A Framework for ADR Standards
National Alternative Dispute Resolution Advisory Council

April 2001
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Chapter 1

Introduction

1.1 Background

NADRAC’s charter

1.1 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. The issue of ADR standards is one of NADRAC’s primary concerns.

1.2 NADRAC was established in October 1995. It has its origins in the 1994 report of the Access to Justice Advisory Committee chaired by the Hon Justice Ronald Sackville, entitled *Access to Justice – an Action Plan*. The report recognised the need for a national body to advise the Government and Federal courts and tribunals on ADR issues with a view to achieving and maintaining a high quality, accessible, integrated Commonwealth ADR system.

1.3 The issues on which NADRAC will advise 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;
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- 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;
- the desirability and implications of the use of alternative dispute resolution processes to manage case flows within courts and tribunals.

1.4 In considering the question of minimum standards, the Council is required to 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;
- the accessibility of alternative dispute resolution services.

About this project

1.5 A NADRAC discussion paper *The Development of Standards for ADR* was launched on 30 March 2000. The discussion paper, which represented the work of many council members over the previous five years, promoted discussion in the ADR community about the development of standards, and invited responses that have informed this report.

1.6 NADRAC’s approach to the development of standards has been guided by the need to deal with the full range of ADR processes and the need to balance the objectives and interests of parties, ADR service providers, governments and society at large.
1.2 Consultation process

Dissemination and publicity

1.7 In its discussion paper NADRAC 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 in various centres during 1996.

1.8 The Attorney-General launched the discussion paper on 30 March 2000 in Sydney. Copies were mailed to 900 addressees on NADRAC’s database, including ADR agencies, law societies and bar associations, professional associations and industry groups, academic institutions, private individuals and other stakeholder groups. Discussion papers and letters inviting submissions were also sent to Chief Judicial Officers of Commonwealth, State and Territory courts and tribunals, Attorneys General of each of the States and Territories and all Commonwealth Government Ministers.

1.9 An advertisement was placed in *The Australian* on 1 April 2000 and in *The Financial Review* on 3 April, announcing 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 two weeks prior to the forum scheduled in the relevant city. *The Financial Review* featured an article on 31 March 2000. The discussion paper and synopsis, along with information about the launch and the forums were placed on the NADRAC web site.

1.10 By February 2001, 2000 printed copies of the discussion paper were distributed and over 10000 were downloaded from the web site.

1.11 A total of over 250 participants attended public forums held in each capital city, as well as an additional forum during the 2000 National Mediation Conference in Brisbane. These forums commenced with a presentation about the NADRAC discussion paper, provided an opportunity for participants to ask questions of Council members about the approach taken and included group discussion on issues affecting ADR standards. Notes from the forums were collected and collated and progressively placed on NADRAC’s web site. As a result participants were able to review the comments made in other locations, which in turn encouraged further discussion.

1.12 The forums were positively received by the participants, who appreciated the information provided and the opportunity to discuss issues with others.
Suggestions made at the forums often formed the basis for more detailed consideration in submissions provided later. The forums enabled NADRAC to gain a breadth and diversity of view that could not have been gained from a written submission process alone.

1.13 While the forums aimed to promote the discussion paper, provide information, gain informal input and stimulate debate, they were considered to be complementary to the formal submission process; participants were strongly encouraged to submit written submissions in addition to providing comments at the forums.

1.14 The 41 written submissions received are listed at Appendix B. 12 submissions were provided by individuals, 4 by academic institutions, 11 by organisations involved in the provision of ADR services, 7 by ADR associations or representative bodies and 7 by other bodies with an interest in ADR.

1.15 NADRAC considered the views of other interested groups and individuals through hearing from guest presenters at Council meetings, through the participation of members and staff in various meetings, conferences and seminars and through the existing informal networks which NADRAC members maintain.

1.16 Responses to the discussion paper are summarised at Appendix B of this report.

### 1.3 The report

#### Purpose of this report

1.17 The purpose of this report is to promote and guide the development of standards in ADR in Australia. NADRAC has found that there is overwhelming support for the development of standards in ADR in order to improve and maintain the quality and status of ADR, educate and protect consumers and develop Australia’s international ADR profile.

1.18 The report attempts to balance two principles. The first is to recognise the diversity of contexts in which ADR is practised and to facilitate the development of standards within these contexts (the diversity principle). The second is to promote consistency in the practice of ADR by identifying essential standards for all ADR service providers (the consistency principle).
1.19 The principle of diversity influenced the ‘framework approach’ contained in NADRAC’s discussion paper on standards and has influenced the recommendations in this report. At the same time the evidence before NADRAC indicated the importance of moving towards essential standards in key areas which has resulted in it suggesting that service providers adopt and comply with a code of practice.

1.20 The report contains guidelines to assist service providers and other relevant bodies to develop appropriate codes of practice. It will also assist consumers to understand and evaluate the quality of ADR services.

**Scope**

**Policy Responsibilities**

1.21 NADRAC is a policy advisory body and is not a peak organisation, standards setting agency or implementation body. The focus of this report is therefore on recommendations for action by bodies that have responsibility for implementation. These include Commonwealth Government agencies, State and Territory government agencies, local government, statutory bodies, non-government agencies, industry groups and professional associations.

1.22 NADRAC’s charter is to advise the Commonwealth Attorney-General on matters relating to ADR standards. It has therefore focused many of its recommendations on actions that the Commonwealth can initiate. As NADRAC is in a unique position to foster the development of ADR standards generally, it has also identified areas for future development by other relevant bodies.

**ADR services and processes**

1.23 NADRAC has taken a broad view of alternative dispute resolution (ADR) and of the range of processes that may be included under this umbrella term. Originally, NADRAC focussed on the development of standards in mediation. Because of the large overlap between different ADR processes and the lack of clear boundaries between ADR processes, NADRAC has since decided that there was little value in isolating standards for a single form of ADR and extended its consideration to cover all forms of ADR.

1.24 NADRAC’s charter defines ADR as methods for resolving disputes without judicial decision. ADR includes a wide range of processes as described in its
1997 definitions paper (see Appendix A). For purposes of this report, ADR is not taken to include all non-judicial processes, and this report does not address issues for standards in relation to quasi-judicial or merits review processes, or to investigative processes that aim to assist administrative or judicial decision making.

1.25 The report concerns itself with standards associated with the provision of ADR services and not with the broader application of ADR principles or techniques. That is, the report deals with situations where organisations or practitioners are formally engaged to provide an ADR service to parties in a dispute, or where a practitioner or organisation holds itself out as offering an ADR service. The report does not concern itself with standards for parties or clients, such as the use of, or compliance with, dispute resolution clauses.

1.26 NADRAC acknowledges that many of the processes used in ADR borrow from, and are borrowed by, other fields of endeavour, for example, management, public sector planning, complaint handling, counselling, therapy and community development. NADRAC also acknowledges that ADR processes and approaches are used continually in normal community life, and that colleagues, family members, friends and associates frequently are used as informal ‘mediators’, ‘conciliators’, ‘arbitrators’ or ‘evaluators’. While NADRAC hopes that standards for ADR may influence these contexts, it is neither appropriate nor feasible for ADR standards to attempt to cover such practices.

1.27 There may be difficulties in setting clear boundaries around ADR and other processes. For example, a service provider may offer a range of processes, including ADR, as part of an integrated service. A practitioner may also move from an ADR process to a non-ADR process in the course of their service delivery. Criminal justice matters may involve a conflict between individuals, and between the individual and society at large, represented by the state. Criminal matters may co-exist with, follow or lead to civil disputes.

1.28 NADRAC suggests that ADR standards are relevant where:

- ADR processes, such as ‘mediation’, ‘conciliation’, ‘arbitration’, or ‘neutral evaluation’, are specifically named; and

- the primary objective of the process is the resolution of a dispute, as opposed, for example, to behaviour change, personal growth, rehabilitation, organisational development or relationship enhancement.

Service providers and practitioners may need to decide on a case by case basis whether any standards developed for ADR are relevant.
1.29 NADRAC recognises that particular forms of ADR, such as commercial arbitration, already have well-developed national and international standards, infrastructure and statutory regulation. NADRAC’s focus in its consideration of standards is on those areas where there is a need for further development, rather than areas where standards are already well established.

### Structure of this report

1.30 The report is structured so that it can be used flexibly by different users. The executive summary and recommendations provide a brief overview for those who wish to examine NADRAC’s key conclusions. Chapters 1 to 4 are directed primarily to policy makers:

- Chapter 1 introduces the report, its background, scope and terminology;
- Chapter 2 surveys the current provision of ADR in Australia and the risks and benefits associated with ADR;
- Chapter 3 describes existing and possible forms of standards for ADR;
- Chapter 4 suggests future directions and priorities for ADR standards, including recommendations for government, ADR organisations, professional associations and industry bodies.

Chapter 5 is directed primarily to program administrators and service providers. It offers practical guidance for those actually developing and implementing standards, within the policy framework outlined in earlier chapters:

- Section 5.1 describes key issues to be taken into account in developing standards;
- Section 5.2 lists the elements of a code of practice for ADR service providers;
- Section 5.3 describes the knowledge, skills and ethics that ADR practitioners may require.

The appendices contain NADRAC’s Alternative Dispute Resolution Definitions, responses to its discussion paper and major references used in the report.

### 1.4 Terminology

1.31 Definitions of many of the terms used in this report are themselves issues of substantive debate with important implications for the development of ADR
standards. The paragraphs below offer definitions and explanations for terms as they are used by NADRAC. This report has not attempted, however, to judge the use of terms by others and, in reporting on service provision (Chapter 2), current standards (Chapter 3) and responses to its discussion paper (Appendix B), NADRAC has used the terms provided by the relevant contributors.

**ADR processes**

1.32 NADRAC has used its 1997 paper *Alternative Dispute Resolution Definitions* to define ADR processes. These definitions are contained at Appendix A. The paper aimed not to impose definitions of dispute resolution processes, but to encourage shared understanding of the particular processes under consideration or discussion.

1.33 NADRAC notes that while these definitions have been widely adopted, they are not applied universally or consistently and there remains considerable debate about definitional issues (outlined in Appendix B). For example, the term ‘conciliation’ is not always seen as the facilitative process described by NADRAC’s definitions paper. There is continued debate, both in Australia and internationally, over the application of the term ‘mediation’, especially over whether a mediator should provide advice. This important debate will require further attention in the future.

1.34 While national agreement on terminology would be desirable for the development of standards, it is not essential. Given the confusion over terminology, however, NADRAC regards it as vital that all ADR service providers clearly describe their processes to consumers, determine respective responsibilities and develop standards accordingly. These requirements are addressed in the discussion of the code of practice at Section 5.2 of this report.

**The ADR field**

1.35 In NADRAC’s discussion paper the term ‘ADR community’ referred to the collective interests of persons and entities involved in ADR. This included practitioners, service providers, parties, parties’ advisers or representatives, clients, consumers, governments, courts, ADR bodies and professional associations.

1.36 In this report, the term ADR ‘field’ is used similarly to refer to the range of activities, individuals and entities associated with ADR. The word ‘sector’ is
used to describe particular areas of practice, such as commercial, family, industrial, or community ADR. The report also refers to an ‘educational sector’, that is schools, vocational education and training, higher education, and adult and community education.

1.37 For the purposes of this report, NADRAC draws distinctions between ‘organisations’, ‘bodies’, associations’, ‘practitioners’, ‘service providers’, ‘services’, ‘schemes’ and ‘programs’.

1.38 ‘ADR organisations’ are formally constituted entities, whether government, statutory, or non-government, which are involved in defined activities. These activities may comprise service provision, training, accreditation and professional membership services associated with ADR service providers. The term ‘bodies’ is used to describe entities, such as advisory and advocacy groups and committees, which are not necessarily organisations. ‘ADR associations’ are bodies which represent or support ADR practitioners and organisations. They may be formally constituted professional organisations, loose coalitions or ad hoc groups formed to address a specific issue.

1.39 ‘ADR practitioners’ are the individuals directly involved in the delivery of services. They may work privately or through engagement by an ADR organisation. A ‘sole practitioner’ is a sole trader or other individual operating alone and directly engaged by clients.

1.40 ‘ADR service providers’ are the entities responsible for the actual delivery of services. The term ‘service provider’ includes both organisations and sole practitioners, but does not include organisations which have no service provision function. ‘ADR services’ are the particular forms of assistance, such as dispute resolution assistance, provided to consumers by service providers.

1.41 ADR ‘scheme’ refers to a systematic and planned arrangement for the provision of ADR. ADR ‘program’ is used to describe a planned set of activities in which ADR is used to meet defined objectives. A program could involve a number of service providers under a government funding arrangement, or could represent a series of projects and activities undertaken by a particular service provider.

1.42 In this report the words ‘party’ and ‘parties’ are used to describe persons or bodies who are in a dispute which is handled through an ADR processes. The word ‘client’ is used to describe an individual or organisation who engages an ADR service provider in a professional capacity. A client may not necessarily be a party to a dispute, but may engage an ADR service provider to assist the resolution of a dispute between others. The word ‘consumer’ is used as an umbrella term to describe all those who seek, use or receive ADR services.
They may not necessarily be involved in a dispute, have engaged a service provider or have participated directly in ADR processes, but may seek information or other assistance from the ADR service provider.

1.43 ‘Referrers’ (or ‘referring agencies’) are used to describe individuals and agencies that suggest, encourage, recommend or direct the use of ADR services. Examples are courts, legal practitioners, community agencies, professionals, friends and relatives. It is noted that ADR service providers themselves make referrals to other ADR and non-ADR services.

Standards

1.44 In this report the term ‘standards’ is used to refer to rules, principles, criteria or models by which quality, effectiveness and compliance can be measured or evaluated.

1.45 Standards can be expressed in codes of practice, benchmarks, guidelines, models, exemplars, service charters, credentials, competencies and capabilities, as well as criteria for approval, certification, selection, endorsement or accreditation. Some of these forms are discussed in Chapter 3.

1.46 A ‘code of practice’ is defined as, ‘a set of rules or standards, which are designed to control behaviour, products or services within a particular industry or area of activity’. For the purposes of this report, a code of practice is taken to include a code of conduct, a code of ethics or other forms of standards that have the same effect as a code of practice.

1.47 ‘Benchmarking’ is taken to mean, ‘a performance measurement tool used in conjunction with improvement initiatives to measure comparative operating performance and identify Best Practices’.

1.48 The term ‘competence’ is used to describe a practitioner’s overall capacity to undertake defined roles and responsibilities (see Chapter 5). ‘Competencies’ refers to specific units of competency as defined by the Australian National Training Authority, namely, ‘the specification of knowledge and skills and the application of that knowledge and skill to the standard of performance required in the workplace’.

1.49 ‘Assessment’ is defined as the process of collecting evidence to make a decision. ‘Accreditation’ is a process of formal and public recognition and verification that an individual, organisation or program meets, and continues to meet, defined criteria. The concept of accreditation is discussed in more detail at Section 4.4.
1.50 The report has not attempted to define ‘education’ and ‘training’ in precise terms. It notes the theoretical debate on the differences between education and training, outlined in some of the submissions received. Generally NADRAC sees ‘training’ as being focused on the development of competence, while ‘education’ may fulfil broader social and personal goals and be more concerned with the acquisition of generic knowledge or qualities. Education and training ‘providers’ refers to those responsible for providing education, training or assessment. ‘Participants’ refers to students, trainees, candidates for assessment, and other recipients of education, training or assessment. ‘Program’ refers to a course of study, a training workshop, assessment procedure, professional development activity or other process.

1.51 ‘Professional development’ refers to the ongoing development of practitioner competence, such as through continuing professional education and other processes. ‘Supervision’ refers to the means by which the ongoing maintenance and development of practitioner competence is monitored and supported, which may include requirements with respect to professional development.

1.52 ‘Selection’ refers to means by which a practitioner or organisation is chosen for a particular purpose, including employment, contracting, inclusion in a training course or inclusion on a list. ‘Engagement’ is the process by which a practitioner is retained, whether by employment by, or subcontract to, an organisation, or through a direct contract with a client.

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2 The Benchmarking Network – www.benchmarkingnetwork.com
3 http://www.anta.gov.au
Chapter 2

Profile of ADR in Australia

This chapter describes possible objectives for ADR, the stage of development of ADR in Australia, the different contexts for ADR and the implications of this diversity for the development of standards for ADR. The chapter outlines the benefits and risks associated with ADR and examines how standards could maximise these benefits and minimise the risks.

2.1 Objectives for ADR

2.1 NADRAC’s discussion paper identified potential common objectives for ADR. It referred to these objectives as follows: ‘ADR resolves disputes, uses a process which is considered by the parties to be fair, achieves acceptable outcomes, achieves outcomes that are lasting and uses resources effectively’.

2.2 The responses to NADRAC’s discussion paper (see Appendix B) indicate that there are divergent views on ADR objectives in the following areas: the extent to which ADR practitioners and service providers should be responsible for the substantive outcomes of ADR processes, whether ‘actual’ as well as ‘perceived’ fairness should be an objective of ADR, the appropriateness of broader societal and personal objectives in ADR, the importance of durability and enforceability of outcomes and the relevance of cost-effectiveness.

2.3 In the light of these responses and its further analysis of ADR service provision, NADRAC is of the view that the following objectives would be common for most parties, practitioners, service providers, government and the community at large:

- ADR should resolve or limit disputes in an effective and efficient way.

  Measures of effectiveness and efficiency of dispute resolution vary according to context, and may include factors such as the costs to
parties, service providers, or the community, the speed of resolution and the durability or enforceability of outcomes. Where ADR does not resolve a dispute fully, it may serve to limit the issues in dispute or the ongoing consequences of the conflict.

• **ADR should provide fairness in procedure.**

  Fairness in procedure is fundamental to many of the current standards in Chapter 3 and the standards described in Chapter 5 of this report. As non-determinative forms of ADR leave decisions to the parties, it is not possible to guarantee substantive fairness across all ADR processes. There is, however, a strong view that all forms of ADR should aim to ensure fairness in procedure.

• **ADR should achieve outcomes that are broadly consistent with public and party interests.**

  The nature of ‘acceptable’ or ‘appropriate’ outcomes (see Section 5.3, 27) varies across different ADR processes and contexts. For example, particular responsibilities apply to family and child mediators with respect to protecting the interests of children, and ADR practitioners in statutory organisations often have responsibilities to support the objectives of relevant legislation. In NADRAC’s view appropriate outcomes would be consistent in broad terms with both party (including third party) interests and public interests, although the balance of these interests may need to be determined according to the context and matter under consideration.

2.4 Additional objectives may apply to some forms of ADR but not to others. For example, some types of ADR may aim to promote understanding and enhance relationships between the parties, or contribute to their empowerment and recognition.

2.5 In the responses received there was a strong view that all forms of ADR should contribute in some form or another to broader societal goals. These goals, such as community development, human rights, justice and security, may be reflected in the values and missions of ADR programs and service providers.

2.2 **State of development**

2.6 This report identifies four overlapping phases in the historical development of ADR in Australia:
Phase One: Initially pioneering work was done to develop ADR programs, often in the face of resistance and scepticism from traditional service providers. These programs were often highly successful and resulted in ...

Phase Two: characterised by the increasing acceptance, adoption of and use of ADR, leading to a rapid growth in the number of providers, programs, accrediting and training organisations, in turn leading to an oversupply of service providers for a limited market, which in turn led to ...

Phase Three: in which there were rivalries among professions, service providers and organisations over qualifications, practices and approaches to ADR, resulting in fragmentation, duplication and inconsistency in practice and confusion in the market place, leading to ...

Phase Four: characterised by a move towards increased coordination and collaboration to address common challenges and achieve joint objectives.

These phases reflect the development of other professions and occupations that strive to gain ownership in a field of knowledge, autonomy over practices, control over entry and credentials, state recognition and social status.

2.7 NADRAC's consultations indicate that the ADR field in Australia has features of phases three and four, with a degree of fragmentation and diffusion, but moving to the phase of coordination and collaboration. This is reflected in the view by many that, 'the time for standards had come'. A similar trend towards institutionalisation, regulation, legalisation, innovation, internationalisation and coordination in ADR has been observed in the United States of America. It appears, however, that this development is uneven. ADR in some jurisdictions, regions and sectors is more developed than in others and some forms of ADR in Australia are still at an early pioneering phase.

2.8 A recurring theme is that of increased professionalisation in ADR. This theme, which has positive connotations for some and negative connotations for others, parallels the tension experienced in other fields of endeavour, such as the apprehension by social workers that they, 'may have to scuttle their social-action heritage as a price of achieving the public acceptance accorded a profession'.
2.9 The trend of ADR towards greater collaboration and professionalisation carries the potential risk of increasing exclusivity, costliness and elitism. In this report NADRAC has attempted to maximise the benefits of consistent and coordinated standards, while at the same time enabling ADR to maintain some of its key strengths, including its diversity, inclusiveness, accessibility, affordability and creativity.

2.3 Diverse contexts

2.10 The diverse contexts in which ADR is practised leads to a diffusion of responsibility for standards development and suggests that a single set of standards is unlikely to apply across all ADR sectors.

