



NADRAC
NATIONAL ALTERNATIVE DISPUTE
RESOLUTION ADVISORY COUNCIL

MAINTAINING AND ENHANCING THE INTEGRITY OF ADR PROCESSES

From principles to practice through people



February 2011

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The National Alternative Dispute Resolution Advisory Council (NADRAC) is an independent body charged with providing policy advice to the Commonwealth Attorney-General on the development of alternative dispute resolution (ADR) and with promoting the use and raising the profile of ADR.

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Terms of reference

Terms of Reference

Integrity of ADR Processes

Federal legislation varies considerably on whether different ADR processes are subject to confidentiality and non-admissibility and as to the conduct obligations for participants in different ADR processes. Furthermore, different legislative provisions apply to ADR practitioners' immunity.

NADRAC and the Family Law Council previously provided joint advice, which was adopted, in relation to the removal of immunity for family dispute resolution practitioners. NADRAC has not provided advice in relation to other ADR processes.

NADRAC is requested to advise on legislative changes required to protect the integrity of different ADR processes including issues of confidentiality, non-admissibility, conduct obligations for participants and ADR practitioners and the need, if any, for ADR practitioners to have the benefit of statutory immunity.

In undertaking this reference NADRAC should consult with interested parties as required by its Charter.

Timeframe: NADRAC is to report by 30 November 2010.



Robert McClelland
Attorney-General
1 December 2009

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Chapter 1: Introduction

In this Report, the National Alternative Dispute Resolution Advisory Council (NADRAC) canvasses particular issues that support the integrity of alternative dispute resolution (ADR) processes, and that are identified in the Terms of Reference. These are: conduct obligations, rules about confidentiality and inadmissibility of communications within ADR processes, and immunity of ADR practitioners from being sued. The Report explains NADRAC's understanding of the breadth of the concept of integrity as it applies to ADR processes, canvasses the views of interested parties about the integrity of ADR processes and how this might best be protected, and makes recommendations about possible legislative intervention to further support the integrity of ADR processes in certain contexts.

1.1 Outline of Chapters

Chapter 1: Introduction

Chapter 1 sets out NADRAC's recommendations, provides definitions of terms used in this Report, and describes the background to the reference given by the Attorney-General, the Hon Robert McClelland MP. It canvasses recent developments across a range of Australian jurisdictions, and defines the scope of NADRAC's analysis.

Chapter 1 also describes the underlying premises and guiding considerations that NADRAC used as a framework for developing recommendations to protect and preserve the integrity of ADR processes.

Overarching themes – what is meant by 'integrity of ADR'?

The Terms of Reference identify four particular elements that interact to support ADR processes that can be said to possess integrity. NADRAC members consider there to be two principal dimensions to the characteristic of integrity in this context. They are:

- the reputation and credibility enjoyed by ADR as an effective mechanism for respectfully and constructively resolving disputes, together with the reputation and credibility enjoyed by ADR practitioners as being capable of assisting to effect such outcomes through effective communication. The elements specified in the Terms of Reference speak directly to this dimension of integrity, as they directly affect the regard in which the community will hold ADR and its practitioners. For example, if ADR practitioners – like practitioners of professions such as medicine or law - are generally trusted to keep confidences, and are accountable for misconduct, then ADR and its practitioners will continue to maintain a good reputation, and
- the prominence which the practice of ADR generally affords to participants' self-determination and their opportunity for empowerment to work through and, if appropriate, resolve disputes with assistance of a third party. ADR practitioners can aspire to reflect this quality in guiding disputants, through processes, to resolutions that go beyond 'legal solutions' to solutions that may well reflect deeper interests of the disputants.

This reference is principally concerned with the four outward-facing elements referred to in the Terms of Reference. These distinguish ADR from judicial determination by supporting the National Principles for Resolving Disputes, as identified by NADRAC in its interim Report to the Attorney-General in October 2010.¹ These Principles include the opportunity for participants to exercise self-determination, the effective and ethical conduct of ADR practitioners, simplified processes for resolving disputes and the diversion of disputes to judicial determination when appropriate. While this Report's focus is on the outward-facing elements, NADRAC's consideration of the issues relating to them is informed throughout by a broader understanding of integrity described in the second dot point above.

Overarching themes – distinguishing between private ADR processes and mandatory ADR processes

It is useful, at the outset of this Chapter, to identify and explain a distinction drawn throughout this report, which is critical in developing NADRAC's recommendations. NADRAC distinguishes between 'private' and 'mandatory' ADR processes (these terms are explained in the following paragraphs). It should be emphasised that these processes are discrete approaches, with different origins. In practice, it may be difficult to characterise precisely a particular process. Nevertheless, NADRAC considers there to be practical benefit in making this distinction to support analysis of the issues canvassed in this reference.

NADRAC has not made recommendations for legislative intervention in private ADR processes. This is for two reasons. The more significant of these is that NADRAC's strong view is that private ADR processes are working very well, and that available evidence does not support the need for legislative intervention to protect and maintain their integrity. Secondly, the terms of this Reference require recommendations that can be enacted within the constitutional power of the Commonwealth. This would be much harder to establish for private ADR processes.

Mandatory ADR – where legislation requires, or a court or tribunal orders or directs, disputants to engage in an ADR process. The definition applies regardless of whether the ADR practitioner is an employee of, or otherwise associated with or retained by, a court or tribunal. Mandatory screening and assessments of suitability are included within this definition of mandatory ADR, regardless of whether ADR subsequently occurs, or an outcome is reached. This is because NADRAC considers it to be important to ensure that what occurs in these earlier or preliminary stages attracts the same kinds of protections for disputants and ADR practitioners as things that occur, and communications that are made, in later parts of ADR processes.

Private ADR – is ADR other than mandatory ADR. If legislation does not prescribe or require ADR participation, or a court or tribunal does not order or direct ADR, then ADR undertaken in relation to a dispute is private ADR.² NADRAC considers that a general requirement in legislation to explore ways to resolve a dispute gives parties a choice as to whether to undertake ADR or some other genuine step. Accordingly, any ADR process chosen by the parties remains 'private', for the purposes of this reference.

1 These Principles are set out at Appendix 1.2.

2 See, for example, the Civil Dispute Resolution Bill 2010 (Cth), which does not mandate ADR.

Appendix 1.1 illustrates some distinctive characteristics of ‘private’ ADR and ‘mandatory’ ADR. While the differences in these two broad categories of ADR have influenced NADRAC’s recommendations, it is necessary to be mindful that, in practice, the distinction between private and mandatory ADR may not be a ‘bright line’ distinction. Accordingly, Appendix 1.1 should be used as a reference to support an understanding of NADRAC’s analysis in this Reference, rather than as an attempt to precisely or exhaustively fit a range of practices within either of the classifications.

Chapter 2: Conduct obligations

Conduct covers the behaviours and attitudes of those participating in ADR processes. There is currently no uniform federal legislation prescribing conduct obligations for disputants and their representatives in ADR processes, and little legislation prescribing the conduct of ADR practitioners.³ This may adversely affect the value and perceived integrity of ADR. This Chapter canvasses whether it would be useful, to promote and preserve the integrity of ADR, to impose statutory conduct obligations on participants, their representatives, and ADR practitioners.

Recommendations

2.6.1 Where such a requirement does not already exist, legislation should be introduced which requires participants (disputants and their representatives) in mandatory ADR processes to participate in those processes in good faith.

2.6.2 The legislation should define ‘good faith’ inclusively, and capture the concept of a genuine effort to abide by enumerated ADR principles.

2.6.3 The legislation should explicitly require ADR practitioners in mandatory ADR processes to support ADR participants to comply with conduct standards.

2.6.4 Participants in private ADR processes should not be required, through legislation, to adhere to any prescribed conduct standard. Instead, consensual adherence to appropriate conduct standards in private ADR should be encouraged in other ways, such as through codes of conduct, industry standards, and community education.

2.6.5 Consistent with recommendations 6.5 and 6.6 of NADRAC’s ‘Resolve to resolve’ report, accreditation of ADR practitioners within the federal civil justice system should be encouraged by the federal government, and there should be professional codes of conduct developed in ADR areas where accreditation and standards have not yet been developed.

2.6.6 The federal government should encourage legal practitioners participating in ADR in the federal civil justice system to undertake further education and training about ADR.

2.6.7 The conduct of legal practitioners involved in ADR should be further promoted as part of ongoing reforms to the legal profession across Australia.

³ Other than some provisions imposing obligations of confidentiality.

2.6.8 The Attorney-General should write to government agencies, legal professional bodies and ADR accreditation bodies to encourage them to incorporate the NADRAC Principles in training and accreditation materials (for instance, in compulsory ethics education).

Chapter 3: Confidentiality

Confidentiality is regarded as an essential feature of most ADR processes.⁴ Existing confidentiality protections derive from various sources, and the scope of these protections may be unclear to ADR participants and their representatives, ADR practitioners, and the community in general. This Chapter identifies the sources and likely scope of confidentiality protections available in relation to information disclosed in ADR processes, and considers whether federal legislative intervention is warranted to better protect the integrity of ADR processes and, if so, what should be the scope of that intervention.

