



**Legislating for alternative  
dispute resolution**

**A guide for government  
policy-makers and legal  
drafters**

**November 2006**

*National Alternative Dispute Resolution Advisory Council*



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The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent body which provides advice to the Commonwealth Attorney-General on a wide range of Alternative Dispute Resolution issues.

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# 1. INTRODUCTION

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## PURPOSE

1.1 This publication aims to provide guidance to government policy makers and drafters who are involved in developing or amending legislative provisions concerning alternative dispute resolution (ADR), so as to assist in achieving appropriate standards and consistency in the legislative framework for ADR, especially in relation to the rights and obligations of the parties. While the primary focus is on Commonwealth legislation, this publication should also be valuable to State and Territory Governments.

1.2 The guide deals with advisory and facilitative ADR processes such as neutral evaluation, conferencing, mediation and conciliation, but not determinative processes such as arbitration, which involve different policy considerations.<sup>1</sup>

1.3 The guide will be available in print but is intended to be used as a web-based resource to enable it to be updated as the need arises.

## NADRAC'S ROLE

1.4 NADRAC's role is to advise the Commonwealth Attorney-General on the development of high quality, economic and efficient ways of resolving disputes without the need for a judicial decision and promotes the use of ADR. NADRAC has provided advice on such matters as ADR standards, criteria for referral to ADR, diversity in ADR, ADR in small business, the use of technology in ADR, ADR research and Indigenous dispute resolution. Its publications are available on its website <<http://www.nadrac.gov.au>>.

## THE INCREASING USE OF ADR

1.5 Over the last three decades, Australian society has increasingly sought more informal mechanisms to resolve its disputes, rather than relying on formal resolution of disputes by the courts (judicial adjudication). ADR processes aim to provide more flexible options that can be both time and cost-effective compared to a judicial decision, providing a tailor-made solution that can meet the specific needs of the disputing parties.

1.6 The growing use of ADR in Australia has resulted in its widespread use in community organisations, tribunals, government agencies, private commercial

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<sup>1</sup> Arbitration has a longer history in both the Australian and international legal systems, and many of the issues are already settled. See for example, the *International Arbitration Act 1974*, the *Commercial Arbitration Act 1986* (ACT), the *Commercial Arbitration Act 1984* (NSW), the *Commercial Arbitration Act 1991* (NT), the *Commercial Arbitration Act 1990* (QLD), the *Commercial Arbitration Act 1986* (SA), the *Commercial Arbitration Act 1986* (TAS), the *Commercial Arbitration Act 1984* (VIC), and the *Commercial Arbitration Act 1985* (WA). See also note 20.

organisations and industry dispute resolution schemes. Virtually all court systems in Australia, at Commonwealth, State and Territory levels, provide for the use of ADR.

## POLICY CONTEXT

1.7 Australian Government policy aims to reduce litigation where possible. Government agencies are seeking to incorporate ADR in the conduct of their everyday business and Commonwealth legislation increasingly provides for ADR to be used in the discharging of agency responsibilities.

1.8 The Attorney-General, the Hon Philip Ruddock MP, has stated that ‘the Australian Government by promoting the use of alternative dispute resolution (ADR) is attempting both to relieve stress on the courts and to ensure litigants are in a position to make an informed choice whether to pursue litigation. Through ADR, the Government aims to foster a more conciliatory approach to dispute resolution, built on a foundation of constructive engagement between parties.’<sup>2</sup>

1.9 The following Australian Government initiatives show the importance Government places on ADR.

- 1.9.1 The [Federal Civil Justice System Strategy Paper](#),<sup>3</sup> which provides guidance on policy directions for the federal civil justice system, identifies the need to settle disputes as fairly, quickly and cheaply as possible and to assist self-represented litigants while preventing unmeritorious or misguided litigation from clogging the courts. The Strategy Paper focuses on ways of managing federal civil disputes, how litigants interact with the system and the role of courts and lawyers in the system.
- 1.9.2 The [Legal Services Directions 2005](#),<sup>4</sup> made by the Attorney-General under section 55ZF of the *Judiciary Act 1903*, regulate the way Commonwealth agencies conduct their legal affairs, including their participation in alternative dispute resolution. The Directions include an obligation for Commonwealth Departments and agencies to act as ‘model litigants’,<sup>5</sup> and to endeavour to avoid, prevent and limit the scope of litigation wherever possible. The Directions also make agencies accountable for their conduct.

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<sup>2</sup> The Hon Philip Ruddock MP (Attorney-General), ‘Towards a less litigious Australia: The Australian Government’s Alternative Dispute Resolution initiatives’ (2004) 23(1) *The Arbitrator & Mediator* 1, <<http://www.iama.org.au/journal/jnprevix.htm>> or <<http://www.ag.gov.au/publications>>.

<sup>3</sup> Attorney-General’s Department, *Federal Civil Justice System Strategy Paper*, Canberra, 2003, <<http://www.ag.gov.au/publications>>.

<sup>4</sup> The *Legal Services Directions 2005* replace the former Legal Services Directions issued in 1999. The Directions set out the framework for the procurement of legal services by Australian Government entities and for the handling of legal matters including litigation. The Directions can be found at <<http://www.ag.gov.au/olsc>> or at <<http://www.comlaw.gov.au>> under legislative instruments.

<sup>5</sup> *Legal Services Directions 2005*, Appendix B: The Commonwealth’s Obligations to Act as a Model Litigant, states that ‘consistently with the Attorney-General’s responsibility for the maintenance of proper standards in litigation, the Commonwealth and its agencies are to behave as model litigants in the conduct of litigation’.

- 1.9.3 The *Human Rights and Equal Opportunity Commission Act 1986* empowers the Human Rights and Equal Opportunity Commission (HREOC) to use conciliation to attempt to resolve disputes under anti-discrimination and human rights law. The President of HREOC is required to inquire into and attempt to conciliate complaints of alleged unlawful discrimination under the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* (Cth). Conciliation is also used, where HREOC considers it appropriate, in relation to complaints about acts or practices that may constitute discrimination in employment or occupation, and acts or practices that may be inconsistent with or contrary to 'human rights'.
- 1.9.4 The Government has made wide-ranging reforms to the family law system. The reforms follow the report of the parliamentary inquiry into child custody arrangements in the event of family separation *Every Picture Tells a Story*. They include the establishment of a network of community-based Family Relationship Centres and the expansion of other counselling, mediation and similar services which will help parents reach agreement on parenting arrangements after separation. The Government has also made changes to the *Family Law Act 1975* to ensure parents attempt to resolve disputes about parenting matters before filing proceedings in courts. Other measures are aimed at making family law cases involving children's matters that do go to court less adversarial and less likely to increase conflict.

1.10 Family law is arguably the most significant and difficult of the areas in which the Commonwealth has responsibility for facilitating effective alternative dispute resolution. But the Government has also recognised the growing importance of using ADR methods in a range of other areas, including small business and workplace relations, to resolve disputes.

## **OUTLINE OF THE GUIDE**

1.11 NADRAC has identified a number of issues policy-makers need to consider when incorporating ADR processes into new or existing legislation. The key issues examined in this guide concern the legal rights, obligations and protections of the parties who participate in ADR processes and the powers and obligations of both the bodies who refer parties to ADR and ADR practitioners.

1.12 The initial issue, examined in Chapter 2, is whether legislation is necessary or desirable to mandate or facilitate the use of ADR.

1.13 The following specific issues are then introduced in Chapter 3 before being examined more closely in the remaining chapters.

1. Processes or types of ADR.
2. Referral of disputes to ADR.
3. Obligations of parties to participate in ADR.
4. Standards and accreditation of ADR practitioners.

5. Immunity of ADR practitioners.
6. Confidentiality of communications made during ADR.
7. Admissibility of ADR proceedings.
8. Enforcement of ADR outcomes.

A key issues checklist is included in Chapter 3, beginning on page 14.

## **HOW THE GUIDE CAN ASSIST WHEN NEW LEGISLATION NEEDS TO BE DRAFTED**

1.14 Implementing Government policy may sometimes, though not always,<sup>6</sup> require new legislation or amendments to existing legislation. At the Commonwealth level, after policy authority has been provided, drafting instructions will usually need to be provided from instructors to the [Office of Parliamentary Counsel](#).<sup>7</sup> The Office is responsible for drafting primary legislation—Acts of Parliament—for the Government.

1.15 One of the instructor's primary roles is to tell the drafter all he or she needs to know to be able to draft a legally effective Bill that implements the policy. Often, the Government's policy authority may be in general terms, but can only be implemented by a detailed legislative scheme. The instructor needs to be in a position to tell the drafter about all aspects of the scheme—from the big picture to matters of relatively minor detail.

1.16 It is hoped that this guide, by examining issues such as the standards and immunity of mediators, the confidentiality and admissibility of ADR communications, the status and enforcement of ADR agreements, and whether participation in ADR should be voluntary or compulsory, will help instructors to clarify the policy issues related to any proposed legislation (primary or subordinate) that provides for ADR.

1.17 Further information about the drafting process is provided in Chapter 2.

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<sup>6</sup> See also Chapter 2 – 'Identifying the need for legislation'.

<sup>7</sup> The Office of Parliamentary Counsel is a statutory office created under the *Parliamentary Counsel Act 1970* (Cth). It falls within the portfolio of the Commonwealth Attorney-General.

## 2. IDENTIFYING THE NEED FOR LEGISLATION

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2.1 When contemplating initiatives involving ADR mechanisms, several initial questions need to be asked about the need for, and nature of, any legislative provisions that might deal with those mechanisms. They are:

1. What are the risks or problems to be addressed?
2. Is there a need for legislation to deal with that risk or problem? For example, could the issue be dealt with better by relying on:
  - (a) the common law
  - (b) contractual arrangements between the parties and the ADR practitioner or service provider
  - (c) codes of practice or other self-regulatory mechanisms, or
  - (d) existing overarching legislation.
3. If a legislative provision is considered necessary or desirable, what formulation is most appropriate? For example:
  - (a) does other legislation provide a useful model, and
  - (b) to what extent should the provision be consistent with other legislation?
4. Is the type of legislative instrument that is most appropriate:
  - (a) an Act, or
  - (b) regulations?

It may also be appropriate to deal with ADR mechanisms in rules of court. In order to make discussion easier, the guide includes rules of court within the concept of legislative instruments, while noting that the rules of the High Court, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court are not legislative instruments.<sup>8</sup>

### THE DRAFTING PROCESS FOR NEW LEGISLATION

2.2 Implementing Government policy may sometimes, though not always, require new legislation or amendments to existing legislation. Where new legislation is required, there must be appropriate Government authority for the policy implemented

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<sup>8</sup> For the purposes of the *Legislative Instruments Act 2003*, s 9. However, the notes to that section say that the rules of court 'are treated as if they were legislative instruments by express amendment of the legislation providing for them to be made'. See, for example, the *Family Law Act 1975*, ss 26E, 37A(14), and 123(2); the *Federal Court of Australia Act 1976*, s 59(4); and the *Federal Magistrates Act 1999*, s 81(3).

by the Bill before it can be introduced into Parliament. At the Commonwealth level, there are four kinds of policy authority. Policy authority is given by:

- the Cabinet (for matters with major policy implications)
- the Prime Minister or the Parliamentary Secretary (Cabinet) on the Prime Minister's behalf (for matters of minor policy significance)<sup>9</sup>
- the relevant Minister (for technical amendments within existing policy),<sup>10</sup> and
- the First Parliamentary Counsel (for technical corrections, of the kind that would otherwise be suitable for inclusion in a Statute Law Revision Bill).

2.3 Usually, after policy authority has been provided, drafting instructions for primary legislation (Acts of Parliament) need to be given by instructors to the Office of Parliamentary Counsel. Subordinate legislation (eg regulations) is drafted either by the Office of Legislative Drafting in the Attorney-General's Department or by the Department or authority that administers the Act under which the subordinate legislation is made. Similar arrangements with counterparts may apply in the States and Territories.

2.4 One of the instructor's primary roles is to tell the drafter all he or she needs to know to be able to draft a legally effective Bill that implements the policy. The instructor needs to be in a position to tell the drafter about all aspects of the scheme. The instructor must know, and be able to brief the drafter on, the aims of a legislative proposal. If the underlying authority is insufficiently detailed, the instructor may need to interpret the authority in a particular way or seek a further policy authority.

2.5 Legislative policy development (leading to drafting instructions) can be seen as a phase in a process started by a political decision. The instructor has to take that policy, and to fill out the detail, having regard to:

- political considerations
- administrative considerations
- the existing legislative context in which the policy is to be implemented, and
- the matters which have to be dealt with in legislation (some matters may be able to be dealt with administratively).

2.6 Useful sources of further information include the Office of Parliamentary Counsel home page <<http://www.opc.gov.au>>. Its publications (available on the website) include *Working with the Office of Parliamentary Counsel: A guide for clients*<sup>11</sup> and 'Giving written drafting instructions' which provides guidance in the form of a checklist about giving written instructions for drafting Bills.

2.7 Another useful source of information is the Australian National Audit Office publication *Some better practice principles for developing policy advice (2001)*. It

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<sup>9</sup> The Legislation Section of the Department of the Prime Minister and Cabinet (PM&C) can advise whether a matter has major policy implications. The Prime Minister's approval may be obtained by the relevant Minister writing a letter to the Prime Minister seeking approval. The Legislation Handbook, prepared by PM&C, sets out the matters that the letter should deal with. The Legislation Section of PM&C processes requests for the Prime Minister's approval, and can provide assistance in relation to such requests.

<sup>10</sup> Individual Departments will have their own procedures for seeking the Minister's authority.

<sup>11</sup> Office of Parliamentary Counsel, *Working with the Office of Parliamentary Counsel: A guide for clients*, Canberra, July 2002.

includes a check list for developing policy advice. The Australian National Audit Office website address is <<http://www.anao.gov.au>>.

2.8 The Department of the Prime Minister and Cabinet produces the Legislation Handbook, which provides a description of the procedures involved in making Commonwealth Acts. A link to the [Legislation Handbook](http://www.dpmc.gov.au/guidelines/index.cfm) is available on the Department's website at <<http://www.dpmc.gov.au/guidelines/index.cfm>>.

## **SOME ASSISTANCE: EXISTING LEGISLATION**

2.9 The existing Commonwealth legislative provisions for ADR should provide some assistance for policy-makers when considering whether legislation is necessary or desirable in their particular context.

2.10 Fifteen key Commonwealth laws have been identified which refer to ADR in a substantive way.<sup>12</sup> The Acts (many administered by the Attorney-General's Department) include the *Administrative Appeals Tribunal Act 1975*, the *Family Law Act 1975*, the *Federal Court of Australia Act 1976*, the *Federal Magistrates Act 1999*, the *Human Rights and Equal Opportunity Commission Act 1986*, the *International Arbitration Act 1974*, the *Native Title Act 1993*, the *Trade Practices Act 1974*, and the *Workplace Relations Act 1996*. Major regulations relating to ADR include the *Family Law Regulations 1984* and the *Marriage Regulations 1963*. The rules of the Family Court, the Federal Court and the Federal Magistrates Court also make provisions in relation to ADR.

2.11 Arbitration is by far the most common process referred to in legislation, followed by conciliation, mediation, negotiation and conferencing. Processes such as adjudication, case appraisal and neutral evaluation are also occasionally referred to.

2.12 The most common arena in which an ADR process is provided for under Commonwealth legislation is within a statutory authority or court. Tribunals, international forums and non-government organisations are referred to less frequently.

2.13 The types of disputes that are most likely to be governed by ADR provisions are those occurring within commercial contexts, workplace relations, international disputes, native title and family law.

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<sup>12</sup> In addition, approximately 109 pieces of legislation refer to ADR making ad-hoc, minor or passing reference to ADR, and are administered across a wide range of Australian Government portfolios.

### **3. KEY ISSUES TO CONSIDER WHEN PROVIDING FOR ADR**

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3.1 Eight key issues related to the regulation of ADR have been identified following an analysis of Commonwealth legislation. The guide addresses the key policy concerns related to these issues.

3.2 Before examining each issue in detail, an overview is set out below.

#### **PROCESSES OR TYPES OF ADR**

3.3 Although this guide does not provide a strict definition of all advisory and facilitative processes (which include neutral evaluation, conferencing, mediation and conciliation), it is important to distinguish between them. Users of ADR need to understand what ADR processes are available and what process is most likely to be able to assist them. Different evidentiary consequences may attach to different processes. For example, there is a stronger basis for allowing evidence of a neutral evaluation or case appraisal report to be admitted before a court or tribunal than for allowing evidence of mediation. This is because the types of processes are different (i.e. advisory rather than facilitative). NADRAC's views about how to define the differing ADR processes according to whether they are facilitative, advisory or determinative are included in this guide. A glossary of common ADR terms is provided in Appendix 1 starting at page 98.

#### **REFERRAL OF DISPUTES TO ADR**

3.4 This issue relates to how legislation or court rules require or facilitate the referral of disputes to ADR. In some legislation, a court or tribunal is required or empowered to make orders or directions referring matters to ADR in certain circumstances. Legislation may also seek to encourage disputing parties to attempt ADR before commencing litigation or lodging a complaint.

3.5 In practice, it can be difficult to define the criteria on which to base referral decisions. Available research identifies very few consistent features about disputes and their participants that can be used to predict whether or not ADR will be successful. This makes it difficult then, outside of general principles, to determine specific criteria for referral to ADR.

3.6 NADRAC's view is that some criteria for referral are desirable but those criteria should not necessarily be written into the principal legislation. In some circumstances, it may also be more useful to look at negative criteria, for example when not to refer a dispute. In the experience of NADRAC members, multi-issue and difficult cases are often particularly suitable for ADR and even an unsuccessful

mediation or other ADR attempt is useful where it helps to clarify the issues and narrow the areas in dispute.

3.7 As a matter of principle, compulsory referral of a dispute to ADR is only recommended if the legislative framework is specific about the processes the dispute is being referred to and there is, generally speaking, public confidence in the suitability and quality of the available ADR services.

3.8 The aim is to determine general principles on which to base referral decisions without hindering the discretion of the courts and other relevant bodies to make decisions about individual circumstances.

### **OBLIGATIONS OF PARTIES TO PARTICIPATE IN ADR**

3.9 In some legislation, the parties to a dispute may consent to participate in an ADR process, but in others, the parties can be required to participate.

3.10 Policy-makers need to assess whether positive outcomes or reduced litigation are likely to result from ADR processes where parties are compelled to participate. Although available research is inconclusive, NADRAC's view is that compulsory participation in ADR can be worthwhile, subject to appropriate assessment of the suitability of the dispute for referral to ADR and the regulation of professional standards of the ADR practitioner involved.

3.11 Another related question concerns the consequences for failure to participate in a compulsory ADR process. If parties are to be compelled to participate in ADR, it may be appropriate to impose sanctions if they do not do so or if they do not do so in a meaningful way.

### **STANDARDS AND ACCREDITATION OF ADR PRACTITIONERS**

3.12 Minimum standards for ADR practitioners and mechanisms for selecting those practitioners are important considerations for an ADR system. Where parties to legal proceedings are compelled to use ADR this is especially important.

3.13 The accreditation of ADR practitioners or organisations relates to how the legislation defines or regulates the provider of an ADR service. A major difficulty for policy-makers in relation to accreditation has been the absence of a nationally co-ordinated approach to the accreditation of ADR practitioners. Progress is being made in this regard through the drafting of a [National Mediation Accreditation System](#), including a National Mediator Standard using a grant provided to the National Mediation Conference Pty Ltd by the Commonwealth Attorney-General. On 5 May 2006 at the National Mediation Conference, participants voted unanimously to

support the draft scheme and approved the appointment of an implementation committee to do all things necessary to cause the speedy and effective implementation of the scheme.<sup>13</sup>

3.14 Legislation varies significantly in defining the qualifications needed by a practitioner and the criteria to be satisfied for organisations to be approved as ADR providers. In some cases, the criteria for selection are simply specified, for example, selection by a Minister, by virtue of the office held or nomination by the parties. In other cases, the requirements may be more detailed, such as requiring a minimum number of hours of experience before a practitioner can be appointed.

3.15 As an example, the *Family Law Act 1975*<sup>14</sup> provides that the Family Law Regulations may prescribe Accreditation Rules for family counsellors and family dispute resolution practitioners. The Regulations may also address the standards that are to be met by persons seeking accreditation, who is responsible for determining whether a person meets the Rules, how accreditation is to be recognised, who is responsible for monitoring ongoing compliance with the Rules, and the process for handling complaints.<sup>15</sup> Specific criteria apply during a transitional period (see paragraph 7.18).

3.16 In considering the nature and extent of standards and accreditation mechanisms to be included in legislation, policy-makers may wish to consider the scope of the law and the characteristics of the people upon whom the law will operate. It is more feasible to set out specific standards, qualification and accreditation requirements where the law is likely to impact on large numbers of people. In addition, accreditation mechanisms are more important where users of ADR are not in a good position to assess practitioner standards. For example, large companies involved in international commercial arbitrations are likely to have legal advice and be well informed about the skills and qualifications of potential arbitrators.

3.17 Another issue to consider is that most legislation governing accreditation requires tertiary qualifications. Many ADR Practitioners have begun their careers at the community level and may not have formal qualifications. Therefore each statutory framework will require a careful consideration of its own stakeholder needs and resource limitations such as the availability of suitable practitioners. Policy-makers may need to consider including transitional processes that can accommodate experienced practitioners who may lack formal qualifications.

## **IMMUNITY OF ADR PRACTITIONERS**

3.18 It is important to consider whether ADR practitioners should be awarded protections and immunities from suit, and if so, in what circumstances and to what

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<sup>13</sup> The System and the Standard are included as Appendix 3 in the Guide on page 114.

<sup>14</sup> *Family Law Act 1975*, s 10A (Accreditation Rules).

<sup>15</sup> *Family Law Act 1975*, s 10A.

extent. Under some legislation, these immunities equate to those extended to a judge. Opinions differ as to whether this is appropriate. Some concern has been expressed about the appropriateness of blanket immunity provisions in the context of widely varying regulatory schemes and the effect immunity has on the enforcement of practitioner standards.

3.19 NADRAC's view is that, where a court orders ADR, and the ADR is part of a continuum of case management strategies which aim to resolve litigation between parties, ADR should attract the same immunity as for other aspects of the court process. However, it is very difficult as a matter of principle to justify the immunity of ADR practitioners when the ADR is community-based rather than part of a court's case management process. Community-based ADR practitioners are able to limit or cover their liability through individual contract and/or professional indemnity insurance.

3.20 In order to meet particular policy needs, policy-makers may wish to consider whether to extend legislative immunity for a limited time to practitioners involved in processes not initiated by court referral. However, the continued extension of any statutory immunity for ADR practitioners should be reviewed.

## **CONFIDENTIALITY OF COMMUNICATIONS MADE DURING ADR**

3.21 This issue relates to the obligations of ADR practitioners and participants not to disclose any information that has been provided for the purposes of the ADR process or that has been disclosed during an ADR session. The duty of practitioners and participants to keep such matters confidential is seen as a key underpinning of ADR services. On the other hand, disclosure may be necessary in limited circumstances in order to protect a person from harm or to prevent a serious breach of the law.

3.22 NADRAC's view is that the ADR practitioner's duty of confidentiality needs to be balanced by his or her duty of care to the parties participating in the ADR process and to any third party at risk of harm.

3.23 If policy-makers wish to include a confidentiality obligation in legislation,<sup>16</sup> then NADRAC's view is that both the obligation and exceptions to it will need to be clearly set out. For example, it may be desirable that information is revealed in order to defend a complaint against the ADR practitioner, to protect personal or public safety or to provide suitably anonymous data for research. However, as the number of exceptions may increase or decrease over time, regulations may offer greater flexibility in dealing with some issues.

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<sup>16</sup> Commonwealth statutory provisions generally do not prevent the parties from disclosing matters that are discussed during ADR processes. However, there are some notable exceptions. See Chapter 9, paragraphs 9.16 to 9.19.

3.24 NADRAC's view is that as a matter of principle, participating parties should also be obliged to keep matters discussed during an ADR process confidential.

3.25 Parties may agree at the beginning of an ADR process, with a specific contractual provision if desired, that their negotiations are to be kept confidential. The contract may also specify exceptions to that requirement. It may still be useful for policy-makers to consider legislative provisions that include exceptions which can override the obligations imposed by contract, for example, when making a complaint against the practitioner or in cases of fraud.

## ADMISSIBILITY OF ADR PROCEEDINGS

3.26 The term 'admissibility' relates to the question of whether evidence of things said or done or admissions made during an ADR process can be admitted into future proceedings. It also concerns the question of whether ADR practitioners can or should be compelled to appear as witnesses.

3.27 In most circumstances, it is not considered appropriate to admit such matters into evidence in later proceedings. In some situations, there may need to be exceptions to this rule to prevent either harm or injustice, but those exceptions also need to be carefully specified. Legislation should provide a general rule that evidence of matters disclosed in ADR is inadmissible, qualified by those exceptions considered appropriate by policy-makers.

3.28 In some cases legislation or the common law imposes a duty on an ADR practitioner to disclose information revealed during an ADR process to a third party such as the police or a child welfare authority, but that same information is not admissible in court.<sup>17</sup> NADRAC suggests that information revealed by a practitioner under a duty of disclosure should lose the protection of confidentiality and subsequently become admissible in court.<sup>18</sup> Examples might include information about child abuse,<sup>19</sup> terrorist acts or proposed criminal acts.

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<sup>17</sup> Examples of an ADR practitioner's obligations of confidentiality and disclosure (and the admissibility of required disclosures) can be found in the *Family Law Act 1975*, ss 10D, 10E, 10H, 10J and 11C.

<sup>18</sup> Under the *Family Law Act 1975*, subsection 10H(7), evidence that would be inadmissible under s 10J is not admissible merely because s 10H requires or authorises its disclosure. This means that a family dispute resolution practitioner's evidence is inadmissible in court even if section 10H allows the practitioner to disclose the information in other circumstances (for example to prevent or lessen a serious and imminent threat to the life or health of a person). The same rules apply to family counsellors under subsection 10D(6). The only exception to the inadmissibility provisions are where there is an admission or disclosure of child abuse. See note 19 below.

<sup>19</sup> It should be noted that under the *Family Law Act 1975*, sub-ss 10E(2) and 10J(2) an admission or disclosure (made during a family dispute resolution process or family counselling) by an adult or a child that indicates that a child under 18 has been abused or is at risk of abuse, *will be admissible* unless the court believes there is sufficient evidence of the admission or disclosure from other sources.

## **ENFORCEMENT OF ADR OUTCOMES**

3.29 An agreement reached during an ADR process (sometimes referred to as a ‘mediated settlement agreement’) will generally become enforceable once it is agreed as a private contract between the disputing parties. In situations where most of the matters have been agreed, but some details remain to be finalised, the status of the agreement is less certain. Where a court or tribunal has referred a matter to ADR, legislation may authorise that body to accept an ADR agreement as evidence of settlement and make orders accordingly. Specific detail about the enforcement of ADR agreements or partly finalised agreements needs to be clearly provided for both in legislation (where applicable), and in the ADR agreement itself. Uncertainty in this regard may lead to the re-opening of the dispute and undermine efforts to promote ADR as a viable alternative to litigation.

## KEY ISSUES CHECKLIST WHEN CONSIDERING ADR

<b>1. IS THERE A NEED FOR LEGISLATION?</b>		
RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<p style="text-align: center;"><b>ARGUMENTS AGAINST LEGISLATION</b></p> <p>Is legislation necessary or are other mechanisms likely to be more effective?</p>	<p style="text-align: center;"><b>NO LEGISLATION</b></p> <p style="text-align: center;">?</p> <p>If not enacting new legislation, policy-makers could rely on the use of ADR mechanisms in the common law, contractual arrangements between the parties and codes of practice or other self-regulatory mechanisms applying to ADR practitioners.</p>	<p>➤ Examine existing practice; seek feedback from relevant stakeholders and from the relevant Department having ADR policy responsibility about whether a legislative ADR scheme is useful or necessary.</p>
<p style="text-align: center;"><b>ARGUMENTS SUPPORTING LEGISLATION</b></p> <ul style="list-style-type: none"> <li>• When introducing ADR for the first time, there may be a need for some element of compulsion or legislative control (see Chapter 6, paragraphs 6.22-6.26).</li> <li>• Government policy is to encourage ADR to foster a more conciliatory approach to dispute resolution. It can also be important that parties have a choice to use an effective ADR process. This may necessitate legislative change.</li> </ul>	<p style="text-align: center;"><b>LEGISLATION</b></p> <p style="text-align: center;">?</p> <ul style="list-style-type: none"> <li>• ADR mechanisms could be introduced through the principal Act, regulations or rules of court.</li> <li>• Another legislative approach might be to deem that ADR clauses are part of private contracts.</li> </ul>	<p>➤ For Commonwealth legislation, see <b>Chapter 2</b>, paragraphs 2.9-2.13.</p> <p>➤ The <i>Workplace Relations Act 1996</i>, for example, includes a model dispute resolution process (in Part 13) that is taken to be included in workplace agreements if the agreement does not include dispute settlement procedures (ss 353 and 694-697). See <b>Chapter 6</b> of the guide, paragraphs 6.6-6.7.</p>

## 2. WHAT TYPE OF ADR IS MOST APPROPRIATE?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<ul style="list-style-type: none"> <li>• Consider the nature of the ADR processes - facilitative, advisory, determinative or, in some cases, a combination of these (see Chapter 4, paragraphs 4.7 to 4.10).</li> <li>• Examples of facilitative processes are mediation, facilitation and facilitated negotiation. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation. Determinative processes include arbitration, expert determination and private judging.</li> <li>• Various ADR processes may also be described according to their objectives, the specific strategies used or the type of dispute. For example, <i>transformative mediation, evaluative mediation or co-mediation</i>.</li> </ul>	<ul style="list-style-type: none"> <li>• Leaving arbitration aside, mediation and conciliation are the most common processes referred to in legislation, followed by negotiation and conferencing. Adjudication, case appraisal and neutral evaluation are also occasionally referred to.</li> <li>• ADR definitions should not be provided in legislation except in limited situations. Policy-makers may wish to consider distinguishing between the types of ADR processes to be used rather than setting out prescriptive definitions.</li> <li>• ADR may be used for different categories of dispute, for example family dispute resolution, community mediation, victim-offender mediation, equal opportunity conciliation, workers' compensation conciliation, tenancy conciliation or commercial arbitration. Multi-party mediation may involve several parties or groups of parties.</li> </ul>	<ul style="list-style-type: none"> <li>➤ The <i>Administrative Appeals Tribunal Act 1974</i>, section 3(1), adopts a definition of ADR listing various types of ADR processes. Under section 34E, some ADR processes are treated differently for the purpose of admissibility of evidence (see <b>Chapter 10</b>, paragraphs 10.7-10.17).</li> <li>➤ Descriptions of different types of ADR can be found in <b>Chapter 4</b>, paragraphs 4.7-4.10, and some specific definitional issues are noted in paragraph 4.16. See also <i>Glossary of ADR Terms</i> in Appendix 1 on page 98.</li> </ul>

### 3. HOW SHOULD DISPUTES BE REFERRED TO ADR?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<ul style="list-style-type: none"> <li>• The Australian Government encourages its agencies to resolve disputes at the lowest appropriate level and to proactively avoid unnecessary escalation of conflict.</li> <li>• Except where judgement has been reserved in a judicial process, parties can attempt an ADR process at any stage in their dispute.</li> <li>• If legislation is to provide for referral to ADR, the nature and extent of any referral criteria or negative criteria, as well as whether to include these in legislation or regulations, needs to be decided.</li> <li>• It is important where legislation compulsorily refers parties to ADR that appropriate professional standards are maintained and enforced. (See Chapter 5, paragraphs 5.26-5.29 and Chapter 7.)</li> </ul>	<ul style="list-style-type: none"> <li>• Most Commonwealth courts and tribunals have a power to refer a matter to ADR. In some circumstances, this can be done without the consent of the parties (compulsory referral). The referring body will generally have a discretion to refer the dispute to ADR.</li> <li>• Legislation or court rules may require disputing parties to access community-based ADR before commencing proceedings. Grievance and complaints procedures governed by law may also require that an ADR attempt has been made.</li> <li>• NADRAC's view is that legislation should only require a dispute to be referred to ADR without the consent of the parties where an assessment of suitability for referral has been made. However, any assessment criteria do not need to be contained in legislation. It may be more useful for legislation to specify negative criteria, for example when not to refer a dispute.</li> </ul>	<ul style="list-style-type: none"> <li>➤ For Government policy encouraging Commonwealth agencies to use ADR, see the <i>Federal Civil Justice System Strategy Paper</i>, (2003) at &lt;<a href="http://www.ag.gov.au/publications">http://www.ag.gov.au/publications</a>&gt; and the <i>Legal Services Directions 2005</i>, including Appendix B: <i>The Commonwealth's Obligations to Act as a Model Litigant</i>, at &lt;<a href="http://www.ag.gov.au/olsc">http://www.ag.gov.au/olsc</a>&gt; or &lt;<a href="http://www.comlaw.gov.au">http://www.comlaw.gov.au</a>&gt; under legislative instruments.</li> <li>➤ For an example of legislation that requires disputing parties to attempt to resolve their dispute before commencing proceedings, see the <i>Family Law Act 1975</i>, section 60I.</li> <li>➤ See <b>Chapter 5</b> of the Guide. NADRAC commissioned a paper on this issue authored by Associate Professor Kathy Mack, <i>Court Referral to ADR: Criteria and Research</i> (2003), which is available on NADRAC's website &lt;<a href="http://www.nadrac.gov.au">http://www.nadrac.gov.au</a>&gt; under Publications.</li> </ul>

