in the US it has been argued that ODR can reduce harmful gender and racial bias that is said to exist in some judicial processes.¹⁶² ODR may be particularly suitable for certain types of family disputes and in restorative justice.

154 B L Mann, *Smoothing some of the wrinkles in ODR*, (2009) *International Journal of Law and Technology* 83, pp 90–97.

155 P Gilliéron, *From face-to-face to screen-to-screen: real hope or true fallacy?*, (2008) 23 *Ohio State Journal on Dispute Resolution* 301, p 305.

156 M J Hall, D Calabro, T Sourdin, A Stranieri and J Zeleznikow, *Supporting Discretionary Decision Making with Information Technology: A Case Study in the Criminal Sentencing Jurisdiction*, (2004) 1(2) *University of Ottawa Law and Technology Journal*.

157 C Rule, *Making Peace on E-Bay: resolving disputes in the world’s largest market place*, (2008) *AC Resolution* 8.

158 See www.icann.org/about (viewed 17 September 2009).

159 R McMahon, *The Online Dispute Resolution Spectrum*, (2005) 71 (3) *Arbitration* 218, p 218.

160 A useful example for the flexibility and efficacy of proper arbitration procedures using extensively online support technology has been the *Anaconda Operation Pty Ltd v Fluor Australia Pty Ltd* arbitration (arbitrated by Paulsson, Uff QC, Naughton QC). In this arbitration, the parties exchanged a large amount of discovered documents by way of photographic images accessible via a database. See A Stephenson, *Procedural Efficiency in International Arbitration*, (2003) *Australian Resources and Energy Law Yearbook* 14, p 29.

161 S Rogers, *ODR: and option for mediation in the midst of gendered violence*, (2009) *Ohio State Journal on Dispute Resolution* 349, p 379.

162 *ibid.*

- 5.58 Some governments also provide, or at least support, ODR services. For example, the Austrian Government provides a multi-tiered ODR platform called ‘Internet Ombudsman’ that assists parties to resolve certain kinds of e-commerce disputes.¹⁶³ Since 2005, the EU has supported the *Network of European Consumer Centres* (ECC Net), which maintains centres that assist consumers with the resolution of trans-border disputes.¹⁶⁴ This service can be used online. The US Government also conducts a large-scale online consultation project sponsored by the White House Office of Science and Technology Policy (OSTP). The project *Collaborative Problem-Solving and Alternative Dispute Resolution* is part of the US Government’s Open Government project. The focus of the most recent discussion threads has been the use of ODR, particularly when dealing with government.¹⁶⁵
- 5.59 It is probable that these schemes will impact upon economic and other dispute systems in the future and result in a more globalised delivery of dispute resolution services.

Possible benefits and some unresolved issues

- 5.60 The benefits generally associated with ODR include the speed with which disputes may be resolved, the low costs at which dispute resolution can be offered, and the convenience of the online environment. Parties may also use the nature of the online environment to their advantage. It has been argued that in some cases, the loss of images, physical reactions or non-verbal cues may be beneficial to resolving the dispute. Also, where violence between disputants is a real possibility, the online environment may provide appropriate safety. Recently, Gilliéron observed the Internet’s ubiquity may be used to avoid jurisdictional issues.¹⁶⁶ There are suggestions that frequent online users may attribute decisions made in the online environment a higher legitimacy and are thus more willing to accept them.¹⁶⁷ In this regard, regular online users may have a preference for electronic communication, may be less likely to resort to litigation, and may have a commitment to a global virtual community.¹⁶⁸
- 5.61 However, there are also still some unresolved issues. In 2001, NADRAC prepared a paper in respect of issues that are raised by online ADR.¹⁶⁹ NADRAC noted that gender, age and cultural differences may be more pronounced, particularly where parties may not be familiar with newer technologies. In addition, NADRAC has

163 See www.ombudsman.at. The service was initiated by the *Austrian Institute for Applied Telecommunication* (ÖIAT) and is supported by the *Austrian Department for Labour, Social Affairs and Consumer Protection* as well as Employees’ Interest Groups (AK).

164 For the *Consumer Centre Germany* see: <http://www.eu-verbraucher.de/en/home/>.

165 See the relevant discussion thread at <http://blog.ostp.gov/2009/06/29/collaborative-problem-solving-and-alternative-dispute-resolution> (viewed 29 August 2009).

166 P Gilliéron, *From face-to-face to screen-to-screen: real hope or true fallacy?*, (2008) 23 *Ohio State Journal on Dispute Resolution* 301, p 314.

167 L Q Hang, *ODR Systems: The future of Cyberspace Law*, (2001) 41 *Santa Clara Law Review* 837, p 856.

168 See NADRAC, *On Line ADR – A Background Paper*, 2001, p 9.

169 *ibid*.

noted that a ‘digital divide’ exists and that technology usage continues to grow most rapidly among more advantaged groups. There are also concerns that conclusions relating to the efficacy of online services do not reflect the experiences of ordinary disputants. A number of questions previously raised by NADRAC continue to require attention. For example, how to:

- ensure the privacy, confidentiality and integrity of the dispute resolution processes
- ensure fair and transparent processes that offer appropriate levels of due process
- safeguard the authenticity and integrity of electronic documents
- alleviate the impact of the remaining digital divide
- address still existing computer illiteracy
- enhance disputant skills
- ensure the quality of ODR processes
- train neutrals, especially in skills relevant to the online environment
- monitor the effectiveness of ODR processes
- ensure the enforceability of agreements and awards
- assess the credibility of parties (or witnesses in determinative ADR processes such as arbitrations), especially in an online environment that is not conducive to assessing traditional demeanour evidence¹⁷⁰
- address the possible marginalisation of disadvantaged groups, and
- account for the loss of personal contact and absence of socio-emotional content, and ensure that disputants can cope with the dehumanisation of the process.

5.62 It may be that ODR is better suited to certain types of processes, eg those that resolve around bargaining, where facts are presented for determination or where there are no ongoing relationship issues.¹⁷¹ Also, ODR may not offer the same benefits as face-to-face interest-based processes where participants can reach a deeper understanding of the other person’s perspective, improve their relationships, and/or learn communication techniques that may help them resolve their own disputes in future without an ADR practitioner to assist.

5.63 To date, multi-disciplinary research has delivered mixed results on these issues. For example, whilst some recent research suggests that the lack of physical reactions or non-verbal cues may influence the negotiation strategies and the neutral’s approach to the dispute resolution processes, earlier research conducted by

170 NSW Law Reform Commission, *Jury directions*, Consultation Paper 4 (2008), December 2008, paras 8.73 – 8.77. See also *Morey v Western Australia* [2007] WASCA 103, paras [17], [21] and E G Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, (2000) Southern Methodist University School of Law Computer Law Review & Technology Journal 89, p 99.

171 One example may be bargaining over the split of marital property. For example, the ‘Family Winner’ model uses a variety of artificial intelligence, game theoretic techniques and heuristic utility functions to assist with structuring family dispute resolution processes. See J Zeleznikow and E Belucci, *Family Winner: Integrating Game Theory and Heuristics to Provide Negotiation Support*, (2008), p 21, available at <http://www.jurix.nl/pdf/j03-03.pdf> (viewed 21 September 2009).

communication scientists and linguists observed that computer communication, when compared to face-to-face communication, operates at a different pace.¹⁷² This research also suggested that computer users can develop and maintain stable interpersonal relationships even in the absence of socio-emotional content.¹⁷³

- 5.64 It is uncertain to what extent the digital divide may still present a problem. Broadly, the digital divide seems to be narrowing.¹⁷⁴ The Federal Government's proposed new National Broadband Network should accelerate that process. Also, any existing digital divide may be addressed by matching the best available technology with an ODR procedure appropriate to that technology. For example, suggesting an ODR process that requires high-definition video-streams for a dispute involving disputants in remote communities will raise significant issues if the required infrastructure (large band-width internet connection) is not available to one party. However, if both parties have dial-up connections, non-synchronous text-based ODR may work well, would bridge the geographical divide and could lead to the resolution of the dispute.
- 5.65 Some recent research suggests that new technologies can be used effectively by some marginalised groups. A study of dispute resolution and the hearing impaired community concluded that hearing impaired people 'today are communicating in unprecedented fashion [using technology]' and noted that:
- conversely, the communication skills that the Deaf Community [...] employ routinely can provide valuable insights for everyone who uses new technologies to communicate and resolve disputes.¹⁷⁵
- 5.66 This includes, for example, the communication of feelings and emotions in text-based environments.¹⁷⁶

Views expressed in the submissions

- 5.67 This issue was not addressed in the submissions.

172 L Klaming et al, *I want the opposite of what you want: reducing fixed pie perceptions in online negotiations*, (2009) *Journal of Dispute Resolution* 139, pp 160-1.

173 J Walther and J Burgoon, *Relational communication in computer-mediated interaction*, (1992) *Human Communication Research* 19, pp 55, 81.

174 A recent report by the Department of Finance and Deregulation found that four out of five Australians now use the internet. The same report noted that in 2008, 68 per cent of Australians had access to broadband internet services. See Department of Finance and Deregulation (Australian Government Information Management Office), *Interacting with Government: Australian's use and satisfaction with e-government services*, Report, 2008, p 4.

175 D A Larson and P Mickelson, *Technology mediated dispute resolution can improve the registry of interpreters for the Deaf Ethical Practices System: the deaf community is well prepared and can lead by example*, (2008) 132 *Cardozo Journal of Conflict Resolution* 131, pp 132, 142-146.

176 *ibid.*, pp 143-144.

NADRAC's view

- 5.68 NADRAC is of the view that ODR can offer potential benefits in a range of situations and that its development and appropriate use should be fostered. ODR may be particularly useful for organisations that have large numbers of small disputes to resolve. In particular, government, including the Federal Government, may be able to use ODR to advantage.
- 5.69 NADRAC would support greater research into and experimentation with ODR in a range of different dispute contexts. Pilot projects are one effective way to achieve that.
- 5.70 The Federal Court is well placed to provide a pilot ODR platform through its existing e-court initiative. NADRAC proposes that the Attorney-General's Department should work with the Federal Court to establish such a pilot with a view to considering its applicability (or something similar) to other areas of government dispute. An evaluation panel could be established for the pilot that includes representatives of Federal Government agencies who deal with high volume disputes. This might include, for example, the Australian Taxation Office, Centrelink, the Child Support Agency and the Defence Materiel Organisation, amongst others.

Recommendation 5.2

The Attorney-General's Department work with the Federal Court to establish a pilot ODR platform to assist resolution of disputes. (The platform could provide a model for other ODR pilots by the Federal Government and others.)

Chapter 6: Supporting Quality ADR

Introduction

- 6.1 Most commentators, consumers and practitioners consider that ADR services can provide significant benefits to disputants. Increasingly, ADR evaluation and research in selected areas has demonstrated that those benefits can be articulated into broad cost, relationship and productivity savings. Also, they appear to produce better outcomes and longer-lasting results.
- 6.2 In addition, over the past decade, research about ADR has highlighted innovative ADR processes (particularly in the family mediation area as child inclusive and child focused processes have developed) and research has shown how some services can be improved and enhanced.
- 6.3 The provision of a high quality service is crucial to the integrity and credibility of ADR processes, to protect consumers and to promote Australia's international dispute resolution profile. In particular, assuring quality of service will facilitate consumer education, build consumer confidence and build the capacity and coherence of the ADR field.
- 6.4 This chapter focuses on how the quality of ADR services can be supported, maintained and enhanced through:
 - effective monitoring, evaluation and research
 - supporting, maintaining and extending accreditation and ethical standards in relation to ADR practitioners, and
 - providing information to ensure disputant expectations are realistic and that ADR process characteristics are supported by more uniform legislative approaches.

The need for comparable data and performance information

- 6.5 The quality of ADR processes and the protection offered to consumers of ADR services has been a matter of interest to the Australian Government at least since the release of the *Access to Justice Report* in 1994 (and probably well before).¹⁷⁷
- 6.6 However, fostering quality in ADR services depends upon several factors. There must be:
 - sufficient information about how current services are provided and used, including information specific to different ADR processes, including both comparable data and qualitative information

¹⁷⁷ Access to Justice Advisory Committee (Cth), *Access to Justice – an Action Plan*, Commonwealth of Australia, 1994.

- sound evaluation of the performance of ADR processes against key performance criteria such as private cost, public cost, timeliness, and consumer satisfaction, and
 - research into issues like performance of ADR on a longitudinal basis, the capacity of processes to meet the needs of disadvantaged and marginalised groups, the interaction between ADR processes and the delivery of other justice services through courts and tribunals and the comparative benefits of different ADR processes in different dispute contexts and relative to other alternatives.
- 6.7 NADRAC's Issues Paper highlighted issues relating to a lack of data collection, particularly comparable data collection, about ADR services. Clearly, in the absence of basic monitoring information and threshold qualitative and quantitative information about ADR processes, it is impossible to compare the performance of ADR services. The problem is compounded by the lack of comparable data about the justice system more generally.
- 6.8 While there is much research that suggests some significant benefits of ADR there is also significant variation amongst ADR practitioners, processes and areas of practice. Cost, whether to individual disputants or to the State, is just one factor that should be considered in evaluating the performance of ADR processes and services.

ADR objectives

- 6.9 NADRAC has previously indicated that to undertake comparable evaluation and research, basic threshold indicators and objectives need to be developed and agreed. However, it acknowledges that there are competing interests and objectives among different groups in the ADR community and among different processes. NADRAC suggested that ADR should have the following common or core objectives:
- resolve disputes
 - use a process which is considered by the parties to be fair
 - achieve acceptable outcomes
 - achieve outcomes that are lasting, and
 - use resources effectively.¹⁷⁸
- 6.10 After a lengthy consultative process, NADRAC concluded that, for most parties, practitioners, service providers, government and the community, ADR has the following common objectives:
- to resolve or limit disputes in an effective and efficient way
 - to provide fairness in procedure, and
 - to achieve outcomes that are broadly consistent with public and party (including third party) interests.¹⁷⁹

178 NADRAC, *The Development of Standards for ADR*, 2000, p 22.

179 NADRAC, *A Framework for ADR Standards*, 2001, pp 13-14.

- 6.11 While these objectives are common to most ADR processes, NADRAC emphasises that they will differ for different ADR processes.
- 6.12 Efficiency and effectiveness will have a different interpretation in an early community-based mediation process from that of a court-referred conciliation late in the litigation process when the emotional and monetary stakes may be much higher.
- 6.13 Perspectives on the fairness of ADR procedure will also differ. For example, there are likely to be different expectations of procedural fairness in a commercial arbitration involving a high value business dispute from those that would apply in a mediation of a neighbourhood dispute or a facilitated multi-party environmental dispute.
- 6.14 Varying weight is also likely to be given to public interest considerations depending upon the process and the setting. For example, public interest considerations would be likely to carry much higher weight in large multi-party processes, such as native title or environmental disputes, than in a mediation of a private business dispute.
- 6.15 Similarly, the degree to which third party interests are taken into account will vary, depending on the process and the third parties affected. For example, in family dispute resolution the best interests of the children of a relationship are considered to be paramount. In the mediation of a dispute between two neighbours the emphasis is more likely to be on private property interests rather than the amenity of the local community – which may be left to the later impact of planning, noise abatement laws and the like.
- 6.16 In view of the above, it is probably impracticable to treat ADR as if it were a uniform whole. When considering quality and performance there is a need to differentiate processes and to compare like with like.

Collection of quantitative and qualitative data

- 6.17 NADRAC has previously noted that, with the exception of data on government funded ADR programs in the family law arena, there is very little empirical data available about the provision and use of ADR. Accordingly, at a systemic level there is little data from which conclusions can be drawn about:
- the use of and the demand for ADR
 - the profile of ADR practitioners and organisations
 - the appropriateness of alternative forms of ADR for different disputes, and
 - the effectiveness of different ADR processes.¹⁸⁰
- 6.18 Existing data collected by courts and tribunals (of the type that measures input and output of case management systems) provides only limited information about some performance objectives. For example, while it is possible to determine the number of mediations conducted in the Federal Court by internal ADR practitioners, it is not possible to ascertain how many matters may be resolved with the assistance of external ADR practitioners, nor compare the length of the sessions, the timing of

180 NADRAC, *A Framework for ADR Standards*, 2001.

the ADR intervention, or the compliance with outcomes within the Federal Court. Further, it is not possible to compare these types of services with those offered by other courts and tribunals, as the data that is collected is not only limited but may also not be comparable.

- 6.19 In addition, qualitative information that can adequately reflect on the experience of disputants and other systemic users is rarely collected. Any qualitative information that is collected is unlikely to be specifically related to ADR processes unless it is the subject of a ‘one off’ grant or review requirement. Such qualitative information can assist greatly to enhance the quality of ADR services into the future – not simply monitor ADR use.

Performance benchmarks for ADR

- 6.20 Again, as NADRAC has previously indicated, the lack of any agreed or uniform success indicators or performance benchmarks for ADR processes means that different service providers are likely to use different benchmarks to evaluate their services.¹⁸¹ One service may develop a set of benchmarks that focus on speed and public cost savings, while another may develop benchmarks that focus on longevity of agreements and satisfaction with the process. Evaluations done in accordance with such benchmarks will clearly have little basis for comparison of service quality at a systemic level.

Civil justice system issues

- 6.21 The lack of sufficiently comprehensive and comparable data and performance benchmarks is not only an issue for ADR. It is an issue for the entire civil justice system. As a result, not only is it impossible to effectively measure or compare different ADR processes in different environments, it is also impossible to get a clear picture of the interaction between ADR and other civil justice services, including litigation. NADRAC is aware that the Attorney-General’s Department’s *Access to Justice Taskforce* has highlighted the problem of the lack of comparable data about civil justice services.¹⁸²

An international issue

- 6.22 The problem is not peculiar to Australia. For example, UK-based Professor Hazel Genn has noted that the Woolf Reforms in England and Wales were implemented without the benefit of detailed research and this has made it difficult to assess the impact of the reforms in relation to their objectives. She went on to say that:

There has been an historic lack of basic factual information about the characteristics of litigated cases in the civil courts. Although courts in England and Wales collect a considerable quantity of information for administration purposes, this database information generally misses vital descriptive elements such as case type, value, and outcome.¹⁸³

181 NADRAC, *A Framework for ADR Standards*, 2001.

182 Attorney-General’s Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009.

183 H Genn, *Solving Civil Justice Problems: What might be best?* Paper, Scottish Consumer Council Seminar on Civil Justice, 2005.

- 6.23 Further, Professor Genn pointed out that in order to properly understand the processes that one is seeking to improve, and to assess the extent to which modifications may have achieved their objectives, it is necessary to be able to answer some simple questions. These include:
- who sues in the civil courts, about what kinds of disputes, and in relation to what sums of money?
 - what is the outcome of cases commenced in the courts? What proportion settle, go to trial, lapse, or are withdrawn? What sums are awarded?
 - how long, on average, do cases take to conclude and are there differences depending on the type of case?
 - how much does it cost the parties to litigate civil claims and are there differences depending on the type of case?
- 6.24 These questions need to be answered from a system-wide perspective, not just separately for each individual court or tribunal. That requires courts and tribunals to collect data according to uniform criteria.

Where to from here?

- 6.25 To assess the extent to which ADR services meet appropriate objectives and benchmarks, comparable data relating to costs, efficiency and fairness are required. In 2001, NADRAC recommended that:
- [...] the Commonwealth encourage relevant bodies to develop common performance and activity indicators for ADR in order to improve quality, consistency and comparability in ADR data collection.¹⁸⁴
- 6.26 That recommendation has not yet been implemented.
- 6.27 The continuing growth and development of the ADR field in recent years now makes the need for data collection much greater. NADRAC strongly recommends that clear criteria be articulated about which courts, tribunals and funded ADR services will collect comparable data about the use of ADR services and also clear benchmarks in relation to which the performance of those ADR services can be measured and compared.
- 6.28 The Attorney-General's Department's recent report *A Strategic Framework for Access to Justice in the Federal Civil Justice System* has recommended that:
- the Productivity Commission should be asked to undertake a review of the efficiency of courts and tribunals in the context of the civil justice system in Australia (with the scope of the review being identification of relevant measures and data requirements necessary for ongoing monitoring of the justice system)¹⁸⁵

184 NADRAC, *A Framework for ADR Standards*, 2001, recommendation 21.

185 See Recommendation 5.1 of the recent report of the Access to Justice Taskforce. Attorney-General's Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, p 73.

- based on the outcome of this review, the Attorney-General’s Department should work with federal courts and tribunals to develop a data collection process to inform the collection of data on a comprehensive, consistent basis,¹⁸⁶ and
- implementation of changes to the justice system should, as standard practice, include consideration of data collection to enable evaluation of the impact of those changes.¹⁸⁷

6.29 NADRAC supports these recommendations but notes that any reference to the Productivity Commission should include not just courts and tribunals but other justice services. NADRAC also hopes that any uniform criteria developed for the civil justice system include, and be developed in tandem with, the uniform criteria and performance benchmarks for ADR services that NADRAC proposes to develop.

The need for high quality research

- 6.30 Comparable quantitative and qualitative data can assist to ensure that ADR processes and services function and are monitored effectively. However, such data may not, on its own, significantly improve quality as it may not reveal deeper issues that will only be exposed by targeted in depth research.
- 6.31 In the absence of high quality research, policy makers, courts and practitioners will be unable to build upon existing ADR services, ensure that ADR services are of high quality and enable innovative and effective techniques to be recognised and extended into other settings.
- 6.32 The ALRC Report, *Managing Justice – A Review of the Federal Civil Justice System*, highlighted the need for ongoing empirical research in the general civil justice area and the need for targeted research.¹⁸⁸

Collaborative information sharing

- 6.33 ADR services are delivered by independent practitioners, ADR organisations, courts, tribunals and government agencies. To foster the development of high quality information about the ADR field, it is necessary for these service providers to collect high quality data and evaluate their services. It is also important to share the information that is gleaned from such monitoring, evaluation and research.
- 6.34 Consequently, it is necessary to consider not only the quality and parameters of the information that is collected but also to consider how information can be shared and assessed with rigour.
- 6.35 NADRAC has attempted in the past to bring together researchers and others through a biennial ADR Research Forum.¹⁸⁹ However, NADRAC is not resourced to undertake such a function and its attempts to do so have created some challenges

¹⁸⁶ *ibid.*, Recommendation 5.2.

¹⁸⁷ *ibid.*, Recommendation 5.2.

¹⁸⁸ Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System*, Report, 2000.

¹⁸⁹ The next Research Forum is being planned for July 2010.

for it. Evaluation and research in relation to ADR processes and their place in the justice system will play a major role in determining how ADR develops and expands. In the information-rich society that is developing, it will be difficult to determine where evaluation has occurred and to consider the choices available to determine policy and funding. NADRAC recognises that given the depth and breadth of the ADR area, considerably more work is required in relation to the coordination of these efforts.

Evidence-based policy development

6.36 In April 2008, Prime Minister Rudd delivered an address to the heads of federal agencies and senior members of the Australian Public Service. In this speech, he outlined seven elements of the government's vision for the future Australian Public Service. One of those elements was 'Developing evidence-based policy making processes as part of a robust culture of policy contestability'.¹⁹⁰ The Prime Minister also said that policy design and evaluation should be driven by analysis of all the available options. He noted that his Government was interested in 'facts, not fads'.¹⁹¹

6.37 In 2009, the Chairman of the Productivity Commission pointed out that 'evidence' as to the extent to which evidence-based policy is actually applied, is mixed and argued that:

[...] we know from experience that, despite best intentions, policies can ultimately be shaped more by guesswork and political drivers than rigorous analysis.¹⁹²

6.38 He also noted that while Australia has, in large part thanks to the Australian Bureau of Statistics, particularly good data in the economic and demographic domains, it lacks good data in many social and environmental areas. As pointed out above, the delivery of civil justice services, including ADR, is one of those areas. Mr Banks went on to say:

For evidence and evaluation to contribute materially to the selection of policies, it must be supported by institutional frameworks that embed the use of evidence and encourage, disseminate and defend good evaluation.¹⁹³

6.39 And further:

Even the best evidence is of little value if it's ignored or not available when it is needed. An evidence-based approach requires a policy-making process that is receptive to evidence: a process that begins with a question rather than an answer, and that has institutions to support such an inquiry.¹⁹⁴

190 The Hon K Rudd MP, Prime Minister of the Commonwealth of Australia, *Address to Heads of Agencies and members of Senior Executive Service*, Speech, 2008.

191 *ibid.*

192 G Banks, *Opening remarks to the Productivity Commission Roundtable: Strengthening Evidence-Based Policy in the Australian Federation*, Speech, Canberra, 2009.

193 *ibid.*

194 *ibid.*

Existing data collection and evaluation bodies

- 6.40 NADRAC notes that the Attorney-General's portfolio funds and supports a number of small advisory bodies like itself that can undertake policy analysis of issues relying virtually exclusively on oral evidence, expert opinion and such published research as is available. However, there is no well resourced institutional support for data collection, comparative evaluation of and targeted research about civil justice services including ADR.
- 6.41 Two bodies have been established to undertake research functions into specific aspects of the justice system: the Institute of Criminology and the Australian Institute of Family Studies.
- 6.42 While the latter was established under the Family Law Act,¹⁹⁵ it was later moved from the Attorney-General's portfolio into the Federal Families portfolio¹⁹⁶ and more recently into the Prime Minister's portfolio.¹⁹⁷ As a result, while it continues to undertake solid research into issues of relevance to family law, its focus is now more broadly spread across general family policy research.
- 6.43 The Federal Government has established a wide variety of research bodies in other areas of federal policy responsibility including dedicated research units within larger government agencies. Some examples are: the Commonwealth Scientific and Industrial Research Organisation, the Productivity Commission (economic, social and environmental issues), the National Health and Medical Research Council, Tourism Research Australia, Fisheries Research and Development Corporation,¹⁹⁸ Rural Industries Research and Development Corporation and the Bureau of Infrastructure, Transport and Regional Economics.

Views expressed in the submissions

- 6.44 In her submission, Professor Kathy Mack, stated:

Unfortunately, reliable, comparable statistics about court use of ADR and the outcome and impact of court-annexed ADR programs are simply not available. Statistics about some aspects of ADR are sometime included in a court or tribunal's annual report, but they are not consistent across jurisdictions or over time. In light of the many different programs, with many different features, which are reported in many different ways, it is simply not possible to compare information from court to court, or even within a court over time.

Clearly, one future research direction is to develop useful statistical measures within each court's own data collection and to make these measures comparable across jurisdictions.

195 Under present Part XIVA.

196 It was transferred to the portfolio of the Minister for Social Security in 1988-89: Attorney-General's Department (Cth), *Annual Report 1988-89*, Canberra, 1989, p 25. That portfolio later became the families portfolio under various names.

197 As a result of machinery of government changes in 2007: Australian Institute of Family Studies (Cth), *Annual Report 2007-2008*, Melbourne, 2008, p 10.

198 Co-funded by the Australian Government and the fishing industry.

6.45 The Federal Magistrates Court of Australia stated:

The Court supports wholeheartedly further research into and evaluation of ADR processes. The Court acknowledges that some of the raw data needs to be supplied by it. Appropriate funding should be maintained or provided to enable the courts to collect and interpret such data. A body external to the courts could be established to collect information across courts and tribunals and use such information to carry out necessary research and to provide a dialogue as between the courts and tribunals, State and Federal, of best practice on a general or individual jurisdictional basis.

6.46 The NSW Bar Association noted:

No statistics are kept on matters that are referred [by a court] to mediation (by consent or otherwise) to private mediators. Where court matters are settled at a private mediation, the parties must terminate the proceeding by filing consent orders or a notice of discontinuance. They could be required to state when filing those documents whether the matter had settled as a result of a private mediation.

6.47 The Law Council of Australia stated:

There is no doubt that comparable data and research is vital to the evaluation of any developments of ADR. Funding constraints and lack of targeted resources for continuing evaluation of ADR initiatives and court involvement requires review. There is a lack of empirical data on the effectiveness of court-ordered ADR in federal and state courts (a lack of comparative data is also due to the constraints in the collection of data at a state level). There is a need for more research on the effectiveness, including the cost effectiveness, of ADR at all government levels and court jurisdictions. Additional data needs to be gathered about qualitative measures such as perceptions of fairness and access to justice by users of court services including ADR.

6.48 The Law Institute of Victoria supported the gathering and recording of data on the use and effectiveness of ADR processes. However, it also stated:

[it] recognised the inherent inconsistency between the object of collecting data and the object of preserving the confidentiality of ADR processes... it considers that the preservation of confidentiality is paramount.