Recommendations

3.9.1 Legislation should be introduced which expressly protects the confidentiality of mandatory ADR processes in the federal civil justice system, unless those processes are intended to be conducted on an ‘open’ basis (eg ‘town-hall’ type ADR processes). The legislation should apply both to participants and ADR practitioners engaging in mandatory ADR processes in the federal civil justice system.

In particular, the legislation should provide that no communications in the course of such ADR processes can be disclosed to non-participants, subject to specified exceptions that reflect countervailing interests of participants, third parties, or the community generally.

Legislation in this area should permit courts to make such orders as they think fit in respect of breaches and apprehended breaches of confidentiality obligations.

3.9.2 Legislation should also specify a range of exceptions, to allow disclosure of communications within a mandatory ADR process in the federal civil justice system:

- to lessen or prevent a serious and imminent threat to an individual’s life, health or safety (whether or not the individual is a participant in the ADR process)
- to lessen or prevent a serious threat to public health or public safety
- to lessen or prevent a serious threat of damage to property
- with the consent of all persons in dispute
- when required to do so by law
- to enable ADR practitioners and participants to obtain legal, medical or psychological advice
- to report professional misconduct to the relevant regulating or accrediting body (eg lawyers, ADR practitioners)

⁴ However, some ADR processes are non-confidential in their nature (eg early neutral evaluation).

- to inform those with a legitimate and direct interest in the process (for example, family members of disputants, Cabinet (if the Federal Government is a disputant), company officers and employers)
- to enforce an outcome of an ADR process
- to provide de-identified information for necessary administrative, research, supervisory or educational purposes, and
- by leave of a court or tribunal, if the court or tribunal is satisfied that disclosure is necessary to protect the administration of justice or the public interest (for example, where it is alleged on reasonable grounds that the outcome of an ADR process was materially affected by fraud, or by misleading or unconscionable conduct, and where that conduct has caused damage to a disputant).

Confidentiality obligations under this legislation should apply to ADR practitioners and participants. The legislation should not override existing, more specific legislation (eg in family law and native title). However, if NADRAC's recommendation is adopted, NADRAC recommends a review of relevant provisions in the Family Law Act and Native Title Act to achieve as much consistency as possible.

3.9.3 The Federal Government should encourage the incorporation of similar protections in private ADR contracts.

NADRAC does not recommend statutory intervention to prescribe confidentiality protections for private ADR. It is important to protect the flexibility and participant self-determination of private ADR; legislating in this area has the potential to undermine these important characteristics. Further, constitutional limits would impinge on any federal legislation directed to ADR processes unconnected to proceedings before federal courts and tribunals.

Instead, participants in private ADR processes should be encouraged to agree on confidentiality protections between themselves. However, the legislative formulation described in Recommendation 3.9.1 could usefully be drawn on as a model for such agreements, and could prompt careful consideration by parties of confidentiality issues in the context of resolving their disputes. Moreover, if Recommendation 3.9.1 is adopted, NADRAC could draft a contract clause that is consistent with the legislation.

Chapter 4: Inadmissibility

Chapter 4 considers whether, having regard to existing admissibility rules that relate to ADR processes, there is merit in the Commonwealth legislating to introduce uniform or consistent provisions to establish what things or matters arising in ADR can be admitted as evidence in court proceedings, or disclosed in proceedings before a tribunal. NADRAC's approach to analysing this issue is significantly informed by the approach taken to confidentiality protection for ADR communications. These concepts intersect because they are justified on a similar public policy ground of encouraging frank discussion in ADR.

Recommendations

Admissibility of communications in ADR required by federal legislation, or ordered by a federal court or tribunal (ie 'federally-mandated ADR')

4.7.1 In implementing the recommendations made in Chapter 3 of this Report, Parliament should also legislate to clarify the circumstances in which ADR communications occurring in, or for the purposes of, ADR required by federal legislation, or by an order of a federal court or tribunal, can be:

- admitted into evidence in any proceedings before any court (whether the court is a federal, state or territory court), or
- disclosed in any proceedings before any tribunal (whether the tribunal is a federal, state or territory tribunal).

To some extent, implementing this Recommendation would, in the context of federally-mandated ADR, displace both s131 of the *Evidence Act* and s53B of the *Federal Court Act*.

4.7.2 The general rule should be that such ADR communications cannot be admitted or disclosed, as the case may be, without the consent of the disputants.

4.7.3 The legislation should, however, allow a court or tribunal to give leave to admit or disclose ADR communications, taking into account:

- whether leave is sought to enable a party to protect a right or interest which is reflected in any exception to confidentiality recommended in Chapter 3
- the general public interest served by maintaining the confidentiality of the communications, and
- whether admission or disclosure would serve the administration of justice.

Admissibility and disclosure of other ADR communications before a federal court or tribunal

4.7.4 Parliament should also legislate to provide that communications which occur in the course, or for the purposes, of any other form of confidential ADR processes cannot, without the disputants' consent, be admitted or disclosed, as the case may be, in proceedings before a federal court or a federal tribunal.

4.7.5 The general provision described in Recommendation 4.7.4 should be subject to allowing admission or disclosure for the purposes of seeking the leave of a federal court or tribunal to admit or disclose evidence of such ADR communications.

4.7.6 The legislation should allow a federal court or tribunal to give leave to admit or disclose ADR communications, taking into account:

- whether leave is sought to enable a party to protect a right or interest which is reflected in any exception to confidentiality recommended in Chapter 3
- the general public interest served by maintaining the confidentiality of the communications, and
- whether admission or disclosure would serve the administration of justice.

ADR practitioners as potential witnesses

4.7.7 The legislation should provide for a general rule that ADR practitioners are not compellable to give evidence of ADR communications before federal courts and tribunals, subject only to the leave of a court or tribunal. In considering whether to grant leave, federal courts or tribunals must take into account the factors enumerated in Recommendations 4.7.6.

Further national reforms

4.7.8 The Attorney-General should liaise with state and territory counterparts to encourage them to consider introducing uniform admissibility provisions across Australia.

Chapter 5: Practitioner immunity

There is no general immunity from legal action for ADR practitioners, although 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.⁵

The question of whether ADR practitioners should have the benefit of immunity from being sued is not new in ADR. NADRAC previously considered aspects of this issue in its 2005 joint advice with the Family Law Council on practitioner immunity under the *Family Law Act 1975* (Cth)⁶ and its 2006 report *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*.⁷ NADRAC has now been asked to specifically consider this question. This Chapter considers policy and other arguments supporting and opposing statutory immunity for ADR practitioners.

Recommendations

This Chapter makes clear that the question of whether ADR practitioners should be immune from suit and, if so, to what extent and under what conditions, is highly contested. NADRAC members did not reach a consensus, and the following recommendations represent a majority view.

5.9.1 ADR practitioners conducting private ADR processes should not have the benefit of statutory immunity.

5.9.2 Private ADR practitioners conducting court-ordered ADR should not have the benefit of statutory immunity.

5.9.3 Court and tribunal staff conducting ADR processes should have the benefit of qualified statutory immunity. The immunity should be conditional on their having acted in good faith and within the terms of their employment. Immunity should not preclude accountability for misconduct under applicable public sector disciplinary regimes.

⁵ NADRAC, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*, Report 2006, 63.

⁶ A copy can be obtained at <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_JointLetterofAdviceonImmunityforFamilyCounsellorsandFamilyDisputePractitioners>

⁷ A copy can be obtained at <http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_Legislatingforalternativedisputeresolution>

5.9.4 Parliament should consider introducing legislation to amend s53C of the *Federal Court Act 1976* so that it only applies to court-retained mediators, and is consistent with recommendation 5.9.3.

5.9.5 A review should be conducted in the next three to five years to assess whether immunity should be preserved for court and tribunal staff who conduct ADR processes.

Chapter 6: Family dispute resolution

ADR processes are used extensively in family disputes. The *Family Law Act 1975* (Cth) sets out arrangements relating to matters, including divorce and matrimonial causes, parental responsibility for children, and financial matters arising out of the breakdown of *de facto* relationships. In particular, the Act prescribes specialised arrangements for ADR processes conducted in connection with matters falling within its ambit.

In this Chapter, NADRAC considers these arrangements, and how the issues described elsewhere in this report intersect with them. Specifically, NADRAC considers whether legislative amendment is required to protect the integrity of ADR processes conducted in the family dispute context. Due to the need to take into account particular issues, including family violence and the existing obligations imposed on family dispute resolution practitioners (FDRPs), a cautious approach is needed before changes are made to the legislative framework.

Further, due to the specialised nature of FDR, and the well-established nature of its practices and processes, recommendations made in other chapters of this Report do not apply to FDR.

NADRAC consulted widely in the family law sector – including FDRPs, Family Relationship Centres, family law courts, legal practitioners, peak industry bodies and academics (a list of stakeholders consulted and submissions received is at Appendix 1.3). NADRAC also sought input from the Family Law Council in considering these issues and developing recommendations. The Family Law Council has indicated its support for the recommendations made in Chapter 6.

Overall, NADRAC notes the success of FDR. FDR has tested the waters on numerous issues of integrity in ADR. The practical experience of FDR stakeholders offers useful insights for the stakeholders of other ADR processes.

Recommendations

6.4.4.1 NADRAC recommends that the Family Law Act should be amended to provide expressly for the inadmissibility of ADR communications made during intake and assessment processes. This would encourage participants to be frank about their circumstances during these early stages, and thus facilitate appropriate risk identification.