#### 4. SHOULD PARTICIPATION IN ADR BE COMPULSORY FOR THE PARTIES?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<p style="text-align: center;"><b>SHOULD PARTICIPATION IN ADR BE MADE COMPULSORY?</b></p> <p>When a dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, this provides an opportunity for participation in a process from which co-operation and consent might come. (See Chapter 6, paragraphs 6.22-6.26.)</p>	<p style="text-align: center;"><b>COMPULSORY</b></p> <p style="text-align: center;">?</p> <ul style="list-style-type: none"> <li>• Parties may be referred to ADR with or without their consent.</li> <li>• The referrer may have the discretion to refer matters to ADR or may be compelled to refer matters to ADR.</li> <li>• Parties engaged in ADR are required to participate in good faith by a variety of laws and rules in Australia. The consequences of not participating in good faith vary.</li> <li>• Contractual agreements containing ADR clauses are common in commercial and employment agreements.</li> </ul>	<ul style="list-style-type: none"> <li>➤ See the <i>Family Law Act 1975</i>, the <i>Federal Magistrates Act 1999</i>, the <i>Federal Court of Australia Act 1976</i> and the <i>Native Title Act 1993</i>. (See <b>Chapter 6</b>, paragraphs 6.8-6.19.)</li> <li>➤ An example of mandatory referral is found in the <i>Native Title Act 1993</i>, section 86B.</li> <li>➤ The <i>Administrative Appeals Tribunal Act 1975</i>, s 34A(5), requires parties who have been referred to an ADR process by the Tribunal to act in good faith in relation to the ADR process concerned. (See Chapter 6, paragraphs 6.27-6.35.) Good faith provisions are more commonly found in State legislation, for example the <i>Civil Procedure Act 2005</i> (NSW).</li> <li>➤ The <i>Workplace Relations Act 1996</i> includes a model dispute resolution process that applies if a workplace agreement does not contain ADR provisions (section 353 and Part 13 generally, in particular sections 694-703). It provides that a party may elect to use a dispute resolution process in an attempt to settle a dispute and that, if an ADR process is used, the parties must genuinely attempt to resolve the dispute using that process (sub-sections 696(1) and 696(6)). See also Chapter 6, paragraphs 6.6-6.7.</li> </ul>

## 5. SHOULD PARTICIPATION IN ADR BE VOLUNTARY?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<p style="text-align: center;"><b>SHOULD PARTICIPATION IN ADR BE VOLUNTARY?</b></p> <ul style="list-style-type: none"> <li>• Generally, settlement during ADR is more likely to occur if the parties participate voluntarily in ADR rather than being compelled to do so.</li> <li>• Compulsory participation may also be inappropriate in certain types of disputes, for example where there is a history of violence.</li> <li>• Where participation is compulsory, ADR may be used as a case management tool by courts and tribunals, rather than as a mechanism for considered and deliberative ADR.</li> </ul>	<p style="text-align: center;"><b>VOLUNTARY</b></p> <p style="text-align: center;">?</p> <ul style="list-style-type: none"> <li>• Parties may agree to attempt to resolve their dispute through ADR at any stage before or during legal proceedings.</li> <li>• Parties may agree to participate in ADR through a private contractual agreement.</li> <li>• Where legislation allows a court/tribunal to refer parties to ADR, the obligation to participate in ADR can be voluntary for the parties.</li> <li>• Wherever a dispute is referred to ADR, the advantages of compulsory participation can only be realised if there is careful assessment of whether the dispute is suitable for ADR and if there are appropriate exceptions for unsuitable cases. Compulsory participation and referral is only appropriate where professional practitioner standards are maintained and enforced.</li> </ul>	<ul style="list-style-type: none"> <li>➤ See <b>Chapter 6</b>, paragraphs 6.9-6.10 and 6.22-6.26.</li> <li>➤ For an example of legislation which provides for the use of ADR processes by party consent, see the <i>Family Law Act 1975</i> section 13E. The Family Court and Federal Magistrates Court may refer any or all of the matters in a family law dispute about financial matters to arbitration only with the consent of all the parties.</li> <li>➤ A party to family law proceedings may apply to the court to order that one or more parties to the proceedings attend an appointment with a family consultant, or attend family counselling or family dispute resolution (<i>Family Law Act 1975</i>, sub-sections 11F(3) and 13C(5)). Before exercising this power, a court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs (section 11E).</li> </ul>

## 6. WHAT ARE THE DUTIES AND STANDARDS EXPECTED OF ADR PRACTITIONERS? HOW IS THE ADR PRACTITIONER SELECTED?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<ul style="list-style-type: none"> <li>• There is no national, single organisation that accredits mediators and other ADR practitioners, but efforts are being made to develop common national standards for mediator accreditation.</li> <li>• Important issues to consider are:               <ol style="list-style-type: none"> <li>1. whether the duties and standards of ADR practitioners should be a legislative requirement or left to ‘good practice’,</li> <li>2. how the ADR practitioner should be selected, and</li> <li>3. whether the ADR practitioner should face sanctions if there is a complaint against him or her.</li> </ol> </li> <li>• Issues to consider when setting out the duties and standards of ADR practitioners include: how the practitioner is to be selected, the role of the practitioner, impartiality, conflicts of interest, competence, confidentiality, the quality of the process, the termination of the ADR process, recording settlement, publicity, advertising and fees.</li> </ul>	<ul style="list-style-type: none"> <li>• Legislation and regulations can specify the level of training and education required in order to conduct mediation and other forms of ADR.</li> <li>• Codes of conduct and professional rules can also provide guidance about the duties of ADR practitioners, so consideration needs to be given to whether or not legislative guidance is needed.</li> <li>• The National Mediation Accreditation System and the National Mediation Standard aim to achieve a national uniform system of mediator accreditation. Further details can be found at: <a href="http://www.mediationconference.com.au">http://www.mediationconference.com.au</a> The System and the Standard are included as Appendix 3 in the Guide starting on page 114.</li> </ul>	<ul style="list-style-type: none"> <li>➤ See <b>Chapter 7</b>. A compendium of Australian legislative provisions covering referral to mediation and accreditation of mediators titled <i>Who can refer to, or conduct, mediation</i> is available on NADRAC’s website &lt;<a href="http://www.nadrac.gov.au">http://www.nadrac.gov.au</a>&gt; under Publications .</li> <li>➤ NADRAC’s discussion paper <i>Who says you’re a mediator? Towards a national system for accrediting mediators</i> (2004) is available on its website under Publications.</li> <li>➤ NADRAC’s report to the Commonwealth Attorney-General: <i>A framework for ADR standards</i> (2001) is available on its website under Publications.</li> <li>➤ Australian Standard AS 4609-2004: <i>Dispute Management Systems</i> provides a guide for the development and application of an effective dispute management system.</li> <li>➤ The <i>Family Law Act 1975</i>, s 10A (Accreditation Rules) allows for the Regulations to prescribe Accreditation Rules relating to the accreditation of persons as family counsellors, family dispute resolution practitioners and in other roles.</li> <li>➤ The Community Services and Health Industry Skills Council is developing a national competency framework for family dispute resolution practitioners and others. The National Training Information Service sets out Competency Standards for ADR, including mediation.</li> <li>➤ The Law Council of Australia sets out <i>Ethical Standards for Mediators</i>. There are also, for example, the <i>NSW Law Society Guidelines for those involved in Mediations</i>.</li> </ul>

## 7. SHOULD LEGISLATION PROVIDE IMMUNITY FROM SUIT TO ADR PRACTITIONERS?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<ul style="list-style-type: none"> <li>• The main issues for policy-makers to consider are whether immunity should be provided and, if so, the extent of immunity and how to ensure parties receive appropriate standards of ADR.</li> <li>• The arguments for and against immunity relate to the need to provide some protection to ADR practitioners and at the same time ensure an acceptable degree of accountability for ADR practice.</li> <li>• NADRAC's view is that any immunity from suit for negligence or other civil wrong must be strongly justified as a matter of public policy. There is almost no profession which is granted the privilege of immunity from civil liability.</li> <li>• Traditionally, the general policy supporting immunity for ADR practitioners has been that the performance of their functions and duties, and the quality of ADR outcomes, might be threatened if there is a risk of legal action.</li> </ul>	<ul style="list-style-type: none"> <li>• There is no general immunity from legal action for ADR practitioners. However, immunity can be provided by the practitioner's individual contract for service (if it is consistent with other legal principles about fair contracts) or by statute in particular areas of ADR work.</li> <li>• Statutory protection for ADR practitioners can either be provided as an absolute immunity (similar to that afforded to judges) for work done in relation to ADR associated with that legislation, or as a qualified immunity limited to acts done in good faith.</li> <li>• NADRAC's view is that where a court refers a matter to an ADR process, and the ADR is part of a continuum of case management strategies which aim to resolve litigation between the parties, safeguards should exist to protect the ADR practitioner from suit because of the proximity of ADR to judicial processes. In these circumstances, ADR is seen as an extension of court processes.</li> <li>• However, NADRAC believes it is very difficult to justify the immunity of ADR practitioners wherever the ADR is community-based rather than part of a court's case management process.</li> </ul>	<ul style="list-style-type: none"> <li>➤ See <b>Chapter 8</b>, paragraphs 8.12-8.22 and paragraphs 8.24-8.25 for arguments for and against statutory immunity.</li> <li>➤ Relevant Acts include the <i>Family Law Act 1975</i>, ss 11D and 10P, the <i>Federal Magistrates Act 1999</i>, s 34, the <i>Federal Court of Australia Act 1976</i>, s 53C, the <i>Administrative Appeals Tribunal Act 1975</i>, s 60(1A), the <i>Human Rights and Equal Opportunity Act 1986</i>, s 48, the <i>Native Title Act 1993</i>, ss 180 and 131A(1), and the <i>Privacy Act 1988</i>, ss 64 and 27.</li> <li>➤ Under the <i>Community Justice Centres Act 1983</i> (NSW), s 27(1), the <i>Dispute Resolution Centres Act 1990</i> (Qld) s 35(1)(c), and the <i>Evidence Act 1958</i> (Vic), s 21N, mediators accredited under the statute are provided with immunity for anything done in good faith in execution of their duties.</li> <li>➤ Professional standards legislation in most States and Territories enables the creation of schemes to limit the civil liability of professionals and others who are members of occupational associations and aims to facilitate improvement in the standards of services provided by those members.</li> </ul>

## 8. CONFIDENTIALITY AND DISCLOSURE OF COMMUNICATIONS MADE DURING ADR PROCESSES

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<ul style="list-style-type: none"> <li>It is widely expected that communications made during ADR will be kept confidential. The key issue to consider is whether legislation should impose these confidentiality obligations and what sanctions should apply for breaches of any confidentiality requirements. This is affected by a consideration of whether any common law or contractual obligations are sufficient.</li> <li>The policy reasons for confidentiality obligations are based on maintaining public confidence in ADR processes and enabling open and honest communication within the process to produce a workable outcome. The arguments for restricting those confidentiality obligations are based on the need for some judicial or public control over the private resolution of disputes and the need for third parties who may be affected by the outcomes of an ADR process to have access to information to assert their rights.</li> </ul>	<ul style="list-style-type: none"> <li>Commonwealth legislation generally does not prevent the parties from disclosing communications made during ADR.</li> <li>NADRAC's view is that the duty of confidentiality on the part of the ADR practitioner is primarily an ethical obligation and generally is best dealt with by reference to professional standards and codes of conduct, rather than legislation. Although there is an obligation on participating parties to keep matters discussed during an ADR process confidential, that obligation should not be imposed by legislation.</li> </ul>	<ul style="list-style-type: none"> <li>See <b>Chapter 9</b> of the guide.</li> <li>Under the <i>Family Law Act 1975</i>, sections 10D and 10H, a family counsellor or family dispute resolution practitioner must not disclose any communication or admission made unless it is necessary to protect a child, prevent a serious threat to the life, health or property of a person or to report or prevent the commission of an offence involving violence to a person or damage to property, or threats of violence or damage.</li> <li>Under the <i>Family Law Act 1975</i>, s 67ZA, additional obligations require disclosure to prescribed child welfare authorities where registrars of the Family Court or Federal Magistrates' Court, family counsellors, family consultants, family dispute resolution practitioners, arbitrators and lawyers independently representing a child's interest, have a reasonable suspicion of child abuse or ill-treatment. Those people are not liable for such disclosures in civil or criminal proceedings and are not considered to have breached any professional ethics if the disclosure is made in good faith (s 67ZB).</li> <li>State laws may impose a duty on ADR practitioners not to disclose confidential information, for example the <i>Civil Procedure Act 2005</i> (NSW), section 31.</li> </ul>

## 9. SHOULD ADR COMMUNICATIONS BE ADMISSIBLE AS EVIDENCE IN LATER PROCEEDINGS?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<ul style="list-style-type: none"> <li>• Legislation sometimes provides that evidence of anything said or done, or any admission made during an ADR process (including meetings with counsellors), is not admissible in court. This is done to facilitate frank discussions and meaningful negotiations, so that parties can negotiate more freely in an ADR session and express their differences openly without fearing that their words and actions will be used against them at a later date.</li> <li>• On the other hand, there may be compelling reasons for admitting some matters into evidence, for example where that evidence could help protect a child, vulnerable person or the public.</li> <li>• The key question for policy-makers is whether the circumstances justify including inadmissibility provisions in ADR legislation and if so, whether specific exceptions need to be added.</li> </ul>	<ul style="list-style-type: none"> <li>• Most legislation dealing with ADR provides that evidence of communications made during an ADR session is inadmissible in later proceedings. A court is usually not permitted to see documents related to the ADR process without the parties' consent if they could not otherwise be obtained from other sources. This rule is designed to encourage the settlement of disputes.</li> <li>• Some legislation containing inadmissibility provisions also specifies the circumstances under which there are exceptions to that admissibility. It is important that inadmissibility provisions are not unfairly used to prevent enforcement of agreements reached through an ADR process.</li> <li>• NADRAC's view is that disclosures made during an ADR process should not generally be admitted into evidence in subsequent court proceedings. Protecting the communications made in an ADR session provides greater certainty about the status of those communications and avoids secondary litigation.</li> </ul>	<ul style="list-style-type: none"> <li>➤ See <b>Chapter 10</b> of the guide.</li> <li>➤ For examples of legislation containing inadmissibility provisions which also set out situations in which those inadmissibility provisions do not apply, see the <i>Family Law Act 1975</i>, ss 10E and 10J, the <i>Administrative Appeals Tribunal Act 1975</i>, ss 34A and 34E, and the <i>Evidence Act 1995</i>, s 131.</li> <li>➤ The Australian, New South Wales and Victorian Law Reform Commissions considered the uniform Evidence Acts in the context of the exclusion of settlement negotiations in their report <i>Uniform Evidence Law</i>, ALRC Report 102 (2005), NSWLRC Report 112 (2005), VLRC Final Report (2005), Chapter 15, paras 15.167-15.179, available at &lt;<a href="http://www.austlii.edu.au/au/other/alrc/publications/reports/102/">http://www.austlii.edu.au/au/other/alrc/publications/reports/102/</a>&gt;. Section 131 of the <i>Evidence Act 1995</i> (Cth) excludes evidence of settlement negotiations except in proceedings to enforce a settlement agreement or where the making of such an agreement is in issue.</li> </ul>

## 10. HOW SHOULD AGREEMENTS REACHED AT ADR BECOME ENFORCEABLE?

RELEVANT CONSIDERATIONS	POSSIBLE APPROACH	SOURCES OF INFORMATION
<ul style="list-style-type: none"> <li>• The issue facing policy-makers in relation to the enforcement of ADR agreements is a question of balancing competing needs. Settlement negotiations and other ADR processes need to be encouraged and their confidentiality protected through inadmissibility rules. This priority needs to be balanced against the need to encourage finality of disputes and to allow ADR agreements to be submitted as evidence of an agreement reached.</li> <li>• The main difficulty in relation to the enforcement of ADR agreements occurs where one party wishes to rely on the agreement and the other party wishes to withdraw from it. In such cases, one party will usually claim that the agreement was not final, but an interim document created during ADR. Such interim documents would usually be inadmissible, and therefore not enforceable.</li> <li>• The intended enforcement of ADR outcomes needs to be clearly stated in the agreement as uncertainty may undermine efforts to later enforce the agreement.</li> </ul>	<ul style="list-style-type: none"> <li>• Where a court/tribunal has referred a matter to ADR, legislation may authorise that body to accept an agreement reached through an ADR process as evidence of settlement and make orders accordingly.</li> <li>• ADR processes should, where possible, assist parties to avoid litigation. For this reason, it is important that agreements reached at mediation and other ADR processes should be able to be enforced, subject to other statutory protections in relation to misleading and deceptive conduct and the protection available in cases of unfair contracts.</li> <li>• Where a court or tribunal has the legislative power to refer a matter to an ADR process, it should be able to make any orders within its power relating to any settlement agreement reached. Any agreements that go beyond the court or tribunal's power should be enforced through the law of contract.</li> </ul>	<ul style="list-style-type: none"> <li>➤ See <b>Chapter 11</b> of the guide.</li> <li>➤ Under the <i>Administrative Appeals Tribunal Act 1975</i>, section 34D, if parties engage in an alternative dispute resolution process related to a proceeding in the Tribunal and the parties lodge a written agreement (from which they have seven days to withdraw), the Tribunal may either: <ul style="list-style-type: none"> <li>• make a decision in accordance with the terms of the agreement, or</li> <li>• if the agreement relates to only part of the proceedings, give effect to the agreement at the proceeding without dealing with the matter to which the agreement relates.</li> </ul> </li> <li>➤ The Federal Court has the power, under the <i>Native Title Act 1993</i>, section 86D, to adopt any agreement on disputed facts that are reached between the parties during mediation conducted by the National Native Title Tribunal.</li> </ul>

## 4. PROCESSES OR TYPES OF ADR

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### OUTLINE OF ISSUE

4.1 Policy-makers need to consider whether ADR processes could assist with achieving policy aims and, if so, determine what processes might assist. They also need to consider whether to define those ADR processes in legislation.

4.2 NADRAC has often referred to the need for legislative consistency, clarity and certainty when regulating ADR. While there are many advantages to using terms consistently, policy-makers should also recognise the desirability of enabling diversity, flexibility and dynamism in dispute resolution practices and processes. Legislative definitions that are overly prescriptive may not provide the flexibility needed.

4.3 On the other hand, a clear framework for the statutory powers, obligations and protections (outlined in other chapters) relies on clear definitions or descriptions of terms, such as the person or body providing ADR, the referring agency, the process to be used and the outcome to be achieved. A glossary of commonly used ADR terms is included in Appendix 1 on page 98 (see also paragraph 4.6).

### WHAT IS ADR?

4.4 ADR is often understood to be those processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them.

4.5 Commonwealth legislation refers to a range of ADR processes which include arbitration, conciliation, mediation, negotiation, conferencing, adjudication, case appraisal and neutral evaluation. This guide examines legislative issues relating to most of these ADR processes but does not consider determinative processes such as arbitration,<sup>20</sup> to which different considerations apply.

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<sup>20</sup> Arbitration has a longer history in both the Australian and international legal systems, and many of the issues are already settled. Legislation relating to arbitration includes the *International Arbitration Act 1974* and the Commercial Arbitration Acts in the States and Territories (see note 1) as well as international rules such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html)> or <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>>. Model codes include the Institute of Arbitrators and Mediators (IAMA) Rules for the Conduct of Commercial Arbitrations (incorporating the Expedited Commercial Arbitration Rules) <<http://www.iama.org.au/rulesca.htm>>, and the IAMA Labour Arbitration Rules <<http://www.iama.org.au/ruleslabour.htm>>.

## GLOSSARY OF ADR TERMS

4.6 A [glossary of commonly used ADR terms](#) is available on NADRAC's website and is included in Appendix 1 on page 98. The glossary explains common usage of terms used in dispute resolution in Australia. The glossary is not intended to be used as a set of definitions. Agencies, practitioners and legislators may use these terms in different ways. Readers should therefore check how terms are used in any particular situation. The glossary is a web-based companion to NADRAC's brochure [What is ADR?](#) and [ADR Terminology: A discussion paper \(2002\)](#). This glossary supersedes NADRAC's earlier publication *Alternative Dispute Resolution Definitions* (1997).

## TYPES OF ADR

4.7 ADR processes can be described as facilitative, advisory, determinative or, in some cases, a combination of these.

- In *facilitative processes* an ADR practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are mediation, facilitation and facilitated negotiation.
- In *advisory processes* an ADR practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law, and in some cases, possible or desirable outcomes and how these may be achieved. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation.
- In *determinative processes* an ADR practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative ADR processes are arbitration, expert determination and private judging.
- In *combined or hybrid processes* the ADR practitioner may play multiple roles. For example, in conciliation and in conferencing, the ADR practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In hybrid processes, such as med-arb, the practitioner first uses one process (mediation) and then a different one (arbitration).

4.8 Various ADR processes may also be described according to their objectives, the specific strategies used or the type of dispute. For example, in *transformative mediation* the mediator aims to enhance relationships and understanding between the parties, while in evaluative mediation the mediator may suggest solutions. In *co-mediation*, two mediators work as a team.

4.9 ADR may be used for different categories of dispute, for example, family dispute resolution, community mediation, victim-offender mediation, equal

opportunity conciliation, workers' compensation conciliation, tenancy conciliation or commercial arbitration. *Multi-party mediation* may involve several parties or groups of parties.

4.10 Bearing in mind the varying types of ADR outlined above, policy-makers need to consider what type of ADR is most appropriate to the types of disputes for which ADR is to be provided.

## **ISSUES TO CONSIDER**

4.11 In general, using dispute resolution terms in a consistent manner can serve several important functions.

- First, it ensures those who use, or are referred to, dispute resolution services receive consistent and accurate information and have realistic and accurate expectations about the processes they are undertaking. This will enhance their confidence in, and acceptance of, dispute resolution services.
- Secondly, it helps courts and other referrers to match processes to specific disputes and different parties. Better matching improves outcomes from these processes.
- Thirdly, it helps service providers and practitioners to develop consistent and comparable standards. Such understanding also underpins contractual obligations and the effective handling of complaints about dispute resolution services.
- Fourthly, it provides a basis for policy and program development, data collection and evaluation.

4.12 However, it is important to take account of the broad contexts in which dispute resolution takes place. Different terminology has evolved in different sectors and problems may arise if processes are defined too prescriptively. For example, statutory protections may not apply if there is a minor departure from the process as defined in a specific piece of legislation.

4.13 Policy makers may wish to consider distinguishing between the types of ADR processes to be used, rather than setting out prescriptive definitions. This could be useful when considering the issues of admissibility and practitioner immunity, as different rules may well be appropriate. For example, it is generally accepted that the more determinative an ADR process is, the more justification there is for practitioner immunity. It is also believed that evidence about the more advisory processes should be admissible, while evidence of facilitative processes should remain inadmissible.

4.14 While formal definitions may be needed for legislative purposes, it may be preferable to consider the need for and nature of formal legal definitions *after* the substantive matters (eg referral, compliance, admissibility, and immunity) have been determined. For example, where legislation provides for parties to be referred to ADR without their consent, there may be a stronger need to explain the process and its purpose.

4.15 ADR terms may be ‘defined’ or ‘described’. NADRAC sees ‘descriptions’ as an indication of how particular terms are used, whereas ‘definitions’ refer to the essential nature or features of a specific term. Definitions or descriptions of ADR terms may need to be developed for the principal Act, rules or regulations, administrative directions, and codes or standards. NADRAC’s glossary of commonly used ADR terms on page 98 may assist in this regard, although it is not intended to be used as a set of definitions.

4.16 There are also a number of specific definitional issues. Three definitional debates commonly emerge in providing a legislative framework for ADR.

- Different terms can be used to describe the impartial person who assists those in dispute to resolve their differences. NADRAC prefers to use the term ‘dispute resolution practitioner’ (rather than ‘third party’, ‘third party neutral’<sup>21</sup> or ‘intervener’) unless a distinction is required between dispute resolution practitioners in a particular process.
- There are different views on the meaning of the terms ‘mediation’ and ‘conciliation’. NADRAC considers that ‘mediation’ should be used where the practitioner has no advisory role on the content of the dispute (the process is purely facilitative) and the term ‘conciliation’ used where the practitioner does have such a role. However, an overlap in the usage of these terms is inevitable given the wide range of processes referred to.
- Particular consideration may be needed where courts or tribunals refer or offer parties a dispute resolution process, as the community will look to these bodies for guidance on what type of ADR is to be used. Terms other than ‘mediation’ may more accurately reflect the actual processes being offered by courts.

## STATUTORY PROVISIONS

4.17 ADR processes are rarely defined comprehensively in Commonwealth legislation. Where definitions are provided, they most commonly apply to the ADR practitioner<sup>22</sup> or body that conducts the process rather than the procedure<sup>23</sup> to be

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<sup>21</sup> Most dispute resolution practitioners could be described as ‘impartial’, and this term would be preferred to ‘neutral’.

<sup>22</sup> Acts that define the *ADR practitioner* include the *Administrative Appeals Tribunal Act 1975*, ss 34C and 34H and the *Family Law Act 1975*, ss 10A, 10C, 10G, 10M and 11B. For State and Territory legislation see NADRAC’s compendium of Australian legislative provisions covering referral to mediation and accreditation of mediators, available at

followed. Some provisions also describe the parties,<sup>24</sup> proceedings and outcomes<sup>25</sup> of ADR processes.

4.18 Following consultation with NADRAC, the *Administrative Appeals Tribunal Act 1975* adopted a definition of ADR processes which includes a non-exhaustive list of the various kinds of processes.<sup>26</sup> A similar approach, listing the ADR processes available, is found in section 698 of the *Workplace Relations Act 1996* and section 21 of the *Federal Magistrates Act 1999*.

***alternative dispute resolution processes*** means procedures and services for the resolution of disputes, and includes:

- (a) conferencing; and
- (b) mediation; and
- (c) neutral evaluation; and
- (d) case appraisal; and
- (e) conciliation; and
- (f) procedures or services specified in the regulations;

but does not include:

- (g) arbitration; or
- (h) court procedures or services.

Paragraphs (b) to (f) of this definition do not limit paragraph (a) of this definition.

4.19 The definition does not set out the specific features of each particular ADR process. However, the distinction between the *types* of ADR processes became important when providing for admissibility of evidence from ADR. The section on admissibility permits evidence of case appraisal reports or neutral evaluation reports to be admitted before the Administrative Appeals Tribunal (unless a party objects).<sup>27</sup> These are advisory processes rather than facilitative processes such as mediation or conferencing.

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[http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Who\\_can\\_refer\\_to](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Who_can_refer_to).

<sup>23</sup> ADR processes are defined in the *Workplace Relations Act 1996*, s 698, the *Administrative Appeals Tribunal Act 1975*, s 3(1), the *Family Law Act 1975*, ss 10B, 10F, 10L and 11A, and the *Federal Magistrates Act 1999*, s 21.

<sup>24</sup> The parties to an ADR process are specified in Acts including the *Trade Practices Act 1974*, s 44U and the *Native Title Act 1993*, s 30A. The *Family Law Act 1975* allows for the participation of other parties to an ADR process. Under sub-section 13C(3), the Act provides for the Court to refer parties to family counselling, family dispute resolution and other family services, and the Court may order the parties to encourage the participation of other persons who are likely to be affected by the proceedings, for example the participation of children, grandparents or other relatives.

<sup>25</sup> For statutory provisions in relation to the enforcement of ADR agreements see Chapter 11, paragraphs 11.5-11.23.

<sup>26</sup> *Administrative Appeals Tribunal Act 1975*, s 3(1).

<sup>27</sup> *Administrative Appeals Tribunal Act 1974*, s 34E.

## NADRAC'S VIEW

4.20 In NADRAC's view, it is not particularly helpful to provide definitions in legislation except where it is proposed to:

- list the types of ADR that are permitted in a particular context (see the definition used in the *Administrative Appeals Act 1975*)
- limit the categories or qualifications of persons authorised to carry out ADR (see the examples provided in Chapter 7), or
- provide defined circumstances for certain outcomes, eg immunity from suit or non-admissibility in any court action (see Chapters 8 and 10).

4.21 In some cases it may be desirable to ensure flexibility by permitting some of these matters to be dealt with in legislative instruments, in particular, in regulations or rules of court.

## **5. HOW DISPUTES ARE REFERRED TO ADR**

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### **OUTLINE OF ISSUE**

5.1 Policy-makers need to decide which method or methods of referral to ADR are most appropriate. Where referral to ADR is compulsory, several complementary issues may need to be addressed. Consideration also needs to be given to whether any referral criteria should be included in legislation.

5.2 Most Commonwealth courts and tribunals have a power to refer a matter to ADR. Under some legislation, this can be done without the consent of the parties (compulsory or non-consensual referral). The referring body will generally have a discretion to refer the dispute to ADR or may apply referral criteria to determine whether a dispute is suitable for ADR. However, under some legislation, almost all matters must be referred (mandatory referral).

5.3 Legislation or court rules may require disputing parties to access community-based ADR before commencing proceedings.<sup>28</sup> Grievance and complaints procedures may also require that an ADR attempt has been made.<sup>29</sup> Parties are free to attempt an ADR process at any stage in their dispute or may agree to use ADR when the dispute arises. Alternatively, a contract, code of practice or set of rules may encourage or require parties to use ADR. In addition, the Government encourages Commonwealth agencies to resolve disputes at the lowest appropriate level and proactively avoid unnecessary escalation of conflict.<sup>30</sup>

### **STATUTORY PROVISIONS**

5.4 At the Commonwealth level, legislation provides for varying forms of ADR, or for ADR as a pre-requisite to commencing proceedings, in the following courts, tribunals and commissions:

- Federal Court (*Federal Court of Australia Act 1976*)
- Family Court of Australia (*Family Law Act 1975*)
- Federal Magistrates Court (*Federal Magistrates Act 1999*)
- Human Rights and Equal Opportunity Commission (*Human Rights and Equal Opportunity Commission Act 1986*)
- Australian Industrial Relations Commission (*Workplace Relations Act 1996*)
- Administrative Appeals Tribunal (*Administrative Appeals Tribunal Act 1975*)

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<sup>28</sup> For example, the *Family Law Act 1975*, s 60I, aims to ensure that people who have a dispute involving children make a genuine effort to resolve that dispute by attending family dispute resolution before applying for a parenting order. In property matters, the *Family Law Rules 2004* require parties to make a genuine effort to resolve the dispute before filing an application to start a case in the Family Court by participating in dispute resolution such as negotiation, conciliation, arbitration and counselling. (*Family Law Rules 2004*, Schedule 1, Pre-action Procedures, Part 1, Financial cases, (1).) See also paragraph 6.15.

<sup>29</sup> *Complaints (Australian Federal Police) Act 1981*, s 6B; *National Health Act 1953*, s 82ZSB and the *Migration Act 1958*, s 318.

<sup>30</sup> Sometimes termed 'proportionate dispute resolution'. See the Federal Civil Justice System Strategy Paper, found at <<http://www.ag.gov.au/publications>> in particular, pp 128-163.

- National Native Title Tribunal (*Native Title Act 1993*)
- Australian Competition and Consumer Commission (*Trade Practices Act 1974*), and
- Social Security Appeals Tribunal (*Social Security Act 1991*).

