

Annual Report 1999/2000

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Contents

1. YEAR IN REVIEW
2. CHARTER OF THE COUNCIL
3. COUNCIL MEMBERSHIP AND STAFF
 - 3.1 Members
 - 3.2 NADRAC Secretariat
 - 3.3 Previous Council Members
4. COUNCIL ACTIVITIES
 - 4.1 Meetings
 - 4.2 Communications
5. PROJECTS
 - 5.1 Overview
 - 5.2 Federal courts and tribunals
 - 5.2.1 Magistracy Committee
 - 5.2.2 Australian Law Reform Commission
 - 5.2.3 Administrative Review Tribunal
 - 5.2.4 Parenting Plans
 - 5.3 Standards for ADR
 - 5.4 Criteria for ADR
 - 5.5 Research
 - 5.6 Diversity
 - 5.7 Small Business
6. ADMINISTRATIVE MATTERS
 - 6.1 Council Procedure
 - 6.2 Fees and allowances
7. FINANCIAL REPORT

1. YEAR IN REVIEW

1) Council has undertaken significant work in the past year, in its provision to the Attorney-General of coordinated and consistent policy advice on matters relevant to alternative dispute resolution. This work represents the fruition of the efforts of current and previous members and staff in the major areas contained within NADRAC's charter, namely standards for ADR, ADR within federal courts and tribunals, the

suitability of different forms of ADR for different client groups, and research, and evaluation and data collection in ADR.

2) In March 2000, Council published and disseminated a comprehensive discussion paper on *The Development of Standards for ADR*, which has formed the basis for public consultation on this key issue. Following release of this paper, submissions were invited, and NADRAC members and staff organised consultative forums in every capital city. This may have been the one of the most far-reaching national consultative processes undertaken on any aspect of modern ADR in Australia. A total of 253 people attended the forums, and the comments of participants, along with written submissions on this topic, will greatly assist Council as it prepares its report to the Attorney-General.

3) Council completed the second part of its advice to the Attorney-General in relation to the Federal Magistrates Service. This second part related to the *Regulations and Rules of the Court*. Council has also considered the role of ADR in the proposed Administrative Review Tribunal, and will continue work on this matter in the coming year.

4) Council published a guide to managing differences in conciliation and mediation. The guide, entitled '*A Fair Say*', built on previous work of the NADRAC's diversity committee, and represents Council's commitment to ensuring that its advice is practical and user-friendly, as well as of high quality.

5) During 1999/2000, Council initiated a major project to identify the criteria by which agencies refer disputes to different forms of ADR. Council has contacted agencies and collated the results. Work on this will continue into the current year.

6) In addition to these major areas of work, NADRAC has continued to respond to particular issues affecting ADR, including small business use of ADR. In March 2000 NADRAC provided a submission to the Department Employment, Workplace Relations and Small Business in relation to the *Franchising Code of Conduct*.

7) The need for better research, evaluation and data collection in ADR is a major issue, and the lack of adequate information on the use, and effectiveness of different forms of ADR significantly hinders the confidence of policy advice. While NADRAC does not have the resources to undertake such research itself, it is developing strategies to ensure that ADR research is given a high priority, and that research efforts are effectively directed.

8) The ADR field is growing in diversity and complexity, it is increasingly being incorporated into legislation and statutory processes, and new approaches are being explored. These developments produce special challenges for NADRAC, and require it to be proactive and strategic in its approach. A planning exercise undertaken by Council members identified the following key priority areas:

- promoting the quality of practice in ADR;
- facilitating the development of Court based ADR;
- responding to increasing diversity in the ADR field, and

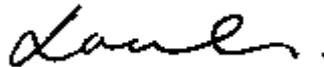
- advocating for effective ADR research and evaluation.

9) Council has also identified some key needs in relation to its own functions and operations, including the need for effective appointment processes, improved resourcing, better management and accessibility of its knowledge base, and increased diversity in its membership and consultative processes.

10) Council members have observed strong international interest in NADRAC's work, as shown by visits to its web-site, visits by overseas delegations, and comments made in overseas forums. NADRAC is unique and does not appear to have a parallel in other countries, and it needs in some respects to lead, rather than follow, international practice.

11) As chairperson, I would like to express appreciation for the work of Mr Richard Moss, former Deputy Secretary of the Attorney-General's Department, who retired in May 2000. Mr Moss has been with Council almost from its inception, and his contribution to Council will be greatly missed.

12) I thank past and present members of Council, staff of the secretariat, and the Attorney-General's Department for their commitment and support. Continuation of such commitment and support will mean that Council can look forward to another productive year in its provision of effective advice to the Attorney-General.