6.4.4.2 NADRAC recommends a detailed review of ss10H and 10J of the Family Law Act, noting that subs10J(2) provides much narrower exceptions to inadmissibility than those provided for in s10H (which protects confidentiality). A review of these provisions would be useful to assess whether there is a principled differentiation between these criteria,

or whether the scope of exceptions in each provision should be made uniform. NADRAC would support the inclusion of exceptions which:

- protect a child from risk of harm (physical or psychological) (paragraph 10H(4)(a)), or
- prevent or lessen a serious and imminent threat to the life or health of a person (paragraph 10H(4)(b)).

1.2 Glossary and definitions for the purpose of this Report

1.2.1 Glossary

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 participants to prevent or manage their own disputes without assistance.

ADR communications are:

- (a) communications, written and oral, which are made between one or more persons in dispute, in connection with an attempt to achieve a resolution of the dispute (or part of it), with the help of an ADR practitioner, and
- (b) a document (whether delivered or not) that has been prepared in connection with such an attempt to resolve a dispute.

ADR practitioner is a person whose impartial assistance is given to those in dispute to resolve the issues between them, through the use of an ADR process. 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.

Advisory dispute resolution processes are processes in which an ADR practitioner considers and appraises the dispute and gives advice on 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 disputants present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination.

Collaborative practice is an approach to managing issues in which the participants (who will ordinarily include professional experts or advisers) commit to a principled approach to negotiation and resolution, and agree that the professional experts and advisers will not be involved in any litigation. All participants are members of a problem-solving team who agree to disclose all information and also agree to negotiate in a constructive manner. In most collaborative models, participants are supported by a lawyer.

Combined or hybrid dispute resolution processes are processes in which the ADR practitioner plays multiple roles. For example, in *conciliation* and in *conferencing*, the ADR practitioner may facilitate discussions, as well as give advice on the merits of the dispute. In *hybrid* processes, such as *med-arb*, the practitioner first uses one process (eg *mediation*) and then a different one (eg *arbitration*).

Conciliation is a process in which the participants, with the assistance of the ADR practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. A conciliator will advise on the matters in dispute and/or options for resolution, but will not make a determination. A conciliator may have professional expertise in the subject matter in dispute. The conciliator is responsible for managing the conciliation process. ‘Conciliation’ may also be used broadly to refer to other processes used to resolve complaints and disputes including:

- informal discussions held between the participants and an external agency in an attempt to avoid, resolve or manage a dispute, and
- combined processes in which, for example, an impartial practitioner facilitates discussion between the participants, advises on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement.

Determinative dispute resolution processes are processes in which an ADR practitioner evaluates the dispute (which may include the hearing of formal evidence from the participants) and makes a determination. Examples of determinative dispute resolution processes are *arbitration*, *expert determination* and *private judging*.

Disputants are persons in dispute.

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 formal judicial determination are often referred to as *ADR*.

FDR (Family Dispute Resolution) is a process conducted by an independent practitioner to assist people affected, or likely to be affected, by separation or divorce, to manage and resolve some or all of the issues arising between them without going to court. A legal definition can be found in the *Family Law Act 1975*. The term ‘family dispute resolution’ is an umbrella term that covers many different sorts of ADR processes. Mediation and conciliation can both be kinds of family dispute resolution.

A **Family Dispute Resolution Practitioner** is a person who has training and experience in conducting Family Dispute Resolution. They must fall within one of the categories of family dispute resolution practitioners listed in section 10G of the Family Law Act. Requirements for the accreditation of Family Dispute Resolution Practitioners are set out in the Family Law Regulations. See also *Registered Family Dispute Resolution Provider*.

Mediation is a process in which the participants 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 in accordance with an existing contractual agreement.

National Mediator Accreditation System (NMAS) is an industry-based scheme which relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards. These organisations are referred to as RMABs (see definition below). The NMAS is intended to provide a base level of accreditation for all mediators irrespective of their field of work. Mediation organisations may opt to accredit mediators under both the NMAS and more specific field-based accreditation schemes.

Automated, online dispute resolution, ODR, E-ADR, cyber-ADR processes are processes where a substantial part, or all, of the communication in the dispute resolution process takes place electronically, especially by email.

Recognised Mediator Accreditation Body (RMAB) is an organisation that accredits mediators in accordance with the NMAS's Practice Standards and Approval Standards.⁸

1.3 Background to this Reference

1.3.1 NADRAC's 2009 'Resolve to resolve' report

On 30 September 2009, NADRAC delivered to the Attorney-General its report, *The Resolve to Resolve – Embracing ADR to improve access to justice in the federal jurisdiction* ('Resolve to resolve' report). The report made 39 recommendations about promoting greater use of ADR in the federal civil justice system. It identified strategies for disputants, legal and ADR practitioners, tribunals and courts, as well as initiatives the Government might take, including legislative action.

The report referred to several issues concerning the integrity of ADR processes. NADRAC noted that 'there is considerable legislative variation in terms of confidentiality and inadmissibility regarding ADR services'.⁹ It also observed that the imposition of conduct obligations in ADR raises complex issues and is the subject of much debate.¹⁰

Further, NADRAC noted that though it had in the past commented on the issue of mediator immunity, it had not done so with respect to other ADR practitioners, and that it would be timely to do so. As those issues were beyond the ambit of the 'Resolve to resolve' report, they were not fully explored at that time.

⁸ See <<http://www.nadrac.gov.au/>> for more information about voluntary standards to support the quality of ADR processes, particularly mediation.

⁹ NADRAC, *The resolve to resolve: embracing ADR to improve access to justice in the federal jurisdiction*, Report 2009, 94.

¹⁰ NADRAC, *The resolve to resolve: embracing ADR to improve access to justice in the federal jurisdiction*, Report 2009, 135.

Following NADRAC's 'Resolve to resolve' report, the Attorney-General wrote to NADRAC on 1 December 2009, indicating his interest in further promoting the use of ADR services, while ensuring that ADR participants are adequately protected. He asked NADRAC to undertake further work arising from the recommendations in the 'Resolve to resolve' report and, in particular, to:

...advise on legislative changes required to protect the integrity of different ADR processes including issues of confidentiality, non-admissibility, conduct obligations for participants and ADR practitioners and the need, if any, for ADR practitioners to have the benefit of statutory immunity.¹¹

1.3.2 Recent developments

The ADR landscape and the civil justice system are dynamic. In particular, NADRAC notes several recent developments in the federal and state civil justice systems that are aimed at encouraging more extensive use of ADR. In light of this, it is timely for NADRAC to consider issues that underpin (or, conversely, may undermine) the integrity of ADR processes. Examples of recent developments that have informed this reference are set out below.

Access to Justice Report

On 23 September 2009, the Attorney-General released the report of the Access to Justice Taskforce,¹² *A Strategic Framework for Access to Justice in the Federal Civil Justice System*. The central recommendation of that report was for the establishment of a strategic framework for access to justice which would be used to guide justice system reforms, underpinned by the principles of accessibility, appropriateness, equity, efficiency and effectiveness.

A key finding of the Access to Justice Report was that an increase in the early consideration and use of non-litigious models of dispute resolution has significant capacity to improve access to justice for people in dispute.

Relevant legislative developments

As mentioned above, governments around Australia are acting to foster early dispute resolution and there is a cultural shift away from adversarial litigation as a means to resolve disputes. In the past 12 months, legislation has been introduced in several jurisdictions, imposing overarching obligations on disputants to consider other ways to resolve disputes before commencing litigation.

Access to Justice (Civil Litigation Reforms) Amendment Act 2009 (Cth)

In November 2009, the *Access to Justice (Civil Litigation Reforms) Amendment Bill* was passed by the Parliament. This legislation requires the Federal Court, and litigants and legal practitioners before the Federal Court, to facilitate the just resolution of disputes

11 Referred to as the 'Integrity of ADR' Reference.

12 The Attorney-General established an Access to Justice Taskforce in early 2009 to undertake a comprehensive examination of the federal civil justice system, with a view to developing a more strategic approach to access to justice issues.

according to law and as quickly, inexpensively and efficiently as possible. Judges may employ case management powers, including:

- referring parties to ADR
- requiring parties to narrow the issues in dispute
- limiting the length of submissions or the number of witnesses, and
- setting time limits for the completion of part of a proceeding.

Civil Dispute Resolution Bill (Cth)

The Australian Government first introduced the Civil Dispute Resolution Bill on 16 June 2010.¹³ The Bill aims to promote a move away from the adversarial culture of litigation by encouraging parties to consider options for resolution before commencing proceedings. The Bill contemplates that, before commencing proceedings, disputants will take genuine steps to resolve their disputes. The Bill is deliberately flexible in allowing parties to tailor their genuine steps to the circumstances of the dispute. It does not prescribe pre-action protocols or mandatory ADR. Exemptions are provided where either the application of the requirement is not likely to be of any benefit (such as when one party has been declared a vexatious litigant), significant mandatory dispute resolution processes are already in place (such as in native title cases), or where the requirement would be inappropriate (such as in civil penalty matters). By defining the ‘what’ of the elements of an ADR approach, without prescribing them, the Bill leaves to ADR participants and practitioners the question of ‘how’ to implement that approach on a case-by-case basis. In doing so, the Bill reflects and maintains distinctive attributes of ADR, including voluntariness and procedural flexibility.