5.5 Commonwealth legislation deals with referral to ADR in one of several ways. The referral can be compulsory (or non-consensual) so that consent is not required from the parties,<sup>31</sup> or referral can be voluntary (or consensual), so that all parties must consent to participate.<sup>32</sup> Referral can be discretionary, so that a person in a nominated position or a body *may* refer a dispute to an ADR process,<sup>33</sup> or mandatory, so that the referring body *must* refer the dispute to ADR in all but exceptional cases.<sup>34</sup> In some circumstances, legislation requires mandatory consideration of whether to refer a dispute to ADR.<sup>35</sup>

5.6 Referral can be both mandatory and compulsory. Referral can also be both discretionary and compulsory in that the referrer has a discretion to refer the dispute to ADR with or without the consent of the parties<sup>36</sup> or both mandatory and voluntary in that the majority of disputes are referred to ADR but only with the consent of the parties.<sup>37</sup> Referral can also be both discretionary and voluntary.<sup>38</sup> Sometimes, discretionary referral is based on the application of specified referral criteria.<sup>39</sup> The following table outlines the options available.

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<sup>31</sup> See for example *Federal Court of Australia Act 1976*, s 53A, the *Family Law Act 1975*, s 13C and the *Federal Magistrates Act 1999*, s 34(3).

<sup>32</sup> For example, the *Family Law Act 1975*, s 13E, where all parties to the proceedings must consent if a court refers proceedings to an arbitrator for arbitration.

<sup>33</sup> For example, the *Family Law Act 1975*, ss 13C and 13E, the *Federal Magistrates Act 1999*, s 34; the *Administrative Appeals Act 1975*, s34A, the *Broadcasting Services Act 1992*, s 185; the *Migration Act 1958*, s 318; the *Human Rights and Equal Opportunity Commission Act 1986*, s 31(b); the *Corporations Act 2001*, s 241, and the *Radiocommunications Act 1992*, s 205.

<sup>34</sup> See for example, *Native Title Act 1993*, s 86B, where the Federal Court must refer every application under section 61 (native title and compensation applications) to the NNTT for mediation unless an order is made that there be no mediation.

<sup>35</sup> See for example, the *Trade Practices Act 1974*, s 152CLA (Resolution of access disputes), where the Commission *must* have regard to the desirability of access disputes being resolved in a timely manner (including through the use of alternative dispute resolution methods). Also, the *Copyright Act 1968*, s 195AZA(3), where the court *must* consider whether it should adjourn the hearing of an injunction application in relation to an infringement of an author's moral rights, for the purpose of giving the parties an appropriate opportunity to negotiate a settlement, whether through a process of mediation or otherwise. Under the *Family Law Act 1975*, s 13B, a court exercising jurisdiction over a divorce proceeding *must* consider, from time to time, the possibility of a reconciliation between the parties to the marriage, and if the court decides to adjourn the proceedings, the court must advise the parties to attend family counselling.

<sup>36</sup> As in *Federal Court of Australia Act 1956*, s 53A, the *Family Law Act 1975*, s 13C and the *Federal Magistrates Act 1999*, s 34(3).

<sup>37</sup> *Native Title Act 1993*, s 86B(2), where the Federal Court must refer every application under section 61 (native title and compensation applications) to the NNTT for mediation unless a party makes an application that there be no mediation and the Court makes such an order.

<sup>38</sup> For example, the *Family Law Act 1975*, s 13E, where the court may refer proceedings to arbitration but only if all parties consent.

<sup>39</sup> This is sometimes considered an important safeguard. For example, although there are no specific referral criteria under the *Family Law Act 1975*, before a court can make an order under section 13C that the parties attend family counselling or family dispute resolution or participate in a program or service, the court *must consider* seeking the advice of a family consultant about the services appropriate to the parties' needs (see also s 11E of the *Family Law Act*).

REFERRER	PARTIES
<b>DISCRETIONARY REFERRAL ?</b> Referrer <i>may</i> refer parties to ADR	<b>VOLUNTARY PARTICIPATION</b> Parties must consent to referral
	<b>COMPULSORY PARTICIPATION</b> Parties' consent is not required
<b>MANDATORY CONSIDERATION ?</b> Referrer <i>must consider</i> referring parties to ADR	<b>VOLUNTARY PARTICIPATION</b> Parties must consent to referral
	<b>COMPULSORY PARTICIPATION</b> Parties' consent is not required
<b>MANDATORY REFERRAL ?</b> Referrer <i>must refer</i> parties to ADR	<b>VOLUNTARY PARTICIPATION</b> Parties must consent to referral
	<b>COMPULSORY PARTICIPATION</b> Parties' consent is not required

5.7 In other situations, the parties may request that their dispute be referred to an ADR process (self-referral).<sup>40</sup> ADR clauses are now included in most industry and government agreements for the provision of goods and services (referral by contract) and legislation can deem that ADR clauses are taken to be included in employment agreements.<sup>41</sup> There are also statements of principle, where the court must advise parties to attend ADR if there is a possibility of reconciliation<sup>42</sup> or must provide general ADR information<sup>43</sup> (advisory referral).

5.8 In the Family Court, until 30 June 2007, parties who have a dispute involving children are encouraged to make a genuine effort to resolve that dispute by family dispute resolution before a parenting order is applied for (pre-filing ADR). From 1 July 2007 people with new parenting matters will be required to attend dispute resolution with an accredited family dispute resolution practitioner before they can lodge an application for a parenting order. This will apply to all parenting matters, rather than only new ones, following a date which is yet to be proclaimed.

<sup>40</sup> For example, the *Family Law Act 1975*, sub-s 13C(5), where a party to the proceedings can apply for an order that one or more of the parties attend family counselling, family dispute resolution or participate in an appropriate course or program. See also the *Native Title Act 1993*, s 44F.

<sup>41</sup> The *Workplace Relations Act 1996*, s 353 states that a workplace agreement must include procedures for settling disputes about matters arising under the agreement. If a workplace agreement does not include dispute settlement procedures, the agreement is taken to include the model dispute resolution process set out in Part 13, in particular ss 694-697.

<sup>42</sup> For example, the *Family Law Act 1975*, s 13B (Court to accommodate possible reconciliations) where the court must advise parties to attend family counselling if there is a possibility of reconciliation. More general statements of intention regarding the use of ADR are also found in the *Family Law Act 1975*, ss 13A and 60I.

<sup>43</sup> *Family Law Act 1975*, ss 12A-12G (Obligations to inform people about non-court based family services and about court's processes and services).

5.9 Case flow management is often closely related to ADR, so the various case flow management conferences may incorporate some form of ADR process or referral.

5.10 Key pieces of legislation which contain referral provisions include the *Family Law Act 1975*, the *Federal Magistrates Act 1999*, the *Federal Court of Australia Act 1976* and the *Native Title Act 1993*.

#### ***Federal Court of Australia Act 1976***

5.11 The Federal Court can order mediation without the parties' consent.<sup>44</sup> The Act allows the Court to make its own rules regarding the procedures to be followed during mediation.<sup>45</sup> The Court can also direct parties to attend a case management conference to consider the most economic and efficient means of conducting proceedings.<sup>46</sup>

#### ***Federal Magistrates Act 1999***

5.12 The Federal Magistrates Court may also refer non-family matters to mediation without the parties' consent.<sup>47</sup> Before the Federal Magistrates' Court refers family law matters to family counselling or family dispute resolution, or orders a person to participate in a course, program or other service, or attend appointments with a family consultant, the court may seek, *and must consider seeking*, the advice of a family consultant as to the services appropriate to the needs of the person and the most appropriate provider of those services.<sup>48</sup> Family law matters referred to family dispute resolution by the Federal Magistrates Court must be assessed for suitability by family dispute resolution providers.<sup>49</sup>

#### ***Native Title Act 1993***

5.13 The Federal Court is required to refer native title and compensation applications<sup>50</sup> to the National Native Title Tribunal for mediation as soon as practicable,<sup>51</sup> but the Court must make an order that there be no mediation if it considers that mediation is unnecessary due to an agreement between the parties or there is no likelihood that parties will reach agreement on any of the matters.<sup>52</sup> In making its decision about referral, the Court must consider the number of parties, how long it will take to reach agreement, the nature and extent of non-native title rights

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<sup>44</sup> *Federal Court of Australia Act 1976*, s 53A.

<sup>45</sup> *Federal Court of Australia Act 1976*, sub-ss 59(2)(zf), 59(2)(zg), 59(2)(zh) and 59(2)(zi).

<sup>46</sup> *Federal Court Rules*, Order 10, Rule 1(2)(i).

<sup>47</sup> *Federal Magistrates Act 1999*, s 34(3).

<sup>48</sup> *Family Law Act 1975*, s 11E (Courts to consider seeking advice from family consultants).

<sup>49</sup> Under the *Family Law Regulations 1984*, Reg 62, family dispute resolution practitioners to whom a dispute is referred under the *Family Law Act 1975* must conduct an assessment of the parties to the dispute to determine whether family dispute resolution is appropriate. The Rules of the Federal Magistrates Court may make provision for family counselling, family dispute resolution, assistance from family consultants and participation by parties in programs, courses or other services. (*Federal Magistrates Act 1999*, s 87(2)).

<sup>50</sup> Under section 61 of the *Native Title Act 1993*.

<sup>51</sup> *Native Title Act 1993*, s 86B(1).

<sup>52</sup> *Native Title Act 1993*, s 86B(3).

and any other relevant factor.<sup>53</sup> In addition, the Court can refer a matter to mediation at any time if it thinks that agreement can be reached.

### ***Family Law Act 1975***

5.14 The Family Court or the Federal Magistrates' Court may, on its own initiative, require parties to attend family counselling or family dispute resolution, or to participate in a course or program, or attend an appointment with a family consultant, at any stage in the proceedings.<sup>54</sup>

5.15 The Family Court may refer any or all of the matters in a property or financial dispute to arbitration with the consent of the parties.<sup>55</sup> A party to the proceedings or a child<sup>56</sup> may request that one or more of the parties attend family counselling, family dispute resolution or participate in an appropriate program or course.<sup>57</sup> The court may also make such orders on its own initiative.<sup>58</sup> Before making such an order, the court must consider seeking the advice of a family consultant about the services appropriate to the parties' needs.<sup>59</sup> In addition, the court must advise the parties to attend family counselling if it considers that there is a reasonable possibility of reconciliation.<sup>60</sup>

5.16 Before providing family dispute resolution under the *Family Law Act 1975*, a family dispute resolution practitioner to whom a dispute is referred must first conduct an assessment of the parties to determine whether family dispute resolution is appropriate. The family dispute resolution practitioner must consider whether the ability of any party to negotiate freely in the dispute is affected by a history of family violence, the likely safety of the parties, the degree of equality, the risk of child abuse and the emotional and psychological state of the parties.<sup>61</sup>

5.17 Married couples considering separation or divorce should be provided with information about ways of resolving disputes other than by applying for court orders<sup>62</sup> and with information about the services available to help with a possible reconciliation (where reconciliation is reasonably possible).<sup>63</sup> There are obligations on legal practitioners,<sup>64</sup> principal executive officers of courts,<sup>65</sup> family counsellors, family dispute resolution practitioners and arbitrators<sup>66</sup> to provide information to the parties about non-court based family services and the court's processes and services.<sup>67</sup> The *Family Law Regulations 1984* may prescribe information that is to be included in

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<sup>53</sup> *Native Title Act 1993*, s 86B(4).

<sup>54</sup> *Family Law Act 1975*, s 13C.

<sup>55</sup> *Family Law Act 1975*, s 13E.

<sup>56</sup> Independently represented by a lawyer under an order made under s 68L of the *Family Law Act 1975*.

<sup>57</sup> *Family Law Act 1975*, sub-ss 13C(1) and 13C(5)(b).

<sup>58</sup> *Family Law Act 1975*, sub-ss 13C(1) and 13C(5)(a).

<sup>59</sup> *Family Law Act 1975*, sub-s 13C(1) and s 11E.

<sup>60</sup> *Family Law Act 1975*, sub-s 13B(3).

<sup>61</sup> *Family Law Regulations 1984*, Reg 62.

<sup>62</sup> *Family Law Act 1975*, sub-s 12A(1)(c).

<sup>63</sup> *Family Law Act 1975*, sub-s 12A(1)(a).

<sup>64</sup> *Family Law Act 1975*, s 12E.

<sup>65</sup> *Family Law Act 1975*, s 12F.

<sup>66</sup> *Family Law Act 1975*, s 12G.

<sup>67</sup> *Family Law Act 1975*, s 12B.

the documents provided.<sup>68</sup> The information may indicate that family dispute resolution may not be appropriate for all disputes, particularly where one party is threatened by another party with violence.<sup>69</sup>

5.18 Parties to a dispute involving children must make a genuine effort to resolve that dispute by family dispute resolution<sup>70</sup> before applying for a parenting order.<sup>71</sup> A court cannot hear an application for a parenting order unless the applicant files a certificate given by a family dispute resolution practitioner about whether the parties attended family dispute resolution and whether or not a genuine effort was made to resolve the issues.<sup>72</sup> There may be costs penalties for non-compliance with these requirements, as the court may take the type of certificate into account in determining whether to award costs against a party.<sup>73</sup>

5.19 The requirement to attempt to resolve a dispute by family dispute resolution before applying for a parenting order does not apply where a child has been abused or is at risk of being abused, there has been family violence or a risk of violence, the application is urgent, or one of the parties is unable to participate because of an incapacity including physical remoteness.<sup>74</sup>

## POLICY ISSUES

5.20 Referral to ADR raises three key issues.

5.21 First, a decision needs to be made as to whether referral should be mandatory or discretionary, compulsory or voluntary, or an essential process prior to commencing a case or lodging a complaint.

5.22 Policy-makers also need to consider the level of public confidence in the ADR process when contemplating mandatory and/or compulsory referral. This may be enhanced by a legislative framework which is clear about the processes to which the dispute is being referred.

5.23 Secondly, if it is proposed that legislation will provide for referral to ADR, the nature and extent of any referral criteria or negative criteria need to be decided. Whether some basic referral criteria should be included in legislation or in regulations or rules, with further criteria developed by the referring body, is a further consideration. NADRAC commissioned research ([\*Court Referral to ADR: Criteria and Research\*](#)) about whether it is possible to establish specific criteria or identify key

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<sup>68</sup> Family Law Act 1975, ss 12D and 12C.

<sup>69</sup> Family Law Regulations 1984, Reg 63.

<sup>70</sup> Family dispute resolution is defined in the *Family Law Act 1975*, s 10F. A family dispute resolution practitioner (defined in s 10G) is a person who is accredited under the Accreditation Rules.

<sup>71</sup> *Family Law Act 1975*, s 60I. Similar provisions apply under the *Family Law Rules 2004*, Schedule 1, Pre-action procedures, which are applicable until 30 June 2007. After 30 June 2007, a court must not hear an application for a Part VII order (parenting order) unless the applicant files a certificate by a family dispute resolution practitioner relating to whether or not the parties have made a genuine effort to resolve the issues in dispute.

<sup>72</sup> *Family Law Act 1975*, sub-ss 60I(7) and 60I(8).

<sup>73</sup> *Family Law Act 1975*, s 117.

<sup>74</sup> *Family Law Act 1975*, sub-s 60I(9).

features which might provide a checklist to guide a court in making a referral to ADR.<sup>75</sup>

5.24 Thirdly, particularly if referral to ADR is mandatory and/or party participation is compulsory, policy-makers should consider what professional standards should be satisfied by ADR practitioners and what standards the ADR process should meet.

5.25 A number of factors may be relevant to a referral decision. These include:

- the capacity of the parties to participate safely or effectively on their own behalf on the basis of factors including:
  - current fear of violence by a party
  - an unmanaged mental illness or intellectual disability
  - any power imbalance and the extent to which it can be redressed, and
  - any relevant court orders (eg restraining orders) which make ADR difficult
- the relative costs of ADR and litigation, compared with the benefits of each
- cultural factors, and
- whether the public interest requires a formal, public, binding determination or an authoritative interpretation and application of statute or case law.<sup>76</sup>

## NADRAC'S VIEW

5.26 NADRAC considers that in some circumstances, it is justifiable to require parties to attempt ADR through compulsory (or non-consensual) participation.<sup>77</sup>

5.27 Compulsory participation in an ADR process is only appropriate where there is adequate assessment of the suitability of the dispute for referral to ADR and where appropriate professional standards are maintained and enforced. Compulsory participation in ADR is not recommended unless careful assessment and practitioner standards are adequately established. In addition, the legislative framework should be clear about the processes the dispute is being referred to and there should be general public confidence in ADR.

5.28 Compulsory participation in ADR before applying for court orders needs to continue to remain a meaningful process. It should not become merely a procedural step that parties take in order to make an application to a court or tribunal.

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<sup>75</sup> The paper, *Court Referral to ADR: Criteria and Research* (2003) was authored by Associate Professor Kathy Mack on behalf of the National Alternative Dispute Resolution Advisory Council and the Australian Institute of Judicial Administration. The paper is available on NADRAC's website at <[http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Court\\_Referral\\_to\\_ADR:\\_Criteria\\_and\\_Research](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Court_Referral_to_ADR:_Criteria_and_Research)>.

<sup>76</sup> The criteria outlined were detailed in Associate Professor Kathy Mack's paper, note 75, pp 57-60, heading 7.2.

<sup>77</sup> The research commissioned by NADRAC (see paragraph 5.23) shows that people who participate compulsorily in ADR do not generally express objections after the fact, nor do they opt out, if given the choice. See Mack K., *Court Referral to ADR: Criteria and Research*, note 75 at p 4, heading 1.4.2.

5.29 While it may not be practical to develop a single checklist or model criteria, legislation that requires a dispute to be referred to a compulsory ADR process, whether the referral is mandatory or not, should also require an assessment of the dispute's suitability for ADR to occur before referral. While some criteria are needed to determine how disputes are to be referred to ADR, those criteria shouldn't necessarily be written into legislative provisions. It may be more useful to look at negative criteria, for example when *not* to refer a dispute. NADRAC has consistently emphasised the need to make proper assessments about the suitability of ADR processes for different cases and client groups.

## 6. OBLIGATIONS OF PARTIES TO PARTICIPATE IN ADR

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### OUTLINE OF ISSUE

6.1 Parties can agree to participate in an ADR process voluntarily at any stage of their dispute, or they may be compelled to participate by a prior contractual agreement, legislation or court rules.<sup>78</sup> Legislation enables a number of courts and tribunals to refer disputing parties to an ADR process either with or without the parties' consent. Furthermore, a genuine attempt at ADR is required in some circumstances before proceedings can be commenced in the Family Court or the Federal Magistrates' Court.<sup>79</sup>

6.2 Legislating for compulsory participation can support the growth of ADR, particularly if it is being introduced for the first time in a particular field. On the other hand, compulsory participation might be inappropriate in certain circumstances. Legislation may also require that parties participate in ADR in a meaningful way. Some Commonwealth and State legislation requires parties to participate in ADR 'in good faith'.

6.3 Policy-makers need to consider whether legislation should compel parties to participate in ADR and, if so, whether they should be compelled to participate in good faith. If participation in ADR is made compulsory, the consequences for failing to participate must also be determined.

### WHAT IS 'MANDATORY PARTICIPATION'?

6.4 Court or tribunal-directed ADR without the parties' consent is often described as mandatory, compulsory or non-consensual ADR. For further discussion, see paragraph 5.6.

6.5 There is a question as to whether compulsory ADR results in participation of the parties or mere attendance.<sup>80</sup> The voluntary nature of ADR has traditionally been seen as one of its defining characteristics, so there are a variety of views about the use of coercive powers to regulate the level of participation required by the parties. Such

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<sup>78</sup> Depending on whether parties' consent is needed before participating in an ADR process, their involvement in ADR is usually described as being either compulsory or voluntary, or consensual or non-consensual.

<sup>79</sup> See discussion in paras 5.18 to 5.19. The *Family Law Rules 2004*, Rule 1.05 and Schedule 1, Pre action procedures, are applicable until 30 June 2007 under the *Family Law Act 1975*, s 60I. After 30 June 2007, a court must not hear an application for a Part VII order (parenting order) unless the applicant files a certificate by a family dispute resolution practitioner relating to whether or not the parties have made a genuine effort to resolve the issues in dispute. The *Family Law Act 1975*, s 63B states that in relation to parenting plans, 'parents are encouraged to use the legal system as a last resort rather than a first resort.'

<sup>80</sup> Venus P., 'Court directed compulsory mediation – attendance or participation?' (2004) 15(1) *Australasian Dispute Resolution Journal* 29.

requirements have usually been expressed in the ‘good faith’ provisions described below under paragraphs 6.27-6.35.

## **PARTICIPATING IN ADR BY CONTRACTUAL AGREEMENT**

6.6 Contractual agreements containing ADR clauses are common in commercial and employment agreements and are increasingly used in other areas. Many of these clauses provide for ADR processes to be undertaken before litigation may be commenced by the parties. The *Workplace Relations Act 1996*, for example, includes a model dispute resolution process that is taken to be included in workplace agreements if the agreement does not include dispute resolution procedures.<sup>81</sup> The model dispute resolution process provides that a party to the dispute may elect to use a dispute resolution process in an attempt to settle a dispute and that, if an ADR process is used, the parties must genuinely attempt to resolve the dispute using that process.<sup>82</sup>

6.7 Generally, the courts have determined that ADR clauses – particularly those that seek to enforce dispute resolution in ‘good faith’ – must be sufficiently certain to be enforceable.<sup>83</sup> Traditionally, contractual clauses which have required parties to engage in ADR before litigation have been struck out, either because they were too uncertain or because they sought to exclude the court’s jurisdiction.<sup>84</sup> However, the courts have tended to uphold the validity of ADR clauses in general.<sup>85</sup>

## **STATUTORY PROVISIONS**

6.8 Key Commonwealth statutes regulating parties’ obligation to participate in ADR include the *Family Law Act 1975*, the *Federal Magistrates Act 1999*, the *Federal Court of Australia Act 1976* and the *Native Title Act 1993*.

### ***Voluntary participation***

6.9 The Family Court may refer any or all of the matters in a property or financial dispute to arbitration with the consent of the parties.<sup>86</sup> A party to the proceedings or a child<sup>87</sup> may request that one or more of the parties attend family counselling, family dispute resolution or participate in an appropriate program or course.<sup>88</sup> Before making such an order, the court must consider seeking the advice of a family

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<sup>81</sup> *Workplace Relations Act 1996*, s 353. If a workplace agreement does not include dispute settlement procedures, the agreement is taken to include the model dispute resolution process mentioned in Part 13 (Dispute Resolution Processes), ss 692-716.

<sup>82</sup> The model dispute resolution process is found in ss 694-697 (Part 13, Division 2) of the *Workplace Relations Act 1996*.

<sup>83</sup> *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996.

<sup>84</sup> Sarah Minnery, ‘Drafting “in good faith” – perks, pitfalls and perils’, (2004) 24(6) *Proctor* 21.

<sup>85</sup> For example, *Morrow v Chinadotcom* [2001] NSWSC 209 per Barrett J.

<sup>86</sup> *Family Law Act 1975*, s 13E.

<sup>87</sup> Independently represented by a lawyer under an order made under s 68L of the *Family Law Act 1975*.

<sup>88</sup> *Family Law Act 1975*, sub-ss 13C(1) and 13C(5)(b).

consultant about the services appropriate to the parties' needs.<sup>89</sup> In addition, the court must advise the parties to attend family counselling if it considers that there is a reasonable possibility of reconciliation.<sup>90</sup>

6.10 Parties who participate in family dispute resolution under the *Family Law Act 1975* must first attend an interview with a family dispute resolution practitioner to determine whether family dispute resolution is appropriate.<sup>91</sup> The practitioner must consider whether the ability of any party to negotiate freely in the dispute has been affected by issues such as family violence, unequal bargaining power of the parties, and the emotional, physical and psychological health of the parties.<sup>92</sup>

### ***Compulsory participation***

6.11 The Federal Court can order mediation without the consent of the parties.<sup>93</sup> The Court is empowered to make its own rules regarding the procedures to be followed during mediation.<sup>94</sup> The Court can also direct parties to attend a case management conference to consider the most economic and efficient means of conducting proceedings.<sup>95</sup>

6.12 The Federal Magistrates Court may also refer non-family matters to mediation without the consent of the parties.<sup>96</sup> Family law matters which are referred to family dispute resolution by the Federal Magistrates Court must be assessed for suitability for family dispute resolution by the service providers.<sup>97</sup>

6.13 The Family Court or the Federal Magistrates' Court may, on its own initiative, require parties to attend family counselling or family dispute resolution, or to participate in a course or program, or attend an appointment with a family consultant, at any stage in the proceedings.<sup>98</sup> The Court may also require the parties to encourage the participation of other persons, such as children, grandparents, or other relatives, who are likely to be affected by the proceedings.<sup>99</sup>

6.14 In parenting matters, courts exercising family law jurisdiction require parties to make a 'genuine effort' to resolve their dispute by participating in family dispute resolution before applying for a parenting order.<sup>100</sup> From 1 July 2007 people with

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<sup>89</sup> *Family Law Act 1975*, sub-s 13C(1) and s 11E.

<sup>90</sup> *Family Law Act 1975*, sub-s 13B(3).

<sup>91</sup> Under the *Family Law Regulations 1984*, Reg 62, family dispute resolution practitioners to whom a dispute is referred under the *Family Law Act 1975* must conduct an assessment of the parties to the dispute to determine whether family dispute resolution is appropriate.

<sup>92</sup> *Family Law Regulations 1984*, Reg 62(2).

<sup>93</sup> *Federal Court of Australia Act 1976*, s 53A.

<sup>94</sup> *Federal Court of Australia Act 1976*, sub-ss 59(2)(zf), 59(2)(zg), 59(2)(zh), 59(2)(zi).

<sup>95</sup> *Federal Court Rules*, Order 10, Rule 1(2)(i).

<sup>96</sup> *Federal Magistrates Act 1999*, s 34.

<sup>97</sup> Under the *Family Law Regulations 1984*, Reg 62, family dispute resolution practitioners to whom a dispute is referred under the *Family Law Act 1975* must conduct an assessment of the parties to the dispute to determine whether family dispute resolution is appropriate.

<sup>98</sup> *Family Law Act 1975*, s 13C.

<sup>99</sup> *Family Law Act 1975*, sub-s 13C(3).

<sup>100</sup> *Family Law Act 1975*, s 60I. Until 30 June 2007, the *Family Law Rules 2004* impose a requirement for dispute resolution. After 30 June 2007, a court must not hear an application for a Part VII order

new parenting matters will be required to attend dispute resolution with an accredited family dispute resolution practitioner and provide a certificate before they can lodge an application for a parenting order. The third phase will apply the requirement to attend family dispute resolution to all parenting matters, rather than only new ones, following a date which is yet to be proclaimed. The requirements do not apply if the court is satisfied that there are reasonable grounds to believe that there has been abuse of the child by one of the parties, or family violence, or a risk of family violence.<sup>101</sup>

6.15 In property matters, the *Family Law Rules 2004* require parties to make a genuine effort to resolve the dispute before filing an application to start a case in the Family Court by participating in dispute resolution such as negotiation, conciliation, arbitration and counselling.<sup>102</sup> There may be serious consequences, including costs penalties, for non-compliance with these requirements.<sup>103</sup>

6.16 Some State legislation also supports ‘pre-trial’ ADR. Under NSW law, farmers are empowered by legislation to request that banks participate in mediation before taking enforcement action on a farm mortgage, although banks cannot be compelled to participate.<sup>104</sup> In disputes about retail leases, proceedings cannot be commenced until mediation has been attempted under legislation in NSW<sup>105</sup> and Victoria.<sup>106</sup>

### ***Discretionary referral***

6.17 The Federal Court may refer proceedings in the Court to a mediator or an arbitrator.<sup>107</sup> Referrals to arbitration require the consent of the parties. As noted above, referrals to mediation may also be made without the consent of the parties.<sup>108</sup>

6.18 The Federal Magistrates Court may refer non-family law proceedings for conciliation or mediation without the consent of the parties to the proceedings.<sup>109</sup>

### ***Mandatory referral***

6.19 The Federal Court is required to refer native title and compensation applications<sup>110</sup> to the National Native Title Tribunal for mediation as soon as

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(parenting order) unless the applicant files a certificate by a family dispute resolution practitioner relating to whether or not the parties have made a genuine effort to resolve the issues in dispute.

<sup>101</sup> *Family Law Act 1975*, s 60I(9).

<sup>102</sup> *Family Law Rules 2004*, Schedule 1, Pre-action Procedures, Part 1, Financial cases, (1).

<sup>103</sup> *Family Law Rules 2004*, Schedule 1, Part 1, (3).

<sup>104</sup> *Farm Debt Mediation Act 1994* (NSW), ss 8, 9 and 10.

<sup>105</sup> *Retail Leases Act 1994* (NSW) Part 8, Division 2 (Mediation) and s 68(1). A retail tenancy dispute may not be the subject of proceedings before any court unless and until the Registrar has certified in writing that mediation under Part 8 has failed to resolve the dispute.

<sup>106</sup> *Retail Leases Act 2003* (VIC), Part 10 (Dispute Resolution) and s 87(1). A retail tenancy dispute may only be the subject of proceedings before the Victorian Civil and Administrative Tribunal if the Small Business Commissioner has certified in writing that mediation or another form of ADR under Part 10 has failed, or is unlikely, to resolve it.

<sup>107</sup> *Federal Court of Australia Act 1976*, s 53A.

<sup>108</sup> *Federal Court of Australia Act 1976*, s 53A(1A).

<sup>109</sup> *Federal Magistrates Act 1999*, sub-ss 26(1) and (3) and sub-ss 34(1) and (3).

practicable, unless it considers that mediation is unnecessary due to an agreement between the parties or there is no likelihood that parties will reach agreement on the matters.<sup>111</sup>

## **POLICY ISSUES**

6.20 Five key issues arise in considering the legislative framework for ADR referrals:

1. whether or not to compel parties to participate
2. whether to stipulate the extent or quality of that participation
3. whether, and if so, how, to penalise parties who do not comply with their obligations
4. how to provide for methods to assess whether disputes are suitable to be referred to ADR to safeguard the parties from inappropriate referrals, and
5. whether suitable ADR practitioners are available, including whether mechanisms for monitoring practitioner standards and accreditation are needed, and if so, in place.

6.21 Issues 1-3 are considered under paragraphs 6.22-6.40. Issue 4 is considered in Chapter 5, 'How disputes are referred to ADR' and issue 5 is dealt with in Chapter 7, 'Standards and accreditation of ADR practitioners'.

### ***Voluntary or compulsory participation in ADR***

6.22 Those in favour of voluntary participation in ADR argue that conciliation or mediation is essentially a consensual process that requires the co-operation and consent of the parties. Those who argue in favour of compulsory participation in ADR respond that if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, then even the most fundamental resistance to compromise can turn to co-operation and consent. 'What is enforced is not co-operation and consent, but participation in a process from which co-operation and consent might come.'<sup>112</sup>

6.23 The arguments in favour of court/tribunal-ordered, compulsory ADR are that it can:

- force parties to consider settlement before legal costs escalate

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<sup>110</sup> Under section 61 of the *Native Title Act 1993*.

<sup>111</sup> *Native Title Act 1993*, s 86B.

<sup>112</sup> Giles J (as he then was) in *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd* (1992) 28 NSWLR 194 at 206.

- overcome the risk that parties will fail to suggest ADR from fear they will appear weak to the other party<sup>113</sup>
- ensure that court/tribunal time is not taken up with disputes which could be resolved less expensively in another process and that only those disputes incapable of reaching a negotiated settlement are put before the court or tribunal<sup>114</sup>
- ensure that parties to tribunal/court proceedings have the opportunity to attempt ADR irrespective of their counsel's view of the process or of any prejudice held by particular legal practitioners against ADR<sup>115</sup>
- allay any fears about the neutrality of the ADR practitioner because the practitioner is being appointed by an impartial third party, and
- ensure parties with disputes that are suitable for ADR but who otherwise may not have attempted ADR, can engage in ADR.<sup>116</sup>

6.24 Generally, compulsory participation can support the growth of ADR, particularly if it is being introduced for the first time in a particular field. ADR has developed at different rates in the various fields of practice. In family law and commercial contexts, ADR is widely accepted. In other civil disputes such as defamation suits, the use of ADR is less well-established. In such circumstances, ADR may need additional legislative support before it is used in large numbers by the public and by lawyers.

6.25 The arguments against court/tribunal ordered, non-consensual participation in ADR are that:

- consensual participation is the fundamental assumption of most ADR methods and a key source of its legitimacy<sup>117</sup>
- settlement at an ADR process is more likely to occur if the parties are naturally ready to settle, rather than obliged to participate<sup>118</sup>
- the process might stop being an alternative to litigation and become part of the judicial process, which in time may affect the way in which it is used<sup>119</sup>

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<sup>113</sup> 'Court ordered mediation – the debate', (June 2003) *New Zealand Law Journal*, 210.

<sup>114</sup> 'Court ordered mediation – the debate', note 113.

<sup>115</sup> 'Court ordered mediation – the debate', note 113.

