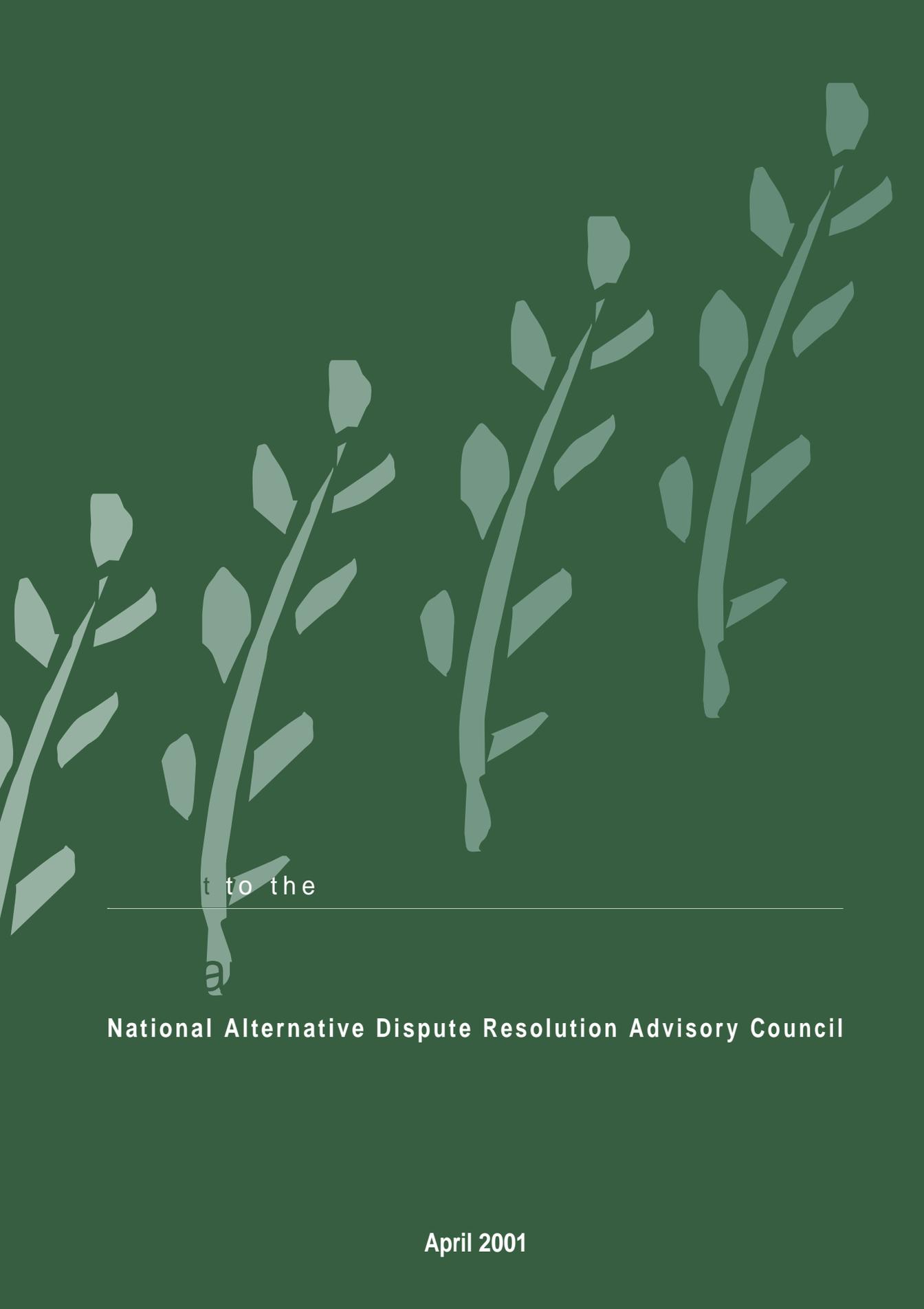


Report to the Commonwealth Attorney-General

A Framework for ADR Standards

National Alternative Dispute Resolution Advisory Council

April 2001



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National Alternative Dispute Resolution Advisory Council

April 2001

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Introducing

this report

A Framework for ADR Standards is a report to the Commonwealth Attorney-General on the current position of standards for Alternative Dispute Resolution (ADR) in Australia and on future directions for their development. Its purpose is to assist relevant bodies and individuals to develop and promote standards for ADR in Australia.