***Civil Procedure Act 2010* (Vic) and the Civil Procedure and Legal Professions Amendment Bill 2011 (Vic)**

In 2010, the Victorian Parliament passed the *Civil Procedure Act 2010* (Vic). This reform was underpinned by the principle that disputes should be resolved in a fair, timely and cost-effective manner. ADR, genuine negotiation and early exchange of information are strongly promoted.

The Act seeks to impose overarching obligations on several participants in civil proceedings,¹⁴ for example, by requiring parties to undertake ‘reasonable steps’ to resolve disputes by agreement before litigation, or to clarify and narrow the issues in dispute in the event that litigation is commenced.¹⁵ The Act also enhanced courts’ case management powers by enabling courts to ‘make any order or give any direction it considers appropriate to further the overarching purpose in relation to pre-trial procedures’¹⁶

13 The Bill lapsed when the Federal election was called, and Parliament was prorogued. It was reintroduced on 30 September 2010.

14 The obligations apply to parties, legal practitioners or other representatives, legal practices, expert witnesses (where relevant) and any person who provides financial assistance or other assistance to any party, to the extent that the person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding.

15 *Civil Procedure Act 2010* (Vic), ss22 and 23.

16 Subs48(1).

More recently, the Civil Procedure and Legal Profession Amendment Bill 2011 was introduced into the Victorian Legislative Assembly, following the change of government in Victoria.¹⁷ This Bill seeks the removal of mandatory pre-action protocols in proceedings before Victorian courts. Such protocols were to be imposed, under the *Civil Procedure Act 2010* (Vic), with effect from 1 July 2011. The Victorian Government has taken the view that mandatory protocols would add unnecessarily to the costs of resolving disputes, and hinder access to the courts. Nevertheless, the Victorian Attorney-General, the Hon Robert Clark MP, has emphasised that

The Government recognises the benefit of people trying to resolve their legal disputes without the cost and complexity associated with going to court...¹⁸

The new Bill will preserve the courts' powers, in making orders and giving directions under the Civil Procedure Act, to consider the extent to which parties have used reasonable endeavours to resolve or narrow their disputes.

The approach taken in the Bill is consistent with the approach taken by the Commonwealth, in its support for disputants taking steps to resolve their disputes, and in refraining from prescribing how this should be done in the circumstances of a particular dispute.

Civil Procedure Act 2005 (NSW)

This Act was recently amended to further promote the use of ADR before resorting to litigation.¹⁹ The Act already placed a heavy emphasis on mediation²⁰ and the case management powers of the court to refer proceedings to this form of ADR.²¹ The provisions now go further to include pre-litigation requirements that parties take reasonable steps to resolve, clarify or narrow the dispute by agreement. Reasonable steps can consist of notifying, responding, exchanging information, considering options and taking part in a range of ADR processes.²² The steps taken will form part of the dispute resolution statement that must be completed by all parties upon filing proceedings with the court.²³ The amendments also set out the confidentiality and admissibility rules for pre-litigation procedures, the duties of legal practitioners to inform their clients about the pre-litigation requirements, and how the cost for pre-litigation procedures will be dealt with.²⁴

17 Introduced on 8 February 2011 and read for the second time on 10 February 2011. The Bill and its Explanatory Memorandum can be found at <<http://www.parliament.vic.gov.au/static/www.legislation.vic.gov.au-bills.html>>.

18 Media release by the Victorian Attorney-General, the Hon Robert Clark MP, Coalition Government simplifies civil litigation rules, 10 February 2011.

19 *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), inserted Part 2A and other miscellaneous amendments into the *Civil Procedure Act 2005* (NSW). For a discussion of the New South Wales amendments, see S Lancken and N Rohr, 'Pre-litigation dispute resolution – What the new requirements will mean in practice' (2011) *Law Society Journal*, February, 1. This article notes that the provisions are expected to commence in the second half of 2011 (they will commence on Proclamation).

20 *Civil Procedure Act 2005* (NSW), Part 4.

21 *Civil Procedure Act 2005* (NSW), s26.

22 *Civil Procedure Act 2005* (NSW), s18E.

23 *Civil Procedure Act 2005* (NSW), Part 2A, Division 3.

24 *Civil Procedure Act 2005* (NSW), ss18F, 18J, 18L, 18M and 18O.

These amendments promote the overarching purpose of the Act to facilitate the just, quick and cheap resolution of disputes.²⁵ These requirements apply to all civil proceedings, unless specifically excluded.²⁶

Changes in family law

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* introduced into the *Family Law Act 1975* a requirement to attempt family dispute resolution. Section 60I of that Act requires disputants in parenting disputes to attend family dispute resolution before applying for a Part VII order relating to children. They must also make a 'genuine effort' to resolve issues during the family dispute resolution process. Several exceptions exist, including urgency, inability to participate effectively, family violence or child abuse, and consent of the parties.

The *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* place a range of obligations on family dispute resolution practitioners, including obligations to provide certain information and to avoid conflicts of interest. The Regulations also provide for a family dispute resolution practitioner accreditation scheme.

Before 1 July 2006, the Family Law Act provided immunity to family mediators, now family dispute resolution practitioners. Reforms in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* removed this immunity, consistent with joint advice from NADRAC and the Family Law Council. The advice was based on several reasons, including that any immunity from suit for negligence or other civil wrong must be strongly justified as a matter of public policy. Despite the removal of immunity, the inadmissibility provisions of the *Family Law Act* mean that, in effect, it may not be possible to bring evidence of fraud or negligence by a family dispute resolution practitioner.

1.4 Scope of this Reference

1.4.1 Dimensions of integrity of ADR processes

While the Report endeavours to reflect the nature of a range of ADR processes, including facilitative, advisory and determinative processes, much of the discussion relates to mediation. This reflects several factors, including that mediation:

- is a widely used form of ADR process
- is extensively dealt with in case law and legislation
- is the subject of some academic research
- is the focus of most of the submissions received by NADRAC in the course of undertaking this reference, and
- evaluative processes often have many of the features of mediation (such as self-determination), protected by the right to reject recommendations or opinions.

²⁵ *Civil Procedure Act 2005* (NSW), s56.

²⁶ *Civil Procedure Act 2005* (NSW), subs18B(1).

The Report uses the term ‘ADR processes’ where the discussion is applicable to all types of processes, and makes references to specific types of ADR where appropriate.

NADRAC acknowledges that there are many other issues and dimensions, beyond the scope of this Reference, that are also fundamental to the quality, accessibility and usefulness of ADR. Many of these changes require a systemic approach that goes beyond legislative reform. The ‘Resolve to resolve’ report outlined several measures that are important to promoting and protecting the integrity of ADR. These include (but are not limited to):

- identifying and implementing initiatives to educate the public about ADR service providers as well as the benefits and importance of ADR, through resources including program initiatives, website and telephone hotlines²⁷
- developing guidelines and standards that describe good ADR practices²⁸
- increasing professional awareness of ADR among law students, practising lawyers and judges
- encouraging the federal, state and territory governments to show leadership in their use and promotion of ADR as the preferred method of dispute resolution. For example, the Civil Dispute Resolution Bill 2010 (Cth) (discussed above) is a clear indication of the federal government’s support of ADR
- encouraging the use, particularly by government agencies, of dispute resolution clauses
- extending the range of ADR services to allow for greater accessibility and suitability of ADR to particular situations (there should be particular focus on online dispute resolution)
- conducting, collecting and publishing research regarding the use and outcome of ADR processes
- using more standardised frameworks to evaluate and monitor ADR
- further encouraging the use of ADR processes through education, training and effective case management by judges, and
- making consistent use of ADR terminology.

While these measures are not canvassed in this Report, further analysis and development of them could usefully be the subject of a future reference to NADRAC.

Arbitration

NADRAC determined not to consider conduct obligations, confidentiality, inadmissibility and immunity for practitioners in the context of arbitration. Arbitration is, of course, a very important and very visible form of ADR that is widely practised around the world in a range of areas, and there remain unsettled issues. Generally, however, the issues dealt with in this Reference are already adequately covered by a combination of legislation and institutional rules.²⁹

²⁷ NADRAC, *The resolve to resolve: embracing ADR to improve access to justice in the federal jurisdiction*, Report 2009, Recommendation 3.1.

²⁸ The usefulness of guidelines and standards is canvassed further at section 1.5.6.

²⁹ See, for example, the *Commercial Arbitration Act 2010* (NSW). This enacts uniform legislation developed from an agreement by the Standing Committee of Attorneys-General. For a discussion of how institutional arbitration rules deal with confidentiality, see M Hwang SC and K Chung, ‘Defining the Indefinable: Practical Problems of Confidentiality in Arbitration’ (2009) 26 *Journal of International Arbitration*, 609, 637-641.

1.5 Considerations guiding NADRAC's analysis

The terms of this Reference ask NADRAC to advise on the 'legislative changes required to protect different ADR processes'. Accordingly, NADRAC's recommendations focus on possible legislative reforms. It is important to emphasise, though, that NADRAC's analysis of the issues is based on broader concepts and premises, and overarching considerations and values that infuse ADR and distinguish it from litigation.