Professor Laurence Boule
Chairperson

2. CHARTER OF THE COUNCIL

The National Alternative Dispute Resolution Advisory Council (NADRAC) was established in October 1995 to provide independent advice to the Commonwealth Attorney-General on policy issues relating to ADR. The need for a national body to advise the Commonwealth on issues relating to the regulation and evaluation of alternative dispute resolution was identified in the 1994 report of the Access to Justice Advisory Committee (the 'Sackville Committee') entitled *Access to Justice-an Action Plan*.

NADRAC's charter is outlined below:

1) The National Alternative Dispute Resolution Advisory Council (NADRAC) 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 disputes without the need for a judicial decision.

2) The issues on which NADRAC will advise will include the following:

- minimum standards for the provision of alternative dispute resolution services;

- minimum training and qualification requirements for alternative dispute resolution practitioners, including the need, if any, for registration and accreditation of practitioners and dispute resolution organisations;
- appropriate professional disciplinary mechanisms;
- the suitability of alternative dispute resolution processes for particular client groups and for particular types of disputes;
- the quality, effectiveness and accountability of Commonwealth alternative dispute resolution programs;
- ongoing evaluation of the quality, integrity, accountability and accessibility of alternative dispute resolution services and programs;
- programs to enhance community and business awareness of the availability, and benefits, of alternative dispute resolution services;
- the need for data collection and research concerning alternative dispute resolution and the most cost-effective methods of meeting that need; and
- the desirability and implications of the use of alternative dispute resolution processes to manage case flows within courts and tribunals.

3) In considering the question of minimum standards, the Council will examine the following issues:

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

4) 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.

5) 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 alternative dispute resolution. A copy of any such submission must be provided to the Attorney-General as soon as possible after the submission is dispatched.

6) In performing its functions, the Council will consult broadly with alternative dispute resolution 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 and the Family Services Council, when appropriate.

7) 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.

8) The Council will provide the Attorney-General with a report of its operations as soon as possible after 30 June each year.

3. COUNCIL MEMBERSHIP AND STAFF

3.1 Members

The members of Council from 1 July 1999 to 30 June 2000 were:

Chair

Professor Laurence Boulle Professor of Law, Bond University

Members

David Bryson
Conciliation Officer and Manager
Quality and Services
Victorian WorkCover Conciliation Service

Barbara Filipowski
Secretary and General Counsel
Sydney Ports Corporation

Susan Gribben (to April 2000)
(formerly) Executive Director
Relationships Australia (Vic)

Associate Professor Kathy Mack
School of Law
Flinders University, South Australia

Richard Moss (to May 2000)
Deputy Secretary
Attorney-General's Department

Sue Pidgeon (from May 2000)
Acting First Assistant Secretary
Civil Justice Division
Attorney-General's Department

Bernadette Rogers
Conference Registrar
Administrative Appeals Tribunal
Brisbane

Warwick Soden
Registrar
Federal Court of Australia, Sydney

John Steele
Community Mediation Training and Development Officer
Community Mediation Services (SA)

1) The Council when fully constituted, has a complement of ten members, appointed by the Attorney-General. The number of members of Council at any one time and the length of their respective terms of appointment is a matter which lies wholly within the Attorney-General's discretion.

2) NADRAC members are appointed for their personal expertise in ADR and related matters, not as the

representatives of any particular organisations or interest groups. Nevertheless, Council members have links to a broad range of organisations in the dispute resolution field from courts and tribunals to legal professional bodies and community mediation and conciliation organisations.

3) To encourage the provision of balanced policy advice, NADRAC's membership reflects a variety of ADR backgrounds. Current members have combined expertise in the conduct of family dispute resolution, community mediation, administrative dispute resolution, industrial and workplace conciliation, commercial mediation, and court and tribunal ADR processes. Members include educators, academics, managers and practitioners who have made significant contributions to ADR literature, theory, policy and practice.

4) One member of the Council is appointed by virtue of his or her position as a Deputy Secretary within the Attorney-General's Department. Mr Richard Moss has held this ex officio position since his appointment as a Deputy Secretary of the Department on 25 July 1996 until his retirement in May 2000. Ms Sue Pidgeon, Acting First Assistant Secretary, Civil Justice Division, has since represented the Department on NADRAC, pending the outcome of the restructure of the Attorney-General's Department.

5) Five members of Council were appointed by the Attorney-General for a term of three years commencing on 6 April 1998 and expiring on 5 April 2001. Susan Gribben was re-appointed to the Council for a two year term which expired on 5 April 2000. Ms Gribben has continued to support the work of NADRAC through her engagement as a consultant. Action is currently underway to fill the positions left vacant by the resignation in 1999 of Ms Kerrie Tim, and the expiry of Ms Susan Gribben's term.

3.2 NADRAC Secretariat

1) The Secretariat for the Council is located in the Civil Justice Division, Commonwealth Attorney-General's Department.

2) While the Council Secretariat is based within the Attorney-General's Department and receives a measure of administrative support from the Department, the Council is nevertheless independent of the Department.