Australian ADR is at an historic moment in its development. Initial pioneering work has led to the increasing acceptance and use of ADR in many areas. The National Alternative Dispute Resolution Advisory Council (NADRAC) has found overwhelming support for the development of standards for ADR, in order to maintain and improve the quality and status of ADR, to protect consumers and to promote Australia's international dispute resolution profile.

NADRAC has based its recommendations in this report on its understanding of the current state of ADR in different areas of practice and application. The council was conscious in its deliberations of the need to balance two principles. The first is to recognise the diversity of contexts in which ADR is practised and to promote the development of standards within those particular contexts (the diversity principle). The second is to promote some consistency in the practice of ADR by identifying essential standards for all ADR service providers (the consistency principle).

The principle of diversity influenced the 'framework approach' contained in NADRAC's earlier 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 all ADR service providers adopt and comply with a code of practice.

In line with these recommendations, the report refers to a number of issues to be considered in developing standards, various elements to be taken into account in developing or accepting the recommended code of practice, and a description of the knowledge, skills and ethics to which ADR practitioners can be expected to aspire.

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 service

Executive

summary

Background

- 1 The charter of the National Alternative Dispute Resolution Advisory Council (NADRAC) requires Council, among other things, to advise the federal Attorney-General on standards for the provision of alternative dispute resolution (ADR), on minimum qualifications for ADR practitioners, including the need for registration and accreditation of ADR practitioners or organisations, and appropriate professional disciplinary mechanisms.
- 2 In March 2000 NADRAC launched a discussion paper on *The Development of Standards for ADR* which formed the basis for consultation on this issue. The current report builds on this discussion paper, suggests future directions, and makes recommendations for ADR policy makers, including the Commonwealth government. It also provides practical guidance to those developing ADR standards.

Profile of ADR in Australia

- 3 While ADR service providers may have divergent objectives, NADRAC considers that the common objectives for ADR are that it should resolve or limit disputes in an effective and efficient way, provide fairness in procedure, and achieve outcomes which are broadly consistent with both client and public interests. Some forms of ADR may also aim to promote understanding and enhance relationships between the parties, or contribute to their empowerment and recognition. The missions and values of ADR service providers may give different emphases to broader social goals, for example, community development, human rights, justice and security.
- 4 Responses to NADRAC's discussion paper indicate divergent views about the nature of ADR, its future directions and the risks and benefits of

'professionalisation'. NADRAC believes that it is possible both to maximise the benefits of consistent and coordinated standards, and to enable ADR to maintain some of its key strengths, which include flexibility, cost effectiveness, diversity, inclusiveness, accessibility and creativity. The diversity of 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.

- 5 ADR has been developed through government organisations, through private industry and in the community. Examples of ADR are community mediation schemes, primary dispute resolution in family law, ADR through courts and tribunals, industry dispute resolution schemes, public policy dispute resolution, commercial ADR and ADR within organisations. There is a range of representative, standards setting and educational bodies concerned with ADR. The lack of consistent data collection makes it difficult to estimate the demand for, and provision of, ADR services.
- 6 This report has taken into account consumer satisfaction with ADR, and the risks associated with service provision, based on research studies and complaints. Generally complaints and dissatisfaction with ADR services are low, although problems and risks are identified in particular areas. The lack of empirical data, however, prevents firm conclusions from being made about the overall quality of ADR services. The low number of reported complaints about ADR may result from systemic barriers to making complaints, and does not necessarily mean that there are few instances of poor practice.
- 7 The problems and potential risks associated with ADR indicate that standards need to address some issues in particular. These include informed and effective participation by parties, the appropriateness of the dispute for the ADR process, accessibility, fairness in procedure, termination of the ADR process and maintenance of confidentiality. ADR service providers need to establish the appropriate level of practitioner competence, ensure the quality of the ADR process and develop processes for compliance and complaints.

Options for standards

- 8 Many ADR standards have already been developed in Australia and overseas, and a range of regulatory instruments cover the provision of ADR. NADRAC notes that competition and regulatory reform policies may need to be further considered in the future development of standards or regulation in ADR. Other fields of endeavour have developed standards to meet challenges similar to those facing ADR, but none of these approaches fully addresses the particular needs of ADR.

- 9 Standards may operate at the level of practice, such as codes, guidelines or benchmarks, at the level of the individual practitioner, such as qualifications, competencies or other credentials, or at the organisational level, such as quality management. The appropriate form of standards varies from context to context. Standards for practices (such as a code of practice) are more widely applicable across the whole ADR field, while practitioner and organisational models may suit specialist professionals and service delivery organisations respectively.