1.5.1 Recommendations should, as far as possible, preserve the defining attributes of ADR

ADR has particular attributes that define it and distinguish ADR processes from litigation. These include:

- focus on preserving existing relationships and ensuring their survival beyond the dispute³⁰
- voluntariness
- accessibility, flexibility, affordability, and informality
- recognition that productive coexistence of difference is not only possible, but can be beneficial
- self-determination, and
- opportunities for disputants to resolve disputes through constructive, rather than defensive or destructive, engagement with other parties.³¹

Participants in the justice system, including in ADR processes, also need procedural reliability and transparency. ADR should have the capacity to balance interests, needs and expectations that may exist in tension with each other. For example, there is a need to balance the desirability of external or public scrutiny in some cases with a need for privacy in ADR. If ADR processes are perceived to be too open to scrutiny by third parties (including courts or tribunals), then participants may restrict themselves to arguing legal rights and limit their receptiveness to other factors or means of reaching agreements. The weight given to these kinds of interests and expectations differs from person to person and depends on individual circumstances. Any statutory intervention must be responsive to the varying circumstances in which ADR takes place.

A specific and important aspect of this governing consideration is that the distinctiveness of ADR from judicial processes must be preserved, to retain the benefits to society of these means of resolving disputes. Courts (and tribunals) are characterised by, among other things, the power to make binding decisions that are enforceable, using a range of powers, including coercive powers. Because the exercise of this power can have grave

30 This is, of course, not always the case. For example, in a range of commercial circumstances, there will be neither a need nor a desire to continue to maintain a relationship. By way of contrast, however, disputants in family and neighbourhood disputes may have an ongoing need to maintain a constructive (or at least civil) relationship.

31 For a more detailed description of the distinctive characteristics of mediation, see L Boule, *Mediation: Principles, Process, Practice* (2005), 15. Litigation, on the other hand, is a process in which a person other than the parties determines a binding outcome, and where the determinative body is owed certain duties by those who come before it (eg lawyers are officers of the court, with specific duties to the court).

and far-reaching consequences for disputants and for society at large, there is a valid expectation that these powers will ordinarily be exercised in public,³² and that the exercise of these powers is subject to appeal and review.

The ADR environment is, in many ways, very different. ADR seeks to foster empowerment of participants in informal, accessible and non-threatening ways. This includes, for instance, expectations of confidentiality to encourage open discussion, and of good conduct (however described) of ADR practitioners and participants. This is an environment that deliberately seeks to avoid the exercise of coercion or the application of sanctions.

NADRAC is concerned that increasing involvement by judicial officers in conducting ADR may blur the distinction between these two very different ways of resolving disputes, running the risk of damaging the credibility – and thus integrity – of both. An example of how this might occur arises from the recommendation to preserve a qualified immunity for court and tribunal staff who conduct ADR (see Recommendation 5.9.3). This Recommendation is expressly made not on the basis of a principled analysis, but in recognition of pragmatic barriers to removing a long-recognised immunity for people who fall within this category. The consequence of continuing to confer this immunity, however, may be that disputants who are ordered by a court or tribunal to engage in ADR conducted by a staff member of that court or tribunal (eg a Registrar) will have no means of redress if that person engages in any kind of misconduct. This could be perceived, legitimately, as an unfair consequence of compliance with an order of the court or tribunal and could, in itself, undermine the integrity of that ADR process.

This issue is a very complex one which NADRAC expects to be the subject of significant debate and discussion.

1.5.2 The needs of participants should take precedence

NADRAC has identified a wide range of stakeholders in the civil justice system whose interests may be affected by NADRAC's recommendations. They include disputants, legal practitioners and other representatives of disputants, disputants' support people and other advisors, experts, ADR practitioners, courts and tribunals, and government. In addition, the community in general has a stake in protecting and preserving the integrity of ADR, in providing – through taxation – resources to support ADR, and in ensuring a safe and civil society governed in accordance with the rule of law.

The interests and expectations of these stakeholders vary in weight. Consistent with its reasoning in the 'Resolve to resolve' report, NADRAC considered that its primary focus should be on the needs, interests and expectations of the potential and current consumers of civil justice – the disputants. At the same time, to ensure the workability of its recommendations, NADRAC took into account the interests of other stakeholders, who have broader interests in the delivery of civil justice.

32 There are exceptions, but these must be strongly justified.

1.5.3 Civil justice reforms should ensure that the benefits of ADR outweigh the risks of satellite litigation

One issue that has been closely considered in this Report is the extent to which ‘the shadow of the law’³³ might have a negative impact on the integrity of ADR. This issue is closely linked with the premise described at section 1.5.4.

Each recommendation made to protect the integrity of ADR processes should add value to the distinctive attributes of ADR. In particular, great care should be taken to ensure that any recommendations for legislative intervention do not, individually or cumulatively, lead to participation in ADR being subject to as much (or more) legislative or other administrative prescription as litigation. Similarly, legislative intervention should not open ADR processes up to the assertion of legal rights in a way which could, in turn, lead to disproportionate satellite litigation.

1.5.4 Legislation should not be a first resort solution

While the terms of reference ask for advice on necessary legislative changes, NADRAC has developed its recommendations on the premise that a legislative ‘fix’ is neither necessary nor desirable as a response to a range of issues. This is particularly so in the field of ADR, which itself is premised on concepts such as self-determination and flexibility to meet the varying needs and circumstances of disputants. This can be very difficult to adequately capture and preserve in legislation, and legislative intervention may inadvertently stagnate ADR practice, and prevent it from organically evolving to meet changing needs and circumstances. Even less desirable would be an outcome where legislative prescription in the ADR field eventually led to ADR becoming quasi-litigious, or simply an adjunct of court processes, rather than a genuinely alternative way in which to resolve disputes. Accordingly, NADRAC has:

- only recommended legislative intervention where there is an empirically-demonstrated issue which needs to be resolved to protect and promote the integrity of ADR, and
- attempted to craft recommendations for legislation in a way that deliberately avoids over-regulation of a field that is necessarily, and innately, dynamic rather than prescriptive in the way it changes and evolves. In particular, NADRAC has avoided making recommendations of legislative interventions to be enforced by the imposition of sanctions.

33 ‘One of the consequences of dispute resolution being practised in the shadow of the law and its formalisation is the extent to which the law impinges on its practice’: D Spencer and S Hardy, *Dispute Resolution in Australia: cases, commentary and materials*, (2009) 349. NADRAC prefers to conceptualise ADR as being practised in the context (not the shadow) of the law.

1.5.5 Disputants in private ADR processes should be allowed to establish their own processes

A fundamental difference between ADR processes and legal proceedings is that ADR processes provide an opportunity for participants to reach agreements by self-determination. To a certain extent, participants in private ADR processes can choose how to participate in ADR processes. For example, they can, through contract, set the ground rules they wish to apply, including any conduct requirements. For this reason, NADRAC considers that statutory intervention in private ADR processes can be justified only in exceptional circumstances.

NADRAC acknowledges, however, that there may be greater justification for legislative prescription in the context of mandatory ADR processes. Caution is still needed, however, in light of NADRAC's other guiding considerations to the effect that legislation should not be a 'first resort' means of protecting and preserving the integrity of ADR.

1.5.6 There are effective, non-legislative means of maintaining the integrity of ADR processes, particularly private ADR processes

As a corollary to the other guiding considerations that urge caution in recommending legislative responses, NADRAC observes that there are other means by which to maintain the integrity of ADR processes, especially private ones. Examples of these include:

- developing clear and robust professional standards³⁴
- having appropriately skilled and accredited ADR practitioners
- supporting training and education for ADR practitioners, participants and the community generally
- developing guiding materials to enhance the participants' understanding of ADR processes (eg NADRAC's National ADR Principles reference)³⁵
- supporting ADR practitioners to develop and use effective contractual agreements and clauses to address issues on a case-by-case basis (eg through making available model contract clauses)
- providing professional 'clinical supervision,' and
- promoting a culture of best practice that aspires beyond 'rote compliance' with minimum requirements.

34 ADR practices such as mediation and collaborative practice have recently been characterised by the development of accreditation systems and standards. These support greater clarity in the use of the relevant ADR practices, and may help to better define the dimensions of integrity of ADR explored in this Report.

35 For example, NADRAC has recently developed a set of 'National Principles for Resolving Disputes'. Principle 3 states that 'People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.' NADRAC will develop a supporting guide for the Principles which will further set out expected conduct of professionals and participants in ADR processes.

1.5.7 Where legislation is warranted, consistency should be promoted in legislative arrangements within and across civil justice jurisdictions in Australia

There is no uniform approach in federal legislation to the confidentiality or inadmissibility of ADR communications, participant conduct in ADR processes, or the immunity of ADR practitioners. NADRAC considers that there is value in achieving as much consistency as possible, to provide greater certainty and transparency for practitioners and participants.³⁶

1.6 Consultation for this Reference

NADRAC conducted extensive consultation in undertaking this Reference, including a range of face-to-face consultation sessions and calls for public submissions in December 2009 and July 2010. A list of submissions received by NADRAC is at Appendix 1.3.

Many comments put forward in the consultation process have been incorporated into this Report. There was no clear consensus on several issues, and often a spectrum of views was presented. The diversity in views expressed highlights the complexity of the issues and the array of policy considerations that need to be carefully considered.