3) During the reporting period there were changes in the Secretariat staff of the Council. The Council would like to take this opportunity to thank Mandy Doherty and Allison Wood for their significant contributions to the work of the Council.

4) The staffing of the Secretariat for 1999/00 was:

Director:

Mandy Doherty (until February 2000)

David Syme (from February 2000)

Legal Project Officer:

Allison Wood (to November 1999)

Danielle Windley (from March 2000)

Administrative Officer:
Karen Stark

Temporary Administrative Support Officer:
Tenai Bennett (March to June 2000)

Contact details for the Secretariat are:

Telephone: (02) 6250 6897

Fax: (02) 6250 5911

E-mail: NADRAC@ag.gov.au

Postal Address:
Robert Garran Offices
National Circuit
BARTON ACT 2600

Location:
Robert Garran Offices
National Circuit
BARTON ACT 2600

3.3 Previous Council Members

Professor Hilary Astor
Quentin Bryce AO
Associate Professor Gay Clarke
Professor Jennifer David
Magdeline Fadjar
Wendy Faulkes
Richard Moss
The Hon Justice Nahum Mushin
Kurt Noble
Oscar Shub
Philip Theobald
Dr Josephine Tiddy
Dr Gregory Tillett
Ms Kerrie Tim

4. COUNCIL ACTIVITIES

4.1 Meetings

1) The Council aims to hold quarterly meetings each year in different capital cities depending on resources. Part of its purpose in so doing is to meet with, and gain information from, individuals and agencies with an interest in ADR.

2) This year it held meetings in the following cities:

- Canberra 16-17 September 1999
- Sydney 6-7 December 1999
- Adelaide 24-25 February 2000
- Brisbane 15-16 May 2000.

3) The Council would like to acknowledge the generosity of the Commonwealth Attorney-General's Department and the Federal Court of Australia in providing premises for its meetings in Canberra, Sydney and Brisbane.

Guests at Council Meetings

4) Mr Tim Johnstone and Dr Jane Romeyn addressed Council's Canberra meeting. Mr Johnstone, Chair of the Council of Approved Mediation Agencies in the ACT spoke about the ACT Mediation competencies and the operation of the ACT Mediation Act. Dr Romeyn, from the Department of Employment, Workplace Relations and Small Business, outlined government proposals for mediation in workplace relations matters.

5) Sir Laurence Street and Ms Salli Browning addressed Council's meeting in Sydney. Sir Laurence, former Chief Justice of the Supreme Court of NSW, mediator, and Chair of the International Legal Services Advisory Council, described a number of national and international developments in ADR. Ms Browning, Chief Executive Officer of the Australian Commercial Dispute Centre (ACDC), outlined ACDC's role, assessment criteria for ADR, and ADR standards.

6) At its Adelaide meeting Council was addressed by Mr Andrew Cannon, Supervising Magistrate, and Mr Jim MacDonald, mediator, of the Adelaide Magistrates Court, who described the pre-filing mediation procedures adopted by that court. Council members also visited the Bowden-Brompton Community Centre, to hear of the range of projects being conducted through that centre.

7) Professor Rosemary Hunter, Director of the Centre for Socio-legal Studies at Griffith University, and formerly of the Justice Research Centre, addressed Council's meeting in Brisbane. Professor Hunter spoke about research and evaluation issues in ADR.

8) The Council would like to extend its thanks to these guests for their valuable contributions.

4.2 Communications

1) In performing its functions the Council is required to consult broadly with alternative dispute resolution 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 and Family Services Council, when appropriate.

2) NADRAC is keen to hear the views of those with an interest in ADR, including ADR practitioners and agencies, consumers of ADR services, industry and professional groups, non-government organisations, and government or statutory agencies. Formal submissions may be invited in relation to specific areas of work that NADRAC is engaged in, and informal consultations on issues affecting ADR are also undertaken.

3) NADRAC released two publications during 1999/2000. *A Fair Say*, which is a guide to managing differences in conciliation and mediation, was launched by the Attorney-General in Parliament House, Canberra in August 1999. A

discussion paper on *The Development of Standards for ADR* was launched by the Attorney-General at Darling Harbour, Sydney in March 2000. These publications are available on NADRAC web-site.

4) 'The Financial Review' interviewed the chairperson and ran a story on 3 April 2000 on NADRAC's paper on the development of standards for ADR

5) Subject to the agreement of the Attorney-General, reports and submissions prepared by NADRAC are also placed on the web-site. NADRAC's report on the *Rules and Regulations in the Federal Magistracy*, its submission on the *Franchising Code of Conduct*, and its letter of advice on *Parenting Plans* are available on the site.