6.49 Some private ADR organisations (such as the Australian Commercial Disputes Centre Ltd) strongly supported the development of strategies for the collection of data by providers of private ADR services.

NADRAC's view

6.50 NADRAC considers that the Federal Government should address the significant and longstanding lack of comparable data, evaluation and research about ADR, to ensure that future policies are built upon a strong evidence base.

6.51 In NADRAC's view the Government should ensure that mechanisms are in place to:

- review, advise on, encourage compliance with and maintain consistent uniform criteria for the collection of data and performance benchmarks for civil justice services, including ADR services

- provide a clearing house for civil justice evaluation and research, including ADR evaluation and research
 - institute, on a user pays basis, independent evaluations of civil justice programs, including ADR programs, whether by public or private bodies or partnerships between them
 - promote, by conducting, encouraging and coordinating research and by other appropriate means, the identification of, and development or understanding of, the factors affecting the resolution of disputes in Australia
 - convene regular forums or conferences of civil justice and ADR evaluators, researchers and policy developers to encourage and coordinate their activities, and
 - make grants to foster research that supports the objectives outlined above.
-

Recommendation 6.1

Federal courts, tribunals and other bodies funded to provide ADR services, collect and publish comparable data using uniform criteria and benchmarks as to the use and performance of ADR processes both before and after proceedings are commenced.

Recommendation 6.2

The Attorney-General:

- request that NADRAC develop uniform criteria for the collection of data about the use, and qualitative benchmarks for measuring the performance, of ADR services, and
 - propose to SCAG a national adoption of those criteria and benchmarks.
-

Recommendation 6.3

Federal courts, tribunals and other bodies funded to provide ADR services:

- evaluate their ADR services including periodic independent review, and
 - include the results in their annual reports.
-

Recommendation 6.4

The Attorney-General implement initiatives to:

- address the significant and longstanding lack of comparable data, evaluation and research about ADR in the federal civil justice system, and
 - ensure that future ADR policy is built upon a strong evidence base.
-

ADR Standards

6.52 The importance of appropriate quality measures has also been highlighted by the Chief Justice of the High Court of Australia, Chief Justice French. In a recent speech, his Honour raised the significance of measures and mechanisms to assess and ensure the quality of ADR services. His Honour concluded that ADR has much to offer so long as appropriate quality controls exist.¹⁹⁹

NADRAC's charge: improving the quality of ADR services

6.53 In 1994, the Access to Justice Advisory Committee, chaired by the Hon Ronald Sackville, recommended to the then Attorney-General, the Hon Michael Lavarch MP, and Minister for Justice, the Hon Duncan Kerr MP, that:

The Commonwealth should establish a body to advise the Government and the courts and tribunals on ADR issues with a view to achieving and maintaining a high quality, accessible, integrated Commonwealth ADR system. In particular, the body should provide advice to:

- the Government and courts and tribunals on minimum standards for their ADR programs; and
- the Government on the merits of establishing an ADR database to inform consumers and policy advice.²⁰⁰

6.54 Pursuant to its Charter, NADRAC is required to advise the Attorney-General as to the following matters relating to the quality of ADR services:

- minimum standards for the provision of ADR services
- minimum training and qualification requirements for ADR practitioners, including the need, if any, for registration and accreditation of practitioners and dispute resolution organisations
- appropriate professional disciplinary mechanisms
- the suitability of ADR processes for particular client groups and for particular types of disputes²⁰¹
- the quality, effectiveness and accountability of Australian Government ADR programs
- ongoing evaluation of the quality, integrity, accountability and accessibility of ADR services and programs
- programs to enhance community and business awareness of the availability, and benefits of ADR services

199 The Hon Chief Justice R French, Chief Justice of the High Court of Australia, *Perspectives on court-annexed alternative dispute resolution*, Paper, Multi-Door Courthouse Symposium, Canberra, 2009.

200 Access to Justice Advisory Committee, *Access to Justice an Action Plan*, Canberra, 1994, see Action 11.3.

201 The words 'including restorative justice and ADR in the context of criminal offences' were added by former Attorney-General, the Hon Philip Ruddock, in 2006.

- the need for data collection and research concerning ADR and the most cost-effective methods of meeting that need, including by courts and tribunals, and
- the desirability and implications of the use of ADR processes to manage case flows within courts and tribunals.

6.55 Further, in considering the question of minimum standards, NADRAC was asked to examine the following:

- the respective responsibilities of the courts and tribunals, government and private and community sector agencies for the provision of high quality ADR services
- ethical standards for practitioners
- the role of lawyers and other professional advisers in ADR
- legal and practical issues arising from the use of ADR services, such as the liability or immunity of practitioners, the enforceability of outcomes and the implications of confidentiality, and
- the accessibility of ADR services.

6.56 In response to this broad agenda, NADRAC has published a series of reports and discussion papers. It has also supported sector-wide research, biannual research fora, developed standards frameworks and completed a number of projects specifically directed at the objectives.

NADRAC's work on ADR standards

6.57 NADRAC commenced consideration of standards issues upon its foundation. However, the process was challenging for a number of reasons.

6.58 There was concern about a lack of standards in some processes, particularly processes that were private and confidential with no avenue for external complaint or review. It was not clear what was happening 'behind closed doors.' Yet, there were sufficient anecdotal reports of ADR practitioners who saw their role to be simply one of 'banging heads together' to be concerning.

6.59 There was also concern amongst many ADR practitioners that the imposition of standards would hinder the development of new forms of ADR. That matched the concern that standards could limit the flexibility of ADR practitioners to appropriately adapt processes to match the needs of particular disputes and disputants. Indeed, over the past decade, considerable variations have developed in mediation models and new forms of dispute resolution techniques, practices and processes have emerged, including, for example, collaborative practice and ODR.

National standards for mediation

6.60 NADRAC began by considering standards for mediation. However, it later broadened its consideration to all ADR processes because of the apparent overlap and lack of clear boundaries between them.²⁰² NADRAC crafted systemic framework

²⁰² NADRAC, *The Development of Standards for ADR*, 2000. See also NADRAC, *A Framework for ADR Standards – Report to the Commonwealth Attorney-General*, 2001.

documents to guide the development of standards. A more targeted project directed at mediation eventually supported the industry's development of voluntary standards for mediators.²⁰³

National Mediator Accreditation System

- 6.61 From 1 January 2008, a voluntary, industry standards framework called the NMAS applies to the Australian mediation sector.
- 6.62 As an advisory body to the Federal Attorney-General, NADRAC is independent of the NMAS. The National Mediator Accreditation Committee (NMAC) has been established and charged with the task of developing NMAS. NMAC has also been charged with establishing a mediator standards body from 2010.
- 6.63 NMAC now has over 40 member organisations, comprising RMABs, education and training organisations, government representatives and other stakeholders. The mediators that are represented on it are drawn from a wide range of backgrounds — including lawyers, psychologists and engineers — with a number of fields of practice including Indigenous, community, workplace, court related, multicultural, family and commercial dispute resolution and management.
- 6.64 A recent grant from the Federal Attorney-General will assist the NMAC to meet its objective of establishing the new Mediator Standards Body in 2010. NADRAC will continue to take an interest in its development.

Minimum standards

- 6.65 NMAS includes both practice standards for mediators and threshold approval standards for mediators and organisations that accredit mediators.²⁰⁴ NMAS provides an overarching framework of minimum standards for mediators from a variety of fields. Because NMAS represents minimum standards, it is capable of being layered with more specific standards relevant to any other field. For example, the accreditation as a family dispute resolution practitioner under the Family Law Act requires practitioners to fulfil the minimum standards for mediators under the NMAS, in addition to obtaining additional qualifications specifically tailored for the family dispute sector.

Family dispute resolution practitioner accreditation

- 6.66 Family dispute resolution practitioners who wish to provide family dispute resolution and issue section 60I certificates under the Family Law Act must meet the final accreditation standards set out in the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*. The final accreditation standards are modelled on new competency-based qualifications that have been developed for the family relationships sector.²⁰⁵ To be accredited under the final accreditation standards, a person must:

203 NADRAC, *Who says you're a mediator? Towards a National System for Accreditation of Mediators*, 2004.

204 Accrediting organisations are known as Recognised Mediator Accreditation Bodies or RMABs.

205 Vocational Graduate Diploma of Family Dispute Resolution – CHC80208.

- have completed the full Vocational Graduate Diploma of Family Dispute Resolution (or the higher education provider equivalent)
- have an appropriate qualification or accreditation under the National Mediation Accreditation Scheme and competency in the six compulsory units from the Vocational Graduate Diploma, or
- have been included in the Family Dispute Resolution Register before 1 July 2009 and demonstrate competency in the three specified units of the Vocational Graduate Diploma (or higher education provider equivalent).²⁰⁶

6.67 The skills and experience of practitioners are recognised by the final Accreditation Standards. However, all practitioners that were included in the Register before 1 July 2009 will need to be assessed to ensure they have demonstrated competency in three specified units (of the six compulsory units) of the Vocational Graduate Diploma. A person included in the Register before 1 July 2009 has until 30 June 2011 to achieve competency in the three specified units of the Vocational Graduate Diploma of Family Dispute Resolution.

Views in submissions

6.68 Several submissions expressed support for standards such as NMAS.²⁰⁷ Some expressed support for such standards, but suggested that they should not be mandatory.²⁰⁸ Other submissions highlighted some of the issues concerning standards that may be raised by different forms of ADR.²⁰⁹

6.69 In its submission, the Western Australian Dispute Resolution Association discussed standards in the context of court-annexed ADR services. It noted that it is important to distinguish between the various forms of ADR. For instance:

It is not helpful to call a process mediation when it is a settlement conference in the Court or an assisted negotiation. If the Courts legitimately want to provide a mediation service then it needs to be clear that the process is mediation and the process must be consistent with the national standard and NADRAC definition.²¹⁰

6.70 The District Court of Western Australia stated in its submission that:

Court based ADR services should at least meet the same standards as private and community based services. Court based ADR tends to be mandatory, meaning that one or more of the parties may be an unwilling participant. This imposes a greater obligation on courts to ensure that their mediators, practices and facilities are at leading practice standards.²¹¹

206 The specified units are: Responding to family and domestic violence in family work; Creating a supportive environment for the safety of vulnerable parties in dispute resolution; and Operating in a family law environment.

207 See, for example, the Federal Court of Australia, Submission, p 11.

208 See, for example, NSW Bar Association, Submission, p 7.

209 See, for example, Financial Ombudsman Service, Submission, p 4.

210 Western Australian Dispute Resolution Association, Submission, p 2.

211 District Court of Western Australia, Submission, p 5.

- 6.71 The Victorian Association for Dispute Resolution noted in its submission that:
- Many practitioners operate as sole traders or similar. So while the NMAS are moving towards some consistency of practice standards, there are still several areas in which practices vary widely and inconsistently. These include referrals, access points, intake procedures, fee structures and follow up or review processes.²¹²
- 6.72 In its submission, the NSW Law Society suggested that ‘advising clients about the range of ADR processes that may be suitable for a client’s matter should be a requirement of practice standards.’²¹³
- 6.73 In its submission, the Financial Ombudsman Service noted the importance of standards in the various ADR processes for financial service providers. It noted that internal dispute resolution processes (IDR) and EDR processes for financial service providers are required to meet minimum standards. The requirement for EDR schemes to comply with standards ‘contributes to stakeholder confidence that the EDR provided by an ASIC approved EDR scheme is credible and trustworthy and this promotes confidence in the ADR scheme and the likelihood of resolutions being achieved.’²¹⁴

NADRAC View

- 6.74 As ADR has developed, it has become clear that there is an emerging recognition that different ethical and practice issues are raised by different forms of ADR. For example, the sorts of ethical and practice issues that apply in a commercial arbitration are likely to be very different from those that should be expected of an interest-based process like mediation. Similarly, advisory processes, even those that have an interest-based focus, will raise their own distinct issues.
- 6.75 As a result, NADRAC is of the view that it is necessary to distinguish different types of ADR processes when considering issues relating to standards and quality.
- 6.76 As a first step, NADRAC considers that it is timely to consider the potential for a standards framework for advisory dispute resolution similar to that which has been developed for mediation. Whilst NADRAC considers that there may be some similar issues that surface in relation to advisory and facilitative dispute resolution processes (for example, practice standards in respect of conflicts of interest), there are also likely to be significant differences. For example, advisory practitioners are likely to require considerably different qualifications and training competency requirements that are relevant to the subject areas within which they provide advice.

212 Victorian Association for Dispute Resolution, Submission, p 2.

213 NSW Law Society, Submission, p 2.

214 Financial Ombudsman Service, Submission, p 4.

Recommendation 6.5

As a general rule federal courts and tribunals, and other bodies funded by the Federal Government, should only use or refer matters to mediators who meet the minimum requirements of accreditation under the NMAS or other higher standards specified in legislation.

Recommendation 6.6

The Attorney-General ask NADRAC to advise on the development of a standards framework for advisory ADR processes similar to the standards framework developed for mediators.

Confidentiality of ADR processes

- 6.77 Issues relating to confidentiality are more fully explored in schedule 3. Under NMAS, confidentiality is addressed in terms of ethical and related reporting requirements. NADRAC considers and has previously noted that there is considerable legislative variation in terms of confidentiality and non-admissibility in relation to ADR services. This variation and the lack of clear consistent guidelines raise issues for ADR practitioners and participants in ADR processes.

ADR practitioner immunity

- 6.78 NADRAC has previously expressed the view that mediators should not be protected from suit for negligence unless there is a strong public policy rationale. An example would be such close integration with judicial proceedings that it is appropriate that judicial immunity should be extended to the mediators. It is difficult to argue that private, confidential processes, the proceedings of which are largely inadmissible, are so closely integrated with judicial proceedings that the umbrella of judicial immunity should extend to them. Such a rationale was adopted in the family law context. Community-based family dispute practitioners who provide private services that are not reportable to the Family Court do not benefit from statutory immunity from suit. The services provided by Family Consultants, formerly Family Court mediators, were changed so that they were no longer confidential and Family Consultants were responsible for reporting to the Court. The view was taken that, as a result, judicial immunity should extend to the functions of the Family Consultants.
- 6.79 NADRAC's position is supported by the fact that insurance has now become readily available to mediators and other ADR practitioners.
- 6.80 However, the position is still not clear. For example, as there is no exception to the non-admissibility provision in the Family Law Act for suits taken against family dispute practitioners for negligent performance of their services, it seems likely that it would remain difficult to bring a suit against them.

- 6.81 In addition, while NADRAC has considered the position with respect to mediators, it has not done so in relation to other ADR practitioners, such as arbitrators. NADRAC now considers that it would be timely to do so.
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Recommendation 6.7

The Attorney-General ask NADRAC to report on:

- the need for confidentiality and non-admissibility in different ADR processes, and
 - the need for immunity from suit for ADR practitioners.
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Chapter 7: Better Court Processes Using ADR Techniques

Introduction

- 7.1 Commentators have observed a certain level of overlap of, and resulting integration between, ADR and adjudication.²¹⁵ They also remarked that, as a result, courts are currently undergoing a shift in emphasis from a pure adversarial to a more problem-solving model.²¹⁶
- 7.2 This chapter deals with ways in which court and tribunal processes could be enhanced to make them more time and cost efficient without unduly impacting on the rule of law and the public's confidence in the court and tribunal system. The chapter focuses essentially on three issues:
- the role of case management in courts and tribunals
 - the use of ADR techniques in courts and tribunals, and
 - judicial dispute resolution processes.

Case management in federal courts and tribunals

- 7.3 In 1999, the Hon Justice Hayne observed that the 'days when the courts were seen as passive tools controlled wholly by the litigants are days that are past.'²¹⁷ Since then, there have been calls for even greater case management powers for courts, including from the ALRC²¹⁸ and the VLRC.²¹⁹ NADRAC understands that the AAT views its conferencing procedure as both a case management tool and an ADR process.²²⁰

215 J Resnick, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, (1995) 10 Ohio State Journal on Dispute Resolution 211, p 214. T O Main, *ADR: The new equity*, (2005) 74 University of Cincinnati Law Review 329, pp 397–398.

216 J F Henry, *Some reflections on ADR*, (2000) Journal of Dispute Resolution 63, p 63. Commentators have also noted that this tendency is linked with the crystallization of certain common characteristics for ADR processes and the systemization of ADR. T O Main, *ADR: The new equity*, (2005) 74 University of Cincinnati Law Review 329, p 392. See also the Prefatory Comments to the US Uniform Mediation Act. See also Chapter 3 – Towards National ADR Principles.

217 The Hon Justice K Hayne, *Judicial Case Management and the Duties of Counsel*, Paper, Bar Practice Course, Brisbane, 24 February 1999.

218 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No. 89, 2000.

219 Victorian Law Reform Commission, *Civil Justice Review*, Report No. 14, Melbourne, 2008.

220 Administrative Appeals Tribunal, Submission. Under the *Administrative Appeals Tribunal Act 1975* (Cth), parties may be directed to an ADR process (ss 34A and 34 B Administrative Appeals Tribunal Act). Conferencing is one of the ADR processes available (s 3(1) Administrative Appeals Tribunal Act). According to the Conference Process Model, conferencing is 'an opportunity for the Tribunal and the parties to discuss and define the issues in dispute; identify further evidence that needs to be gathered; explore whether the matter can be settled; and discuss the future conduct of the matter, including referral to further ADR processes or progress to a hearing, where settlement is not possible.' AAT Conference Process Model, available at <http://www.aat.gov.au/docs/ADR/ConferenceProcessModel.doc> (viewed 17 September 2009).

J L Holding and Aon

- 7.4 However, until recently, case management was said to be under a cloud after the High Court’s decision in *J L Holding*.²²¹ In that case, the High Court held that case management principles might not ‘be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable’ and cannot supplant the ultimate aim of courts – the attainment of justice.²²²
- 7.5 However, a majority in the recent *Aon* case concluded that *J L Holding* was not in line with relevant previous authority²²³ and held that civil litigation is not only directed towards the resolution of disputes between parties, but that the ‘achievement of a just, timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants.’²²⁴ Case management principles, whilst concerned with achieving just solutions, may place limitations on parties to avoid costs and delays. In particular, limitations may be placed after ‘account [has been] taken of other litigants, not just the parties to the proceedings in question.’²²⁵ Chief Justice French held that *J L Holding* did not stand for the proposition that to attain justice, ‘waste of public resources and undue delay, with the concomitant strain and uncertainty imposed on litigants’ must be accepted.²²⁶

The benefits and problems

- 7.6 Case management powers can offer significant advantages, including the saving of valuable court time, the freeing up and better allocation of finite court resources, the minimisation (or at least reduction) of costs for litigants and the referral of matters to ADR. Importantly, in a docket system such as that applied by the Federal Court (where each case is allocated to a judge upon commencement and stays with the same judge until finalised) there is an inherent incentive for the judge to manage the case to produce a settlement as soon as possible or minimise the extent of the trial. It could also be suggested that the docket system would provide incentives for judges to refer to ADR. Moreover, in *Aon*, Chief Justice French highlighted the benefits properly managed litigation has for public resources, the rule of law and the public confidence in the justice system.²²⁷
- 7.7 On the other hand, if applied inappropriately (or if case management is over applied), it might be argued that case management powers can deny litigants justice. Too many, or unnecessary pre-trial hearings may result in unjustified delays or disproportionate legal costs, especially when compared to the value of the issue in dispute. An automatic or ‘usual’ approach to refer to ADR might also produce problems, especially if there is no careful consideration as to whether or not the matter should be referred to ADR and to which process.

221 *The State of Queensland v J L Holding* (1997) 189 CLR 146.

222 *ibid.*, at 155 per Dawson, Gaudron, McHugh JJ.

223 *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (5 August 2009), at [95], [116] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

224 *ibid.*, at [93] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

225 *ibid.*, at [95], [98] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

226 *ibid.*, at [30] per French CJ.

227 *ibid.*, at [5], [24] and [30] per French CJ.

- 7.8 Overall, there seems to be no data or analysis that could assist with assessing whether case management processes result in either cost and time efficiencies for courts and litigants or just outcomes for litigants.²²⁸ Some have argued that case management may have increased costs and that case management may have been used as part of a delaying strategy.²²⁹ However, recent comments by parties involved in the Federal Court Fast Track procedures indicate that costs are reduced by up to two-thirds.²³⁰

Legislating case management powers

- 7.9 Legislating case management powers and case management rule-making powers for courts may be advantageous because legislation can convey Parliament's strong message about the objectives that govern the use of case management and the framework for achieving those objectives.²³¹
- 7.10 NADRAC notes that the Attorney-General expects the recently introduced *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* to send a clear message to the Federal Court, the parties and their lawyers, all of whom will be expected to conduct litigation efficiently and cost-effectively.²³² When passed, this Bill will:
- [...] amend the Federal Court Act to introduce case management and procedural reforms. The amendments introduce an overarching obligation upon the Court, the parties to litigation and legal practitioners to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. They also clarify the kinds of directions the Court can make to control the progress and conduct of proceedings.²³³
- 7.11 At a recent symposium, the Attorney-General stated that he expects the 'overarching obligation to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible' and hopes that the law will trigger 'something of a cultural shift in the way disputes are resolved'.²³⁴

228 NSW Attorney-General's Department, *ADR Blueprint Discussion Paper*, Sydney, April 2009, p 21. See The Hon Justice G Davies, 'The reality of civil justice reform: why we must abandon the essential elements of our system', Paper, 20th AIJA Conference, 2002, p 8.

229 The Hon Justice G Davies, 'The reality of civil justice reform: why we must abandon the essential elements of our system', Paper, 20th AIJA Conference, 2002.

230 Federal Court of Australia, Submission, p 4.

231 The Hon Ronald Sackville AO, *The Future of Case Management in Litigation*, (2009) 18 *Journal of Judicial Administration* 211, p 217.

232 The Hon Robert McClelland, Attorney-General for the Commonwealth of Australia, Speech, Multi-Door Court House Symposium, Canberra, 27 July 2009, available at http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2009_27July2009-SpeechtotheMulti-doorCourtHouseSymposium (viewed 11 September 2009).

233 *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, Explanatory Memorandum, p 3, available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4160_ems_7b44bb3d-3cc3-4198-8260-36ffa9a1f949/upload_pdf/331042.pdf;fileType=application%2Fpdf (viewed 11 September 2009).

234 The Hon Robert McClelland, Attorney-General for the Commonwealth of Australia, Speech, Multi-Door Court House Symposium, Canberra, 27 July 2009, available at http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2009_27July2009-SpeechtotheMulti-doorCourtHouseSymposium (viewed 11 September 2009).

Increasing use of ADR techniques in courts and tribunals

- 7.12 NADRAC understands that several tribunals already make significant use of ADR techniques to resolve (or limit the scope of) disputes. For example, as noted above, the AAT views its conferences as part case management tool and part ADR process.²³⁵ This also applies to tribunals that use procedures that closely resemble ADR processes. The Social Security Appeals Tribunal and the Veterans Review Board are examples. Other tribunals, such as the Superannuation Complaints Tribunal, are required by law to use ADR processes to resolve their disputes.²³⁶
- 7.13 Considering the case management powers referred to above, it seems a fair comment that courts and tribunals already use a range of techniques adapted from ADR processes to enhance their functions. NADRAC's Issues Paper referred to three types of ADR techniques which are already applied. These include the family law consultants, the less adversarial trial, and the hot tubbing of experts. An important issue for the future will be 'what should be used and when', together with how might judges and tribunal members be trained in the case management procedures to include ADR?

ADR techniques already applied

- 7.14 A number of ADR techniques are already applied by the courts.

Family Consultants

- 7.15 The role of Family Consultants in the Family Court has built upon the former function of court mediators whose work with parties was confidential. Also, anything said to those court mediators was inadmissible in court. The family law reforms in 2006 created the Family Consultants. Their functions include reporting to the court.²³⁷ Accordingly, their work is not confidential. Evidence of anything said to a Family Consultant is admissible in court.
- 7.16 Family Consultants are retained to work with parties to disputes arising out of separation and divorce. They are professionals such as social workers or psychologists experienced in dealing with child and family issues, and are appointed by the court. They are dispute resolution practitioners in that they may help disputants to resolve conflicts through conferences. If no resolution can be achieved, Family Consultants also assist the disputants through the court process. They are integral to the court proceedings and the discharge of judicial functions in the family law area and can assist and advise the court during trials.
- 7.17 It may be possible for some similar role to be performed by court registrars in civil proceedings in either the Federal Court or the Federal Magistrates Court. However, careful consideration needs to be given to the way in which communications between the registrar and the parties are conveyed to the judge.

235 See above, footnote 220.

236 The Superannuation Complaints Tribunal uses conciliation to settle disputes, s 27 *Superannuation (Resolution of Complaints) Act 1993* (Cth).

237 See s 11A *Family Law Act 1975* (Cth).

It is not uncommon already, following a case management conference conducted by a registrar on behalf of a judge, for the registrar to ‘report’ or advise the judge of the outcome of the conference, with recommendations about further case management orders that might be made. Importantly, the form of the advice is usually settled with the parties before it is delivered to the judge. The registrar in the federal civil jurisdiction is not the ‘expert adviser’ that Consultants might be considered to be in the family law jurisdiction.

Less adversarial trials

7.18 The less adversarial trial was introduced into the Family Law Act in 2006. It applies to cases involving children. Its hallmark is that the judge retains the control over the proceedings.²³⁸ The parties are required to work with a family law consultant before the trial commences. The family consultant attends the trial as an ‘expert adviser’ to the presiding judge. The procedure contemplates that the parties themselves speak to the judge, not through counsel. Thus, parties are able to tell in their own words their story and what they want to achieve in the trial. Evaluations accompanying the introduction of this type of trial found that this form of trial led to faster court processes, more satisfaction amongst the parties, and fostered a more cooperative approach between the parties to resolve their dispute.²³⁹

Receiving or managing expert evidence

7.19 ADR techniques can be used to reduce the amount of time a court or tribunal must spend on hearing evidence from multiple expert witnesses. Rather than hearing from expert witnesses separately and subjecting each of them separately and sequentially to examination and cross-examination, the use of ADR techniques aim at hearing from experts simultaneously in a pre-trial conference setting or expert conclave.²⁴⁰ This is a different process to the one known as ‘concurrent evidence’ or ‘hot tubbing’, where the experts give their evidence together in the course of a trial.²⁴¹

7.20 Justice North of the Federal Court explained the conferencing process used as part of the case management of a native title matter. Noting that the matter required ‘a certain amount of trial focus’, his Honour opined that:

238 In a similar way to the docket system in the Federal Court where the case stays with the same judge from commencement until disposition. The Federal Court’s scheduling conference in its Fast Track procedures also includes similar elements to the less adversarial trial, with the judge usually presiding in an informal conference setting, and the parties being present and participating in the conference.

239 Evaluations of the reforms were conducted in 2006 by Professor Rosemary Hunter and Dr Jennifer McIntosh. Professor Hunter’s evaluation showed that those who were parties in less adversarial trials were significantly more satisfied with both the process and the outcomes. The evaluations also showed that the less adversarial trial was particularly beneficial for clients who were unrepresented. Family Court of Australia, *Finding a better way, A bold departure from the traditional common law approach to the conduct of legal proceedings*, Canberra, 2006, pp 56–59. The report is available at www.familycourt.gov.au (viewed 18 September 2009).

240 As used by the Domestic Building List of the Victorian Civil and Administrative Tribunal, VCAT. See C Aird, *Compulsory conference, expert conclaves and ‘hot-tubs’*, Paper, AIJA Tribunals Conference, Sydney, 2009, p 3.

241 The AAT is developing guidelines covering concurrent evidence or hot-tubbing processes. See the AAT’s draft *Guidelines for the Use of Concurrent Evidence in the Administrative Appeals Tribunal*, available at <http://www.aat.gov.au/docs/DraftAATGuidelinesConcurrentEvidence.pdf> (viewed 17 September 2009).