2.11 NADRAC has struggled to find a word to describe ADR, as the use of words such as ‘profession’, ‘industry’, ‘process’ or ‘social movement’ implies a particular view of the nature of ADR and consequently the appropriate form for standards. The following paragraphs show that none of these terms is entirely appropriate for ADR in Australia. In some areas, ADR functions very much like a profession, comprising full-time practitioners with high levels of specialisation and autonomy. In such a ‘profession’ standards may take the form of higher education qualifications, approved by professional associations, along with continuing professional development requirements. In other areas ADR resembles an industry with a network of employing organisations, occupations and industrial arrangements. Standards for such an ‘industry’ may comprise vocational skills recognition and competency development, delivered through the workplace and by registered training organisations. In other situations ADR is a set of processes adopted and used as part of other professional or occupational practices, in which context standards may take the form of supplementary short courses, training and assessment. In some sectors, ADR functions more like a social movement, owned by the community at large and fulfilling broader societal goals. In such sectors, standards are more likely to be informed by community development principles.

2.12 ADR practitioners and organisations may be specialised in ADR service provision, or may have ADR as a supplementary function or role. They may offer a direct service to the parties in dispute or they may provide indirect services such as referral, information, training or research. Government and statutory agencies may act as providers, purchasers or funders of ADR services.
2.13 An ADR practitioner may be employed by an organisation with prescribed procedures and direct supervision. Alternatively, a sole practitioner may be engaged directly by the parties, without reference to an intermediate agency and without external supervision. Other arrangements range between these alternatives. For example, practitioners may be placed on a list or recommended to parties by an intermediary organisation or individual. Practitioners may also operate under the auspices of an accrediting agency or professional association and be supervised and supported by that agency or association.

2.14 ADR practitioners also are engaged under very different conditions. Many are employed by an organisation on a full-time, part-time casual or sessional basis. Others are self-employed either as a specialist ADR practice or as add-on to an existing professional practice such as a management consultancy or legal practice. Some practitioners work on a volunteer or pro bono basis. Where ADR functions are attached to a statutory office, the ADR practitioner operates largely independently, within the parameters of their appointment. It is also common for ADR practitioners to work across agencies and contexts and to have a ‘portfolio’ of work. For example, a practitioner may belong to several panels, undertake volunteer work, conduct training and provide private consultancy services.

2.15 The range of responsibilities of practitioners varies across ADR programs. Responsibility for the conduct of the ADR session, intake, assessment, coordination and follow up may belong an individual ADR practitioner. Alternatively, such functions may be divided across different practitioners, work areas or agencies.

2.16 Sole practitioners may provide a total service to clients, including professional assistance, physical facilities, administration and follow up. In other situations, sole practitioners may work within the organisational environment provided by the referrer or client, in the same way as consultants. The client then purchases the personal services of the practitioner for a particular purpose, but takes responsibility for many other aspects of service delivery.

2.17 The context of the engagement of the service provider will directly affect the appropriate form of standards. It is common for ADR practitioners to have competing or conflicting responsibilities to their employing organisation, the client who engages their services and the parties involved in their dispute. In all cases the ADR practitioner will have responsibilities to two or more parties who are in dispute, who seek different outcomes and who may have different views about the appropriateness of the practitioner’s conduct.
2.4 Overview of ADR

2.18 This section provides a general description of ADR services and programs in Australia. While specific examples have been referred to, this section is not intended to be an exhaustive description. Inevitably the headings described here overlap and there are no hard and fast boundaries around the different types of ADR services.

2.19 Much of the information contained in this chapter was provided in NADRAC’s discussion paper but has been updated in the light of additional material provided in responses to the paper. NADRAC notes that, as ADR is a dynamic field, new developments can quickly make such information obsolete. As in the discussion paper, this chapter should be seen as a snapshot of the situation at the time of writing, not as a comprehensive, definitive or ongoing review.

Community dispute resolution

2.20 Most jurisdictions have community programs, funded by the respective State or Territory governments, which offer ADR services. They include the Community Justice Centres in New South Wales, the Conflict Resolution Service in the Australian Capital Territory, Dispute Resolution Centres in Queensland, Dispute Settlement Centres in Victoria, Community Mediation Services in South Australia, Western Australia and Tasmania, and the Aboriginal Alternative Dispute Resolution Service in Western Australia.

2.21 In some jurisdictions (Queensland, NSW, Victoria) government departments run the programs, while in other jurisdictions (South Australia, ACT, Western Australia and Tasmania) funding is provided to non-government community organisations to run the services. Most services are provided free of charge to the parties.

2.22 The programs provide mediation and other dispute resolution services, such as dispute counselling, referral and conciliation to deal with a broad range of disputes in the community, including neighbourhood disputes, workplace disputes, family disputes (in some jurisdictions), public issue disputes, school disputes and victim-offender matters.

2.23 The programs tend to use a panel of sessional or volunteer mediators drawn from the general community, trained and accredited by the program and brought in to mediate as required, usually on a co-mediation basis. Staff in the centres provide intake services, such as information provision, assessment, dispute counselling, referral and coordination and community education.
2.24 Some States operate, or have operated, community-based alternative dispute resolution services specifically targeted to indigenous communities.

Family mediation services

2.25 The Commonwealth Government provides funding for approved community organisations involved in the Family Relationships Services Program. These organisations are affiliated with one of three family services industry representative bodies, namely, Family Services Australia, Relationships Australia and Centacare.

2.26 Dispute resolution services provided by such organisations include family and child mediation and counselling and adolescent mediation and family therapy. The services use a range of service delivery models, varying from the use of full-time professionals, through to the use of a panel of sessional mediators. Both sole and co-mediation models are used.

2.27 Funding agreements require agencies to charge a fee for service, commonly administered on a sliding scale based on income.

2.28 Family mediation is also conducted by some of the State- and Territory-based community mediation services (see paragraph 2.22) and by private ADR practitioners.

2.29 The Family Courts of Australia and Western Australia and legal aid commissions also provide dispute resolution services for family matters (see paragraphs 2.31 and 2.38 below).

Courts and tribunals

2.30 Courts and tribunals in both State and Federal jurisdictions use ADR. The main forms of ADR that are used are pre-trial conferences, mediation, arbitration, early neutral evaluation, expert appraisal and settlement negotiations. The ADR process can be mandatory or voluntary, depending on the jurisdiction and the type of ADR being used.

2.31 In the Family Court of Australia, voluntary and court-ordered counselling and conciliation conferences have been provided since 1975 and voluntary mediation services have been provided since 1992. (The Family Court now uses the term 'mediation' to describe publicly all such processes.) Since the introduction of the Family Law Reform Act 1995 (Cth) parties have been encouraged to use 'primary dispute resolution' methods such as conciliation, counselling, mediation and arbitration. However, arbitration in terms of this
A Framework for ADR Standards

scheme has not been used to date. Similar processes are found in the Family Court of Western Australia and more recently in the Federal Magistrates Service.

2.32 The Federal Court initiated an ‘assisted dispute resolution program’ in 1987, with mediation and arbitration being available to the parties. However, while mediation has been used to resolve cases, arbitration has been little used. Most mediation involves consumer protection disputes under the Trade Practices Act 1974 (Cth). Under its individual docket system for case management, the court can also hold pre-trial settlement conferences to attempt to resolve a dispute or at least to clarify the issues in dispute.

2.33 Commonwealth administrative tribunals use a variety of conferencing and ADR processes. The Administrative Appeals Tribunal (AAT) routinely uses the ADR processes of pre-hearing conferences and mediation if the parties consent. Mediation has been used in all registries since 1993. The AAT is also piloting conciliation conferences to encourage earlier consideration of the merits of a case.

2.34 The National Native Title Tribunal uses a model of mediation adapted for complex, multi-party disputes. Unless the Federal Court determines otherwise, all native title applications must be referred to the tribunal for mediation.

2.35 Other Commonwealth tribunals, such as the Superannuation Complaints Tribunal, use ADR processes. The Tribunal attempts to resolve complaints about superannuation and trustee decisions by using conciliation. The Australian Industrial Relations Commission arbitrates and conciliates disputes in relation to workplace relations matters. It is proposed to supplement the range of processes offered by the commission with mediation provided by private practitioners.

2.36 The use of ADR processes is widespread throughout State and Territory courts. Processes include mediation, arbitration, early neutral evaluation, case appraisal, expert referees, conferences and various informal and inquisitorial approaches to settling disputes. ADR processes are also used in State and Territory tribunals such as commercial tribunals, consumer claims tribunals, small claims tribunals, building disputes tribunals and residential tenancies tribunals.

Statutory agencies

2.37 Various government agencies at the Commonwealth, State and Territory levels provide a wide range of ADR services. For example, Equal
Opportunity Commissions around the country provide mediation and conciliation services for disputes about unlawful discrimination. Workers compensation disputes are resolved using ADR procedures, usually conciliation.

2.38 Legal aid commissions around the country deliver primary dispute resolution services, such as mediation and conferencing, for family disputes. These services are provided either in-house or through referral to external service providers.

2.39 Governments have established various commissions and ombudsman offices, such as the Health Services Commissioner and the Legal Ombudsman in Victoria, to deal with disputes relating to the provision of particular professional services. The Federal Private Health Insurance Ombudsman negotiates settlement of private health insurance complaints.

2.40 Diversionary conferencing and restorative justice schemes operate in many Australia jurisdictions, in relation to adult or juvenile offences. These schemes usually involve bringing the victim(s), offender(s) and support people together to resolve issues arising out of the offence, and may serve as an alternative to formal charging and processing by the court. Police or other justice authorities, sometimes in conjunction with community programs, run such schemes. While there is debate about whether these processes are ‘ADR’ (see Section 1.3), there are many parallels with ADR processes used in the civil justice system.

Industry dispute resolution schemes

2.41 Since 1990 various industries have set up dispute resolution schemes to deal with customer disputes. All schemes encourage customers to resolve their complaints in the first instance with the member of the industry concerned. Industry members are expected to have their own complaints handling procedures in place to deal with those complaints, but if they cannot be resolved, then the customer can take the complaint to the industry dispute resolution scheme.

2.42 The current schemes include the Telecommunications Industry Ombudsman, the Energy Industry Ombudsman (Victoria), the Energy and Water Ombudsman (New South Wales), the Electricity Ombudsman (Tasmania) and the South Australian Electricity Ombudsman. They also include various financial disputes schemes such as the Australian Banking Industry Ombudsman, the General Insurance Enquiries and Complaints Scheme, the Financial Industry Complaints Resolution Scheme, the
Insurance Brokers Dispute Facility and the Credit Union Dispute Reference Centre.

2.43 Most schemes use investigation and conciliation processes to attempt to resolve disputes. In most cases where a resolution is not reached by conciliation, the scheme provides for a determination, up to a specified dollar limit, which is binding on the industry member concerned but not on the customer.

2.44 Other industries have set up schemes to resolve disputes, but these usually involve referral of a complaint to a private mediator or arbitrator for resolution.

Public policy dispute resolution

2.45 There are a number of schemes throughout the country which deal with public policy disputes, such as environmental matters, land usage, resource management or planning. Such schemes operate through existing government departments, through local government and through statutory agencies, such as land and environment courts, commissions and planning authorities.

2.46 In addition to formal schemes, ADR is used on a case by case basis for public disputes by agreement between the parties, and may be provided by individual consultants or by private, community or government organisations.

Commercial ADR

2.47 Many private organisations and individuals provide ADR services. The organisations include commercial bodies and professional organisations such as the various State and Territory law societies. Private ADR is used for a wide range of disputes, including commercial, personal injury, building and construction. Mediation appears to be the main form of private ADR, and arbitration, conciliation and private judging are also used.

Internal organisational ADR

2.48 In addition to the services provided to external clients, many organisations and institutions have developed internal grievance and dispute handling processes that make use of ADR.
Many educational institutions, from primary and secondary schools through to universities, have developed mediation programs, using students as mediators. Sporting bodies also have introduced dispute resolution procedures.

Other organisations, both government and non-government, use in-house personnel, external consultants, ADR service providers and employee assistance services to deal with internal conflicts or disputes. Internal ADR may be used on an ad hoc basis, or as part of a systematic approach to disputes. ADR may be associated with occupational health and safety, equal employment opportunity, disciplinary matters, appeals, industrial and employment issues and other human resource management procedures.

### ADR associations and training/education bodies

Most States and Territories have voluntary associations established for the promotion of ADR or for the benefit of ADR practitioners. These associations include the Australian Dispute Resolution Association, the Victorian Association for Dispute Resolution, the South Australian Dispute Resolution Association, the Alternative Dispute Resolution Association of Queensland, the Mediation Association of the Northern Territory, the Western Australian Dispute Resolution Association and Let’s Talk (Victoria and NSW). The ACT’s Council of Approved Mediation Agencies was formed to represent organisations approved under the ACT Mediation Act. The Australian Family Mediation Association has recently been formed to provide membership support for those engaged in family mediation. The National Mediation Conference Ltd is a non-profit company that organises biennial mediation conferences and provides other support to the ADR field.

A number of other associations provide membership support as well as direct services such as training and referrals. These organisations include LEADR (Leading Edge Alternative Dispute Resolvers), the Institute of Arbitrators and Mediators Australia and the Australian Institute of Family Law Arbitrators and Mediators.

Training and education in ADR has been developed and delivered by a range of agencies, including service providers themselves, professional associations, institutes of technical and further education (TAFEs), universities and private training organisations.

A number of service providers have become Registered Training Organisations (RTOs) under the Australian Recognition Framework and are able to offer nationally accredited courses of study. In many cases.
partnerships exist between tertiary institutions and service providers for the delivery of training and education for practitioners.

**Demand for, and provision of, ADR services**

2.55 There are substantial difficulties in gauging the usage of ADR services and the numbers of ADR practitioners and service providers. Complicating factors are:

- the diverse contexts for ADR
- the fact that ADR is often supplementary to a practitioner's primary area of practice
- the lack of consistency in how organisations and practitioners describe their roles and define ADR processes
- complexities in the engagement of practitioners
- the lack of a national peak body
- the lack of consistent data collection
- the lack of statistical measures for ADR.

2.56 NADRAC feels it would be difficult to estimate the numbers of ADR service providers and practitioners. The paragraphs below can therefore only be taken as indicators, not estimates, of the possible numbers.

2.57 In a different project conducted recently by NADRAC to identify criteria used in referring cases to ADR, 114 organisations were identified nationally as providing or formally referring to ADR services. This list excluded sole practitioners.

2.58 In the first *Australian Dispute Resolution Directory*\(^{16}\), published in 1996, approximately 2000 individuals and organisations identified themselves as providing ADR services. No listing fee was involved in the preparation of this directory. The *Yellow Pages* (at August 2000) has 520 entries nationally for mediators or mediation and 74 for arbitrators. There are no listings for other forms of ADR.

2.59 Estimating the level of service demand and usage is even more problematic. Although figures are available for statutory bodies, funded service providers and industry programs, there is a lack of consistency in data sets across the different sectors. No figures are available for privately funded ADR.

2.60 Although there is a lack of hard data, NADRAC’s consultations indicate that the demand for private and community-based ADR services, such as
mediation and arbitration, lags considerably behind the supply of prospective practitioners who have completed training and education programs.

### 2.5 Benefits and risks associated with ADR

2.61 Supporters of ADR claim a range of benefits for ADR over judicial determination or unassisted negotiation between parties and their representatives. ADR is claimed to be quicker, cheaper, more flexible and more responsive to party needs than other processes. Facilitative ADR is claimed to provide parties with greater control over the process and responsibility for the outcome and to allow existing relationships to continue and prosper.

2.62 A number of shortcomings of ADR have also been identified. For example, where ADR is a compulsory step in court procedures it can draw out the litigation process. Where one party uses ADR with the intent of deliberately delaying the proceedings, the other party may see it as an abuse of the court process. The private nature of ADR may result in unfair procedures or outcomes in the absence of clear standards and forms of accountability.

2.63 There are two main sources of knowledge about how parties in Australia experience and perceive ADR. The first comprises those research studies undertaken in various ADR programs. The second comprises actual complaints and anecdotal evidence. NADRAC notes, however, that such information is patchy, with considerable information available, for example, in relation to family mediation, and very little in other areas, for example, in commercial ADR or internal dispute resolution in organisations.

### Research studies

2.64 Most Australian research has concentrated on two aspects of ADR: the objective results of ADR and the subjective views of parties, practitioners and legal representatives. The former are mainly quantitative in nature, and the latter are mainly qualitative. These research studies reveal similar findings about the operation of mediation in particular:

- There is consistently a very high rate of agreement reached by parties at mediation, and mediated agreements are shown to be durable over time.

- There is a high level of satisfaction with the fairness of the mediation process, the fairness of the mediated outcome and with the professional skills and impartiality of mediators.
• Most parties felt that they had been given a chance to have their say and believed that mediation gave them an opportunity to understand the other party’s point of view.

• Most women who use mediation feel that they have equal influence over the terms of the agreement and report increased confidence in their ability to stand up for themselves and handle future disagreements.

• Most parties in pre-trial conference and mediation felt that they had more control over the outcome of their dispute than did parties who used litigation or arbitration.

• One of the most frequently identified benefits relating to mediation as an alternative to court action is the avoidance of stress, tension and the trauma of a possible court hearing.

2.65 While high satisfaction is reported generally with ADR, research studies indicate specific problems and needs in particular areas. The sections below deal with findings in three areas: family dispute resolution, industry dispute resolution schemes and conciliation in equal opportunity setting. These are used for illustrative purposes only and do not imply that specific findings, issues or concerns apply only to these areas of ADR practice.

2.66 The research into ADR must be viewed with caution in the light of the following factors:

• There has been no comprehensive evaluation of ADR across all sectors in Australia. Most of the research relates to family mediation or covers programs that are sufficiently organised and resourced to support significant evaluation research.

• The lack of public and professional awareness about what to expect from ADR means that data obtained from parties and from referring agencies may not be an altogether reliable and valid measure of service quality.

• There is a lack of comparability of data and lack of definitional consistency across programs and processes over matters such as what constitutes an ‘agreement’.

• There are many methodological problems associated with the quantitative research conducted, such as small sample size, sampling error, lack of control groups, a lack of cross referencing of responses and subjectivity in respondents’ interpretation of the words used in surveys.

• Qualitative research provides for greater depth in interpretation, especially of minority views, but is unable to provide an overall picture of service effectiveness.
Primary dispute resolution (Family disputes)

2.67 Studies on family mediation services report generally high satisfaction with family mediation\(^2\) and, although it is difficult to separate their conciliation role from other functions, Family Court personnel such as counsellors and registrars also have been highly rated by clients in surveys conducted by the court\(^3\).\(^4\).

2.68 Studies on specific issues relating to family and child mediation show that the needs of third parties, especially children, affected by parental disputes need to be taken into account.\(^5\) Assessment of suitability for mediation has also been highlighted, as some matters are unsuited to mediation due to violence, power imbalance and other factors.\(^6\)\(^7\) As the overall level of awareness of family mediation is quite low\(^8\), consumer choice may have limited applicability.

2.69 Qualitative research reveals a number of themes about party satisfaction or dissatisfaction with primary dispute resolution in family matters:

- Many clients are highly satisfied with the process and with the practitioner, through the dignity and sense of empowerment offered:

  \(I\ \text{felt for the first time my ex-husband who had bullied me for years and who sought to reduce me to ‘nothing’ (his words) finally saw that I had equal rights; was given dignity via the mediation and confidence myself to speak out.}\)\(^9\)

- Others may be dissatisfied due to the behaviour of the other party:

  ‘A problem is that mediation assumes that the parties have a commitment to achieving a workable outcome ... its value is low where a party uses it to appear to be doing the “right thing”.’\(^10\)

- For some the process itself was unsatisfactory:

  ‘Mediation isn’t final from my point of view. I felt that I was pushed into mediation and agreement because legal aid refused to avoid this and go straight to court. I would have much preferred to go to court as it’s final and my child’s father can’t push me around.’\(^11\)

  ‘In retrospect mediation, which was my idea, was a total waste of time and money.’\(^12\)

  ‘I found it crazy that one mandatory requirement for mediation was one had to be a solicitor, yet could not give legal advice ... she may as well have been a tram driver.’\(^13\)
• Dissatisfaction with the standards of practice or ethics also features:

‘I had strong feelings that: mediators anti-me or anti-men; did not respect confidentiality; did not mediate in a way which encouraged resolution; a thorough waste of time and money; mediators had a pattern of work, obviously taught but ineffective; did not attempt to mediate or conciliate. When my wife lost her temper and ended sessions – no attempt to retrieve situation. Two very nice people but not pro-active, not mediators, not conciliators, did not actively seek a resolution.’

‘I felt she was going overboard to be fair to him because she was a woman and did not want to look as though she was gangging up on him with me. However, this meant she let him drag up all sorts of things and accuse me of psychologically damaging my kids when they were with me, for three or four sessions, without actually agreeing on anything.’

(women felt that) ‘the skills of some people involved in running the primary dispute resolution and conferencing processes are not always appropriate or well honed’.