6) NADRAC's web-site (<http://www.nadrac.gov.au>) has proven to be a popular means of communication. In 1999/2000, the site had 17663 hits at an average of 48 per day. There were 4934 visitor sessions, 41% of whom were international visitors, with 35% from the USA. The usefulness of NADRAC's publications is shown by the proportion of repeat visitors (28%). The web-site is currently being rebuilt to handle the additional publications placed on it, and also to ensure disability compliance.

7) In addition to the public forums on standards (see section below) various NADRAC members and staff made presentations in relation to NADRAC's work at:

- a meeting of ACT mediation agencies (April 2000);
- the ALRC 'Managing Justice' conference (May 2000);
- the National Mediation conference (May 2000);
- the staff of Murdoch University Law School (May 2000);
- the Annual General Meeting of ACT Chapter of the Institute of Arbitrators and Mediators Australia (June 2000).

8) A Council member attended a meeting on international ADR convened by the Australian Centre for Global Finance in May 2000, and met with a delegation from the Indonesian National Commission on Human Rights in June 2000.

5. PROJECTS

5.1 Overview

Most of Council's work is conducted as projects overseen by committees of the Council and supported by the secretariat. During 1999/2000, Council's work concentrated on the following areas, which are described in more detail in the next sections:

1. **Federal courts and tribunals.**
 - Additional advice to the Attorney-General on ADR in the Federal Magistrates Service
 - Submission to the Australian Law Reform Commission on the review of the Federal Civil Justice System
 - Advice on the proposed Administrative Review Tribunal

2. **Standards for ADR.**
 - Preparation, release and dissemination of a discussion paper on ADR standards
 - Forums and other consultation processes associated with the discussion paper
3. **Criteria for ADR.**
 - Research into criteria used to assess disputes for different forms of ADR
4. **ADR research.**
 - Continuing examination of research priorities and strategies
5. **Diversity.**
 - Preparation, release and dissemination of the 'A Fair Say' booklet
6. **Small Business.**
 - Advice on the review of the Franchising Code of Conduct
7. **Definitions.**
 - Reprint of ADR definitions paper
 - Commencement of review of definitions

5.2 Federal courts and tribunals

5.2.1 Magistracy Committee

1) The members of the Magistracy Committee were Kathy Mack (convenor), David Bryson, Bernadette Rogers, Warwick Soden and Richard Moss.

2) The terms of reference were in two stages. The first required the Council to report to the Attorney-General by 31 March 1999 on those matters relating to ADR which might need to be incorporated in legislation creating the Federal Magistrates Service. This stage was reported on in the 1998/99 annual report.

3) The second part of the reference involved advising on the incorporation of ADR into the rules and regulations for the Federal Magistrates Service. Council reported to the Attorney-General on this part on 16 December 1999.

4) Key features of NADRAC's advice were:

- The parties' choice will always be significant in matching the dispute and the parties to the appropriate ADR process. Generally, the rules should do all they can to assist parties to learn about ADR and to encourage a change in culture.
- Legal representatives should be required to indicate whether or not they have advised their client of the ADR options and whether they have given their client the court's standard brochure on ADR.
- Based on guidelines to be developed by NADRAC, the court should develop and publish guidelines that relate to the allocation of a dispute to the appropriate ADR process.
- There is a need to regulate the quality of ADR practitioners and the regulations should encourage the development of proper standards of ADR practitioner competence and accountability.

- ADR service providers should be required to take responsibility for quality control by developing their own standards.
 - Parties should be encouraged to go to court to get a referral order before attending an ADR process.
 - Immunity for ADR practitioners should only apply where the ADR process is a result of a court referral.
 - On balance NADRAC is of the view that it is worth requiring court-ordered referrals to ADR as they provide valuable protections for both parties and ADR practitioners.
 - Court personnel, including Federal Magistrates, should not be regarded as suitable ADR practitioners merely by virtue of their employment as court personnel.
 - The court should order attendance and production of information and the rules should prescribe a standard form of orders.
 - Any decision parties make to settle should be as fully informed as possible (that is, based on disclosure of all relevant information). To this end NADRAC recommends that the regulations should grant powers to all ADR practitioners to: require the production of relevant information or documents; and include and/or exclude people from attending the ADR process.
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- In appropriate circumstances, parties to a dispute should be allowed to have legal representatives and other support people, subject to the ADR practitioner's assessment of whether that attendance and level of involvement is appropriate.
 - NADRAC definitions of ADR processes should be incorporated into the rules of court.
 - Where an ADR practitioner has been negligent, engaged in misconduct or has significantly departed from their function as an ADR practitioner, it is appropriate that the parties should have redress.
 - The regulations should prescribe that ADR service providers must have an internal complaint procedure to deal with allegations of negligence and misconduct against individual ADR practitioners and provide information to the Attorney-General about complaints made about particular ADR practitioners.
 - ADR practitioners should report back only limited information to the court. However, it is undesirable for the ADR practitioner to be involved in any evaluation of the parties' willingness to co-operate in the ADR process.
 - If the parties are unable to agree on how the costs of an ADR process should be distributed, then the rules of court should provide guidance to the Federal Magistrates in exercising their discretion to make costs orders. However, the rules should not incorporate a specific schedule of fees for ADR practitioners.
 - It is important for the court to be able to scrutinise any agreement reached by the parties (particularly if one or both parties have failed to obtain independent legal advice) before making orders in the terms of that agreement.