³⁶ NADRAC recognises that consistent practice may also be achieved through standardised accreditation and regulation.

Chapter 2: Conduct obligations

2.1 Introduction

There is a well-established and growing trend in Australia to encourage people in dispute to consider ADR processes, such as mediation, as alternatives to litigation. Managing the conduct of those involved in ADR processes has become increasingly important to ensure participants have some protection and ADR and legal practitioners some accountability in respect of processes in which disputants are being encouraged to participate.

The extent to which conduct in ADR processes should be prescribed by legislation is the subject of ongoing debate among those in the ADR field. Some observe that the imposition of conduct obligations on ADR participants improves the efficiency and effectiveness of ADR processes, helps eliminate abuse and ultimately promotes the integrity of such processes. Some express concerns about the difficulties and complexities posed by statutory regulation of conduct in ADR, including difficulties in enforcement, potential conflict with confidentiality protection and the risk of satellite litigation. They fear that the imposition of statutory conduct obligations and sanctions would bring more illness than it cures, and could actually undermine the integrity of ADR processes.

This part of NADRAC's inquiry is concerned with the conduct of disputants, their legal representatives, and ADR practitioners during ADR processes, whether mandatory or private.

There is no uniform federal legislation prescribing conduct obligations for disputants and their representatives in ADR processes, and little legislation prescribing the conduct of ADR practitioners.³⁷ This Chapter canvasses whether it would be useful, in promoting and preserving the integrity of ADR, to impose conduct obligations on participants, their representatives, and/or ADR practitioners.

2.2 Conduct of participants and their representatives

Currently, some conduct obligations are imposed by legislation, but rarely outside the context of mandatory ADR.³⁸

It seems that existing statutory conduct obligations attach more to facilitative and evaluative processes, such as mediation, conciliation and neutral evaluation, rather than to determinative processes, such as arbitration. This may be because in determinative processes, the dispute resolution practitioner has a higher measure of control over practice and procedure, there are often opportunities for review, and transcripts or recordings are usually taken. Accordingly, there is less need for conduct standards to be explicitly imposed by legislation.

³⁷ Other than some provisions imposing obligations of confidentiality.

³⁸ An example of conduct obligations being imposed outside the context of mandatory ADR is seen in the *Farm Debt Mediation Act 1994* (NSW).

There is no evidence to suggest that ‘bad behaviour’ by participants is prevalent and undermining the overall integrity of ADR processes. There are, however, instances of conduct that can undermine particular ADR processes. The kinds of conduct (by disputants and their representatives) at which imposition of obligations should be directed include:

- failure to attend (for example, persistent last minute non-attendance at meetings)
- failure to participate
- using ADR for the sole purpose of gathering information to be used outside the ADR process (eg for court proceedings)
- using ADR to delay the court’s determination of a dispute
- using ADR to exhaust other parties’ resources
- using ADR to harass the other participants
- using ADR to apply coercion or improper pressure
- using ADR to engage in abusive and threatening behaviour (which might include subtle emotional and cognitive abuse)
- pursuing an outcome in ADR on the basis of dishonest or fraudulent representations
- persistent non-compliance with agreed actions, leading to stalling of the process, and
- publicly releasing confidential material in breach of an agreement.

It is not difficult to understand why such behaviour could cause concern to ADR participants who are subjected to it, but still required to continue to participate. For this reason, it is important that, where disputants are required to attend ADR, they retain the power to end processes (subject to the possible need to justify doing so where a ‘good faith’ conduct obligation applies).

2.2.1 Participant conduct in private ADR processes

In private ADR processes, participant conduct is largely managed by guidelines, contract clauses, legal representative input³⁹ and/or ADR practitioners (who can manage participant conduct within the process and may terminate the process if participant conduct remains an issue).

Through provisions in private ADR contracts setting out conduct obligations, and through professional standards and codes of conduct (including managing lawyers’ conduct in ADR), participants are informed of what behaviour is expected of them.

Moreover, recent legislative changes around Australia, such as the Civil Dispute Resolution Bill 2010 (Cth), place additional expectations on disputants. These may have implications for their conduct in ADR processes, even in the absence of a court order.

39 Particularly in collaborative law processes where lawyers contract with parties to comply with particular requirements to support interest-based negotiations and where lawyers may withdraw if there is non-compliance with those contractual arrangements.

2.2.2 Participant conduct in mandatory ADR processes

Under various Commonwealth,⁴⁰ state and territory legislation, courts and tribunals have powers to order parties to participate in ADR at various stages of the dispute (after commencement of litigation). Some laws make some form of ADR process mandatory even before commencement of litigation. Disputants who undertake ADR to fulfil a legislative requirement may also be required, by that legislation, to comply with certain conduct obligations. The legislation may not necessarily set out the consequences for disputants' failure to comply with their conduct obligations. However, these obligations might, under some circumstances, be dealt with by courts under their existing case management powers, or pursuant to an implied power to supervise adherence to orders.

Many statutory provisions that impose conduct obligations do not specify sanctions for non-compliance. However, there appear to be other ways that are used to promote compliance. For example, in the family law context, 'genuine effort' participation in family dispute resolution is a prerequisite to commencing litigation about parenting disputes. In other instances, because conduct obligations are often attached to a court-ordered ADR process, failure to comply with such obligations could potentially lead to various consequences (depending on the extent and gravity of the non-compliance), including:

- case management by the court
- costs being awarded against the offending party
- fees being incurred (for neutral and legal representatives)
- damages being awarded (eg in respect of claims in tort, such as for assault, deceit or negligence)
- the person concerned being dealt with for contempt, and
- dismissal or a stay of the pending litigation.

ADR practitioners should ordinarily be able to manage participant conduct in ADR processes. For instance, while a mediator may not be able to enforce any conduct obligations,⁴¹ the following options may be pursued to promote constructive behaviour by participants and their representatives:

- demonstrate appropriate behaviour
- explore the consequences of such behaviour (in mediation, this can occur in the private sessions)
- expert listening, questioning and communication skills (eg reframing)
- use of 'shuttle' or 'one text' processes
- naming the inappropriate behaviour
- setting clear expectations of behaviour in the ADR process by preliminary meetings and agreement to process guidelines

⁴⁰ For example, the Family Court, the Administrative Appeals Tribunal and the National Native Title Tribunal.

⁴¹ Except, for example, through contractual arrangements made in collaborative law contexts.

- terminate the session
- adjust or reset the mediation, and
- in some circumstances – report conduct to an agency, a court or a professional misconduct body.⁴²

Federal legislation dealing with participant conduct in ADR processes

Appendix 2.1 lists a selection of federal legislation which imposes conduct obligations on participants in ADR processes. Formulations of conduct obligations in legislation vary. Some attach to ADR processes referred by courts after commencement of litigation. Others can apply as a pre-litigation requirement.

State/territory legislation

Several state/territory statutes relating to mandatory ADR processes also impose conduct obligations on participants and, often, on their representatives as well. A table containing a selection of these provisions can be found in Appendix 2.5.

How is participant conduct measured? The ‘good faith’ standard⁴³

‘Good faith’ features as the most widely-used standard of conduct prescribed by the federal and state/territory legislative provisions for parties and their representatives in ADR processes. However, as noted in NADRAC’s 2009 ‘Resolve to resolve’ report, while several federal and state laws impose ‘good faith’ obligations on participants in ADR processes, there is little legislative guidance on the precise meaning of the phrase in the ADR context.⁴⁴ Nevertheless, judicial interpretation of these obligations has developed somewhat in recent years. As Angyl has pointed out:

The *Civil Procedure Act 2005* (NSW), s27, provides that parties who are ordered to mediate must “participate, in good faith, in the mediation”. Various other statutes and regulations have requirements for participation in mediation in good faith. It is hard to accept that the standard by which the courts must supervise the performance of orders that parties mediate is so inherently uncertain that it renders void an agreement to mediate.⁴⁵

The meaning of ‘good faith’ has been elaborated in case law, mainly in the contexts of native title negotiation and contractual obligations to engage in ADR in ‘good faith’. Examples are discussed below.

42 Such examples include federal native title mediations and retail lease mediations in some states.

43 Another formulation used in federal legislation is ‘genuine effort’. Family dispute resolution practitioners are required under the Family Law Act to issue ‘genuine effort’ certificates to participants, which is a way of regulating conduct obligations during family dispute resolution processes. The meaning of ‘genuine effort’ has not been elaborated on in legislation (though there has been some guidance provided to FDRPs by the Attorney-General’s Department). This will be discussed further in the section on ‘Family Law Issues’.

44 NADRAC, *The resolve to resolve: embracing ADR to improve access to justice in the federal jurisdiction*, Report 2009, 142-146.

45 R Angyl, ‘Enforceability of agreements to mediate: Seventeen years after Hooper Bailie’ (2009) 83 *Australian Law Journal* 299 at 303.