[...] it seems to me that the conferencing between experts should be undertaken not as part of the mediation, but rather as part of the trial preparation and what I would propose for the attention of the parties is that the meeting of experts be undertaken under the supervision of a registrar in the context of the case management conference.²⁴²

- 7.21 His Honour went on to highlight the difference between mediating experts and conferencing experts. Stating that the difference ‘is perhaps small’, Justice North explained that it is:

[...] nonetheless significant because I have in mind that a number of our registrars have had experience in similar situations and have determined a certain regime whereby experts meet and importantly in this case that in the meeting one of the issues on the agenda would be a proposed way of dealing with their evidence at trial and that’s something that perhaps would not emerge from a mediation conference. What I have in mind is not only that the experts exchange views and identify what is agreed and what is not agreed, but under the supervision of a registrar with an eye to a trial that they work out, for instance, what questions have to be asked; what questions should be put to the court if it be done in that way; whether for instance a hot tub method would be useful; whether the registrars might, as was done in another case although in slightly different circumstances, prepare a report for the parties and the parties then move forward on the basis of that report or any other creative way of dealing with it. But I would, I think, be cautious about simply letting the matter be dealt with entirely in the mediation context given what I see as a real need to have a discipline in the case focused on a hearing, a contested hearing, if that eventuates.²⁴³

- 7.22 This kind of conferencing of experts, possibly using mediation techniques, can be used to assist experts to settle on a joint expert opinion or report which might be admitted into evidence.

ADR techniques that might also be applied

- 7.23 There are other ADR techniques which might also be appropriate for some civil proceedings.

Judicial or early case appraisal

- 7.24 An early appraisal could be used to cut short the time required by courts to deal with matters (and to reduce the costs for parties) where the parties agree to receiving an early appraisal. An appraisal process would aim at providing an indication of the strength, weakness or likely outcome of the case. An appraisal is necessarily preliminary. The appraisal could be provided shortly after filing either by a judge or a person engaged by the court and agreed by the parties. Parties could present their case with limited written material and within strictly managed time-limits and the person undertaking the appraisal would express an opinion as to the likely outcome of issues in dispute and the likely outcome of the whole matter. The cost of the

242 *Lovett on behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474, pp 20–26.

243 *ibid.*

appraiser (if it is not a judge) could be met by the parties, although this may deter parties from agreeing on the appraisal or early neutral evaluation process.²⁴⁴

- 7.25 The incentives or disincentives for agreeing to the appraisal or neutral evaluation process are complex. If there is a risk of an adverse cost order for failing to ‘accept’ the evaluation, then parties might be unwilling to agree to participate in the process. On the other hand, no adverse cost consequence for failing to accept the appraisal is likely to diminish the incentive to accept the appraisal. Moreover, no suggestion has been made that there should be a power to compel parties to undertake a case appraisal or neutral evaluation, at their cost with a person they select (or by a judge at no cost to the parties) and that there be the possibility of an adverse cost order if a party fails to accept either the appraisal or evaluation and proceeds to trial.
- 7.26 NADRAC notes, however, that during case management a judge may often express views about the strength or weakness of issues in dispute, and what might be involved in establishing or disproving an issue. Comment may be made about whether or not the issue or proposed way of dealing with the issue is a key issue to be resolved to enable the whole dispute to be resolved or tried. Comment may also be made about whether or not certain witnesses are necessary or whether some alternative method of introducing evidence might be sufficient. This kind of discussion in case management processes is a valuable way in which Federal Court judges regularly assist parties to refine the issues in dispute. It can also contribute to a better consideration as to which ADR process might be suitable.

Case management conferencing

- 7.27 Another ADR technique that might be used to great effect as part of case management is conferencing in an informal, collaborative setting.²⁴⁵ Parties, their representatives and a registrar or judge come together to discuss the best way of preparing the matter for trial. This can be used to narrow the issues, identify gaps in the information provided, or to give appraisals on the strength of the case (or individual aspects of the matter as mentioned above). This approach is similar to the one applied by the AAT.²⁴⁶ It is also similar to the scheduling conference conducted by judges of the Federal Court as part of the Fast Track directions.

244 Issues about who pays for the evaluator need to be considered. The simplest approach is for the parties to agree on the person and on the amount of the payment. The down side of this approach is that the parties might be reluctant to incur further expense on a process with no guarantee of success. Federal Courts are not funded to pay for evaluators.

245 NADRAC defines a conference or conferencing as ‘a general term, which refers to meetings in which the parties and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.’ NADRAC Glossary of Terms, available at www.nadrac.gov.au.

246 Parties may be directed to an ADR process under ss 34A and 34B *Administrative Appeals Tribunal Act*. According to s 3(1) *Administrative Appeals Tribunal Act*, conferencing is one of the ADR processes available. The AAT defines conferencing as ‘[a] meeting conducted by a Tribunal member or officer of the Tribunal (conference convenor) with the parties and/or their representatives. Conferences provide an opportunity for the Tribunal and the parties to discuss and define the issues in dispute; identify further evidence that needs to be gathered; explore whether the matter can be settled; and discuss the future conduct of the matter, including referral to further ADR processes or progress to a hearing, where settlement is not possible. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.’ See AAT Conference Process Model, available at <http://www.aat.gov.au/docs/ADR/ConferenceProcessModel.doc> (viewed 17 September 2009).

Some judges in federal jurisdictions use a similar process as part of their case management processes prior to trial. In the Federal Court, case management conferences are conducted by judges or registrars on behalf of a judge.

Views expressed in the submissions

- 7.28 Chief Justice French stated that he is in favour of round table case management conferencing.²⁴⁷ Such processes are also supported by the WA District Court. However, the Court identified some issues with respect to judicial case appraisals.²⁴⁸ Other submissions supported or conditionally supported facilitative judging techniques, such as hot-tubbing experts, the less adversarial trial and agreement on facts. NADRAC also received comment from the Family Court that its judges were well satisfied with the new role of family consultants and the support they provided to the judiciary.

NADRAC's views

- 7.29 NADRAC believes that various ADR techniques, such as those described above, can be appropriate for some civil proceedings. For example, NADRAC considers that a greater use of collaborative conferencing could be applied. However, NADRAC considers that ADR techniques should not be assumed to be suitable for all cases, and that their use should be subject to analysis by the judge in charge of the matter as to the suitability of the proposed technique.

Recommendation 7.1

The Attorney-General propose to the National Judicial College of Australia that it design and deliver case management courses for judges covering the ways in which judges could identify suitable matters for referral to ADR, and suitable ADR techniques and mechanisms.

Judicial dispute resolution and judge-led mediation

- 7.30 Judicial dispute resolution is a broad term that encompasses various processes and responsibilities.²⁴⁹ The increased attention being given to various forms of judicial dispute resolution reflects a global trend towards greater judicial involvement and control over civil disputes. It is based on the idea that more efficient disposition of cases can be achieved by allowing judges to add ADR techniques or processes to their traditional repertoire of determinative functions.

247 The Hon Chief Justice R French, Chief Justice of the High Court of Australia, Submission.

248 District Court of Western Australia, Submission, p 13.

249 Although judicial dispute resolution may sometimes be interpreted to include judicial determination, NADRAC uses the term to refer to practices by judges of processes that would customarily be regarded as ADR. This may include mediation, conciliation, case appraisal, settlement conferences or arbitration.

Greater judicial use of ADR techniques – a global trend

- 7.31 NADRAC's research indicates that in the past decade at least Canada, the US, Germany, Japan, Israel, Bangladesh, the Netherlands, several Scandinavian countries, Slovenia and Latvia appear to have trialled various forms of judicial dispute resolution, including 'judge-led' mediation and conciliation where the judge actually delivers the process.²⁵⁰ The most recent bi-annual report *European Judicial Systems*, released by the European Commission for the Efficiency of Justice, notes that 38 European countries reported that judicial mediation procedures exist.²⁵¹ Of those, 12 seem to have procedures where judges are responsible for conducting mediations.²⁵²
- 7.32 In the UK, sitting judges can accept (under certain circumstances) appointments as arbitrators.²⁵³ Scotland, too, is in the process of introducing legislation that will allow sitting judges to sit as arbitrators or umpires in commercial disputes (with the consent of the Lord President of the Court of Session).²⁵⁴ NADRAC also heard evidence of successful Australian judge-led mediation programs which were used successfully to reduce the court lists.²⁵⁵

Why greater judicial use of ADR techniques?

- 7.33 Greater judicial involvement may increase the resolution of disputes at an early stage, thus un-clogging growing court lists.²⁵⁶ However, the success of trials and pilots appears to be varied. Their success seems to depend on the personality of the judge concerned and the environment in which it is practised. There is some research in the US and Canada that appears to suggest that a high percentage of lawyers believe that judicial involvement improves the chances of settlement of legal actions.²⁵⁷ Research in New Zealand suggests that 'about a third ... of the ADR practitioner respondents to the survey noted that judicial support was a "very important" factor in ensuring that ADR is effective.'²⁵⁸

250 J M von Bargen, *Gerichtsinterne Mediation*, Veröffentlichungen zum Verfahrensrecht No. 57, October 2008, pp 115 to 127. N Alexander, *International and Comparative Mediation: Legal Perspectives* (Alphen an den Rijn: Kluwer Law International 2009), Chapter 3. E Ficks, *Models of General Court-Connected Conciliation and Mediation for Commercial Disputes in Sweden, Australia and Japan*, (2008) *Zeitschrift für Japanisches Recht* 131.

251 European Commission for the Efficiency of Justice, *European Judicial Systems*, Report, 2008, p 99. Countries reporting such procedures include Austria, Denmark, Germany, the Netherlands, Slovakia and the Russian Federation. Of course, this information does not reveal what kinds of procedures are conducted in those countries and who conducts them.

252 European Commission for the Efficiency of Justice, *European Judicial Systems*, Report, 2008, p 103. Countries reporting judges mediating include Croatia, Finland, Norway and Turkey. It is not clear whether 'mediation' can be understood as 'mediation' within the meaning of mediation as understood by NADRAC.

253 United Kingdom, s 93 *Arbitration Act 1996*.

254 Scotland, proposed s 23 *Arbitration (Scotland) Bill* (as introduced 29 January 2009).

255 Her Honour Judge Margaret Sidis, District Court NSW, Newcastle Register [12 June 2009]. See also her Honour Judge M Sidis, *Judicial mediation in the District Court*, (2006) 18(9) *Judicial Officers Bulletin* 74.

256 R Greger, *Justiz, Schlichtung, Mediation – Alternativen oder Teil des Ganzen?* (2007) A(4) *Schleswig-Holsteinische Anzeigen* 109, p 112.

257 See D Spencer, *Judicial mediators: Is the Time Right? – Part I*, (2006) 17 *Alternative Dispute Resolution Journal* 130.

258 K Saville-Smith and R Fraser, *Alternative Dispute Resolution: general civil cases, Chapter 6 – ADR and the Courts System*, (2004) New Zealand Ministry of Justice, available at: <http://justice.govt.nz/publications/global-publications/a/alternative-dispute-resolution-general-civil-cases/6-adr-and-the-courts-system> (viewed 11 September 2009).

7.34 Based on those research findings, there may be an argument that greater judicial involvement saves time and costs for disputants, the courts and the justice system at large. For individual disputants, judicial involvement may mean an earlier and more efficient resolution of their matters. For the courts, litigation may be disposed of more efficiently, thus reducing their overall workload. For the justice system, more efficiency could translate into better outcomes overall. However, NADRAC is not aware of any evidence to suggest that the outcomes for litigants will be qualitatively improved.

What is judicial dispute resolution?

7.35 The literature accompanying the above mentioned trials and pilots indicates that it is often unclear what kind of ADR processes are used by those asserting to practise judicial dispute resolution.²⁵⁹ It is apparent that the term can be (and is) used in a number of ways, including to:

- describe a range of activities and processes utilised by judges through referral mechanisms
- mean judges taking responsibility for managing different processes, including ADR processes, but not actually delivering the process themselves, and
- refer to judges being involved in dispute resolution processes where the judge actually delivers the dispute resolution process, which is not a trial.

7.36 The latter also includes judicially assisted settlement negotiations, facilitative judging or judge-led or judicial mediation. Judge-led or judicial mediation can also be understood differently. The term might be used to include procedures where the judge actually undertakes the mediation. In other circumstances, the term is used to describe processes where judges manage cases and refer cases to mediation, under their continuing supervision.

7.37 What is often unclear is what part a judge who is involved in ‘judicial dispute resolution’ plays.

7.38 There appears to NADRAC to be a preponderant view that if a judge is involved in any ADR process and meets privately with the parties to the dispute, that judge must not preside at the trial of the dispute.²⁶⁰ However, there seem to be some jurisdictions where this appears possible, at least with the consent of the parties.²⁶¹

In other jurisdictions there is some evidence that judges continue to hear matters even though legislation suggests, and commentary supports, the referral of such matters to another judge.²⁶²

259 See Chapter 3 – Towards National ADR Principles.

260 See Schedule 3 – Confidentiality in ADR processes.

261 New Zealand, s 268 *Resource Management Act 1991*.

262 R Greger, *Justiz, Schlichtung, Mediation – Alternativen oder Teil des Ganzen?*, (2007) A(4) *Schleswig-Holsteinische Anzeigen* 109, p 112. Compare A J Cannon, *What is the proper role of judicial officers in ADR?* (2002) 13 *Australasian Dispute Resolution Journal* 253.

7.39 NADRAC is aware that in some courts in Australia judges have, on occasion, mediated a matter which involved private meetings with the parties. In each of those few cases, the judge who mediated (often for another judge who had responsibility for the matter as the ‘docket’ judge) did not, and would not, preside at the trial.

What is judge-led mediation?

7.40 Recently, judicial dispute resolution gained increased attention in Australia when the Attorney-General for Victoria identified ‘judge-led mediation’ as a priority for the Victorian Government.²⁶³ However, even in that initiative, what is meant by the phrase ‘judge-led mediation’ is not clear. NADRAC notes the recent clarification by Chief Justice Warren who ‘would describe the model as a judge led settlement conference. In such a situation: [...] the judge would [...] conduct a pre-settlement directions hearing and direct the materials to be provided [...]’.²⁶⁴

7.41 However, there appears to still be some uncertainty surrounding the use of the term. It has been used to describe processes akin to court-ordered mediation (as opposed to voluntary, consensual mediation).²⁶⁵ It may be contemplated that judicial officers actually undertake mediation, or that they lead the case management procedures prior to, and after any referral to, mediation, where a person other than a judge conducts the mediation. Moreover, it is not clear whether it is proposed that only certain categories of judicial officers mediate. For example, associate judges might mediate disputes, rather than judges. The term ‘judge-led mediation’ can also include using retired judges as mediators.

Questions surrounding judge-led mediation

7.42 If sitting judges conduct mediations which are facilitative, interests-based processes in which those judges conduct private sessions with the parties, there remain significant questions. One cluster of issues arises from the specific nature of the mediation process. Questions include:

- the specific hallmarks of mediation (such as engaging in private sessions or caucusing with parties) may mean that judicial mediation is incompatible with the constitutional role of judges exercising the federal jurisdiction of the Commonwealth²⁶⁶

263 The Hon R Hulls, *Roadmap of Reform for Victoria’s Justice System*, Media Release, 14 October 2008.

264 The Hon Marilyn Warren, Chief Justice of Victoria, ADR and a different approach to litigation, Speech, Law Institute of Victoria, 18 March 2009, available at http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/ebc7af0173b4fcb/ADR%20and%20a%20different%20approach%20to%20litigation_CJ.pdf (viewed 11 September 2009).

265 J Timsit, *Mediation: An alternative to judgement, not an alternative judgement*, (2003) 69(3) *Arbitration* 159, 164. See also the distinction drawn by H E Chodosh, *Judicial Mediation and Legal Culture*, (1999) 4(3) *Issues of Democracy* 1.

266 In Australia, the prevalent view appears to be that judicial mediation is not part of the exercise of the judicial power of the Commonwealth. See P Tucker, *Judges as Mediators: A Chapter III Prohibition*, (2000) 11 *Australian Dispute Resolution Journal* 84, 88; the Hon M Moore J, *Judges as Mediators: A Ch III Prohibition or Accommodation?* (2003) 14 *Australian Dispute Resolution Journal* 188, 194; and D Spencer, *Judicial Mediators: Is the Time Right? – Part I*, (2006) 17 *Australian Dispute Resolution Journal* 130, 137–139. This may be different in other countries. In Germany, for example, it seems to be accepted that judicial mediation is part of the judicial function under Art 92 of the German Constitution. J M von Bargaen, *Gerichtsinterne Mediation*, Veröffentlichungen zum Verfahrensrecht No. 57, October 2008, pp 162–190.

- parties might expect a judge to express an opinion on likely outcome of the proceedings, which might be thought to be inconsistent with both the principles of mediation and the role of a judge, and
- it is inappropriate for judges to engage with parties in private sessions because this might cause an appearance of bias.

7.43 Another cluster of issues relates to the specific role judges perform, the authority they hold as a result of that role, and to their specific judicial skills. These issues include:

- judicial mediation might only be successful due to the judge's imprimatur, particularly arising from a process of encouraging or even suggesting solutions
- an agreement reached on the basis of a judge's imprimatur or authority might leave the parties dissatisfied with the outcome
- a perception of judges using their authority might threaten public confidence in the integrity and impartiality of the court and the judge²⁶⁷
- unless specifically trained, the judicial skills of analysis, judgment, and decision-making are far less relevant in mediation²⁶⁸
- judges risk confusing their respective roles as judge and mediator²⁶⁹
- judges are usually appointed (with the necessary skills) to perform the judicial function, and are likely to need extensive training in appropriate skills
- judges might be required to excuse themselves from an increasing number of hearings because they mediated disputes where they were privy to confidential information relevant to the matter before them,²⁷⁰ or
- there are numerous mediation services now available and it should not be necessary to rely on existing judges to provide mediation services.

267 See the comments of Sir Laurence Street in a number of different forums, such as Sir L Street, *The Courts and Mediation – A Warning*, (1991) 2 Australian Dispute Resolution Journal 203; and Sir L Street, *Mediation and the Judicial Institution*, (1997) 71 Australian Law Journal 794.

268 The Hon Justice H F Landerkin QC, A J Pirie, *Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?*, (2003) 82 Canadian Bar Review 249, p 271. The Hon Justice L Otis, E H Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, (2006) 6 Pepperdine Dispute Resolution Law Journal 351, p 353. See also Professor F Sander's comments in N Shaffer, *Rush to Judgement*, (2008) Massachusetts Lawyers Weekly, available at <http://www.dolanmedia.com/view.cfm?recID=344146> (viewed 11 September 2009).

269 *Travelers Casualty and Surety Co. v The Superior Court of Los Angeles County* 24 Cal. Rptr. 3d 751 (Cal Ct App 2005). In this case, Lichtman J purported to make (judicial) orders as part of a mediation he conducted. Certilman noted that it is often 'assumed that [judges'] dispute resolution skills are as broad as one hopes they are deep. Ironically, judges in mediation proceedings often have difficulty setting aside their broad powers and judicial demeanour and mustering diplomatic skills and powers of persuasion in service the goal of eliciting compromise.' S A Certilman, *Judges as mediators: retaining neutrality and avoiding the trap of social engineering*, (2007) 73 Arbitration 1, p 24.

270 *The Duke Group Ltd (In Liq) v Alamain Investments Ltd* [2003] SASC 272. D Spencer, *A warning against judges as mediators*, (2006) 17 Australian Dispute Resolution Journal 185, p 186. There may also be problems in relation to 'Chinese walls' in courts established to prevent the leakage of information, especially where the public may apprehend or suspect that such leakages could occur nevertheless. See *Ruffles v Chilman* (1997) 17 WAR 1.

- 7.44 Finally, judicial time is expensive in comparison to high quality private ADR providers.
- 7.45 Where participants are dissatisfied with a judge's conduct of the mediation (which could include a refusal to express an opinion), this might reflect negatively upon the judiciary as a whole. Also, participants' dissatisfaction may be further increased because judicial immunity will leave them with no legal remedy for a judge's inappropriate conduct during mediation.
- 7.46 In a recent speech to the Queensland Law Society, Justice Daubney referred to the experience in Sweden. His Honour explained:

Sweden is a jurisdiction in which they have judge mediators. The Ombudsman is the official charged with the responsibility of investigating complaints against judicial officers. The Ombudsman pointed out that a not infrequent complaint to him was from parties to mediations conducted by judge mediators. They complained after the event about the settlements reached on the basis, in effect, that they felt intimidated by the judge or felt pressured by the judge into compromise. Now that, of course, is a very serious complaint to make about the conduct of a judicial officer. The problem, however, is that it is really impossible for the Ombudsman to undertake any sort of satisfactory investigation – the mediation was conducted under the shroud of confidentiality, and there is no transcript of the proceedings. The other party to the settlement is hardly likely to complain. The Ombudsman said, in effect, that there is really no satisfactory way of responding to such a complaint.²⁷¹

- 7.47 Justice Daubney concluded that:

That sort of experience can hardly enhance the standing of the judiciary in the eyes of the public, and must be very unsettling and unsatisfactory for the judges whose integrity is called into question, let alone the parties who wish to ventilate grievances against those judges.²⁷²

- 7.48 If judges were to conduct mediations it is reasonable to assume that they would be expected to be accredited according to the national standards, especially if the court required its officers to be accredited or the parties seeking a referral to an external mediator expected an accredited mediator. Moreover, the maintenance of that accreditation would impose the burden upon a judge of conducting a minimum number of mediations each year, together with an annual requirement for professional development in relation to ADR.

Views expressed in the submissions

- 7.49 NADRAC did not receive any submission supportive of judicial mediation where the judge assigned to a matter also took on the role of the mediator. There was only little support in relation to judicial mediation where the mediation is conducted by a different judge.

²⁷¹ The Hon M Daubney, Directions in ADR – Reflections from the Bench, Speech, Queensland Law Society, 30 October 2008. Justice Daubney referred to information Justice Byrne obtained first-hand in Sweden.

²⁷² *ibid.*

- 7.50 Chief Justice French acknowledged the possible benefits of judicial mediation that could flow from judges bringing their authority to bear. However, his Honour also noted the potential confusion of the role of judge and concluded that ‘now that there is a plethora of court officers with a good track record in court mediation and where there is a well-established private sector of highly qualified mediators, including former judges, the need for a judicial mediation facility is questionable.’²⁷³
- 7.51 The Victorian Bar agreed that there are serious concerns about judicial mediation and stated that ‘Judges are appointed to Judge, and not to negotiate or take part in commercial negotiations between commercial parties. Judges are appointed not for their mediation skills but for their judicial abilities.’²⁷⁴ However, the Victorian Bar also noted that judges may be more suited to conduct advisory processes.²⁷⁵
- 7.52 Of those supporting judge-led mediation models, National Legal Aid noted that ‘such models [should] be applied in a targeted manner and not as a general approach in all court matters.’²⁷⁶ Other processes that would fall under the umbrella of judicial dispute resolution received some support or at least qualified support. These processes included judicial conferencing, moderation and facilitative judging.

NADRAC’s view

- 7.53 NADRAC is of the view that courts fulfil a specific role within society. As noted in Chapter 5 of this report, as the third arm of government, courts fulfil a basic yet fundamental role in society: they resolve legal disputes according to law.²⁷⁷ NADRAC respectfully agrees with the Chief Justice of Australia who recently argued that:
- [...] it is in the public interest that the constitutional function of the judiciary is not compromised in fact or a matter of perception by blurring its boundaries with non-judicial services.²⁷⁸
- 7.54 ‘Judicial dispute resolution’ is a phrase that describes a range of judicially assisted dispute resolution processes and may even include active or collaborative case management conferences.²⁷⁹
- 7.55 NADRAC understands ‘mediation’ to be a facilitative, interests-based process in which mediators foster communication and discussion of the issues with the parties, conduct private sessions with the participants and encourage them to reach

273 The Hon R French, Chief Justice of the High Court of Australia, Submission, p 1.

274 The Victorian Bar, Submission, para 86.

275 The Victorian Bar, Submission, para 116.

276 National Legal Aid, Submission, p 5.

277 The Hon Justice K Hayne, High Court of Australia, *The Vanishing Trial*, Paper, Supreme and Federal Courts Judges Conference, 23 January 2008, Sydney.

278 The Hon Chief Justice R French, Chief Justice of the High Court of Australia, Perspectives on Court Annexed Alternative Dispute Resolution, Paper, Multi-door courthouse forum, Canberra, 27 July 2009, available at <http://www.highcourt.gov.au/speeches/frenchcj/frenchcj27july09.pdf>, (viewed 18 September 2009).

279 In Canada, judicial dispute resolution has been described as ‘non-adjudicative procedures used by judges to assist settlements within [the] public justice system.’ See The Hon H F Landerkin QC J, A J Pirie, *Judges as Mediators: What’s the Problem with Judicial Dispute Resolution in Canada?*, (2003) 82 *Canadian Bar Review* 249, p 271.

an agreed conclusion. ‘Judicial mediation’ would be a similar process but conducted by a judge-mediator who would not subsequently hear the matter.

- 7.56 Whilst NADRAC accepts that (subject to constitutional considerations) ADR processes other than mediation may be acceptable forms of judicial dispute resolution, NADRAC does not support the practice of judicial mediation.
- 7.57 Under the Australian constitutional framework, there seems to be some doubt about whether judges exercising federal jurisdiction could conduct judicial mediations. The specific hallmarks of mediation, especially private sessions with the parties, seem incompatible with the traditional role of the judge as envisaged by the Constitution. Further, these hallmarks may undermine the role of the judge more generally and damage the confidence in the judiciary.
- 7.58 NADRAC is cautious about reports of successful judicial mediation pilots in other jurisdictions. Whilst such pilots might be instructive, there seem to be at least three reasons why comparisons may be of limited assistance. First, different historical developments of legal systems are significant, particularly having regard to Chapter III constraints. Secondly, it is unclear how mediation in these pilots was conducted. A lack of consistency in terminology as well as a significant lack in comparative data and data evaluation does not allow a proper comparative analysis.²⁸⁰ Thirdly, some of the successes seem to be due to the personal characteristics, skills and enthusiasm of individual judges rather than being the result of a general embrace of judicial mediation in the particular jurisdiction.
- 7.59 NADRAC is also of the view that if judges were to mediate, they should be accredited according to the national framework, which raises other issues supporting NADRAC’s conclusion that judges should not mediate.
- 7.60 Nevertheless, NADRAC does support judge-led mediation if that term means that judges adopt a ‘facilitative role’,²⁸¹ actively manage cases, and refer cases which are suitable for mediation at an appropriate time. NADRAC supports increased active case management in the courts and believes that government and the courts should continue to explore options and identify solutions to make proceedings more efficient, less expensive, and quick – provided that litigants are not disadvantaged and receive better or at least similar outcomes. In that sense, NADRAC sees potential for the use of some ADR techniques by the judiciary to improve court processes.

Recommendation 7.2

Except in exceptional circumstances, judges should not mediate and, if they do so, they should not hear the case. Moreover, any judge who mediates should be accredited under NMAS.

280 See Chapter 3 – Towards National ADR Principles. See also Chapter 6 – Supporting Quality ADR.

281 T Sourdin, *Facilitating Dispute Resolution within Courts*, Paper, International Conference of the Presidents of the Supreme Courts of the World, Abu Dhabi, March 2008.

Chapter 8: Use of ADR by the Federal Government

Introduction

8.1 NADRAC's enquiries revealed that the Federal Government is playing an important leadership role in increasing the use of ADR in Australia. The Government recently emphasised the importance of ADR in ensuring an affordable, efficient and accessible justice system.²⁸² It has also expressed its commitment to reducing spending on legal services and to freeing up court time by requiring Commonwealth agencies to pursue ways of resolving disputes without recourse to litigation. Recent amendments to the LSDs reflect this commitment. In addition, beyond those forms of ADR associated with actual or potential litigation there exist broader Government ADR strategies, including in the areas of customer and client relations, procurement, employment and industrial relations.

The Legal Services Directions – ADR and ‘meaningful prospect of liability’

- 8.2 The LSDs are a set of binding rules about the performance of legal work for the Commonwealth. Issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*, they cover legal services provided by government in-house lawyers, by the Australian Government Solicitor (AGS), and by other external legal service providers.
- 8.3 Appendix B to the LSDs imposes an obligation on nearly all Commonwealth agencies to act as ‘model litigants’, including requirements to endeavour to avoid, prevent and limit the scope of litigation.²⁸³ On 1 July 2008, the LSDs were amended. Before initiating legal proceedings, such agencies must have considered ADR and be satisfied that litigation is the most suitable method of dispute resolution. In addition, Commonwealth agencies must keep the costs of litigation to a minimum by monitoring the progress of the litigation and using appropriate methods of resolving the litigation, including through ADR.
- 8.4 Although the requirement to consider ADR applies specifically to the Commonwealth and its agencies, as the biggest single litigator in the federal justice system the Commonwealth has the potential to influence dispute resolution processes more broadly through its involvement in a large variety

282 The Hon Robert McClelland, Attorney-General for the Commonwealth of Australia, Speech, Multi-Door Court House Symposium, Canberra, 27 July 2009, available at http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2009_27July2009-SpeechtotheMulti-doorCourtHouseSymposium.