5.2.2 Australian Law Reform Commission

1) On 29 November 1995 the then Attorney-General, the Hon Michael Lavarch MP, gave a reference to the Australian Law Reform Commission (ALRC) to conduct a review of the adversarial system of litigation. On 2 September 1997 the Attorney-General, the Hon Daryl Williams AM QC MP, altered the terms of reference to give a more specific focus to the inquiry.

2) The ALRC produced a number of issues papers in the course of the inquiry including Issues Paper No 20, *Rethinking the federal civil litigation system*, and Issues Paper No 25, *ADR - Its role in federal dispute resolution*. A Discussion Paper, *Review of the federal civil justice system*, was produced in August 1999. NADRAC provided submissions on these papers.

3) The final report, *Managing Justice*, was launched by the Attorney-General on 17 February 2000.

4) Major issues for NADRAC arising out of the report are outlined below.

- The report appears to take on board the previous advice of NADRAC about the potential separate needs of lawyer and non-lawyer ADR practitioners. As a consequence, the report only addresses those practitioners who are also lawyers, whether they are acting as lawyers or lawyer-neutrals in the ADR process.
- The report seems to suggest that different standards may apply for the two groups, however, the recommendations could also be interpreted to suggest that the ADR community is the most appropriate body (as suggested by NADRAC in previous submissions to the ALRC), to create guidelines for the qualifications and conduct of practitioners, and that those ADR practitioners who are also lawyers will be subject to additional standards. This does, however, leave the issue of consistency of both standards and training for lawyer and non-lawyer ADR practitioners.
- The report suggests that the creation of an extensive referral directory should be the primary responsibility of National Legal Aid. As previously suggested by NADRAC, the proper development of such a directory would require extensive consultation with the ADR community.

5.2.3 Administrative Review Tribunal

1) NADRAC's work plan for 1999-2000 included a project concerning the use of ADR in relation to the proposed Administrative Review Tribunal (ART).

2) The Bill was introduced to Parliament in June 2000 and it is anticipated that it will be passed and in operation in early 2001.

3) The Attorney-General's Department finalised the draft Bill on 3 April 2000 and asked for comments from NADRAC in relation to aspects of the Bill which impact on ADR. There will

also be further opportunity later in the process for NADRAC to provide input in relation to the drafting of consequential amendments to other legislation, regulations and practice directions.

4) NADRAC provided two sets of comments on the Bill to the Attorney-General's Department on 17 May and 25 June 2000. The comments related to Division 4 of the Bill, "Conferences and other processes during review".

5) NADRAC is looking forward to providing further comments on the consequential amendments to the Bill and to the Tribunal itself in the context of drafting its rules of practice and procedure.

5.2.4 Parenting Plans

1) NADRAC continued work on a joint project with the Family Law Council on the use of parenting plans under the *Family Law Act 1975* (Cth). The Attorney-General had requested that this issue be examined by the Family Law Council and NADRAC. NADRAC representatives on the joint committee were Susan Gribben and Bernadette Rogers.

2) A letter of advice was provided to the Attorney-General in March 2000. At the end of the reporting period, arrangements were being finalised to publish and disseminate this [letter of advice](#).

3) The advice recommended that the *Family Law Act 1975* (Cth) be amended to repeal the provisions requiring parenting plans to be registered in the court, and to insert provisions which would encourage the use of parenting plans. The report favoured the use of consent orders for those parts of a parenting plan which the parties wanted to be enforceable, and gave emphasis to the use of ADR to assist in the formation of parenting plans and as a method of resolving disputes arising out of parenting plans.

5.3 Standards for ADR

1) Members of the Standards Committee were David Bryson (Convenor), Laurence Boulle, Susan Gribben, Barbara Filipowski and John Steele.

2) The committee continued previous work in examining the issue of standards for ADR, and prepared a discussion paper on [The Development of Standards for ADR](#). This paper raised a number of key issues and questions which formed the basis for public consultations held during the first half of 2000. The discussion paper built on earlier consultations conducted by NADRAC during 1996. The issues and questions raised in the discussion paper are summarised below.

- Because of the diversity of ADR in Australia, NADRAC believes that no single prescriptive set of standards, no matter how minimal, can cover all ADR services, and specific standards should not be determined by a single body or

institution, but by the relevant entities in consultation with all other stakeholders.