The need for a framework for standards

- 10 There are strong arguments for the development of standards for ADR. NADRAC believes that standards are required to enhance the quality of ADR practice, to facilitate consumer education about ADR, to build consumer confidence in ADR services, to improve the credibility of ADR and to build the capacity and coherence of the ADR field.
- 11 NADRAC proposes a framework for the development of standards for ADR, in which responsibility is shared across service providers, practitioners, and government and non-government organisations (Recommendation 1). It proposes the following strategies:
- Facilitate the ongoing development of standards at the sector, program and service provider level, in order to improve the quality of ADR practice and to enhance the credibility and capacity of the ADR field.
 - Implement particular standards, within a code of practice, in order to educate and protect consumers, and build consumer confidence in ADR processes.
- 12 The development of standards in any particular context needs to take into account:
- the likelihood and severity of risks;
 - the needs of parties, disputes and ADR processes;
 - differing levels of practitioner or service provider responsibility for the outcome of the dispute;
 - the nature, complexity and specialisation of the work performed; and
 - the community, organisational and professional environment in which ADR services are provided.

A code of practice

- 13 Some essential standards for practices, contained within codes of practice, should apply to all ADR services. NADRAC recommends that ADR service providers adopt and comply with an appropriate code of practice. Such a code may be developed by individual service providers, or through ADR associations (Recommendation 2).
- 14 NADRAC's recommendation for an appropriate code of practice is commensurate with the issues involved in ADR service provision and addresses the problems identified at paragraph 7. Codes are strongly supported by ADR practitioners and organisations, complement existing standards, have proven effective in other fields and are consistent with regulatory reform principles.

Complaints

- 15 NADRAC regards the provision of an effective complaints mechanism, contained within an appropriate code of practice, as an essential requirement for ADR service provision. Such a mechanism should be based on accepted standards for complaints handling and, where possible, provide access to a second tier complaints process conducted by an independent person or body (Recommendation 3). The feasibility of an ADR Ombudsman providing a second tier complaints process warrants further consideration (Recommendation 4). Targeted research and data collection may be required in specific areas where particular issues or complaints are identified (Recommendation 5).

Regulation

- 16 Compliance with an appropriate code of practice should be based primarily on self-regulation (Recommendation 6). Existing evidence on the provision of ADR does not indicate the need for more direct regulation across all ADR, although intervention in areas where there are particular problems may be justified. Conversely, a market approach would neither address the risks associated with service provision, nor meet the social objective of promoting ADR.
- 17 The Commonwealth can play a role in ensuring compliance with a code of practice through its own contractual arrangements, and through encouraging other levels of government and statutory organisations to do likewise

(Recommendations 7 and 8). Other strategies for building acceptance of a code of practice include consumer information and education initiatives (Recommendation 9), and providing benefits to those with an appropriate code in place. These benefits may include the granting of preferred supplier status, statutory protections, and consideration of favourable professional indemnity insurance conditions.

- 18 NADRAC notes that particular responsibilities for standards apply in mandatory situations, as 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 (Recommendation 10)
- 19 ADR practitioners and consumers are faced with differing ADR provisions and court decisions in different jurisdictions. Clarity on these provisions would enable greater confidence in the ADR services and avoid problems associated with inter-jurisdictional disputes. NADRAC maintains its view that statutory immunity provisions for ADR practitioners should be conditional on compliance with an appropriate code of practice, and should not prevent consumers from obtaining appropriate remedies. (Recommendation 11)

Attainment of standards

- 20 NADRAC notes that the conditions for an overall scheme for accrediting ADR practitioners, organisations or programs currently do not exist, and that any requirement for accreditation should be determined on a sector by sector basis (Recommendation 12). Nevertheless, greater clarity and consistency is required in relation to current accreditation arrangements, especially with respect to practitioners. In NADRAC's view, accreditation is a process of formal and public recognition and verification that a practitioner, organisation or program meets, and continues to meet, defined criteria (Recommendation 13).
- 21 Accreditation of practitioners may be relevant only in situations where a panel or list of practitioners is developed, from which clients or service providers make a choice. Accrediting bodies also may need to set limits on the numbers of practitioners they can reasonably supervise. There is potential however, for accrediting bodies to develop procedures so that a degree of mutual recognition is possible (Recommendation 14).
- 22 Processes for the selection and engagement of ADR practitioners need to be fair and transparent, (Recommendation 15) and based on an assessment of the knowledge skills and ethical requirements of the particular ADR

program, service or sector. NADRAC does not support a minimum level or type of tertiary qualification as a requirement for all ADR practitioners (Recommendation 16).