Industry dispute resolution schemes

2.70 Industry dispute resolution schemes differ from ‘traditional’ ADR schemes in several ways. In particular, they are ‘asymmetrical’. They do not treat the industry member and consumer in the same way, as schemes are usually binding on industry members but not on consumers. In addition, industry members tend to be ‘repeat players’, creating special challenges in maintaining the perception of fairness.

2.71 The Consumer Redress Study, published in 1999 by the Commonwealth Department of the Treasury, indicated high consumer satisfaction with the accessibility of the schemes, wide variation in satisfaction with scheme independence and general dissatisfaction with the outcome of the dispute.

2.72 Recommendations from this survey included the need to provide clear information to consumers and to manage the situation of repeat users (‘overuse syndrome’).

Conciliation (Equal Opportunity)

2.73 There has been limited research on consumer perceptions of statutory conciliation.

2.74 A 1994 study on the processes of investigation and conciliation under the Western Australian Equal Opportunity Act 1984 showed that while most
complainants (65%) were satisfied with conciliation, the same proportion of respondents were dissatisfied as were satisfied with conciliation. This study, along with other studies on equal opportunity conciliation, indicates that:

• Complainants are pleased with the changes or clarification of policy or practice obtained through conciliation. 40

• As with industry dispute resolution schemes (see above), the issue of repeat users needs to be addressed. 41

• Complainants appreciate staff knowledge, commitment, reassurance, helpfulness, explanation and understanding. 42

• Parties’ understanding of the role of the agency is related to their satisfaction with the process and outcome of conciliation. 43

Negative comments reported in the Western Australian study 44 included:

• lack of impartiality:
  ‘assumed that the complainant was right/concentrated on the complainant's and not the respondent's views’

• lack of involvement or intervention:
  ‘respondent negotiated directly with complainant, EOC not very involved’
  ‘didn't know what to ask for and the EOC didn't help with this’
  ‘overpowered by the respondent in the conference’
  ‘lack of communication’

• dissatisfaction with outcome:
  ‘didn't want a conference’
  ‘expected more from a settlement’
  ‘did nothing wrong’
  ‘settled because commercially better/cheaper option’.

Complaints about ADR

There are very few reported complaints about ADR. In June 2000 NADRAC conducted a survey of all consumer affairs offices, law societies, bar associations and legal complaints bodies concerning complaints about ADR service providers or practitioners. The Law Council of Australia recently conducted a similar survey of constituent bodies and legal ombudsmen/legal
services commissioners regarding the handling of complaints against persons who act as neutrals in ADR processes. These surveys revealed that in most jurisdictions no complaints had been received, while in the remainder very few were received.

2.77 The Family Court of Australia collects data on complaints, some of which relate to the behaviour of court staff and judicial officers. Of 89 such complaints in 1998–99, 19 concerned court counsellors and 12 concerned registrars. Most complaints about counsellors alleged unprofessional behaviour, while most complaints about registrars and other court staff alleged rudeness. This analysis, however, does not separate out complaints relating to the conduct of ADR from other functions performed by court staff.

2.78 While there is little data on formal complaints about ADR, NADRAC continues to receive anecdotal evidence of unsatisfactory practice that would normally constitute grounds for complaints. These practices tend to concern:

- parties being misled about the purpose and nature of the process being undertaken, such as where practitioners breach expectations of confidentiality;
- the appointment of people as mediators without any reference to their training, experience or qualifications;
- the inappropriate use of ADR in cases involving violence, especially family violence;
- the application of duress or pressure to settle matters;
- conflicts of interest.

2.79 NADRAC believes that the low number of reported complaints does not necessarily mean that there are no instances of poor practice. There are many possible reasons for this:

- There is low public awareness about ADR, particularly about what constitutes good or bad practice in any specific area.
- There is no accessible and well-publicised procedure for complaints about ADR.
- As most ADR consumers are one-off users, they do not have points of comparison.
- Conversely, repeat users may not wish to complain about service providers whom they may be required to use in the future. As repeat users may see advantages in maintaining amicable relationships with ADR service providers, they may be reluctant to make complaints.
• As ADR may be part of a dispute handling process itself, the consequences of unsatisfactory service are often dealt with in a later adjudicative context. The perceived need to lodge complaints with external bodies therefore may be diminished.

• There are few practical means for redressing problems associated with ADR services. The consequences of incompetent or unethical ADR practice are not readily put right without affecting the rights of other parties. There may be little motivation to make complaints that have negative outcomes for the provider, but produce no benefits to the consumer.

• As many complaints bodies are themselves ADR providers, there may be uncertainty about their capacity to resolve complaints about ADR.

• The desire to promote ADR may lead to a reluctance to encourage complaints about it, especially during ADR’s formative stages of development.

2.80 NADRAC believes that the lack of complaints is not an argument against documented standards. Indeed, such an argument is circular, in that the lack of agreed, publicly available standards makes it difficult to form clear expectations about the quality of ADR services. Consequently neither consumers, nor complaint handling bodies, are in a position to judge whether, in any specific instance, there are legitimate grounds for complaint.

### Risks associated with ADR service provision

2.81 NADRAC has identified a number of risks that need to be taken into account in standards development, despite the lack of clear evidence of major problems associated with the provision of ADR in Australia. These risks vary in severity and likelihood and also may vary according to the form of ADR, the types of disputes and the contexts in which it takes place. Because of this variability, NADRAC has not attempted a comprehensive risk analysis, but recommends such analyses take place when considering standards for a particular service, program, process or sector.

2.82 Risks to parties and third parties involved in ADR include violence, unfair or unjust outcomes, non-resolution or escalation of disputes, being referred to the wrong process, needs not being addressed and coercion by another party or the ADR practitioner. Possible measures to address these risks include practitioner competence and ethics, organisational and professional practices, effective intake and referral processes and limits on the enforceability of agreements reached in ADR (see Table 1).
2.83 Risks to ADR practitioners and organisations include stress, loss of credibility, an oversupply of ADR practitioners and ADR training, fragmentation of the field and complaints from consumers. These risks may be addressed by occupational health and safety measures, through developing effective quality assurance processes, through assessing training needs, through improved coordination and cooperation and through the development of effective complaints mechanisms (see Table 2).

2.84 Risks to public interests include unfair or unjust outcomes, undermining public interest, increased litigation, loss of faith in the justice system and loss of international credibility. Measures to address these risks include quality service provision, appropriate safeguards and national coordination and development (see Table 3).

Table 1 — Risks to consumers

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likelihood</th>
<th>Impact/Severity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violence (a) to parties</td>
<td>Actual occurrence is low, but fear/threat of violence may be higher</td>
<td></td>
</tr>
<tr>
<td>Violance (b) to third parties, including children</td>
<td>May be more likely in ongoing relationship disputes such as family or neighbourhood matters</td>
<td></td>
</tr>
<tr>
<td>High</td>
<td>High Impacts may be physical and psychosocial injury to the party and significant others, such as children</td>
<td></td>
</tr>
<tr>
<td>Requires a holistic approach covering organisational and professional practices, physical security and effective risk management</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unfair or unjust outcomes (a) as perceived by party or (b) by an external standard</td>
<td>Moderate: difficult to define or measures due to lack of clarity about ‘fairness’</td>
<td></td>
</tr>
<tr>
<td>High: there is no guarantee of settlement</td>
<td>Consequences vary widely according to processes undertaken; may result in financial loss, or other injury, disillusionment and dissatisfaction</td>
<td></td>
</tr>
<tr>
<td>Need for safeguards and risk management strategies, especially over dealing with diversity of parties and status of agreements</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-resolution of disputes</td>
<td>High: there is no guarantee of settlement</td>
<td></td>
</tr>
<tr>
<td>May result in wasted resources (time and money)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Effective intake policies and the development of realistic expectations of what ADR can achieve; avoidance of unnecessarily expensive or time-consuming procedures</td>
<td></td>
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</table>

continued…
<table>
<thead>
<tr>
<th>Risk</th>
<th>Likelihood</th>
<th>Impact/Severity</th>
<th>Implications for standards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Escalation of disputes</td>
<td>Moderate</td>
<td>Worsening of problem, including further financial and psychosocial costs, possibly involving other players</td>
<td>As above ADR agencies may need to develop a dispute management approach</td>
</tr>
<tr>
<td>Wrong process for dispute</td>
<td>Moderate to high</td>
<td>Inconvenience, frustration, possible worsening of dispute</td>
<td>Effective referral and intake practices</td>
</tr>
<tr>
<td>Legitimate needs of parties not addressed, including those of affected third parties, especially children</td>
<td>Moderate to high, especially where there are time constraints on process</td>
<td>Disputes not resolved in long term, or unfair outcomes obtained</td>
<td>Effective referral and intake practices and appropriate level of competence on the part of the practitioner to ensure needs are identified and addressed</td>
</tr>
<tr>
<td>Coercion by other party</td>
<td>Moderate to high</td>
<td>May lead to unfair or inappropriate outcomes</td>
<td>Appropriate level of competence on the part of ADR practitioner in order to control, manage or terminate the process Appropriate protections, e.g., cooling off periods, termination, access to advocacy services, judicial review, legal recourse (including limitations on confidentiality)</td>
</tr>
<tr>
<td>Coercion by practitioner</td>
<td>Moderate to low</td>
<td>As above</td>
<td>Ethical standards and supervision Protections as above</td>
</tr>
</tbody>
</table>
### Table 2 — Risks to ADR practitioners and organisations

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likelihood</th>
<th>Impact/Severity</th>
<th>Implications for standards</th>
</tr>
</thead>
</table>
| Violence                                  | Violence is more likely to be between parties, but threats or actual violence against practitioners are not unknown | High physical and psychological impact | Employing organisations need to have proper security and OH&S policies and procedures in place  
Sole traders need to have risk management strategy in place                                     |
| Stress                                    | Moderate                                                                  | Varies                                                                           | Organisation needs to ensure good work design and personnel practices, e.g., variation of work, debriefing  
Sole traders also need to have appropriate practices in place (e.g., peer support)             |
| Loss of credibility                       | Moderate to high                                                           | High                                                                              | Need for effective quality assurance                                                      |
| Supply of services/practitioners exceeding demand for service | High. In some areas this problem already appears to exist. Numerous bodies provide ADR training both in public and private sector | False expectations of practitioner competency or of supply of work                  | Requirement for a needs assessment prior to implementing new ADR services or training programs |
| Pressure on ADR organisations to raise money through training | High - see above                                                          | Distorts priorities and contributes to oversupply of practitioners above          | As above                                                                                  |
| Fragmentation                              | High                                                                      | Lack of consistent benchmarks for engaging or approving ADR providers              | Need for cooperation and communication in the field, along with development of consistent benchmarks and codes |
| Complaints about ADR services              | Moderate                                                                  | Depends on nature of complaints                                                   | Effective systems for complaint handling                                                   |
### Table 3 — Public interest risks

<table>
<thead>
<tr>
<th>Risk</th>
<th>Likelihood</th>
<th>Impact/Severity</th>
<th>Implications for standards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfair or unjust outcomes</td>
<td>Moderate</td>
<td>Could result in additional community burdens (e.g., dependency)</td>
<td>Need for good quality services, including practices, practitioners and organisations. Appropriate risk management strategies and safeguards (e.g., about the status and enforceability of agreements)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>May perpetuate and reinforce social disadvantage and social division</td>
<td></td>
</tr>
<tr>
<td>Private dispute resolution resulting in denial of public interest</td>
<td>Moderate</td>
<td>Difficult to gauge - may be substantial</td>
<td>Quality services and risk management (as above)</td>
</tr>
<tr>
<td>Increased use of legal remedies</td>
<td>High</td>
<td>Increased financial burden on parties and community</td>
<td>Need to ensure ADR programs are effective</td>
</tr>
<tr>
<td>Loss of public faith in the justice system</td>
<td>Long term effect - difficult to calculate</td>
<td>Broad disillusionment Loss of social capital</td>
<td>Need to pay special attention to mandatory ADR. Effective complaint handling processes and availability of legal recourse with respect to unsatisfactory ADR services</td>
</tr>
<tr>
<td>Loss of international credibility of Australia’s dispute resolution system</td>
<td>Unknown</td>
<td>Moderate - may result in loss of opportunities</td>
<td>Quality services and risk management (as above) National coordination and development</td>
</tr>
</tbody>
</table>

### 2.6 Implications for standards

Despite their methodological shortcomings, research studies appear to support some of the claims of ADR, namely that it is responsive, quick, fair and informal, and that it is cheaper than litigation. Most parties appear to value ADR, and seem capable of making distinctions between substantive satisfaction and procedural satisfaction in that, while they may be unhappy with the outcome of the dispute, they appreciate the fairness of the procedure and the competence of practitioners.
2.86 Research indicates that ADR practitioners need to be competent to conduct the ADR process and that the knowledge and skills required vary according to the type of ADR practice and the context in which it is delivered (see Section 5.3). However, NADRAC has found no evidence in Australia or overseas connecting a practitioner’s professional discipline or possession of academic qualifications with the quality of service provided.

2.87 NADRAC’s consideration of the research and of the potential risks associated with ADR indicates that satisfaction does not relate solely to practitioner and service standards and that consumer expectations, referral practices, and the suitability of the process for particular disputes or parties are also critical factors. Service standards may need to address the following in particular:

- The role of the third party should be clearly explained and acceptable to the parties and consistently followed during the process, particularly in relation to impartiality, confidentiality and responsibility for giving legal or other expert advice, suggesting solutions or determining the outcome.
- Service providers should ensure the accessibility of the service and the process to parties with diverse needs, taking into account the issue of repeat users, where relevant.
- ADR practitioners need to control the process in an effective way so that parties are encouraged to achieve settlement or resolution of their dispute, but are not subjected to abuse or coerced into agreement.
- The suitability of any ADR process in a particular case needs to be carefully assessed and the process terminated if it becomes clear it is doing damage, or wasting time and resources.
- The confidentiality of the ADR process needs to be limited where agreements have been obtained under duress.
- Service providers need to provide an accessible and effective process for handling complaints about ADR.

2.88 The diversity of ADR suggests that service providers need to develop their own standards which take into account the context of service provision. Section 5.1 of this report provides guidance on the development of such standards.

2.89 Standards developed by ADR service providers need to ensure that adequate protection is provided for consumers in key areas. In particular, ADR service providers need to consider how they will enable informed and effective participation, determine the appropriateness of the dispute for the ADR process, ensure accessibility and fairness in procedure, terminate and
conclude the ADR process, maintain confidentiality, establish the appropriate level of practitioner competence and ensure the quality of the ADR process. These elements may be included in a code of practice (see Section 5.2).

2.90 Some of the risks associated with ADR may also be addressed by improving complaint handling about ADR services, effective self-regulation, clarification of parties’ and practitioners’ legal rights and obligations within ADR processes, consideration of responsibilities associated with mandatory ADR and greater consistency in accreditation and selection processes. Recommendations with respect to these issues are made in Chapter 4 of this report.

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5 ibid, 13.1 [24].
7 A pilot program of early neutral evaluation was conducted in the Perth Registry in 1992–3 but relatively few cases were referred to it. See Boulle L. & Mack K., op. cit., 13.1 [23].
16 University of South Australia (1996) *Australian Dispute Resolution Directory*.


Ingleby R., op. cit., p. 6.


Bordow S. & Gibson J., op. cit., p. 108.
35 Keys Young, op. cit., p. 80
36 ibid., p. 99.
37 Rush Social Research Agency and John Walker Consulting Services, op. cit. p. 31.
41 ibid.
42 ibid.
43 Western Australian Equal Opportunity Commission, op. cit.
44 ibid.
45 ibid.
Chapter 3

Options for ADR standards

This chapter describes current standards and regulations for ADR in Australia and overseas, identifies parallels with other fields and outlines the public policy context for standards and regulatory reform. It examines possible models for standards applying to practices, to practitioners and to organisations and considers the relevance of these models to ADR.

3.1 Current standards for ADR

Summary of Australian ADR standards

3.1 Standards for ADR have been developed by community organisations, governments, courts, statutory agencies, professional associations, industry groups, training advisory bodies and other standards setting bodies. NADRAC does not claim to have analysed all these standards and the rapid rate of development means that information is quickly dated. In preparing this report, NADRAC took into account a range of existing documented standards (see Table 4) and distributed excerpts from a selection of these in its discussion paper. Additional standards were provided to NADRAC in response to the paper.

3.2 Most of the standards examined focus on practices, and take the form of guidelines, rules, or codes of conduct or ethics. Several common themes emerge which relate to ethical considerations. These are fairness, confidentiality, communication issues, conduct during proceedings, neutrality, impartiality, termination, settlement, practitioner competence, qualifications and training, advertising and publicity, professional responsibilities and agreement on fees.
3.3 While ethical standards often refer to the need for practitioners to be appropriately qualified or competent, there was limited material available which specified practitioner competencies, knowledge or skills. The *ACT Competency Standards for Mediators* specify competencies for mediators, and competencies in alternative dispute resolution have been proposed both in the review of the national *Community Services and Heath Training Package* and in the endorsement submission for Stage 2 of the national *Business Services Training Package*. Knowledge and skills relevant to ADR may also be included in the content of individual training and education programs. Several overseas programs (see section below) specify practitioner competencies.

3.4 The *Benchmarks for Industry Dispute Resolution Schemes and Standards* Australia’s *Guide to the Prevention, Handling and Resolution of Disputes* relate more clearly to schemes or programs than to individual practitioners. The industry dispute resolution scheme benchmarks are accessibility, independence, fairness, accountability, efficiency and effectiveness. The Standards Australia Guide outlines three principles, namely, effective processes, open and effective communication, and good faith; and it recommends that processes of policy, resources, prevention procedures (codes and dispute resolution clauses), communication, monitoring and review be included as measures to prevent disputes.

3.5 The *Family Services Quality Strategy* provides standards for organisations funded under the Family Relationship Services Program (see Section 2.4). These standards include a statement of values, planning, management of data, entry of practitioners, supervision of practitioners, training and development, staff appraisal, safety of staff, accessibility of services, client feedback, client confidentiality, client safety and service design. The Attorney-General’s Department is currently considering a proposal to broaden the approval process for counselling and family and child mediation organisations, and to adapt the quality standards accordingly.
### Table 4 — Selection of Australian ADR standards

<table>
<thead>
<tr>
<th>Body or statute</th>
<th>Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT Community Services and Health Industry Training Board</td>
<td>ACT Competency Standards for Mediators, December 1995</td>
</tr>
<tr>
<td>Alternative Dispute Resolution Branch, Queensland Department of Justice</td>
<td>Code of Ethics for Mediators</td>
</tr>
<tr>
<td>Australian Commercial Disputes Centre</td>
<td>Guidelines for Expert Determination Guidelines for Arbitration Guidelines for Commercial Mediation</td>
</tr>
<tr>
<td>Family Law Act (1975) Cth</td>
<td>Family Law Regulations part 5, Division 2</td>
</tr>
<tr>
<td>Family Services Council</td>
<td>Mediation Standards</td>
</tr>
<tr>
<td>Institute of Arbitrators &amp; Mediators Australia</td>
<td>Practice Note 2 - Professional Conduct</td>
</tr>
<tr>
<td>Law Council of Australia</td>
<td>Ethical Standards for Mediators</td>
</tr>
<tr>
<td>Law Institute of Victoria</td>
<td>Mediation: A Guide for Victorian Solicitors</td>
</tr>
<tr>
<td>Law Society of South Australia</td>
<td>Guidelines for Legal Practitioners Acting as Mediators and Accreditation of Mediators</td>
</tr>
<tr>
<td>NSW Community Justice Centres</td>
<td>Code of Professional Conduct for CJC Mediators.</td>
</tr>
<tr>
<td>NSW Law Society</td>
<td>Revised Guidelines for Solicitors who act as mediators</td>
</tr>
<tr>
<td>Queensland Law Society</td>
<td>Standard of Conduct for Solicitor Mediators</td>
</tr>
<tr>
<td>Workcover Conciliation Service (Vic.)</td>
<td>Code of Conduct and Protocols</td>
</tr>
<tr>
<td>Attorney-General's Law Reform Advisory Council &amp; Victoria Law Foundation</td>
<td>Standards for Court-Connected Mediation in Victoria</td>
</tr>
<tr>
<td>Attorney-General's Department/ Department of Family and Community Services</td>
<td>Family Services Quality Strategy</td>
</tr>
<tr>
<td>Department of Industry Science and Tourism</td>
<td>Benchmarks for Industry Customer Dispute Resolution Schemes</td>
</tr>
<tr>
<td>Standards Australia</td>
<td>AS 4269: Australian Standard Claims Handling</td>
</tr>
</tbody>
</table>
Regulatory environment for ADR

3.6 Regulations applying to ADR have been introduced in Commonwealth, State and Territory jurisdictions to cover court, private and community-based ADR processes.

3.7 In relation to mediation alone, the Attorney-General's Department recently reviewed regulations in 30 separate statutes. In 27 of these there was immunity provided for mediators. In 25 statutes, the selection, nomination, accreditation, approval or appointment of mediators was specified through such means as:

• approval, listing or nomination by a judicial officer
• appointment by a court at the request of the parties
• delegation by an officer of the court
• attachment to a judicial office
• reference to accreditation by a specified external body
• accreditation through a separate instrument (e.g., *NSW Community Justice Centres Act 1983*, *ACT Mediation Act 1997*)
• self-selection via specification of requirement to be a mediator (e.g., qualifications defined in the *Family Law Regulations*).