- NADRAC considered that certain 'core' objectives should inform the development of standards, namely that ADR should:

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.

- NADRAC was of the view that the development of standards would promote the objectives of ADR, improve ADR practice, minimise dissatisfaction with its operation, promote service provider and practitioner accountability and promote the appropriate use of ADR. This approach is consistent with international developments.
- NADRAC has identified the following potential content of standards:

Knowledge about conflict, culture, negotiation, communication, context, procedures, self, decision-making and matching ADR to disputes;

Skills in assessing a dispute for ADR, gathering and using information, defining the dispute, communication, managing the process, managing interaction between the parties, negotiation, being impartial, making a decision and concluding the ADR process;

Ethics in promoting services accurately, ensuring effective participation by parties, eliciting information, effectively controlling the process, exhibiting neutrality, maintaining impartiality, maintaining confidentiality, and ensuring appropriate outcomes.

- NADRAC was of the view that the development, attainment, maintenance and enforcement of standards should be a shared responsibility of different parties in the ADR community, particularly in the early development of ADR. There are various aspects of accreditation, including training or education, service provision and referral, practice of courts and tribunals, and government intervention. In many cases it will be the service provider that develops the standards and has a role in ensuring that the standards are maintained.
- The principles underlying to development of standards include:

The development of standards should be a consultative process;

Standards should be developed in light of the objectives of ADR;

Standards need to recognise context;

Standards should balance the needs of parties, providers and broader societal interests and needs;

Standards should take balance theoretical knowledge and actual ADR practice;

Standards should be based on a realistic appraisal of resources;

ADR standards need to be supported by an appropriate balance of government regulation, professional self-regulation, public accountability, legal redress and competitive market forces;

The responsibility for upholding and enforcing standards is shared responsibility;

Standards should be able to be changed and adapted over time.

- NADRAC's view was that the enforcement of standards may be the responsibility of more than one stakeholder, including service providers, industry associations, government, practitioners and parties. An effective code of conduct could also include sanctions, and legal avenues of redress. The liability of ADR practitioners is affected by immunity and confidentiality/inadmissibility considerations.
- NADRAC identified a range of options for regulatory means for implementing standards in ADR. Options ranged from:
 - no regulation;
 - self regulation;
 - quasi-regulation, through to;
 - explicit government regulation.

Self-regulation or quasi regulation may be more appropriate for most of the ADR community, although in the context of mandatory ADR, there may be a greater need for more explicit regulation.

- The key issues on which NADRAC sought comment were:
 - whether a framework for the development of standard was preferable to prescription;
 - whether there was a need for standards;
 - what the content of standards should be;
 - what should be the principles underpinning the development of standards;
 - who should be responsible for the attaining, maintaining and enforcing standards;
 - whether regulation is required, and what sort.

3) The Discussion Paper was launched by the Attorney-General on 30 March 2000 in Sydney. Copies of the paper,

and invitation to participate in the consultation process were sent to a wide range of agencies including: chief judicial officers of Commonwealth, State and Territory courts and tribunals, Attorneys General of each of the States and Territories, Commonwealth Government Ministers, ADR agencies, law societies and bar associations, professional associations and industry groups, academic institutions, private individuals, consumer groups and other stakeholder groups. A total of 2000 copies of the discussion paper were distributed.

4) Submissions were invited by 31 July 2000.

5) An advertisement was placed in 'the Australian' on 1 April 2000, and in 'the Financial Review' on 3 April advising the public of the release of the Discussion paper and the public forums to be held to discuss it. Advertisements were also placed in the major State or Territory dailies approximately 2 weeks prior to the forum scheduled in that the relevant city. 'The Financial Review' also featured an article on the paper on 31 March 2000.

6) The Discussion Paper, information about the launch and the forums, and a synopsis of the Discussion Paper were placed on the NADRAC web-site.

7) Public forums were held in each capital city. An additional forum was conducted during the national Mediation Conference on 17 May 2000. These forums included a presentation about the NADRAC Discussion Paper, an opportunity for participants to ask questions of Council members about the approach taken, and enabled group discussion about issues affecting ADR standards. Notes from the forums were collected and collated.

8) The forums were considered to be complementary to the formal submission process; participants were strongly encouraged to make written submissions as well.

Table 1: Summary of forums

City	Date	Numbers attending
Melbourne	11 April	60
Hobart	4 May	15
Adelaide	8 May	18
Darwin	9 May	20
Perth	29 May	32
Sydney	6 June	36

Brisbane	7 June	22
Canberra	8 June	26
Mediation conference	16 May	24
TOTAL		253

5.4 Criteria for ADR

- 1) This project arises out of NADRAC's first priority area for research (referral to non-judicial dispute resolution). The original purpose of trying to determine what criteria dispute resolution assessors currently use to assess whether a particular matter and parties are suited to a particular form of dispute resolution and what criteria should be used, was to create guidelines for the Federal Magistrates' Service and other service providers to help assess appropriate screening methods. For those disputes which are suitable for ADR, it needed to be determined which particular ADR method was appropriate.
- 2) The project began in late 1999 with a literature review. In March 2000, Council sent out approximately 115 letters to relevant agencies requesting information on how they deal with this issue.
- 3) Council is currently considering the responses in detail.