283 Appendix B *Legal Services Directions 2005*, which applies to all agencies subject to the *Financial Management and Accountability Act 1997* (FMA agencies) and nearly all agencies subject to the *Commonwealth Authorities and Companies Act 1997* (CAC Act agencies).

and number of disputes.²⁸⁴ By being at the cutting edge of dispute management practices, the Commonwealth can enhance the quality and consistency of ADR services through its participation in ADR processes with private business and the broader community.²⁸⁵

- 8.5 Appendix C to the LSDs only permits Commonwealth agencies that are subject to the *Financial Management and Accountability Act 1997* (FMA agencies) to settle a claim against the Commonwealth or the agency in accordance with legal principle and practice. Appendix C provides that:

A settlement on the basis of legal principle and practice requires the existence of at least a meaningful prospect of liability being established. In particular, settlement is not to be effected merely because of the cost of defending what is clearly a spurious claim.

- 8.6 The chief executives of FMA agencies have an obligation to issue certificates of compliance with the LSDs, including compliance with Appendices B and C.
- 8.7 Some concerns exist that confusion about the interpretation of the requirements in the LSDs might be creating a barrier to the use of ADR by agencies.

Views expressed in the submissions

- 8.8 The Department of Resources, Energy and Tourism suggested in its submission to NADRAC that the requirements in Appendix C to the LSDs are too restrictive in relation to the extent to which they [are perceived to] limit ADR.
- 8.9 During NADRAC consultations, some agencies expressed the view that the LSDs prevent them from settling claims on a ‘commercial basis’.
- 8.10 In its submission to NADRAC, the AGS expressed the view that the interaction between the use of ADR and the requirement in Appendix C of the LSDs for settlements to be in accordance with legal principle and practice is workable. As to whether Appendix C should be amended, AGS stated that the question is a policy issue for government.²⁸⁶

NADRAC’s view

- 8.11 NADRAC is of the view that clarification of the LSDs could remove a potential barrier to the use of ADR by agencies. NADRAC supports clarification of the interplay between the LSDs encouragement of ADR and the requirement for settlements to be in accordance with legal principle and practice.
- 8.12 The concept of a ‘meaningful prospect of liability being established’ may not be sufficiently clear, and there is a risk that some agencies or their legal advisers set the bar too high, thereby leaving insufficient room for negotiation and agreed resolution of claims. Also, difficulties can arise if, during ADR, new information that might affect the prospect of liability being established comes to light that was

²⁸⁴ NADRAC, *Submission on the Legal Services Directions Issues Paper*, 2004, p 1.

²⁸⁵ *ibid.*, p 2.

²⁸⁶ Australian Government Solicitor, *Submission*, p 5.

not available when initial advice about the prospect of liability was given. The person representing the Commonwealth may then be precluded from agreeing to any proposed settlement until new written advice is received (see paragraph 4 of Appendix C). This possibility seems to generate confusion, particularly in relation to ‘authority to settle’, and may create a barrier to effective participation in ADR. Guidance for dealing with this scenario might usefully be included in the LSDs.

- 8.13 Also, there is a view that agencies cannot settle monetary claims on a ‘commercial basis’, because they cannot take future costs into account when assessing a fair settlement amount, such an approach not being in accordance with legal principle and practice. NADRAC suggests that this is not the intention of Appendix C and has the potential to undermine the use of ADR in Government. Appendix C provides that:

If there is a meaningful prospect of liability, the factors to be taken into account in assessing a fair settlement amount include:

- (a) the prospects of the claim succeeding in court
- (b) the costs of continuing to defend or pursue the claim, and
- (c) any prejudice to Government in continuing to defend or pursue the claim (eg a risk of disclosing confidential government information).

- 8.14 NADRAC is of the view that it may assist agencies if the LSDs were amended or additional guidance material provided to make it clear that unless a claim is spurious, then the costs of continuing to defend or pursue a claim should be taken into account in assessing a fair settlement amount.

Recommendation 8.1

The Attorney-General amend the LSDs to clarify the criteria for settlement and, in particular, the meaning of the words ‘a meaningful prospect of liability’.

The role of agency chief executives in encouraging ADR

- 8.15 The LSDs require chief executives of Commonwealth agencies to (i) ensure that their agencies adopt appropriate dispute management strategies and practices; and (ii) report in relation to some issues.²⁸⁷ However, there is no requirement for chief executives to provide information specifically about their agencies use of ADR.
- 8.16 In addition to the obligations arising under the LSDs, the *Financial Management and Accountability Act 1997* (FMA Act) and regulations made under it impose obligations on chief executives concerning the expenditure of public money, and the recovery of amounts of money owing to the Commonwealth. Amounts should generally be recovered, but it may in some circumstances be appropriate to consider compromise for a lesser amount, deferral of the debt, write-off or waiver of amounts owing.²⁸⁸

²⁸⁷ Paragraph 11.1 (b) *Legal Services Directions 2005*.

²⁸⁸ *ibid.*, note to clause 4.3.

Views expressed in the submissions

- 8.17 The NSW’s Attorney-General’s Department provided a copy of its *ADR Blueprint (A Framework for the Delivery of ADR services in NSW)* to NADRAC, for NADRAC to consider as part of its enquiries. In that document, the Department noted that in NSW the responsibility for ensuring compliance with the model litigant policy rests with the chief executive officers of government agencies, and there is no mechanism to test whether government agencies are in fact complying with the spirit and intent of the policy, nor is there a complaints process.²⁸⁹
- 8.18 The Department’s discussion paper includes a proposal that government agencies be more accountable with respect to their adherence to the Model Litigant Policy and relevant premier’s memoranda, by putting in place appropriate performance measures to monitor compliance and/or using appropriate auditing mechanisms.²⁹⁰
- 8.19 The Department subsequently published its *ADR Blueprint Draft Recommendations Report 2: ADR in Government*. It includes the following draft recommendation:
- Government agencies be required to respond to an annual survey of their use of ADR to resolve legal proceedings and other disputes and of their compliance with the ADR requirements in the Model Litigant Policy, and the results be publicly available.²⁹¹
- 8.20 On a different issue, some agencies noted the tension between legal and financial requirements applying to the utilisation of ADR. In its submission to NADRAC, the Law Institute of Victoria noted that a balance must be struck between the desirability of using ADR processes and the prudent use of public revenue. In its submission the Department of Families Housing Community Services & Indigenous Affairs (FaHCSIA) suggested that the costs of ADR are sometimes a barrier to its use. FaHCSIA noted that it weighs the relative costs and benefits of ADR against other options for settling disputes which may be more cost effective (such as settlement negotiations, lawyers’ letters, etc).

NADRAC’s view

- 8.21 NADRAC’s view is that because direct responsibility for ensuring compliance with the model litigant policy – including requirements in relation to ADR – rests with the chief executives of government agencies, it is important for these officers to identify and implement strategies and systems to ensure that their agencies fully comply with all ADR-related requirements (eg processes to promote resort to ADR, pilot schemes to trial new ADR initiatives, introduction of performance measures, a regime for monitoring of compliance). The inclusion of a reporting requirement in the LSDs could help to test the effectiveness of such strategies and systems.

289 NSW Attorney-General’s Department, *ADR Blueprint Discussion Paper*, Sydney, April 2009, Proposal 8, p 14.

290 *ibid.*

291 NSW Attorney-General’s Department, *ADR Blueprint*, Draft Recommendations Report 2: ADR in Government, Sydney, September 2009, p 1.

- 8.22 Chief Executives could provide guidance material or instructions, possibly included in their Chief Executive Instructions, to agency officers about how to achieve compliance with ADR-related requirements of the LSDs. Such material could reduce a barrier to the use of ADR by agencies, by assisting them to resolve perceived tensions between the provisions in the FMA Act and regulations concerning expenditure of public moneys and the provisions in the LSDs about ADR. Reference could be made to any guidance material published by the Department of Finance and Deregulation (Finance) on obligations under the FMA Act and recovery of amounts owing to the Commonwealth.
- 8.23 Familiarity with and experience of ADR processes is critical to the uptake of ADR by government agencies. It seems that to some agency officers, ADR is understood to mean settlement negotiations. A coordinated approach to ADR at the senior government level could help to overcome such misunderstandings and to provide leadership and sponsorship in relation to ADR. In addition to government lawyers, corporate divisions, including human resources sections, and policy and program areas within agencies, would benefit from a better understanding of ADR. Chief Executives have a crucial role in achieving this outcome.
- 8.24 At this stage, NADRAC is not making any recommendations about the role of Chief Executive Officers in relation to the use of ADR by agencies. However, some of the matters raised above are addressed to some extent in NADRAC's recommendations about dispute management plans. The options of ADR surveys and mandatory reporting obligations warrant further consideration.

Use of accredited mediators

- 8.25 Appendix F to the LSDs imposes restrictions on the provision of legal services to the Commonwealth. However, there exist no restrictions on arrangements for the provision of ADR services to the Commonwealth. Mediation and other ADR services are not legal services for the purposes of Appendix F to the LSDs. Firms appointed to agency panels to provide legal services to agencies may employ lawyers with expertise in mediation or other ADR services, but such expertise is not a requirement for a legal service provider.
- 8.26 Agencies often engage mediators and other ADR professionals who are perceived as having a high degree of credibility and authority, such as senior counsel and retired judges. However, it could be argued that ADR processes that are not determinative are better provided by facilitators who may have backgrounds in advice giving or adjudicating, but who in addition have skills to assist ADR participants to reach agreements.
- 8.27 Another concern is that the costs of ADR services provided by retired judges and counsel can be very high. This has a tendency to distort the ADR market in relation to disputes involving the Commonwealth. The Directions on *Engagement of Counsel* at Appendix D of the LSDs limit the daily rate of fees that can be paid to legal counsel, but there are no restrictions governing the fees that can be paid to ADR

practitioners, including to legal counsel providing ADR services. Some agencies have expressed concerns about this anomaly.

- 8.28 Ensuring that ADR services utilised by the Commonwealth are of a high quality requires that the Commonwealth has a reliable source from which to access high quality mediation practitioners. There are currently no requirements for the Commonwealth to use accredited mediators. There might be a need for the introduction of a requirement that agencies use accredited mediators, such as mediators accredited under the NMAS.

Views expressed in the submissions

- 8.29 In its submission, the Australian Tax Office noted that whereas the OLSC sets the rates for government when engaging barristers, it does not set rates for ADR practitioners. It stated that the costs of some ADR services such as mediation can therefore become a perceived barrier to its uptake in some government disputes, and some restrictions or agreed government rates for ADR practitioners may be cost effective.²⁹² It also suggested that some additional whole-of-government approaches to engagement of ADR practitioners in general may be an advantage, such as standardised ADR agreements and rates, training requirements, and mechanisms for dealing with conflicts of interest.²⁹³
- 8.30 The Law Institute of Victoria in its submission advises that it publishes a mediators' directory as well as a directory of accredited specialists in mediation.²⁹⁴ During consultations with NADRAC, some agencies stated that they use mediators recommended to them by panel firms.

NADRAC's view

- 8.31 NADRAC supports the introduction of a requirement to use accredited mediators. It also supports a more active role for the Attorney-General's Department in the provision of information about mediators.
- 8.32 At this stage, because too few submissions addressed this issue, NADRAC is not making a recommendation that there should be restrictions applying to the fees that can be paid by the Commonwealth to ADR service providers. However, NADRAC suggests that the matter should be considered further by the Government.

Recommendation 8.2

That the Attorney-General amend the LSDs to require agencies to use mediators accredited under the NMAS, unless approval to use other mediators is obtained from the Attorney-General or his or her delegate.

292 Australian Taxation Office, Submission, p 17.

293 Australian Taxation Office, Submission, pp 17, 32.

294 Law Institute of Victoria, Submission, pp 4, 13.

Recommendation 8.3

The Attorney-General's Department should assist agencies to find accredited mediators and other ADR practitioners who are independent of the agencies and experienced in government disputes.

Dispute management plans

- 8.33 The ALRC has previously recommended that each federal department and agency should be required to establish a dispute avoidance, management and resolution plan which should be consistent with the model litigant rules.²⁹⁵
- 8.34 While there is currently no requirement to do so, consideration continues to be given by policy-makers to the introduction of a requirement that agencies develop dispute management plans consistent with the LSDs. Dispute management plans could help to guard against the possibility of the LSD requirements concerning ADR being overlooked. Chief executives could be required to ensure that their agencies comply with such plans. Chief executives could also be required to report against such plans. A reporting requirement could focus agencies' commitment to ADR and provide useful data regarding the uptake and use of ADR by agencies.
- 8.35 For agencies that handle large numbers of similar claims, tailored dispute management plans could streamline processes and increase efficiency. There could be a generic dispute management plan which could be adapted by agencies to reflect their specific circumstances and the particular disputes which arise involving them.

Views expressed in the submissions

- 8.36 While none of the submissions specifically addressed this issue, some submissions noted that agencies had difficulties determining when and how to use ADR. It was suggested that the requirement to consider ADR during legal proceedings is sometimes overlooked.

NADRAC's view

- 8.37 NADRAC's view is that the LSDs should impose more specific obligations on agencies in relation to the use of ADR. A requirement for dispute management plans could provide frameworks for a more systematic approach to the consideration and use of ADR.
- 8.38 NADRAC agrees with the ALRC's suggestion that agencies should be required to have dispute management plans, especially where an agency is involved in the handling of a significant number of claims and disputes.²⁹⁶

²⁹⁵ Australian Law Reform Commission, *Managing Justice*, Report, Sydney, 2000, Recommendation 69.

²⁹⁶ NADRAC, *Submission on the Legal Services Directions Issues Paper*, 2004, p 2.

Recommendation 8.4

The Attorney-General amend the LSDs to require agencies, unless an exemption is obtained, to develop and regularly review dispute management plans that require appropriate use of ADR.

Recommendation 8.5

The Attorney-General ask NADRAC, in consultation with OLSC, to prepare a model dispute management plan that could be used to assist agencies to comply with their obligations under the LSDs.

Recommendation 8.6

The Attorney-General amend the LSDs to require agencies to include in their reports to OLSC details of their dispute management plans.

Support for agencies

- 8.39 There exists a range of legislative requirements for ADR and various statutory provisions that bear on the scope of matters that can be agreed through ADR.
- 8.40 Agencies should take into account any legislative constraints on Commonwealth action in the subject matter of the dispute, before considering ADR. For example, the Federal Court has ruled that the *Safety, Rehabilitation and Compensation Act 1988* constitutes a comprehensive code of entitlements not amenable to displacement by agreements between the employee and the employing agency.²⁹⁷ Nevertheless, the power given to Comcare to undertake ‘own motion’ reconsiderations of decisions leaves considerable scope for exploring agreed outcomes.²⁹⁸
- 8.41 Agencies exercising statutory powers should take into account that an outcome pursued through ADR may run the risk of being illegal or unenforceable if it purports to fetter the exercise of a statutory power. Nevertheless, a great many disputes can be settled through mediation without impermissibly fettering the future exercise of statutory powers.²⁹⁹
- 8.42 Applying ADR in administrative law settings is constrained by legal requirements for valid decision-making. However, legal requirements for valid decision-making will often leave considerable latitude for settlements on agreed terms. The *Administrative Appeals Tribunal Act 1975* makes specific provision for the resolution by ADR of applications for review before the AAT. In a recent article in the *Australian Journal of Administrative Law*, the President of the AAT said:

297 *Behan v Australian Telecommunications Corporation* (1990) 26 FCR 337.

298 Australian Government Solicitor; *Alternative Dispute Resolution for Commonwealth Agencies*, Legal Briefing No. 88, 18 August 2008, p 18.

299 *ibid.*, p 3.

[...] it is important to remember that ADR processes can be used for a range of purposes. While the primary goal may be to attempt to reach an agreed outcome in a matter, ADR processes can also help to clarify and narrow the issues that are in dispute between the parties. Settling a matter in its entirety is not the only possible outcome of an ADR process.³⁰⁰

- 8.43 Regulatory agencies must also consider the importance of generating legal precedents. Over-reliance on legal settlements can reduce the development of clear precedents, which can reduce the extent to which regulation can deter non-compliance. ADR processes can nevertheless be expected to be useful in a wide range of disputes. Even if a matter cannot be resolved through ADR, the issues in dispute may be able to be significantly narrowed to shorten proceedings.
- 8.44 While there is a range of guidance material for agencies on the use of ADR in Commonwealth disputes, a centralised information service, such as an ADR website or helpline, could assist agencies to identify and apply appropriate processes.
- 8.45 The establishment by Commonwealth agencies of an ADR Inter-Agency Group has enabled agencies to share ideas about effective dispute management practices and to identify problems within existing dispute management systems. The working group also facilitates the sharing and building of corporate knowledge relating to ADR.

Views expressed in the submissions

- 8.46 In correspondence to NADRAC, the Department of Immigration and Citizenship noted the importance of ADR in broader government systems. By way of example, the Department referred to its community assistance support program which provides services to eligible case-managed clients, including services to facilitate the resolution of their immigration status.
- 8.47 The Department of Veteran's Affairs explained in its submission to NADRAC that it provides training to its pension and welfare officers to enable them to assist claimants to prepare claims more effectively, which reduces disputes and litigation.³⁰¹ The Department also noted that most of its litigation concerns entitlements to compensation and benefits under statutory schemes and that in the administration of legislation and the exercise of statutory powers it is required to be open and accountable. The Department noted that private mediation and negotiation of the interpretation of statutory provisions is not always appropriate. The Department nevertheless successfully utilises ADR processes in certain disputes and certain parts of disputes, where appropriate.³⁰²

300 The Hon Justice G Downes AM, *Alternative dispute resolution at the AAT* (2008) 15 Australian Journal of Administrative Law 137.

301 Department of Veterans' Affairs, Submission, p 3.

302 Department of Veterans' Affairs, Submission, pp 1, 2.

- 8.48 The Department of Agriculture, Fisheries and Forestry suggested in its submission that confusion about ADR processes creates a barrier to their effective use by agencies.³⁰³ The Department stated that there is a proliferation of guidance material on ADR in government, but difficulties can arise in reconciling this information.³⁰⁴
- 8.49 The AAT in its submission states that it makes use of ADR, particularly through its unique conference process, which is part case management and part ADR.³⁰⁵
- 8.50 In its submission, the AGS strongly agrees that targeted guidance to government lawyers and other Commonwealth officers is highly desirable.³⁰⁶ Similarly, the Law Institute of Victoria noted in its submission that Government agencies would benefit from education and training in ADR processes.³⁰⁷ The Institute noted that the lines of authority under which government officers may reach a resolution of a dispute in an ADR process may need clarification.³⁰⁸
- 8.51 The Australian Taxation Office stated in its submission that it provides guidance material where there are tensions in the duties of the Commissioner in relation to the resolution of taxation disputes, for example, its Code of Settlement Practice.³⁰⁹

NADRAC's view

- 8.52 NADRAC notes that ADR in government is not confined to processes linked to litigation and should be an element of broader systems and strategies.³¹⁰
- 8.53 NADRAC has previously encouraged and continues to encourage government to adopt a more consistent approach to the treatment of ADR in legislation.³¹¹ While some stakeholders have developed their own ADR systems, the existence of such systems should not preclude the Government from encouraging consistency in the treatment of ADR in legislation.
- 8.54 NADRAC notes that there may be a need for agencies to create their own specialised guidance material on ADR. However, taking into account that there exists a broad range of disputes that all agencies may potentially be engaged in, NADRAC is of the opinion that centralised guidance material for Commonwealth officers involved in ADR processes would assist with the take-up and quality of ADR.

303 Department of Agriculture, Fisheries and Forestry, Submission, p 1.

304 Department of Agriculture, Fisheries and Forestry, Submission, p 1.

305 Administrative Appeals Tribunal, Submission, p 1.

306 Australian Government Solicitor, Submission, p 2.

307 Law Institute of Victoria, Submission, p 13.

308 Law Institute of Victoria, Submission, p 13.

309 Australian Taxation Office, Submission, p 7.

310 NADRAC, *Submission on the Legal Services Directions Issues Paper*, Submission, 2004, p 6.

311 NADRAC, *Legislating for alternative dispute resolution, A guide for government policymakers and legal drafters*, Canberra, 2006.

Recommendation 8.7

The Attorney-General's Department:

- provide information to agencies about ADR – using both a dedicated webpage and an enquiry line, and
 - assist agencies to manage their significant disputes using ADR where it is assessed as likely to assist.
-

Dispute resolution clauses in contracts

- 8.55 Commonwealth agencies need to anticipate the types of disputes that may arise and to develop strategies to prevent their occurrence. Although some disputes are beyond the control of the Commonwealth, successful strategies exist that can assist in resolving issues and problems before they become significant disputes. These strategies include, in relation to contracts, the use of dispute resolution clauses.³¹²
- 8.56 Including dispute resolution clauses in contracts allows the settlement process to begin at an early stage and obviates the frequent problem of persuading the other party to the dispute to engage in an ADR process. While many agencies currently include ADR clauses in contracts and funding agreements, there is no requirement to do so.

Views expressed in the submissions

- 8.57 The Australian Bureau of Statistics (ABS) states in its submission to NADRAC that all ABS template contracts and Memoranda of Understanding contain dispute resolution clauses. It states that, to date, it has been able to resolve commercial disputes successfully through negotiation and has not needed to instigate other mechanisms such as mediation or litigation.
- 8.58 FaHCSIA noted in its submission that the terms and conditions of the funding agreements that apply to the funding of Indigenous programs generally include a dispute resolution clause. If the dispute is unable to be resolved by informal discussion or through direct negotiation, FaHCSIA is then required to pursue ADR.
- 8.59 The Department of Resources, Energy and Tourism's submission states that it includes an ADR clause in all its contracts and funding agreements and expresses the view that the inclusion of a standard ADR clause raises consciousness and sets the scene for a non-litigation culture.
- 8.60 The Department of Defence's submission suggested that a dispute resolution clause could be included in the LSDs, providing a process of dispute resolution for all disputes, including those that do not arise out of contracts.

³¹² NADRAC, *Submission on the Legal Services Directions Issues Paper*, 2004.

NADRAC's view

- 8.61 NADRAC believes that agencies should adopt the most efficient dispute resolution practices available, both to prevent litigation in the first place and to better manage litigation once commenced. More explicit obligations on agencies in relation to the use of ADR, such as a requirement to include ADR clauses in contracts and funding agreements, would help to achieve this.

Recommendation 8.8

The Attorney-General amend the LSDs to require agencies to have an appropriate form of dispute resolution clause in government contracts wherever possible.

ADR and Federal Compensation Schemes – CDDA and Act of Grace

- 8.62 The Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme) allows Government portfolio Ministers and authorised [...] officials in agencies operating under the *Financial Management and Accountability Act 1997* (FMA Act) to compensate individuals or other bodies who have experienced losses caused by Commonwealth agencies' maladministration. The Scheme is designed to cover losses due to an administrative failure, where there is no legal liability to compensate the person involved.³¹³
- 8.63 Act of Grace payments are made to individuals or other bodies who have experienced losses as a direct result of the involvement of an agency of the Australian Government, or the application of Commonwealth legislation. Payments are generally made where the paramount obligation to the claimant is moral, rather than legal. Under section 33 of the FMA Act, the Finance Minister, or his or her delegates, has the power to authorise act of grace payments. The Finance Minister has delegated this power to officials within Finance. As the powers have not been delegated outside the Finance portfolio, agencies do not make act of grace decisions themselves. However, the decision-makers within Finance rely strongly on the expertise of agencies in providing advice on the merits of claims that come directly to Finance.³¹⁴

Views expressed in the submissions

- 8.64 The Department of Agriculture, Fisheries and Forestry suggested in its submission to NADRAC that consideration needs to be given to the relationship between the settlement of legal claims and claims under discretionary compensation schemes.

³¹³ Department of Finance and Deregulation, *Finance Circular 2006/05: Discretionary Compensation Mechanisms*, p 6.

³¹⁴ *ibid.*, p 7.

NADRAC's view

- 8.65 In its Issues Paper, NADRAC noted that the relationship between the settlement of legal claims under the LSDs and the resolution of claims under the CDDA and Act of Grace schemes would benefit from further consideration and clarification.
- 8.66 In handing down its decisions in unsuccessful appeals, the AAT has sometimes suggested that certain claimants could consider seeking compensation under the CDDA Scheme.³¹⁵ The AAT has said that the CDDA scheme provides 'agencies with discretionary authority to compensate where there is no legal entitlement but where a claimant has suffered loss as a result of an agency's defective administration'.³¹⁶
- 8.67 There is a view that many disputes could be resolved by negotiation under the CDDA or Act of Grace schemes on a pre-hearing basis, but for the reluctance of parties to a dispute, based on their understanding of the schemes' requirements, to negotiate until all legal avenues are exhausted.
- 8.68 NADRAC suggests that the CDDA and Act of Grace schemes should be amended to make clear that payments may be made under them, notwithstanding that a legal claim might be pressed, if a view is properly formed that the legal claim is without merit (and therefore does not require settlement in accordance with Appendix C of the LSDs).

Recommendation 8.9

The Attorney-General write to the Minister for Finance and Deregulation requesting that the CDDA Scheme and the Act of Grace Scheme be amended to make it clear that they can be accessed by claimants who have not exhausted all avenues of legal redress.

315 *Derrick and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] AATA 375, 22 May 2009.

316 *Dervish and Secretary, Department of Education, Employment and Workplace Relations* [2009] AATA 376, 22 May 2009.

Chapter 9: A Model ADR Clause

Introduction

- 9.1 Parties to a contract may agree to include in their contract provisions that set out the processes (other than litigation) by which they will resolve any disputes that arise in the performance of the contract.
- 9.2 NADRAC understands that the inclusion in contracts of such dispute resolution clauses is now common, especially in commercial contracts. NADRAC is also aware that the majority of government contracts contain dispute resolution clauses.
- 9.3 NADRAC's Issues Paper noted that dispute resolution clauses that lack clarity can create barriers to use of ADR. Disputes relating to the interpretation of such clauses may result in litigation, and such clauses may be found to be void for uncertainty. NADRAC attached a proposed draft model mediation clause to the Issues Paper and invited and received comments about this clause.³¹⁷

Benefits dispute resolution clauses may offer

- 9.4 Contracting parties can agree to include a wide range of provisions in a dispute resolution clause. Appropriately drafted dispute resolution clauses can offer parties a range of benefits, including, for example:
 - they can operate in relation to a wide range of disputes that may arise under a contract³¹⁸
 - they can provide parties with flexibility to select a process or processes that best suit their specific relationship and contractual circumstances
 - they provide an opportunity to select, on the basis of skill or experience, those who are considered best able to assist with the resolution of the dispute
 - they allow for up-front agreements about the allocation of costs relating to the resolution of the dispute
 - the contract remains effective
 - the parties can continue with the performance of the contract, and
 - courts may stay litigation where a party commences such proceedings in court despite the existence of dispute resolution clause.³¹⁹

317 The model clause was based on the precedent prepared by the NSW Law Society which is available on their webpage.

318 *Vasp Group Pty Limited v Service Stream Limited* [2008] NSWSC 1182; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160.

319 For example, under a statutory power, see s 52 of the *Uniform Arbitration Acts*.

Risks associated with the use of dispute resolution clauses

- 9.5 However, there are risks associated with the use of dispute resolution clauses. Protracted and complex legal disputes concerning their interpretation or effectiveness at a later stage are a key risk. The drafting of such clauses therefore should seek to guard against this outcome. When drafting dispute resolution clauses, parties should:
- avoid the clause becoming an agreement to agree, because dispute resolution clauses must provide parties with the necessary amount of certainty concerning the process³²⁰
 - consider carefully whether to include obligations concerning their conduct during the selected dispute resolution process, such as ‘good faith’, ‘best endeavour’ or ‘genuine effort’ requirements³²¹
 - structure the dispute resolution process so that it suits their particular circumstances. This could include the parties’ agreement on whether:
 - certain kinds of disputes may be excluded from the operation of the dispute resolution clause
 - to use one- or multi-tiered dispute resolution clauses
 - there should be a mechanism, or several alternative mechanisms, by which a suitable ADR practitioner is chosen
 - to subject the dispute to particular provisions (for example as prepared by a reputable ADR service provider)
 - to stipulate milestones applicable to stages of the dispute resolution, or
 - time limits should apply (and what these time limits may be).