3.8 Different governments have also formulated regulations covering early neutral evaluation, expert appraisal, arbitration and conciliation.

3.9 NADRAC notes that ADR in Australia is already subject to numerous legislative acts, regulations and rules. However these are not consistent, coordinated or systematic across jurisdictions and programs. For example, mediators may conduct a family mediation under the provisions of the *NSW Community Justice Centres Act*, but fall outside the provisions of the *Family Law Regulations* and vice versa. The lack of consistent processes for the recognition and accreditation of mediators may lead to legal uncertainty and duplication of efforts for both practitioners and organisations, which in turn may increase the cost and decrease the accessibility of mediation service provision. This situation is not unique to Australia. For example, the United States has over 2500 statutes which contain legal rules affecting mediation, prompting the development of the *Draft Uniform Mediation Act* which is designed to achieve consistency and cohesion in the field.3
International developments

3.10 In preparing the discussion paper and subsequently in preparing this report, NADRAC took note of developments in ADR in other parts of the world. NADRAC has no equivalent body in other countries, and the development of standards elsewhere usually has reflected legislative initiatives, or the work of professional organisations or groups. The following paragraphs represent a sample of overseas standards and are not intended to provide an exhaustive list.

3.11 The key issues in developing standards for ADR, contained in Section 5.1 of this report, were influenced by the report of the Society for Professionals in Dispute Resolution (SPIDR)4 Ensuring Competence and Quality in Dispute Resolution Practice (1995). SPIDR is an international association but is based in the United States, and the bulk of its membership is from North America.

3.12 In the United States, ADR organisations have developed several national standards for mediation, for example Model Standards of Practice for Family and Divorce Mediation5, Model Standards of Conduct for Mediators6 and Performance-Based Assessment - a Methodology for use in selecting, training and evaluating mediators.7 The National Center for State Courts (NCSC) and SPIDR, through a grant from the State Justice Institute (SJI), are in the process of developing and publishing principles and policies guiding state courts in the selection, training, qualification and evaluation of neutrals. The National Association for Community Mediation (NAFCM)8, which represents community mediation centres, is currently working on a quality assurance project. The proposed Draft Uniform Mediation Act (see paragraph 3.9) does not limit who may mediate, but a mediator is required to determine whether their impartiality may be affected and to disclose their qualifications if asked by a disputant.

3.13 Canadian organisations similarly have taken an active interest in ADR standards. Family Mediation Canada (FMC) produced in 1995 a report on Practice Standards, Training and Certification of Competent Family Mediators and Standards for FMC Endorsement of Family Mediation Training Programs. In August 2000 the Arbitration and Mediation Institute of Canada and the Canadian Association for Dispute Resolution joined to create a new national body, the ADR Institute of Canada Inc9. The Institute’s certification process is based on sets of competencies for arbitrators and for mediators.

3.14 The Hong Kong International Arbitration Centre (HKIAC)10 and the Hong Kong Mediation Council have developed accreditation systems for general and for family mediators comprising initial training requirements, actual
practice and assessment. Additional requirements apply for family mediators. The objectives of accreditation of mediators are to safeguard the minimum professional standard of mediation practice in Hong Kong, to help the public best utilise the existing mediation expertise in Hong Kong and to encourage further professional advancement.

3.15 In 1994, the Mediators Institute Ireland (MII), a professional association of mediators, established professional standards for mediation and the accreditation of practitioner mediators. The standards provide a general framework for the accreditation of mediators across different sectors. They include entry requirements, structure and content of training courses, accreditation process, establishment of an accreditation board and accreditation of training courses.  

3.16 The United Kingdom’s Lord Chancellor’s Department discussion paper on Alternative Dispute Resolution (November 1999) raised similar issues to those raised by NADRAC. The paper suggested, among other things, that the criteria for approving ADR schemes include training, quality control (monitoring performance of its neutrals), transparency (including complaints) and access. The paper supported self-regulation and noted that codes of practice had been, or were being, developed by several ADR associations. Other developments in the UK include the accreditation of community mediation schemes through Mediation UK, National Family Mediation’s quality assurance processes for affiliated organisations and a nationally recognised level 4 qualification in mediation.

3.17 The Commission of European Communities has recommended a number of principles for bodies with responsibility for out-of-court settlement of consumer disputes. The principles are independence, transparency, adversarial procedure, effectiveness, legality, liberty and representation.

3.18 In Israel, the National Center for Mediation and Conflict Resolution was established in 1998 within the Ministry of Justice. Amongst the Center’s activities are, ‘a proposed amendment to the Court’s Regulations specifying qualification requirements for mediators wishing to be included in the court’s listings, (and) the preparation of professional guidelines for certifying training programs for mediators ... ’

3.19 NADRAC notes that the international situation reflects many of the challenges faced by ADR in Australia, including diversity and differing stages of development. In other federal systems, such as Canada and USA, networks of state and national standards exist side by side. While separate standards are being developed in specific areas of practice, especially in family mediation,
there also appears to be a movement towards greater collaboration across ADR sectors with a view to achieving a greater consistency of standards.

3.20 Overseas bodies have taken a keen interest in this project by NADRAC, and some have commented that ADR in Australia is at a very mature stage in the international context. Australia therefore may need to lead, as well as follow, international developments.

Parallels with standards approaches in other fields

3.21 In examining the development of standards for ADR, NADRAC examined approaches taken in other fields and through organisations facing similar issues and challenges in relation to national standards. Examples of these are psychotherapy and counselling, translators and interpreters, trainers and assessors, and migration agents.

3.22 Like ADR, the field of psychotherapy and counselling has grappled with issues arising from a lack of agreed standards for training and education, diversity, the absence of coordination and a lack of cohesion. Concerns about the possibility of government regulation led to a number of self-regulatory initiatives. Arising out of the Standing Conference of Educators and Trainers in Counselling and Psychotherapy, a national ‘organisation of organisations’ was formed which would allow for organisations that were already setting standards to work together to develop common standards. This led in 1998 to the establishment of the Psychotherapy and Counselling Federation of Australia (PACFA) which now audits members’ ethical code and membership training standards.

3.23 In a similar way to many ADR practitioners, translators and interpreters are often sessional professionals who undertake language-specific work on an ‘as required’ basis, often in statutory contexts and in courts, and with differing skills requirements depending on context. The Federal, State and Territory governments established the National Accreditation Authority for Translators and Interpreters (NAATI) in the early 1980s. It is an independent company that sets and monitors standards of interpreting and translation in Australia. NAATI offers accreditation at different levels of competence, through a system of assessment, including assessment only, or assessment at the completion of approved course of study.

3.24 In a situation comparable to ADR, the practice of vocational training and assessment combines industry specific knowledge with process skills and knowledge. That is, training and assessment are often add-on qualifications
to specialist technical knowledge in a particular field. The national *Trainers and Assessors Body* has developed training packages and competencies for different levels of trainers, from those who occasionally deliver training sessions, through to those responsible for overall course design and management. Workplace assessor competencies also have been developed.

3.25 Like ADR practice, migration agents may be specialised services, or an add on to an existing professional service, such as a solicitor's practice. The Migration Institute of Australia was appointed in 1998 to operate the *Migration Agents Registration Authority*. It replaced the Migration Agents Registration Board. A ‘statutory self-regulation scheme’, the authority registers and initiates disciplinary action against registered migration agents and has recently initiated a new complaints process, which includes provision for mediation. The authority's structure allows one body to have responsibility for the management of industry entry requirements, continued registration and discipline of migration agents. To maintain their registration, migration agents need to meet prescribed requirements for Continuing Professional Development (CPD).

3.26 NADRAC notes parallels between the situation for ADR and the situations for each of the above professional and vocational areas, but is of the view that there is no existing ‘template’ which ADR could automatically adopt. In particular, standards for ADR need to recognise that ADR practitioners have responsibilities to two or more clients who are in dispute and seeking conflicting outcomes.

### 3.2 Government policy context for standards

#### National Competition Policy

3.27 The pursuit of micro-economic reform in Australia led to the signing of competition policy agreements at the meeting of Council of Australian Governments (COAG) in April 1995. The agreement introduced a range of measures, including the application of competitive neutrality principles and the review of all laws that restrict competition.

3.28 National Competition Policy focuses on competition reform ‘in the public interest’, on the basis that community welfare is advanced through increasing national income as a result of improvements in efficiency. Governments, however, have, *some flexibility to deal with circumstances where competition might be inconsistent with the weighting placed by the community on particular*
Related to competition policy is the process of separating the responsibilities of ‘funders’, ‘purchasers’ and ‘providers’ (the ‘purchaser-provider model’), whereby the funder allocates the resources and sets broad parameters and goals for service delivery, the purchaser procures the service through identifying the most cost-effective means for achieving the service required, and the provider is responsible for actual delivery of the service. An example of this separation is the Family Relationships Services Program, where the Attorney-General’s Department funds the Department of Family and Community Services to purchase primary dispute resolution services from approved agencies (see Section 2.4).

Competition policy suggests that a level playing field needs to be maintained between ADR service providers through ensuring that selection and tendering processes are open, fair and transparent. In addition, government agencies which fund or purchase ADR services may need to stay at arm’s length from service provision.

Regulatory Reform

The purpose of regulatory reform is to enable Australia to compete successfully in world markets by eliminating regulatory systems that are unnecessarily complex, and generate delays, inconsistencies and unnecessary costs. In addition, the need to overcome discrepancies in standards between jurisdictions has made the development of national standards a priority. In 1995 the COAG Committee on Regulatory Reform issued Principles and Guidelines for National Standard Setting and Regulatory Actions by Ministerial Council and Standard-Setting bodies. At the Commonwealth level, these principles and guidelines find expression in the Office of Regulatory Review’s (ORR) Guide to Regulations (December 1998). The principles include:

- minimising the impact of regulation, including its impact on competition;
- providing compatibility with international standards and practices, and non-restriction of international trade;
- regular review mechanisms;
- flexibility;
- providing predictability of outcomes, and standardisation of the exercise of bureaucratic discretion.

These principles suggest several features of good regulation, namely that it minimises regulatory burden, follows regulatory impact assessment, quantifies costs and benefits, includes public consultation, provides
accountability, has compliance strategies which ensure greatest compliance at lowest cost to all parties, considers secondary effects, includes standards in appendices rather than the instruments themselves, is performance-based, is drafted in plain language, and is publicly advertised with clear date of effect.

3.32 The principles and guidelines apply to ministerial councils and to intergovernmental standards setting bodies, including bodies established statutorily and administratively to deal with national regulatory problems. The principles and guidelines may also cover the development of voluntary codes and other advisory instruments that give rise to a reasonable expectation that their dissemination and promotion could be interpreted as requiring compliance.

3.33 The Committee on Regulatory Reform has also issued a guide to the operation of the *Trans-Tasman Mutual Recognition Arrangement (TTMRA)* between the Commonwealth of Australia, the Australian States and Territories and New Zealand (1998). This agreement covers, *all occupations for which some form of legislation-based registration, certification, licensing, approval, admission or any other form of authorisation is required by individuals in order to legally practice their occupation*.

3.34 In its discussion paper NADRAC proposed that standards should balance the need for competition, regulation and consumer protection, and did not advocate any national regulatory action or exclusionary standards for ADR. While NADRAC’s charter includes a responsibility to advise the Attorney General on issues concerning ADR standards, it is not in itself a standards setting body.

3.35 While the current project by NADRAC on ADR standards does not constitute the type of action at which regulatory reform principles are targeted, NADRAC nevertheless has taken the principles into account. It also notes that, should regulatory action be proposed by governments in relation to ADR standards, then COAG Regulatory Reform principles, processes and agreements may need to be observed more formally.

**Policy Framework for Codes of Conduct**

3.36 In keeping with the principles of regulatory reform and the Government’s commitment, *to support and foster industry-based cooperative schemes such as codes of conduct developed between industry and consumer groups, designed to guarantee the delivery of quality goods and services to consumers*, the Commonwealth Government Minister for Customs and Consumer Affairs released in March 1998 a Policy Framework for Codes of Conduct.
This policy framework sets out four principles:

- The general presumption is that competitive market forces deliver greater choice and benefit to consumers.
- The Government will consider intervention where there is market failure or a demonstrated need to achieve a particular social objective.
- Effective voluntary codes of conduct are the preferred method of intervention.
- Where a code of conduct is not effective, the Government may assist industry to regulate effectively.

NADRAC has taken this policy framework into account in its approach to the development of standards for ADR.

Service charters

In March 1997 the Commonwealth Government announced the introduction of service charters across Commonwealth Government agencies that provide services direct to the public. Service charters are to be developed by each agency and cover key information about the agency's service delivery approach, and the relationship the client will have with the agency, including:

- what the agency does
- how to contact and communicate with the agency
- the standard of service clients can expect
- clients' basic rights and responsibilities
- how to provide feedback or make a complaint.

Service charters would be relevant to ADR services provided directly to the public by Commonwealth agencies, such as by federal courts and tribunals, commissions and statutory bodies.

Possible types of standards for ADR

Standards may focus on different aspects of service quality. These include the appropriateness of ADR practices adopted, the competence of the individual practitioner who conducts the ADR process, and the quality of the organisation that provides the facilities which support the ADR process and practitioner.
3.42 The following sections group possible forms of standards according to whether they focus on practices, practitioners or organisations. Standards for practices include codes, benchmarks, agreements, models and exemplars. Standards relating to practitioners include training, education and assessment requirements, and processes for selection, supervision, professional development and discipline. Standards for organisations include quality management or quality assurance systems, service charters and various recognition processes.

Standards for practices

3.43 As paragraph 3.2 shows, standards for practices are the most common form of standards used in ADR and have the broadest applicability across different ADR contexts as they may include, or be included in, standards for both organisations and practitioners.

3.44 Standards for practices may relate to individual behaviour and ethics, to schemes and programs, to organisational policies and procedures or to underpinning processes and methodologies. They may be:

- highly specific or general statements of principles or philosophy
- minimalist (lowest acceptable standards) or aspirational (best practice)
- normative (prescribing certain practices) or exemplary (suggesting certain practices)
- expressed in positive terms (what to do) or negative terms (what not to do).

3.45 Standards for practices take a number of forms, including codes, benchmarks, agreements, models and exemplars, each of which serves a different purpose. A code of practice offers a degree of consistency in what consumers may expect from ADR service providers, an important factor in consumer satisfaction with ADR (see Section 2.5). Benchmarks provide means for comparing ADR services in those sectors where practice is well developed, but may not be as useful in diverse and emergent areas of practice. Agreements provide means for enforcing other standards or developing standards that are unique to a particular dispute. A model provides ADR service providers and standards-setting bodies with a ready made product and enables particular standards to be adopted without the need for each service provider or body to develop their own. Exemplars encourage information sharing in ADR and assist continuous development of good practice, especially if a clearinghouse for ADR were to be established in the future.
Codes

3.46 Codes set controls or boundaries about acceptable or desirable practice (see definition at paragraph 1.46). The analysis of current ADR standards at Section 3.1 showed that codes of practice, professional conduct or ethics are used voluntarily by many ADR service providers. The concept of a code is strongly supported in responses to NADRAC’s discussion paper (see Appendix B).

3.47 Codes may be voluntary or mandatory in nature, and may involve direct or indirect sanctions for non-compliance:

- A code may take the form of an internal written statement applying to the individual service provider, without any externally imposed sanctions.
- A code also may form part of a contract for the provision of services, in which case a breach of the code becomes a breach of the contract (see paragraph 3.56).
- A code may be developed and adopted by an industry or profession, and where breaches occur, involve sanctions, such as loss of membership, licensing or recognition.
- Compliance with a code may be used as evidence of compliance with legislation.
- Regulations and other legislative instruments may refer to, or incorporate directly, codes of practice.

3.48 Voluntary codes are consistent with the regulatory reform policies outlined at paragraph 3.37. The effectiveness of voluntary codes depends on the commitment of organisations, practitioners, professional associations and industry groups to their enforcement. The development of voluntary codes, therefore, requires extensive consultation as well as clear benefits to providers.

3.49 Mandatory codes of practice are more readily enforced than voluntary codes, but involve less control than direct regulation. The advantages of mandatory codes over direct regulation are that they provide greater flexibility, can be more readily updated, can deal more effectively with technical matters and involve greater cooperation between government and industries (or professions).

Benchmarks

3.50 Whereas codes set the boundaries or rules about practices, benchmarks attempt to provide relative measures of good practice (see definition at
They typically are not associated with formal sanctions or penalties in the way codes are, but provide measures of comparative performance and may therefore guide consumer choice, public funding, management decisions and professional development.

As a measure of comparative performance, a benchmark could be ‘world best practice’ (however defined), comparison with a similar body or benchmarking ‘partner’ (similar to peer review), comparison with one’s own previous performance, an agreed target or an agreed set of performance criteria.

Benchmarking appears to be most useful as a management tool for ensuring the most effective use of resources. Benchmarks have been developed for industry dispute resolution schemes (see paragraph 3.4) but may be difficult to implement in new and emergent fields where there are few points of comparison. The lack of comprehensive data on ADR effectiveness limits the usefulness of a benchmarking approach in relation to many ADR services. Benchmarking therefore may be most relevant to organisations and practitioners who are at the more advanced stages of development where incremental improvement is required.

**Agreements**

Expectations, indemnities and standards can be agreed between the client(s) and service provider by way of a formal agreement prior to the ADR process being undertaken. Formal agreements including the above also may be made between government and ADR service providers for the provision of services to the public.

Many ADR service providers have Agreement to Mediate forms, consent forms or contract clauses. These agreements may relate both to party behaviour and to practitioner and service provider responsibilities. They provide a means to ensure that parties are aware of what ADR can and cannot offer and to assist in clarifying the ADR process and the rights and duties of participants.

The use of comprehensive individually negotiated agreements to cover the responsibilities of parties and practitioners may be particularly useful in complex or novel ADR processes conducted over an extended time with sophisticated parties. Commercial, planning and environmental disputes are examples of this. Recent court decisions, however, have illustrated that such dispute resolution clauses and agreement may have limited enforceability and would not override common law or legislative rights.
Chapter 3 — Options for ADR standards

3.56 Formal agreements provide means for enforcing other standards through normal civil remedies. For example, a contract may include a requirement to comply with a code of practice and any non-compliance may then constitute a breach of contract.

Models

3.57 Model codes, rules, assessment criteria and curricula provide consistency in minimum requirements where there is limited authority to prescribe standards centrally. Service providers are free to adopt the models in whole or in part or to develop their own approaches consistent with any legislative, industry, funding or licensing requirement.

3.58 As responsibility for ADR crosses all levels of government as well as the non-government sector, the development of model standards provide useful means for encouraging greater consistency in standards without involving centralised control.

Exemplars

3.59 A final option in standards for practices is the development and dissemination of examples of good practice, such as case studies. This approach does not attempt to provide guidance on how a service should operate, but merely gives instances of successful approaches adopted by others. This can also be linked to awards recognising good practice (for example, SCRAM – School Conflict Resolution and Mediation – competitions conducted in several states).

3.60 Such an approach, however, raises the questions of what constitutes success, what examples should be selected and who should select them. Variations in the approach may get around these problems. For example, a clearinghouse system could be used where all contributions are accepted and disseminated without evaluation. Alternatively, evaluations of practices (whether positive, negative or mixed results) could be disseminated.

Standards for practitioners

3.61 The options available for standards for individual practitioners are outlined below. These standards include requirements in relation to education, training, assessment, selection, supervision, professional development and discipline.
3.62 ADR education and training crosses the schools, vocational education and training, higher education and adult and community education sectors, and is also conducted by ADR organisations themselves. A performance-based approach to education and training that can apply in each of these sectors therefore is desirable. In Section 5.3 of this report, possible knowledge, skills and ethics for ADR practitioners are described which may be included in relevant curricula and competencies developed through different education and training systems.

3.63 Selection processes for ADR practitioners are based on the needs of particular ADR service, and many criteria may be legitimate in ensuring the acceptability and effectiveness of ADR to different consumer groups. NADRAC suggests, however, that selection processes are fair and transparent, and ensure that parties have access to the best available practitioners.

3.64 Supervision, professional development and discipline are dependent on the nature of the engagement of the practitioner, which varies enormously across areas of ADR practice. Service providers therefore need to analyse their own contexts to determine the most appropriate mechanism (see Section 5.1 of this report).

Education, training and assessment

3.65 There is an enormous range of options for standards applying to education, training and assessment of practitioners. Many of the options outlined below already apply in different sectors of ADR. These may take the form of formal qualifications, short courses, assessment guidelines, independent accreditation and non-accredited training options.

Formal qualifications

3.66 Formal qualifications are tied to the Australian Qualifications Framework (AQF) (see Table 5). The AQF provides benchmarks for all qualifications from higher school certificate, vocational certificates and diplomas through to higher education post-graduate awards.