5.5 Research

1) NADRAC's charter concerns advice to the Attorney-General on:

- *"ongoing evaluation of the quality, integrity, accountability and accessibility of alternative dispute resolution services and programs; and*
- *the need for data collection and research concerning alternative dispute resolution and the most cost-effective methods of meeting that need".*

2) A major issue identified by NADRAC is the lack of comprehensive data collection on ADR especially in relation to courts and tribunals. In addition, the lack of rigorous evaluation of ADR programs limits the future development of ADR. These issues were also identified by the Australian Law Reform Commission in its review of the federal civil justice system, *Managing Justice*.

3) Council is currently identifying research priorities, and is formulating a set of strategies that will enhance and promote

effective research and evaluation in ADR, and ensure comparability and consistency of data across ADR contexts.

5.6 Diversity

- 1) Members of the Diversity Committee were Barbara Filipowski (Convenor), Richard Moss and Bernadette Rogers.
- 2) Council continued work relating to the discussion paper *Issues of Fairness and Justice in Alternative Dispute Resolution*, which was issued in November 1997. The Discussion Paper dealt with potential barriers to fairness and justice in mediation and conciliation for some user groups. Such barriers may be associated with gender, culture, age, disability, sexual preference, rural and remote locality, and socio-economic power.
- 3) Council decided to prepare a short, practical guide for users of mediation and conciliation based on the proposals in the discussion paper.
- 4) This guide, called *A Fair Say*, was launched by the Attorney-General at Parliament House in September 1999.
- 5) Very favourable comments have been received about the guide, although there has also been criticism from some quarters over the editorial decision to use the word 'mediation' to include 'conciliation', notwithstanding Council's position that these two forms of ADR are distinct.

5.7 Small Business

- 1) The Small Business Committee comprised Barbara Filipowski (convenor), Laurence Boulle, Warwick Soden, and John Steele. The work of the Committee this year has focussed on the review of the Franchising Code of Conduct.
- 2) In November 1999 the Office of Small Business (Department of Workplace Relations and Small Business) wrote to the NADRAC Secretariat inviting a submission on the upcoming review of the Franchising Code of Conduct, which was to take place between December 1999 and June 2000.
- 3) The Office of Small Business made available to NADRAC two discussion papers on this issue, one in November 1999 and one in January 2000. The second paper summarised the findings of a national survey of franchisors and franchisees, seeking their opinions on how the code is operating. The review did not address the operation of the Office of the Mediation Adviser.
- 4) The final date for submissions to the review was 29 February 2000, however, NADRAC was able to secure an extension and made a *submission* in April 2000, on aspects of the Code relating to:
 - whether the code's dispute resolution processes have led to an increase in parties adopting mediation over litigation;
 - whether the code's dispute resolution processes provide a generally lower cost and speedier outcome than litigation;

- whether there should be a requirement to mediate in good faith;
- whether the current requirement for mediation is adequate (should the code allow for other forms of ADR?); and
- whether the Commonwealth can restrict the rights of parties to a franchise agreement to take legal proceedings while the parties are engaged in a ADR process.

6. ADMINISTRATIVE MATTERS

6.1 Council Procedure

1) The Council operates in accordance with the following procedures.

Mode of Decision Making

2) Council proceeds by way of consensus, and votes only where necessary. The expression of diversity of opinion is valued by Council.

Recording of Meetings

3) Minutes of all Council meetings and some Committee meetings are recorded electronically.

Council Records

4) A record is kept of each Council meeting and each committee meeting.

5) Minutes of Council meetings are prepared by the Secretariat and circulated to members within ten working days of each meeting. The minutes contain the decisions of Council, a brief summary of the major issues, and an action column, specifying the nature of tasks, who is to take action and the date for the completion of the task. Decisions for immediate action are recorded at Council meetings and circulated at the meeting.

6) The Council maintains an up-to-date register of formal recommendations it has made to the Attorney-General and the outcome of those recommendations.

Confidentiality

7) From time to time, Council has access to confidential materials and has therefore developed some guidelines relating to confidentiality. These guidelines are also useful to allow Council members to contribute ideas as individual members of Council rather than as representatives of their individual organisations. Accordingly, the Council decided upon the following guidelines:

- no information communicated to people outside Council will attribute any particular view to any particular Council member without the agreement of the member concerned;

- the Council will decide if any particular matter is sensitive and Council wishes confidentiality to attach to that matter;
- subject to the above, each member of Council is required to use his or her discretion in discussing the issues considered by Council;
- except for material in the public domain Council papers will not be circulated outside Council without a prior decision of Council; and
- before Council publishes any of its decisions it will consult with the Office of the Attorney-General.