<sup>116</sup> Without some degree of compulsion, it appears that few would choose ADR processes such as mediation, according to research by Mack K., note 75, at pp 4 and 47 (headings 1.4.2 and 6.1). According to Ass Prof Mack, available research is inconclusive about whether compulsory participation in ADR affects the likelihood of settlement or satisfaction with the process, (pp 47-48), referring to overseas research by Wissler R., (2002) 'Court Connected Mediation and Adjudication in the Small Claims Court: the Effects of Process and Case Characteristics' 19 *Law and Society Review* 323.

<sup>117</sup> Mack, K., note 75, at p 47, heading 6.1, quoting Howieson J., (2002) 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' 9(2) *Murdoch University Electronic Journal of Law*, paras 10-11 and Astor H., (2000) 'Rethinking Neutrality: A theory to Inform Practice: Part I' 11 *Australasian Dispute Resolution Journal* 73, at p 73.

<sup>118</sup> 'Court ordered mediation – the debate', note 113.

- compulsory participation is inappropriate in certain circumstances or for certain types of disputes (for example where there is inequality between the parties or a history of violence)
- compelling people to participate in ADR may increase the rate of inappropriate referral and may create a situation where parties participate in ADR as a purely procedural step, with little commitment to the process
- ADR may be used as a case management tool by courts and tribunals,<sup>120</sup> rather than as a mechanism for considered and deliberative ADR
- some research indicates that court-annexed ADR does not lead to overall savings for courts and tribunals,<sup>121</sup> and ancillary costs such as ADR practitioner fees, extensive preparations resulting in increased lawyers' fees, and unanticipated effects of ADR can all increase the net costs involved,<sup>122</sup> and
- a party who does not want to participate in ADR and is yet compelled to do so may not participate in good faith, rendering the process unsuccessful and perhaps even harmful, by increasing costs and delay.<sup>123</sup>

6.26 Despite these concerns, court/tribunal-ordered ADR is well established and generally well regarded in Australia. In NADRAC's view, the potential benefits, both in providing parties with a further opportunity to resolve their dispute and in ensuring publicly funded and scarce judicial resources are used only in determining intractable disputes, justify the continued use of court-ordered ADR. Participation in ADR should be compulsory only where there is appropriate assessment of whether the dispute is suitable to be referred to ADR and where appropriate professional standards are maintained and enforced.

### ***Participating in ADR in 'good faith'***

6.27 Parties engaged in ADR are required to participate in good faith by a variety of laws and rules in Australia. The consequences of not participating in good faith vary.

6.28 In parenting cases, as noted in paragraph 6.14, the *Family Law Act 1975* requires parties to make a 'genuine effort' to resolve their dispute by participating in

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<sup>119</sup> 'Court ordered mediation – the debate', note 113.

<sup>120</sup> John Handley (Senior member of the Commonwealth Administrative Appeals Tribunal), 'Mediation in the Commonwealth Administrative Appeals Tribunal,' (1995) 6 *Alternative Dispute Resolution Journal* 5, at p 8.

<sup>121</sup> Astor H., & Chinkin C., *Dispute Resolution in Australia* (2002), at p 262. The authors state that 'the evidence does not suggest that use of court-connected ADR produces significant overall savings for courts and tribunals.'

<sup>122</sup> Professor Laurence Boulle, Bond University, and Professorial Associate Richard Ingleby, University of Melbourne, cited in Spencer D., 'Court given power to order ADR in civil actions' (2000) 38(9) *Law Society Journal* 71, at p 72.

<sup>123</sup> Mack, K., note 75, at p 47.

family dispute resolution before applying for a parenting order.<sup>124</sup> The consequences of non-participation are outlined in paragraph 6.37 below.

6.29 In property matters, as noted in paragraph 6.15, the *Family Law Rules 2004* require parties to make a ‘genuine effort’ to resolve disputes before starting a case by participating in dispute resolution. Failure to comply with this requirement may attract cost penalties or other sanctions.<sup>125</sup>

6.30 The *Administrative Appeals Tribunal Act 1975* requires parties who have been referred to an ADR process by the Tribunal to act in good faith in relation to the ADR process concerned,<sup>126</sup> but no costs penalties apply.

6.31 The *Workplace Relations Act 1996* provides that if an alternative dispute resolution process is used to attempt to resolve a dispute, the parties to the dispute must genuinely attempt to resolve the dispute using that process.<sup>127</sup>

6.32 Good faith provisions are more commonly found in State legislation. In NSW, for example, the *Civil Procedure Act 2005* states that it is the duty of parties who have been referred to mediation under the Act to participate in good faith.<sup>128</sup> The *Land and Environment Court Act 1979* (NSW) has a similar provision in relation to both mediation and neutral evaluation.<sup>129</sup>

6.33 When considering whether to include a good faith provision in legislation, policy-makers should have regard to:

- the benefit of setting a minimum standard of behaviour during ADR
- defining good faith<sup>130</sup>
- managing claims of bad faith on the part of the other party to intimidate their opponents<sup>131</sup>
- protecting confidentiality over what is said in ADR, as it may be breached in the course of presenting evidence in court regarding whether a party acted in good faith<sup>132</sup>
- maintaining the mediator’s facilitative role, and

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<sup>124</sup> *Family Law Act 1975*, s 60I. As already noted, there are exceptions to the requirement in cases of child abuse or family violence.

<sup>125</sup> *Family Law Rules 2004*, Schedule 1, Part 1, 1(3). The Court can consider parties’ participation in ADR when making general orders as to costs and case management: *Family Law Rules 2004*, Schedule 1, Part 1, 2(3), Rule 1.10(2)(d) and Rule 11.03(2)(b).

<sup>126</sup> *Administrative Appeals Tribunal Act 1975*, s 34A(5).

<sup>127</sup> *Workplace Relations Act 1996*, s 696(6).

<sup>128</sup> *Civil Procedure Act 2005* (NSW), s 27.

<sup>129</sup> *Land and Environment Court Act 1979* (NSW), s 61E.

<sup>130</sup> In *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206, Giles J outlined what the obligation to participate in ADR in good faith might mean. He outlined an obligation to ‘subject oneself to the process of negotiation or mediation, to have an open mind in the sense of a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate, and a willingness to give consideration to putting forward options for resolution of the dispute’. Subject to those requirements, the obligation to participate in good faith does not oblige a party ‘to act for or on behalf or in the interests of the other party or to act otherwise than by having regard to self-interest’.

<sup>131</sup> Lande J., ‘Why a good-faith requirement is a bad idea for mediation,’ (2005) 23 *Alternatives to the High Cost of Litigation* 1, at p 8.

<sup>132</sup> Lande J, note 131.

- the effect of non-compliance with any good faith requirement (see paragraph 6.36).

6.34 Two NSW decisions defining good faith have discussed the parties' 'willingness' to consider and contribute to resolution options.<sup>133</sup> An 'obstructive or uncooperative attitude' indicates a failure to participate in good faith.<sup>134</sup> However, participation in good faith does not require a party to act other than in their self-interest.<sup>135</sup> One view is that 'there is an inherent tension between negotiation, in which a person is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith'.<sup>136</sup>

6.35 NADRAC generally supports good faith provisions. However, it may be preferable to require parties to use their 'best endeavours' during an ADR process to work towards a resolution of the dispute. Such a requirement may deter a party from behaving unreasonably or from walking out of the ADR process. The prospects for good faith participation may be undermined where participation in ADR is compulsory. This is based on the assumption that parties who are not willing to engage in ADR would be unlikely to do so in good faith. This further emphasises the importance of appropriate referral criteria (see Chapter 5, paragraphs 5.23-5.29) to assess whether individual cases are suitable for ADR.

### ***Sanctions for non-participation***

6.36 The *Family Law Rules 2004* governing financial cases require parties to make a 'genuine effort' to resolve disputes by participating in ADR before commencing proceedings in the Family Court.<sup>137</sup> Failure to comply with this requirement may attract cost penalties or other sanctions.<sup>138</sup> If a party has displayed 'unreasonable non-compliance' with the provision, the Court may order that party to pay the costs of the other parties involved in the case.<sup>139</sup> The Court can consider parties' participation in ADR when making general orders as to costs and case management.<sup>140</sup>

6.37 In relation to parenting cases, from Phase 3 (see paragraph 6.14) a court exercising family law jurisdiction must not hear an application for a parenting order unless the applicant files a certificate by a family dispute resolution practitioner in relation to the person's attendance at family dispute resolution. Under the *Family Law Act 1975*, sub-section 60I(8)(c) enables a family dispute resolution practitioner to give a certificate to the effect that the person attended family dispute resolution but that the person, the other party or another of the parties did not make a genuine effort

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<sup>133</sup> *Aiton v Transfield* [1999] NSWSC 996 [156] per Einstein J, generally affirming *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd* (1992) 28 NSWLR 194.

<sup>134</sup> *Capolinga v Phylum Pty Ltd* (as Trustee for the Gennoe Family Trust and Ors) (1991) 5 WAR 137.

<sup>135</sup> *Aiton v Transfield* [1999] NSWSC 996 [156] per Einstein J.

<sup>136</sup> *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd* (1992) 28 NSWLR 194 at 209.

<sup>137</sup> *Family Law Rules 2004*, Schedule 1 (Pre-action procedures), Part 1 (Financial cases), 1(1).

<sup>138</sup> *Family Law Rules 2004*, Schedule 1, Part 1, Rule 1(3). However, exceptions can apply: Schedule 1, Part 1, 1(4). The Court can consider parties' participation in ADR when making general orders as to costs and case management: *Family Law Rules 2004*, Schedule 1, Part 1, 2(3), Rule 1.10(2) (d) and Rule 11.03 (2) (b).

<sup>139</sup> *Family Law Rules 2004*, Schedule 1, Part 1, 2(4).

<sup>140</sup> *Family Law Rules 2004*, Schedule 1, Part 1, 2(3), Rule 1.10(2)(d) and Rule 11.03(2)(b).

to resolve the issue or issues.<sup>141</sup> When an applicant files one of these certificates, the court may take the kind of certificate into account in determining whether to award costs against a party under section 117 of the Act.

6.38 The *Family Law Rules 2004*, Rule 5.03, provide that, before filing an Application in a Case for orders other than Final Orders or Divorce, a 'party must make a reasonable and genuine effort to settle the issue to which the application relates'. The Court may take into account a party's failure to comply with the rule when considering any order for costs.

6.39 Costs penalties for refusing to participate in mediation in good faith are also provided for in State legislation. For example, under the *Water Act 1912* (NSW), where participation in ADR processes such as mediation is compulsory in certain circumstances, a person is taken to have failed to take part in a mediation session if he or she has not participated in good faith.<sup>142</sup> Individual courts and tribunals may apply costs penalties for failures to participate in mediation in good faith. For example, the NSW Dust Diseases Tribunal, in making an order as to the payment of costs in proceedings, must take into account a certificate issued by a mediator saying that the party referred to mediation did not participate in good faith.<sup>143</sup> This may include declining to include costs of mediation in an award of costs to a successful party.<sup>144</sup>

6.40 English courts have indicated that where ADR processes such as mediation are voluntary, they will not penalise a party for non-participation so long as the non-participating party had not been 'unreasonable' in refusing to participate.<sup>145</sup>

## NADRAC'S VIEW

6.41 Wherever a dispute is referred to ADR, the advantages of compulsory participation can only be realised if there is careful assessment of whether the dispute is suitable for ADR and if there are appropriate exceptions for unsuitable cases. Compulsory participation and mandatory referral are only appropriate where professional practitioner standards are maintained and enforced.

6.42 If ADR is to be made compulsory in particular circumstances, it may be appropriate to impose consequences if parties refuse to participate or if they do not do so in a meaningful way. Good faith requirements ensure a minimum standard of behaviour by the parties but individual cases should be adequately assessed to determine whether they are suitable for referral to ADR. If there is strong evidence

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<sup>141</sup> As noted in paragraph 6.14, the requirements in relation to participation in family dispute resolution do not apply if the court is satisfied that there are reasonable grounds to believe that there has been abuse of the child by one of the parties or a risk of abuse, or family violence or a risk of family violence. *Family Law Act 1975*, s 60I(9) and the *Family Law Rules 2004*, Schedule 1, Part 1, 1(4) and Schedule 1, Part 2, 1(4).

<sup>142</sup> *Water Act 1912* (NSW), s170B(5). The Ministerial Corporation may refuse to determine an application for approval if the applicant fails to take part in a mediation session.

<sup>143</sup> *Dust Diseases Tribunal Regulation 2001* (NSW), Reg 53(3).

<sup>144</sup> *Dust Diseases Tribunal Regulation 2001* (NSW), Reg 39(3).

<sup>145</sup> *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576. The court also gave weight to the policy view that courts should encourage, but not compel, parties to participate in dispute resolution.

that the parties will not participate in good faith, ADR is unlikely to be appropriate. Compulsory participation in ADR should remain a meaningful process, particularly when it is a pre-requisite for litigation to commence, so that it does not become a procedural step undertaken by parties in order to be able to make an application to a court or tribunal.

6.43 One of the reasons NADRAC supports compulsory ADR—subject to professional standards and appropriate referral—is because it believes that multi-issue and difficult cases are particularly suitable for ADR. Even where a dispute is not resolved through ADR, the process often helps to clarify the issues and narrows the issues in dispute. Obligating parties to participate in an ADR process is a way of ensuring there is an opportunity for this to happen. Research commissioned by NADRAC shows participants in compulsory ADR do not generally express objections at the end of the process and that they do not opt out if given the choice.<sup>146</sup>

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<sup>146</sup> Mack K., note 75, p 4 and p 50, heading 6.4, quoting research by Macfarlane (1995), Rosenberg and Folberg (1995) and Hensler (2002).

## 7. STANDARDS AND ACCREDITATION OF ADR PRACTITIONERS

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### OUTLINE OF ISSUE

7.1 Both the further development of standards for ADR practitioners and the development of desirable common national standards for mediator accreditation are needed in order to maintain and improve the quality and status of ADR and to protect users of ADR services. This would also assist in promoting Australia's international dispute resolution profile.

7.2 The extent to which practitioner standards are maintained and enforced is fundamental to each of the legislative issues explored in this guide. Where parties to legal proceedings are compelled to use ADR, it is especially important to ensure an acceptable level of quality and accountability for those processes. Where legislation provides for parties to be compulsorily referred to ADR, it should also set out minimum standards for ADR practitioners and how those practitioners are to be selected. The extent of legislative immunity, if any, to be granted to an ADR practitioner cannot be considered in isolation from whether there are adequate measures to guarantee that a high quality of service will be provided.

7.3 Any legislative framework regulating ADR is based on the expectation of high standards of ADR practice, both for successful implementation and as a safeguard for disputing parties. For ADR to be a viable alternative to litigation, disputing parties need to have confidence that the quality of the ADR service to be provided will meet the standards of professionalism, accountability and ethical conduct the community expects from those providing legal and court-related services.<sup>147</sup> Public awareness of how these practitioner standards are met through training and accreditation, and how any complaints are dealt with, also help build consumer confidence.

### WHAT IS ACCREDITATION?

7.4 Although there is currently no national, single organisation that accredits mediators and other ADR practitioners, efforts are being made to develop common national standards for mediator accreditation.

7.5 A [National Mediation Accreditation System](#), including a National Mediator Standard, has been drafted using a grant provided to the National Mediation Conference Pty Ltd by the Commonwealth Attorney-General. On 5 May 2006 at the National Mediation Conference, participants voted unanimously to support the draft

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<sup>147</sup> Although a higher standard may apply to judicial officers. According to Justice JB Thomas, 'acceptable behaviour for them must be determined with an even sharper focus on what is beneficial to and acceptable by the community than may be necessary in other professions'. See Thomas J., *Judicial Ethics in Australia* (1997), pp 12-13.

scheme and approved the appointment of an implementation committee to do all things necessary to cause the speedy and effective implementation of the scheme.

7.6 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. There are a variety of terms used which fit either of the above definitions. These terms include ‘approval’, ‘registration’, ‘licensing’, ‘recognition’, ‘certification’ and ‘credentialing’.<sup>148</sup>

7.7 Legislation and regulations can provide specific detail about the level of training and education required in order to conduct mediation and other forms of ADR. The Accreditation Rules provided under the *Family Law Act 1975*<sup>149</sup> and the specific requirements provided for under the *Family Law Regulations 1984*<sup>150</sup> are a good example.

## STATUTORY PROVISIONS

### *Duties of ADR practitioners*

7.8 Under section 10A of the *Family Law Act 1975*, Accreditation Rules will be specified in the regulations that deal with qualifications and other standards for accreditation of family counsellors and family dispute resolution practitioners.<sup>151</sup> In addition, the *Family Law Regulations 1984* provide a detailed list of the obligations of family dispute resolution practitioners who provide family dispute resolution under the *Act*.<sup>152</sup> The family dispute resolution practitioner must:

- conduct an assessment of the parties to the dispute to determine whether family dispute resolution is appropriate<sup>153</sup>

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<sup>148</sup> For further information about accreditation of mediators, see NADRAC’s discussion paper ‘Who says you’re a mediator? Towards a national system for accrediting mediators’ (2004) available on NADRAC’s website at [http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Who\\_says\\_you&apos](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Who_says_you&apos)

<sup>149</sup> *Family Law Act 1975*, s 10A. The section provides that the regulations may prescribe Accreditation Rules.

<sup>150</sup> At the time of writing, the Accreditation Rules were yet to be drafted. Under the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, transitional arrangements apply until 30 June 2009. Under the transitional arrangements, Regulation 83 of the *Family Law Regulations 1984* sets out the requirements for persons who are taken to be family dispute resolution practitioners during the transition period. See also paragraph 7.18 of the Guide.

<sup>151</sup> Transitional arrangements apply and are specified in Regulation 83 of the *Family Law Regulations 1984*.

<sup>152</sup> *Family Law Regulations 1984*, Regs 62, 63, 64, and 65.

<sup>153</sup> *Family Law Regulations 1984*, Reg 62. The family dispute resolution practitioner must consider whether the ability of any party to negotiate freely in the dispute is affected by: a history of family

- provide a written statement providing information about family dispute resolution to each party at least one day before family dispute resolution<sup>154</sup>
- ensure that the family dispute resolution process is suited to the needs of the parties involved<sup>155</sup>
- terminate the family dispute resolution if the practitioner is no longer satisfied that family dispute resolution is appropriate<sup>156</sup>
- not provide legal advice to any of the parties<sup>157</sup>
- avoid conflicts of interests<sup>158</sup>
- not use any information acquired from the family dispute resolution for personal gain or to the detriment of any person,<sup>159</sup> and
- not disclose any communication or admission made to the family dispute resolution practitioner or family counsellor in his/her capacity as a family dispute resolution practitioner/family counsellor unless it is necessary in order to:
  - protect a child
  - prevent or lessen a serious and imminent threat to the life or health of a person or the property of a person, or
  - report the commission or prevent the likely commission of an offence involving violence or a threat of violence to a person, or intentional damage or threat of damage to property of a person.<sup>160</sup>

7.9 The duties of ADR practitioners extend to disclosing any potential conflicts of interest.<sup>161</sup> The *Native Title Act 1994* requires disclosure of conflicts of interest by

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violence amongst the parties, the likely safety of the parties, the equality of bargaining power among the parties (for example if a party is economically or linguistically disadvantaged), the risk that a child may suffer abuse, the emotional, psychological and physical health of the parties, or any other relevant matter.

<sup>154</sup> *Family Law Regulations 1984*, Reg 63. The statement must set out information explaining that family dispute resolution is a process by which the parties, with the assistance of the family dispute resolution practitioner, isolate the issues in the dispute, consider and develop options to resolve those issues, attempt to agree to one of those options, and if a child is affected, attempt to agree to options that are in the best interests of the child.

<sup>155</sup> For example, by ensuring the suitability of the family dispute resolution venue, the layout of the family dispute resolution room and the times at which family dispute resolution is held. *Family Law Regulations 1984*, Reg 64(a).

<sup>156</sup> *Family Law Regulations 1984*, Reg 64(c).

<sup>157</sup> *Family Law Regulations 1984*, Reg 64(d).

<sup>158</sup> *Family Law Regulations 1984*, Reg 65(1).

<sup>159</sup> *Family Law Regulations 1984*, Reg 64(e).

<sup>160</sup> *Family Law Act 1975*, ss 10D and 10H.

<sup>161</sup> Under the *Family Law Regulations*, Reg 65, a family dispute resolution practitioner should not provide family dispute resolution services where the practitioner has previously acted in a professional capacity (other than as a family dispute resolution practitioner, a family counsellor or an arbitrator) to a party to the dispute, has had a previous commercial dealing with a party, or is a personal acquaintance of a party. The family dispute resolution practitioner may only provide dispute resolution services if each party to the process agrees and the previous professional dealing does not relate to any issue in the

mediators to the President of the Tribunal and to the parties.<sup>162</sup> A conflict of interest is defined as ‘any interest, pecuniary or otherwise, that could conflict with the proper performance of his or her duties as a consultant in relation to the assistance or mediation’.

7.10 Codes of conduct and professional rules can also provide guidance about the duties of ADR practitioners. For example, the Law Council of Australia has published [\*Ethical Standards for Mediators\*](#)<sup>163</sup> to ‘serve as a general ethical and practical framework for the practice of mediation’. The Standards set out guidelines and comments about the role of the mediator, impartiality, conflicts of interest, competence, confidentiality, the quality of the process, the termination of the mediation, recording settlement, publicity, advertising and fees.

7.11 Some of the key features of the mediator’s duties, as outlined by the Law Council, are that the mediator:

- facilitates communication, promotes understanding, assists the parties to identify their needs and interests and uses creative problem-solving techniques to enable the parties to reach their own agreement
- promote voluntary agreement by the parties to the dispute
- only mediate those matters in which the mediator can remain impartial and even-handed
- avoid partiality or prejudice and conduct that gives any appearance of partiality or prejudice
- disclose all actual and potential conflicts of interest before the mediation or during the mediation if conflicts arise
- not act in such a manner as to raise legitimate questions about the integrity of the mediation process
- only mediate where the mediator has the necessary competence to do so
- satisfy the reasonable expectations of the parties
- maintain the confidentiality required by the parties, subject to any applicable legal requirements

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dispute and the previous commercial dealing or acquaintance is not of a kind that could be expected to influence the family dispute resolution practitioner in the provision of his or her family dispute resolution services.

<sup>162</sup> *Native Title Act 1994*, s 131B. Consent is required from each before the mediation can proceed.

<sup>163</sup> Available on the Law Council of Australia’s website at <http://www.lawcouncil.asn.au/policy/1957353025>. The Law Council of Australia’s standards for mediators are based on the work of the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution. They were reworked for Australia in 1996 by members of the Alternative Dispute Resolution Committee of the Law Council of Australia and further reviewed and updated by the Committee in February 2000.

- prepare for and conduct the mediation diligently and with due regard for the fact that an agreed outcome requires the voluntary consent of the parties
- consider whether to terminate the mediation if the mediator considers that any party is abusing the process or there is no reasonable prospect of settlement
- encourage the parties to record the terms of settlement in writing if the mediation results in a settlement between the parties
- not engage in misleading or deceptive publicity or advertising, and
- fully disclose his or her fees to the parties.

7.12 The [\*NSW Law Society Guidelines for those involved in Mediations\*](#)<sup>164</sup> are directed to solicitors acting as mediators and set out a number of obligations, including that the solicitor mediator:

- not impose a solution on the disputants
- not attempt to coerce a party into agreement
- not give legal advice
- not act as a sole mediator unless an approved course has been satisfactorily completed or the solicitor has had appropriate mediation experience<sup>165</sup>
- recognises that competent and informed parties can reach an agreement which need not conform to legal precedents or to general community standards, and
- enters into a written agreement with the parties to mediate that may include a provision to exclude the mediator's liability.

7.13 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. The National Mediation Accreditation System (see paragraphs 7.5 and 7.15) will incorporate a National Mediation Standard and a uniform Code of Practice.

7.14 Other sources of information include the Community Services and Health Industry Skills Council which is currently developing a national competency framework for family counsellors, family dispute resolution practitioners and workers in Children's Contact Services.<sup>166</sup> The National Training Information Service sets out Competency Standards for ADR, including mediation.<sup>167</sup> The Institute of Arbitrators

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<sup>164</sup> Available on the Law Society of NSW website, <[http://www.lawsociety.com.au/uploads/filelibrary/1098240091625\\_0.9820372869515228.pdf](http://www.lawsociety.com.au/uploads/filelibrary/1098240091625_0.9820372869515228.pdf)>

<sup>165</sup> Or experience approved by the Dispute Resolution Committee of the Law Society of New South Wales.

<sup>166</sup> Further information about the project can be found on the Community Services and Health Industry Skills Council website at <<http://www.cshisc.com.au>>.

<sup>167</sup> The National Training Information Service at <<http://www.ntis.gov.au>> sets out national standards that define the competencies required for effective performance in the workplace. A competency comprises the specification of knowledge and skill and the application of that knowledge and skill at an

and Mediators Australia publishes the [\*Principles of Conduct for Mediators \(2003\)\*](#)<sup>168</sup> and [\*Rules of Professional Conduct \(1996\)\*](#).<sup>169</sup> Australian Standard AS 4608-2004: [\*Dispute Management Systems\*](#)<sup>170</sup> provides a guide for the development and application of an effective dispute management system and AS ISO 10002-2006: [\*Customer satisfaction - Guidelines for complaints handling in organisations\*](#)<sup>171</sup> provides guidance on the process of complaints handling.

### ***Accreditation of mediators***

7.15 In May 2006, participants at the 8<sup>th</sup> National Mediation Conference voted unanimously to support a National Mediation Accreditation System, including a National Mediator Standard. A code of conduct will be drafted as part of the implementation phase. Further information about the content of the standard and how the system may operate is available from the mediation conference website <<http://www.mediationconference.com.au>> or by contacting NADRAC. The National Mediation Accreditation System is also included in the guide in Appendix 3 starting on page 114.

7.16 A [compendium of Australian legislative provisions](#) covering referral to mediation and accreditation of mediators is available on NADRAC's website.<sup>172</sup>

7.17 The *Family Law Regulations 1984* are a good example of how the Commonwealth regulates the qualifications, training and experience required by those who wish to provide dispute resolution services under the *Family Law Act 1975*.<sup>173</sup> The Act enables the Regulations to prescribe Accreditation Rules relating to the accreditation of persons as family counsellors, family dispute resolution practitioners and in other roles. The Accreditation Rules may deal with the standards that are to be met by persons who seek to be accredited, how accreditation is to be recognised, who is responsible for determining whether a person meets accreditation criteria, who is responsible for monitoring compliance, and the consequences of accredited persons failing to comply with the provisions of the *Family Law Act* and the Accreditation

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industry level, to the standard of performance required in employment. Included on the NTIS website are details of Competency Standards developed by industry. The standards are linked to industry sectors and courses, where the course has been based on the standards. Competency standards can be downloaded from the database or can be purchased from the relevant Industry Skills Council/industry advisory body. Go to <<http://210.9.70.37/stdpage1.htm>> and type 'mediation' or other keywords.

<sup>168</sup> The Institute of Arbitrators and Mediators Australia website is at <<http://www.iama.org.au>> and the document can be found at <<http://www.iama.org.au/docs/medtrconduct.doc>>.

<sup>169</sup> Found at <<http://www.iama.org.au/docs/rulesconduct.doc>>.

<sup>170</sup> Published by Standards Australia, and available for purchase at <<http://www.standards.com.au/catalogue/script/Details.asp?DocN=AS0733759637AT>>.

<sup>171</sup> Published by Standards Australia and available for purchase at <<http://www.saiglobal.com/shop/Script/Details.asp?DocN=AS0733773117AT>>.

<sup>172</sup> Available at <[http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Who\\_can\\_refer\\_to](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Who_can_refer_to)>.

<sup>173</sup> *Family Law Act 1975*, s 10A (Accreditation Rules).

Rules. There are penalties for family dispute resolution practitioners who do not meet the requirements of the regulations.<sup>174</sup>

7.18 The transitional arrangements under the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (which will apply until 30 June 2009) and the *Family Law Regulations 1984* require that for a person to be a family dispute resolution practitioner during the transition period, a person must have been awarded an appropriate degree, diploma or other qualification by a university, college of advanced education or other tertiary institution, and completed at least 5 days training in mediation or dispute resolution and engaged in at least 10 hours of supervised mediation or dispute resolution in the 12 months immediately following completion of that training.<sup>175</sup> Additional regulations allow some flexibility for more experienced mediators who have provided at least 150 hours of mediation since 11 June 1991.

7.19 In the Administrative Appeals Tribunal, the Registrar may, on behalf of the Commonwealth, engage persons to conduct alternative dispute resolution processes to which parties are referred by the Tribunal but must not engage a person unless the Registrar is satisfied that the person has the qualifications and experience to be suitable to conduct the ADR process.<sup>176</sup>

7.20 The *Native Title Act 1993* empowers the President of the National Native Title Tribunal to engage a consultant to assist with mediation only if the person has particular skills or knowledge that may assist.<sup>177</sup> Any consultant engaged must disclose any conflict of interest.<sup>178</sup>

7.21 The *Defence Reserve Service (Protection) Regulations 2001* require that mediators to whom a dispute is referred by the Office of Reserve Service Protection under the Act or the regulations have appropriate qualifications as a mediator.<sup>179</sup>

7.22 In addition to the legislation noted, most Commonwealth Acts allow a court or the registrar to appoint a mediator where a court refers a matter to ADR. The court usually develops its own rules and procedures relating to mediation referred by the court.<sup>180</sup> This approach allows maximum flexibility but the lack of consistency can

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<sup>174</sup> Family Law Act 1975, s 10K.

<sup>175</sup> *Family Law Regulations*, regs 82 and 83.

<sup>176</sup> *Administrative Appeals Tribunal Act 1975*, s 34H.

<sup>177</sup> *Native Title Act 1993*, s 131A.

<sup>178</sup> *Native Title Act 1993*, s 131B.

<sup>179</sup> *Defence Reserve Service (Protection) Regulations 2001*, sub-regulation 22(2).

<sup>180</sup> Under the Federal Court Rules, after a mediation order is made, the Registrar must nominate a person as the mediator (*Federal Court Rules Order 72*, Rule 6).

In the Industrial Relations Court, a person can be appointed by the Court or a Registrar as the mediator where the Court has referred a matter for informal mediation. (*Industrial Relations Court Rules*, Order 75, Rule 4).

In the Federal Magistrates Court in non-family law matters, if the parties cannot reach agreement on a mediator within 14 days of an order for mediation by the Federal Magistrates Court, a Registrar must nominate a person as the mediator (*Federal Magistrates Court Rules 2001*, Rule 27.04 (1)).

also create a lack of certainty about what is required in order to become a mediator across the various courts.

7.23 Generally in legislation providing for ADR, the selection, nomination, accreditation, approval or appointment of mediators is 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
- reference to accreditation by a specified external body, or
- self-selection via specification of requirement to be a mediator (eg qualifications defined in the *Family Law Regulations 1984*).

### *Accreditation of organisations*

7.24 The *Family Law Act 1975* enables the Australian Attorney-General to designate organisations that provide dispute resolution and family counselling services.<sup>181</sup> An individual family counsellor or a family dispute resolution practitioner can be accredited under the Accreditation Rules, or may be authorised to act on behalf of an organisation designated by the Minister. The Minister must annually publish a list of organisations approved to provide family counselling services and family dispute resolution services.<sup>182</sup>

7.25 To ensure that family dispute resolution and family counselling services can continue on an uninterrupted basis while the new accreditation standards are being developed by the Australian Government, section 124 of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* allows for a transitional period from 1 July 2006 to 30 June 2009. During this time, approved organisations and organisations designated by the Attorney-General can authorise family dispute resolution practitioners and family counsellors to act on their behalf. However, it is expected that from 1 July 2009, all family dispute resolution practitioners and family counsellors will meet new accreditation standards. At the cessation of the transition period, the concept of ‘approved organisations’ will be removed from the legislation.

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The Federal Court generally sets its own procedures in relation to ADR. If a Court or a Judge orders proceedings to be referred to a mediator, the mediation must proceed in accordance with *Federal Court Rules* (Order 72, Rule 1). The Judges of the Court may make Rules of Court in relation to the referral of any proceedings in the Court to a mediator and in relation to the practice and procedure to be followed by a mediator in mediating anything referred under the *Federal Court of Australia Act 1976* (see ss 59(2)(zf) and 59(2)(zg)). A judge may undertake a mediation. (*Federal Court Rules*, Order 72, Rule 3).

Under the *Corporations Act 2001*, the Court (meaning the Federal Court, the Supreme Court of a State or Territory, or the Family Court of Australia), may make any orders and give any directions it considers appropriate in relation to proceedings brought, including directions about the conduct of proceedings, including requiring mediation (*Corporations Act 2001*, s 241 (1)).