Views expressed in the submissions

- 9.6 Several submissions commented on the attached draft model clause. Some submissions did not offer a concluded view on the merits of the clause but addressed some drafting issues. Other submissions noted that a wide range of similar model clauses already exist, or referred to the Australian Standard AS 4608-1999: Guide to Prevention, Handling and Resolution of Disputes, Appendix C.³²²
- 9.7 One submission noted that the adoption of model clauses could potentially upset existing and successful dispute resolution mechanisms, and highlighted the costs associated with the resolution of disputes in accordance with the proposed clause when compared to (free) regimes that exist under statute.

320 *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709; *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646.

321 The inclusion of ‘good faith’ or similar obligation as a rule of conduct may have unforeseen consequences for the contracting parties. Good faith obligations may lead to a possible loss of confidentiality of ADR processes. Enforcing good faith obligations may require courts to inquire into the parties’ conduct, thus reducing or even eliminating confidentiality.

322 Law Council of Australia, Submission.

- 9.8 Some submissions expressed support for model clauses more generally (without expressly dealing with the proposed draft model clause). One submission viewed such a clause as ‘an excellent methodology of promoting ADR generally.’³²³ Another submission stated that NADRAC should recommend the inclusion of the clause in all government contracts. This submission also suggested that NADRAC should send the clause to all major trade, industry and professional organisations.³²⁴

NADRAC’s view

- 9.9 NADRAC has considered all the comments included in the submissions relating to the proposed draft model clause. NADRAC is grateful for the feedback provided and feels encouraged to pursue the preparation of a model clause for release on its webpage.
- 9.10 NADRAC understands that this model clause will be one of many available to parties for inclusion in their contracts.
- 9.11 NADRAC offers this model clause as a template only. Parties may wish to use this model clause (or parts thereof) as a starting point and make modifications to the clause to suit the parties’ needs and relationship.

Recommendation 9.1

The Attorney-General broadly promulgate and promote the use of dispute resolution clauses, particularly government agencies, noting that a model clause prepared by NADRAC for consideration of parties will be placed on the NADRAC website.

323 Australian Commercial Disputes Centre, Submission, p 8.

324 J N Creer, Submission, para 6.7.

Schedule 1: Domestic Arbitration

Introduction

Traditionally, arbitration is understood to be a fast and economical way of resolving disputes through determinations (arbitral awards) made by a neutral third party, the arbitrator.³²⁵ NADRAC defines arbitration as a:

[...] process in which the participants to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.³²⁶

Arbitration may be consensually chosen by parties, either anticipatory at the time of contracting (dispute resolution clause) or ad-hoc when a dispute arises, or may be provided for in legislation.

Where parties agree to arbitration, the award may become binding as a result of their consent to be bound by the outcome. However, unlike a judicial determination which takes effect according to its terms, the effect of arbitral awards depends on the law which operates with respect to them.³²⁷

Domestic arbitration at federal and state level

At federal level, arbitration provisions or mechanisms to refer matters to domestic arbitration are included, for example, in the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999*, and *Family Law Act 1975*.

For constitutional reasons, federal legislation may not impose a requirement for binding arbitration of a legal dispute, and arbitral awards must be reviewable by the courts.³²⁸

At state/territory level, arbitration is used to resolve disputes relating to industrial relations, gas pipeline access, local government, the public sector, building contracts, tenancy or dust diseases. The states also have responsibility for domestic commercial arbitration. Uniform domestic commercial arbitration legislation is implemented in all states and territories.

325 See for example the observations made by Rogers CJ in *Imperial Leatherwear Pty Ltd v Macri & Marcellino* (1991) 22 NSWLR 653.

326 NADRAC ADR Glossary.

327 Courts exercise their judicial power 'independently of the consent of the person against whom the proceedings are brought' with their power being an emanation of the states' authority. *Construction, Forestry Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 658.

328 There are limits on the Commonwealth enacting legislation that would compel parties to resolve a dispute by 'binding' arbitration. It may require interposing an independent exercise of the judicial power of the Commonwealth. See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Luton v Lessels* (2001) 210 CLR 333.

The use of domestic arbitration

NADRAC has heard evidence that domestic commercial arbitration is now rarely used in Australia. Recently, commentators have also highlighted this underutilisation.³²⁹ Similarly, arbitration appears to be used infrequently in other areas including, for example, in family law disputes.³³⁰

Several reasons were advanced that may explain underutilisation.

The 'legalisation' of arbitration processes

NADRAC understands that arbitral processes were promoted from the early 20th century onwards as a quick, inexpensive, and confidential alternative to a slow and costly court system.

However, NADRAC heard evidence that domestic commercial arbitrations now tend to mimic court processes and are generally conducted in an adversarial fashion. NADRAC understands that such increased 'legalisation' of the arbitral process could be due to a number of factors, including:

- the adversarial system seems to be equated 'with the idea of due process itself'³³¹
- retired judges and senior counsel acting as arbitrators, and/or
- legal representatives feel more comfortable with such procedures as they are often barristers skilled in adversarial litigation procedures.³³²

This trend may also be driven by parties who perceive adversarial procedures as ensuring that 'justice is done'.

The 'legalisation' of arbitration processes has been said to make arbitrations expensive and slow and, consequently, has discouraged their use.

Privacy and confidentiality

Both privacy and confidentiality are traditional key benefits of arbitration,³³³ making this ADR procedure particularly appealing for the resolution of commercial disputes.

The High Court of Australia has confirmed that, unless a contrary intention is evinced, arbitration is a private process 'in the sense that it is not open to the public'.³³⁴ However, as soon as arbitral awards are challenged in the courts, the matter becomes open to the public.

329 P Megens and B Cubitt, *Meeting disputants needs in the current climate: what has gone wrong with arbitration and how can we repair it?*, Paper, IAMA Annual Conference 2009, Melbourne, 31 May 2009.

330 *ibid.* Family Law Council, *The Answer from the Oracle: Arbitrating Family Law Property and Financial Matters*, Discussion Paper, p 10, para 1.20.

331 L S Rubenstein, *Procedural Due Process and the limits of the adversary system*, (1976) 11 Harvard Civil Rights – Civil Liberties Law Review 48. See also T O Main, *ADR: The new equity*, (2005) 74 University of Cincinnati Law Review 329, p 394.

332 P Megens and B Cubitt, *Meeting disputants needs in the current climate: what has gone wrong with arbitration and how can we repair it?*, Paper, IAMA Annual Conference 2009, Melbourne, 31 May 2009.

333 A C Brown, *Presumption meets reality: An exploration of the confidentiality obligation in International Commercial Arbitration*, (2001) 16 American University International Law Review 969, p 975.

334 *Esso v Plowman* (1995) 183 CLR 10 at 26.

To maintain privacy even on appeal, some overseas jurisdictions such as Singapore now allow courts to conduct appeals *in camera*.

In relation to confidentiality, the High Court held that no obligation of confidence can be implied into an arbitration agreement.³³⁵ This decision is in stark contrast to the UK where confidentiality is considered to be incidental to an agreement to arbitrate. NADRAC notes that the decision has been widely criticised by practitioners, who now argue in favour of a statutory confidentiality requirement.³³⁶

Pool of arbitrators with special expertise

NADRAC notes that there is some concern that the pool of arbitrators with special expertise (who are not lawyers) has steadily declined over the years.³³⁷

A lack of precedent

Due to privacy and confidentiality obligations, arbitral awards are usually not published.³³⁸ NADRAC heard that such lack of precedent may cause uncertainty and confusion amongst parties, practitioners and arbitrators. It was also said that inconsistent arbitral awards may hinder the further development of arbitration more generally.³³⁹

NADRAC notes that arbitration is traditionally not based on a system of precedent.³⁴⁰ Criticism that there is a lack of precedent in the area of arbitration suggests a trend towards the legalisation of the process.³⁴¹ It may also be a reaction to the risks associated with the broad interpretation of the statutory appeal provisions (see below). Internationally, there appears to be little conclusive evidence to suggest that the introduction of (legislated) requirements to publish awards creates more certainty.³⁴²

A lack of judicial restraint when exercising powers to review arbitral awards

Traditionally, arbitral awards were considered binding and final. Superior courts had an inherent power to remit awards where there was an error of law on the face of the award.

335 *ibid.*, at 30; see also *Commonwealth v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662.

336 Such requirement has been enacted, for example, in Singapore and Hong Kong.

337 NADRAC heard this concern during its consultations. See also P Megens and B Cubitt, *Meeting disputants needs in the current climate: what has gone wrong with arbitration and how can we repair it?*, Paper, IAMA Annual Conference 2009, Melbourne, 31 May 2009.

338 In the international arena, some tribunals publish their awards. See for example the Iran-United States Claims Tribunal.

339 S D Franck, *The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions*, (2005) *Fordham Law Review* 1521, pp 1606-1610. This problem has sparked calls for the creation of an arbitral 'super' or review tribunal that can review conflicting arbitral awards and thus reduce inconsistencies.

340 C S Gibson and C R Drahozal, *Iran-US Claims Tribunal Precedent in investor-state arbitration*, (2006) 23 *Journal of International Arbitration* 521, p 540 ff.

341 The same criticisms are also made of other ADR processes (such as mediation) which are essentially processes that are simply intended to facilitate private agreement making.

342 No such research could be identified in Australia. For the US, see C R Drahozal, *Is arbitration lawless?*, (2006) 40 *Loyola of Los Angeles Law Review* 187, p 213.

However, statutory arbitration regimes can provide broader appeal grounds.³⁴³

Commentators have criticised the courts for their ‘judicial interventionism’ ie not displaying sufficient restraint when exercising powers to review arbitral awards.³⁴⁴ The increase of circumstances in which the courts have found breaches of the rules of natural justice has led to a significant erosion of the finality of arbitral awards.

NADRAC also heard evidence that arbitrations are sometimes used as a ‘dry-run’ for later litigation, thus significantly increasing costs and delaying the final resolution of the dispute.

Reform

At its April 2009 meeting, SCAG decided to update uniform commercial arbitration laws by reference to the principles governing international commercial arbitration. The aim is to improve the current commercial arbitration system, and to provide a method of finally resolving disputes that is quicker, cheaper, and less formal than litigation.

343 The Uniform Domestic Commercial Arbitration laws allow appeals in two circumstances: arbitral awards are subject to judicial review (s 38) and courts can set aside awards on the basis of misconduct on behalf of the arbitrator or improper procurement of the arbitration or award (s 42). The term ‘misconduct’ is defined to include corruption, fraud, partiality, bias and breach of the rules of natural justice (s 4).

344 V Donnenberg, *Judicial review of arbitral awards under the commercial arbitration acts*, (2008) 30 (2) Australian Bar Review 177, p 183. For an often criticised example, see *Oil Basins Ltd v BHP Billiton Ltd* [2007] VSCA 255.

Schedule 2: Conduct Obligations in ADR – good faith, genuine effort and other formulations

Introduction

It is often suggested that conduct obligations should be applied to ADR processes, particularly where those processes are ordered or required by a court or tribunal. Discussion of these issues has increased in recent years and appears to parallel the growth in mandatory ADR in a variety of contexts.

The imposition of conduct obligations in ADR raises a number of complex issues and it is the subject of much debate. While there are many arguments that can be made in support of such obligations, there are also many difficulties and complexities associated with the concept. This schedule highlights some of the benefits, difficulties, and complexities. It is not the purpose of this schedule to come to a concluded view about whether conduct obligations should be imposed in ADR. Rather, the intention is to canvass some of the issues that may be relevant to consideration of such requirements.

Consideration of whether and how to apply ADR conduct obligations raises a number of issues, including:

- Who should be subject to the conduct obligation – the participants/their legal representatives/other professional advisers who attend/people who attend in a supporting role?
- What could the ambit of any obligations be? Obligations could apply to a range of matters such as a failure to attend an ADR process, a failure to attend with sufficient authority, misleading behaviour or conduct in an ADR process that is of a bullying nature
- How should any conduct obligation be framed? Some examples are good faith, genuine effort, duty to cooperate, and obligation to use reasonable endeavours. Should the framing differ according to who is subject to it?
- Should conduct obligations differ according to the ADR process eg is different conduct expected or appropriate in arbitration, mediation or settlement negotiations?
- Are conduct obligations appropriate in entirely private processes, outside the court, irrespective of whether proceedings have commenced or not? If so, should they be applied by statute or by private agreement?
- At what stage should the conduct obligation apply, ie before court or tribunal proceedings are commenced, after such proceedings are commenced, or only after a court or tribunal has ordered or required attendance at the ADR process?

- Should, and if so how should, conduct obligations be enforced and what penalties should apply for breach of the obligation? Could enforcement have any detrimental impact on participant conduct or some ADR processes, and if evidence has to be given to enforce a conduct obligation, how might that affect the confidentiality of some ADR processes?
- What alternatives are there to deal with bad or inappropriate conduct in ADR?

The purpose of this schedule is to discuss some of those issues at greater length while not expressing any concluded view in relation to them.

To whom should conduct obligations apply?

There appears to be limited evidence that participants in ADR act unreasonably or exhibit a lack of ‘good faith’. This may reflect the fact that most participants in ADR do actually act reasonably once they have entered the process. However, it may also reflect the growth in the imposition of conduct obligations in various contexts in recent years. The National Native Title Tribunal expressed the view in its submission to NADRAC that a gentle reminder about the ‘good faith’ provision in the *Native Title Act 1993* has been sufficient to change parties’ behaviour. It noted that there has not been a need for the Tribunal to issue a report as to a breach of the requirement in its Act to ‘act in good faith’.

Legal practitioners

Where concerns have been raised about the conduct of participants in ADR, they seem most often to be about the conduct of some lawyers. The submission from the National Native Title Tribunal noted:

Many of the parties have legal representatives who attend mediation meetings on their behalf and there has been a tendency for some parties to approach the mediation with a legalistic viewpoint rather than a willingness to compromise and find a negotiated solution. ... Many lawyers involved in native title are not trained in ADR and may therefore feel more comfortable with standard court processes.

Concerns about the conduct of some members of the legal profession in ADR, particularly in mediation, are supported by research which seems to show that some lawyers tightly control the nature of the ADR process. Some lawyers may be happy to exclude or limit the disputants direct participation in the process, and may be more focused on the legal risks involved than facilitating a resolution.³⁴⁵ Such conduct may mean that ADR processes are less successful in reaching positive outcomes than might otherwise be the case. At the same time, it seems likely that this behaviour reflects an adversarial culture and a lack of understanding of ADR, rather than misconduct.

345 O C Rundle, *Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases*, Queensland University of Technology Law and Justice Journal, 8, (1) pp 77-92; T Sourdin, *Mediation in the Supreme and County Courts of Victoria*, Department of Justice, Victoria, Australian Centre for Peace and Conflict Studies, September 2008.

It has been noted that some participants in mediation experience a ‘legal take-over’,³⁴⁶ – that is, the lawyers take control of the mediation, exclude any direct party involvement and may even physically exclude a party. This phenomenon has been observed in a range of mediation processes. At times, the structure of the mediation process is driven by lawyers, and mediators can be placed in the uncomfortable position of being asked to deliver a service which may not comply with standard mediation models or, in particular, with the Practice Standards articulated by the NMAS.

Where conduct of this nature takes place, disputants and mediators may be reluctant to complain and may simply accept the behaviour. The behaviour may not amount to ‘misconduct’ in terms of how such behaviour is defined by Law Societies, Institutes and Bar Associations around Australia. Even if such behaviour does amount to misconduct there may be little point in complaining about such behaviour given the uncertain outcomes and cost involved in making a complaint. The role that lawyers play in negotiations has been the subject of much comment within Australia and internationally.

In the US, a two-part ethical standard has been proposed for lawyers in negotiation:

- the lawyer must act honestly and in good faith, and
- the lawyer may not accept a result that is unconscionably unfair to the other party.³⁴⁷

There may be a question as to whether formulations such as this address the real problems. As Sourdin has noted:

[...], most writers consider that more complex ethical measures that extend beyond truthfulness and fairness are aspirational. Aside from ethical concerns there are broader issues about lawyers’ cultures and behaviours that could be considered to determine whether lawyers negotiate from a positional and adversarial perspective. It has been said that some lawyers negotiate while wearing their ‘adversarial suits’ and that this approach promotes the risk of stalemate and hostility because extreme positions and a focus on ‘winning’ ‘most often produce unprincipled compromise even if a settlement is reached’. For others, negotiation processes can redefine the role of a lawyer at this level which is to assist in resolving a dispute in a constructive and helpful way. [Footnotes omitted].³⁴⁸

If some lawyers are approaching disputes in a legalistic way, such behaviour may not by any definition be a breach of ‘good faith’ or any other similar conduct obligation. Training and education may be a more appropriate way to address that issue.

346 T Sourdin, *Poor Quality Mediation – A Systemic Failure*, Paper, LEADR Kongress, September 2009; M Dewdney, *Party Mediator and Lawyer Driven Problems*, LEADR Update, 5 June 2007, p 9.

347 See T Sourdin, *Alternative Dispute Resolution*, third edition, Thomson Reuters, 2009, Chapter 2; R Gordon, *Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics* (1985) 18(2) *University of Michigan Journal of Law Reform* 503, p 524; It has been argued that such a rule is unhelpful as the definition of ‘good faith’ is so uncertain. See for a full discussion of ethical issues in negotiation: C Menkel-Meadow, M Wheeler (eds), *What’s Fair: Ethics for Negotiators*, San Francisco, 2004.

348 Sourdin cites extensively from C Menkel-Meadow, M Wheeler (eds), *What’s Fair: Ethics for Negotiators*, San Francisco, 2004, p 270. C Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or ‘The Law of ADR*, (1991) 19(1) *Florida State University Law Review* 1, p 33, pp 35 – 36; P Killingsworth, ‘Winning’ Redefined: A Positive Approach to the Practice of Law, (1996) 12 *Georgia State University Law Review* 653, p 654; B Sordo, *The Lawyer’s Role in Mediation*, (1996) 7 *Australian Dispute Resolution Journal* 20.

However, the VLRC has recently considered and made recommendations aimed at changing the negotiating culture adopted by, at least some, members of the legal profession.³⁴⁹ This issue is dealt with further below.

In terms of lawyers misleading or omitting information (arguably a clearer category than non-compliance with behavioural guidelines) there is only one well known 2006 case of a legal practitioner who was found to have demonstrated misconduct in a mediation. The VLRC has referred to it in the following terms:

In a recent Queensland case, in the course of mediation leading to a settlement, medical information became known to a barrister and his client that the projected life expectancy of the client might be reduced because of a recently discovered medical condition. This was likely to have an important bearing on the quantum of damages payable for the personal injuries giving rise to the claim. The case was settled without disclosure of this information. The defendant and the defendant's insurer subsequently became aware of this information and this resulted in an application to have the settlement set aside and disciplinary proceedings against the barrister. The Legal Services Tribunal found the barrister guilty of professional misconduct for the failure to disclose the recently discovered medical evidence.³⁵⁰

Disputants

The more formal the ADR process the easier it may be to identify the role of the disputants and to determine appropriate conduct standards for them.

Different ADR processes will involve different expectations of the conduct of disputants. In some, such as commercial arbitrations, the conduct of the litigants and their legal representatives may be virtually impossible to distinguish from confidential litigation. In other ADR processes, such as expert determination or case appraisal, the legal representatives may still have a primary role but the disputants may also have a significant role. Where lawyers represent their clients in ADR processes, one issue will be whether the disputant should always be held responsible for the conduct of their legal adviser on the basis that it is the disputant who instructs their legal adviser?

In some interest-based processes, such as mediation, the disputants may be encouraged to represent themselves, albeit with the advice and support of their lawyer. In those cases the conduct of the disputant will be readily distinguishable. However, some features of those processes may make it more difficult to identify a standard of conduct that can be fairly applied to all disputants in any kind of dispute.

Dealing with disputant emotions

Interest-based processes are generally built upon the idea that in order to get to resolution, the disputants need some opportunity to identify their emotions and underlying interests.

349 See Victorian Law Reform Commission – Civil Justice Draft Documents 2007 at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb4c700164031bf/Exposure%20Draft%20Proposals.pdf> (viewed 17 April 2008).

350 Victorian Law Reform Commission, *Civil Justice Review Report 14*, Melbourne, 2008, p 164. The report cites *Legal Services Commissioner v Mullins* [2006] LPT 012.

Accordingly, well trained mediators generally demonstrate a fairly high tolerance for some difficult conduct and regard it as their role to support participants in an open discussion and use specific techniques to enable a ‘difficult conversation’ to take place. The mediator may terminate the process if it gets out of hand depending on how each of the participants is managing the situation. Legal practitioners in these type of processes are not expected to act as advocates but to appropriately advise their clients.

It is difficult to determine how externally determined conduct requirements are being applied in such processes. NADRAC understands that in parenting disputes in family law, where a genuine effort requirement applies, family dispute resolution practitioners rarely issue certificates reporting failures to make a genuine effort, a term which while pivotal to participants’ access to court, is not defined in the *Family Law Act 1975*.

There are some anecdotal reports about why there is little reporting of a failure to make a genuine effort. On the one hand it may be that the possibility of the issuing of a lack of genuine effort certificate causes disputants and their legal advisers to behave in a more constructive manner. It may be that the requirement has a substantial positive normative impact. On the other hand it has been said that in an area where the disputants are often traumatised, highly emotional and may have been subject to past violence or verbal intimidation, it is extremely difficult to assess whether or not a disputant is being deliberately recalcitrant or whether they are simply incapable of engaging with the process. It has even been suggested that since family dispute resolution practitioners are dependent on the legal profession for their work it may not be in their financial interests to issue a certificate finding that a lawyer’s client has not made a genuine effort. Further, it has been suggested that the difficulties in defining ‘genuine effort’ may mean that family dispute resolution practitioners avoid it.³⁵¹ It is also possible that the vast majority of family law disputants understand and accept the requirement to make a genuine effort, notwithstanding the high emotion that often accompanies parenting disputes.

High emotions are commonly associated with parenting disputes. Such emotions are often demonstrated in other civil disputes, too. Small business, bankruptcy, discrimination, tax, social security, workplace, employment and consumer disputes may all be characterised by high emotionally laden conflict. Some large business and government disputes may also produce strong emotional responses. A high level of emotion usually indicates that the issues in dispute are important to those involved.

Where any dispute involves high emotions and disputants are encouraged to talk about the impact of the dispute and to express their emotions, it may be difficult to define expected behavioural conduct and to indicate norms and guidelines. It might be argued that the decision is best left to the ADR practitioner. However, while the ADR practitioner may be best placed to make the decision, it is still likely to be a subjective one. Some people may criticise the ADR practitioner for not intervening or terminating the process earlier, others will say more leniency should have been permitted in the circumstances. Enforcing a good faith standard may be difficult in practice.

351 H Astor, *Making a ‘genuine effort’ in family dispute resolution: What does it mean?*, (2008) 22 Australian Journal of Family Law 102, p 102.

Perceived pressure to compromise

Pressure to compromise may be acceptable in some venues such as courts, where procedural fairness applies and the parties' interests are ultimately protected. It would be of great concern if conduct requirements are interpreted by disputants as pressure to settle in private and community-based processes. NADRAC has previously said that the aim of any legislated conduct obligations should be to change the participants' mindset before the mediation and such provisions should not be used to put undue pressure on the participants during the mediation.³⁵²

An important feature of most interest-based processes, including mediation, is the focus on empowering the disputants to reach their own agreements without pressure to compromise. It is arguable that disputants should be able to say: *'I've given you a fair hearing and have listened to what you've had to say, I cannot agree for the reasons I've outlined and I continue to believe that my position is justified. I therefore propose to terminate the process.'*

Many current conduct obligations are interpreted as only requiring disputants to consider options for resolution and to consider proposing options for resolution, and not requiring that they actually consider or propose such options (see later discussion as to the framing of conduct obligations). However, that distinction is a relatively fine one and there may be potential for confusion about what is required. An inaccurate perception that there is a requirement to actually consider options for compromise may do injustice in some cases. To avoid that outcome comprehensive information and education about the particular conduct obligations that apply may be required both for potential participants in ADR and for ADR practitioners.

Incapable disputants

There may be some disputants who, because of their emotional state or for some other reason, are simply incapable of participating in certain processes, such as open principles-based negotiation or mediation. The threshold question is whether such people should be referred to such processes. Attempting to enforce objective conduct obligations seems unlikely to succeed in those circumstances.³⁵³ Furthermore, any such attempt may have damaging consequences for the process itself.³⁵⁴ Better assessment for referral to ADR processes may be required. However, it has been noted that people who are disabled or incapacitated should not be deprived of the benefits of ADR – and forced into litigation – simply because of their incapacity. Where processes can be identified or developed that address particular disabilities or incapacities, they clearly should be.

352 NADRAC, *Submission to the Review of the Franchising Code of Conduct – addressing questions raised in Discussion Paper No 1 relating to the dispute resolution provisions of the Franchising Code of Conduct*, March 2000.

353 Research into views of lawyer participants in collaborative practice in Vancouver, Canada, concluded that in situations where the parties did not feel that they could come to the negotiating table or that they could not trust the other party to participate in a respectful and honest way, then the collaborative process would not be desirable. See B Degoldi, *Lawyers' Emerging Experiences of Interdisciplinary Collaborative Separation and Divorce*, (2008) 15(3) *Psychiatry, Psychology and the Law* 413.

354 For example, due to the loss of confidentiality, lack of candour or open communication or perceived pressure to compromise on the legal rights.

Avoidance of ADR processes

If disputants think that they are at risk of being sanctioned for a breach of a conduct obligation if they participate in an ADR process then they may avoid such processes altogether. Where an unscrupulous disputant wants to coerce or manipulate, they can do so outside an ADR process without fear of sanction. The question then arises as to whether conduct obligations should apply to private negotiations whether conducted directly by disputants or by their legal practitioners (for instance).

There is a view that the involvement of a skilled ADR practitioner offers the opportunity for a third party to manage and therefore minimise the impact of unscrupulous behaviour if such parties engage in the processes.

It is also possible that the creation of a good faith obligation will actually encourage participation in ADR because it may increase the confidence of disputants in the process. NADRAC did hear concerns expressed to the effect that some disputants are reluctant to engage in ADR because of uncertainty about what may take place, and the absence of any predetermined standards of behaviour.

Other professionals and support people

The standard of conduct in ADR of professionals, other than lawyers, and support people such as community advocates and family members, has received less attention than has the conduct of legal professionals and disputants. There is still work to do to define the role of those people and how that may differ in different ADR processes. There are few reports of such people exhibiting inappropriate conduct which mediators cannot manage, but no doubt it occurs from time to time.

What could the ambit of any obligations be?

There has been discussion of the ambit of potential conduct obligations. In the US, theorists suggest that there are certain clear-cut areas where obligations are applied.³⁵⁵ For example, where parties failed to attend or failed to attend with sufficient authority, ADR obligations may have been breached.

The less certain area in relation to behavioural obligations relates to the conduct actually expected during the negotiations or within an ADR process. In that context, there may or may not be grounds to draw a distinction between:

- rights-based positional negotiations conducted by legal practitioners, whether facilitated or not (‘without prejudice negotiations’), and
- open discussions between disputants based on their underlying concerns and interests whether facilitated or not (eg mediation).

³⁵⁵ This has also been the subject of some discussion in Canada and the US although many theorists limit bad faith to select situations – such as failure to attend, failure to send a representative with authority etc. See J Lande, *Using Dispute System Design Methods to Promote Good- Faith Participation in Court – Connected Mediation Programs*, 50 *University of California Los Angeles Law Review* 69, Table 1.

How should conduct obligations be framed?

There are a variety of different formulations which may be used to refer to appropriate conduct in ADR processes. The most common refers to ‘good faith’ but some other formulations refer to a ‘genuine effort’, a ‘duty to cooperate’, or a duty to use ‘reasonable endeavours’.

Duty to participate in good faith

The obligation to participate in good faith in different ADR processes has already been inserted in a number of Australian statutes.³⁵⁶ It is sometimes enforced and sometimes is not.³⁵⁷ Issues relating to enforcement are dealt with in more detail below. Good faith is also applied in a variety of contractual and ADR contexts in overseas jurisdictions (see Annexure A). However, care should be taken in assuming that overseas models can simply be transported into Australian law, given the very significant differences in legal culture that may exist. In addition, the way in which good faith is applied in the context of commercial contractual disputes may not be appropriate in other contexts.