3.67 A qualification requires an approval or endorsement process through existing education and training structures. In the vocational education and training sector, endorsement involves industry training advisory bodies, the National Training Framework Committee, and training and education authorities in each State and Territory. In the higher education sector endorsement is provided by the individual institution.
3.68 A qualification tied to the AQF has a number of advantages. These include articulation and portability across different sectors and jurisdictions, eligibility for public education funds, availability of accepted benchmarks and recognition systems and, in the case of the vocational education and training system, formal recognition of competencies gained through work experience.

3.69 A requirement for a formal qualification in ADR, however, could be excessive, especially where ADR is one of many functions performed by the practitioner. Qualifications can be cumbersome and complex to develop and maintain. Such a requirement may also make ADR more of a ‘profession’ and create greater exclusivity (see paragraph 2.8).

Table 5 — Australian Qualifications Framework

<table>
<thead>
<tr>
<th>Schools</th>
<th>Vocational education</th>
<th>Higher education</th>
<th>AQF level</th>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Doctorate</td>
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<td>Masters</td>
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<td>Graduate Diploma</td>
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<td>Graduate Certificate</td>
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<td>Bachelors</td>
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<tr>
<td>Advanced Diploma</td>
<td>Advanced Diploma</td>
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<td>6</td>
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<tr>
<td>Diploma</td>
<td>Diploma</td>
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<td>5</td>
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<td>Certificate IV</td>
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<td>Certificate II</td>
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<td>2</td>
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<tr>
<td>Higher School Certificate</td>
<td>Pre-vocational</td>
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</table>

Accredited short courses

3.70 An alternative to a formal qualification is a short course or module(s) accredited with State and Territory training authorities, or with universities. Such short courses could be stand-alone courses or could form modules or units drawn from a qualification. They usually lead to a statement of attainment.

3.71 Short courses may be more suitable where ADR is a supplementary or non-specialised function performed by a practitioner. If accredited and linked to
the AQF, they also have the advantages of national recognition, articulation and portability and (potentially) eligibility for public education funding.

Assessment systems

3.72 Recent reforms to the Vocational Education and Training system provide the potential for an outcome driven approach which relies on nationally recognised competencies and assessment guidelines. This approach does not define curriculum or learning strategies, but measures competency directly. It does not matter whether one gains the skills through formal training in any sector, through life experience, through work experience or through self-education.

3.73 This approach could combine consistency in the appropriate level of performance with flexibility in the means for acquiring competence. Such an approach, however, is relatively new in the education and training system, is not well understood and relies on well-developed benchmarks agreed to by all relevant sectors.

Independent credentials or accreditation

3.74 Instead of seeking formal approval through existing education and training infrastructure, individual organisations or professional groups could establish their own accreditation and approval mechanisms for their own courses or for courses provided by others. This is a common arrangement in ADR at the moment.

3.75 Such an approach gives the organisation or professional association the greatest degree of control over courses. Lack of consistency across organisations, however, may limit the degree of recognition and portability of any credential gained.

Non-accredited education and training

3.76 A great deal of ADR education and training is not accredited through any process and has no assessment component. Many adult and community education programs and in-house training programs do not attempt to measure performance but aim to promote personal, community or organisational development. For example elements of ADR may be included in programs to develop the capacity of individuals or organisations (such as schools) to manage conflict and resolve disputes.

An integrated model

3.77 There are a number of means by which ADR education and training could integrate the alternatives mentioned above. These options, which may require
mutual recognition across sectors and agencies, have already been considered or implemented in some places:

- As vocational education and training has a schools component, peer mediators at higher levels of secondary school could gain formal credit for their mediation training.
- Professionals with higher education qualifications such as law, social work or psychology may go on to a practical vocational course in ADR to acquire relevant work skills.
- Modules may be developed at the Certificate or Diploma level, which then are recognised as units (or parts of units) in a post-graduate course.
- A professional qualification may include a practical work-based unit or module.

**Selection systems**

3.78 Training or education in ADR does not necessarily lead to selection as an ADR practitioner, and many practitioners are engaged in an ADR role without any prior education or training in ADR. Individuals may complete ADR education and training and then gain selection as an ADR practitioner. Alternatively, practitioners may be selected on the basis of personal attributes and experience and subsequently provided with training (as in the case of community- and school-based mediation schemes).

3.79 While practitioners may be selected on the basis of their knowledge, skills and ethics alone, many service providers have other considerations in relation to selection. These include:

- the maintenance of diversity in panels of practitioners (as in the case of community mediation schemes);
- the acceptability of the ADR practitioner to potential parties and referrers;
- personal knowledge of, or confidence in, the practitioner;
- prior requirements to be a member of another professional association;
- provisions that attach responsibility for ADR to an organisational or statutory role.

3.80 Because of the diverse contexts for ADR, NADRAC has not attempted to specify processes for selecting ADR practitioners. Principles of fairness and transparency, however, should be observed. Moreover, as ADR service providers need to ensure that parties have access to the best available
practitioners, criteria for selecting practitioners should be directly related to the quality or accessibility of the service.

**Professional development and supervision**

3.81 Responsibilities for the supervision and professional development of ADR practitioners vary according to the nature of their engagement. An organisation that employs a practitioner has an obligation to monitor performance and ensure that the practitioner continues to maintain and develop their competence. A private professional is more likely to be covered under a professional association's rules of membership, supervision, continuing professional education, complaint handling and discipline. An individual practitioner also may be retained by contract, with certain obligations formally agreed with the client.

3.82 Options for the ongoing supervision and professional development of practitioners include regular skills audits, re-accreditation processes, requirements to do a certain amount of work (for example, conduct a minimum number of sessions per annum), mentoring and co-mediation models, clinical supervision and continuing professional education (CPE) requirements.

3.83 Some of these requirements are activity-based (for example, minimum number of hours of continuing education or supervision, number of sessions done) while others are performance-based (for example, review of outcomes of sessions, skills audits, performance improvement, re-assessment). Performance-based requirements would be preferable in most circumstances, since they relate directly to the maintenance and development of practitioner competence. As performance-based requirements may be difficult to administer, however, activity-based processes may be appropriate where a link to actual performance can be demonstrated.

3.84 A lifelong learning approach integrates supervision and professional development with education and training. For example, a practitioner could undertake a series of short courses, in parallel with continuing practice on the job and receive progressive recognition of their increasing competence. Such an approach has considerable benefits in promoting continuous learning and improvement in ADR practice.

**Discipline**

3.85 Disciplinary processes for the management of a practitioner's failure to comply with standards depends on the nature of engagement and on the industrial, professional or contractual arrangements in place. Discipline could
take the form of counselling, reprimand, loss of pay, termination of employment, loss of professional membership, being removed from a list, not receiving payment as contracted, or legal liabilities, such as for negligence or breach of contract.

3.86 While discipline should aim primarily to protect consumers, the rights of the practitioner also need to be respected. Commonly accepted principles for the application of discipline include natural justice, transparency, the right to review or appeal a decision and the use of graduated and sequential steps from counselling and reprimand through to penalties and termination. These matters may need to be taken into account by service providers in adopting or developing a code of practice (see Section 5.2 - complaints and compliance).

**Standards for organisations**

3.87 Standards for organisations assume that effective management processes will ensure appropriate outcomes for consumers and for other stakeholders (for example, funding bodies). The organisational approach recognises that the quality of service does not depend solely on the competence of the practitioner, but depends also on the procedures, facilities and management systems surrounding the practitioner. Examples of quality systems, processes and contracting systems for organisations are described in the sections below.

3.88 Quality systems would enable accreditation of ADR organisations by applying criteria to determine the appropriateness of those organisations' standards for practices and practitioners. Quality systems, however, can be quite resource intensive. Most are linked either to a government funding or purchasing process, or to a recognition or registration process, with potential benefits for the organisation concerned. A system that covered strictly commercial operations may require additional benefits if it were to be adopted.

3.89 Quality systems have limited application for ADR. ADR quality systems may be workable for established and financially viable organisations with well-developed management structures and for which ADR was 'core business'. Such systems may be excessive for organisations that provide ADR as a supplementary service, for new and innovative services and for service providers that lack substantial management experience (for example, local community groups). Quality systems do not apply readily to sole ADR practitioners, although there is potential for accrediting bodies or professional associations supporting such practitioners to undertake a quality assurance process.
3.90 Other systems for organisational standards have narrower uses. Competitive tendering and similar processes for selecting organisations tend to be limited to the particular program under consideration. Service charters apply to Commonwealth service providers but do not necessarily apply across all organisations.

Quality systems

3.91 There are many variations in quality systems which are described in terms such as quality control, quality assurance, quality management, ‘TQM’ (‘Total Quality Management’) and continuous improvement. Quality systems reflect different management theories\(^{28}\) and the type of service or organisation for which the quality system applies.\(^{29}\) In some systems, the emphasis is more on the quality control, that is, preventing ‘defects’ or failures in service delivery. In others the emphasis is more on quality improvement, that is, bringing about continuous systemic change through innovation and creativity.

3.92 Quality systems are in place for many industries and sectors, for example, education\(^{30}\) and health care.\(^{31}\) A quality system already applies to Commonwealth government contracted family relationship services, such as mediation, as outlined in paragraph 3.5.

Procedures

3.93 Assessment, auditing and accreditation processes for organisations typically involve the following steps:

- Resources and training are provided to organisations seeking accreditation in order for them to undertake the management change processes necessary for compliance.
- Self-assessment tools are provided so that organisations can judge for themselves whether they are ready for an external audit.
- An external auditing and assessment process is undertaken. The auditing body may be a private QA body, or a government agency, and may require a visit by an assessment panel comprising industry ‘peers’ and stakeholders.
- After the assessment the organisation may be recommended for formal accreditation by the appropriate body.

3.94 Funds are required to cover the developmental costs of quality systems. Once established the schemes are expected to be self-funding through fee-for-
service arrangements and industry subscriptions. The ongoing costs to organisations vary according to the scheme and the size and complexity of the organisation seeking accreditation. There are costs associated with accreditation and auditing procedures, with information systems, and with the preparation, documentation, training and staff time required for organisations to gain accreditation.

Other systems for organisations

3.95 Organisations can also gain recognition of their standards through such systems as competitive tendering processes or merit selection of ‘preferred suppliers’. Statutory organisations, peak bodies and professional associations may also be recognised by regulation or administrative discretion. Service charters, such as those described in the previous section, apply to Commonwealth service delivery agencies.

Maintaining and enforcing

3.96 Most quality systems involve a process of initial accreditation, then a regular auditing and re-accreditation cycle, for example, one to three years. ‘Spot audits’ may also be involved. The penalty for not meeting standards is usually loss of accreditation, often on a temporary basis while remedial action is undertaken. Quality systems usually have an in-built complaints mechanism, in that organisations are expected to have a system for managing client feedback that includes a complaints policy.

3.97 Contractual arrangements may also be used to ensure standards are maintained, and contracts may be terminated where there is a breach. Funding arrangements have accountability and reporting mechanisms that serve a similar purpose. In the case of government service providers, compliance is effected through a variety of administrative and statutory mechanisms.

3.4 Professional, organisational and practice models

3.98 The emphasis on standards for practices, for practitioners and for organisations may vary in different contexts. The following approaches illustrate these differences.
A framework for ADR Standards

- A practices approach would emphasise the appropriateness of practices adopted. Guidelines or codes would provide consistency in practices, and reduce reliance on the competence of the individual practitioner or quality systems of the organisation.

  The practices approach may be most suited to practitioners and to organisations that have ADR as an add-on to their core business. Examples of these include non-ADR professional associations and statutory agencies.

- A professional approach would place the primary responsibility on the individual practitioner. The individual would be expected to choose or develop appropriate standards of practice. Their organisational context would be of secondary importance.

  This approach would be most appropriate to those with specialised ADR qualifications who work autonomously, often by direct engagement by the clients or client organisation. Examples of these are environmental and public policy facilitators, commercial mediators and ADR consultants involved in organisational development.

- An organisational approach would focus on the quality of management systems in place. These systems would be expected to ensure that an appropriately qualified practitioner is used for the job, and that they are properly trained and supervised. The organisation also would be expected to develop appropriate practices and procedures for service delivery.

  This approach may be suited to organisations that specialise in ADR and have well-developed structures for recruitment, training, supervision, monitoring and service development. Examples of these include community mediation services, family mediation services, and private mediation and dispute resolution organisations.

3.99 An approach based on practices applies most broadly across the diverse contexts in which ADR is currently practised, especially given the lack of specialised infrastructure for ADR. Appropriate codes of practice would help to guide and protect consumers and ensure that ADR service providers identify means for ensuring practitioner competence and service quality. Codes may also be used to supplement existing professional and organisational standards, and contractual arrangements (see Section 5.2).

3.100 ADR service providers need to determine the appropriate type and level of practitioner competence to take account of the context of service provision. The knowledge, skills and ethics standards, which are described in Section 5.3 of this report, may be used to develop education, training, assessment
and supervision processes, and to guide the selection, accreditation and engagement of individual practitioners.

3.101 As ADR evolves further, ADR organisations may assume a greater role in, and seek formal recognition for, ensuring practitioner competence and service quality. For example, recognised ADR professional associations increasingly could accredit and supervise individual ADR practitioners, and ADR organisations providing direct services could gain increased recognition through quality accreditation processes such as those described in this chapter.

Table 6 — Summary of options for standards

<table>
<thead>
<tr>
<th>Practices</th>
<th>Attaining Standards</th>
<th>Maintaining Standards</th>
<th>Enforcing Standards</th>
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</thead>
<tbody>
<tr>
<td>Practices</td>
<td>Codes</td>
<td>Supervision</td>
<td>Voluntary/mandatory</td>
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<tr>
<td></td>
<td>Benchmarks</td>
<td>Professional development</td>
<td>Regulations/penalties</td>
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<td></td>
<td>Agreements</td>
<td>Re-accreditation</td>
<td>Contractual arrangements</td>
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<tr>
<td></td>
<td>Models</td>
<td>Skills audit</td>
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<td></td>
<td>Exemplars</td>
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</tbody>
</table>

| Practitioners | Pre-requisite qualifications | Supervision | Disciplinary mechanisms |
|              | Other credentials | Professional development | Loss of accreditation |
|              | Short course | Re-accreditation | Loss of work |
|              | Selection (pre- or post training) | Skills audit | Legal remedies |
|              | Accreditation | | |
|              | Competency assessment | | |

| Organisations | Quality systems | Quality review or audit | Built in complaints mechanisms |
|              | Selective systems | Reporting | Loss of accreditation |
|              | Service charters | Accountability | Loss of funding |


4 http://www.spidr.org
5 Contained in Family Court Review (January 2001), vol 39 no. 1, pp. 124–134
6 American Bar Association (undated) *Model Standards of Conduct for Mediators*.
8 http://www.nafcm.org
9 http://www.amic.org
10 http://www.hkiac.org
14 http://www.mediationuk.org.uk/
15 http://www.nfm.u-net.com/menu.htm
16 http://europa.eu.int/comm/consumers/policydevelopments/acce_just/
17 Personal communication, December 2000.
25 ibid.
29 The International Standards Organisation (ISO) and Standards Australia have a series of quality standards for different types of organisations (e.g., production/manufacturing, design, service, etc.) The ISO 9000 series is most relevant to services such as ADR.
30 In order to issue a qualification or statement of attainment in any nationally recognised training, a training organisation must be registered with the relevant State and Territory training authority. The registration process is underpinned by a quality auditing and accreditation process, which differs from jurisdiction to jurisdiction. In Queensland, the ISO 9000 system is used, while other jurisdictions (e.g., WA, ACT) use a derivative of the AQc system.
31 There are several quality systems in the health sector. Most jurisdictions require organisations receiving health care funding to undergo a quality accreditation process. The Quality Improvement Council (QIC), formerly CHASP, has developed a national system for quality accreditation especially targeted to community health settings. The Council produces a set of core and elective quality modules. The core
modules cover standards that all organisations would need to observe, while elective modules cover certain types of specialised health care services (such as alcohol and drug services, etc.). The auditing and accreditation process is conducted by regional services on a fee-for-service basis. The QIC also enter into mutual recognition arrangements with other quality bodies.

The Australian General Practice Accreditation Limited (AGPAL), which consists of member organisations (RACGP, AMA, ADGP, AAGP), provides accreditation for general practitioners as a way of assessing and recognising the quality of general practice against professionally developed and trialled standards. It involves a 3-year cycle comprising self-assessment, survey visits and continuous improvement. The Commonwealth Government's Practice Incentives Program (PIP) links funding to continuous improvement under the General Practice Accreditation (GPA).
Chapter 4
The way forward

This chapter summarises the key issues that have emerged in NADRAC’s consideration of standards for ADR, taking into account the diversity of ADR outlined in Chapter 2, current and possible types of standards suggested in Chapter 3, and the responses to NADRAC’s discussion paper reported in Appendix B.

NADRAC in this chapter describes a framework for the ongoing development of standards for ADR, including guidelines for developing and implementing standards, a requirement for a code of practice which takes account of essential areas and enforcement of that code through appropriate means. It makes further recommendations in relation to complaint handling, self-regulation, statutory provisions, accreditation, means for attaining and maintaining practitioner standards, infrastructure, resources and improved data quality.

Specific policy recommendations are made in relation to each of these issues. While many of these recommendations concern areas of Commonwealth responsibility, others are directed to the diverse range of bodies which have an interest in, or responsibility for, the development of standards for ADR.

4.1 The need for a framework for standards

4.1 NADRAC believes that there are strong arguments for having ADR standards in place. These arguments have been raised in Chapter 2 of this report and supported in the responses to NADRAC’s discussion paper (see Appendix B). In summary, ADR standards would promote the following objectives:

• to enhance the quality and ethics of ADR practice
• to protect consumers of ADR services
• to facilitate consumer education about ADR
• to build consumer confidence in ADR services
• to improve the credibility of ADR as an alternative to litigation
• to build the capacity and coherence of the ADR field.

4.2 In its discussion paper, NADRAC advocated a framework enabling service providers to develop their own standards. Such a framework was strongly supported in the responses to the paper (see Appendix B) and is consistent with NADRAC’s assessment of the nature of ADR service provision (see Chapter 2). While the development of standards across all ADR is an ambitious task, NADRAC believes that significant progress can be made by adopting the following approach:

• Treat the development of standards as an evolutionary process requiring long term commitment, not a one-off solution.

• Combine broad guidelines and principles for development, with specific and achievable actions.

• Continuously develop standards at the sector, program and service level to improve the quality of ADR practice, and the credibility and capacity of the ADR field.

• Develop and implement particular standards, contained in a code of practice, to assist in educating and protecting consumers and to build consumer confidence in ADR.

4.3 Responses to the discussion paper also reinforced NADRAC’s position that, because of the diversity of ADR, a single set of prescriptive standards for all ADR would be inappropriate. The diversity of ADR does not diminish the need for standards, but requires standards to be developed and implemented at the sector, program or service provider level, taking into account of the particular context in which they are to apply. Factors to be considered include:

• the likelihood and severity of risks and consequences to consumers of unsatisfactory delivery of ADR services, which vary across ADR contexts;

• levels of consumer choice, capacities by parties to attend to their own interests, and levels of practitioner or service provider responsibility for the outcome of the dispute, which vary across client groups and ADR processes;

• the nature of the work performed, its level of complexity, and the degree of practitioner autonomy and specialisation, which determines the appropriate knowledge, skills and ethics required of individual practitioners;
the community, organisational and professional environment in which ADR services are provided, which affects the respective responsibilities of individual practitioners, service providers, professional associations, referring or mandating bodies, and funding or purchasing bodies.

4.4 Section 3.3 outlined the different forms of standards, which vary in focus and emphasis. Practical guidelines are contained in Section 5.1 to assist ADR organisations, service providers and program developers to choose and implement the form and content of standards most relevant to their context.

Recommendation 1

THAT standards for ADR be developed based on the framework described in this report, comprising guidelines for developing and implementing standards, a requirement for a code of practice which takes account of essential areas and, where applicable, the enforcement of such a code through appropriate means. That developing ADR standards be an ongoing process and recognise the diversity of ADR.

4.2 Codes of practice

4.5 Although standards need to be developed to suit the context in which ADR services are provided, particular standards should apply to all ADR service providers.

4.6 NADRAC has adopted the term a ‘code of practice’ (as defined at 1.46) to describe the means by which service providers address these essential standards. Service providers may use other terms for such standards, for example, codes of ethics, codes of conduct, rules, guidelines, benchmarks, policies and procedures, quality criteria and service charters, which may have the same effect as a code of practice. NADRAC is not recommending that alternative forms of standards necessarily be called ‘codes of practice’, but that they take into account the elements contained in Section 5.2 of this report.

4.7 Codes of practice are a response commensurate with the issues raised by consumers and the risks associated with service delivery. As Chapter 2 of this report outlines, problems and risks experienced in ADR service delivery are associated with parties’ expectations of and preparedness for the process, the degree to which the process and the conduct of the practitioner is consistent with those expectations, the appropriateness of the process for the dispute and the availability of an effective complaints mechanism. The elements of a code of practice, as described in Section 5.2 of this report, address these
issues and minimise the risks of unsatisfactory service delivery.