<sup>181</sup> *Family Law Act 1975*, sub-ss 10C(1)(b) and 10G(1)(b).

<sup>182</sup> *Family Law Act 1975*, sub-ss 10C(2) and 10G(2) respectively.

7.26 As part of a range of family law reforms, the Government is implementing a competency-based approach to standards for counsellors, family dispute resolution practitioners and workers in Children's Contact Services. The Community Services and Health Industry Skills Council (CSHISC) is carrying out this work under the competency-based Vocational Education and Training System. This will include the development of units of core competency standards and supporting training materials as well as a mechanism for the assessment of practitioners.

## POLICY ISSUES

7.27 In its report to the Commonwealth Attorney-General on the issue of standards for ADR in Australia, NADRAC recommended moving towards essential standards in key areas and suggested that all ADR service providers adopt and comply with a code of practice.<sup>183</sup> In particular, NADRAC recommended that standards for ADR be developed 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. It was noted that although standards need to be developed to suit the context in which ADR services are provided, minimum standards should apply to all ADR service providers.

7.28 NADRAC found overwhelming support, from submissions received and from responses to its discussion paper, for the development of standards for ADR in order to:

- maintain and improve the quality and status of ADR
- protect consumers
- facilitate consumer education about ADR
- build consumer confidence in ADR services
- improve the credibility of ADR
- build the capacity and coherence of the ADR field, and
- promote Australia's international dispute resolution profile.

7.29 NADRAC has also recommended the development of a national accreditation system for mediators.<sup>184</sup> In granting funds to the National Mediation Conference Limited to facilitate the development of national standards for mediator accreditation, the Government made clear that it considers that such developments are 'central both to achieving higher quality mediation services, and their acceptance, both nationally

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<sup>183</sup> NADRAC, *A framework for ADR standards, Report to the Commonwealth Attorney-General*, 2001, Canberra, See Recommendations 1-2, p 71. The paper is available at [http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Framework\\_for\\_ADR\\_Standards](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Framework_for_ADR_Standards).

<sup>184</sup> See NADRAC's discussion paper 'Who says you're a mediator? Towards a national system for accrediting mediators' (2004) available on NADRAC's website at [http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Who\\_says\\_you&apos](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Who_says_you&apos).

and internationally. This will contribute in turn towards an improved civil justice system and a less litigious society'.<sup>185</sup>

7.30 As noted above at paragraph 7.15, participants at the 8<sup>th</sup> National Mediation Conference voted unanimously to support a National Mediation Accreditation System, including a National Mediator Standard, in May 2006. The report and proposal that was presented to and supported by the Conference are included in Appendix 3 starting on page 114.

### ***Why practitioner standards are an essential element of any legislative framework***

7.31 In order for the legislative framework of ADR to function well, including how disputes are referred to ADR, the obligations of parties to participate in ADR and the immunity of ADR practitioners (see Chapters 4, 6 and 8), the standards of ADR practitioners need to be regulated, maintained and enforced.

7.32 As stated elsewhere throughout the guide, parties should not be compelled to participate in ADR unless practitioner standards are regulated and maintained and there are adequate measures to assess whether individual matters are suitable to be referred to ADR. Practitioners themselves are often responsible for assessing whether a dispute will be suitable for ADR<sup>186</sup> again showing the importance of high standards of practice and training.

7.33 Generally, it is not recommended that ADR practitioners be given broad statutory immunity from civil suit unless there are adequate means for ensuring their accountability and there are opportunities for addressing the concerns of any clients who have suffered loss or damage. An effective means of providing these accountabilities and safeguards is through a system of accrediting ADR practitioners.

7.34 Matters such as the confidentiality, admissibility and enforceability of ADR processes (see Chapters 9, 10 and 11) are also important in building public confidence and rely to some extent on the practitioner's skill in communicating and explaining these implications, as well as the practitioner's ethical standards.

7.35 Particularly where ADR is compulsory, rule-makers, courts and tribunals have a special responsibility for ensuring appropriate standards are maintained in the delivery of their dispute resolution services.

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<sup>185</sup> Attorney-General Philip Ruddock, Media Release, 'Funding for improved Alternative Dispute Resolution', 30 June 2004, (Media Release 113/2004), available at: [http://agnet.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media\\_Releases\\_2004\\_Second\\_Quarter\\_30\\_June\\_2004\\_-\\_Funding\\_for\\_improved\\_alternative\\_dispute\\_resolution\\_-\\_1132004](http://agnet.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2004_Second_Quarter_30_June_2004_-_Funding_for_improved_alternative_dispute_resolution_-_1132004) >

<sup>186</sup> For example, before providing family dispute resolution under the *Family Law Act 1975*, a family dispute resolution practitioner to whom a dispute is referred must conduct an assessment of the parties to determine whether family dispute resolution is appropriate. See *Family Law Regulations 1984*, Regulation 62.

## *Accreditation of ADR practitioners*

7.36 In considering the nature and extent of standards and accreditation mechanisms to be included in legislation, policy-makers may wish to consider the scope of the law and the characteristics of the people upon whom the law will operate. It is more feasible to set out specific standards, qualification and accreditation requirements where the law is likely to impact on large numbers of people. In addition, accreditation mechanisms are more important where users of ADR are not in a good position to assess practitioner standards.

7.37 One of the key issues in relation to the accreditation of ADR practitioners has been the absence of a national accreditation system for mediators. Differing accreditation systems use different benchmarks or standards. There have been calls for many years to establish a peak ADR body, but there have been diverse views about the need for, and nature of, any peak body.

7.38 NADRAC convened a workshop on mediator accreditation at the 7<sup>th</sup> National Mediation Conference in Darwin on 2 July 2004 and invited written comments to its discussion paper [\*Who says you're a Mediator? Towards a National System for Accrediting Mediators\*](#), which was released in March 2004.<sup>187</sup> (See also paragraph 7.48 below). The overwhelming majority of submissions supported the concept of a national accreditation system. For consumers and referrers, an accreditation system could serve to lift standards, improve services to the public, provide protection for consumers, and ensure that referrers can be confident of the skills, qualifications and practice framework of mediators.

7.39 NADRAC supports an accreditation system which can accredit individual mediators as well as organisations that accredit mediators. The National Mediation Accreditation System, including a National Mediator Standard (see paragraphs 7.15 and 7.30), provides for individuals to be certified as accredited according to the National Mediation Standard by recognised mediator accreditation bodies (RMABs).<sup>188</sup>

7.40 One of the disadvantages of the absence of a national approach to accreditation has been that users of ADR services might be unclear about the quality and nature of the services offered. A recognised accrediting body might assure the public that all organisations it has approved meet well-known benchmarks.

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<sup>187</sup> An overview of the submissions and the paper is available on NADRAC's website at [http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Overview\\_of\\_responses\\_to\\_Who\\_Says\\_You%27s](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Overview_of_responses_to_Who_Says_You%27s) and [http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Who\\_says\\_you%27s](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Who_says_you%27s).

<sup>188</sup> RMABs will be those bodies whose education, training and assessment credentials have been approved from time to time through the Recognition and Supervision of Mediator Accreditation function.

7.41 The absence of an accrediting body makes redress very difficult if the user of an ADR service is dissatisfied with the level of service received. Complaints against legal practitioners are usually directed to the relevant Law Society, and the practitioner may face disciplinary measures or the ultimate prospect of being ‘struck off’ for misconduct. No recourse of this kind exists for the users of ADR services that are provided by non-lawyers.

7.42 For non-lawyers who are members of an ADR professional association, some disciplinary measures may apply, although not all ADR service providers are currently members of such organisations. In the absence of a national accreditation system, complaints mechanisms may need to be mandated. For example, services funded by the Commonwealth Government’s Family Relationship Services program are required to have a complaints mechanism in place. Furthermore, the *Family Law Act 1975* contains provision for financial penalties for dispute resolution practitioners who do not comply with the regulations.<sup>189</sup>

7.43 Without standards, where courts are empowered to refer matters to ADR and to appoint ADR practitioners, referrers may not trust the quality of ADR services offered in the market place and so either establish their own formal or informal systems of accreditation, or provide services in-house, or rely on word of mouth recommendations.

7.44 In addition, public and private resources can be wasted as organisations establish their own accreditation systems and individual practitioners seek to meet inconsistent criteria across different accreditation systems.

7.45 In the absence of other systems of accreditation, care should be taken when introducing threshold educational requirements for ADR practitioners. For example, many ADR practitioners have begun their careers at the community level and, while being potentially suitable ADR practitioners for the purposes of any new legislation, may not have the requisite formal qualifications. This could have the effect of shrinking the available number of practitioners to an unsustainable level and, at the same time, reducing the diversity of ADR practitioners. Policy-makers may wish to consider including transitional provisions and provide for the recognition of prior learning to accommodate experienced practitioners.

7.46 NADRAC has suggested that any accreditation system should promote the following objectives:

- enhance the quality and ethics of mediation practice
- protect consumers of mediation services
- build consumer confidence in mediation services, and

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<sup>189</sup> *Family Law Act 1975*, s 10K

- build the capacity and coherence of the mediation field.

7.47 These objectives are also likely to be the objectives of any statutory ADR scheme. Parliaments may therefore enact legislation which requires or empowers bodies to develop ADR accreditation processes that:

- clearly define the standards recognised through the accreditation
- are based on valid and reliable assessment
- include monitoring, review or audit processes
- provide fairness to those seeking accreditation
- are transparent and publicly available, and
- are consistent and comparable with similar accreditation regimes.

### **NADRAC'S VIEW**

7.48 NADRAC has addressed the need for a viable and effective national system for mediator accreditation as well as an effective regulatory environment for the attainment of standards in its publications [A Framework for ADR Standards](#) and [Who says you're a mediator? Towards a National System for Accrediting Mediators](#) both available on its website.<sup>190</sup> NADRAC welcomes the moves toward a national system of mediator accreditation and the development of a National Mediation Standard.

7.49 NADRAC is of the view that the best method of ensuring accountability and maintaining both the standards of practice and public faith in the ADR process is to have clear, transparent accreditation systems in place, with sanctions for breaches of professional standards. If ADR practitioners are bound by professional standards of which the public is made aware, the reputation of ADR practitioners would be enhanced, increasing public faith in ADR as a viable alternative to litigation.

7.50 NADRAC believes that the development of standards for ADR 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.<sup>191</sup> NADRAC supports the ongoing development of standards for ADR, including a code of practice which takes account of essential areas and the enforcement of that code through appropriate means.

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<sup>190</sup> NADRAC, *A framework for ADR standards*, note 183, available at [http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications\\_All\\_Publications\\_Framework\\_for\\_ADR\\_Standards](http://www.nadrac.gov.au/agd/WWW/disputeresolutionHome.nsf/Page/Publications_All_Publications_Framework_for_ADR_Standards).

<sup>191</sup> NADRAC, *A framework for ADR standards*, note 183, at p xi and pp 69-70.

7.51 NADRAC also believes that a simple, achievable and credible system for accrediting mediators is needed to advance the quality and acceptance of mediation in Australia. NADRAC has suggested that rather than establishing a single body to accredit each mediator individually, a system is required to accredit (or approve) organisations which in turn accredit mediators. In order for these organisations to be approved, they would need to develop common standards for initial assessment, as well as ongoing monitoring, review and disciplinary processes for mediators. The standards for the accreditation of mediators could be expressed in an agreed code of practice. The process for approving mediator accreditation organisations could be overseen by a national body developed on a consensual basis. While an effective accreditation system would go a long way toward ensuring service quality, there would also be a need for service providers to attend to aspects of service delivery, such as service design, monitoring and professional supervision, compliance, complaints handling and physical facilities.

## 8. IMMUNITY OF ADR PRACTITIONERS

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### OUTLINE OF ISSUE

8.1 There is no general immunity from legal action for ADR practitioners. However, immunity can be provided by the practitioner's individual contract for service or by statute in particular areas of ADR work. Practitioners engaged in both facilitative and determinative ADR processes have been afforded immunity in both these ways.<sup>192</sup>

8.2 The general policy supporting immunity for ADR practitioners is that the performance of their functions and duties, and the quality of ADR outcomes, might be threatened if there is a risk of legal action. This threat comes from two main sources.

8.3 First, parties to an ADR process expect that things said and done during ADR will be kept confidential and that ADR evidence will generally be inadmissible in subsequent proceedings.<sup>193</sup> In the course of court proceedings against an ADR practitioner who does not have immunity, these same things could be used as evidence. Under these circumstances parties may be reluctant to participate fully in ADR.

8.4 The second source of threat is that the potential for a civil suit against an ADR practitioner may make the ADR process more formal and legalistic or provide a means by which a party could re-open the substance of the dispute.

8.5 An additional problem is that some ADR practitioners have said that it is likely that many community ADR practitioners would not have the capacity or willingness to become practitioners without explicit immunity provisions in legislation.<sup>194</sup> However, this factor diminishes in importance as ADR practice grows.

8.6 The main issues for policy-makers to consider are whether immunity should be provided. If so, the extent of immunity must be determined and the problem of ensuring parties receive appropriate standards of ADR must be addressed. The arguments for and against statutory immunity relate to the need to limit the potential liability of ADR practitioners and at the same time ensure an acceptable degree of accountability for ADR practice. Also, the need to preserve the effectiveness of the

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<sup>192</sup> These terms are defined in Chapter 4 in paragraph 4.7

<sup>193</sup> For further discussion, see Chapters 9 and 10.

<sup>194</sup> Responses to NADRAC's Discussion Paper - *The Development of Standards for ADR* (2000). A summary of the responses is available in <[Appendix B](#)> of NADRAC's *A framework for ADR standards* (2001), note 183.

ADR process must be balanced against the need to ensure there are adequate means by which ADR practitioners are held accountable.

## WHAT IS IMMUNITY?

8.7 Judges, and other participants in the judicial system, have immunity from civil suit for the performance of their duties. It is in this sense that immunity is relevant for ADR practitioners.

8.8 Judges have traditionally been provided with statutory immunity to ensure that justice is administered impartially and independently.

8.9 At common law, ‘an advocate cannot be sued by his or her client for negligence in the conduct of a case, or in work out of court which is intimately connected with the conduct of a case in court’.<sup>195</sup> The common law justification for providing this immunity relates to ‘the adverse consequences for the administration of justice which would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings’.<sup>196</sup> It is worth noting that overseas courts have overturned the protection given to barristers and that debate on this issue continues in Australia.

8.10 Immunity may be provided in three ways. First, the common law extends judicial immunity to judges, other participants in the judicial system and quasi-judicial officers and bodies such as tribunals.<sup>197</sup> In very limited circumstances this immunity may extend to an ADR practitioner. However, the general view is that common law immunity does not provide ADR practitioners with immunity generally.<sup>198</sup> Secondly, a statute may provide that an ADR practitioner is not liable for any civil action arising out of his or her conduct as a practitioner (statutory immunity). Finally, an ADR practitioner’s civil liability may be excluded or limited by agreement between the parties (contractual immunity). The validity of such clauses depends on the nature of the liability that is sought to be excluded and the applicable law in the jurisdiction where the contract is made.

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<sup>195</sup> *D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 (10 March 2005), paragraph 25, quoting the decision in *Giannarelli v Wraith* (1988) 165 CLR 543. Barristers’ immunity was upheld by the High Court’s decision in *D’Orta-Ekenaike v Victoria Legal Aid* by Gleeson CJ, Gummow, Hayne and Heydon JJ, see paragraphs 54, 84, 85 and 91. The High Court recognised that barristers’ immunity is no longer protected by the common law in the United Kingdom, Canada and New Zealand. The High Court reasoned that there were no compelling reasons to change the existing position, but it did not decide about the desirability of barrister’s immunity. It reasoned that advocate’s immunity is a necessary consequence of the need for certainty and finality of judicial decisions. This need is a ‘fundamental and pervading tenet of the judicial system.’ (para 84). ‘Controversies, once quelled, should not be re-opened.’ (para 64)

<sup>196</sup> *Giannarelli v Wraith* (1988) 165 CLR 543 per Mason CJ at 555.

<sup>197</sup> Carroll R., ‘Mediator Immunity in Australia’ (2001) 23(2) *Sydney Law Review* 185. Examples of quasi-judicial proceedings include military tribunals, a board of inquiry into police malpractice or proceedings before a solicitors’ professional disciplinary tribunal. It is often necessary to establish the ‘judicial’ function of the tribunal in order to claim the immunity.

<sup>198</sup> Carroll R., note 197, p 186.

8.11 In the absence of common law, statutory or contractual immunity, civil actions that might be brought against an ADR practitioner could include ‘actions for breach of contract,<sup>199</sup> negligence, statutory torts (for example, discrimination and harassment), breach of fiduciary obligation, breach of confidence, defamation, misleading or deceptive conduct and other statutory consumer protection actions’.<sup>200</sup> Action has been taken against a mediator on the basis that the practitioner applied undue pressure on the parties to agree and breached a duty of care owed to the client.<sup>201</sup>

## STATUTORY PROVISIONS

8.12 There is no general statute at state or federal level that confers immunity on all mediators working within the jurisdiction.<sup>202</sup>

8.13 There may be specific statutory regimes that provide immunity in specified circumstances. Statutory protection for ADR practitioners is either provided as an absolute immunity (similar to that afforded to judges) for work done in relation to ADR associated with that legislation, or a qualified immunity limited to acts done in good faith.

### *Protection equal to that of a judicial officer*

8.14 For matters referred to mediation by the Federal Magistrates Court or the Federal Court, mediators have the same immunity as that extended to a Federal Magistrate or Federal Court Judge respectively.<sup>203</sup> Family consultants and arbitrators in the Family Court have the same immunity as a Family Court judge.<sup>204</sup> ADR

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<sup>199</sup> An action for breach of contract could include a breach of implied conditions. For example, the *Fair Trading Act 1987* (NSW) s 40S (which is based on the *Trade Practices Act 1974* (Cth), s 74(1) in relation to corporations) provides that in every contract for the supply by a person of services to a consumer in the course of a business, there is an implied warranty that the services will be rendered with due care and skill. (See also, for example, the *Fair Trading Act 1999* (Vic) s 32J). On the other hand, no liability will arise if the professional was acting in accordance with accepted standards of professional practice in the field. See the *Civil Liability Act 2002* (NSW), s 5O(1) and the *Wrongs Act 1958* (Vic), s 59(1). In addition, legislation such as the *Professional Standards Act 1994* (NSW), Part 2 and the *Professional Standards Act 2003* (Vic), Part 2 may apply so as to limit professional liability.

<sup>200</sup> Carroll R., note 197, p 189.

<sup>201</sup> *Tapoohi v Lewenberg* (No 2) [2003] VSC 410 (21 Oct 2003). Action against the mediator was taken by a firm of solicitors responding to an action by their client for breach of contract and breach of ‘duty of care’. The allegation of coercion arose from evidence that the mediator had been made aware that the parties required advice on the taxation implications of any settlement that might be reached before finalising the terms but that the mediator had insisted that terms of settlement be executed on the night of the mediation.

<sup>202</sup> For discussion of the position, see Robyn Carroll, note 197.

<sup>203</sup> *Federal Magistrates Act 1999*, s 34 and *Federal Court of Australia Act 1976*, s 53C.

<sup>204</sup> *Family Law Act 1975*, ss 11D and 10P respectively. Family counsellors and family dispute resolution practitioners do not have statutory immunity. Statutory immunity is given to family and child specialists, mostly comprising of Family Court mediation staff, who will give non-confidential advice to the parties and have a reportable role in the process of case management. See also the discussion in footnote 227.

practitioners in the Administrative Appeals Tribunal have the same immunity as a Justice of the High Court.<sup>205</sup>

### ***Protection for acts and omissions done in good faith***

8.15 A member or a person acting on behalf of the Human Rights and Equal Opportunity Commission is not liable to an action for damages where an act or omission has been done in good faith in the performance of any function or power conferred on the Commission.<sup>206</sup>

8.16 The Privacy Commissioner or a person acting under his or her authority has protection from suit for acts done in good faith in exercising any power,<sup>207</sup> which can include conciliation.<sup>208</sup>

8.17 The *Aboriginal Councils and Associations Act 1976*<sup>209</sup> provides immunity to a person conducting an arbitration under the Act for anything done or omitted to be done in good faith in connection with the arbitration. A similar provision applies in the *Payment Systems (Regulation) Act 1998*.<sup>210</sup>

8.18 In legislation establishing the community justice centres in New South Wales and their equivalents in Queensland and Victoria, mediators accredited under the statute are provided with immunity for anything done in good faith in execution of their duties.<sup>211</sup>

8.19 Statutory immunity may also protect the parties to an ADR process from liability arising from communications made in good faith during that process.<sup>212</sup>

### ***Other statutory immunities***

8.20 Other statutory immunities may provide narrower protection to ADR practitioners which is limited to particular circumstances and/or specific loss<sup>213</sup> and

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<sup>205</sup> *Administrative Appeals Tribunal Act 1975*, s 60(1A).

<sup>206</sup> *Human Rights and Equal Opportunity Commission Act 1986*, s 48.

<sup>207</sup> *Privacy Act 1988*, s 64.

<sup>208</sup> *Privacy Act 1988*, s 27.

<sup>209</sup> *Aboriginal Councils and Associations Act 1976*, s 58A.

<sup>210</sup> *Payment Systems (Regulation) Act 1998 No. 58, 1998*, s 20. The Reserve Bank may arrange for a dispute to be settled by arbitration, to be conducted by the Governor of the Reserve Bank or a person appointed in writing by the Governor. The person conducting the arbitration is not subject to any action, claim or demand in respect of anything done or omitted to be done in good faith in connection with the arbitration.

<sup>211</sup> *Community Justice Centres Act 1983 (NSW)* s 27(1), *Dispute Resolution Centres Act 1990 (Qld)* s 35(1)(c), *Evidence Act 1958 (Vic)* s 21N. In Victoria, the Evidence Act refers to conferences with mediators or employees of dispute settlement centres, including neighbourhood mediation centres.

<sup>212</sup> *Radiocommunications Act 1992*, s 211.

<sup>213</sup> *Agricultural and Veterinary Chemicals (Administration) Act 1992*, s 69H.

may stipulate that only practitioners appointed in accordance with the process described in the legislation are protected. Granting immunity contingent on an accreditation process can be a worthwhile approach because the standards of ADR practitioners can be regulated through the accreditation process.

8.21 Professional standards legislation in most States and Territories enables the creation of schemes to limit the civil liability of professionals, and others who are members of occupational associations, and aims to facilitate improvement in the standards of services provided by those members.<sup>214</sup> In some instances, Professional Standards Councils have been established to supervise the preparation and approval of schemes and to assist in the improvement of the occupational standards of professionals and in the protection of consumers.

8.22 If mediators and other ADR practitioners wish to be regarded as professionals for the purposes of this legislation, and wish to take advantage of the limits on liability, they may need to join or form an occupational association. In addition, further efforts towards monitoring and enforcing the standards of ADR practitioners may be required in order to meet the requirements of the legislation. An example of this is the *Professional Standards Act 1994* (NSW) where an occupational association may prepare a scheme to limit their occupational liability but must meet other requirements relating to insurance and complaints and disciplinary matters. The Act provides a Model Code for complaints and disciplinary matters.<sup>215</sup> Generally, the legislation also indicates a broad policy direction towards restricting liability in negligence claims in response to pressures on insurance funds.

## POLICY ISSUES

8.23 To the extent that ADR practitioners perform a ‘quasi-judicial function’ in a determinative process such as arbitration,<sup>216</sup> there are some arguments to support immunity. In Australia, the common law and legislation traditionally protect judges and barristers engaged in court work from liability. However, it may be more difficult to justify absolute immunity for facilitative ADR practitioners such as mediators.<sup>217</sup>

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<sup>214</sup> *Professional Standards Act 1994* (NSW), *Civil Law (Wrongs) Act 2002* (ACT), *Professional Standards Act 2003* (Vic), *Professional Standards Act 2004* (SA), *Professional Standards Act 2004* (Qld), *Professional Standards Act 2005* (Tas), *Professional Standards Act 1997* (WA).

<sup>215</sup> Occupational Associations (Complaints and Discipline) Code. See the *Professional Standards Act 1994* (NSW), s 38 and Schedule 1.

<sup>216</sup> NADRAC defines ‘determinative’ processes as those in which an ADR practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative ADR processes are arbitration, expert determination and private judging.

<sup>217</sup> NADRAC defines ‘facilitative’ processes as those in which an ADR practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are mediation, facilitation and facilitated negotiation.

### *Arguments in support of statutory immunity*

8.24 The main arguments in support of statutory immunity for ADR practitioners, in particular those working with the courts, are as follows.

- 8.24.1 Judges have traditionally been provided with statutory immunity to ensure that justice is administered impartially and independently. See also paragraph 8.8 above. Where an ADR practitioner's functions are closely connected with the court process or the practitioner is engaged in a 'determinative' role, the practitioner should be immune from liability in order to properly exercise his or her functions. The growing use of court-annexed ADR assists courts to perform their judicial role of determining disputes.
- 8.24.2 Failing to protect an ADR practitioner from suit can indirectly lead to the re-opening of the substance of the dispute, creating lack of finality, uncertainty and further costs. The principles of confidentiality and inadmissibility could be weakened if evidence of ADR communications needs to be revealed in order to defend or pursue a suit against an ADR practitioner.
- 8.24.3 Given the nature of ADR processes and the compromises usually involved, parties occasionally have second thoughts about the agreement reached through ADR. Given that any legal agreement reached arising out of the ADR process is otherwise binding, dissatisfaction with the ADR practitioner may be expressed.
- 8.24.4 Extending immunity through legislation is seen as a means of defining its limits and avoiding doubt. Parliaments have afforded ADR practitioners immunity in express terms in a number of existing Acts.
- 8.24.5 Where it is proposed to provide immunity by an individual contract between the parties and the practitioner (see discussion about contractual immunity under paragraph 8.10 above), it may be more convenient for a practitioner operating in a statutory framework to have immunity without first having to obtain the agreement of the parties. Also, it may be legally difficult to exclude or limit liability by contract due, for example, to consumer protection legislation, contracts review legislation and the common law.

## *Arguments for limiting statutory immunity*

8.25 The main arguments for limiting the availability of statutory immunity for ADR practitioners are as follows.

- 8.25.1 Some ADR practitioners have said it is possible that many community ADR practitioners would not have the capacity or willingness to become practitioners without explicit immunity provisions in legislation.<sup>218</sup> More recent consultations by NADRAC and the Family Law Council indicate that immunity from liability for negligence is not an issue of great importance to practitioners in the field. Most organisations that offer mediation offer a range of other services, such as counselling, which does not attract immunity from civil liability. These organisations need to have insurance covering the liability of the majority of their professional staff, so could extend insurance protection to ADR practitioners in the absence of legislative immunity.
- 8.25.2 The strongest practicable immunity would be subject to some implied limitations. It would apply only to conduct within the purpose of the statute while performing the ADR functions, it would protect only against civil action by the parties not disciplinary action by the court or appointing body and would not preclude actions for breach of a statutory obligation such as secrecy or non-disclosure provisions or statutory duties of care.
- 8.25.3 NADRAC has previously noted that ‘whatever model of mediation operates, the mediator is not a decision maker whose freedom to make decisions, according to law and good conscience, needs protection’.<sup>219</sup> From this it follows that an ADR practitioner does not determine the parties’ legal rights and entitlements and therefore should not have the same broad immunity as judicial officers. Any arguments based on the effective administration of justice become ‘weaker the further away from the court the mediation takes place’.<sup>220</sup>
- 8.25.4 It may be inappropriate for facilitative ADR practitioners to have immunity.<sup>221</sup> If facilitative functions are conducted competently, there will, in theory, be no grounds for legal proceedings against the practitioner. The practitioner is merely assisting the parties to make their own agreement. It has also been argued that ADR practitioners should have the skills to ensure their words and actions are not misunderstood. One view is that facilitative ADR practitioners should be immune from legal action with regard to the

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<sup>218</sup> Responses to NADRAC’s Discussion Paper - *The Development of Standards for ADR* (2000). A summary of the responses is available in <Appendix B> of NADRAC’s *A framework for ADR standards* (2001), note 183.

<sup>219</sup> National Alternative Dispute Resolution Advisory Council, *Primary Dispute Resolution in Family Law*, 1997, p 31.

<sup>220</sup> Carroll, R., note 197, p 207.

<sup>221</sup> Boule, L., *Mediation: Principles, Process, Practice*, Butterworths, 1996, pp 251-252.

outcome of an ADR process, but not immune from liability for aspects of the management of the process, for example where there is serious misconduct.<sup>222</sup>

- 8.25.5 Immunity may have the effect of denying redress to parties who have suffered a loss due to an ADR practitioner's conduct. Removing the right to legal action may be particularly difficult to justify where ADR is compulsory. However, it can be argued that civil liability is an inappropriate or ineffective way of dealing with practitioner misconduct and that it would be better to focus on setting and enforcing acceptable standards through other means. (Though both civil liabilities and disciplinary mechanisms are important safeguards for users of ADR services).
- 8.25.6 Professional indemnity insurance is another possible alternative to statutory immunity.<sup>223</sup>
- 8.25.7 ADR practitioners who are engaged privately are able to negotiate the terms of their agreement, and so are able to include provisions to exclude or limit their exposure to claims. Statutory immunities may therefore be unnecessary where immunity is provided by contract. Removing statutory immunity would be highly unlikely to reduce immunity provisions written into ADR contracts. On the other hand, there may be situations where contractual immunity is inappropriate because the parties have no choice in selecting the practitioner and legislation may need to account for this.

### *The link between immunity and standards*

8.26 Immunity may, on the assumption that 'immunity encourages carelessness by removing the incentive of cautiousness,'<sup>224</sup> slow the development of acceptable standards of care and remove incentives for ADR practitioners to achieve or exceed those standards. By denying ADR practitioners the benefit of statutory immunity, a greater incentive is provided for ADR practitioners to undertake appropriate training and comply with relevant standards.

8.27 A possible solution to this problem is to rely on a range of sanctions in addition to exposure to litigation, to encourage the maintenance of acceptable standards. These sanctions could include reprimands, fines and suspension or, ultimately, removal of the right to practice. A number of ADR organisations have suggested that codes of conduct for practitioners should be developed that include

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<sup>222</sup> See also NADRAC's views, under paragraphs 8.30-8.34.

<sup>223</sup> Responses to NADRAC's Discussion Paper - [The Development of Standards for ADR](#) (2000). A summary of the responses is available in <[Appendix B](#)> of NADRAC's *A framework for ADR standards* (2001), note 183.

<sup>224</sup> Chaykin A., 'The liabilities and immunities of mediators: a hostile environment for model legislation' (1986) 2 *Journal of Dispute Resolution* 47, p 77.

complaint-handling and disciplinary procedures.<sup>225</sup> They have suggested that a financial compensation scheme may be needed for cases where an ADR practitioner's conduct has caused a loss which cannot be addressed by other means.

8.28 Generally, sanctions are already in place for lawyers acting as mediators because of the rules relating to the conduct of lawyers. NADRAC has received submissions saying that the accrediting body or ADR service provider should enforce the sanctions. However, other submissions say an effective code of conduct should not include sanctions but that complaints should be dealt with under the contractual agreements between parties and ADR practitioners.

8.29 To date, few legal proceedings have been taken against mediators and other ADR practitioners in Australia. Usually the proceedings involved allegations of excessive pressure to settle and involved a claim that the ADR practitioner's duty of care to his or her client was breached. See for example *Tapoohi v Lewenberg*.<sup>226</sup>

## NADRAC'S VIEW

8.30 Where a court refers a matter to an ADR process, safeguards should exist to protect the ADR practitioner from suit because of the proximity of ADR to judicial processes. Where a court orders ADR and the ADR is part of a continuum of case management strategies which aim to resolve litigation between parties, ADR may be seen as an extension of the judicial role, which should attract the same immunity as for other aspects of the court process. NADRAC believes that legislative immunity is strongly justified in relation to court-ordered or court-annexed ADR.

8.31 NADRAC believes it is very difficult to justify the immunity of ADR practitioners wherever the ADR is community-based rather than part of a court's case management process. For example, under the *Family Law Act 1975*, dispute resolution that is conducted by employees of the Family Court of Australia or the Federal Magistrates' Court attracts immunity because it is part of the totality of the court process. The same does not apply to community-based ADR conducted under the same Act.<sup>227</sup>

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<sup>225</sup> Responses to NADRAC's Discussion Paper - [The Development of Standards for ADR](#) (2000). A summary of the responses is available in <[Appendix B](#)> of NADRAC's *A framework for ADR standards* (2001), note 183.

<sup>226</sup> *Tapoohi v Lewenberg & Ors* (No 2), note 201.