The VLRC has noted that, in the context of contractual relationships, ‘courts have been grappling with the question of whether, independently of the express terms of contract, parties have an obligation to each other to act in good faith’.³⁵⁸

In *United Group Rail Services Limited v Rail Corporation New South Wales*,³⁵⁹ Allsop P held that a contractual obligation to negotiate in good faith was binding. He said:

One of the available tools of dispute resolution is the obligation to engage in negotiations in a manner reflective of modern dispute resolution approaches and techniques – to negotiate genuinely and in good faith, with a fidelity to the bargain and to the rights and obligations it has produced within the framework of the controversy. This is a reflection, or echo, of the duty, if the matter were to be litigated in court, to exercise a degree of co-operation to isolate issues for trial that are genuinely in dispute and to resolve them as speedily and efficiently as possible.³⁶⁰

356 See, for example, s 34A(5) *Administrative Appeals Tribunal Act 1975* (Cth); ss 136GA, 136GB *Native Title Act 1993* (Cth); *Fair Work Act 2009* (Cth); s 27 *Civil Procedure Act 2005* (NSW); *Farm Debt Mediation Act 1994* (NSW); s 70B(5) *Water Act 1912* (NSW); regs 35(2), 35(3) *Dust Diseases Tribunal Regulation 2001* (NSW).

357 For example, s 98(2) *District Court of Qld Act 1967* (Qld) (stay of order for relief and costs reg 46(3)); *Dust Diseases Tribunal Regulations 2001* (NSW) (re adverse costs order); rule 331(3) *Uniform Civil Procedure Rules 1999* (Qld) (re issue of mediators certificate); O29A r11(5)(b) and O29 r3(2)(b) *Rules of the Supreme Court 1971* (WA) (mediator report may be used to determine costs).

358 Victorian Law Reform Commission, *Civil Justice Review Report 14*, Melbourne, March 2008, p 166 citing: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; *Australian Mutual Provident Society v 400 St Kilda Road Pty Ltd* [1991] 2 VR 417; *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33; [2002] WASCA 94.

359 *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177.

360 *ibid*, para 79.

In recent years, there has been a significant growth in statutory provisions that apply a duty of ‘good faith’ to ADR. Nevertheless, the issue is a complex and challenging one and remains controversial. NADRAC has itself changed its position on the issue at different times³⁶¹ and there continue to be differences of view about the issue amongst NADRAC members.

What is it?

The ‘good faith’ test has been criticised for vagueness.³⁶² It has been recognised by some as a ‘notoriously amorphous and variable concept’.³⁶³ In a submission to the VLRC, the Victorian Bar pointed out that one academic had defined ‘good faith’ as ‘a concept which means different things to different people in different moods at different times in different places.’³⁶⁴

It has also been said that:

[...] what good faith in negotiation means is frequently embedded in complex exegeses about what good faith requires when carrying out an existing agreement rather than negotiating a new one, or whether good faith is enforceable as a contractual term. The writing and authorities on good faith are also substantially situated in a commercial context that has little in common with the particular challenges of family disputes. Further, the definitions adopted in the commercial context are themselves variable, so that good faith means different things, for example, in the context of contract law, insurance and international arbitration.³⁶⁵

NADRAC has no doubt that the courts are capable of giving meaning to the concept of a duty to act in good faith in different ADR processes. However, there are two concerns:

- it may take some time for the law to reach a fairly comprehensive position as to what amounts to good faith conduct in any one ADR process, and
- in the interim, the participants in different ADR processes will be acting without much guidance.

Nevertheless, general standards of reasonableness are regularly applied by judges as a touchstone for enforcing rights and granting remedies, notwithstanding that disputants may disagree about the content of that standard. It may be ‘too easy’ to overstate the need for precision and exactitude. In any event, some judges have explained the duty to act in good faith in the context of settlement negotiations, and ADR. In *Hooper Bailie*, Justice Giles indicated that the obligation to act in good faith requires willingness to:

361 For example, NADRAC, *Submission to the Review of the Franchising Code of Conduct – addressing questions raised in Discussion Paper No 1*, March 2000.

362 See Victorian Law Reform Commission, *Civil Justice Review Report 14*, Melbourne, 2008, p 183.

363 H Flechtner, *Comparing the general good faith provisions of the PECL and the UCC: appearance and reality*, (2001) Pace University Law Review 295, p 301.

364 M Bridge, *Does Anglo-Australian Contract Law Need a Doctrine of Good Faith*, (1984) 9 Canadian Business Law Journal 385, p 407, cited by Gordon J in *Jobem Pty Ltd v Breakfree Resorts (Victoria) Pty Ltd* [2007] FCA 1066, p 136.

365 H Astor, *Making a ‘genuine effort’ in family dispute resolution: What does it mean?* (2008) 22 Australian Journal of Family Law 102, p 111.

... subject oneself to the process of negotiation or mediation, to have an open mind in the sense of willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate, and a willingness to give consideration by putting forward options for the resolution of the dispute.’³⁶⁶

Justice Einstein expressed a very similar view some years later in *Aiton v Transfield*.³⁶⁷

More recently, the NSW Court of Appeal considered the issue of what constitutes good faith in negotiation in *United Group Rail Services Limited v Rail Corporation New South Wales* and expressed the view that what constitutes good faith must be determined by context and contract.³⁶⁸

It has been said that good faith requirements do not require parties to subordinate, disregard or abandon their own interests.³⁶⁹

This discussion above does not address conduct that is harassing or intimidating. Presumably, such conduct would be considered to contravene the duty to act in good faith. Such conduct may be momentary or sustained. One simple question is whether the duty should apply to any intimidating or harassing conduct, or only to conduct that results in the ADR process being aborted.

Given these concerns it may possibly be more appropriate to develop a statutory definition or at least a set of obligations that can assist to provide clarity.

Legalistic

NADRAC has previously suggested that the term ‘good faith’ has legalistic overtones.³⁷⁰ This issue was also raised by submissions to the VLRC’s Civil Justice Review. Concerns were raised about potential conflicts between competing legal duties of good faith.³⁷¹ The Victorian Law Institute and the Public Interest Law Clearing House both expressed the view that ‘the [Commission’s] draft proposed obligation to act in ‘good faith’ was nebulous and that it was unrealistic to expect litigants without legal training or legal assistance to understand the proposed obligations.’³⁷² Concern was expressed that the requirement would be detrimental to self-represented and disadvantaged litigants. Against that, it may be said that a requirement to act in good faith is a reasonable normative standard which most parties will understand most of the time and in most circumstances.

A concern has been expressed that a duty to act in good faith might itself be used as a tool to coerce, ie that the unscrupulous may use allegations of bad faith behaviour to intimidate the less confident.

366 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194, p 196.

367 *Aiton v Transfield* (1999) 153 FLR 236.

368 *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177.

369 *Jobem Pty Ltd v BreakFree Resorts (Vic) Pty* [2007] FCA 1066. *United Group Rail Services v Rail Corp NSW* [2008] NSWSC 1364, para. [15].

370 NADRAC, *Submission to the Review of the Franchising Code of Conduct – addressing questions raised in Discussion Paper No 1 relating to the dispute resolution provisions of the Franchising Code of Conduct*, March, 2000.

371 Submission ED1 18 (Clayton Utz).

372 Submissions ED1 31 (Law Institute of Victoria) and ED1 20 (Public Interest Law Clearing House).

Contextual

One of the most detailed and frequently cited statements of what may constitute a lack of good faith is that found in the case of *Western Australia v Taylor (Njama! People)*.³⁷³ The 18 indicia of bad faith there stated (see Annexure B) seem to have been developed in the context of large multi-party native title disputes carried on over a long period of time and with limited confidentiality.

Section 228 of the *Fair Work Act* also defines good faith requirements for bargaining representatives in similar terms:

- (1) The following are the good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet:
 - (a) attending, and participating in, meetings at reasonable times;
 - (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
 - (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
 - (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
 - (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
 - (f) recognising and bargaining with the other bargaining representatives for the agreement.
- (2) The good faith bargaining requirements do not require:
 - (a) a bargaining representative to make concessions during bargaining for the agreement; or
 - (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

The bargaining processes to which this provision applies are large multi-party workplace negotiations conducted over a period of time. Such disputes have little in common with private, confidential mediations, conciliations or arbitrations that involve fewer disputing parties and limited stakeholder interests but the above indicia of good faith may nevertheless be relevant to a range of disputes.

It seems that assessing whether good faith or genuine effort have been exhibited depends, at least in part, on the context. It has been pointed out that:

Behaviour that looks like a lack of genuine effort in one context may have a quite different appearance in another. For example, in the family law context, a determined and intransigent refusal to consider allowing the other parent to have unsupervised access to a

³⁷³ *Western Australia v Taylor (Njama! People)* (1996) 134 FLR 211 (per Member Sumner).

child may look like a lack of genuine effort in one context; in another context it may be a reasonable position taken to protect the child from physical and emotional abuse.³⁷⁴

However, the need to have regard to context does not necessarily render a good faith standard meaningless. People generally understand the importance of context in their dealings with one another.

Victorian Law Reform Commission – Civil Justice Review

The VLRC has proposed that a set of overriding obligations should apply to civil proceedings in Victoria, including ADR processes and negotiations in civil proceedings pending. The obligation is intended ‘... to create a ‘model standard’ for the behaviour of all who become involved in the civil justice system.’³⁷⁵

The VLRC has said that ‘[m]any of these reforms have been directed to ameliorating the adversarial culture, in particular by emphasising ‘cooperation, candidness and respect for truth’.³⁷⁶

The Commission’s original proposal in respect of overriding obligations proposed that there should be an obligation to act in good faith. However, submissions raised concerns about the proposal. Following further consultations, the Commission decided to replace the obligation to act in good faith with a duty to ‘cooperate’.

Requirement to make a genuine effort

The Family Law Rules provide that, subject to some exceptions, each prospective party to a parenting matter in the Family Court ‘is required to make a genuine effort to resolve the dispute before starting a case’.³⁷⁷ Reforms to the Family Law Act in 2006³⁷⁸ inserted a provision³⁷⁹ which prevents the court from hearing applications for parenting orders under Part VII of the Act after 1 July 2008 unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner. The relevant section also provides that a family dispute resolution practitioner may give a number of kinds of certificates to a person including a certificate to the effect that a person did not make a genuine effort to resolve the issue or issues. The object of the section is said to be to ensure that people with parenting disputes ‘make a genuine effort to resolve that dispute by family dispute resolution’.

As mentioned above, it seems that in practice such certificates are very rarely given.

374 H Astor, *Making a ‘genuine effort’ in family dispute resolution: What does it mean?*, (2008) 22 Australian Journal of Family Law 102, pp 111-112.

375 See Victorian Law Reform Commission – Civil Justice Draft Documents 2007, p 6, available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb4c700164031bf/Exposure%20Draft%20Proposals.pdf> (viewed 17 April 2008).

376 See Victorian Law Reform Commission – Civil Justice Draft Documents 2007, available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb4c700164031bf/Exposure%20Draft%20Proposals.pdf> (viewed 17 April 2008), referring to Ross, *Ethics in Law: Lawyers’ responsibility and accountability in Australia*, 2005, para 13.16

377 *Family Law Rules 2004*, r 1.05(1) and Part 2, Schedule 1.

378 *Family Law Amendment (Shared Parental Responsibility) Act 2006*.

379 See s 60I *Family Law Act 1975*.

What is it?

The Family Law Act does not define what is meant by genuine effort in the context of certificates by family dispute resolution practitioners. It has been said that:

There are so many difficulties in defining it and giving it meaning in practice that there must be some doubt about whether the genuine effort provisions of the Act will be implemented or will be avoided by family dispute resolution practitioners.

Consistency in the meaning given to genuine effort is important to ensure fairness, discourage forum shopping and prevent conflict about genuine effort certificates from arising. However, family dispute resolution is carried out by a large number of agencies and individuals across Australia, they have varied approaches to resolving disputes and there has been recent significant expansion of the sector. Inconsistent, inappropriate or contested decision-making about genuine effort could open family dispute resolution practitioners to criticism.³⁸⁰

Despite these concerns, NADRAC heard little evidence of significant problems arising in respect of the ‘genuine effort’ requirement applicable to parenting disputes.

Attorney-General’s Department view

The Attorney-General’s Department has issued some guidance for family dispute resolution practitioners on what constitutes ‘genuine effort’ (see Annexure C). The Department has stated:

The Attorney-General’s Department has received legal advice that ‘genuine effort’ should be given its ordinary meaning in the context of Part VII of the Family Law Act which deals with children.

A genuine effort involves a real, honest exertion or attempt. It must be more than a superficial or token effort, or one that is false, or is pretence. The effort must be one that is realistically directed at resolving the issues that are the subject of the application for a court order.

The question about whether a genuine effort has been made to resolve issues in a particular case will depend on the circumstances of the case. It is a matter for the professional judgement of the family dispute resolution practitioner. Both objective matters (such as a refusal to engage in discussion) and subjective matters arising from the circumstances of the case (for example, the health of the people involved) may be relevant to the opinion of the practitioner.

Whether the issue in dispute is resolved or not, it will not necessarily be because one or more people did not make a genuine effort. There may be valid reasons why people have differing views on an issue.³⁸¹

380 H Astor, *Making a ‘genuine effort’ in family dispute resolution: What does it mean?*, (2008) 22 *Australian Journal of Family Law*, 102, p102.

381 See Annexure B.

Migration Act

The term ‘genuine effort’ is used in the *Migration Act 1958 (Cth)* in relation to the test for retaining visas. A list of factors is given to enable assessment of whether a ‘genuine effort’ has been made. However, it has been suggested that these factors are not helpful for family dispute resolution practitioners as they are particular to the context and the decision-maker must rely on the ordinary meaning of the words.³⁸²

Reasonableness

Attempts to define ‘good faith’ or ‘genuine effort’ often refer to concepts such as reasonableness. However, they may themselves be difficult to give meaning to.³⁸³ What is reasonable may depend on the capacity of the disputants, the nature of the dispute, the type of process, the skill demonstrated by the ADR practitioner and particular events on the day. Nevertheless, as noted above, courts, tribunals and disputants are familiar with reasonableness as a touchstone.

Duty to cooperate

The VLRC, as already noted, rejected a good faith requirement and instead proposed a duty to ‘cooperate’.

What is it?

The VLRC’s Civil Justice Review Report does not much elaborate on what the duty to ‘cooperate’ may comprise. It merely says:

Statutory or other civil procedural obligations on parties to cooperate in relation to disclosure of documents or information and the conduct of civil proceedings have become increasingly common.³⁸⁴

Civil procedure expert Neil Andrews has noted the ‘interesting suggestion’ that procedural systems should recognise a duty of cooperation between disputants, even within the pre-action phase.³⁸⁵ This appears to have developed as part of the Dutch law of civil procedure. He also notes that English pre-action protocols rest on a principle of cooperation between disputants and lawyers, and in England this principle is now accepted by courts and, through practice directions, operates independently of the strict letter on individual pre-action protocols.³⁸⁶

Nevertheless, it seems that the duty to ‘cooperate’ may be subject to some of the same difficulties of definition as the duty to participate in good faith or to make a genuine effort.

382 H Astor, *Making a ‘genuine effort’ in family dispute resolution: What does it mean?*, (2008) 22 *Australian Journal of Family Law*, 102, p 110.

383 *ibid.*, p 112.

384 The Commission cites the example of the s 272 *Workers Compensation and Rehabilitation Act 2003* (Qld). But see O 29A r 11(5)(b), O 29 r 3(2)(b) *Rules of the Supreme Court 1971* (WA) (a mediator may report to the court on failure by a party to cooperate in a mediation conference).

385 The Commission cites N Andrews, *The Pre-Action Phase: General Report*, Paper, World Congress of Procedural Law, Brazil, 2007.

386 Victorian Law Reform Commission, *Civil Justice Review Report 14*, Melbourne, 2008, p 184.

Reasonable endeavours

The VLRC referred to an earlier NADRAC suggestion that parties be encouraged by the courts to use their ‘best endeavours’ during an ADR process to resolve disputes.³⁸⁷ Such a requirement might deter a person from behaving unreasonably or walking out of an ADR process.³⁸⁸ Potentially, it might also encourage the participants’ legal advisers to act ‘reasonably’.

The VLRC recommended that its proposed duty to cooperate be supported by three other relevant requirements:

- a duty not to engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive, or knowingly aid, abet or induce any other participant to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive
- use *reasonable endeavours* to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of ADR processes, and
- where the dispute is unable to be resolved by agreement, use *reasonable endeavours* to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute.

The words in italics indicate that the commission has proposed an additional test of ‘use reasonable endeavours’ which may also require elucidation in the ADR context.

Conduct requirements in different ADR contexts

Authority with respect to the standard of conduct expected of business partners in negotiating or carrying out commercial contracts may not be readily applicable to the conduct of disputants in ADR.

In the context of ADR, expectations of conduct may differ for different categories of participants in a process. In addition, the conduct expected in facilitated settlement negotiations, arbitration, conciliation or interest-based mediation may differ significantly.

It is also possible that different conduct may be expected or tolerated according to different dispute contexts, for example, in a workplace dispute or a business dispute. It may even be different according to the socio-economic profile of the disputants involved. For example, the conduct tolerated in neighbourhood or construction disputes³⁸⁹ may be very different from that tolerated in corporations law or large contractual disputes. In that regard, the developing law with respect to good faith, genuine effort or cooperation in one ADR context may not be readily applicable in other contexts.

387 Victorian Law Reform Commission, *Civil Justice Review Report 14*, Melbourne, 2008, p 167.

388 NADRAC, *Legislating for alternative dispute resolution – A guide for government policy-makers and legal drafters*, 2006, p 46.

389 For example, it is understood mediators in construction disputes show a high tolerance for swear words and even some limited aggressive posturing but that they quickly terminate the process if there is any violence – which is not unknown.

Conduct requirements in private ADR processes

Disputants who agree to use a private ADR process to attempt to resolve or narrow a dispute, whether before or after proceedings have commenced, may also agree to meet a specified standard of conduct in the process. Ideally, that decision should be made after discussion with the ADR practitioner and agreement as to the exact process to be used. Further, the choice of any particular standard of conduct should be made with a clear understanding of what it requires and of any risks to be involved.³⁹⁰

Requirement for advice

Where disputants are represented by lawyers, it should be expected that the lawyers will carefully explain what the standard of conduct entails and any potential risks associated with it.

Use of template agreements that include specified standards of conduct run some risks as to whether the agreed standard is appropriate to the process proposed by the ADR practitioner and whether the disputants are properly advised of the implications of adopting the standard including any risks. A template with associated commentary or advisory notes may be desirable.

Level of participation

As an alternative to using a broad and unspecified term such as ‘good faith’, ‘genuine effort’ or ‘duty to cooperate’, it may be desirable for disputants’ to specify a minimum level of participation. Many mediation schemes in Australia specify such minimum levels of participation. For example, material in submissions to NADRAC relating to the *Farm Debt Mediation Act (NSW)* Guidelines as well as material relating to various retail lease schemes that operate around Australia set out specific criteria.

Internationally, Hong Kong’s new Practice Direction 31 on mediation, which is to take effect on 1 January 2010, includes a specimen ‘Mediation Notice’ which anticipates that an applicant will propose a specified minimum level of participation which ‘should qualify as a sufficient attempt at the mediation’. A footnote to the template paragraph says:

An example of a specified minimum level of participation may be as follows: “Agreement between the parties as to the identity of the mediator and the terms of his or her appointment, agreement as to the rules applicable to the mediation (if any) and participation by the parties in the mediation up to and including at least one substantive mediation session (of a duration determined by the mediator) with the mediator”.³⁹¹

The Practice Direction also requires legal practitioners to advise their clients of the possibility of the court making an adverse costs order if a party unreasonably fails to engage in mediation. However, the adverse costs order will not apply where the party

³⁹⁰ For example, the consequences of breach and to what extent statements made, or information revealed, in the process may ultimately be subject to being brought into evidence in open court proceedings.

³⁹¹ Hong Kong, *Practice Direction-31 Mediation*, available at http://legalref.judiciary.gov.hk/doc/whats_new/prac_dir/html/PD31.pdf, (viewed 23 September 2009).

engaged in mediation at the agreed minimum level of participation (or directed by the court) or the party has a reasonable explanation for not engaging in mediation.³⁹²

The example of a specified minimum level of participation may not deal with some extreme behaviour, such as violence or fraud, or other inappropriate conduct such as misleading or deceptive behaviour. However, if required, both might be covered in the mediation agreement itself in relation to applicable rules.

Need for legislation?

Public policy considerations

Legislation may be justified on public policy grounds where there is significant evidence of a social ill arising from poor conduct in ADR processes. Legislation may also be justified on public policy grounds where the ill, if it occurred, is so significant that it may undermine social *mores* including the upholding of the rule of law. On that basis, an argument may be made for legislation that deals with potential criminal conduct in ADR such as violence or fraud if existing law is not sufficient for that purpose.³⁹³

Court ordered ADR

Legislated conduct requirements most often apply to private ADR where the participants have been ordered or directed to attend an ADR process. A range of issues are raised by this. Has the judicial officer ordered the parties to attend an appropriate form of ADR? Are the parties capable of engaging in that process? Is the order simply an order to attend – ie the judicial officer considers that ‘it is worth trying’ – or does the judicial officer intend to send a message that the parties should use their best endeavours to resolve the dispute privately? Does the judicial officer have doubts about whether the parties will attend or conduct themselves appropriately once there? Does the judicial officer have the power to make his/her own directions as to the appropriate form of conduct to be adopted?

When should conduct obligations apply?

As noted above, disputants may, and probably should consider whether to, agree to conduct requirements in ADR at any stage of the litigation process.

Most current legislated conduct requirements apply once proceedings are commenced but some may apply where proceedings are contemplated³⁹⁴ or pending.³⁹⁵

392 For example, the fact that the parties are actively engaged in without prejudice settlement negotiations or another form of ADR.

393 There is considerable existing law that defines acceptable conduct in business and commercial contexts, including such legislation as the *Trade Practices Act 1974* (Cth), various Fair Trading Acts, the law of fraud and estoppel, the Crimes Acts and corporations law.

394 The Family Law Act’s ‘genuine effort’ requirement applies to prospective parties.

395 The Victorian Law Reform Commission’s proposed overriding obligation applies to negotiations and ADR processes in civil proceedings pending.

However, this may be difficult to determine. One might ask at what point it can be said with clarity that proceedings are contemplated or pending. Despite the lack of clarity which might be thought to arise, courts are familiar with determining a point in time at which proceedings can properly be regarded as ‘contemplated or pending’ (for example, in the context of litigation privilege).

A clearer point at which to apply a legislative conduct requirement may nevertheless be once proceedings are actually commenced in a court or tribunal.

Enforcement of conduct obligations

Where there is a statutory, contractual or judicial requirement to meet certain conduct obligations, such as a duty to participate in good faith, to make a genuine effort or to cooperate, it seems appropriate that the requirement should be enforceable and that there should be some sanction for failure to meet the requisite standard. If a conduct obligation cannot be enforced or there are no effective sanctions then it may become ‘honoured in the breach’ and the requirement may be brought into disrepute or contempt. Enforcement of such obligations is usually through a costs hearing and the making by the court of an adverse cost order against the party who has not participated in good faith, made a genuine effort, or cooperated.

Inherent power of the courts

There may be an argument that courts exercising federal jurisdiction have an inherent power to supervise compliance with their own orders and that federal courts may exercise supervisory jurisdiction over compliance with orders of federal tribunals.

The extent of the courts’ power in this regard may be confined by the breadth of its power to make orders. For example, the *Federal Court Act 1976* provides that the court may by order refer the proceedings to mediation without the consent of the parties.³⁹⁶ It may impliedly include an obligation on the parties to participate in the mediation in good faith and that that obligation is enforceable. On the other hand, there may be an argument that the order is simply for the parties to attend and for the mediation or arbitration, as the case may be, to take place.

The AAT Act provides that the President of the Tribunal may direct that a proceeding, or part of a proceeding, be referred for an ADR process³⁹⁷ and the legislation includes a requirement that parties act in good faith in ADR.³⁹⁸ However, the Tribunal does not have a general costs power. The Tribunal could, if it saw fit, make specific directions referable to the requirement for parties to act in good faith.

³⁹⁶ See s 53A(1) *Federal Court of Australia Act 1976*.

³⁹⁷ See ss 34A(1)(b) and 34B(1)(b) *Administrative Appeals Tribunal Act 1975*.

³⁹⁸ See ss 34A(1)(b) and 34B(1)(b) *Administrative Appeals Tribunal Act 1975*.

Concerns about enforcement

There are concerns about both the enforcement and non-enforcement of conduct obligations:

- enforcement or non-enforcement may have some detrimental consequences on the integrity of ADR
- enforcement may lead to unnecessary ‘satellite litigation’, and
- non-enforcement in the context of court/tribunal ordered ADR may undermine the authority and standing of the court/tribunal.

Confidentiality³⁹⁹

A common concern about the enforcement of conduct obligations in ADR is that in order to enforce them, a court or tribunal would need to ‘lift the veil’ of confidential processes in order to take evidence of relevant statements and documents. Related to this is a fear that ADR practitioners may be called to give evidence.

While it may be that most judges would be very careful about doing so, there may still be concerns about the potential loss of confidentiality and the impact it may have on the fullness and frankness of communications in ADR. If participants fear that there is a chance, however remote, that their words or documents may later be provided in open court and thereby become public, they may not be as willing to make admissions and apologies or provide confidential documents. Lawyers may advise their clients to take the route of least risk and to say as little as possible or let the lawyer speak on their behalf. There is evidence of lawyers adopting that sort of approach in at least one court-annexed mediation program.⁴⁰⁰ However, it must also be said that participation in ADR which is compulsory and which includes a conduct standard does not appear to have generated any widespread reports of counter productive consequences.

In the extreme, disputants may avoid processes rather than subject themselves to ‘rules’ that have a vague meaning or are not easily understood.

Privilege and inadmissibility

Section 131 of the *Evidence Act 1975 (Cth)* provides that, subject to a number of significant exceptions, evidence is not to be adduced of communications or documents prepared in connection with an attempt to settle a matter. Many statutes, including many that create conduct obligations in ADR, contain broad non-admissibility provisions that relate to ADR. For example, section 53B of the Federal Court of Australia Act provides:

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred ... [by the Court] is not admissible:

- (a) in any court (whether exercising federal jurisdiction or not); or

³⁹⁹ For a further discussion of confidentiality and inadmissibility in relation to ADR, see Schedule 3 – Confidentiality in ADR processes.

⁴⁰⁰ O C Rundle, *Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases*, Queensland University of Technology Law and Justice Journal, 8, (1) pp 77-92.

- (b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.⁴⁰¹

No exceptions are specified in the provision.

There may be an argument, particularly in the federal jurisdiction, that such a provision would not prevent the court from exercising an inherent power to supervise its own order. The High Court has emphasised that a contempt power is an indispensable feature of a Chapter III court which cannot be excluded by legislative stipulation.

However, a court faced with this prospect may seek to balance the need to enforce its own order, with the need to protect the confidentiality of the process.

Hong Kong's new Practice Direction with respect to mediation makes it clear that the court may take into account an unreasonable failure to attend mediation in exercising its discretion as to costs.⁴⁰² However, it then goes on to say:

In all contexts, including dealing with matters arising under this PD and in exercising its discretion on costs, the Court cannot compel the disclosure of or admit materials so long as they are protected by privilege in accordance with legal principles, including legal professional privilege and the privilege protecting without prejudice communications. What happens during the mediation process, being without prejudice communications, is protected by privilege. It must be emphasized that there is no question of the Court undermining the protection afforded by privilege.

There may be a question as to whether the protection afforded to court-ordered ADR by statutory inadmissibility provisions could be subject to an implicit good faith requirement. However, the fact that some statutes contain explicit good faith requirements while others do not may not support that approach.

The Family Law Act contains an extensive inadmissibility provision relating to both communications in family dispute resolution and communications in processes to be conducted by referral from family dispute resolution.⁴⁰³ There are two exceptions: one for child abuse and one for information necessary for the practitioner to give a certificate which would include a certificate as to whether a party had not made a genuine effort. It seems clear that this exception was specifically included at the time of the reforms that introduced family dispute resolution practitioner certificates to enable evidence to be introduced of the conduct that gave rise to the certificate.

