

Appendix A

ADR definitions

Note: This appendix is reproduced from NADRAC's publication *Alternative Dispute Resolution Definitions* (first printed March 1997, reprinted March 2000).

- 1) Processes involving third party intervention can be categorised in many ways. One helpful classification is to divide them into:
 - Facilitative Processes
 - Advisory Processes
 - Determinative Processes.
- 2) The qualities and qualifications required by the third party, the nature of their responsibilities to the parties to the dispute and the outcome to be expected from the process will vary from one category to another. In some cases, several processes may be employed in an attempt to resolve the same dispute. In some agencies, different processes may be applied at different stages of an attempt to resolve the dispute. For example, under most equal opportunity law, the responsible agency is required to apply an advisory process in the first stage, then a facilitative process; finally, a determinative process may be used. Complaints under the legislation can be resolved at any stage during these processes.
- 3) A system of classification of processes, and the definitions which it involves, should assist parties proposing to use a process to understand what can realistically be expected from it, and help those providing the processes to determine appropriate quality control mechanism.

Facilitative ADR processes

- 4) Facilitative processes involve a third party providing assistance in the management of the process of dispute resolution. Generally the third party has no advisory or determinative role on the content of the dispute or the

outcome of its resolution, but may advise on or determine the process whereby resolution is attempted. This category of ADR includes the processes of mediation, conciliation and facilitation.

- 5) Mediation is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

Although the components of mediation - identifying the disputed issues, developing options, considering alternatives and endeavouring to reach agreement - usually occur, they do not necessarily occur in every mediation and are not necessarily sequential.

- The general term mediation may be further defined by the addition of one or more of the following descriptors: therapeutic, community, co-, shuttle, victim-offender or expert, or by the addition of descriptors referring to the agency within which mediation is undertaken (for example, Community Justice Centre, Family Court). Each agency should be able to define mediation more specifically insofar as its practice differs from the general definition given above.

- 6) Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

- Statutory conciliation is a process in which the parties to a dispute which has resulted in a complaint under a statute, in which the parties to the dispute with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give

expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement which accords with the requirements of that statute.

- The general term conciliation may be further defined by the addition of one or more of the descriptors given above for mediation: therapeutic, community, co-, shuttle, victim-offender or expert, or by the addition of descriptors referring to the agency within which conciliation is undertaken (for example, Human Rights and Equal Opportunity Commission, Industrial Relations Court), or by agency-specific descriptors (for example, conciliation counselling in the Family Court). Each agency should be able to define conciliation more specifically insofar as its practice differs from the general definition given above.

7) Facilitation is a process in which the parties (usually a group), with the assistance of a neutral third party (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation. The general term facilitation can be further defined by the addition of the following descriptors.

- Facilitated negotiation is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a neutral third party (the facilitator), to negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.
- Indirect negotiation is a process in which the parties to a dispute use representatives (for example, lawyers or agents) to identify issues to be negotiated, develop options, consider alternatives and endeavour to negotiate an agreement. The representatives act on behalf of the participants, and may have authority to reach agreements on their own behalf. In some cases the process may involve the assistance of a neutral third party (the facilitator) but the facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

Advisory ADR Processes

- 8) Advisory processes involve a third party who investigates the dispute and provides advice as to the facts of the dispute, and, in some cases, advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved. The following are advisory processes.
- Investigation is a process in which a third party (the investigator) investigates the dispute and provides advice (but not a determination) as to the facts of the dispute.
 - Expert appraisal is a process in which a third party, chosen on the basis of his or her expert knowledge of the subject matter of the dispute, (the expert appraiser) investigates the dispute and provides advice as to the facts of the dispute and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.
 - Case appraisal is a process in which a third party (the case appraiser) investigates the dispute and provides advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.
 - Case presentation is a process in which the parties to the dispute present their evidence and arguments to a third party who provides advice as to the facts of the dispute, and, in some cases, advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.
 - Mini-trial is a process in which the parties present arguments and evidence to a neutral third party who provides advice as to the facts of the dispute, and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved.
 - Dispute counselling is a process in which a third party (the dispute counsellor) investigates the dispute and provides the parties or a party to the dispute with advice regarding the issues which should be considered, possible, probable and desirable outcomes and the means whereby these may be achieved.

Determinative ADR processes

- 9) Determinative processes involve a third party investigating the dispute (which may include the hearing of formal evidence from the parties) and making a determination, which is potentially enforceable, as to its resolution. Processes which are determinative may be divided into those which are

internally enforceable, those which are externally enforceable and those which are neither internally or externally enforceable.

- Internally enforceable processes are those in which the determination can be enforced by the person or agency making the determination.

Adjudication is a process in which the parties present arguments and evidence to a neutral third party (the adjudicator) who makes a determination which is enforceable by the authority of the adjudicator. The most common form of internally enforceable adjudication is determination by state authorities empowered to enforce decisions by law (for example, courts, tribunals) within the traditional judicial system. However, there are also other internally enforceable adjudication processes (for example, internal disciplinary or grievance processes implemented by employers).

- Externally Enforceable Processes. Processes which are not internally enforceable are those in which the determination cannot be enforced by the person or agency making the determination but may be enforced by external processes (for example, actions in the courts for enforcement of a contract). The following determinative processes are not internally enforceable, are not inherently enforceable externally, but may be subject to external enforcement depending upon the terms of any contracts entered into before, during or after the process concerned. For example, if the parties to an arbitration or an expert determination are bound by a contract, or enter into a contract, accepting in advance any determination, such determination may be legally enforceable in the same way as any other provision of the contract.

Arbitration is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination.

Expert determination is a process in which the parties to a dispute present arguments and evidence to a neutral third party chosen on the basis of their specialist qualification or experience in the subject matter of the dispute (the expert) who makes a determination.

Fast-track arbitration is a process in which the parties to a dispute present, at an early stage in the attempt to resolve the dispute, arguments and evidence to a neutral third party (the arbitrator) who makes a determination on the most important and most immediate issues in dispute.

Private judging is a process in which the parties to a dispute present arguments and evidence to a neutral third party chosen on the basis of their experience as a member of the judiciary (the private judge) who makes a determination in accordance with his or her opinion as to what decision would be made if the matter was judicially determined.

- Processes which are not enforceable. Processes which are not enforceable are those in which the determination does not provide a basis for an action, internal or external to the process, for enforcement.

Fact finding is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the investigator) who makes a determination as to the facts of the dispute, but who does not make any finding or recommendations as to outcomes for resolution.

Determinative case appraisal is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the appraiser) who makes a determination as to the most effective means whereby the dispute may be resolved, without making any determination as to the facts of the dispute.

- 10) Early neutral evaluation is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a neutral third party who makes a determination as to the key issues in dispute, and most effective means whereby the dispute may be resolved, without making any determination as to the facts of the dispute.