- 23 Those delivering ADR education or training programs need to inform participants of the objectives and expected outcomes of the program (Recommendation 17). ADR training and education programs should take account of the elements of a code of practice, and the knowledge, skills and ethics described by NADRAC in this report. Where a program is designed to enable a person to be an ADR practitioner, an assessment should be made of the practitioner's competence, based on nationally accepted assessment standards. Recognition of prior learning or current competence, as well as recognition across educational sectors, should also be provided. NADRAC supports methods of education, training and professional development that effectively integrate theoretical knowledge with practical experience, and, where feasible, adopt a lifelong learning approach (Recommendation 18).

Infrastructure

- 24 The lack of appropriate infrastructure for ADR is a barrier to the future development, recognition and implementation of standards. The establishment of a peak body or bodies, or an ADR complaints body, could assist implementation of many of the recommendations contained in this report. The feasibility and viability of new ADR bodies need to be explored further, taking into account possible functions, structures, constraints, funding and cost-effectiveness. The primary impetus for an ADR peak body should come from the ADR field itself, not from government (Recommendation 19).

Resources

- 25 Those developing or requiring standards for ADR need to take into account the resources associated with both development and compliance, and ensure that such resources are commensurate with the risks to be addressed and the benefits to be obtained (Recommendation 20).

Data

- 26 The future development of standards requires valid measures of the effectiveness of ADR services and programs. A strong case exists for

improving the quality and extent of data collection and evaluation in ADR. Responsibility for data collection and evaluation rests with ADR service providers, research bodies, courts and government agencies. The development of consistent activity and performance indicators is a major priority.

Implementing the standards

27 NADRAC suggests that several key issues need to be considered in developing standards for ADR:

- the context of service provision
- the needs to be addressed in developing the standards
- the appropriateness of existing or comparable standards
- the roles and responsibilities of the service provider and of practitioners
- the standards of practice that service providers should adopt
- the standards that should apply to practitioners
- other considerations to ensure service quality
- review and evaluation of the standards.

28 NADRAC recommends that ADR service providers adopt and comply with a code of practice, which describes:

Process

- The ADR process or processes to be covered by the code, including the roles of all participants in the process;
- How and when the ADR process may or should be terminated
- The service provider's and practitioners' obligations after the process is concluded

Informed participation

- 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
- The service provider's and practitioners' obligations with respect to advertising and promotion of themselves, their service and the ADR process

- How and when parties will be informed of the standards that apply to the service provider and to practitioners

Access and fairness

- 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
- The service provider's and practitioners' obligations to ensure the accessibility of the service and the process to parties with diverse needs
- The service provider's and practitioners' obligations to achieve fairness in procedure, including neutrality and impartiality
- The service provider's and practitioners' obligations to maintain confidentiality and to inform the parties of confidentiality requirements

Service quality

- The knowledge, skills and ethics that are required by practitioners
- The service provider's and practitioners' obligations to ensure the quality of the ADR processes

Complaints and compliance

- The service provider's and practitioners' obligations to handle complaints appropriately
- The service provider's and practitioners' obligations to comply with the code.

29

Following feedback on NADRAC's discussion paper, NADRAC has refined the descriptions of the knowledge, skills and ethics standards for ADR practitioners. These standards need to be adapted to suit the context of service provision and the roles and responsibilities of practitioners.

- Areas of knowledge include knowledge about conflict, culture, negotiation, communication, context, procedures, self, decision-making and ADR.
- Skills include assessing a dispute for ADR, gathering and using information, defining the dispute, communication, managing the process, managing interaction between the parties, negotiation, being impartial, making a decision and concluding the ADR process.
- Ethics include promoting services accurately, ensuring effective participation by parties, eliciting information, managing continuation or termination of the process, exhibiting lack of bias, maintaining impartiality, maintaining confidentiality and ensuring appropriate outcomes.

List

of recommendations

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.

p71

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.

p72

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.

p73

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.

p73

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.

p74

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. p76

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. p76

Recommendation 8

THAT State, Territory and local government agencies include compliance with an appropriate code of practice in any contracts providing for ADR. p77

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. p77

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. p78

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. p79

Recommendation 12

THAT the need for and nature of accreditation of ADR practitioners, organisations and programs be determined on a sector by sector basis. p83

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.

p83

Recommendation 14

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

p83

Recommendation 15

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

p84

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.

p84

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.

p86

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.

p86

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.

p90

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. p92

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. p93