Satellite litigation

The growth of ADR in recent decades has been fuelled by the argument that people in dispute should attempt to resolve their dispute before calling on the resources of the State to resolve it in bodies like courts and tribunals. Significant changes to civil procedure have been developed with the goal of either encouraging people to attempt ADR before

401 See s 53B *Federal Court of Australia Act 1976*.

402 Hong Kong, *Practice Direction – 31 Mediation*, paragraph 6, available at: http://legalref.judiciary.gov.hk/doc/whats_new/prac_dir/html/PD31.pdf, (viewed 23 September 2009).

403 See s 10J *Family Law Act 1975*.

commencing proceedings, or enabling courts and tribunals to require parties to engage in ADR processes.

It would be regrettable if greater use of ADR actually resulted in increased litigation, whether in costs hearings or in subsequent proceedings, over the standard of conduct in the ADR process. It seems indisputable that there should be mechanisms for dealing with serious breaches of conduct, such as violence, threats of violence or fraud. However, the concern is that some parties may be disposed to make claims in relation to other less significant breaches, particularly if there is a financial incentive to do so in the form of a potential adverse cost order against the other party.

The VLRC considered that satellite litigation was an issue. It said:

[...] because of the commission's concern about the undesirability of 'satellite' litigation in respect of sanctions and remedies for alleged breaches of the overriding obligations, it is proposed that applications by a party or person with sufficient interest would require leave of the court.⁴⁰⁴

Reports/certificates by ADR practitioners

There is legislation which requires or permits ADR practitioners to report or give a certificate to the court if a requisite standard of conduct was not achieved.⁴⁰⁵ Such reports or certificates may be a central feature of some ADR processes.⁴⁰⁶

There are concerns amongst ADR practitioners about the likelihood that they may be called to give such evidence. It has been noted that the exception to inadmissibility in the Family Law Act in relation to information relating to certificates 'may open up family dispute resolution practitioners to questioning about the basis of their decision to grant a particular certificate'.⁴⁰⁷

It has been observed that there are some risks in the practitioner certificate/report model. In the family law context it has been suggested:

[...] that the requirement to issue genuine effort certificates both threatens the perception of family dispute resolution practitioners as neutral and risks public confidence in family dispute resolution, which may be 'undermined by certificates either too readily issued, or too readily refused'.⁴⁰⁸

404 Victorian Law Reform Commission, *Civil Justice Review Report 14*, 2008, p 151.

405 See, for example, the *Family Law Act 1975* (Cth), the *Farm Debt Mediation Act 1994* (NSW), and *Civil Procedure Rules 1999* (Qld).

406 It is understood that an important feature of the family conferencing model conducted by the Legal Aid Commission is a report from the conference convenor which may include comments on the conduct of the participants and may be used by some Commissions to inform a decision of whether to extend legal aid for the matter or not.

407 H Astor, *Making a 'genuine effort' in family dispute resolution: What does it mean?*, (2008) 22 *Australian Journal of Family Law* 102, p 106.

408 *ibid.*, citing T Altobelli, *A Generational Change in Family Dispute Resolution*, (2006) 17 *Australasian Dispute Resolution Journal* 140, p 149.

It has been argued that a requirement for some ADR practitioners, eg mediators, to provide reports or give certificates about the conduct of the participants has the potential to significantly change their role and, by extension, the nature of the process. NADRAC's definition of ADR refers to processes in which '...an impartial person assists those in a dispute to resolve the issues between them'. If the ADR practitioner's role is transformed to one where they are making judgments about the conduct of the participants, their role may be perceived as one of authority rather than one of assisting. This may be less of an issue in more authoritarian models such as commercial arbitration. However, even there participants may consider that if they are paying for the arbitrator he/she should be assisting them rather than assisting the court.

Yet, another concern is that if an ADR practitioner has a power or obligation to 'report' or penalise inappropriate emotional responses then less skilled practitioners may fall into the habit of using that power rather than using skills to manage such inappropriate emotional behaviour.

Reporting models might be seen to be more appropriate in more interventionist court-based models of assisted dispute resolutions such as some conciliation conferences or the services provided by family consultants in the Family Court.

NADRAC has previously said that it opposes a requirement for mediator certification as it could raise questions of the protection of confidentiality, and may undermine his/her neutrality.⁴⁰⁹

Alternative ways of managing conduct in ADR

If there is a need to better manage conduct in ADR processes, but it is decided that generic requirements such as 'good faith', 'genuine effort' or a duty to 'cooperate' are not appropriate, there are some alternatives that could be considered.

It has always been regarded as the role of the ADR practitioner to manage conduct within the process and to terminate the process where they cannot do so. That role could be given greater authority by including it in legislation.

Legislation could set out, possibly as exceptions to inadmissibility provisions, examples of conduct that is not acceptable and in relation to which evidence will be admitted. Obvious examples would include violence, fraud and serious threats in relation to people or property.

Legislation could give judges a discretion to make appropriate orders with respect to the conduct of the parties in an ADR process to which they are ordered but taking into account relevant factors such as the capability of the parties to engage fully in the particular process and the desirability of protecting the confidentiality of the process so far as possible.

⁴⁰⁹ NADRAC, *Submission to the Review of the Franchising Code of Conduct – Submission addressing questions raised in Discussion Paper No 1 relating to the dispute resolution provisions of the Franchising Code of Conduct*, March, 2000.

If it is decided that there is value in using generic requirements such as ‘good faith’ etc, then consideration should be given as to how to limit their detrimental effects, for example, by requiring leave of the court before an application may be lodged for costs in relation to a breach of the standard. In addition, consideration might be given to whether it may be possible for judges to take evidence about what happened in a private, confidential ADR process in closed court.

Conclusion

It may be argued that the concept that parties in court proceedings are not expressly required to undertake court-ordered ADR in good faith or according to some other appropriate standard of conduct is contrary to good public policy, and undermines the authority and standing of courts. In addition there is a need to ensure justice and protect participants in ADR from unfair outcomes that might be caused by inappropriate conduct.

A different view may be that ADR processes are an alternative to a determination by the courts, and are not part of their function. ADR processes have their own integrity which must be supported if ADR is to achieve its objective of resolving cases quickly, inexpensively and satisfactorily. It is important to carefully consider changes that may have a detrimental impact on the process.

There is a need to balance these competing objectives. While NADRAC has previously expressed views on the subject, it believes it is an issue that warrants further and deeper consideration.

NADRAC has proposed the development of a new ADR Protocol to inform the community about appropriate conduct in different ADR processes for practitioners, disputants, professional advisers and persons who attend in a supporting role.⁴¹⁰ Much may still be achieved in developing participation and effectiveness in ADR by education, leadership and understanding at all levels of society.

Further consideration could be given to this issue in the context of developing such a Protocol and implementation of NADRAC’s other recommendations.

410 See Recommendation 3.1

Schedule 2: Annexure A — Good faith and ADR in other jurisdictions

Whilst previously recognised as a ‘notoriously amorphous and variable concept’,⁴¹¹ many jurisdictions now apply the doctrine of good faith. Good faith obligations exist as contractual, statutory and/or implied obligations. As contractual or implied obligations, they exist predominantly as rule of conduct. As statutory obligation, good faith can be a rule of interpretation or conduct.

The USA

The Uniform Commercial Code (UCC) applies to transactions in goods throughout the US.⁴¹² It imposes into every contract governed by it an obligation of good faith in its performance or enforcement.⁴¹³ Parties cannot opt out of this obligation. Contracts not governed by the UCC are governed by general (state) contract law. Most states appear to impose an obligation of good faith which seems to correspond broadly to the obligation under the UCC.⁴¹⁴

The UCC defines ‘good faith’ as ‘honesty in fact and the observance of reasonable commercial standards of fair dealing’. It has been described as a ‘weak background or interpretative principle’ that cannot support a cause of action, a position that apparently reflects the common law distrust in the judiciary to create obligations upon which parties had not agreed.⁴¹⁵

It appears that US (state) courts cannot require parties to exhibit good faith in court-ordered mediations.⁴¹⁶ However, an increasing number of states seem to have legislated good faith requirements for mediation proceedings.⁴¹⁷ The content of these good faith requirements appears to be informed by the good faith obligation contained in the UCC. At federal level, Rule 16(F) of the *Federal Rules of Civil Procedure* allows federal courts to sanction parties for not participating in good faith in pre-trial conferences.

Germany

Germany’s doctrine of good faith originates in the roman doctrine of *bona fides*.⁴¹⁸ Good faith underpins all legal relationships governed by the *German Civil Code*. The Civil Code contains both, a rule of interpretation (§157 Civil Code) and a rule of conduct (§242 Civil Code). German courts also imply good faith obligations into contractual relationships.⁴¹⁹

411 H Flechtner, *Comparing the general good faith provisions of the PECL and the UCC: appearance and reality*, (2001) Pace University Law Review 295, p 301.

412 US *Uniform Commercial Code*, § 2-102.

413 *ibid.*, § 2-304.

414 H Flechtner, *Comparing the general good faith provisions of the PECL and the UCC: appearance and reality*, (2001) Pace University Law Review 295, p 298 (FN 9).

415 *ibid.*, p 310.

416 *Avril v Civilmar*, 605 So2d 988 (Florida District Court of Appeal, 1992).

417 See already K Kovach, *Good faith in mediation – requested, recommended, or required? A new ethic*, (1997) S Tex L Rev 575, 588-9.

418 The German law applies ‘fidelity and faith’ (transl: *Treu und Glaube*). This term is generally considered to be synonymous with ‘good faith’.

419 German Federal Supreme Court (*Bundesgerichtshof*), VIII ZR 344/97 (18 November 1998).

What amounts to good faith is not defined by the Civil Code. It was left to the courts to determine its content. The jurisprudence concerning §242 Civil Code has developed many categories of conduct in pre- and post-contractual circumstances that are considered to breach good faith obligations. Examples include:⁴²⁰

- the inadmissible exercise of rights
- the abuse of rights
- the collapse of an underlying basis or understanding for a contract, or
- the prohibition to go against one's own former conduct to the detriment of another party.⁴²¹

Where parties have agreed to use ADR to resolve their disputes, §242 Civil Code requires them to cooperate to fulfil the agreement. Where they fail to cooperate, courts have refused access to them until ADR had been attempted.⁴²² However, it appears that good faith has not been implied into ADR processes as a general rule of conduct applicable to parties.⁴²³

The UK

In the UK, parties are required to give due consideration to engage in ADR as part of their pre-action conduct.⁴²⁴ This requirement may be breached where a party unreasonably refuses to consider ADR to resolve the dispute or at least narrow the issues. There is no presumption in favour of ADR processes.⁴²⁵

When considering costs, Part 44.3 of the CPR allows courts to take into consideration the parties' conduct throughout the proceedings, including at pre-action protocol stage. The unreasonable refusal to consider ADR may result in cost sanctions even against a successful party. This is a departure from the traditional rule that 'cost follows the event'. The courts have promulgated several parameters for the application of cost sanctions.⁴²⁶

Art 3(d) of the CPR Mediation Procedure obliges parties to cooperate fully with the mediator. There appears to be no express duty to participate in ADR processes in good faith. However, the courts held that to take an unreasonable position in mediation is not dissimilar to refusing mediation unreasonably so that the parties' conduct during

420 S Whittaker, R Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape' In Whittaker and Zimmerman (eds) *Good Faith in European Contract Law*, Cambridge University Press, 2000, pp 23–25.

421 In Germany, these categories are (in order of the bullet points): *Unzulässige Rechtsausübung*, *Rechtsmissbrauch*, *Wegfall der Geschäftsgrundlage* and *Zuwiderhandlung gegen das eigene frühere Verhalten (venire contra factum proprium)*. The latter category is similar to the estoppel developed by the High Court in *Walton Stores v Maher* (1988) 164 CLR 387.

422 German Federal Supreme Court (*Bundesgerichtshof*), VIII ZR 344/97 (18 November 1998). See also German Federal Supreme Court (*Bundesgerichtshof*), III ZB 91/07 (30 April 2009), para 6.

423 As Alexander observed, most mediation contracts contain a duty to cooperate into which good faith may be implied. See N Alexander, *International and Comparative Mediation: Legal Perspectives* (Alphen an den Rijn: Kluwer Law International 2009) Chapter 5 – At the mediation table: conduct of mediators and participants.

424 Paragraph 4.4(3) Practice Direction on Pre-Action Conduct.

425 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

426 *ibid.* *General NHS Trust* [2004] EWCA Civ 576. *Nigel Witham v Smith anor* (No. 2) [2008] EWHC 12 (TCC).

mediation can be taken into account by a court when considering costs according to the principles promulgated in *Halsey*.⁴²⁷

Supranational jurisdictions

A number of international instruments contain good faith obligations. Examples include:

- Art 1.7 of the UNIDROIT Principles on International Commercial Contracts
- Art 7(1) and Art 13 of the United Nations Convention on Contracts for the International Sale of Goods; a number of provisions in the Convention that regulate parties conduct are derived from the principle of good faith,⁴²⁸ and
- Art 11 of the UNCITRAL Conciliation Rules.
- Art 1:106 and Art 1:201 of the Principles of European Contract Law.

The Principles of European Contract Law (the Principles) are ‘designed as a statement of derivative general legal norms.’⁴²⁹ They are not binding but are used by courts and law and policy makers. The Principles contain good faith as a rule of interpretation⁴³⁰ as well as a rule of behaviour.⁴³¹

As a rule of behaviour, it complements the (subjective) concept good faith with the (objective) concept of ‘fair dealing.’⁴³² Commentators have described the substantive notions of good faith as referring to the ‘need to take into account the legitimate interests of the other party.’⁴³³ The rule applies pre- as well as post-conclusion of a contract. Parties are prohibited to modify or exclude this duty.⁴³⁴ Like the general duty to cooperate,⁴³⁵ there are other Articles that are a ‘black-letter’ codification of certain aspects of good faith.⁴³⁶

427 *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB), para 72.

428 United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, 1981, p 18. See also the UNCITRAL Digest of Case law on the United Nations Convention on the International Sale of Goods, Article 7, 8 June 2004, A/CN.9/SER.C/DIGEST/CISG/7.

429 H Flechtner, Comparing the general good faith provisions of the PECL and the UCC: appearance and reality, (2001) *Pace University Law Review* 295, p 297.

430 Art 1:106 of the Principles.

431 Art 1:201(1) of the Principles.

432 Part E of the Comment to the Principles.

433 M E Storme, *Good faith and the contents of contracts in European private law*, (2003) 7(1) *European Journal of Comparative Law*.

434 Art 1.201 (2) of the Principles.

435 Art 1.202 of the Principles.

436 For example, Art 2:301 – the duty not to negotiate a contract with no real intention of reaching an agreement or Art 4:109 – the duty not to take advantage of the other party’s dependence, economic distress or weakness. See further: M E Storme, *Good faith and the contents of contracts in European private law*, (2003) 7(1) *European Journal of Comparative Law*.

Schedule 2: Annexure B – Indicia set out in *Western Australia v Taylor (Njamal People)*

The 18 indicia set out in *Western Australia v Taylor (Njamal People)* (1996) 134 FLR 211 (per Member Sumner) are:

1. unreasonable delay in initiating communications in the first instance;
2. failure to make proposals in the first place;
3. the unexplained failure to communicate with the other parties within a reasonable time;
4. failure to contact one or more of the other parties;
5. failure to follow up a lack of response from the other parties;
6. failure to attempt to organise a meeting between the native title and grantee parties;
7. failure to take reasonable steps to facilitate and engage in discussions between the parties;
8. failing to respond to reasonable requests for relevant information within a reasonable time;
9. stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
10. unnecessary postponement of meetings;
11. sending negotiators without authority to do more than argue or listen;
12. refusing to agree on trivial matters, eg a refusal to incorporate statutory provisions into an agreement;
13. shifting position just as agreement seems in sight;
14. adopting a rigid non-negotiable position;
15. failure to make counter proposals;
16. unilateral conduct which harms the negotiating process eg issuing inappropriate press releases;
17. refusal to sign a written agreement in respect of the negotiation process or otherwise;
18. failure to do what a reasonable person would do in the circumstances.

Schedule 2: Annexure C – Genuine effort – excerpt from Attorney-General’s Department website – frequently asked questions – family dispute resolution certificates

(Original at Home » Families » Family Relationship Services Overview of Programs » Family Dispute Resolution FAQ and Resources Downloads)

How does a family dispute resolution practitioner assess if a person has made a ‘genuine effort’ to resolve the issue or issues in dispute?

The Attorney-General’s Department has received legal advice that ‘genuine effort’ should be given its ordinary meaning in the context of Part VII of the Family Law Act which deals with children.

A genuine effort involves a real, honest exertion or attempt. It must be more than a superficial or token effort, or one that is false, or is pretence. The effort must be one that is realistically directed at resolving the issues that are the subject of the application for a court order.

The question about whether a genuine effort has been made to resolve issues in a particular case will depend on the circumstances of the case. It is a matter for the professional judgment of the family dispute resolution practitioner. Both objective matters (such as a refusal to engage in discussion) and subjective matters arising from the circumstances of the case (for example, the health of the people involved) may be relevant to the opinion of the practitioner.

Whether the issue in dispute is resolved or not, it will not necessarily be because one or more people did not make a genuine effort. There may be valid reasons why people have differing views on an issue.

Should a ‘genuine effort’ certificate be issued if people have resolved a dispute?

Certificates serve the sole purpose of allowing people to file an application in court. Where people attend family dispute resolution in relation to an issue and resolve their dispute, there is no need to issue a certificate.

Should a ‘non-genuine effort’ certificate be issued if people attend but refuse to change their views on the dispute?

It is a matter for the professional judgment of the family dispute resolution practitioner. Both people may have valid personal reasons why they have refused to change their views. The failure to resolve a dispute does not necessarily mean they have not made a genuine effort.

What happens if a person is not happy with the type of certificate issued? Can people legally challenge a family dispute resolution practitioner’s decision to issue a certificate stating that a person/people did not make a genuine effort?

If people are unhappy with the certificate issued, they can choose to attend further family dispute resolution with a different provider. They can also make an application to court to resolve their dispute.

While all registered family dispute resolution practitioners are required to have a complaints mechanism in place, people are not able to legally challenge a practitioner's decision to issue a 'non-genuine effort' certificate. This is the practical effect of communications in family dispute resolution being inadmissible in court.

What are the possible consequences for the people involved in the dispute if a 'non-genuine effort' certificate is issued by a family dispute resolution practitioner?

If a 'non-genuine effort' certificate is issued, the court may order people to attend family dispute resolution before hearing the application.

The court may also take into account that a 'non-genuine effort' certificate has been issued when deciding if a costs order should be made against a person.

Schedule 3: Confidentiality in ADR Processes

Introduction

Confidentiality relates to the obligations of ADR practitioners and participants not to disclose any information that has been provided for the purposes of the ADR process or that has been disclosed during an ADR session.⁴³⁷ The term ‘confidentiality’ is frequently used broadly to include concepts such as the responsibility of the practitioner and the participants not to publicly discuss statements made and documents provided during the process, the extent of admissibility of evidence about the proceedings and the immunity for ADR practitioners from mal-practice law suits. However, the sources of obligations relating to these distinct yet closely related concepts often address each concept separately.

Confidentiality is widely regarded as an integral element of ADR processes, because it promotes interest based communications and negotiations. Communications made in a confidential forum can be open and honest, because the potential consequences that might follow from such communications if made in a non-confidential rights-based environment, such as a court or tribunal, are avoided.

Arguments in favour of maintaining confidentiality are therefore based on a number of issues, including the need: to ensure the integrity of the ADR process; to promote open and honest communication; to protect the interests of all participants; and to promote resolution of the dispute.

On the other hand, there are public interest arguments against confidentiality. For example, disclosure may be necessary in limited circumstances: in order to protect a person from harm; to prevent a serious breach of the law; to provide important information to government in the public interest; or to assist in regulating the ADR profession. There are also arguments that exceptions should be made to non-admissibility provisions to allow evidence to be given of inappropriate conduct in ADR processes, through conduct standards such as ‘good faith’ and ‘genuine effort’.

Confidentiality is usually regarded as belonging to the participants in the ADR process, so that they can jointly agree to waive it. However, some current statutory provisions do not permit that.⁴³⁸ In addition, a recent English case took the position that the parties could not agree to waive confidentiality unless they also had the agreement of the ADR practitioner, in that case a mediator.⁴³⁹

While there is a generally accepted principle that communications made during ADR will be kept confidential, there is no general source of confidentiality obligations. The obligation of confidentiality can be expressed through a code of conduct, legislation, private contractual arrangements, or it may exist at common law.

437 NADRAC, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*, November, 2006, p 11.

438 See for example the non-admissibility provision in section 53B of the *Federal Court of Australia Act 1976*.

439 *Farm Assist v DEFRA* (No2) [2009] EWHC 1102 [TCC].

Common law confidentiality

The obligations of ADR practitioners not to disclose ADR communications have been affirmed by the common law. Practitioners should not disclose information about the dispute to third parties.⁴⁴⁰ In addition, practitioners generally have an ethical obligation not to disclose information provided by a party during a separate private session where this is part of an ADR process. This extends to keeping that information from the other party to the process. The importance of the actual and perceived impartiality of the ADR practitioner is one of the hallmarks of the ADR process.⁴⁴¹

The confidentiality obligations of the parties participating in an ADR process may be more problematic. Parties may be required to report to managers, a board, auditors or partners about an ADR process. In family law matters, particularly in matters that relate to parenting arrangements for separating couples, it is unrealistic to expect a party to leave the process and not reveal to someone such as their current partner the proposals or agreements discussed, especially in relation to the children.⁴⁴²

Contractual confidentiality

Professional guidelines for ADR practitioners generally impose obligations to clarify the participants' expectations of confidentiality before undertaking the ADR process and to maintain the confidentiality of ADR proceedings.⁴⁴³ Many ADR practitioners therefore prefer to make an agreement between themselves and the participants at the outset of the process to maintain confidentiality. Where such agreements exist, the court may enforce a promise to keep a confidence by injunction. The difficulty is that usually no-one will know about the disclosure until after it has occurred, and while damages may be an appropriate remedy in some cases, their use has not spread to matters involving ADR.⁴⁴⁴

Where there are no contractual requirements for confidentiality, it is unclear whether the courts will imply such requirements. In relation to arbitration, the High Court held that such confidentiality requirements cannot be implied into an arbitration agreement that does not contain an express confidentiality clause.⁴⁴⁵ This decision is in stark contrast to the situation in the UK.⁴⁴⁶ Whether courts are more willing to imply confidentiality in relation to other ADR processes is unclear.⁴⁴⁷

440 See cases such as *AWA Ltd v Daniels* (1992) 7 ACSR 463 (Comm Div) and *Rajski & Anor v Tectran Corporation Limited and Ors* (2003) NSWSC (26 May 2003).

441 NADRAC, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*, November, 2006, p 74.

442 *ibid.*, p 75.

443 See, for example, s 6 of the National *Practice Standards*, National Mediator Accreditation System, September 2007, available at www.nadrac.gov.au (viewed 16 September 2009).

444 *ibid.*

445 *Esso Australia Resources v Plowman* (Minister for Energy and Minerals) (1995)183 CLR 10, p 30.

446 *Dolling-Baker v Merrett* (1990) 1 WLR 1205.

447 L Boule, *Mediation: Principles, Process, Practice*, 2nd Edition, 2005, p 574.

Statutory confidentiality

Commonwealth statutory provisions generally do not prevent the participants from disclosing matters that are discussed during ADR processes. However, there are some exceptions.

In family law matters, family counsellors⁴⁴⁸ and family dispute resolution practitioners⁴⁴⁹ must not disclose any communication or admission⁴⁵⁰ made by a participant unless the disclosure is necessary: to achieve compliance with a state, territory or Commonwealth law; to protect a child from harm; to prevent or lessen a serious threat to the life, health or property of a person; or to report or prevent the commission of an offence involving violence to a person or damage to property or threats of violence or damage. Of course, such information may be disclosed as is necessary to provide a certificate for the purposes of section 60I of the *Family Law Act 1975*.

The Family Law Act does not attach confidentiality to arbitration processes⁴⁵¹ or to processes conducted by family consultants.⁴⁵²

In relation to mediation processes for non-family civil law matters, neither the *Federal Court of Australia Act 1976*⁴⁵³ nor the *Native Title Act 1993* include confidentiality provisions of general application.

In the absence of any overarching legislative or common law requirement attaching confidentiality to ADR processes, it is impossible to say either that confidentiality is always maintained or that information revealed in the dispute resolution process is never used for other purposes. There may be arguments for some uniform national guidance in that regard.

Non-admissibility of things said or done in the course of ADR proceedings

The term ‘admissibility’ relates to the question of whether evidence of things said or done or admissions made during an ADR process can be admitted into future proceedings. It also concerns the question of whether ADR practitioners can or should be compelled to appear as witnesses.⁴⁵⁴

Statutory non-admissibility provisions

Admitting evidence of ADR sessions into formal court proceedings can undermine the alternative nature of the attempt to resolve the dispute as ADR becomes another component of litigation. Some legislation therefore provides that evidence of anything said

448 s 10D *Family Law Act 1975*.

449 *ibid.*, s 10H.

450 *ibid.*, s 10J.

451 *ibid.*, s 10P.

452 *ibid.*, s 11C.

453 s 53B *Federal Court of Australia Act 1976*.

454 NADRAC, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*, November, 2006, p 11.

or done, or any admission made at a meeting or conference held by ADR practitioners, including counsellors, is not admissible in court.

For example, under the Native Title Act, evidence may not be given and statements may not be made in the Federal Court concerning words or acts at a mediation conference conducted by the National Native Title Tribunal, unless the parties agree.⁴⁵⁵

The *Federal Court of Australia Act 1975* provides that admissions made to mediators are inadmissible.⁴⁵⁶ Under the *Administrative Appeals Tribunal Act 1975*, evidence of anything said or an act done at an ADR process is not admissible in any court unless the parties agree.⁴⁵⁷ The Family Law Act provides that family counsellors and family dispute resolution practitioners must not disclose a communication made, except in specified circumstances.⁴⁵⁸

These provisions facilitate frank discussions and meaningful negotiations so that parties can divulge information and express their differences openly without fearing that the discussions will be used against them at a later date.

On the other hand, there may be compelling reasons for admitting some matters into evidence, for example where that evidence could help protect a child, vulnerable person or the public.⁴⁵⁹

Section 131 of the *Evidence Act 1995* is a provision of general application that would apply to proceedings in federal courts, unless its operation is excluded by a more specific provision as to admissibility in other legislation. Subject to certain exceptions, section 131 provides that evidence is not to be adduced of a communication that is made, or document that has been prepared, in connection with an attempt to negotiate a settlement of a dispute. Tribunals may adopt provisions in the Evidence Act, including section 131. Some tribunals include provisions similar to section 131 in their establishing legislation.

In the joint Uniform Evidence Act report, the Australian, NSW and VLRC considered whether mediations fall within the scope of section 131.⁴⁶⁰ They concluded that the section applies to communications in mediations, other than court-ordered mediations, which are typically covered by the legislation of the court.⁴⁶¹

It is understood that section 131 sought to codify the common law position with respect to the ‘without prejudice privilege’. However, unlike the common law formula, the provision in the Evidence Act provision does not require the negotiations to be in good faith. The common law principle of without prejudice privilege makes inadmissible in court any statements and information made in good faith attempts to settle disputes, unless all

455 s 136A *Native Title Act 1993*. (Evidence is inadmissible only where the Federal Court has referred whole or part of a proceeding to the National Native Title Tribunal for mediation.)

456 s 53B *Federal Court of Australia Act 1975*.

457 s 34E *Administrative Appeals Tribunal Act 1975*. Evidence is inadmissible only for dispute resolution processes referred by the Administrative Appeals Tribunal.

458 See, for example, s 10J *Family Law Act 1975*.

459 *ibid.*, s10 J and 11C and D.

460 Australian Law Reform Commission, *Uniform Evidence Law: Report*, Report 102, ALRC, NSWLRC and VLRC, (2005), para. 15.173–15.175.

461 Victorian Law Reform Commission, *Civil Justice Review: Report*, 2008, p 193.

the participants consent to the evidence being provided to a court.⁴⁶² Section 131 of the Evidence Act includes the consent exception and several other exceptions, including, for example where the communication was made in the furtherance of the commission of a fraud or other offence, and where the communication is relevant to determining costs.⁴⁶³

ADR practitioners as witnesses

There is currently no general privilege for mediators or other ADR practitioners at federal law equivalent to the legal professional privilege afforded to lawyers.