4.8 Other arguments support codes of practice:

- Codes would complement, rather than compete with, ADR standards currently in place or being developed.
- Codes have proven effective in other fields.
- Codes are consistent with regulatory reform principles (see Section 3.2).
- Codes have the broadest applicability across the whole ADR field, and are less dependent on the particular context in which ADR is practised than are standards relating to practitioner qualifications or organisational capacity (see Section 3.3).
- Codes were strongly supported in the responses to NADRAC’s discussion paper (see Appendix B).

4.9 While individual service providers may wish to develop their own codes, there is considerable potential for ADR associations (see paragraph 2.51) to develop common codes for their members, especially for small organisations and sole practitioners. NADRAC notes that associations such as Let’s Talk have already taken initiatives to develop common codes across ADR service providers.

Recommendation 2

THAT all ADR service providers adopt and comply with an appropriate code of practice, developed by ADR service providers or associations, which takes into account the elements contained in Section 5.2 of this report.

Complaints

4.10 NADRAC regards access to an effective complaints mechanism as an essential element within an acceptable code of practice, and considers improved complaints handling as a priority for the future development of ADR standards. Existing standards for complaints handling, which may be used by ADR service providers, include Standards Australia - *Complaint handling AS 4269 - 1995*, and the Consumer Affairs Division’s *Benchmarks for Industry-based Consumer Dispute Resolution Schemes*.

4.11 As the number of complaints may have as much to do with the effectiveness of the complaint handling system as with the quality of service provided, a proactive and strategic approach to complaints may be required. For example, parties could be advised of a service’s quality requirements and code
of practice, and encouraged to complain where those requirements are not met. Such measures may lead to an increase in reported complaints but this should not be taken necessarily as a sign of a worsening problem.

4.12 While the primary responsibility for managing complaints should rest with the service provider, many impediments prevent consumers from taking a complaint directly to the provider. Ideally, complaints systems applying to ADR services should provide access to a second tier complaints process conducted by an independent person or body.

4.13 NADRAC is undecided on whether such a second tier process would best be implemented through existing structures or through a new body. While an ADR Ombudsman may be a desirable option, NADRAC has doubts about the viability of such a body, given the wide range of environments for ADR, the lack of a clearly recognised industry body or professional association, and inherent difficulties in relation to complaints about ADR (see paragraph 4.72).

4.14 Continued consideration of the establishment of an ADR Ombudsman is required as progress is made in relation to other recommendations contained in this report. This issue is examined in more detail under the section on new and existing infrastructure.

4.15 Targeted research, evaluation and data collection may be required in specific areas where particular issues or complaints are identified. As the complaints processes outlined at Recommendation 3 are implemented, areas of ADR practice in which problems arise could be monitored. Specific research in these areas should then be undertaken to determine the nature and scale of the problems, and to suggest appropriate means for addressing them.

**Recommendation 3**

THAT ADR service providers have in place an appropriate and effective system for managing complaints. That such systems be based on appropriate complaint handling practices and take into account the elements of a code of practice, as outlined in Section 5.2 of this report.

**Recommendation 4**

THAT ADR organisations examine the feasibility and appropriateness of establishing an ADR Industry Ombudsman or similar body, in order to provide a second tier complaints system. That this examination take place in the context of consideration of a possible peak ADR body, as outlined in Recommendation 19.

continued…
Recommendation 5

That ADR organisations monitor the complaints arising from the processes described at Recommendations 3 and 4, identify any problem areas and undertake further consultation and research on the need for additional standards in such areas.

4.3 An effective regulatory environment

Building compliance

4.16 Recommendation 3 proposed that ADR service providers adopt and comply with an appropriate code of conduct. The issue of compliance raises questions of how a code would be enforced, the role of government in ensuring compliance, the nature of any penalties for non-compliance and the role of regulation generally.

4.17 In its discussion paper, NADRAC described the options for regulation, which ranged from no regulation, self-regulation and quasi-regulation through to explicit government regulation. Section 3.1 of this report outlined current regulations and standards for ADR and Section 3.2 outlined the regulatory reform principles adopted by the Council of Australian Governments. A requirement for an appropriate code of practice is consistent with a self-regulatory approach to ADR standards, which was advocated by NADRAC in its discussion paper and supported by responses to the paper.

4.18 In NADRAC's view there is little justification for increased explicit government regulation across all ADR practices. There is little direct evidence of consumer dissatisfaction with the quality of ADR services. Although anecdotal evidence exists of poor practice, most studies indicate generally high levels of satisfaction among parties using ADR.

4.19 Current problems with ADR relate to consumer understanding and acceptance of ADR, fragmentation of the ADR field and a possible oversupply of practitioners. Government regulation would be ineffective in addressing these issues.

4.20 It is also apparent that much ADR is already subject to forms of state control. This control may take the form of laws, regulations and rules specifically covering ADR. Indirect control also occurs through ADR being managed by an existing statutory body, or being directly funded by government.
4.21 Additional government intervention may be needed in specific areas of practice, for example, family disputes involving violence, tenancy and other disputes where particular groups in the community would suffer disadvantage if specific protections were not provided. Conversely, if some areas are already over-regulated, de-regulation would be desirable. Moreover, as ADR develops, the need for external regulation may change.

4.22 While explicit regulation across the ADR field may not be justified, there is a significant public interest in promoting community acceptance of ADR, and there are significant risks associated with unsatisfactory ADR service provision. Market principles do not readily apply to much of ADR, due to the lack of consumer and public knowledge about ADR, the one-off nature of most ADR service provision, mandatory requirements concerning the use of many forms of ADR, and the fact that ADR practitioners have responsibilities to clients seeking conflicting outcomes. It is unlikely that a totally free market would build community confidence in ADR, promote the use of ADR or address the risks associated with ADR service provision.

4.23 NADRAC acknowledges that self-regulation will apply only to service providers who voluntarily adopt common standards, and notes the following areas where self-regulation may not apply. Some ADR service providers, whether individuals or organisations, may choose to ignore accepted standards of ADR practice (these were described in the responses to NADRAC’s discussion paper as ‘lone rangers’). NADRAC believes that this issue is best addressed by ensuring that self-regulatory processes are open and inclusive, and by continually encouraging ADR service providers to become part of a self-regulatory process though the strategies recommended below.

4.24 NADRAC does not propose any regulatory action that would carry criminal or civil penalties to non-compliance with a code. Any such penalties would be difficult to police and would be unlikely to build effective compliance. The Commonwealth, however, can support self-regulation and encourage ADR service providers to adopt and comply with a code through other means.

4.25 The Commonwealth can play a direct role in ensuring compliance with an appropriate code of practice through its own contractual arrangements. Commonwealth agencies provide ongoing funding for a range of ADR services and engage ADR service providers on an ad hoc basis. As outlined in Section 3.3, NADRAC considers that contracts provide an effective means for ensuring that essential standards are attained, maintained and enforced. Thus a contract for the provision of ADR services could include a clause requiring adherence to an appropriate code of practice. Any breach of that
code would be a breach of the contract for which civil remedies would be available.

4.26 The Commonwealth also enters into agreements in which ADR may be provided indirectly, such as through an ADR clause for the resolution of any disputes arising in relation to the contract. The Commonwealth can ensure that any service provider engaged through such arrangements adopt and comply with an appropriate code of practice.

4.27 The Commonwealth can encourage other levels of government and statutory organisations to adopt an appropriate code as a requirement of ADR service provision, within their respective areas of responsibility.

4.28 Strategies for building acceptance of a code of practice in the private sector are outlined below:

- Consumer information and education initiatives may encourage individual clients and industry groups to require ADR service providers to adhere to an appropriate code of practice. Such initiatives, which could be conducted by government, professional and industry bodies, would encourage clients to choose providers who comply with self-regulation.

- Government, professional and industry bodies may grant preferred supplier status to those with an appropriate code in place.

- Common law and consumer protection provisions may address unsatisfactory practice, with statutory protections (see paragraph 4.36) limited to providers with an appropriate code in place.

- As compliance with an appropriate code is likely to reduce the risks associated with ADR practice, ADR organisations may be able to negotiate favourable professional indemnity premiums and conditions which are contingent on such compliance.

Recommendation 6

THAT regulation of ADR be based primarily on self-regulation, with the need for greater or lesser regulation to be assessed on a sector by sector basis.

Recommendation 7

THAT compliance by the service provider with an appropriate code of practice form part of any contract entered into by Commonwealth agencies providing for ADR.

continued…
Recommendation 8

THAT State, Territory and local government agencies include compliance with an appropriate code of practice in any contracts providing for ADR.

Recommendation 9

THAT government, industry, professional and consumer bodies undertake consumer education activities which encourage the inclusion of an appropriate code of practice in private contracts for ADR services.

Rights and responsibilities in mandatory ADR

4.29 In its discussion paper, NADRAC suggested that there was greater need for standards where ADR was mandatory, a position also adopted by SPIDR (see paragraph 3.11). While this position was strongly supported in the responses to NADRAC’s discussion paper (see Appendix B) it was questioned in a submission from the Federal Court which was, ‘satisfied with the operation of court supervised mediation (and) confident that it is able to self-regulate adequately, even in circumstances of non-consensual mediation’.

4.30 NADRAC notes that in court-mandated ADR there may be safeguards, such as court oversight of the process, the presence of legal representation and clear options to return to court if the process is unsuccessful. The option to return to court if ADR is unsuccessful does not, however, prevent damage from being done in the first place and does not detract from the responsibilities of mandating bodies to ensure appropriate standards are met.

4.31 Where mandating bodies are courts or statutory agencies, requirements to attend ADR may be expressed in legislation, rules or practice directions. Mandating bodies may also be employing bodies, which require ADR as part of their personnel practices, or industry bodies and professional associations, which require ADR as part of their rules or codes.

4.32 In NADRAC’s view, the extent to which ADR is mandated affects the implementation of standards and responsibility for compliance. In non-mandatory settings, responsibility for standards rests mainly with the service provider. In mandatory situations, both the mandating body and the service provider need to make an assessment of the context, including the risks involved, and take responsibility for the quality of service provided. Mandating bodies therefore need to consider selection, auditing and checking processes to ensure that appropriate standards are set and
maintained. Similarly, government agencies responsible for legislation which requires the use of ADR should ensure that processes are developed to ensure the quality of ADR services delivered as a result of the legislation.

**Recommendation 10**

THAT bodies which mandate or compel the use of ADR give special attention to the need for mechanisms and procedures to ensure the ongoing quality of mandated ADR.

**Reviewing statutory provisions**

4.33 While NADRAC does not see a need for increased government control over ADR service delivery, it noted in Section 3.1 the need for greater consistency and clarity relating to statutory rights and obligations of parties and providers. There are already numerous statutory provisions at the Commonwealth and State and Territory government levels. These relate to matters such as the status of disclosures and agreements made in ADR, the enforceability of ADR clauses, representation and the immunity and liability of ADR practitioners and service providers. These issues also were raised in several submissions (see Appendix B).

4.34 Difficulties arise where different laws and regulations apply different rules for the practice of ADR in a specific dispute. A single dispute involves different laws and may not be confined within State and Territory borders. Parties and service providers may be located in different jurisdictions, and ADR sessions in the one matter may be conducted at different locations. In virtual processes, such as online ADR, statutory coverage becomes even more complex.

4.35 National ADR practitioners and national users such as insurers are faced with differing ADR provisions and court decisions in different jurisdictions. An example of this is the group of cases dealing with the enforceability of ADR clauses. These legal differences create prospective inconsistencies over the rights and obligations of parties and providers in ADR. Those who refer parties to ADR may also be faced with inconsistent legal arrangements. Consistency in relation to such arrangements would generate greater confidence in the provision of ADR services and avoid problems associated with inter-jurisdictional disputes (see Appendix B).

4.36 NADRAC maintains its position (expressed in *Primary Dispute Resolution in Family Law* March 1997), that a case exists for lessening the immunity
provisions for ADR practitioners currently contained in various acts and regulations. The rationale for this is to increase protection for consumers through enabling normal consumer redress mechanisms to apply. As suggested at paragraph 4.28 above, where immunity provisions do apply, they should be conditional on compliance with an appropriate code of practice.

Recommendation 11

THAT Commonwealth, State and Territory Governments undertake a review of statutory provisions applying to ADR services, including those concerned with immunity, liability, inadmissibility of evidence, confidentiality, enforceability of ADR clauses and enforceability of agreements reached in ADR processes. That this review provide recommendations on how to:

(a) achieve clarity in relation to the legal rights and obligations of parties, referrers and service providers, and

(b) provide means by which consumers of ADR services can seek remedies for serious misconduct.

4.4 Attainment of standards

4.37 As Chapters 2 and 3 of this report show, there are diverse models of service delivery and many different forms of standards. Chapter 5 of this report offers a framework for the development of standards in which responsibilities for standards, and the means by which standards are attained and recognised, are determined.

4.38 Responses to NADRAC’s discussion paper, however, indicate the need for general principles in relation to the attainment and recognition of standards. These principles relate to bodies that accredit individuals and organisations involved in ADR, to organisations that select and engage individual ADR practitioners and to individuals and organisations that provide ADR education and training.

Accreditation

4.39 The term ‘accreditation’ is most frequently used in relation to practitioners. Accreditation may also relate to organisations (see, for example, paragraph 3.5, *Family Services Quality Strategy*, and paragraph 3.7, *ACT Mediation Act*), or to programs (see, for example, Section 3.3, accreditation of ADR training and education courses).
NADRAC took account of the suggestions received in response to its discussion paper on the need for broad-based schemes through which ADR organisations could be accredited to accredit practitioners, or through which ADR education and training organisations or programs could be accredited. Such schemes would require recognised government, industry, professional or standards setting bodies, and agreed criteria for accreditation across the ADR field. As such conditions currently do not exist, NADRAC believes that any requirement for accreditation should be determined on a sector by sector basis, depending on the nature of standards developed and the organisational and professional arrangements in place. As structures and benchmarks are developed, however, a broad-based accreditation scheme for ADR may be appropriate in the future (see Recommendation 19).

NADRAC believes, however, that greater clarity and consistency is required in relation to current accreditation arrangements, especially as they relate to practitioners. The lack of consistency across accreditation processes leads to uncertainty over the quality of services provided, and to distortions in ADR training and service delivery. It would be valuable for a common language and principles to be adopted for the various recognition processes for standards in ADR.

In its discussion paper, NADRAC used the term ‘accreditation’ to describe ‘the recognition or approval by an organisation that a person meets certain levels of education, training or performance that the organisation requires in order for that person to practice ADR. It implies some assessment process by the organisation to ensure that the claimed levels of education, training or performance are met’.

In reality the term ‘accreditation’ is used in many different ways. It can refer to a simple listing process without any assessment, to a rigorous process of selection and monitoring based on pre-determined criteria, or to other options in between. This divergence has led to confusion among some consumers about the quality of service provided and, as one submission suggested, may result in inappropriate practices by accrediting bodies competing for training revenue. The range and variability of accreditation processes, as well as the lack of mutual recognition across accreditation schemes, was a major concern raised in responses to NADRAC’s discussion paper, and potentially leads to wasted public and private resources.

Diverse recognition systems have been developed in the higher education system and in vocational education and training, as well as in different ADR sectors. For example:
• A service provider may recognise a training or education provider by accepting practitioners who have completed a particular course accredited by the training or education provider.

• An organisation may directly recognise the competence of a practitioner through a selection process preceding appointment or employment.

• A training or education provider may provide recognition of a practitioner's competence through issuing a qualification or statement of attainment.

• A practitioner may have acquired competence through learning on the job and receive formal recognition through 'recognition of prior learning', or a prescribed 'grandparent' clause.

• A training or education provider may provide a course, but arrange for another organisation to conduct an assessment or issue a qualification.

• An organisation delivering ADR services may itself select, train, assess and accredit its own practitioners.

• A course of study or training package may be recognised, endorsed or accredited by the relevant training authority or professional association.

• An organisation may itself be approved, registered, quality-endorsed or quality-accredited.

• Regulations may specify (and recognise) certain criteria for education and training courses (as in the Family Law Regulations).

4.45 NADRAC does not believe that there should be a single pathway for recognition and notes that different systems have evolved to meet the needs of particular sectors and services (see Section 3.3). A prescriptive approach may create duplication, or inappropriate exclusion of organisations or practitioners who would otherwise be considered suitable. Instead NADRAC provides a framework based on common descriptions and principles for recognition processes and recommends that accreditation bodies work towards greater consistency and clarity in their processes and criteria.

4.46 For the sake of simplicity, it is suggested that recognition processes in ADR be categorised as 'assessment' and 'accreditation', each of which has a different level of responsibility and accountability.

• ‘Assessment’ is a process of collecting evidence and interpreting that evidence to make a decision. That decision may relate to personal, organisational or program performance or suitability. An assessment may serve different purposes, including selection, engagement, employment, the issuing of a qualification, review or disciplinary proceedings and
accreditation. An assessing body or person has a responsibility for ensuring the appropriateness of the assessment process and of the evidence for making a decision. The primary focus of assessment is on the person (or organisation or program) being assessed, at the time the assessment is made. While an assessment may be conducted over time (for example, continuous assessment) and may be reviewed or invalidated, one does not ‘lose’ an assessment in the same way one may ‘lose’ accreditation status.

- ‘Accreditation’ is a process of formal and public recognition and verification that an individual, (or organisation or program) meets, and continues to meet, defined criteria. An accrediting body or person is responsible for the validation of an assessment process or processes, for verifying the ongoing compliance with the criteria set through monitoring and review, and for providing processes for the removal of accreditation where criteria are no longer met. Since accreditation is a form of public recognition, an accrediting person or body has continuing responsibilities to the person (or organisation or program) being accredited, to others it accredits, to other accrediting bodies, to consumers and to the public at large. In relation to practitioners, accreditation processes therefore need to:
  - clearly define the level of competence and responsibility recognised through the accreditation
  - be based on valid and reliable assessment
  - include monitoring, review or audit processes
  - provide fairness to those seeking accreditation
  - be transparent and publicly available
  - be consistent and comparable with similar accreditation regimes.

4.47 Accreditation of practitioners may not be relevant for all ADR schemes, but may be appropriate in situations where a panel or list of practitioners is developed, from which clients, referrers or service providers make a choice.

4.48 NADRAC notes that different organisations apply different criteria for accrediting practitioners, which may preclude automatic recognition of a practitioner accredited by another organisation. The limited extent of mutual recognition is consistent with the diversity of ADR practice and context. Since accreditation implies continuing responsibility for monitoring and compliance, accrediting bodies need to set limits on the numbers of practitioners they can reasonably supervise. This need to limit the numbers on lists also works against automatic mutual recognition of ADR practitioners.
4.49 Nevertheless, it is desirable for accrediting bodies to develop a degree of mutual recognition through common benchmarks, evidence guides, assessment tools or performance indicators, so that wastage of time and resources is avoided. Mutual recognition may be more feasible at the assessment level than at the accreditation level. That is, accrediting bodies may recognise the assessment conducted elsewhere, but conduct their own accreditation process to ensure validity and currency and to satisfy their obligations to their own stakeholders.

Recommendation 12
THAT the need for and nature of accreditation of ADR practitioners, organisations and programs be determined on a sector by sector basis.

Recommendation 13
THAT those responsible for accrediting ADR practitioners:
(a) clearly define the level of competence and responsibility recognised through the accreditation; (b) use valid and reliable assessment procedures; (c) provide monitoring, review or audit processes; (d) provide fairness to those seeking accreditation; (e) ensure that accreditation processes are transparent and publicly available; and (f) provide consistency and comparability with similar accreditation regimes.

Recommendation 14
THAT those responsible for accrediting ADR practitioners develop processes for mutual recognition of qualifications, training and assessment.

Selection and engagement of practitioners

4.50 NADRAC does not prescribe a particular approach to the selection of ADR practitioners. Each selection system is based on the needs of the ADR service and many criteria may be legitimate in ensuring the acceptability and effectiveness of ADR to different consumer groups. NADRAC suggests, however, that selection processes adhere to the general principles of fairness and transparency, and ensure that parties have access to the best available practitioners.

4.51 As noted in Chapter 2 (Table 1 and paragraph 2.86) of this report, the competence of the practitioners in relation to the particular ADR process is a central consideration in service quality and should be the primary
consideration where service providers engage practitioners (see the elements of a code of practice in Section 5.2).

4.52 NADRAC has found no evidence from Australia or overseas to indicate that a particular level or discipline of practitioner qualification is generally associated with greater consumer satisfaction or a higher level of ADR service quality. The knowledge and skills requirements (and, to a lesser degree, ethical requirements) vary widely across different ADR programs, services and sectors, and the possession of a single qualification is an inadequate means for establishing the suitability of a practitioner to conduct a particular ADR process.

4.53 Organisations that engage ADR practitioners therefore need to identify practitioner roles and responsibilities, establish the knowledge, skills and ethics which practitioners require in order to perform these roles and responsibilities effectively, and select appropriate practitioners accordingly.

**Recommendation 15**

THAT processes for selecting ADR practitioners be fair and transparent, and enable parties to have access to the best available practitioners.

**Recommendation 16**

THAT those engaging ADR practitioners clearly establish the knowledge, skills and ethics required through the processes described in Chapter 5 of this report, and that tertiary qualifications not be a universal requirement for ADR practitioners.