‘Good faith’ negotiation in native title

In *Western Australia v Taylor*,⁴⁶ the National Native Title Tribunal considered how to identify good faith negotiation and whether the government party had complied with the requirement to negotiate in good faith. In the absence of any definition in the *Native Title Act* itself, the Tribunal pointed out that the only statutory definition it was aware of was that set out in paragraph 170QK(z) of the *Industrial Relations Act 1988* (Cth) (now repealed). The Tribunal accepted the ‘totality of circumstances’ test in that provision. The test provided that a single element of a party’s behaviour may not, of itself, indicate that a party has not negotiated in good faith, but an examination of the overall conduct of a party may indicate the absence of good faith.⁴⁷

The ‘good faith’ standard in contractual obligations to engage in ADR

In considering potential conduct standards for participants in mandatory ADR, it is useful to bear in mind relevant case law, including that which has arisen around private agreements to engage in ADR. In several cases, courts have considered the enforceability of contractual clauses to engage in ADR in ‘good faith’ in the event of a dispute. These cases suggest that ‘good faith’ may be sufficiently certain and capable of enforcement.

*Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*⁴⁸ is an authority for the proposition that an agreement contained in a contractual clause to mediate or conciliate in good faith can be sufficiently certain to be given effect.⁴⁹ Cases are likely to turn on their individual facts, and the language used in the relevant contractual provisions. For example, in the NSW Supreme Court decision in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*,⁵⁰ the Court found that the agreement to mediate did not set down a procedure for the mediation, other than the parties’ presence or representation, and that the accumulation of phrases such as ‘attempt’, ‘good faith’, ‘negotiate towards achieving a settlement’ was attended by too much ambiguity.

In *Aiton Australia Pty Ltd v Transfield Pty Ltd*,⁵¹ the Court held that demonstrating good faith does not equate to reaching an agreement or settling a dispute; that is, it does not require a particular outcome.⁵² The Court indicated that indicia of good faith may include:

- undertaking to engage in a pre-determined form of negotiation or mediation, and
- demonstrating an open mind in the course of negotiation or mediation, involving both a willingness to consider appropriate options put forward by the other party (or by the mediator) and a willingness to consider putting forward options for resolution.⁵³

46 (1996) 134 FLR 211.

47 (1996) 134 FLR 211, at 221. For a further example of use of ‘good faith’ in federal legislation, see the *Fair Work Act 2009* (Cth); in particular, s228.

48 (1992) 28 NSWLR 194.

49 Here, the NSW Supreme Court gave effect to an agreement to mediate by staying an arbitration, so that the arbitration could not resume until mediation was concluded. Mediation is essentially consensual. Opponents of enforceability argue that it is futile to seek the enforcement of something that requires consent and cooperation. However, the Court held that what is enforced is not cooperation or consent, but participation in a process in which consent and cooperation might come. That agreement needs to be sufficiently certain.

50 (1995) 36 NSWLR 709.

51 (1999) 153 FLR 236.

52 (1999) 153 FLR 236, para 105 per Einstein J.

53 (1999) 153 FLR 236, para 156 per Einstein J.

Further, the Court held that an obligation to act in good faith does not require a party to ‘act for or on behalf of or in the interests of the other party or to act otherwise than by having regard to self-interest.’

More recently, a court decision in New South Wales, *United Group Rail Services Limited v Rail Corporation New South Wales*⁵⁴ supported the concept of good faith and goes some way towards further developing the concept as it applies to parties and representatives in mediations. Allsop P closely considered how parties negotiate, and held that a contractual obligation to negotiate in good faith was binding:

One of the available tools of dispute resolution is the obligation to engage in negotiations in a manner reflective of modern dispute resolution approaches and techniques – to negotiate genuinely and in good faith, with a fidelity to the bargain and to the rights and obligations it has produced within the framework of the controversy. This is a reflection, or echo, of the duty, if the matter were to be litigated in court, to exercise a degree of co-operation to isolate issues for trial that are genuinely in dispute and to resolve them as speedily and efficiently as possible.⁵⁵

General, overarching conduct obligations in dispute resolution

Litigants may also be subject to broader, overarching obligations as participants in the civil justice system. These obligations may require parties to give *bona fide* consideration to alternative ways of resolving a dispute, although they do not directly impose any specific conduct standard, or even require participation in any particular form of ADR process. For this reason, though NADRAC’s enquiry under the reference is primarily concerned with the conduct of participants *within* ADR processes, NADRAC considers it necessary to also acknowledge some of these overarching obligations. They support the proposition that, in the context of court-ordered ADR, parties ought to participate in the process in good faith.

Federal Court of Australia Act 1973

As a result of changes introduced to the *Federal Court Act 1973* in November 2009,⁵⁶ new obligations are now placed on the Court, litigants and legal practitioners to facilitate the just resolution of disputes according to law, and to do this as quickly, inexpensively and efficiently as possible.⁵⁷ New provisions have also broadened the Court’s case management powers, including by allowing the Court to:

- refer parties to ADR
- require parties to narrow the issues in dispute
- limit the length of submissions or the number of witnesses, and
- set time limits for the completion of part of a proceeding.

54 [2009] NSWCA 177 (3 July 2009).

55 *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 (3 July 2009), para 79.

56 Access to Justice (Civil Litigation Reforms) Amendment Bill 2009.

57 Section 37M.

Section 37N imposes on parties to a civil proceeding before the Court a duty to ‘conduct the proceeding in a way that is consistent with the overarching purpose.’ Furthermore, the Court may take account of failure to comply with the duty in making an award of costs in a civil proceeding.

‘Genuine steps’ to resolve disputes under the Civil Dispute Resolution Bill 2010

The Bill requires disputants to consider options for resolution before commencement of proceedings. It requires parties to proceedings in the Federal Court of Australia or the Federal Magistrates Court to lodge a statement upon filing that sets out what steps they have taken to resolve their dispute or, if they have not taken steps, the reasons why not.⁵⁸ Lawyers will also be required to advise their clients of the requirement to file the genuine steps statement, and to assist their clients to comply.

The court can consider whether a statement was provided, and the information contained in the statement about what attempts have been made to resolve the dispute, when exercising its existing case management and costs powers.

The Bill does not require parties to take any specific step. It recognises that the most appropriate steps to take will depend on the circumstances of the particular dispute. It is deliberately flexible in allowing parties to tailor the genuine steps they take to the circumstances of their dispute.

Civil Procedure Act 2005 (NSW)

Following recent amendments, this Act includes explicit description of how participants can satisfy the requirement to take ‘reasonable steps’ to resolve their disputes or to clarify or narrow the issues involved in dispute.⁵⁹ Such steps can involve:⁶⁰

- notifying the other person of the issues in dispute and making an offer to discuss and resolve them
- responding to any such notifications
- exchanging information and documents necessary to reach an agreement, or
- taking part in some form of ADR, which could include mediation, expert determination, early neutral evaluation, conciliation or arbitration.⁶¹

The Act also allows the making of regulations that set out ‘pre-litigation protocols.’ The protocols will set out reasonable step requirements in a more detailed manner, as they apply to particular types of civil dispute.⁶²

58 There are exceptions to this requirement – where either the application of the requirement is not likely to be of any benefit (for example, where one of the parties has been declared a vexatious litigant), significant mandatory dispute resolution processes are already in place (for example, in native title disputes), or where the requirement would be inappropriate (for example, in civil penalty matters).

59 *Civil Procedure Act 2005* (NSW), subs18E(1).

60 *Civil Procedure Act 2005* (NSW), subs18E(2).

61 *Civil Procedure Act 2005* (NSW), s18A.

62 *Civil Procedure Act 2005* (NSW), s18C.

Model litigant obligations

The *Legal Services Directions 2005* (Cth) require Commonwealth government agencies to act as ‘model litigants’.⁶³ As part of this obligation, Commonwealth government agencies are required to consider other methods of dispute resolution before commencing litigation.⁶⁴ Further, when participating in ADR, Commonwealth agencies must ensure that their representatives participate ‘fully and effectively’, and have authority to settle the matters (subject to narrow exceptions).⁶⁵ The definition of ‘litigation’ extends to ADR processes, so that Commonwealth agencies are required to observe model standards of conduct when participating in ADR.

State and territory government agencies operate under similar model litigant obligations. For example, the Model Litigant Principles of the State of Victoria are to be found in the Standard Legal Services to Government Panel Contract, and are largely modelled on the Commonwealth version.

Obligations under EDR Schemes

In External Dispute Resolution (EDR) Schemes, members (eg banks and financial institutions) may be under contractual obligations to abide by certain conduct. Breach of these arrangements may affect financial or other licensing requirements.

2.3 Conduct of ADR practitioners

There are few statutory provisions prescribing the conduct of ADR practitioners.⁶⁶ Instead, ADR practitioners’ conduct may be regulated through a range of other mechanisms, including internal and external complaint systems, standards and guidelines set by employers and by ADR professional bodies. In addition, practitioners’ conduct can, to an extent, be stipulated through contracts. However, as discussed in other chapters of this Report, the application of widespread provisions dealing with inadmissibility and practitioner immunity may effectively shield the conduct of ADR practitioners from public scrutiny.

The NMAS requires all accredited mediators to comply with the NMAS Practice Standards, and adhere to the Ethical Standards of their member organisation. The Practice Standards provide a general framework for the conduct of mediation in Australia. They specify practice and competency requirements for mediators, and inform participants and others about what they can expect of mediation. These standards are intended to govern the relationship of mediators with the participants in the mediation, their professional colleagues, the courts and the general public, so that all will benefit from high standards in the practice of mediation.⁶⁷

63 *Legal Services Directions 2005* (Cth), Appendix B.