However, as discussed above, for most disputes in federal courts and tribunals, there exists legislation providing that evidence of communications made during ADR processes is not admissible in court. Such legislation makes it unlikely that ADR practitioners would be called to give evidence as they would be precluded from being compelled to give evidence in relation to communications in ADR processes they have provided.⁴⁶⁴

Where there are no such statutory provisions, ADR practitioners would be compellable witnesses⁴⁶⁵ and would have no protection if subpoenaed.⁴⁶⁶ However, participants in an ADR process may agree not to call the mediators as a witness.

Immunity of ADR practitioners

An important question is whether ADR practitioners should be afforded protections and immunities from suit, and if so, in what circumstances and to what extent. A key argument against blanket immunity provisions for ADR practitioners is that professional negligence lawsuits provide an important mechanism for regulating the ADR profession. The general provision of immunity would protect ADR practitioners from professional scrutiny and criticism, potentially affecting the quality ADR services.

While there are no provisions of general application, there are specific statutory schemes that provide immunity for ADR practitioners. Some of the schemes provide immunities that equate to those extended to a judge. For example, under the Family Law Act, arbitrators⁴⁶⁷ are provided the same protection and immunity as a judge. Opinions differ as to whether this is appropriate.

One view is that, where a court orders ADR, and the ADR is part of a continuum of case management strategies which aim to resolve litigation between parties, ADR should attract the same immunity as for other aspects of the court process.⁴⁶⁸ For example, for court-based ADR processes in the Federal Court, mediators and arbitrators are provided with immunity.⁴⁶⁹

462 See *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285; *Rogers v Rogers* (1964) 114 CLR 608, followed and cited in numerous subsequent cases.

463 s 131 *Evidence Act 1995*.

464 See, for example, s 66 *Administrative Appeals Tribunal Act 1975*.

465 L Boulle, *Mediation: Principles, Process, Practice*, 2nd Edition, 2005, p 574.

466 s 12 *Evidence Act 1995*.

467 s 10P *Family Law Act 1975*.

468 NADRAC, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*, November, 2006, p 11.

469 s 53C *Federal Court of Australia Act 1975*.

However, it is very difficult as a matter of principle to justify the immunity of ADR practitioners when the ADR is community-based rather than part of a court's case management process.

For example, prior to 1 July 2006, the Family Law Act provided immunity to family mediators now family dispute resolution practitioners. Reforms in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* removed this immunity, consistent with joint advice from NADRAC and the Family Law Council.⁴⁷⁰ The Council provided the following reasons for their advice:

- any immunity from suit for negligence or other civil wrong must be strongly justified as a matter of public policy
- judicial immunity could only be properly conferred with respect to mediations that were a part of the court's case management strategies. The Councils noted that the mediations under the Act would be largely community-based and were not necessarily connected with any court application, and were therefore outside of the court system
- liability could be limited via contract
- in any case, it would be difficult to bring a negligence action against a dispute resolution practitioner for two main reasons: the obligations of the parties and the mediator to maintain confidentiality; and the difficulty of establishing that any loss had been caused as a consequence of the mediator's conduct
- the removal of immunity would not dramatically impact the number of family dispute resolution practitioners who would be prepared to continue to offer family dispute resolution, and
- many of the organisations which assist in the provision of family dispute resolution already maintain insurance premiums.⁴⁷¹

The same reforms implemented a change in the role of Family Court mediators. The view was taken that disputants had many options to resolve their dispute privately in the community before family law proceedings were commenced. Once proceedings were commenced, it was considered that a greater degree of intervention was appropriate and that the work of the mediators, now called family consultants, should support the judicial determination function. Evidence about the family consultant's services was made admissible and not confidential. As the function of the family consultants was now so closely linked to the exercise of the judicial function, it was considered appropriate that judicial immunity should extend to their work.

Community-based ADR practitioners are able to limit or cover their liability through individual contract and/or professional indemnity insurance.⁴⁷² The NMAS requires nationally accredited mediators to have either relevant insurance, indemnity

470 NADRAC and the Family Law Council, *Joint letter of advice on immunity for family counsellors and dispute resolution practitioners*, Canberra, November, 2005.

471 E Matthews, *Mediator immunity: an update*, Australian Commercial Disputes Centre, NSW, 2008.

472 NADRAC and the Family Law Council, *Joint letter of advice on immunity for family counsellors and dispute resolution practitioners*, Canberra, November, 2005.

or employment status and also requires mediators relying on indemnity or employment status to demonstrate how these apply.⁴⁷³

In order to meet particular policy needs, policy-makers may wish to consider whether to extend legislative immunity for a limited time to practitioners involved in processes not initiated by court referral.

Conclusion

There is a strong view that in order for participants to continue to have faith in the ADR process and to continue to freely and meaningfully participate in it, it should not be possible for any admissions or apologies made in order to further agreement to be subsequently used against them. Accordingly, it is argued that statutory confidentiality and non-admissibility provisions should apply, albeit with necessary exceptions.

There is also a strong view that the conduct of some participants in ADR processes, often legal practitioners, leaves much to be desired.⁴⁷⁴ As a result it is argued that enforceable standards of conduct such as 'good faith' or 'genuine effort' should be used. Of course, enforcement of such standards would impinge upon confidentiality and non-admissibility to some degree. This is a controversial area as the proposal creates some fears about the continuing integrity of ADR processes, particularly mediation, as a venue for 'frank and fearless' communications between the parties.

In addition, the combination of confidentiality, non-admissibility and immunity for ADR practitioners would create a complete barrier to the scrutiny of practitioner conduct. NADRAC does not consider it to be appropriate for such provisions to be used to protect ADR practitioners from the consequences of misconduct. Exceptions to non-disclosure and to non-admissibility provisions may be appropriate where complaints are made against ADR practitioners. Even if such practitioners are granted immunity, there may be professional bodies to which complaints could be made. In relation to such complaints, certain communications from the ADR processes may need to be disclosed.

These are issues that in NADRAC's view warrant greater consideration.

473 National *Practice Standards*, National Mediation Accreditation System, September 2007, available at www.nadrac.gov.au (viewed 16 September 2009).

474 T Sourdin, *Mediation in the Supreme and County Courts of Victoria*, Australian Centre for Peace and Conflict Studies, The University of Queensland, September 2008; Rundle O, *How court-connection and lawyer perspectives have shaped court-connected mediation in the Supreme Court of Tasmania*, PHD, University of Tasmania.

Schedule 4: Lord Woolf Reforms – Pre-action Protocols

Background

Recommendations contained in Lord Woolf's report on access to justice in July 1996 led to case management reform in the UK and overseas. The objectives of the Woolf reforms were to improve access to justice by reducing inequalities, cost, delay and complexity of civil litigation, and to introduce greater certainty as to timescales and costs.⁴⁷⁵

Lord Woolf's approach to civil justice was that:

disputes should, wherever possible, be resolved without litigation. Where litigation is unavoidable, it should be conducted with a view to encouraging settlement at the earliest appropriate stage. However, settlement is not an end in itself. Settlement must be appropriate to the needs of both parties, and be achieved without excessive cost or delay.⁴⁷⁶

The reforms also led to the introduction of the *Civil Procedure Rules 1999* (the Rules) in England and Wales. The overriding objective of the Rules is to resolve disputes in a proportionate, fair, efficient and expeditious manner.⁴⁷⁷ The court must seek to give effect to the overriding objective when it exercises any power given to it by the Rules,⁴⁷⁸ including making costs orders.

The Rules place an obligation on the courts to actively manage cases to achieve this overriding objective⁴⁷⁹ and, in particular, to encourage any request for proceedings to be stayed 'while the parties try to settle the case by ADR or other means'⁴⁸⁰ or the court can order a stay of its own initiative.⁴⁸¹ The court can also order the parties to consider ADR.⁴⁸²

Framework for pre-action protocols

Pre-action protocols were introduced in England and Wales as part of the civil procedure reforms. The pre-action protocols are aimed at encouraging the early disclosure of relevant documents and information to better enable parties to assess their cases and settle.⁴⁸³

475 Department for Constitutional Affairs, *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* (1995) p 26.

476 Department for Constitutional Affairs, *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* (1996) Chapter 10, paras 2 – 3.

477 *Civil Procedure Rules 1999* (UK) r 1.1.

478 *Civil Procedure Rules 1999* (UK) r 1.2.

479 *Civil Procedure Rules 1999* (UK) r 1.4(1).

480 *Civil Procedure Rules 1999* (UK) r 26.4.

481 *Civil Procedure Rules 1999* (UK) r 26.4(2)(b).

482 *Civil Procedure Rules 1999* (UK) Practice Direction 29.

483 A Marriott QC, *Breaking the dispute resolution deadlock: Civil litigation and ADR in the United Kingdom and beyond* (2006) 17 ADRJ 157, p 157.

Chapter 10 of Lord Woolf's report sets out proposals for the development of pre-action protocols to build on and increase the benefits of early but well-informed settlements that genuinely satisfy both parties to a dispute.⁴⁸⁴

The purposes of the pre-action protocols are to:

- focus the attention of litigants on the desirability of resolving disputes without litigation
- enable them to obtain the information they reasonably need in order to enter into an appropriate settlement
- make an appropriate offer (of a kind which can have costs consequences if litigation ensues), and
- lay the ground for expeditious conduct of proceedings where a pre-action settlement is not achievable.⁴⁸⁵

Pre-action protocols have subsequently been developed under the Practice Direction on pre-action conduct. Each protocol relates to a certain area of dispute, such as construction and engineering, defamation, personal injury, professional negligence, and judicial review.⁴⁸⁶

The Practice Direction on pre-action conduct also contains a part on ADR:

Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR...⁴⁸⁷

The Woolf reforms also provided for the assignment of cases into 'tracks' according to their nature and the value of the amount in issue.⁴⁸⁸ There have been important developments in the success of fixing legal costs for 'fast track cases' since the Woolf reforms were implemented.⁴⁸⁹ The costs payable under the fixed costs regime are fixed (rather than capped) at the prescribed amount. The court has discretion to increase or decrease the amounts based on the conduct of the parties or of the legal representatives.⁴⁹⁰ Further Civil Justice Council initiatives have led to fixed costs schemes and agreements being introduced for certain types of disputes, such as road traffic cases.⁴⁹¹

484 Department for Constitutional Affairs, *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* (1996) Chapter 10, para 1.

485 *ibid.*

486 UK Ministry of Justice website <http://www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm>.

487 Practice Direction (UK) *Pre-action conduct*, 8. Alternative dispute resolution (this Practice Direction came into force on 6 April 2009).

488 *Civil Procedure Rules 1999* (UK) rr 26.7 and 26.8.

489 M Zander, *Cases and materials on the English Legal System*, tenth edition, Cambridge University Press, Cambridge, 2007, p 138.

490 *Civil Procedure Rules 1999* (UK) r 46.3.

491 M Zander, *Cases and materials on the English Legal System*, tenth edition, Cambridge University Press, Cambridge, 2007, p 564.

Benefits of the pre-action protocols

A central aim of the reforms was to make litigation more affordable, predictable, and proportionate to the value and complexity of each case.⁴⁹² Benefits of the pre-action protocols include:

- increased settlement of cases without court involvement⁴⁹³
- greater cooperation between parties, legal practitioners, and the courts,⁴⁹⁴ and
- a reduced caseload for the courts and, therefore, savings to the State.⁴⁹⁵

There have been some obvious financial benefits to the State due to greater settlement of cases because more cases are being resolved without going to court.⁴⁹⁶ It has been reported that the number of claims and appeals filed with the English courts has significantly decreased since the introduction of the *Civil Procedure Rules 1999*.⁴⁹⁷ It was also suggested that cases are being settled earlier as they are ‘more focused with fewer unnecessary disputes over side issues.’⁴⁹⁸

Although there has not been much greater use of ADR mechanisms, it has been suggested that this is a direct result of the effectiveness of the pre-action protocols, as proper protocols should reduce the need for ADR.⁴⁹⁹ It was also argued that other factors have contributed to the lack of demand for ADR, such as client resistance at the early stages of dispute, half-hearted participation, and a lack of knowledge or familiarity with ADR.⁵⁰⁰

The protocols (and the reforms in general) allow judges more discretion in their decision-making process, which has raised concerns about inconsistency. However, it has been suggested that consistency in judicial decision-making could not significantly be improved because it is ‘part of the price that has to be paid for the benefits of the reforms.’⁵⁰¹

Other factors no doubt contribute to the ongoing high cost of civil litigation in the UK, such as the reduction in legal aid for civil disputes, the use of conditional fee agreements, legal costs insurance, and satellite litigation.⁵⁰² It is said that overall, the Woolf reforms

492 M Zander, *Cases and materials on the English Legal System*, tenth edition, Cambridge University Press, Cambridge, 2007, p 136.

493 H Genn, *Solving civil justice problems: What might be best?*, January 19 2005, Scottish Consumer Council Seminar on Civil Justice, p 6.

494 *ibid.*

495 M Zander, *Cases and materials on the English Legal System*, tenth edition, Cambridge University Press, Cambridge, 2007, p 135.

496 *ibid.*

497 H Genn, *Solving civil justice problems: What might be best?*, January 19 2005, Scottish Consumer Council Seminar on Civil Justice, p 6.

498 Department for Constitutional Affairs, *The management of civil cases: The courts and the post-Woolf landscape*, DCA Research Report 9/2005, p 172.

499 The Right Honourable Sir Igor Judge, *The Woolf reforms after nine years: is civil litigation quicker and cheaper in the High Court?*, *Judicial Officers' Bulletin*, November 2007, Volume 19 No 10, p 90.

500 H Genn, *Solving civil justice problems: What might be best?*, January 19 2005, Scottish Consumer Council Seminar on Civil Justice, pp 13 – 14.

501 M Zander, *Cases and materials on the English Legal System*, tenth edition, Cambridge University Press, Cambridge, 2007, p 140.

502 P Cashman, Victorian Law Reform Commission, *The Cost of Access to Courts*, March 2007, p 38.

have effectively encouraged a change of culture in the UK and in other jurisdictions.⁵⁰³ A less adversarial culture promotes the settlement of cases at an earlier stage in the process⁵⁰⁴ and a more simplified approach is taken towards litigation.⁵⁰⁵

Criticisms of the pre-action protocols

There is concern that the costs for litigants have actually increased due to the ‘front loading’ of costs as solicitors have to do much of the work they would have previously done post-filing before the case has commenced.⁵⁰⁶ Therefore, litigants who may have otherwise settled their cases before filing or soon after filing may incur increased litigation costs. As the vast majority of cases have always settled prior to hearing, the number of litigants who are adversely affected may be significant.

Delay in litigation has also been raised as an ongoing issue because cases may take longer to get to court while solicitors fulfil the detailed requirements of the pre-action protocols.⁵⁰⁷ Inconsistency in decision-making is another concern due to the increase in judicial discretion provided by the overriding objective and other case management provisions contained in the Rules.⁵⁰⁸

While there has been fewer cases going to court as a result of the reforms, the general consensus is that there appears to have been little increase overall in the use of ADR processes, such as mediation.⁵⁰⁹

Although there has been an increase in earlier settlements, it has been noted that settlements do not necessarily carry the benefits of principled resolutions. Principled resolutions, such as those associated with ADR processes (particularly mediation) better meet the needs and interests of the disputants. Consequently, the reforms may result in prospective litigants expending more resources than they would have been required to prior to the introduction of the reforms for a similar result.

Despite the higher levels of settlement associated with the Woolf reforms, legal costs associated with civil litigation continue to rise.⁵¹⁰ In particular, mega litigation still involves a ‘significant investment in legal costs.’⁵¹¹

503 The Right Honourable Sir Igor Judge, *The Woolf reforms after nine years: is civil litigation quicker and cheaper in the High Court?*, Judicial Officers’ Bulletin, November 2007, Volume 19 No 10, p 90.

504 *ibid.*, p 89.

505 A Marriott QC, *Breaking the dispute resolution deadlock: Civil litigation and ADR in the United Kingdom and beyond* (2006) 17 ADRJ 157 at 158.

506 H Genn, *Solving civil justice problems: What might be best?*, 2005, Scottish Consumer Council Seminar on Civil Justice, pp 6 – 7.

507 M Zander, *Cases and materials on the English Legal System*, tenth edition, Cambridge University Press, Cambridge, 2007, p 139.

508 *ibid.*

509 H Genn, *Solving civil justice problems: What might be best?*, 2005, Scottish Consumer Council Seminar on Civil Justice, pp 12 – 13.

510 *ibid.*, p 6.

511 The Right Honourable Sir Igor Judge, *The Woolf reforms after nine years: is civil litigation quicker and cheaper in the High Court?*, Judicial Officers’ Bulletin, November 2007, Volume 19 No 10, p 90.

Conclusion

The Woolf reforms have resulted in benefits for the Government, the courts, and the legal profession, such as increased settlement, cooperation, and access to the courts. However, the evidence is that prospective litigants may not be better off, and that those who would previously have settled without proceeding to hearing may now be spending considerably more for a similar outcome.

The evidence suggests that there has been little or no increase in the use of ADR, particularly mediation. Instead it appears that most settlements are negotiated through lawyers. In such circumstances prospective litigants may be less involved, and disputes may be settled on the basis of the likely outcome in court. Consequently, prospective litigants may not be obtaining the advantages of ADR processes such as mediation. Many ADR processes empowers litigants to resolve their own disputes, allows them to propose options for resolution that address their underlying needs and interests, and gives them ownership of the outcome.

Attachment A – NADRAC’s Charter

- 1) The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent advisory council charged with:
 - a) providing the Attorney-General with coordinated and consistent policy advice on the development of high quality, economic and efficient ways of resolving or managing disputes without the need for a judicial decision, and
 - b) promoting the use and raising the profile of alternative dispute resolution.
- 2) The issues on which NADRAC will advise on under paragraph 1(a) include:
 - a) minimum standards for the provision of ADR services
 - b) minimum training and qualification requirements for ADR practitioners, including the need, if any, for registration and accreditation of practitioners and dispute resolution organisations
 - c) appropriate professional disciplinary mechanisms
 - d) the suitability of ADR processes for particular client groups and for particular types of disputes, including restorative justice and ADR in the context of criminal offences
 - e) the quality, effectiveness and accountability of Australian Government ADR programs
 - f) ongoing evaluation of the quality, integrity, accountability and accessibility of ADR services and programs
 - g) programs to enhance community and business awareness of the availability, and benefits, of ADR services
 - h) the need for data collection and research concerning ADR and the most cost-effective methods of meeting that need, including by courts and tribunals, and
 - i) the desirability and implications of the use of ADR processes to manage case flows within courts and tribunals.
- 3) In considering the question of minimum standards, the Council will examine the following issues:
 - a) the respective responsibilities of the courts and tribunals, government and private and community sector agencies for the provision of high quality ADR services
 - b) ethical standards for practitioners
 - c) the role of lawyers and other professional advisers in ADR
 - d) legal and practical issues arising from the use of ADR services, such as the liability or immunity of practitioners, the enforceability of outcomes and the implications of confidentiality, and
 - e) the accessibility of ADR services.

- 4) In promoting the use and raising the profile of ADR under paragraph 1(b), NADRAC will, as appropriate:
 - a) participate in forums, conferences, and meetings of professional associations
 - b) facilitate ADR research and be involved in research conferences
 - c) develop and improve relationships with educational institutions involved in legal, judicial or dispute resolution training
 - d) pursue opportunities to propose improvements to ADR processes
 - e) assist Government agencies to use ADR and to encourage them to make ADR a part of their funded programs
 - f) support Australia's capacity building efforts in relation to ADR in the region, and
 - g) prepare educational materials about ADR.
- 5) The Council may make recommendations of its own motion to the Attorney-General on any matter relevant to the Council's Charter. In addition, the Attorney-General may, from time to time, refer particular issues to the Council for consideration and report.
- 6) As the Council's time and resources permit, it may provide comment on matters relevant to its Charter to any Commonwealth, State and Territory or private organisations with an interest in ADR. A copy of any such submission must be provided to the Attorney-General as soon as possible after the submission is dispatched.
- 7) In performing its functions, the Council will consult broadly with ADR organisations, service providers and practitioners, courts and tribunals, government, the legal profession, educational institutions, business, industry and consumer groups, and community organisations as well as the Family Law Council, when appropriate.
- 8) The Council will develop a forward work plan, including reporting dates, for each year and provide a copy of that work plan to the Attorney-General.
- 9) The Council will provide the Attorney-General with a report of its operations as soon as possible after 30 June each year.

Attachment B – Submissions and comments received by NADRAC

- 1 Australian Competition and Consumer Commission
- 2 Australian Commercial Disputes Centre
- 3 Administrative Appeals Tribunal
- 4 ADR Directorate, Department of Justice Victoria
- 5 Australian Dispute Resolution Association
- 6 Australian Government Solicitor
- 7 Anonymous
- 8 Attorney-General and Minister for Corrective Services of Western Australia
- 9 Australian Bureau of Statistics
- 10 Australian Taxation Office
- 11 Chief Justice of the High Court of Australia
- 12 Chief Justice of Western Australia
- 13 Chief Justice of Victoria
- 14 David Levin QC
- 15 Department of Agriculture, Fisheries and Forestry
- 16 Department of Families, Housing, Community Services and Indigenous Affairs
- 17 Department of Human Services
- 18 Department of Infrastructure, Transport, Regional Development and Local Government
- 19 Department of Resources, Energy and Tourism
- 20 Department of Veterans' Affairs
- 21 Director of Alternative Resolutions and Equity, Fairness and Resolution Branch, Department of Defence
- 22 Dispute Resolution Branch, Queensland Department of Justice and Attorney-General
- 23 District Court of Western Australia
- 24 Energy and Water Ombudsman New South Wales
- 25 Energy and Water Ombudsman Victoria
- 26 Faculty of Law, University of Technology Sydney
- 27 Family Business Australia
- 28 Federal Court of Australia
- 29 Federal Magistrates Court
- 30 Federation of Community Legal Centres

- 31 Financial Ombudsman Services
- 32 Institute of Arbitrators and Mediators Australia
- 33 IMF
- 34 James N Creer, FCIArb, FIAMA, FAIJA
- 35 Jane Power, Associate Professor, Notre Dame University
- 36 John Wade, Professor, Dispute Resolution Centre, Bond University
- 37 Kathy Mack, Professor, School of Law, Flinders University
- 38 Law Council of Australia
- 39 Law Institute of Victoria
- 40 Law Society of Western Australia
- 41 LEADR
- 42 Legal Access Services Pty Limited
- 43 Michael Redfern, Russel Kennedy Legal Group
- 44 Mirek Fajerman
- 45 National Legal Aid
- 46 National Native Title Tribunal
- 47 New South Wales Attorney-General's Department
- 48 New South Wales Bar Association
- 49 New South Wales Law Society
- 50 Ombudsman Victoria
- 51 Public Interest Advocacy Centre
- 52 Public Transport Ombudsman
- 53 Robyn Carroll and Anita Smith
- 54 Social Security Appeals Tribunal
- 55 Superannuation Complaints Tribunal
- 56 Supreme Court of Western Australia
- 57 Telecommunications Industry Ombudsman
- 58 Tenants Union of Victoria
- 59 Victorian Association for Dispute Resolution
- 60 Victorian Bar
- 61 Western Australian Dispute Resolution Association
- 62 Workplace Ombudsman

Attachment C – Consultees on NADRAC’s Civil Proceedings Reference

- 1 Access to Justice Division, Attorney-General’s Department
- 2 Access to Justice Taskforce, Attorney-General’s Department
- 3 Administrative Appeals Tribunal
- 4 ADR Committee, Law Council of Australia
- 5 ADR Committee, The Victorian Bar
- 6 ADR Directorate, Department of Justice Victoria
- 7 Australian Commercial Disputes Centre
- 8 Australian Communication and Media Authority
- 9 Australian Competition and Consumer Commission
- 10 Australian Corporate Lawyers Association
- 11 Australian Government Solicitor
- 12 Australian Prudential Regulation Authority
- 13 Australian Securities and Investments Commission
- 14 Australian Taxation Office
- 15 Centrelink
- 16 Chartered Institute of Arbitrators
- 17 Child Support Agency
- 18 Commonwealth Ombudsman
- 19 Community Justice Centres New South Wales
- 20 Conflict Resolution Service
- 21 Consumer Utilities Advocacy Group
- 22 Department of Education, Employment and Workplace Relations
- 23 Department of Families, Housing, Community Services and Indigenous Affairs
- 24 Department of Finance and Deregulation
- 25 Department of Immigration and Citizenship
- 26 Dianne Gibson
Director, Child Dispute Services, Family Court of Australia
- 27 Dispute Settlement Centre Victoria
- 28 Dr Peter Cashman
Adjunct Professor of Law, Sydney University
- 29 Energy and Water Ombudsman Victoria
- 30 Fairness and Resolution Branch, Department of Defence
- 31 Family Court of Australia

- 32 Farm Debt Mediation
- 33 Federal Court of Australia
- 34 Federal Litigation Section, Law Council of Australia
- 35 Federal Magistrates Court of Australia
- 36 Federation of Community Legal Centres
- 37 Financial Services Ombudsman
- 38 Helen Marks
*Director of Alternative Resolutions and Equity, Fairness and Resolution Branch,
Department of Defence*
- 39 Hilary Astor
Professor of Dispute Resolution, Sydney University
- 40 IMF
- 41 Insurance Council
- 42 IPA
- 43 Jeremy Gormly SC
Barrister, Denman Chambers
- 44 Judge Margaret Sidis
District Court of New South Wales
- 45 Law Institute of Victoria
- 46 LEADR
- 47 Legal Aid Commission Tasmania
- 48 National Association of Community Legal Centres
- 49 New South Wales Bar Association
- 50 New South Wales Law Society
- 51 Office of Legal Services Coordination
- 52 Office of the Victorian Small Business Commissioner
- 53 Social Security Appeals Tribunal
- 54 Takeover panel
- 55 Telecommunications Industry Ombudsman
- 56 Victorian Civil and Administrative Tribunal
- 57 Workers Compensation Commission New South Wales

Attachment D – Model ADR Clause

Dispute Resolution⁵¹²

1. If a dispute arises from or in connection with this contract, a party to the contract must not commence court or arbitration proceedings relating to the dispute unless that party has participated in a mediation in accordance with paragraphs 2, 3 and 4 of this clause. This paragraph does not apply to an application for urgent interlocutory relief.
2. A party to this contract claiming that a dispute has arisen from the contract (“*the Dispute*”) must give a written notice specifying the nature of the Dispute (“*the Notice*”) to the other party or parties to the contract. The parties must then participate in mediation in accordance with this clause.
3. If the parties do not agree, within seven days of receipt of the Notice (or within a longer period agreed in writing by them) on:
 - a. the procedures to be adopted in a mediation of the Dispute; and
 - b. the timetable for all the steps in those procedures; and
 - c. the identity and fees of the mediator; then,
 - d. the [independent appointment body or person]⁵¹³ will appoint a mediator accredited under the National Mediator Accreditation System, determine the mediator’s fees and the parties will pay those fees equally.
4. If the mediator is appointed by [independent appointment body or person] in accordance with paragraph 3, the parties must assist the mediator to mediate the Dispute in accordance with the Practice Standards articulated in the National Mediator Accreditation System
5. If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief, that party must consent to orders by the Court in which the proceedings are commenced that:
 - a. the proceedings relating to the Dispute be referred to mediation by a mediator; and
 - b. if the parties do not agree on a mediator within seven days of the order referred to in paragraph 5(a), the mediator appointed by the [independent appointment body or person] will be deemed to have been appointed by the Court.

512 NADRAC acknowledges the assistance of the Law Society of NSW in the drafting of this clause. The clause is based on the precedent clause prepared for the Law Society of NSW and published on their web site www.lawsociety.com.au

513 NOTE: the independent appointment body could be a Recognised Mediator Accreditation Body, for a list of such bodies see www.nadrac.gov.au.

6. If a party:
 - a. refuses to participate in a mediation of the Dispute to which it earlier agreed; or
 - b. refuses to comply with paragraph 5 of this clause, a notice having been served in accordance with paragraph 2; then,
 - i. that party shall not take any steps to recover its costs whether by way of obtaining or enforcing any order for costs, and,
 - ii. that party shall consent to an order of a Court of competent jurisdiction that it will specifically perform and carry into execution paragraph 3 and 4 of this clause.