**Education, training and professional development**

4.54 Education and training relate to the means by which practitioners acquire relevant knowledge, skills and ethics, and professional development refers to means by which practitioners continue to maintain and develop such standards. The diversity of ADR services means that the training, education and professional development requirements need to take account of the context of service delivery, and the knowledge, skills and ethics required (see Sections 5.1 and 5.3).

4.55 In Chapter 2, NADRAC noted that one of the risks to ADR practitioners and organisations is an oversupply of ADR training resulting in false expectations of practitioner competence or work available (see Table 2).
4.56 Those delivering ADR education and training have a responsibility to communicate clearly to prospective participants the objectives of the education or training program and the extent to which completion of the program may lead to later work as ADR practitioner. NADRAC acknowledges that the objectives of ADR education and training may include personal, community or organisational development, as well as practitioner competence. Where training or education is designed to enable a person to be an ADR practitioner, however, consumers are entitled to have confidence that an assessment has been made of the practitioner’s competence. There are well developed, nationally accepted standards, for example, the workplace trainer and assessor competencies, which can be used as a basis for performance or competency-based education, training and assessment.

4.57 As well as assessing the practitioner competence, ADR education and training programs themselves need to be evaluated to ensure they are meeting their objectives. The appropriate form of evaluation depends on the type, scope and length of the program, and on any contractual or organisational obligations.

4.58 Skills and knowledge are acquired through many ways other than formal training and education. Performance-based assessment, as outlined above, enables recognition of prior learning or current competence, without the requirement to undertake a formal course of study, and ensures that experienced and capable practitioners are not unfairly excluded from practising ADR as the result of any new training or education requirements.

4.59 Professional development similarly should avoid activity-based processes that encourage ritualistic compliance with procedures, or create practical difficulties in meeting threshold requirements. While NADRAC advocates performance-based approaches where possible, such approaches may be more resource intensive and difficult to administer. NADRAC therefore suggests that activity-based approaches may well be appropriate where there is a clear link to performance improvement.

4.60 Many opportunities exist, particularly through the National Training Framework (NTF), for creative and cost-effective ways to link and recognise practical experience, ongoing professional development and formal education across the school, vocational and higher education sectors. The responses to the discussion paper have identified many ADR education and training providers who have developed innovative programs for different sectors, and NADRAC believes such programs should be encouraged and supported (see paragraphs 3.77 and 3.77.)
4.61 There are many ways in which such education, training and professional development can be delivered. The rapid rate of change associated with training reform, along with the emergence of new education and training technologies, means that it would be counter-productive to prescribe a specific means or a particular educational sector by which ADR education and training should be delivered (see Section 3.3). General principles of good practice in ADR education, training and professional development, however, were suggested in the responses to NADRAC’s discussion paper reported at Appendix B. In particular, NADRAC supports approaches that effectively integrate theoretical knowledge with practical experience and application. To achieve this integration, training, education and professional development usually would need to be delivered by individuals or teams which combine theoretical knowledge in ADR, practical experience in ADR and qualifications or competence in education or training.

4.62 As outlined at paragraph 3.84, a lifelong learning approach in which the acquisition of knowledge, skills and ethics is an ongoing process of training, education and personal and professional development, reflects sound educational theory. NADRAC therefore encourages this approach where it is feasible.

Recommendation 17

THAT ADR education and training providers inform participants of the objectives and expected outcomes of the education and training program which they offer, and the extent to which the program may lead to work as an ADR practitioner.

Recommendation 18

THAT education, training, assessment and professional development for ADR practitioners (a) take account of the elements of an appropriate code of practice described at Section 5.2 of this report, and be informed by the knowledge, skills and ethics relevant to the area of practice, as outlined in Section 5.3; and (b) be primarily performance-based, use accepted national standards for education, training, and assessment, including recognition of prior learning or recognition of current competence, adopt best practice learning strategies that integrate theoretical knowledge and practical experience and, where feasible, use a lifelong learning approach.
4.5 Consideration of new or existing infrastructure

Peak bodies

4.63 The need for infrastructure, such as a peak standards body, was mentioned repeatedly in responses to NADRAC’s discussion paper (see Appendix B).

4.64 The development, recognition and implementation of standards could be pursued through existing structures and standard setting bodies, for example, industry training advisory bodies, professional associations or government agencies. Existing structures, however, do not necessarily meet the needs of the ADR field. The very diversity of ADR means that it has no particular allegiance with existing professions, industries or organisations.

4.65 The establishment of a peak body or bodies would greatly assist implementation of many of the recommendations contained in this report. However, the implementation of any of the recommendations in this report should not rely on the existence of a peak body. NADRAC has therefore framed its recommendations in such a way that no new bodies are necessary.

4.66 In NADRAC’s view, the primary impetus for a peak body should come from the ADR field itself. An unsuccessful or premature attempt to establish such a body may impact negatively on the development of ADR in Australia. Despite the attractiveness and potential of an ADR peak body, there are many impediments to its establishment, and NADRAC has doubts about the feasibility and viability of such a body, given the current diversity of ADR. The formation of a peak body itself has problems, given the perceived lack of any person or body with the mandate and necessary independence to act as a facilitator. While many in the ADR field look to government to take on this role, many such initiatives have failed since they are seen as being imposed by government. In NADRAC’s view the role of government should be to support and encourage, but not to lead, an initiative to create a peak ADR body.

4.67 The following issues require clarification in examining the question of a peak ADR body:

- Who would initiate the establishment of such a body? (While many in the consultations looked to NADRAC to take this leadership role, it is clearly beyond NADRAC’s current charter as an advisory body to the Attorney-General.)
Why has such a body not emerged to date? What are the possible constraints and barriers (for example, personal, professional and State rivalries, structural barriers)?

Should it be a body that represented the interests of its members (like a professional association), a federation of existing bodies, or more of a consumer protection watchdog with the interests of consumers at heart?

What should be the governance, structure and representation on a peak body? Should it comprise service providers/practitioners only, or include representatives from consumer and other interest groups? What should be the nature, if any, of government involvement or representation?

How would such a body be resourced? Would government funding be required and, if so, what level and what type? Would seed funding be sufficient? Could it sustain itself via fee-for-service arrangements, for example, through fees for quality auditing and accreditation?

What constraints should be placed on a peak body? Should it be prevented from offering commercial services in competition with its members?

What are the appropriate functions for such a body or bodies? Possible functions are:

- to oversee the development and implementation of standards for ADR organisations and practitioners;
- to provide quality assurance, accreditation or registration for ADR trainers, practitioners, organisations or programs;
- to receive, monitor and publicise complaints about ADR service providers;
- to act as a clearinghouse to collect and disseminate information about good practice in ADR;
- to provide training and ongoing professional development;
- to facilitate or conduct ADR research and evaluation;
- to promote ADR.

To what extent are these functions compatible with one another? For example should one body be responsible for both receiving complaints and promoting ADR? Should separate bodies be established to deal with any incompatible functions?
• Would contributions from fees for service, from industry and professional groups, and from Commonwealth and State and Territory government agencies be required? Under what conditions would the current ADR associations support a new peak body or bodies?

• What would be the costs and benefits of such a body? Who would benefit and who would bear the costs? Is there potential for reducing costs by eliminating duplication in current compliance regimes?

Complaints bodies

4.68 Similar issues arise in relation to complaints bodies, raised in Recommendation 4. A new complaints body, such as an ADR Ombudsman, would address many of the issues raised in this report. Such a body could be associated with an ADR peak body, but could also be a totally separate entity.

4.69 There are doubts about the effectiveness of existing bodies to deal with complaints about ADR. Responses to NADRAC’s discussion paper (see Appendix B) emphasised the need for a complaints body separate from the actual service provider. Existing complaints bodies, however, were not seen as appropriate. For example, legal services ombudsmen/commissioners do not cover non-lawyer practitioners, and there are doubts about their capacity to deal with complaints about lawyers acting as ADR practitioners, especially as ADR does not necessarily involve the practice of law. Similar doubts apply to the appropriateness of existing professional mechanisms in dealing with the ADR aspects of service delivery.

4.70 Models for a specialised ADR complaints body include:

• an industry ombudsman, with dispute resolution functions, advisory powers and the ability to report on complaints to the relevant industry and to make recommendations for improvements;

• a system similar to the health complaints schemes, which sits above and complements professional disciplinary and complaint schemes;

• a quasi-judicial body or tribunal with defined enforcement powers.

4.71 While a specialised body may be a more appropriate option than working through existing bodies, there are a number of doubts about the viability of such a body. Many of the systemic barriers to making complaints about ADR referred to previously in this report at paragraph 2.79 would apply equally to a specialised complaint body, and the current low level of complaints may therefore continue. There are additional challenges applying to an ADR complaints body:
• It may be difficult to separate out a person's grievance about ADR from other aspects of their experience of the justice system, and the actions of the other party.

• Verbally skilled and assertive parties may be more likely to lodge complaints than parties with poor literacy or language skills, or parties who have suffered abuse and victimisation. Recommendations based on complaints may skew standards towards favouring the needs of more dominant groups in the community.

• Complaints received about ADR indicate that some parties are dissatisfied where the practitioner has in fact complied with standards, for example where a mediator has not given advice or taken sides.

• The diversity of ADR service providers, including Commonwealth, State and Territory Governments, community, private businesses and professionals, makes it difficult to establish a clear line of accountability for a complaints body. The purchaser-provider split introduces additional complexity.

Nevertheless, the possibility of an ADR complaints body warrants further examination. As suggested at paragraph 4.12, complaints procedures ideally should provide access to a second tier complaints process conducted by an independent person or body. As service providers implement this suggestion, the viability of a new body, such as an ADR Ombudsman, may become clearer.

Recommendation 19

THAT ADR organisations and practitioners, and government, industry, educational and professional bodies explore the feasibility and functions of a peak body or bodies, and consider the questions concerning a peak body raised in this report.

Effective use of resources

The development and implementation of standards necessarily involve resources, including time and money. These resources may be borne by providers, consumers or taxpayers. The need to be realistic about resources is particularly important as ADR is often a part-time activity and one of numerous functions (see Chapter 2).
4.74 Costs include both development and compliance costs. Development costs are likely to be borne by government agencies, ADR associations and service providers. Compliance costs are likely to be borne by service providers and individual practitioners. Some standards (such as threshold entry criteria) may involve minimal development costs but high compliance costs. Other types (such as practical guidelines and resources) may involve higher developmental cost but lower compliance costs. High development costs lead to reluctance by bodies to support the development of standards in the first place. High compliance costs may mean that the standards developed are ignored or ritualistically applied. Compliance costs may be passed on to the funders and consumers and, as a result, ADR may become less cost-effective and less viable.

4.75 Current compliance costs associated with ADR practice include the time and monetary costs of publicly and privately provided ADR training, quality auditing and accreditation, practitioner supervision, data collection, monitoring, the development and maintenance of lists of approved ADR practitioners, contract documentation and funding accountability and reporting requirements.

4.76 Many of the options for standards outlined in Section 3.3 cost time and money to develop, and may require public or private funding to be viable. Such costs need, however, to be weighed against the public and private resources already committed to compliance. For example, the multiplicity of accrediting bodies, and the lack of mutual recognition across these bodies (see paragraph 4.43), may lead to unnecessary costs for practitioners, organisations and accrediting bodies. A more coordinated structure for the development and recognition of common standards has the potential to reduce total costs. If the costs associated with an effective quality accreditation system were kept to a reasonable level, then the ADR field (including service providers, professional associations, individual practitioners, course participants and government agencies) may be willing to bear the costs of implementation and compliance.

4.77 The recommendations contained in this report have relatively low developmental and compliance costs. More ambitious schemes, for example, a national system for accrediting practitioners or organisations, a national qualification structure for ADR practitioners, or the establishment of a peak body, have many potential benefits, but also involve greater costs and risks. The costs, benefits and risks associated with such schemes, and the willingness of government and ADR bodies to commit resources to such schemes, need to be carefully examined.
4.78 The guidelines at Section 5.1 are designed to assist service providers and program managers to develop cost-effective systems for standards appropriate to their context.

**Recommendation 20**

THAT the resources devoted to the development of and compliance with standards be commensurate with the risks to be addressed and the benefits to be achieved.

### 4.6 Improving data

4.79 At paragraph 4.18 reference was made to the fact that there was little empirical data indicating the need for additional regulatory action by government. This may indicate that ADR generally is performing well, or may simply reflect the inadequate data on ADR (outlined in Chapter 2), which hampers NADRAC’s ability to provide specific advice on the need for standards in particular areas. While there is data on government funded programs, especially on family and community mediation, very little is known of:

- 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
- the effectiveness of different ADR processes.

4.80 The lack of any clear link between suggested standards for ADR practitioners and the outcomes of ADR processes, and the low level of complaints about ADR, make it difficult to specify particular practices or approaches to ADR. Moreover, the lack of agreed success indicators for ADR means that service providers may use different criteria for determining the standards that should apply. For example, a different set of practitioner standards may be developed if success is defined in terms of speed and cost of settlement, as opposed to long term resolution of a dispute.

4.81 Improved research, evaluation and data collection is pivotal to the future development of ADR, including ADR standards. While structural, institutional, technical and human barriers exist to the consistent collection and collation of meaningful data on ADR, there also are many bodies with an interest in effective ADR research, evaluation and data collection. As well as NADRAC itself, these bodies include the Steering Committee on
Commonwealth/State Service Provision, the Australian Institute of Judicial Administration, the Australian Bureau of Statistics, research and academic bodies, statutory agencies and ADR associations. NADRAC therefore believes there is scope for collaborative action to improve data on ADR.

4.82 NADRAC suggests that the formulation and promotion of consistent and comparable activity and performance indicators would provide a means for determining the relative effectiveness of different practices. At the very least, operational definitions of such basic terms as ‘dispute’, ‘case’, ‘termination’, ‘intervention’, ‘resolution’, ‘settlement’, ‘agreement’ and ‘agreement breakdown’ should be commonly accepted and used across the ADR field.

4.83 In addition, the capacity of ADR service providers to undertake both process and outcome evaluation of their programs could be enhanced so that they can continue to develop their standards. Possible initiatives include research partnerships between service providers and universities, and the development and dissemination of practical resources for service providers, such as training for program managers, an evaluation kit or a guide to action research.

**Recommendation 21**

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.

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1 Society for Professionals in Dispute Resolution (SPIDR) (1995) *Ensuring Competence and Quality in Dispute Resolution Practice*.

Chapter 5
Implementing the framework

The previous chapters of this report provide background, conclusions and recommendations in relation to policy on the development of ADR standards. NADRAC recommends (Recommendation 1) that standards for ADR be developed based on the framework described in this report, comprising guidelines for developing and implementing standards, a requirement for a code of practice which takes account of essential elements and, where applicable, the enforcement of such a code through appropriate means. NADRAC also recommends that the development of ADR standards be an ongoing process and recognise the diversity of ADR.

This chapter offers practical guidance on implementing these recommendations. It is directed to service providers (whether organisations or sole practitioners), associations, education and training organisations, accrediting bodies, referring agencies and those purchasing or engaging ADR services.

Section 5.1 suggests issues that may need to be considered in developing standards.

Section 5.2 lists the elements of an appropriate ADR code of practice, which NADRAC regards as essential for all ADR service providers.

Section 5.3 describes possible knowledge, skills and ethics requirements for ADR practitioners.

5.1 Developing ADR standards

This report notes that developing standards for ADR is an ongoing process that must recognise the diversity of ADR. The diverse contexts for ADR are described in Chapter 2 of this report, while Chapter 3 describes options for practice, practitioner and organisational standards.

This section identifies several key issues in the development of ADR standards, and provides guidance to service providers, accrediting agencies, training and education providers and others responsible for developing standards. These issues build on the
principles outlined in NADRAC’s discussion paper on *The Development of Standards for ADR* (March 2000), and were influenced by SPIDR’s report *Ensuring Competence and Quality in Dispute Resolution Practice* (April 1995).

1 What is the context of service provision? *(See Chapter 2)* Issues to be considered include:

1.1 the nature of the disputes and what ADR processes are being provided to address those disputes
1.2 the structure of the ADR services provided (e.g., mandatory/voluntary, government/private)
1.3 resources available to provide and support provision of services
1.4 legal, organisational, industrial or other constraints
1.5 the objectives and expected benefits of the service
1.6 the risks to parties, third parties, practitioners, service providers and the public, associated with service provision
1.7 how success is to be defined and measured
1.8 cultural and other issues of access.

2 Whose needs are to be addressed in developing the standards? What are these needs? What consultation is required?

3 To what extent do existing or comparable standards address the needs identified? *(See Section 3.1.)*

4 What are the roles and responsibilities of the service provider and of practitioners? *(See the elements of a code of practice at Section 5.2)*

5 What standards of practice should service providers adopt? *(See the elements in a code of practice at Section 5.2 and additional options in Chapter 3)*

6 What standards should apply to practitioners? *(See Sections 3.3, 4.4 and 5.3)*

6.1 What knowledge, skills and ethics do practitioners require?
6.2 How should practitioners’ knowledge, skills and ethics be assessed and recognised at different points?
6.3 How best may practitioners acquire or maintain such knowledge, skills and ethics?

7 What other standards should be considered to ensure service quality? Consider issues such physical facilities, accessibility, security, service management, back up resources, professional support and referral networks *(see Sections 2.5, 3.3 and 5.2).*
8 How and when will standards be reviewed and evaluated so that they meet the needs identified, are still appropriate to the context and are being implemented effectively?

5.2 Elements of a code of practice

NADRAC recommends that all ADR service providers adopt and comply with an appropriate code of practice developed by ADR service providers and associations, which takes account of the elements listed below (Recommendation 2). NADRAC also recommends that:

• Compliance by the service provider with an appropriate code of practice form part of any contract entered into by the Commonwealth providing for ADR (Recommendation 6).

• The Commonwealth encourage other government agencies to include an appropriate code of practice as part of any direct provision of ADR services, or within any contracts for externally provided ADR services (Recommendation 7).

• Government, industry, professional and consumer organisations undertake consumer education activities which aim to encourage the inclusion of an appropriate code of practice in private contracts for ADR services (Recommendation 8).

This section describes the elements to be taken into account in an appropriate code of practice. The elements may be used in several ways:

• Commonwealth agencies and other funders and purchasers of ADR services may use them to assess the appropriateness of a service provider's code of practice.

• ADR service providers and ADR associations may use them to assess the appropriateness of their existing codes of practice.

• Those developing and codifying their standards for the first time may use them as drafting guidelines.

This section is not intended to provide an exhaustive list of matters to be considered for inclusion, nor to prescribe the headings, sequence or wording for a code of practice. An appropriate code, however, should take account of each element to the extent that it is relevant to the particular context to which the code is to apply.

For the purposes of this section, a code of practice is taken to include any documented standards that control the delivery of ADR services (see paragraph 1.46). The elements
of a code of practice may be contained within other forms of documented standards, such as service charters, policy and procedure manuals, benchmarks, regulations, professional codes, rules and guidelines (see Chapter 3). Documented standards need not be called a 'code of practice', but should take account of each of the elements described below.

This section refers to the responsibilities of 'service providers' and of 'practitioners', as these terms are being used in this report (see paragraphs 1.39, 1.40). In organisations, different obligations may apply to individual practitioners and to the organisation itself, and different practitioners within the organisation may have different roles and responsibilities. A sole practitioner may also be a service provider, and therefore responsible for each element of the code. Particular codes will need to be clear about these respective obligations and responsibilities.

A code of practice applicable to each service provider should describe the following matters:

**Process**

1. The ADR process or processes to be covered by the code, including the roles of all participants in the process (see ADR definitions at Appendix A)
2. How and when the ADR process may or should be terminated (see 5.3, 23 Managing continuation or termination of the process)
3. The service provider's and practitioners' obligations after the process is concluded (see 5.3, 19 Concluding the ADR process)

**Informed participation**

4. The service provider's and practitioners' obligations to enable parties to make informed choices about the extent and nature of their participation in the process (see 5.3, 21 Ensuring effective participation by parties)
5. The service provider's and practitioners' obligations with respect to advertising and promotion of themselves, their service and the ADR process (see 5.3, 20 Promoting services accurately)
6. How and when parties will be informed of the standards that apply to the service provider and to practitioners
Access and fairness

7 The service provider's and practitioners' obligations to determine the appropriateness of the process for the particular dispute and for the parties to the dispute (see 5.3, 10 Assessing a dispute for ADR)

8 The service provider's and practitioners' obligations to ensure the accessibility of the service and the process to parties with diverse needs (see 5.3, 2 Culture and 5.3, 21 Ensuring effective participation by parties)

9 The service provider's and practitioners' obligations to achieve fairness in procedure, including neutrality and impartiality (see 5.3, 24 Exhibiting Lack of Bias and 5.3, 25 Maintaining impartiality)

10 The service provider's and practitioners' obligations to maintain confidentiality and to inform the parties of confidentiality requirements (see 5.3, 26 Maintaining confidentiality)

Service quality

11 The knowledge, skills and ethics that are required by practitioners (see Section 5.3)

12 The service provider's and practitioners' obligations to ensure the quality of the ADR processes (see Chapter 3)

Complaints and compliance

13 The service provider's and practitioners' obligations to handle complaints appropriately (see Section 4.2)

14 The service provider's and practitioners' obligations to comply with the code (see Section 4.3).
5.3 Knowledge, skills and ethics of ADR practitioners

The areas of knowledge, skills and ethics described in this section were provided in NADRAC’s discussion paper, and amended following responses to the paper. The areas need to be adapted to suit the context of service provision and the roles and responsibilities of practitioners (see Section 5.1). They may be contextualised and customised by:

- adding additional standards about knowledge, skills or ethics
- deleting some standards that do not apply
- defining the standards in order to reflect the particular context
- deciding what are the priorities of some standards in relation to others
- establishing measures for the standards
- setting the appropriate level of proficiency for the standards.