<sup>227</sup> Under the *Family Law Act 1975*, community-based ADR will increasingly occur when people engage in a dispute resolution process before being allowed to file in court. The Family Relationship Centres will offer free mediation to people who seek it in relation to their parenting disputes after separation and there is no necessary connection with any court application. The *Family Law Act 1975* does not confer immunity on family dispute resolution practitioners when conducting facilitative dispute resolution or family counsellors conducting family counselling. However, immunity is retained for family and child specialists, mostly comprised of Family Court mediation staff, who will give non-confidential advice to the parties and have a reportable role in the process of case management. (*Family Law Act 1975*, s 11D.)

8.32 NADRAC's view is that any immunity from suit for negligence or other civil wrong must be strongly justified as a matter of public policy. There is now almost no profession which is granted the privilege of immunity from civil liability. The High Court has found that Australian common law provides immunity to barristers from suit for their advocacy work.<sup>228</sup> However, opinion remains divided in the Australian community about whether this should continue.<sup>229</sup> Where immunity is provided under legislation for mediators and other ADR practitioners, its continuation should be a matter of careful consideration and scrutiny. It requires compelling justification.

8.33 If legislative immunity is to be provided to ADR practitioners, the level of immunity should be clearly defined in the legislation. In some circumstances, the absence of statutory immunity could adversely impact upon the availability of practitioners. An express exception to legislative immunity is justified in cases of fraud. Consideration should also be given to whether there should be an exception to legislative immunity in other situations of misconduct.<sup>230</sup>

8.34 Where statutes confer immunity on dispute resolution practitioners, or where there is an element of compulsion on the parties to legal proceedings to use alternative means of resolving their dispute, governments should ensure that high quality ADR services are available. They should also ensure that these services are available in sufficient quantities and that there are relevant procedures to maintain minimum levels of quality and accountability. This may involve the implementation of accreditation processes and the monitoring and enforcement of standards of practice.

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<sup>228</sup> In *D'Orta-Ekenaike v Victoria Legal Aid* [2005] and *Giannarelli v Wraith* (1988), see also discussion under footnotes 195 and 196.

<sup>229</sup> In relation to *D'Orta-Ekenaike v Victoria Legal Aid* [2005], comments were made by the Hon Chief Justice Marilyn Warren in a speech 'Doctors, lawyers and immunity from suit: what's fair for one should be fair for all' on 6 May 2005 for the Medico-Legal Society of Victoria:

It seems for this reason that, in light of the High Court's divergence from the sort of views now being expressed on this issue around the common law world, that Justice Kirby observed that the High Court of Australia is 'out of step' [per Kirby J in *D'Orta-Ekenaike v Victoria Legal Aid* at [47]]. And not just with New Zealand and English law. His Honour noted that there is no such general immunity for advocates in the United States, Canada, the European Union, Singapore, India, or Malaysia.

<sup>230</sup> NADRAC has previously noted that broad statutory immunity for ADR practitioners raises concerns about the inability of parties to bring actions against them for serious misconduct, - in its report to the Attorney-General on Part 5 of the Family Law Regulations, [Primary Dispute Resolution in Family Law](#) (1997, Canberra) pp 28-32.

## **9. CONFIDENTIALITY OF COMMUNICATIONS MADE DURING ADR**

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### **OUTLINE OF ISSUE**

9.1 There is a generally accepted principle that communications made during ADR will be kept confidential. The key issue to consider is whether legislation should impose these confidentiality obligations and what sanctions should apply for breaches of any confidentiality requirements. Policy makers should also consider whether any common law or contractual obligations are sufficient.

9.2 ADR practitioners have an ethical obligation not to disclose information obtained during an ADR process. The obligation helps to encourage parties to participate openly and honestly in an ADR process without fearing that their comments or actions will be revealed to others or used against them. Parties, their representatives and others they bring with them to the ADR process may also be subject to confidentiality obligations. In some cases, ethical obligations of confidentiality are also legal obligations, imposed either by legislation or by contractual arrangements made between the ADR practitioner or service provider and the parties.

9.3 The policy reasons for confidentiality obligations are based on maintaining public confidence in ADR processes and enabling open and honest communication within the process to produce a workable outcome. The arguments for restricting those confidentiality obligations are based on the need for some judicial or public control over the private resolution of disputes and the need for third parties who may be affected by the outcomes of an ADR process to have access to information to assert their rights.

9.4 The confidentiality of ADR communications is one of the more sensitive issues to be considered by those regulating ADR. The appropriate means of regulating these obligations and the extent of their enforcement, requires careful consideration.

### **WHAT IS THE OBLIGATION OF CONFIDENTIALITY?**

9.5 The obligations of ADR practitioners not to disclose ADR communications have been affirmed by the common law.<sup>231</sup> Practitioners should not disclose information about the dispute to third parties. In addition, practitioners generally have an ethical obligation not to disclose information provided by a party during a separate private session where this is part of an ADR process. This extends to keeping that information from the other party to the process. The importance of the actual and

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<sup>231</sup> See cases such as *AWA Ltd v Daniels* (1992) 7 ACSR 463 (Comm Div) and *Rajski & Anor v Tectran Corporation Limited and Ors* (2003) NSWSC (26 May 2003).

perceived impartiality of the ADR practitioner is one of the hallmarks of the ADR process.

9.6 The confidentiality obligations of the parties participating in an ADR process may be more problematic. Parties may be required to report to managers, a board, auditors or partners about an ADR process. In family law matters, particularly in matters that relate to parenting arrangements for separating couples, it is unrealistic to expect a party to leave the process and not reveal to someone such as their current partner the proposals or agreements discussed, especially in relation to the children.

9.7 Many ADR practitioners prefer to make an agreement between themselves and the parties at the outset of the process to maintain confidentiality. The agreement may be phrased along the lines of the following clause:

The mediator and the parties and all persons brought into the mediation will not disclose and will not seek to rely on or introduce as evidence in court proceedings any of the following:

- exchanges whether oral or documentary;
- views expressed or suggestions or proposals made by the Mediator;
- admissions made;
- the fact that any party has indicated willingness to accept any proposal for settlement by the Mediator or by any party; or
- notes or statements made.<sup>232</sup>

9.8 In many confidentiality agreements, there are exceptions that allow a party to discuss proposals or agreements with anyone likely to be directly affected. Parties may also agree that certain matters may be disclosed. In practice, a further exception exists where the agreement reached subsequently becomes the subject of court orders in the terms of the agreement. Many agreements about the conduct of an ADR process also now state that the promise of confidentiality is ‘to the extent that the law allows’.<sup>233</sup>

9.9 The [NSW Law Society Mediation Program](#)<sup>234</sup> facilitates mediations by legal practitioners in NSW. Participants must first sign the [Law Society Agreement to Mediate](#),<sup>235</sup> which defines the roles of the parties and includes confidentiality clauses for the participants, mediator and third parties. The clauses provide that any information disclosed to a mediator in private is to be treated as confidential by the mediator unless the party making the disclosure states otherwise.<sup>236</sup> The participants agree not to disclose any information to anyone who is not involved in the mediation

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<sup>232</sup> Lancken S., ‘The responsibility of the neutral in respect of mediation confidentiality’ 7(2) *ADR Bulletin* (2004), p 25.

<sup>233</sup> See Lancken, above note 232.

<sup>234</sup> Conducted by the Law Society of NSW, see website at <<http://www.lawsociety.com.au/page.asp?partid=3779>>.

<sup>235</sup> Found at

<[http://www.lawsociety.com.au/uploads/filelibrary/1091602192031\\_0.9890648295210099.pdf](http://www.lawsociety.com.au/uploads/filelibrary/1091602192031_0.9890648295210099.pdf)>

<sup>236</sup> Law Society of NSW, ‘The Agreement to Mediate (Including a Confidentiality Agreement to be signed by third parties)’, Clause 14.

unless required by law to make such a disclosure. This does not prevent the reporting to the Office of the Legal Services Commissioner of a lawyer mediator or legal representative of any breach of the Guidelines or of other unprofessional conduct.<sup>237</sup>

9.10 In addition to contractual clauses and their exceptions, a limited number of legislative provisions protect the confidentiality of the communications that make up an ADR process.<sup>238</sup>

9.11 The court may enforce a promise to keep a confidence by injunction. The difficulty is that usually no one will know about the disclosure until after it has occurred. While damages may be an appropriate remedy in some cases, their use has not spread to matters involving ADR.

9.12 Although the promise of confidentiality is difficult to enforce, it remains an important principle of settlement negotiations. The concept of confidentiality or secrecy underpins the principle that settlement negotiations are conducted ‘without prejudice’ to a party’s legal rights. The concept of confidentiality does not have direct legal consequences and it is different from the evidentiary protection given to settlement negotiations conducted ‘without prejudice’ (see paragraphs 10.17 and 11.9-11.10). The law encourages settlement discussions and will therefore discourage the use in evidence of offers or settlement discussions. This is because the parties should feel free to attempt to resolve a dispute without the fear that their words will be used against them later.

9.13 Confidentiality is also different from the protection given to communications between a lawyer and their client, referred to as ‘legal professional privilege’.

### ***Limitations on confidentiality***

9.14 Limitations on confidentiality may arise in a range of circumstances. According to Professor Sourdin, such limitations may arise where:

- the agreement so provides or the parties give their consent
- misconduct or incompetence is an issue<sup>239</sup>
- legislation specifies exceptions
- reasonable excuse is raised

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<sup>237</sup> Law Society of NSW, ‘The Agreement to Mediate (Including a Confidentiality Agreement to be signed by third parties)’, Clause 15.

<sup>238</sup> The United States Evidence Code # 1119 (California) is more definite in legislating confidentiality and states that ‘all communications, negotiations, or settlement discussions by and between participants in the course of a mediation, or in a mediation consultation shall remain confidential.’

<sup>239</sup> Cases such as *Tapoohi v Lewenberg [No 2] [2003] VSC 410* suggest that courts will consider what has occurred in a mediation if there is an allegation that the agreement reached at the conclusion of the mediation was harsh, unconscionable or unjust.

- research takes place
- an offence or fraud occurs during mediation, or
- there is a commission of, or threat of, a crime.<sup>240</sup>

Additionally, broad exceptions to confidentiality have been accepted by the courts in situations ‘where information may otherwise be available, on an application for costs, or where there is an allegation of mediator pressure, or it has been suggested that the agreement is ‘unconscionable’’.<sup>241</sup>

## STATUTORY PROVISIONS

9.15 Commonwealth statutory provisions generally do not prevent the parties from disclosing matters that are discussed during ADR processes. However, there are some notable exceptions.

9.16 Family counsellors and family dispute resolution practitioners must not disclose any communication or admission made unless it is necessary to protect a child from harm, prevent or lessen a serious threat to the life, health or property of a person or to report or prevent the commission of an offence involving violence to a person or damage to property or threats of violence or damage.<sup>242</sup>

9.17 Additional obligations require disclosure to prescribed child welfare authorities where registrars of the Family Court or Federal Magistrates’ Court, family counsellors, family consultants, family dispute resolution practitioners, arbitrators and lawyers independently representing a child’s interest, have a reasonable suspicion of child abuse or ill-treatment.<sup>243</sup> A person is not liable for such disclosures in civil or criminal proceedings and is not considered to have breached any professional ethics if the disclosure is made in good faith.<sup>244</sup>

9.18 State laws may impose a duty on ADR practitioners not to disclose confidential information, for example the *Civil Procedure Act 2005* (NSW). However the practitioner may disclose information if there are reasonable grounds to believe the disclosure is necessary to prevent or minimise the danger or injury to a person or property. Other laws may also limit the obligation, such as the *Legal Aid Commission Act 1979* (NSW)<sup>245</sup> which sets out the circumstances in which a family law conferencing chairperson may disclose information arising from a conference.

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<sup>240</sup> Sourdin T., *Alternative Dispute Resolution*, 2<sup>nd</sup> ed, 2002, at 7.430.

<sup>241</sup> Sourdin T., note 240, referring to S Lancken, ‘The responsibility of the neutral in respect of mediation confidentiality’ (2004) 7(2) *ADR Bulletin*.

<sup>242</sup> *Family Law Act 1975*, ss 10D and 10H.

<sup>243</sup> *Family Law Act 1975*, s 67ZA.

<sup>244</sup> *Family Law Act 1975*, s 67ZB.

<sup>245</sup> *Legal Aid Commission Act 1979* (NSW), s 60F.

9.19 The *United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation* allows a conciliator to disclose information received from a party to any other party to the conciliation.<sup>246</sup> The onus is on the party disclosing the information to specifically request that the conciliator not share it with the other party. This is not generally the approach taken in Australia.<sup>247</sup> At the same time, the other principles of confidentiality are maintained 'except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement'.<sup>248</sup>

## POLICY ISSUES

9.20 Policy makers have the following issues to consider:

- how the obligation of confidentiality should be expressed, whether through a code of conduct, legislation or private contractual arrangements
- whether penalties should apply to a breach of the obligations of confidentiality and what those penalties, if any, should be, and
- whether there are competing public interests which require that the obligation of confidentiality for ADR communications be overruled by legislation in specific circumstances. There are already many exceptions to the obligations of confidentiality based on overriding legislation, for example in situations where child abuse, criminal intentions or past criminal acts are revealed.

9.21 There are strong policy reasons for implementing an obligation not to reveal confidential information disclosed in ADR proceedings to another party. Unless parties can feel confident that their ADR communications will not be used against them, the discussions might not take place at all. Parties need to feel free to relax and be creative in an ADR process. An apology is often important in moving discussions forward, but without the protection of confidentiality, no apology would ever be given.

9.22 Obligations of confidentiality can also enhance trust in an ADR practitioner and promote confidence in ADR. Without this trust and confidence, people may not perceive ADR as a viable alternative to litigation.

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<sup>246</sup> Unless the party making the disclosure had requested that it be kept confidential. *UNCITRAL Model Law on International Commercial Conciliation*, Article 8.

<sup>247</sup> NADRAC has expressed a contrary view to the treatment of communications made privately to the conciliator, referred to in Article 8 of the *UNCITRAL Model Law*. NADRAC would prefer that such communications be confidential and should not be disclosed to any other party unless by consent of the party giving that information. The Model Law has not been incorporated into Australian law.

<sup>248</sup> *UNCITRAL Model Law on International Commercial Conciliation*, Article 9.

9.23 Policy-makers need to consider whether a specific area of practice could give rise to ethical dilemmas for ADR practitioners. Examples include agreements between the parties to stay silent about or ‘cover up’ a danger to public health and safety (for example, faulty products or adverse scientific research) or to stay silent about facts that may assist a third party in litigation (for example, insurance or employment disputes). Private mediation and confidentiality agreements requiring non-disclosure by an ADR practitioner of information regarding a serious offence committed by a party to the ADR process may be void for illegality. However, policy-makers may wish to consider whether there are additional public interest concerns that should be specifically excluded from the protection of confidentiality and whether these are ethical issues or legal problems requiring a legislative solution. In the absence of specific legal obligations, ADR practitioners will make these decisions based on ethical obligations or their own conscience.

9.24 A commercial-in-confidence matter may need strong confidentiality protections because of the risks to the parties of information being revealed. However, it may also be necessary to allow both the parties and the ADR practitioner some exception to their obligations if the agreement reached should be set aside under the *Trade Practices Act 1974* because it constitutes misleading or deceptive conduct under section 52, or unconscionable conduct or is an unfair or restrictive contract. In some situations, there might be private understandings or no formal evidence of less ethical agreements and only a permissible breach of confidentiality obligations would bring the situation to light. The ADR practitioner may have an ethical dilemma if faced, for example, with an agreement involving tax fraud. In the absence of disclosure requirements, some practitioners may be less inclined to report this type of situation than, for example, a threat of physical harm.

9.25 Another consideration is whether there should also be exceptions to allow the parties who participated in the process to breach their obligations of confidentiality if there are allegations of unfairness or incompetence on the part of the ADR practitioner. While confidentiality arrangements are critical for the practice of ADR they do make public scrutiny of standards in ADR more difficult than is the case for standards adopted by a judicial officer in an open court.<sup>249</sup> At present, these matters are dealt with on a case by case basis by the common law.

9.26 As a guide, policy-makers should consider whether the ADR practitioner’s duty of confidentiality should apply in situations where information needs to be revealed in order to:

- defend a complaint against the ADR practitioner
- protect public safety
- protect the personal safety of a person or persons, or
- provide data for the purposes of research.

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<sup>249</sup> Comment received in response to NADRAC’s Discussion Paper - [The Development of Standards for ADR](#) (2000). A summary of the responses is available in <[Appendix B](#)> of NADRAC’s *A framework for ADR standards* (2001), note 183.

9.27 It should also be noted that there are a number of cultural considerations which impact on the mediation of disputes involving Indigenous people that make confidentiality by the parties problematic. It has been observed that ‘in Aboriginal society, privatisation of disputes as experienced in mainstream urban culture is rarely possible, and not necessarily desirable, in view of physical living arrangements and kinship obligations’.<sup>250</sup> In many disputes, extended family or even the whole community are usually well aware of the history and causes of the dispute and will need to be aware of the outcomes of the mediation.<sup>251</sup> However, the ADR practitioner would still be expected to meet their confidentiality obligations.

9.28 Where ADR processes occur outside a statutory scheme, confidentiality obligations may not be clearly supported by ethical or legislative obligations. Professor Sourdin suggests that one way for dispute resolution practitioners who are grappling with the issue of when and how to report serious crimes or potential threats is to adopt clearer ethical guidelines or standards applying across a range of jurisdictions. This could include a list of circumstances in which confidentiality need not be maintained. She suggests that Australian ethical codes may also need to provide clear examples – given the range of different responses to ethical issues – and be supported by an ‘ethical framework’ that enables mediators and parties to seek guidance and support when ethical problems arise.<sup>252</sup>

## NADRAC’S VIEW

9.29 NADRAC believes that the confidentiality of ADR communications (unless the party making the disclosure directs otherwise) assists the ADR practitioner to fully explore each party’s real interests, canvass options, ‘reality test’ those options and discuss confidential matters relevant to the resolution of the dispute. ADR processes demand a lot from the parties and may involve the discussion of complex issues. A party to an ADR process may reveal information which, outside an ADR process, the party would wish to have kept confidential. Once the information is revealed, however, it cannot be recalled. The Australian practice of maintaining a positive duty of confidentiality protects parties from this kind of situation. Where parties are bound by duties of confidentiality, it can assist them to more freely exchange information with each other.

9.30 NADRAC is of the view that the duty of confidentiality on the part of the ADR practitioner is primarily an ethical obligation and, generally, is best dealt with by reference to professional standards and codes of conduct, rather than legislation. Although there is an obligation on participating parties to keep matters discussed

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<sup>250</sup> O’Donnell, M. and Noble, K., ‘Aboriginal Issues in Mediation’ *Conference Proceedings: Third International Conference in Australasia on ADR* LEADR p 11.

<sup>251</sup> Comment received in response to NADRAC’s Discussion Paper - [The Development of Standards for ADR](#) (2000). A summary of the responses is available in <[Appendix B](#)> of NADRAC’s *A framework for ADR standards* (2001), note 183. The Aboriginal Alternative Dispute Resolution Service has advised NADRAC that it would be ‘severely and negatively impacted if a blanket requirement for confidentiality of [the] process were to be adopted.’

<sup>252</sup> Sourdin T., note 240, at p 161.

during an ADR process confidential, that obligation should not be imposed by legislation. This obligation should normally be resolved by way of agreement at the outset of an ADR process. However, there may still be issues with enforceability of such an agreement.

9.31 The ADR practitioner's duty of confidentiality needs to be balanced by his/her duty of care to the parties participating in the ADR process and to any third party at risk of harm if particular information is not disclosed. An exception should also be considered to allow an ADR practitioner to defend an allegation of misconduct or inappropriate behaviour. NADRAC is of the view that any obligation of confidentiality should not prevent the parties from making such a complaint.

9.32 Legal obligations that override the duty of confidentiality, such as those in the *Family Law Act 1975* and in relation to admissions of past or intended criminal acts may also be appropriate. In addition, confidentiality obligations are inappropriate in relation to information disclosed in ADR processes that is already in the public domain.

## **10. ADMISSIBILITY OF ADR PROCEEDINGS**

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### **OUTLINE OF ISSUE**

10.1 Some legislation provides that evidence of anything said or done, or any admission made at a meeting or conference held by ADR practitioners, including counsellors, is not admissible in court. This is done to facilitate frank discussions and meaningful negotiations so that parties can divulge information and express their differences openly without fearing that the discussions will be used against them at a later date.

10.2 On the other hand, there may be compelling reasons for admitting some matters into evidence, for example where that evidence could help protect a child, vulnerable person or the public.

10.3 The key question for policy-makers is whether the circumstances justify including inadmissibility provisions in ADR legislation and if so, whether specific exceptions need to be added.

### **WHAT IS THE PRINCIPLE OF INADMISSIBILITY?**

10.4 Most legislation dealing with ADR provides that evidence of matters discussed or occurring in an ADR session is inadmissible in later proceedings. A court is usually not permitted to see documents related to the ADR process without the parties' consent if they could not otherwise be obtained from other sources. This rule is designed to encourage the settlement of disputes. Parties can negotiate more freely in an ADR session if they are confident that their words and actions will not be used against them later.

10.5 The obligations of confidentiality imposed by contract or legislation are different from the rule that a court cannot hear evidence of things said or done during an ADR session.<sup>253</sup> Confidentiality obligations prevent a party to the dispute or ADR practitioner from discussing the matter with non-parties. They are often codified through an agreement that is made between the parties at the beginning of the ADR session. Generally, a breach of confidentiality obligations does not result in serious legal consequences. Few legislative provisions make the obligation a legal one, apart from the *Family Law Act 1975* which provides that family counsellors and family dispute resolution practitioners must not disclose a communication made except in specified circumstances.<sup>254</sup>

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<sup>253</sup> See Chapter 9.

<sup>254</sup> *Family Law Act 1975*, ss 10D and 10H (Confidentiality of communications in family counselling and Confidentiality of communications in family dispute resolution).

10.6 Inadmissibility is an important formal legal protection of the ADR process. Admitting evidence of ADR sessions into formal court proceedings can undermine the alternative nature of the attempt to resolve the dispute as ADR becomes another component of litigation.

## STATUTORY PROVISIONS

10.7 Evidence of anything said or admission made at a conference conducted by a mediator is inadmissible under the *Federal Court of Australia Act 1976*<sup>255</sup> and the *Federal Magistrates Act 1999*.<sup>256</sup>

10.8 Under the *Native Title Act 1993*, evidence may not be given and statements may not be made in the Federal Court concerning words or acts at a mediation conference conducted by the National Native Title Tribunal.<sup>257</sup>

10.9 In some cases, an application can be made to protect evidence. Under the *Trade Practices Act 1974* a party to an arbitration may inform the Australian Competition and Consumer Commission that part of a document contains confidential commercial information and request that the Commission not give a copy of that part of the document to another party.<sup>258</sup> In many cases, the parties may agree to evidence being admitted which is inadmissible 'unless the parties consent'.

10.10 In limited situations, legislation explicitly protects the ADR practitioner from being compelled to give evidence. Under the *Native Title Act 1993*, a member or officer of the Tribunal or consultant must not be required to give evidence in relation to a mediation in certain circumstances.<sup>259</sup>

10.11 Some legislation containing inadmissibility provisions also sets out exceptions to that inadmissibility.

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<sup>255</sup> *Federal Court of Australia Act 1976*, s 53B. Evidence is inadmissible only for mediations referred under section 53A of the Act.

<sup>256</sup> *Federal Magistrates Act 1999*, s 34. Evidence is inadmissible only for mediations referred under the Rules of Court.

<sup>257</sup> Unless the parties agree. *Native Title Act 1993*, s 136A. Evidence is inadmissible only where the Federal Court has referred whole or part of a proceeding to the National Native Title Tribunal for mediation.

<sup>258</sup> *Trade Practices Act 1974*, s 44ZL.

<sup>259</sup> *Native Title Act 1993*, s 181. A member or officer of the tribunal or a person who is engaged as a consultant under subsection 131A(1) (the Tribunal may engage a consultant in relation to any assistance or mediation the Tribunal provides) is not competent and must not be required to give evidence to a court if the giving of the evidence would be contrary to a direction under section 155, which provides that the Native Title Tribunal may prohibit disclosure of any evidence or document given. Under subsection 181(4) a person is not required to give evidence relating to any mediation conducted under subsection 31(3), which provides that if any negotiation parties request the arbitral body to do so, the arbitral body must mediate amongst the parties to assist to obtain their agreement.

## ***Family Law Act 1975***

10.12 Section 10J of the *Family Law Act 1975* provides that evidence of anything said or any admission made in the company of a family dispute resolution practitioner conducting family dispute resolution is inadmissible in any court or other legal proceeding. Section 10E applies the same rules to family counsellors conducting family counselling. Section 11C applies the same rules to a family consultant performing the functions of a family consultant.<sup>260</sup>

10.13 There are exceptions to sections 10E, 10J and 11C so that evidence can be admitted of an admission or disclosure by either an adult or a child that a child has been abused or is at risk of abuse, unless there is sufficient evidence of the disclosure available to the court from other sources. Under the *Family Law Act 1975*, subsection 10H(7), evidence that would be inadmissible under s 10J is not admissible merely because s 10H requires or authorises its disclosure. This means that a family dispute resolution practitioner's evidence is inadmissible in court *even if* section 10H allows the practitioner to disclose the information in other circumstances (for example to prevent or lessen a serious and imminent threat to the life or health of a person). The same rules apply to family counsellors under subsection 10D(6). As noted, the only exception to the inadmissibility provisions are where there is an admission or disclosure of child abuse.

## ***Administrative Appeals Tribunal Act 1975***

10.14 Under the *Administrative Appeals Tribunal Act 1975*, evidence of anything said or an act done at an alternative dispute resolution process is not admissible in any court unless the parties agree.<sup>261</sup> The Act provides for a range of dispute resolution processes, including conferencing, mediation, neutral evaluation, case appraisal and conciliation.

10.15 Under the Act, evidence of case appraisal and neutral evaluation reports is admissible unless a party objects.<sup>262</sup> This approach has been taken in order to allow for more flexible use of ADR processes. In advisory processes such as expert appraisal, case presentation, mini-trial and early neutral evaluation, an ADR practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law, and in some cases, possible or desirable outcomes and how these may be achieved. Mediation and conferencing may involve more admissions from each party in an effort to reach compromise than a case appraisal or neutral evaluation will.

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<sup>260</sup> See also notes 18 and 19.

<sup>261</sup> *Administrative Appeals Tribunal Act 1975*, s 34E. Evidence is inadmissible only for dispute resolution processes referred by the Administrative Appeals Tribunal.

<sup>262</sup> *Administrative Appeals Tribunal Act 1975*, s 34E.

## *Evidence Act 1995*

10.16 Unless legislation that provides for ADR sets out inadmissibility provisions and exceptions, the *Evidence Act 1995* will usually apply to govern admissibility of information disclosed in ADR processes in subsequent proceedings in a federal court or the AAT. Section 131 of the Evidence Act provides that evidence is not to be adduced of communications made in, or documents prepared in connection with, an attempt to negotiate or settle a dispute. A substantial number of exceptions are provided, including:

- where the parties consent
- the substance of the evidence has been disclosed with the consent of all parties
- the communication or document included a statement that it was not to be treated as confidential
- the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute
- the evidence is adduced in a proceeding to enforce an agreement between the disputing parties
- evidence already given is likely to mislead the court unless evidence of the communication or document is presented to contradict or to qualify that evidence
- the communication or document is relevant to determining liability for costs
- making the communication, or preparing the document, affects a right of a person, and
- the communication or document was made to further a fraud or civil offence.

10.17 Many of these exceptions have a basis in common law. At common law, the principle of ‘without prejudice’ applies to information disclosed during the course of settlement negotiations. This privilege provides that any communication made with a view to settling either part or the whole of a dispute cannot be put into evidence without the consent of both parties.<sup>263</sup> The ‘without prejudice’ privilege has been replaced by section 131 of the *Evidence Act 1995* for the purpose of most proceedings brought in the federal courts and other bodies where the Act applies. It is unclear whether other common law privileges such as legal professional privilege or marital privilege apply to ADR.

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<sup>263</sup> *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285; *Lukies v Ripley (No 2)* (1994) 35 NSWLR 283.

## POLICY ISSUES

10.18 It is in the public interest to avoid litigation where possible and to promote constructive negotiations. Where agreement is reached, court time and resources are able to be used more effectively. Settlement negotiations are conducted ‘without prejudice’ to the position taken by opposing parties in later litigation. For example, an insurance company may be able to offer a financial settlement to a claimant (in order to avoid the cost of litigation or the risk of an adverse precedent) without prejudicing its right to deny liability in future court proceedings. The inadmissibility provisions allow for more generous, flexible and creative solutions to a dispute.

10.19 What happens in a mediation or ADR session may be of no relevance to the dispute itself. If the court investigates the discussions in an ADR process there is the risk that process will provide the parties with ‘another battleground’ to pursue the dispute.<sup>264</sup> In order for parties to continue to have faith in the ADR process and to continue to freely and meaningfully participate in it, it must not be possible for any admissions or apologies made in order to further agreement to be subsequently used against them.

10.20 Specific provisions can add certainty to the treatment of communications in ADR processes that are established by legislation. In some cases, there are competing public policy interests against the principle of inadmissibility. Under the *Family Law Act 1975*, evidence of child abuse has been made an exception to the inadmissibility rule.<sup>265</sup> Before this exception was added to the *Family Law Act*, there were difficult debates in the courts about whether the child’s right to be protected from abuse outweighed the public’s general interest in maintaining confidence in ADR processes.<sup>266</sup> It can be difficult for the courts to decide between competing public interests<sup>267</sup> so these issues need to be considered by policy-makers and drafters.

10.21 Policy makers should also consider an exception to the inadmissibility rule where evidence has already been disclosed to the police or a child welfare or other authority under a duty of disclosure.<sup>268</sup>

10.22 Policy makers may wish to distinguish between the different types of ADR to allow evidence of advisory processes such as case appraisal or early neutral

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<sup>264</sup> This was the fear of Palmer J in *Rajski v Anor v Tectran Corporation Limited and Ors* (2003) NSWSC (26 May 2003), at para 23.

<sup>265</sup> *Family Law Act 1975*, sub-ss 10E(2) and 10J(2), previously s 19N(3).

<sup>266</sup> *Relationships Australia v Pasternak* (1996) 20 Fam LR 604.

<sup>267</sup> Competing interests include those between the paramount rights of the child and the confidentiality of ADR sessions, as per the deliberations in *Centacare Central Queensland and Downing v G and K* (1998) 23 Fam LR 476; *Northern Territory of Australia v GPAO* (1999) 24 Fam LR 253; *Re W and W* (2001) 28 Fam LR 45.

<sup>268</sup> Such as the duty of disclosure found in section 67ZA of the *Family Law Act 1975*.

evaluation, but to continue to keep facilitative processes such as mediation and conferencing inadmissible.<sup>269</sup>

10.23 Another concern is that some ADR practitioners might feel more comfortable knowing that their evidence will not be introduced in proceedings. If the mediator or ADR practitioner could subsequently be called to give evidence, the informality of the process might be compromised and practitioners may feel reluctant to actively participate in resolving disputes. This could also reduce the participants' trust in the ADR practitioner or the process. Policy-makers should consider whether to include provisions stating that the ADR practitioner is not competent or required to give evidence.<sup>270</sup>

10.24 A further issue to consider is whether there should be an exception to the inadmissibility rule for evidence which could establish misconduct on the part of the ADR practitioner or which may otherwise void an agreement reached in an ADR process in which there was unreasonable pressure on a party to agree.

### **NADRAC'S VIEW**

10.25 Disclosures made during an ADR process should not generally be admitted into evidence in subsequent court proceedings. Protecting the communications made in an ADR session provides greater certainty about the status of those communications and avoids secondary litigation.

10.26 However, exceptions to non-disclosure and to inadmissibility provisions may be appropriate where complaints are made against the ADR practitioner and in cases where there is a risk of harm to a person if such evidence is not admitted. Examples might include child abuse, terrorist acts or proposed criminal acts. Where confidential information has already been provided to the police or another authority under a duty of disclosure, NADRAC believes that evidence should be admissible in the proceedings.<sup>271</sup>

10.27 Apart from such exceptions, the principal purpose of inadmissibility provisions should be to protect the participants in the ADR process – and not the practitioner. As a result, NADRAC does not consider it to be appropriate for such provisions to be used to protect ADR practitioners from the consequences of misconduct. Conversely, where there is a complaint against an ADR practitioner, inadmissibility rules should not prevent the practitioner from mounting a defence.

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<sup>269</sup> This is the approach adopted by the *Administrative Appeals Tribunal Act 1975*.

<sup>270</sup> For example, *Native Title Act 1993*, s 181.