8) However, Council specifically recognises the need to communicate as openly and broadly as possible about its work. Accordingly, the Council has decided that the Secretariat and members may make the Council Meeting Agenda available to any individuals or organisations as appropriate.

Participation in the work of other organisations

9) Having regard to NADRAC's primary role of providing independent advice to the Attorney-General on alternative dispute resolution, it would be inappropriate for the Council to align itself with the work of other non-Government organisations considering issues of alternative dispute resolution. However, the Council maintains an interest in such work and is willing, as appropriate, to be consulted and to make suggestions and comments on the issues that are under consideration.

Papers for Council

10) Papers for Council meetings are prepared by the Secretariat and sent to members seven working days prior to meetings.

Urgent matters

11) NADRAC has adopted the following procedures for responding to urgent matters:

- The Chairperson is immediately advised of any matter which requires urgent consideration.
- Upon notification of the matter, the Chairperson will either:
- ask the Secretariat to prepare a draft response for the Chairperson's signature; or
- establish an ad hoc committee to consider the request and report back on an appropriate response.
- prior to dispatch, if time permits, the Chairperson will clear the draft response with all Council members.
- If time does not permit this, the Chairperson will endeavour to clear the draft response with those members with a particular expertise or interest in the subject area of the request.
- A copy of the final response will then be included in the agenda for consideration by the Council at its next meeting.

Amendment of council decisions

12) Council recognises that from time to time it may be necessary to amend Council decisions to correct inadvertent errors and take account of changing circumstances.

Accordingly, the Council has adopted the following guidelines relating to the amendment of Council decisions.

13) The Chairperson, or where the Chairperson is not available, the director of the Secretariat may:

- depart from the decisions of council where necessary to accord with changed circumstances provided that Council is subsequently informed;
- edit text drafted at Council meetings as needed to progress effectively the business of council, provided that the substantive meaning is unchanged

Correspondence

14) Council correspondence is prepared by the Secretariat and signed by the Chairperson, relevant Committee Convenor or, as appropriate, by the Secretariat.

6.2 Fees and allowances

Travel

1) Members' air travel is arranged by the Council Secretariat and paid out of the Council's operating funds. In general, members fly economy class when travelling involves a flight time of less than 3 hours. Where flight times exceed 3 hours, Council members are entitled to fly business class. Different conditions may apply in relation to any members of the judiciary who are members of Council.

2) As the Attorney-General's Department has a contract with Qantas, members are required to travel with Qantas wherever possible. Council members are not entitled to personal use of any frequent flyer points earned when flying on Council business.

Sitting fees

3) Although not holders of public office, the members of NADRAC are paid sitting fees in line with Category 2 Sitting Fees determined by the Remuneration Tribunal for Non-specified Part-Time Holders of Public Office. Members are entitled to be paid the daily sitting fee for attendance at any Council or committee meeting which exceeds 3 hours. Lesser amounts are payable in respect of meetings of less than 3 hours.

4) The daily fees as at 30 June 2000 were:

- *Chairperson:* \$450.00
- *Member:* \$260.00

Members Travelling Allowance

5) Members are paid travelling allowances in accordance with the rates specified by the Remuneration Tribunal for Part-Time Holders of Public Office.

7. FINANCIAL REPORT

The Council's expenditure is contained within Outcome 1 (*an equitable and accessible system of federal law and justice*), Output 1.1 (*maintenance and development of the federal system of justice and the rights and responsibilities of individuals, family, business and the community*), of the Attorney-General's Department's audited financial statements published in the Department's Annual Report.

The total funds available to NADRAC in 1999/2000 was \$247,000, and total expenditure for the financial year was \$230,906, resulting in a surplus of \$16,094.

Item	Expenditure \$	Totals
SALARIES		
secretariat	88,730	
sitting fees	28,217	
superannuation	13,606	
other employee costs	7,303	
subtotal		137,856
ADMINISTRATION		
advertising	2,819	
training and conferences	3,535	
venue hire/incidentals	170	
consultants fees	375	
domestic airfares	33,882	
travel allowance	15,975	
car/taxi hire	3,964	
car parking	267	
printing	24,133	

stationery/consumables	1,620	
library books	39	
subscriptions	976	
communication charges	252	
meeting costs	5,849	
postage	2,330	
subtotal		96,188
assets /misc revenue		(3,138)
TOTAL EXPENSES		230,906
FUNDS		
allocation	217,000	
carryover	30,000	
TOTAL FUNDS		247,000
SURPLUS/DEFICIT		16,094