The knowledge, skills and ethics described below may be used for various purposes, including:

- developing accreditation, assessment or selection criteria
- guiding ongoing supervision and professional development
- forming part of evidence guides in any competencies developed for ADR within the vocational education and training system
- being incorporated into the content of curriculum in the higher education system.

Knowledge

Knowledge refers to the understanding of relevant theories, principles, practices, their application and other aspects of knowledge, which may be desirable or necessary in order to practise effectively an ADR process. NADRAC has identified nine areas of relevant knowledge. Their order does not indicate any relative importance.

1. **Conflict**

This refers to knowledge about the following aspects of conflict:

- how conflict arises between and within individuals and groups
- the different kinds of conflict that give rise to disputes
Chapter 5 — Implementing the framework

- potential sources of conflict around objectives, values, interests, relationships, information, communication and structures
- how conflict can be diagnosed in terms of its various attributes
- the different procedural, psychological and substantive interests that form the subject of conflict
- patterns of conflict escalation and the factors that contribute to that escalation
- factors which can cause conflict to de-escalate and resolve, including the interventions of ADR practitioners
- appropriate dispute resolution interventions for different kinds of conflict
- the significance of timing in relation to the management and resolution of conflict.

2. Culture

This refers to knowledge about the relevance of culture to varying aspects of conflict and dispute resolution, including:

- the relevance of culture in relation to problem-solving and dispute resolution
- the relevance of culture in relation to negotiation, concessions and compromise
- cultural variations in relation to written, spoken and non-verbal communication
- cultural attitudes towards physical space, venue and time
- cultural attitudes towards the role of outsiders in dispute resolution
- cultural attitudes in relation to the role of law, lawyers and professional advisers
- the cultural significance of the individual and the group in dispute resolution.

3. Negotiation

This refers to knowledge about aspects of negotiation:

- the role of preparation for the parties in negotiation
- parties' capacity and ability to negotiate and make decisions
- the processes of negotiating
- the processes whereby parties, both individually and collectively, reach conclusions and make decisions
A Framework for ADR Standards

- the rituals, process and stages of different models and styles of negotiation, including interest based negotiation
- the potential impact of power on negotiating behaviour, particularly a party's perceptions of their own and the other side's power
- the significance of a safe negotiating environment in which parties can accept or give up power in order to reach agreement
- problem-solving processes and strategies, for example, how to generate ideas and options through brain-storming
- appropriate ways for dispute resolution practitioners to use their negotiation knowledge to intervene in and assist the negotiation process
- predictable tactics, problems and deadlocks which can arise in negotiation, and strategies for dealing with them
- the information that parties need to make their own decisions, and how it can be collected and analysed.

4. Communication

This refers to knowledge about aspects of communication that might be of relevance in the dispute resolution context:

- ways in which inadequate communication can cause conflict, or contribute to its escalation
- appropriate forms of communication for promoting the resolution of conflict and avoiding language which reinforces or encourages conflict
- appropriate questioning and answering, summarising, reframing, paraphrasing and non-verbal communication
- appropriate ways of assisting disputing parties to communicate effectively with each other
- awareness of the effects of the practitioner's communication style on the parties and the progress of the dispute resolution process
- techniques of drafting, writing up decisions and other written communication skills.

5. Context

This refers to knowledge about contextual factors relevant in the practice of ADR processes:

- the legal, social, cultural, economic and institutional context of the dispute
- other dispute resolution procedures that precede or follow an ADR intervention within a particular context
- relevant relationships, such as couple, family and group relationships
availability of professional, academic, technical, community and educational resources for party use or referral
the legal and social standards that would be applicable if the case was taken to a court or other forum following a particular ADR process
the significance of the diversity of the parties involved in ADR, including gender, religion, age, culture, language, race, education, socioeconomic status, and disability
the structures, resources, processes and requirements of the service provider.

6. Procedure
This refers to knowledge about the different procedural elements and requirements of a particular ADR context:
the theory, systems and methods of the relevant dispute resolution processes, and their suitability for particular situations
the management and conduct of a dispute resolution process, and how the practitioner structures and adapts the process in the most appropriate way
stages of a dispute resolution process, and how they can be used most effectively
intake assessment and case management processes
limitations of the processes
when and how to abandon a particular process, and refer to or commence another
how to deal with non-compliance with procedural requirements
how to ensure fairness in procedure
criteria for exercising discretion on procedural matters, for example, adjournments, consultations with individual parties, and duration
how to identify who may be interested parties and how to ensure their appropriate participation.

7. Self
This refers to knowledge about how an ADR practitioner can be aware of and reflect on what they contribute to the process of dispute resolution:
the ADR practitioner's effect on the parties and their effect on him or her
awareness of one's own strengths and limitations in handling the ADR process, and the boundaries of one's role
the dynamics of the relationship between the practitioner and the parties
8. Decision-making

In advisory and determinative ADR, this refers to knowledge about how to make a decision:

- the steps needed to obtain and to consider properly all relevant information before making a decision
- how to evaluate facts, information, evidence, precedent and opinions in arriving at a decision
- how to provide verbal or written reasons for a decision
- the duty to exercise reasonable care in the provision of information or advice
- the extent to which fairness and natural justice should apply in decision-making
- appropriate legal, industrial or social standards or norms.

9. ADR

This refers to knowledge about theories and practices in ADR, and about the appropriateness of different forms of ADR for different disputes. This knowledge enables screening and streaming of appropriate cases to ADR processes:

- principles and philosophy of ADR
- knowledge of one or more practice models or frameworks
- what dispute resolution forum is most appropriate for what kind of dispute
- what is the best time in the development of a dispute for an ADR intervention
- the information parties require to make their own choice of dispute resolution process
- the substantive, psychological and procedural needs of parties that affect the choice of a particular ADR process
• the advantages and disadvantages of various dispute resolution processes, and their alternatives
• issues of confidentiality, duty of care and fairness in procedure during the assessment or intake process
• indications that a dispute would be inappropriate for an ADR process.

Skills

In this section NADRAC has focussed on the skills which may be involved in conducting some or all ADR processes. The order in which the skills are listed in each category is not intended to signify a particular level of importance for each skill, nor is it intended to signify a particular point in time at which a skill should be used. The skills can be used at whatever time they are appropriate in an ADR process.

10. Assessing a dispute for ADR

This refers to a variety of analytical and interpersonal skills used to conduct a sound assessment of a dispute for any particular ADR process or processes. They can be demonstrated by:

• accurately and concisely analysing the issues presented to assess the most suitable process
• accurately and effectively referring parties to other services which may be more appropriate
• assessing parties’ capacity to negotiate
• understanding the emotions and expectations of parties
• determining the parties’ readiness to consider and commit to ADR processes, rather than continue the fight
• preparing and counselling parties in preparation for an ADR process
• assessing power differentials between parties, including the timely and effective exclusion of ADR where appropriate
• providing accurate, timely and relevant information about the ADR processes available, and other resources
• evaluation of factors such as apprehension of violence, security issues, age of the parties, issues affecting a party from a non-English speaking background, the need to seek advice, the legal or factual complexity of the matter, the precedential value of a formal resolution of an issue and the need for public sanctioning of particular conduct
• reassessing when necessary during the process in the light of new information.
11. Gathering and using information

This refers to the skills of collecting and systematising information, drawing inferences and deductions, and where appropriate deciding on questions of fact. They can be demonstrated by:

- collecting and organising data
- assisting parties to provide appropriate information
- investigating and dealing with gaps in information
- research and analytical skills
- identifying and assessing the needs and wishes of affected third parties (e.g., children)
- managing the way information is presented, tested and evaluated
- drawing inferences or deductions from information
- applying relevant rules and principles of evidence.

12. Defining the dispute

This refers to the skills required to analyse and define the issues in dispute. They can be demonstrated by:

- involving the parties in identifying and defining the dispute
- using appropriate terms to describe the dispute
- defining the dispute in terms of interests where appropriate
- establishing common ground between the parties
- ordering, differentiating and prioritising the issues.

13. Communication

This refers to the skills required to clarify, understand and impart understanding, and to manage communication exchanges between the parties. They can be demonstrated by:

- effective, accurate and clear communication with the parties
- effective, accurate and clear communication when acting as an intermediary e.g., in shuttle mediation
- checking with parties that they are clear about what is going on, and responding to their queries
- identifying and acknowledging each party’s feelings, concerns and views on all issues
- showing understanding by use of listening and questioning skills
- summarising, paraphrasing and reframing
- appropriate use of language and terminology, including plain English
14. Managing the process

This refers to the skills necessary to chair, order, control and maintain continuity and progress of the dispute resolution process, including setting procedural rules and behaviour guidelines, and organising the appropriate physical environment. They can be demonstrated by:

- establishing the appropriate venue, rooms, seating and other aspects of the physical environment
- organising appropriate facilities and amenities for the parties
- maintaining a favourable and safe environment for all participants
- ascertaining and supporting the capacity and willingness of all parties to participate in the process
- maintaining party commitment to the process
- maintaining fairness in procedure for all parties involved in the process
- complying with statutory, contractual and procedural requirements
- effectively using technology and expert assistance, such as interpreters, to remove impediments to open communication
- assessing and providing sufficient time for the process and making effective use of the time available to allow parties’ respective interests and views to be identified and explored
- adapting the process to suit the needs of the parties and the dispute
- adapting the process to deal with the use of more than one ADR practitioner in the same dispute.

15. Managing interaction between the parties

This refers to the skills necessary to manage effectively the behaviours of, and interaction between, the parties. They can be demonstrated by:

- choosing appropriate mechanisms to prevent escalation of the dispute
- identifying, acknowledging and normalising conflicting behaviours
- dealing with hostility, emotion and deviations from expected behaviour during the process
- using rules and behavioural guidelines as required by the circumstances
- identifying and managing both the personal and the substantive issues
- identifying and managing expectations
• assessing appropriate use and timing of separate sessions with each party and breaks and adjournments in the process.

16. **Negotiation**

This refers to the skills required to assist the parties to negotiate with one another in order to reach agreement. They can be demonstrated by:

• assisting parties to prepare for negotiations
• assisting parties to identify options and make choices and decisions
• using creative and inventive problem-solving strategies
• assisting parties to identify agreements and decisions made, and future action required
• identifying agreements and decisions made, and future action required
• ensuring legislative and other constraints are identified and taken into account
• focusing on interests (exploration of interests) where appropriate
• assisting parties to make and respond to offers, linking and packaging
• managing blockages, loss of face and final closures
• exploring creative and practical options.

17. **Being impartial**

This refers to the skills necessary to balance the relationships with and between the parties, to create trust in the process and the practitioner, and to ensure fairness for all parties involved. They can be demonstrated by:

• an even-handed conduct of the process
• identifying the existence of any actual or potential bias or conflict of interest
• responding appropriately and immediately to any party's concerns about bias or partiality
• avoiding any appearance of partiality or bias through word or conduct
• ensuring an appropriate degree of party responsibility for the outcome and the process
• hearing all parties to a dispute and considering all relevant arguments before a decision is made
• giving all parties an opportunity to present their point of view before a decision is made
• giving all parties an opportunity to respond to any adverse material which could influence a decision affecting them
• ensuring legislative and other constraints are identified and taken into account
• displaying sincerity and integrity, and building and maintaining trust.

18. Making a decision

This refers to the key elements of good decision-making, namely that it be legal, ethical, explicit, equitable and sensible, and that it complies with the principles of natural justice. These qualities can be demonstrated by:

• ensuring the decision is consistent with the powers vested in the ADR provider
• clearly expressing the decision, its implications, and how the ADR provider came to that decision
• clearly drafting the decision and ensuring it contains enough information to explain the reasons of the decision-maker
• explaining the decision to the affected parties
• in facilitative ADR processes, providing parties with the opportunity to reflect on the agreement or seek legal advice.

19. Concluding the ADR process

In determinative processes this refers to the skills of communicating one’s decision, its basis and its implications, clearly and respectfully to the parties. In facilitative and advisory ADR processes, this refers to the skills required to consolidate an agreement by the parties or conclude the process appropriately if no agreement has been reached. These skills can be demonstrated by:

• assessing accurately when agreement has been reached or when it is not possible
• ensuring parties clearly understand the agreement, and their roles and responsibilities
• enabling parties to reach agreement across the final blockages and gaps
• managing the rituals of closure
• managing any lack of agreement, the termination of the process and the exit of the ADR practitioner
• testing the agreement and its implementation for workability and durability
• drafting the agreement in clear and unambiguous terms
• making appropriate referrals.
Ethics

Ethics refers to the attitudes and conduct of individual ADR practitioners. Many ethical standards parallel the elements of a code of practice for service providers, contained in Section 5.2.

NADRAC focuses on eight areas in ADR practice with ethical implications, and proposes some issues that the development of standards should take into account.

20. Promoting services accurately

Ethical issues arise for ADR practitioners when advertising their services. These issues involve:

- ensuring that information marketing the services is accurate
- being clear about the outcomes that may be expected from the ADR process
- the undesirability of referrers making exaggerated claims about the service provider or the relevant ADR process
- avoiding the appearance of soliciting work in particular disputes
- the prohibition of referral commissions or kickbacks
- taking cases only if work arrangements allow for timely attention
- clarifying any personal involvement if another service provider is already involved in the same dispute in a similar or overlapping role
- providing information about service costs and fees.

21. Ensuring effective participation by parties

Depending on the ADR process used, the practitioner may need to ensure that the parties are given the opportunity to have their say, make decisions about time frames, venues and costs, and understand the issues and the implications of choosing one outcome over another.

In facilitative ADR it is important that the practitioner be aware of those cases in which it would not be appropriate for the parties to participate in an ADR process, or to do so only with special adaptations to the process.

A practitioner may need to consider whether any action is required of them in the following situations:

- the parties lack an adequate level of understanding of the issues and implications of the possible outcomes
- the parties lack sufficient time to assess any proposed outcome
- there is the possibility of undue practitioner influence
• the process is inappropriate to resolve the parties’ dispute
• the physical safety of the parties, practitioner or third parties has been or may be at risk
• strategies which are quite inconsistent with the ADR process are being pursued by one or other of the parties
• a party has undertaken the ADR process in order to gather information to be used in furtherance of the dispute
• where one or more parties is unable to participate and negotiate effectively in the process
• a significant power imbalance between the parties is likely to prejudice the outcome for one of the parties
• the parties are not willing to participate in good faith.

The practitioner may then consider implementing one or more of the following:
• when it is appropriate, include one or more of the following: an interpreter, a support person, an adviser, a representative or an advocate
• enable the provision of technical assistance, information or expert advice
• adjourn the process
• terminate the process/refer to another process.

22. Eliciting information

Most ADR processes rely on developing a clear understanding of the reasons for the dispute. To achieve this the parties need to be encouraged to describe their own perceptions and needs clearly and as completely as possible. ADR practitioners need to be aware of the scope of their duties to elicit relevant information, and encourage the parties to obtain, check and share information. Where determinative ADR is used, ADR practitioners may have a wide discretion to decide what information is relevant. However, where facilitative ADR processes are being used, the ADR practitioner may need to consider issues such as:
• whether an ADR practitioner can contradict a party (e.g., by physical evidence or prior inconsistent statement)
• whether there is any scope for discrediting a party before their colleagues (on the same side of the dispute) in order to verify the relevant facts
• the kinds of information that may only be raised for discussion in private sessions
• whether recommendations or decisions may be restricted to agreed issues in dispute, or may be open to other related issues as well.
23. **Managing continuation or termination of the process**

Some ADR processes end with an expert recommendation and not a final decision. In others, the parties or the ADR practitioner make decisions with a view to ending the dispute. In all cases ADR practitioners are expected to perform their duties diligently and promptly so they are completed within a reasonable time frame. Terminating an ADR process is a responsibility the ADR practitioner has to both parties. Depending on the ADR process involved, the ADR practitioner may need to consider whether to:

- discourage the parties from abandoning the process when the practitioner believes settlement is possible
- abandon (or threaten to abandon) the process in order to induce agreement
- try to restrict the number or scope of settlement options by reference to similar case experience, expert intellectual knowledge or legal principles.

24. **Exhibiting lack of bias**

ADR practitioners need to demonstrate independence and lack of personal interest in the outcome, so that they approach the subject matter of the dispute with an open mind, free of preconceptions or predisposition towards either of the parties. The importance of exhibiting lack of bias is that the parties can be satisfied that they can trust the ADR practitioner to conduct the process fairly. This has usually been referred to as a requirement of neutrality. In NADRAC’s view ‘neutrality’ requires that the ADR practitioner disclose to all parties:

- any existing or prior relationship or contact between the ADR practitioner and any party
- any interest in the outcome of the particular dispute
- the basis for the calculation of all fees and benefits accruable to the practitioner
- any likelihood of present or future conflicts of interest
- personal values, experience or knowledge of the ADR practitioner which might substantially affect their capacity to act impartially, given the nature of the subject matter and the characteristics of the parties.

Having made the disclosure, the practitioner must also decide whether they should withdraw, or, with the express permission of all parties, continue.

25. **Maintaining impartiality**

While neutrality is a question of interest, impartiality is more a matter of behaviour. It relates to the retention of the confidence of the parties based on
their perception that they are treated fairly by the ADR practitioner throughout the process. Any limits on the requirement of impartiality should be clearly explained to and understood by the parties. Impartiality requires the ADR practitioner to:

- conduct the process in a fair and even-handed way
- generally treat the parties equally (e.g., spending approximately the same time hearing each party’s statement or approximately the same time in separate sessions)
- not accept advances, offers or gifts from parties
- give advice and allow representation, support or assistance equally to parties
- ensure they do not communicate noticeably different degrees of warmth, friendliness or acceptance when dealing with individual parties
- organise the venue, times and seating in a way which suits all parties.

26. Maintaining confidentiality

Some ADR processes are considered to be essentially private (e.g., mediation) and some are not (e.g., facilitation of public consultations). It is important that the practitioner and parties in any ADR process have, as far as possible, a clear and common understanding of the extent of confidentiality and the limits of confidentiality. Confidentiality may require an ADR practitioner to:

- not disclose information provided by one of the parties in an ADR session to the other party. (In mediation or conciliation, information may be conveyed to the practitioner during a separate private session. In other ADR processes it may be necessary for all information to be made available to both parties)
- not disclose information about the dispute to third parties, subject to any common law, contractual or statutory requirements.

However, in all cases the ADR practitioner should make clear to the parties the limits on disclosing information that apply to the parties and to the practitioner.

27. Ensuring appropriate outcomes

Depending on the context, the outcome of an ADR process may need to comply with certain requirements, including public accountability, legislation and natural justice. In particular, an ADR practitioner may need to consider or get advice on whether:

- the interests of third parties are appropriately protected, or at least not unnecessarily or unjustifiably threatened
• the outcome, particularly in determinative ADR, is fair as between the parties
• a decision, particularly in determinative ADR, is one which a reasonable person could have made in the circumstances
• an agreement condones an illegal activity
• an agreement is legally void or voidable
• a decision, particularly in a determinative ADR process, is legally valid
• any advice, agreement or decision does not involve unlawful or unjustifiable discrimination.

1 Neutrality and impartiality
NADRAC views ‘neutrality’ as suggesting particular responsibilities on the part of an ADR practitioner. These responsibilities are to identify and disclose any existing or prior relationship between the practitioner and the parties, any interest in the outcome of the dispute, any present or future conflicts of interest and any values, experience or knowledge that may prevent a practitioner from acting impartially. Practitioners then have an obligation to act appropriately, taking into account the parties’ views and the practitioner’s capacity to conduct the process in a fair and impartial manner.

NADRAC sees ‘neutrality’ as referring to questions of interest, while ‘impartiality’ refers to behaviour. However, neutrality is a relative quality that reflects the demands of the context, suggests certain conduct on the part of the practitioner and creates expectations of impartial behaviour. NADRAC acknowledges that absolute neutrality is impossible, since any practitioner has a degree of interest in the outcome of the dispute.

The word ‘neutrality’ is often used with little clarity, consistency or definition (see Section 3.1). NADRAC has considered the debate over the appropriateness and validity of the concept of ‘neutrality’ (see Appendix B), and has noted suggestions to abandon the concept and to use alternative concepts, such as ‘consensuality’ (Astor H. [2000] Address to National Mediation Conference, Brisbane May 2000).

However, NADRAC believes that the concept of neutrality in ADR continues to have value. It has decided in this report to retain the term ‘neutrality’, but to describe more specifically the obligations of an ADR practitioner that neutrality entails.