<sup>271</sup> See paragraph 10.13 and notes 18 and 19.

10.28 As ADR continues to evolve, the issue of whether distinctions should be made between the admissibility provisions that attach to the varying types of ADR processes needs to be considered.

10.29 NADRAC supports the approach taken by the *Administrative Appeals Tribunal Act 1975*, which draws a distinction between advisory and other processes for the purposes of admissibility. In advisory processes, an ADR practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law, and in some cases, possible or desirable outcomes and how these may be achieved. Advisory processes include expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation. Case appraisal and neutral evaluation reports are admissible before the Administrative Appeals Tribunal unless a party objects.<sup>272</sup> These reports are only admissible if the parties were referred to case appraisal or neutral evaluation by the Tribunal.

10.30 On the other hand, NADRAC believes it would generally be appropriate for more facilitative, determinative or hybrid processes to remain inadmissible. For a description of these processes, see paragraph 4.7.

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<sup>272</sup> See the *Administrative Appeals Tribunal Act 1975*, s 34E(3).

# 11. ENFORCEMENT OF ADR OUTCOMES

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## OUTLINE OF ISSUE

11.1 An agreement reached during an ADR process is sometimes referred to as a 'mediated settlement agreement' where the agreement is considered to be final and binding. In situations where most of the matters have been agreed, but some details remain to be finalised, the status of the agreement is less certain.

11.2 Oral settlement agreements can be enforceable, depending on the requirements of the legislation which referred the parties to ADR<sup>273</sup> and/or general principles of contract law. Where a court/tribunal has referred a matter to ADR, legislation may authorise that body to accept an agreement reached through an ADR process as evidence of settlement and make orders accordingly.

11.3 The main difficulty in relation to the enforcement of ADR agreements occurs where one party wishes to rely on the agreement and the other party wishes to withdraw from it. In such cases, one party will usually claim that the agreement was not final, but an interim document created during an ADR process such as mediation. Such documents would usually be inadmissible, and therefore not enforceable.

11.4 Agreements reached through ADR will sometimes include a specific statement to the effect that the parties do not intend to enter into a binding legal agreement. The intended enforcement of ADR outcomes needs to be clearly stated, both in legislation, where applicable, and in the agreement itself, as uncertainty may undermine efforts to later enforce the agreement.

## STATUTORY PROVISIONS

11.5 Under the *Administrative Appeals Tribunal Act 1975*, if parties engage in mediation related to a proceeding in the Tribunal and reach agreement, the Tribunal may either:

- make a decision in accordance with the terms of the agreement, or
- give effect to the terms of the agreement provided that the terms of the agreement are in writing, signed by the parties and have been lodged with the

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<sup>273</sup> This issue was considered in relation to section 93 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) in *Hart v Kuna* [1999] VCAT 626. Section 93 permits the Tribunal to make orders giving effect to a settlement, but does not state that an agreement must be in writing. In *Hart v Kuna*, Deputy President McKenzie noted that s 93 does not require the settlement to be in writing, but 'if the settlement is intended to be achieved only through a settlement agreement and without any order of the Tribunal under s 93, it seems to me that the scheme of the Act is such that the agreement must be in writing' (at [17]).

Tribunal for seven days. During those seven days either party may notify the Tribunal in writing that he or she wishes to withdraw from the agreement.<sup>274</sup>

11.6 The Federal Court has the power, under the *Native Title Act 1993*, to adopt any agreement on disputed facts that is reached between the parties during mediation conducted by the National Native Title Tribunal.<sup>275</sup>

11.7 The *Family Law Act 1975* makes a court order in relation to a child subject to an agreed parenting plan subsequently developed by the child's parents on or after 1 July 2007.<sup>276</sup> As parenting plans are records of agreements between parties, the effect of this section would be to enforce agreements which may, in some circumstances, have arisen out of family dispute resolution processes such as mediation.

11.8 Section 28 of the *Federal Magistrates Act 1999* permits the Rules of Court to make provisions for the procedure to be followed when court-administered dispute resolution processes end.<sup>277</sup>

#### ***'Without prejudice' communications***

11.9 A 'without prejudice' communication is one made during the course of genuine negotiations conducted with a view to settling an existing dispute. Communications made 'without prejudice' are generally inadmissible and therefore cannot form part of an enforceable agreement.

11.10 The 'without prejudice' privilege available at common law is mirrored in section 131 of the uniform Evidence Acts.<sup>278</sup> The primary rationale given for the protection was the public interest in the settlement of disputes.<sup>279</sup> It provides that 'evidence is not to be adduced of a communication that is made in connection with an attempt to negotiate a settlement, including communications made with third parties. The section applies only to civil matters, and not in relation to negotiations concerning criminal charges.'<sup>280</sup>

11.11 Section 131(2) of the *Evidence Act 1995* (Cth) sets out the situations in which the broad exclusionary provision contained in section 131(1) does not apply. These

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<sup>274</sup> *Administrative Appeals Tribunal Act 1975*, s 34D.

<sup>275</sup> *Native Title Act 1993*, s 86D.

<sup>276</sup> *Family Law Act 1975*, s 64D.

<sup>277</sup> Such dispute resolution processes include counselling, mediation, arbitration, neutral evaluation, case appraisal and conciliation. *Federal Magistrates Act 1999*, s 21.

<sup>278</sup> The uniform Evidence Acts currently in operation in the Commonwealth, New South Wales, Tasmania, the Australian Capital Territory and Norfolk Island.

<sup>279</sup> Australian Law Reform Commission, *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [890].

<sup>280</sup> Australian, New South Wales and Victorian Law Reform Commissions, *Uniform Evidence Law*, ALRC Report 102 (2005), NSWLRC Report 112 (2005), VLRC Final Report (2005), para 15.167, p 548.

exceptions were developed along similar lines to those established under the common law.

11.12 Section 131(2) specifically provides for exceptions where:

- (a) the persons in dispute consent or
  
- (f) the proceedings in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue.

11.13 According to the Australian, New South Wales and Victorian Law Reform Commissions, there is some support in the case law for the proposition that mediation agreements fall within the scope of section 131.<sup>281</sup> The Commissions noted in their report *Uniform Evidence Law* that there is not a great deal of case law on section 131 and mediation.<sup>282</sup>

11.14 The Commissions concluded that ‘it appears reasonably well settled that evidence of matters discussed at mediations falls within s 131. While the section could be amended to adopt the terms of a mediation privilege as expressed in Acts such as the *Federal Court of Australia Act 1976*, amendment of s 131 is unwarranted.’<sup>283</sup>

### ***Admissibility of mediation agreements***

11.15 For an ADR agreement to be enforceable, evidence of the agreement must be able to be admitted by a court. If a mediation is conducted through an order made under section 53A of the *Federal Court of Australia Act 1976*, section 53B applies to

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<sup>281</sup> *Uniform Evidence Law*, note 280, para 15.174, p 549. However, communications made in a mediation that is ordered by a court are often privileged under the legislation of that court (eg *Federal Court of Australia Act 1976*, s 53B) and have been found to be excluded from section 131. For example, in *Rajski v Tectran Pty Ltd* [2003] NSWSC 476 Palmer J held that section 131 is ‘not intended to apply to the special process of settlement negotiation provided by a mediation ordered by the court under the provisions of Part 7B of the *Supreme Court Act 1970* (NSW)’ (now repealed and replaced by Part 4 of the *Civil Procedure Act 2005* (NSW)). His Honour found that the rules in Part 7B of the *Supreme Court Act* ‘override the general provisions of the [Evidence] Act’.

<sup>282</sup> Following consultations, the Commissions were told that most mediators tend to rely on the specific confidentiality provisions located in other state and federal statutes, such as the *Family Law Act 1975* (Cth), the *Community Justice Centres Act 1983* (NSW) and the *Farm Debt Mediation Act 1994* (NSW) to protect them from having to disclose matters discussed in mediation rather than section 131. (*Uniform Evidence Law*, note, 280, para 15.177, at p 550). It was also noted that issues may arise from the manner in which an agreement was reached in mediation. For example, a party may allege misconduct or duress on the part of the mediator or the other party. It was put to the Commission that it is not clear if the exceptions in section 131 cover that situation, although it may fall under the exceptions in section 131(f), where the making of the agreement is in issue, or paragraph (j), where the communication was made in furtherance of a fraud or offence.

<sup>283</sup> *Uniform Evidence Law*, note 280, para 15.179, p 551.

render any communications or admissions made during the course of the mediation inadmissible in any court (see also Chapter 10). According to Angyal, the broad effect of section 53B may mean it is impossible to prove oral settlement agreements reached in mediation sessions under this Act.<sup>284</sup>

11.16 The *Supreme Court Act 1970* (NSW) formerly provided that the Court may make orders to give effect to any agreement or arrangement arising out of a mediation session.<sup>285</sup> Part 7B of the *Supreme Court Act* has been replaced by Part 4 of the *Civil Procedure Act 2005* (NSW). Section 29 of the *Civil Procedure Act* provides:

29 Agreements and arrangements arising from mediation sessions

- (1) The court may make orders to give effect to any agreement or arrangement arising out of a mediation session.
- (2) On any application for an order under this section, *any party may call evidence*, including evidence from the mediator and any other person engaged in the mediation, *as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.* (emphasis added).
- (3) This Part does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session, in relation to the matters the subject of a mediation session.

11.17 Prior to the legislative amendments made in NSW in 2005, the inadmissibility provision (now repealed) in the *Supreme Court Act 1970* (NSW) was considered in *Wentworth v Rogers & Anor*,<sup>286</sup> where it was successfully claimed that the inadmissibility rule (that a document prepared for the purpose of, or as a result of, a mediation session is not admissible in evidence in any proceedings before any court, tribunal or body)<sup>287</sup> meant that a document signed at mediation was not admissible<sup>288</sup> and therefore not enforceable.<sup>289</sup> It was argued that the document in question was an interim document which left room for further negotiations.

11.18 It was also argued that the Court's ability to give effect to any agreement arising out of mediation<sup>290</sup> creates an implied exception to the inadmissibility rule. This argument was rejected on the basis that the wording of the section was insufficient to create an implied exception to the inadmissibility rule, and if such an implied exception existed, it would permit evidence of conversations at mediation as well as documents, which would be against the policy behind the inadmissibility provisions in encouraging parties to a mediation to be frank and open.

11.19 The argument was also made that the signed document was evidence that the parties had consented to the document being admitted into evidence. Express or

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<sup>284</sup> Angyal R., 'Legal issues in the mediation process' (1998) 1(6) *ADR Bulletin* 77, at p 81.

<sup>285</sup> *Supreme Court Act 1970* (NSW), s 110N(1).

<sup>286</sup> *Wentworth v Rogers & Anor* [2004] NSWCA 109 (30 March 2004).

<sup>287</sup> *Supreme Court Act 1970* (NSW), s 110P(5).

<sup>288</sup> Under *Supreme Court Act 1970* (NSW), s 110P(5).

<sup>289</sup> Under *Supreme Court Act 1970* (NSW), s 110N(1).

<sup>290</sup> *Supreme Court Act 1970* (NSW), s 110N(1) (now repealed).

implied consent can be given in the document itself. This argument was rejected because on the facts of the case, the Court was not convinced that the document constituted a final agreement indicating an intention to be bound.

11.20 The document was held to be inadmissible. However, if the agreement had been found to be a binding final agreement, then it would have been outside the scope of the inadmissibility rule, and therefore admissible.

11.21 In summary, the Court reasoned that the policy aim of the inadmissibility provision was to encourage frank and open discussion in confidential mediation proceedings. If oral communications during mediation sessions were to be construed as admissible, this policy objective would be hindered.<sup>291</sup>

11.22 If the parties prepare agreement documents in the form of terms of settlement that are ready to be lodged in the proceedings being mediated, a court may infer that parties have impliedly consented to make the documents admissible.<sup>292</sup> The lesson for parties is to take care to draft clear, definite and unambiguous documents which contain the terms of agreement from the mediation session. This could include terms which say that the document is to be admissible and it is intended that a court could enforce its terms if required.

11.23 These steps will make it more likely that the document will be found to be a binding final agreement between the parties. In such cases, inadmissibility provisions will be inapplicable and evidence of mediated agreements will be admissible for enforceability purposes.

11.24 The approach taken by the Administrative Appeals Tribunal (see paragraph 11.5) allows parties seven days to withdraw from an agreement reached through an ADR process before the Tribunal gives effect to the terms of the agreement.

### **COMMON LAW EXCEPTIONS TO ENFORCEMENT OF AN AGREEMENT REACHED BY ADR**

11.25 An agreement reached by an ADR process is, like any other contract, subject to the common law exceptions regarding whether it is binding as any other contract. Therefore, there are a number of factors which may result in such agreements being unenforceable.<sup>293</sup>

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<sup>291</sup> Mei-Lin Robertson, 'Casenotes in ADR: *Wentworth v Rogers & Anor*', 7(2) *ADR Bulletin* (2004) 34, at p 36.

<sup>292</sup> Robertson, note 291 referring to s 110P(6)(a) of the *Supreme Court Act 1970* (NSW) (now repealed).

<sup>293</sup> The issues listed are outlined by Annabelle Bennett SC and Sylvia Emmett in 'Enforcement of Agreements Reached as a Result of Mediation' LEADR, *Australasian Dispute Resolution* (looseleaf service) Lawbook Co (2004), paras 7.820-7.890.

- *Incapacity*: a question may arise as to the capacity of an infant or person with a disability to be bound by a compromise agreement.
- *Fraud*: any agreement induced by a fraudulent misrepresentation will be voidable at the option of the innocent party.
- *Misrepresentation or misleading conduct*: even in the absence of fraud, a party may have a remedy for an innocent misrepresentation or if the other party has engaged in conduct which was misleading or deceptive in relation to the agreement.<sup>294</sup>
- *Undue influence*: certain kinds of duress may vitiate an agreement at common law and undue influence may render an agreement voidable in equity. A mediator should take care to ensure that there can be no allegation of unfair pressure on the parties from the mediator.<sup>295</sup>
- *Relevant legislation dealing with unfair contracts*: under the *Contracts Review Act 1980* (NSW) for example, the court is empowered to intervene where it is satisfied that an agreement is unfair to one of the parties in the circumstances in which it was entered into.
- *Mistake*: a misapprehension of fact, shared by the parties, which goes to the root of the compromise, can vitiate the agreement.
- *Illegality*: an agreement which is, or the purpose of which is, illegal under the general law or statute will not be enforced by the courts.

11.26 On the other hand, despite these factors, agreements reached by mediation have been upheld in decisions by the Federal Magistrate's Court,<sup>296</sup> Victorian Supreme Court,<sup>297</sup> Victorian Civil and Administrative Tribunal<sup>298</sup> and Western Australian Supreme Court,<sup>299</sup> prompting the observation that 'in Australia, it is not easy to have a mediated settlement agreement overturned for duress, lack of capacity because of impaired intellectual ability or physical illness, or lack of legal representation or legal advice. While such defences may be enforced under the principles and rules of Australian contract law, they may fail the tests set down by

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<sup>294</sup> For example, under the *Trade Practices Act 1976* (Cth), s 52, or the *Fair Trading Act 1987* (NSW), s 47, assuming that it can be established that the conduct was in trade or commerce.

<sup>295</sup> *Issues of Fairness and Justice in Alternative Dispute Resolution*, NADRAC, 1997.

<sup>296</sup> *Morbanc Securities v McTaggart* [2001] FMCA 40.

<sup>297</sup> *Tapoohi v Lewenberg* (No. 2) [2003] VSC 410.

<sup>298</sup> *Hart v Kuna* [1999] VCAT 626.

<sup>299</sup> *Pittorino v Meynert* [2002] WASC 76.

Australian common law in the mediation setting when raised after the conclusion of mediation.’<sup>300</sup>

11.27 In the cases outlined, ‘courts are astute to the possibility that, upon reflection outside the circumstances of mediation, parties chose to renege and attempted to roll the dice by re-opening the dispute to negotiation’.<sup>301</sup>

11.28 Hence, while there may be benefits to statutory rules which outline some possible exceptions to the enforcement of a mediated agreement, in some circumstances, it may be preferable to let the courts apply the common law.

### **POSSIBLE SUGGESTIONS FOR ALTERNATIVE MEANS OF ENFORCEMENT**

11.29 Although most mediated agreements are complied with, the legal enforcement of these agreements can involve separate and time-consuming contract litigation. In response, some American commentators are exploring the possibility of enforcement through mechanisms other than the strict application of contract law.<sup>302</sup> Deason anticipates that a more expedited method would contribute to mediation’s reputation as a speedy, reliable and economical resolution process.<sup>303</sup>

11.30 One option would be to establish a separate enforcement mechanism tailored for mediated agreements as an alternative to contract litigation. An ‘expedited enforcement’ system has been suggested, where parties and their lawyers could jointly register for a court to enter a summary judgment reflecting the mediated agreement even though court proceedings have not been commenced.<sup>304</sup> ‘Expedited enforcement’ may also offer greater confidentiality protection in mediation processes, since reduced contract litigation would lessen the reliance on evidence procured from mediation sessions.<sup>305</sup>

11.31 Despite these benefits the consideration of traditional contract laws such as duress, unconscionability and mistake would be bypassed in summary enforcement procedures. This could permit sophisticated parties to take advantage of weak or

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<sup>300</sup> Spencer D., ‘Enforcing Mediation Settlement Agreements in Australia’, (2005) 16(4) *World Arbitration and Mediation Report* 124 at p 129. The conclusion drawn from these cases is that duress must be proven to be illegitimate. Lack of capacity can only be successfully pled if the other parties to the mediation are aware of the diminished capacity due to ill health or intellectual impairment. Lack of legal representation is not a defence of itself but could cause a court to overturn a mediated settlement agreement if it can be proven that the party claiming it as a defence was unable to understand the settlement document without legal assistance.

<sup>301</sup> Spencer D., note 300 at p 130.

<sup>302</sup> Ellen E. Deason, ‘Procedural rules for complementary systems of litigation and mediation – worldwide’ *Notre Dame Law Review*, (January 2005) 553.

<sup>303</sup> Deason, note 302, pp 580-581.

<sup>304</sup> Deason, note 302, pp 584-585.

<sup>305</sup> Deason, note 302, p 586.

uninformed opponents.<sup>306</sup> One suggestion is to introduce special enforcement rules for mediated agreements, including an expansion of the defence of coercion and a ‘cooling-off’ period which would permit rescission of the agreement immediately following the mediation.<sup>307</sup> These measures may prevent plaintiffs from commencing litigation. The converse argument is that such provisions may also enable parties to continually rescind and defer resolution of disputes.<sup>308</sup>

## POLICY ISSUES

11.32 The issue facing policy-makers in relation to the enforcement of ADR agreements is a question of balancing competing needs. Settlement negotiations and other ADR processes need to be encouraged and their confidentiality protected through inadmissibility rules. This priority needs to be balanced against the need to encourage finality of disputes and to allow ADR agreements to be submitted as evidence of an agreement reached.

11.33 These competing priorities are brought to light, usually in the courts, when one party seeks to rely on and enforce an agreement reached through ADR while another seeks to withdraw from it, claiming the agreement is inadmissible through specific legislation or ‘privileged’ as it was part of settlement negotiations. As seen in the example above, the *Civil Procedure Act 2005* (NSW) has helped resolve these issues by providing specific guidance about when mediated agreements are admissible and therefore able to be enforced.<sup>309</sup> The approach taken by the Administrative Appeals Tribunal (see paragraph 11.5) allows parties seven days to withdraw from an agreement reached through an ADR process before the Tribunal gives effect to the terms of the agreement.

11.34 Uncertainty regarding the legal status of mediated settlement agreements has the potential to undermine the appeal and effectiveness of ADR processes, as well as encouraging litigation.

11.35 Research by NADRAC has found that there is consistently a very high rate of agreement reached by parties at mediation, and ‘mediated agreements are durable over time’.<sup>310</sup>

11.36 In order to encourage finality of disputes, and avoid mediations failing after the parties reach what they think is a resolution of the dispute, it has been suggested

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<sup>306</sup> Deason, note 302, p 586.

<sup>307</sup> Nancy A. Welsh, ‘The thinning vision of self-determination in court-connected mediation: the inevitable price of institutionalization?’ *Harvard Negotiation Law Review* (Spring 2001) 1.

<sup>308</sup> Peter N. Thompson, ‘Enforcing rights generated in court-connected mediation – tension between the aspirations of a private facilitative process and the reality of public adversarial justice’ (2004) *Ohio State Journal on Dispute Resolution* 509, p 554.

<sup>309</sup> See also the process in the Administrative Appeals Tribunal above at para 11.5.

<sup>310</sup> National Alternative Dispute Resolution Advisory Council, *A framework for ADR standards* (Attorney-General’s Department, Canberra, 2001), at p 24.

that ‘the mediator’s role should not end at the conclusion of the mediation’. It has been suggested that ‘mediators should be encouraged to suggest to parties that they agree to insert another mediation clause into the settlement agreement in order to ensure that should a dispute arise out of the mediation agreement itself in relation to the drafting of the formal agreement, then the mediator can be called in to mediate or provide an opinion on the correct interpretation of the agreed terms’. It has also been suggested that ‘there should be someone present at the mediation with an ability to draft enforceable documents and explain their terms’.<sup>311</sup>

11.37 A number of ADR practitioners consider that effective ‘reality testing’ in the final stages of facilitative ADR processes assists in ensuring that the agreement reached is reasonable and will be complied with. Reality testing involves the ADR practitioner asking questions about various scenarios to ensure that the agreement incorporates aspects that will ensure compliance.<sup>312</sup>

11.38 In considering the enforcement of mediated agreements by the courts, it is important to clarify whether the court has power to enter judgement on the terms of the agreement, and whether it is practical for the court to be asked to enforce it.

11.39 The policy question for law makers is, in light of the considerations above, to what extent ADR agreements should be supervised by the courts and to what extent should such agreements be left to the law governing contracts. This decision will include balancing the importance of confidentiality against the need to be able to effectively finalise disputes.

## **NADRAC’S VIEW**

11.40 NADRAC is of the view that ADR processes should, where possible, assist parties to avoid litigation. For this reason, it is important that agreements reached at mediation and other ADR processes should be able to be enforced, subject to other statutory protections such as those given by, for example, the *Trade Practices Act 1974* and the *Fair Trading Acts* in relation to misleading and deceptive conduct and the protection available in cases of unfair contracts.

11.41 Where a court or tribunal has the legislative power to refer a matter to an ADR process, it should also be able to make any orders within its power relating to any settlement agreement reached. Any agreements that go beyond the court or tribunal’s power should be enforced through the law of contract.

11.42 NADRAC acknowledges that it is important to encourage frank and open discussions during ADR processes. Therefore the rules governing inadmissibility of

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<sup>311</sup> Spencer D., ‘Casenotes: Whether a matter settled or not at mediation’ (2003) 14 *Australasian Dispute Resolution Journal* 249, at p 256.

<sup>312</sup> Sourdin T., note 240, at p 164.

those processes need to be upheld. On the other hand, it is also important that ADR processes help to achieve finality of disputes, so parties should be able to rely on an agreement reached during an ADR process. Although carefully drafted legislation in relation to the finality of settlement agreements and their admissibility is helpful,<sup>313</sup> perhaps a better approach in practice would be for parties to resume negotiations where there is a dispute as to whether or not the ‘settlement agreement’ records the parties’ final intentions. This approach is consistent with the underlying aims of ADR.

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<sup>313</sup> For example, the seven day cooling off period provided in the AAT (see paragraph 11.5).

# APPENDIX 1

## GLOSSARY OF ADR TERMS

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### INTRODUCTION

The purpose of this glossary is to assist service users, practitioners, organisations and policy makers and to encourage greater consistency in the use and understanding of dispute resolution terms. The glossary is not intended to be prescriptive or to constrain appropriate practices.

It is important to take account of the broad contexts in which dispute resolution takes place. Different terminology has evolved in different sectors and social groups. For example, in family law, mediation and conciliation evolved out of counselling, whereas industry dispute resolution schemes evolved out of self-regulated complaint handling and compliance processes.

Therefore:

- it cannot be assumed that terms all have the same meaning to all people
- terms are often ambiguous and can refer to different settings, processes, or types of disputes, and
- terms have different meanings across cultures.

Practices are evolving and processes need to be applied flexibly. In NADRAC's view it is usually better to 'describe' rather than 'define' dispute resolution terms. NADRAC sees 'descriptions' as an indication of how particular terms are used, whereas 'definitions' refers to the essential nature or features of a specific process.

Descriptions are useful for dispute resolution practitioners, organisations, referrers and service users who have an obligation to explain to participants the nature of the process being offered and the roles and responsibilities of each person involved.

Definitions may be needed for specific purposes, such as legislation or standards. As such definitions have compliance implications, they need to be developed to suit the specific situation in which they are to be used. Indeed, in drafting legislation or standards, it may be preferable to consider the need for and nature of formal legal definitions **after** the substantive matters (eg compliance and immunity) have been determined.

## **APPENDIX 1 GLOSSARY OF ADR TERMS**

### **RELATIONSHIP OF TERMINOLOGY WITH LEGISLATIVE PROVISIONS, STANDARDS, USER INFORMATION AND REGULATION**

Terminology is interwoven with other issues including:

- views about the nature and future of dispute resolution
- legislative provisions for dispute resolution
- practitioner and service standards, and
- compliance and regulation.

Terms do not exist in a vacuum and the meaning and implications of particular words depend largely on the context in which they are used. While consistent definitions and descriptions are useful, they are inadequate tools to achieve improvements to practice, law or service delivery.

For example, NADRAC prefers to see the term mediation used for processes where ‘... the mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted’. In practice, however, the term ‘mediation’ is often used in instances where the dispute resolution practitioner gives advice on the substance of the dispute.

These issues of practice may be better addressed through regulation or codes of practice in specific areas, rather than by a stand alone definition. Regulations or codes would clearly spell out practitioner roles and responsibilities, and the consequences associated with non-compliance.

In NADRAC's view, it is impossible and inappropriate to prescribe how dispute resolution descriptions should be used by service providers. However, it is also NADRAC's view that descriptions of the actual process used by any provider should be available in forms that are easily understood by the users of the service.

### **GLOSSARY OF COMMON TERMS**

This glossary is a resource for agencies, legislators and policy makers. It explains common usage of terms used in dispute resolution in Australia. This glossary is not intended to be used as a set of definitions. Agencies, practitioners and legislators may use these terms in different ways. Readers should therefore check how terms are used in any particular situation.

This glossary is intended to be used as a web-based resource ([www.nadrac.gov.au](http://www.nadrac.gov.au)) that may be updated when needed. It supersedes NADRAC's earlier publication *Alternative Dispute Resolution Definitions* (1997).

## APPENDIX 1 GLOSSARY OF ADR TERMS

**ADR** is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.

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

**Advisory dispute resolution processes** are processes in which a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved. Advisory processes include *expert appraisal*, *case appraisal*, *case presentation*, *mini-trial* and *early neutral evaluation*.

**Arbitration** is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.

**Automated dispute resolution processes** are processes conducted through a computer program or other artificial intelligence, and do not involve a 'human' practitioner. See also *blind bidding* and *on-line dispute resolution*.

**Automated negotiation** (or *blind-bidding*) is 'a form of computer assisted negotiation in which no practitioner (other than computer software) is needed. The two parties agree in advance to be bound by any settlement reached, on the understanding that once blind offers are within a designated range ... they will be resolved by splitting the difference. The software keeps offers confidential unless and until they come within this range, at which point a binding settlement is reached'. See also *automated dispute resolution processes*. (Consumers International (2000) *Disputes in Cyberspace*)

**Case appraisal** is a process in which a dispute resolution practitioner (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved.

**Case presentation** (or *Mini-trial*) is a process in which the parties present their evidence and arguments to a dispute resolution practitioner who provides advice on the facts of the dispute, and, in some cases, on possible and desirable outcomes and the means whereby these may be achieved. See also *mini-trial*.

**Clients** are individuals or organisations that engage dispute resolution service providers in a professional capacity. A client may not necessarily be a party to a dispute, but may engage a dispute resolution service provider to assist the resolution of a dispute between others.

**Combined or hybrid dispute resolution processes** are processes in which the dispute resolution practitioner plays multiple roles. For example, in *conciliation* and in

## APPENDIX 1 GLOSSARY OF ADR TERMS

*conferencing*, the dispute resolution practitioner may facilitate discussions, as well as provide advice on the merits of the dispute. In *hybrid* processes, such as *med-arb*, the practitioner first uses one process (*mediation*) and then a different one (*arbitration*).

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

***Community Mediation*** is mediation of a community issue.

***Community Mediation Service*** is a mediation service provided by a non-government or community organisation.

***Community mediator*** is a mediator chosen from a panel representative of the community in general.

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

Note: there are wide variations in meanings for 'conciliation', which may be used to refer to a range of processes used to resolve complaints and disputes including:

- Informal discussions held between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute
- Combined processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement'.

***Conference/Conferencing*** is a general term, which refers to meetings in which the parties and/or their advocates and/or third parties discuss issues in dispute. Conferencing may have a variety of goals and may combine facilitative and advisory dispute resolution processes.

***Consensus building*** is a process where parties to a dispute, with the assistance of a facilitator, identify the facts and stakeholders, settle on the issues for discussion and consider options. This allows parties to build rapport through discussions that assist in developing better communication, relationships and agreed understanding of the issues.

***Counselling*** refers to a wide range of processes designed to assist people to solve personal and interpersonal issues and problems. *Family counselling* has a specific meaning under the *Family Law Act 1975*, section 10B.

## APPENDIX 1 GLOSSARY OF ADR TERMS

***Determinative dispute resolution processes*** are process in which a dispute resolution practitioner evaluates the dispute (which may include the hearing of formal evidence from the parties) and makes a determination. Examples of determinative dispute resolution processes are *arbitration*, *expert determination* and *private judging*.

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

***Dispute counselling*** is a process in which a dispute resolution practitioner (the dispute counsellor) investigates the dispute and provides the parties or a party to the dispute with advice on the issues which should be considered, possible and desirable outcomes and the means whereby these may be achieved.

***Dispute resolution*** refers to all processes that are used to resolve disputes, whether within or outside court proceedings. Dispute resolution processes may be *facilitative*, *advisory* or *determinative* (see descriptions elsewhere in this glossary). Dispute resolution processes other than judicial determination are often referred to as *ADR*.

***Dispute resolution practitioner*** is an impartial person who assists those in dispute to resolve the issues between them. A practitioner may work privately as a statutory officer or through engagement by a dispute resolution organisation. A sole practitioner is a sole trader or other individual operating alone and directly engaged by clients.

***Diversionsary, victim-offender, community accountability, restorative and family group conferencing*** are processes which aim to steer an offender away from the formal criminal justice (or disciplinary) system and refer him/her to a meeting (conference) with the victim, others affected by the offence, family members and/or other support people. The practitioner who facilitates the conference may be part of the criminal justice system (for example, a police or corrections officer) or an independent person.

***Early neutral evaluation*** is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute.

***Education for self-advocacy*** is a process in which a party to a dispute is provided with information, knowledge or skills, which assist them to negotiate directly with the other, party or parties. See also *dispute counselling* and *decision-making for one*.

***Evaluative mediation*** is a term used to describe processes where a mediator, as well as facilitating negotiations between the parties, also evaluates the merits of the dispute and provides suggestions as to its resolution. (See also *combined processes*). Note: *evaluative mediation* may be seen as a contradiction in terms since it is inconsistent with the definition of *mediation* provided in this glossary.

***Expert appraisal*** is a process in which a dispute resolution practitioner, chosen on the basis of their expert knowledge of the subject matter (the expert appraiser),

## APPENDIX 1 GLOSSARY OF ADR TERMS

investigates the dispute. The appraiser then provides advice on the facts and possible and desirable outcomes and the means whereby these may be achieved.

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

**Expert mediation** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner chosen on the basis of his or her expert knowledge of the subject matter of the dispute (the expert mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

**Facilitated negotiation** is a process in which the parties to a dispute, who have identified the issues to be negotiated, utilise the assistance of a dispute resolution practitioner (the facilitator), to negotiate the outcome. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Facilitation** is a process in which the parties (usually a group), with the assistance of a dispute resolution practitioner (the facilitator), identify problems to be solved, tasks to be accomplished or disputed issues to be resolved. Facilitation may conclude there, or it may continue to assist the parties to develop options, consider alternatives and endeavour to reach an agreement. The facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process, but may advise on or determine the process of facilitation.

**Facilitative dispute resolution processes** are processes in which a *dispute resolution practitioner* assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are *mediation, facilitation* and *facilitated negotiation*

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

**Family dispute resolution** is defined in the *Family Law Act 1975*, section 10F as ‘a process (other than a judicial process) (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other and (b) in which the practitioner is independent of all of the parties involved in the process’.

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

**Hybrid dispute resolution processes** - see *combined dispute resolution processes*

## APPENDIX 1 GLOSSARY OF ADR TERMS

***Indigenous dispute resolution*** refers to wide range of processes used to resolve dispute involving Indigenous people, including the various processes described in this glossary. Other examples include elder arbitration, agreement-making and consensus-building. In the Australian context the term Indigenous (capital 'I') refers specifically to the Aboriginal and Torres Strait Islander peoples.

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

***Industry dispute resolution:*** Industry specific dispute resolution schemes deal with complaints and disputes between consumers (including some small business consumers) and a particular industry. Schemes are usually funded by the industry but governed by an equal number of industry and consumer representatives. Some schemes are required to meet standards established by ASIC. If the industry member and consumer do not reach agreement, most schemes have the power to make a determination. The determination is binding on the industry member, but not the consumer who can choose to accept or reject the determination. Depending on the scheme, the power to make the determination lies with an Ombudsman, panel or referee.

***Inter-mediation*** is 'a process similar to mediation ... the ... [dispute resolution practitioner] interacts with the parties in dispute to assess all relevant material, identify key issues ... and helps to design a process that will lead to resolution of the dispute. (Commonwealth Office of Small Business 2001, *Resolving Small Business Disputes*)

***Investigation*** is a process in which a dispute resolution practitioner (the investigator) investigates the dispute and provides advice (but not a determination) on the facts of the dispute. See also *fact finding*.

***Judicial dispute resolution (or judicial ADR)*** is a term used to describe a range of dispute resolution processes, other than adjudication, which are conducted by judges or magistrates. An example is judicial settlement conference.

***Med-arb*** see *Combined processes*

***Mediation*** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

## APPENDIX 1 GLOSSARY OF ADR TERMS

An alternative is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute'.

**Mini-trial** is a process in which the parties present arguments and evidence to a dispute resolution practitioner who provides advice as to the facts of the dispute, and advice regarding possible, probable and desirable outcomes and the means whereby these may be achieved. See also *case presentation*.

**Multi-party mediation** is a mediation process, which involves several parties or groups of parties.

**Ombudsman (or Ombud)** is a person who 'functions as a defender of the people in their dealings with government. ... In Australia, there is a Commonwealth Ombudsman as well as state and territory ombudsmen. ... In addition, a number of industry ombudsmen have been appointed, whose responsibility it is to protect citizens' interests in their dealings with a variety of service providers, especially in industries previously owned or regulated by governments, for example telecommunications, energy, banking and insurance'. (Commonwealth Ombudsman Home page: [http://www.ombudsman.gov.au/about\\_us/default.htm](http://www.ombudsman.gov.au/about_us/default.htm))

**On-line dispute resolution, ODR, eADR, cyber-ADR** are processes where a substantial part, or all, of the communication in the dispute resolution process takes place electronically, especially via e-mail. See also *automated dispute resolution processes*.

**Partnering** involves the development of a 'charter based on the parties' need to act in good faith and with fair dealing with one another. The partnering process focuses on the definition of mutual objectives, improved communication, the identification of likely problems and development of formal problem-solving and dispute resolution strategies.

**Parties** are persons or bodies who are in a dispute that is handled through a dispute resolution process.

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

**Referrers (or referring agencies)** are individuals and agencies that suggest, encourage, recommend or direct the use of dispute resolution (or other) services. Examples are courts, legal practitioners, community agencies, professionals, friends and relatives.

**Restorative conferencing** (see *diversionary conferencing*)

**Senior executive appraisal** is a form of case appraisal presentation or mini-trial where the facts of a case are presented to senior executives of the organisations in dispute.

**Service users (or consumers)** are those who seek, use or receive dispute resolution (or other) services. They may not necessarily be involved in a dispute, have engaged a

## APPENDIX 1 GLOSSARY OF ADR TERMS

service provider or have participated directly in dispute resolution processes, but may seek information or other assistance from the dispute resolution service provider.

***Shuttle mediation*** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement without being brought together. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. The mediator may move between parties who are located in different rooms, or meet different parties at different times for all or part of the process.

***Statutory conciliation*** takes place where the dispute in question has resulted in a complaint under a statute. In this case, the conciliator will actively encourage the parties to reach an agreement which accords with the advice of the statute.

***Victim-offender mediation*** is a process in which the parties to a dispute arising from the commission by one of a crime against the other, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process.

## APPENDIX 2

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The following is a list of legislation, regulations, legislative instruments and court rules referred to in this Guide. For a complete list see NADRAC's compendium of Australian legislative provisions covering referral to mediation and accreditation of mediators titled *Who can refer to, or conduct, mediation* on NADRAC's website <<http://www.nadrac.gov.au>> under Publications.

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*Northern Territory of Australia v GPAO* (1999) 24 Fam LR 253  
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2003)  
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*Relationships Australia v Pasternak* (1996) 20 Fam LR 604.  
*Tapoohi v Lewenberg* (No 2) [2003] VSC 410 (21 Oct 2003)  
*Wentworth v Rogers & Anor* [2004] NSWCA 109 (30 March 2004).

## APPENDIX 2 - BIBLIOGRAPHY

### WEB-BASED RESOURCES

Australian legislation: <<http://www.comlaw.gov.au>>

Attorney-General's Department: <<http://www.ag.gov.au>>

Community Services and Health Industry Skills Council:  
<<http://www.cshisc.com.au>>

Department of the Prime Minister and Cabinet (Legislation Handbook):  
<<http://www.dpmc.gov.au/guidelines/index.cfm>>

Institute of Arbitrators and Mediators Australia: <<http://www.iama.org.au>>

Law Council of Australia: <<http://www.lawcouncil.asn.au>>

Law Society of NSW: <<http://www.lawsociety.com.au>>

National Alternative Dispute Resolution Advisory Council (NADRAC):  
<<http://www.nadrac.gov.au>>

National Training Information Service at <<http://www.ntis.gov.au>>

Office of Legal Services Coordination: <<http://www.ag.gov.au/olsc>>

Office of Parliamentary Counsel: <<http://www.opc.gov.au>>

Standards Australia: <<http://www.standards.com.au/catalogue>>

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## **APPENDIX 3**

### **THE NATIONAL MEDIATOR ACCREDITATION SYSTEM AND THE NATIONAL MEDIATION STANDARD**

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On 5 May 2006, participants at the 8<sup>th</sup> National Mediation Conference voted unanimously to support the draft scheme for a National Mediator Accreditation System, incorporating a National Mediator Standard. The Report and Proposal included in this Appendix were accepted without amendment.

*No mediator is an island*

*Celebrating difference – Learning from each other*

# Mediator Accreditation in Australia

**Report to**

**The 8<sup>th</sup> National Mediation Conference**

**Hobart, Tasmania**

**3-5 May 2006**

# Mediator Accreditation in Australia

## Report and Proposal of Facilitator and Committee to the 8<sup>th</sup> National Mediation Conference, Hobart, 3-5 May 2006<sup>314</sup>

### Key Terms Used in the Report and Proposal

*Committee* – the representative group appointed by the National Mediation Conference Pty Ltd to supervise the Accreditation initiative.

*Draft Standard* – the original proposal on mediator accreditation developed by the facilitator and committee – see

<http://www.mediationconference.com.au/html/Accreditation.html#draft/>

*System* – the proposed system for national uniform mediator accreditation.

*National Mediator Standard (NMS)* – the instrument setting out the knowledge, skills and ethical understanding required for Accreditation in terms of the System.

*Uniform Code of Practice* – the Code of Practice which will apply to those accredited to the NMS.

*Recognised Mediator Accreditation Bodies (RMABs)* – the organisations which are recognised as being able to Accredite individual mediators in terms of the System.

*National Register of Mediators* – the authoritative record of those Accredited to the NMS.

*Implementation Body* – the interim body responsible for the initial implementation of the System.

### Background

There has been considerable debate in Australia during the last 15 years over issues of accreditation, training, standards, codes of conduct and professional organisations for mediators. The debate has been conducted in the literature, at conferences and consultations, within policy-advisory bodies such as NADRAC, in commission reports, and in numerous other contexts.<sup>315</sup> Some of the debate in Australia, and in other countries, is referred to in the Draft Standard on mediator accreditation.

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<sup>314</sup> The members of the committee are Helen Marks, Scott Pettersson, Franca Petrona, Sandra Boyle, Warwick Soden, Mary Walker, Karen Dey, Salli Browning, Gordon Tippet, Robert Crick and Bill Field and the facilitator is Laurence Boule.

<sup>315</sup> There is an extensive literature from many different countries on all aspects dealt with in this report and proposal – for specific references see the Draft Standard.

A national uniform system of mediator accreditation could have the following objectives: the improvement of mediator knowledge, skills and ethical standards; the promotion of standards and quality in mediation practice; the protection of the needs of consumers of mediation services and the provision of accountability where they are not met; the conferment of external recognition of mediators for their skills and expertise; the development of consistency and mutual recognition of mediator training, assessment and accreditation ;and a broadening of the credibility and public acceptance of Australian mediation and mediators, here and abroad.

This report and proposal are presented against the background of the Draft Standard, the written submissions made in response to it, the public consultation forums conducted in Canberra, Sydney, Melbourne, Brisbane, Adelaide, Perth and Darwin, the feedback responses and documentation from the public meetings, the facilitator's report on the consultations, and the directions and deliberations of the organising committee. The report and proposal have been made available prior to the Conference to the Attorney-General's Department which provided funding for the accreditation initiative.

At the end of most of the public consultation sessions participants were asked to indicate by a show of hands whether the Draft Standard had sufficient merit in principle to be taken to the next phase – the support at the various forums for the broad parameters of the proposal was between 90% and 100%. A general positive sense of the need to move forward was expressed.<sup>316</sup> There was enthusiasm from those who saw the initiative as enhancing the status of mediation, as improving consumer protection, as keeping up with developments abroad, and as giving mediators added legitimacy in promoting their services within and outside the country. There was also an expectation of a possible buy-in to a new system by governments, courts, tribunals, industry bodies and professional associations, which would in turn increase its attractiveness to individual mediators.

The main concerns and reservations expressed in the submissions and at the consultative forums revolved around the potential costs that a national uniform accreditation system might entail, fears of exclusivity and exclusion, concerns that it could become bureaucratic and operate in the interests of larger organisations, and an apprehension that it might in effect become a licensing system. There were also concerns about turf wars, over-professionalisation and the emergence of a two-tiered system involving, on one hand, mediators who were accredited in terms of a national uniform system and, on the other, those who were not.

Views expressed in the submissions, forums and feedback sheets are captured in the evidence available on the web-site (<http://www.mediationconference.com.au/html/Accreditation.html>) and this report does not repeat or elaborate on them. In the light of the history and background of the initiative the facilitator and Committee will present the Proposal contained in this document to participants at the Conference as embodying the perceived consensus of those members of the mediation community who participated in the process, with alternative options where these are regarded as important. The

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<sup>316</sup> The feedback sheets from the public consultations include comments such as, 'We need to get started on this ...', 'We can talk forever but if we don't get something started...', 'Get on with doing it... stop discussing...', 'Do not wait until the crisis as with other unregulated activities ...'.

committee strongly recommends the main elements of the proposal to the Conference and the alternative options are included to reflect other views which surfaced in the consultation process.

### **The Role of the National Mediation Conference**

The 8<sup>th</sup> National Mediation Conference in Hobart is both part of the accreditation consultation process and an occasion for the mediation community to move the initiative to the next phase. Despite the absence of constitutional or legal authority, participants at the conference can make recommendations about the future of a national uniform system of mediator accreditation. They can make a recommendation:

- (i) to move to an implementation phase of such a system;
- (ii) to continue the consultation process; or
- (iii) to abandon the concept entirely.

The Committee which has had the conduct of the initiative strongly recommends option (i) to the Conference, namely that the proposal be endorsed fully or in part and that decisions be taken to move to an implementation phase as set out in the Proposal.

As the Conference has no formal status as a deliberative body there are no specific rules of decision-making. The Committee and facilitator recommend that the first session of the Conference be used to impart information on the proposal and to respond to questions, and that the final session be used for participants to express their views on the proposal as a whole, and on specific features which require attention. Where specific issues cannot be resolved on the floor of the conference the Committee recommends that interim or short-term measures be agreed to in order to assist in getting things started, with these to be reviewed in the intermediate- or longer-term in the light of practical experience in the system.

### **Alignment with other systems**

The proposal for a national uniform system of mediator accreditation is not mutually exclusive of other forms of accreditation. In the immediate term it would sit alongside existing systems, but in the short term it could become the benchmark in the industry. Consideration can be given at the Conference as to how the new system aligns with such initiatives as the standards and requirements of the Industry Skills Council, the Australian Compliance Institute, the Australian Quality Framework, the Cert IV in Mediation, the regulation of Registered Training Organisations, the new family mediator requirements and the emerging workplace relations dispute resolution system. . If the system proposed here moves forward quickly it may itself be a source of influence on other systems, or may be adopted by them. It is proposed in terms of its own merits and not as an exclusive or competitive system vis-à-vis other comparable systems. Unlike other systems it would provide consistency, uniformity and transportability in mediator standards and accreditation across the diversity of mediation systems.

### **Explanation and promotion of the new system**

While it is not part of the Proposal, the Committee recommends to the Conference that consideration be given to ways in which a new system can be explained to and promoted among interested individuals and organisations. It will be to the benefit of the mediation movement to have it adequately explained and promoted to government, courts and tribunals, industry bodies and mediation organisations. Participants at the conference are invited to give attention to this factor.

## The Proposal

### **The participants at the 8th National Mediation Conference, Hobart, 2006**

#### **Noting:**

- a. The views expressed at the 7th National Mediation Conference, Darwin, 2004, about a national uniform mediator accreditation system;<sup>317</sup>
- b. The submissions made and the views expressed during the accreditation consultation process between December 2005 and May 2006;
- c. In particular the frequently expressed desire to enhance the standards of mediation practice, to improve the status of mediators, to have greater mutual recognition across different mediation sectors, and to promote the confidence and protection of consumers, without affecting innovative and creative practice;
- d. The preference for a national uniform system of mediator accreditation to be based on self-regulation by the mediation community, operating on a devolved basis through relevant existing organisations, without direct state regulation or formal legal status;
- e. The desire to remain ahead, or abreast, of comparable occupations and professions, and comparable developments for mediators abroad;
- f. The need for an initial national uniform accreditation system to be relatively basic, simple, inexpensive and easy to implement, and to be built on the foundations of existing mediation organisations and mediator experience;
- g. The desirability of an initial national uniform accreditation system having the in-built capacity for evaluation, review and adaptation over time in terms of changing needs and policies;
- h. The need for mediator accreditation to be regarded as legitimate by interested parties, to cater for diversity in mediation practice, for it to involve collaboration across mediation sectors, and to have transparency in all aspects of the system;

And further recognising that the National Mediation Conference has no legal or constitutional authority in this regard, but as a gathering of members of the mediation field it can make recommendations and provide direction in relation to a uniform national accreditation system;

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<sup>317</sup> The terms 'mediation' and 'mediator' are understood in terms of the NADRAC definition of the process – see NADRAC, *ADR Terminology* (2002). See also the NADRAC paper 'Who Says You're a Mediator? Towards a national system for accrediting mediators' (2004).

## Hereby recommends that:

### I The System

1. There will be a National Mediator Accreditation System (the System) which allows Australian mediators who satisfy the specified requirements to be Accredited to the National Mediation Standard (NMS).
2. The System will be voluntary for those mediators who wish to obtain Accreditation to the NMS and there will be no compulsion for mediators to obtain this Accreditation in order to practice.<sup>318</sup>
3. The System will apply only to mediators and not to other dispute resolution practitioners.<sup>319</sup>
4. There will initially be one level of Accreditation in the System (Accredited to the National Mediation Standard), with advanced or specialised forms of accreditation to be considered later.
5. There will be a National Register of Mediators for those Accredited to the National Mediator Standard.<sup>320</sup>

### II The National Mediation Standard and Code of Practice

1. Accreditation will take place in terms of the requirements of a National Mediator Standard (NMS) and a uniform Code of Practice.
2. The National Mediator Standard enumerates and describes the knowledge, process competencies, skills and techniques required for Accreditation to the System – see Annexure A.
3. The Code of Practice describes the ethical and professional obligations of mediators Accredited to the National Mediator Standard. It will be developed by the Implementation Body in the light of existing Australian mediator Codes of Practice.

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<sup>318</sup> This distinguishes the System from a licensing arrangement in terms of which accreditation is a mandatory pre-requisite to the practice of an occupation or profession.

<sup>319</sup> This is the current proposal, which may change over time.

<sup>320</sup> The designation *Accredited in terms of the National Mediation Standard* could be registered as a trademark to ensure its exclusivity.

### III Recognised Mediator Accreditation Bodies

1. The System will be based on and be operated by those mediation and ADR organisations which are identified for this purpose as Recognised Mediator Accreditation Bodies (RMABs).<sup>321</sup>
2. RMABs will be those bodies whose capacities and credentials as set out in Annexure B have been recognised by the Implementation Body as being compliant with the requirements of the System.<sup>322</sup>
3. The main function of the RMABs will be to Accredite mediators to the NMS.
4. RMABs can provide education and training programs themselves or can use the education and training services of other institutions as part of their Accreditation procedures.<sup>323</sup> Where the education and training services of outside bodies are used the ultimate assessment for Accreditation will be made by the relevant RMAB.
5. Recognition of RMABs in terms of the requirements of the System will be given for the implementation phase of the System.
6. RMABs will provide information on those whom they Accredite in terms of the System to the Implementation Body to assist it to maintain the Register of Mediators Accredited to the NMS.

### IV Accreditation of Mediators in terms of the NMS

1. RMABs will provide certification to the effect that an individual has satisfied the criteria for Accreditation according to the National Mediator Standard.

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<sup>321</sup> A 'peak body' was not recommended in the Draft Standard and there was insufficient support for the concept in the consultation process for it to be recommended here. Such a body may emerge after the development of a national uniform mediator accreditation system.

<sup>322</sup> It is envisaged that a wide assortment of bodies should be able to attain recognition as RMABs. The following categories of bodies might wish to become RMABs:  
Membership Associations (such as LEADR, IAMA);  
Service-providers, (such as Community Justice Programs, Relationships Australia, ACDC, Centacare, Australian Department of Defence, Retail Tenancies agencies);  
Professional associations (such as Law Societies, Australian Association of Social Workers, APS College of Counselling Psychologists);  
Courts and Tribunals (such as the Federal Court of Australia, the National Native Title Tribunal and the Victorian Civil and Administrative Tribunal);  
Not-for-profit associations (such as VADRA, ADRA, WADRA).  
Universities and other educational institutions.

<sup>323</sup> It is likely that in the early years of the System most RMABs will provide their own education and training.

2. In order to be certified by an RMAB, mediators must be persons who are fit and proper to practice as mediators and have attended an education, training and assessment course which complies with the requirements listed in Annexure C.<sup>324</sup>
3. Education and training will be provided in the discretion of RMABs, either themselves or through other education and training organisations. RMABs will have the discretion as to who enters accreditation programs, on whether the education and training is continuous or in stages, and on whether assessment takes place directly after education and training or after a period of delay.

*Alternative option:* That in order to avoid perceived conflicts of interest, there be a separation between training and accreditation institutions, along the lines of those professions where universities undertake the education and professional bodies the accreditation; such an arrangement would require time to organise the practical and financial aspects.

4. Individual RMABs, service-providers and other organisations will be able to build on the national standard by providing additional advanced or specialised forms of accreditation for mediators external to the proposed system.

## V Association with RMABs

1. Mediators Accredited to the National Mediation Standard will be required to be members or associate members of an RMAB, or have an association with an RMAB, on an ongoing basis, or have an employment relationship with an RMAB
2. RMABs will have discretion in relation to categories of membership, associate membership or other associations for mediators Accredited to the NMS.
3. The membership or association referred to in this section will serve as a basis for keeping current the National Register of Accredited Mediators, for managing complaints and disciplinary proceedings against mediators and for furnishing resources to the Implementation Body.

*Alternative option:* That there be no membership or employment requirement for mediators. In such a system there would have to be a staffed national system for initial assessment, for CPD and for complaints, discipline and possible de-accreditation.

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<sup>324</sup> There was general concern about the quality and standards of education and training and the view was frequently expressed this should be commensurate with the progressive goals of the system.

## VI Continuing Professional Development

1. In order to retain Accreditation to the National Mediation Standard, mediators will be required to undergo continuing professional development (CPD).<sup>325</sup>
2. CPD requirements will be finalised by the Implementation Body and will revolve around a points system which has to be satisfied over a two-year period involving the requisite number of points in at least three of five categories – see the model system in Annexure D.
3. CPD can be provided by RMABs and other appropriate bodies such as universities, training institutions and professional associations and mediators will be able to choose with which bodies they undertake CPD requirements.
4. Mediators will be required to report compliance with CPD requirements on an honour basis to a RMAB, which will notify any non-compliance to the Implementation Body responsible for the upkeep of the National Register of Accredited Mediators.
5. In developing CPD requirements the Implementation Body will take account of the access and cost implications for mediators in rural and remote areas and how they can be accommodated in as equitable a way as possible.
6. Where mediators have to undertake CPD for other professional purposes this can also count towards CPD under the System, provided it satisfies the requirements stipulated by the Implementation Body.

## VII Complaints, Discipline and De-Accreditation

1. RMABs will be required, as part of their recognition requirements, to provide a procedural framework for dealing with complaints and grievances against mediators.
2. The procedural framework must ensure that complaints and grievances are handled with as little technicality and formality as possible in a process which accords procedural fairness to all parties.
3. Where a mediator is found to be in breach of the mediator Code of Practice he or she may be suspended from accreditation to the NMS, on a temporary or permanent basis.
4. Mediators will be automatically de-accredited if they fail to comply with their ongoing requirements for Accreditation to the National Mediator Standard.

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<sup>325</sup> While there was some support for a re-accreditation requirement, as under the new Victorian Bar mediator accreditation scheme, the more preponderant view was that this should be subsumed under the CPD requirements.

5. All mediators will have a right of appeal from the decision of an RMAB to the Implementation Body.

*Alternative option* – That there be a national complaints body which would be activated to deal with complaints and grievances when necessary, or fill the role of an independent checking body; this would require resourcing, personnel and infra-structure.

## VIII Initial Implementation Stage

1. For the first two years of the System an Implementation Body will undertake activities required for the establishment and early operation of the System.
2. The Implementation Body will be appointed by the National Mediation Conference Pty Ltd on a basis which ensures that it represents the diversity of Australian mediators and mediation practice.
3. The Implementation Body will, as soon after the Conference as possible attend to:
  - a. The recognition of RMABs;
  - b. The drafting of the uniform Code of Practice;
  - c. The admission of experienced mediators into the System on the basis of their training and experience.
4. The Implementation Body will investigate sources of funding from government and elsewhere for the early operation of the system.
5. The Implementation Body will make six-monthly reports to the directors of the National Mediation Conference and the Accreditation Committee of NADRAC during the two-year implementation period and will report to the 9<sup>th</sup> National Mediation Conference in 2008 on the first two years of the System's operation.
6. The Implementation Body will maintain a National Register of Mediators Accredited to the National Mediation System.

## IX National Register of Mediators Accredited to the NMS

1. There will be a National Register of Mediators Accredited to the NMS.
2. The Register will contain standardised information on Accredited mediators and will be updated in the light of new accreditations, lapsed accreditations and de-accreditations.

3. Information on the Register will be accessible to the public, service-providers, courts, tribunals and other interested parties.<sup>326</sup>
4. The National Register will disclose to the public through a series of web pages the information referred to in Annexure E.

## X Resourcing

1. The System will be resourced through fees paid by mediators who seek Accreditation in terms of the System or who seek to be admitted into the System on the basis of prior learning and experience.
2. RMABs and Federal and State governments may be requested by the Implementation Body to contribute resources for the implementation and operation of the System, such as the financing of a part-time secretariat.
3. Resourcing will be sought from RMABs for the review and evaluation of the System after its first two years of operation; such funding will be based on an equitable allocation of contributions among relevant bodies.<sup>327</sup>

## XI Recognition of Prior Learning and Experience

1. The System will recognise the prior learning, accreditation, practical mediation experience, and other relevant qualifications of existing mediators.
2. Recognition of prior learning and experience will be given on a flexible basis but there will be no automatic 'grandparenting' into the system.

*Alternative options* – That in order to enhance the status of the System all existing mediators who wish to be Accredited to the National Mediator Standard will be required to apply for Accreditation and undergo training, assessment and accreditation in terms of the System; or that 'grandparenting' be granted on a temporary basis after which mediators would have to apply for Accreditation in terms of the System.

3. The principles for recognition of prior learning, experience and accreditation will be laid down by the Implementation Body and will take account of the recency of education and training, prior assessment of mediator knowledge and competency, the duration and regularity of mediation practice, and other relevant criteria such as references,. The principles will be applied by

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<sup>326</sup> Mediation providers may elect to make referrals only to mediators on the National Register of Mediators Accredited to the NMS. Mediation bodies funded by government may be required to use only NMS-Accredited mediators. 'Trust marking' might be used by commercial enterprises where their mediators are NMS-Accredited. Contractual dispute resolution clauses, industry codes and other instruments may require the provision of services by NMS-Accredited mediators.

<sup>327</sup> The user pay system could be based on a small levy paid by mediators Accredited to the NMS.

RMABs to mediators seeking admission to Accreditation to the NMS through recognition of their prior learning and experience.

4. Any experienced mediators Accredited into the System by an RMAB will be subject to the ongoing CPD and other requirements of the System.

## XII System Evaluation and Review

1. The System will be reviewed after two years, with a view to evaluating its merits and demerits and the possibility of developing the System further.
2. The review will focus, among other things, on the extent of mediator take-up in the System, on the attitudes and experiences of consumers, on how the costs of its operation are being borne, on the effectiveness of the Register and the complaints and de-accreditation procedures, on any structural conflicts of interest in the system (for example in organisations which both train and accredit), on how the System aligns with other accreditation systems, on the resourcing issue and the costs to mediators, and on the attitude of governments, courts and industry bodies to the operation of the System.
3. The review and its recommendations will be made available at the 2008 National Mediation Conference for consideration and decisions as to the future of the System.

## Annexure A The National Mediation Standard

In order to be Accredited under the System mediators should be persons of fit and proper character who have been educated, trained and assessed in terms of:

1. Substantive knowledge relating to:
  - a. The nature of conflict, including the dynamics of power and violence;
  - b. The appropriateness or inappropriateness of mediation;
  - c. Pre-mediation preparation, screening and intake;
  - d. Communication patterns in conflict situations;
  - e. Negotiation dynamics in mediation;
  - f. Cross-cultural issues in mediation and dispute resolution;
  - g. The principles, stages and functions of the mediation process;
  - h. The roles and functions of mediators;
  - i. The roles and functions of support persons, lawyers and other professionals in mediation;
  - j. Key issues in a specific Code of Practice referred to in the course;
  - k. The basic law of mediation on confidentiality, enforceability of mediated agreements and liability of mediators.
  
2. Skills and techniques in:
  - a. Preparation for mediation;
  - b. Intake and screening of the parties and dispute to assess suitability for mediation;
  - c. Conduct and management of the mediation process;
  - d. Appropriate communication skills, including listening, questioning and reframing, required for the conduct of mediation;
  - e. Negotiation techniques and the mediator's role in facilitating negotiation and problem-solving;
  - f. Mediator interventions appropriate for standard difficulties in mediation;
  - g. Potential responses to high emotion, power imbalances and violence;
  - h. Use of separate meetings and shuttle mediation;
  - i. Drafting of mediated agreements;
  - j. Protocols for terminating mediation;
  - k. Anticipating and responding to post-mediation difficulties;
  - l. The use of information and computer technology in mediation practice.
  
3. Ethical understanding in relation to:
  - a. The avoidance of conflict of interests;
  - b. Marketing and advertising of mediation;
  - c. Confidentiality, privacy and reporting obligations;
  - d. Neutrality and impartiality;
  - e. Fiduciary obligations;
  - f. Ensuring fairness and equity in mediation;
  - g. Withdrawal from and termination of the mediation process.

## Annexure B Recognition of RMABs

RMABs will be recognised in terms of their capacity and facilities to:

1. To assess and accredit mediators in terms of the requirements of the System.
2. To provide education, training and assessment of mediators in terms of the System, or to have a relationship with bodies other than RMABs which provide the education, training and assessment required in terms of the System.<sup>328</sup>
3. Organisations applying for RMAB status must provide the following information about the education, training and assessment which they provide or which they use on an out-sourced basis:
  - a. The qualifications and experience, as mediators and educators, of the principal course instructors responsible for conducting the education and training course and the assessment of participants;
  - b. The teaching and learning methodologies underlying the education and training courses;
  - c. Course manuals or workbooks, lists of books or reading requirements, and other prescribed materials;
  - d. The course program, indicating the topics and time spent dealing with the different aspects of knowledge, skills and ethics required by mediators;
  - e. The Code of Mediator Practice used in the course as a basis for education and training on issues of mediator ethics and standards;
  - f. The methods of assessment used to examine the knowledge, skills and competence of trainees;
  - g. Assessment instruments used for assessing mediator skills and techniques;
  - h. The past involvement of the institution and/or its instructors in mediator education and training;
  - i. The ratio of instructors and coaches to participants in education and training courses;
  - j. Any other information which goes to establish the credentials of the institution as a mediator educational, training and assessment institution (for example course evaluations, testimonials, references).
4. Provide Continuing Professional Development for mediators as required in the System.
5. Provide the infra-structure required to receive and process complaints and grievances against mediators and make decisions on sanctions, including de-accreditation.

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<sup>328</sup> Bodies such as universities or small training organizations may not wish to become RMABs but provide their educational and training services to RMABs, which will be responsible for assessing the quality and standards of education and training.

7. Have sound governance structures, financial viability and the administrative resources to contribute to the operation and development of the System.
6. Undertake such other activities and functions required by the changing needs of the System.

## Annexure C      Education, Training and Assessment Requirements

1. A training team comprising principal instructors, and assistant instructors or coaches, with suitable qualifications and experience as educators and mediators.
2. A ratio of one instructor or coach for every three participants in the simulation part of the training.
3. An education and training program of a minimum of 40 hours in duration, excluding the assessment period.<sup>329</sup>
4. Involvement by each course participant in at least six simulated mediation sessions, in at least two of which they perform the role of mediator. Assessment of mediator competence in the two simulations will be undertaken by different members of the training team, and will be recorded in written form in an assessment instrument and will be provided to the participant.
5. Completion by each course participant of written debriefing evaluations of two simulated mediations, one in which they were a disputant and the other a mediator, in a prescribed evaluation form.
6. Completion of a written examination of between 45 and 60 minutes in duration in which participants are assessed on their theoretical knowledge and understanding of mediation practice and asked to suggest appropriate or preferred ways of dealing with specific ethical dilemmas, tactical issues or difficult scenarios which can arise in mediation.
7. The overall assessment of participants for Accreditation will be based on competence displayed in mediation simulations, awareness displayed in the written debriefings, performance in the examination, and general course participation such as contributions to the discussions on ethical or critical issues. A written report will be provided to each participant detailing:
  - a. The outcome of the skills assessment (in terms of competent or not yet competent);
  - b. Relevant strengths and how they were evidenced;
  - c. Relevant weaknesses and how they were evidenced;
  - d. Relevant recommendations for further training and skills development.

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<sup>329</sup> It was noted during the public consultations that in some overseas countries the education and training requirements range between 150 and 600 hours in duration.

## Annexure D Continuing Professional Development Requirements

The following model will guide the Implementation Body in the finalisation of the CPD requirements for mediators Accredited to the NMS:

Within each two-year cycle mediators will have to obtain at least 50 CPD points, comprising 20 points from category 1 and 30 points from at least two of the other four categories:

1. The conduct of six mediations or co-mediations (20 points);
2. Representation of clients in four mediations (10 points);
3. Attendance at CPD courses or workshops on mediation or ADR for 20 hours; (20 points);
4. External supervision or auditing of their clinical practice (10 points);
5. Presentations at mediation or ADR seminars or workshops (10 points);
6. Other relevant experience as a practitioner or consultant in dispute resolution and conflict management (10 points).

## Annexure E          National Register of Mediators

The National Register of Mediators shall be maintained as an electronic database by the Implementation Body. A public view of the database will be provided through an internet site established for that purpose. The internet site will display at least the following information for mediators Accredited to the NMS:

1. Name of mediator;
2. Relevant RMAB and link to that RMAB;
3. Principal location of practice;
4. Link to the relevant Code of Practice.

At the option of the Implementation Body it may also contain a link to the mediator's CV (whether resident on an RMAB site or not) and an email link to the mediator.