64 *Legal Services Directions 2005* (Cth), Appendix B, clause 5.1.

65 *Legal Services Directions 2005* (Cth), Appendix B, clause 5.2.

66 Other than those imposing obligations of confidentiality – see Chapter 3 (Confidentiality).

67 Australian National Mediator Standards – Practice Standards – September 2007.

The NMAS is a voluntary industry-based scheme. Furthermore, not all courts and tribunals are required to refer mediations to accredited mediators. The system relies on compliance by Recognised Mediator Accreditation Bodies (RMAB), which undertake to accredit their mediators in accordance with the Standards. An RMAB must have each of the following characteristics:

- more than 10 mediator members, accredited under the NMAS
- provision of a range of member services, such as an ability to provide access to or refer mediators to ongoing professional development workshops, seminars and other programs and debriefing, or mentoring programs
- a complaints system that either meets Benchmarks for Industry-based Customer Dispute Resolution or that can refer a complaint to a Scheme that has been established by statute
- sound governance structures, financial viability and appropriate administrative resources
- sound record-keeping in respect of the approval of practitioners and the approval of any in-house, outsourced or relevant educational courses, and
- the capacity and expertise to assess training and education that may be offered by a range of training providers in respect of the training and education requirements set out in the NMAS Practice Standards.

2.4 Views about statutory imposition of conduct obligations

It is useful to briefly describe the arguments commonly advanced about legislative imposition of conduct obligations in the context of ADR. Most of the discussion is targeted at mandatory mediation. In addition, most comments received on this part of the Reference relate to the conduct of participants in the dispute and their representatives, while only a few address conduct of ADR practitioners. Many of these arguments are interconnected and some overlap.

Appendices 2.3 and 2.4 summarise the principal views supporting and opposing the statutory imposition of conduct obligations on participants, their representatives, and ADR practitioners. Some of these views are canvassed in greater detail later in this section.

While there is some support in the submissions for mandating conduct obligations in ADR (particularly court-connected ADR), the majority of the submissions did not consider further legislative action necessary, and many foresaw problems with defining and enforcing statutory obligations. Several submissions suggested that participant conduct can be adequately managed by ADR practitioners. Some also suggested alternatives for supporting good conduct in ADR such as developing guiding principles and codes of conduct, as well as through further training for lawyers and ADR practitioners.

Interestingly, in respect of courts and tribunals which currently have some form of mandated conduct standard, no submissions were received to the effect that:

- the benefits were outweighed by the disadvantages
- the benefits and disadvantages were closely balanced, or
- for some other reason, the standard was unworkable or should be abolished.

Similarly, there was little support for changes in the formulation of particular stipulated standards, suggesting that stakeholders in the relevant area of dispute develop, over time, a broad level of comfort with whatever formulation applies to them.

2.4.1 Views supporting further statutory imposition of conduct obligations

Several submissions indicated the desirability of further legislative action to impose conduct obligations on participants. Other submissions noted other mechanisms for prescribing conduct.

One submission suggested that, if ADR processes were ordered by a court or were a statutorily required preliminary step in litigation, then statutory obligations regarding conduct during ADR may be appropriate.⁶⁸ Another submission supported a good faith requirement for ADR processes ordered by courts, such as mediations and conciliations. It was reasoned that this ‘serves to impose an obligation on parties which they may not otherwise consider and helps to establish an appropriate framework in which the mediation can be conducted.’⁶⁹ This submission also suggested the Federal Court Act should have a provision similar to the good faith requirement in section 27 of the New South Wales Civil Procedure Act, which states that ‘It is the duty of each party to proceedings that have been referred for mediation to participate, in good faith, in the mediation.’

2.4.2 Views opposing further statutory imposition of conduct obligations

NADRAC also received submissions that opposed further legislative action with regard to imposing conduct obligations. The reasons offered in submissions included the difficulty of defining conduct standards in legislation, the concern that it can lead to undesirable side effects,⁷⁰ the difficulty of enforcing conduct obligations, and general resistance to further statutory obligations being imposed on those who are already subject to statutory conduct obligations. Concern was expressed about the difficulty of judging whether participants act in good faith or undertake a dispute resolution process with genuine effort.⁷¹

Further, where participants are already subject to statutory conduct obligations, it was argued that further prescription is unnecessary.⁷² For example, ADR processes conducted in the Federal Court of Australia are subject to several conduct obligations, including statutory duties on parties in native title mediation, and an implicit obligation on parties to comply in good faith with any ADR process referred by the Court. In light of these existing conduct obligations, the Court did not support any further statutory codification. While any submission from the Court warrants the most careful consideration, it is not apparent to NADRAC why the public interest in the administration of justice is better served by keeping an obligation implicit, as opposed to making it explicit.

68 Submission – Australian Customs and Border Protection Service.

69 Submission – NSW Bar Association.

70 Concern was expressed, for instance, that introducing conduct obligations into conciliation processes governed by statute could ‘[chip] away at the core of the voluntary, confidential and impartial nature of the process’ (Submission – Victorian Health Services Commissioner).

71 Submission – ADRA.

72 Submission – Department of Human Services.

2.4.3 Suggested alternatives to manage participant behaviour

NADRAC received many suggestions for managing participant behaviour through mechanisms outside statutory obligations. These include training legal and ADR practitioners, making greater use of relevant guidelines, codes of conduct and professional standards, and prescribing conduct obligations in agreements to undertake ADR.

Several submissions supported the education of both legal and ADR practitioners as a means of dealing with conduct issues. There was much support for the compulsory training of law students in ADR processes and the introduction of nationally consistent rules about the conduct of lawyers in ADR processes (and enforced through the relevant Legal Services Commissioners).⁷³ It was reasoned that appropriately trained ADR practitioners should be able effectively to address conduct and behaviour issues with participants. Practitioners may choose to draw on guidelines setting out minimum standards as part of the ADR agreement to which participants consent at the start of the ADR process.

Other submissions observed that ADR practitioners with a legal background can sometimes import attitudes and practices from the legal industry into the process. It is therefore important for ADR practitioners to receive ongoing training in ADR to ensure a proper understanding of its essential character and elements.⁷⁴ This is also relevant for family law mediators who should have ongoing training in dealing with safety issues and power imbalances during mediation.⁷⁵

Other submissions suggested managing participant conduct through guidelines, conduct standards in private ADR agreements, other professional standards, and through ADR practitioners managing the participant conduct during the process.⁷⁶ One suggestion was that overarching conduct rules or obligations for ethical practice by ADR practitioners could be developed federally.⁷⁷ These may be based on ADR principles including procedural fairness, impartiality and an ethics-based approach to identified issues such as power imbalances between participants.

In private mediations, a term in the mediation agreement, which requires parties to mediate in good faith, is an important tool for a mediator during the mediation process. As one submission stated, to ensure the effectiveness and resilience of the framework within which parties conduct ADR processes, 'conduct obligations should be as simple as possible...[and] follow the ADR practitioner's direction regarding the process.'⁷⁸ Similarly, another submission recommended that the 'ADR practitioner should be required to conduct the process in accordance with the agreement of the parties and his or her ethical obligations as outlined in legislation, professional rules, or in any code of ethics to which he or she subscribes.'⁷⁹

73 Submission – NSW Bar Association.

74 Submission – Top End Women's Legal Services.

75 Submission – Shoalcoast Community Legal Centre.

76 Submissions – Health Services Commissioner, 5; Workers Compensation Commission NSW, Queensland Law Society.

77 Submission – National Legal Aid.

78 Submission – Victorian Civil and Administrative Tribunal.

79 Submission – Law Council of Australia. The Law Council of Australia has published *Ethical Guidelines for Mediators* to serve as a general ethical and practical framework for the practice of mediation.

2.5 NADRAC's view on the need for further legislative action

NADRAC approached the issue by reference to two broad categories of ADR processes referred to in the Introduction to this report: mandatory and private ADR processes.

NADRAC classified consent orders for ADR as mandatory ADR processes, on the basis that making these orders involves the exercise of binding judicial or executive power, even though the parties consent to the exercise of that power. Once a court or tribunal makes an order requiring parties to participate in ADR, compliance with that order cannot properly be regarded as wholly voluntary. Public interests are invoked when a court or tribunal orders parties to undertake ADR – in particular, the need for parties to act in ways which facilitate, rather than undermine, the objectives sought to be achieved by the order.

Apart from the public interests invoked when a court or tribunal orders parties to undertake an ADR process, NADRAC identified an additional practical reason for approaching the issue of conduct obligations by reference to the two broad categories of mandatory and private ADR. The Attorney-General's reference to NADRAC focussed on possible legislative reform of the federal civil justice system. Considerable constitutional implications would attend any attempt by the Commonwealth to impose conduct obligations on participants involved in private ADR processes.

2.5.1 Conduct obligations for disputants and their representatives in mandatory ADR

On balance, there is value in prescribing conduct standards for mandatory ADR in the federal civil justice system. In particular, NADRAC considers that disputants in such processes should be able to clearly identify expected standards of conduct. NADRAC observes that various forms of conduct obligation are already prescribed for many mandatory ADR processes, and these have apparently worked satisfactorily. Further, if either federal laws or orders of federal courts/tribunals require disputants to undertake an ADR process, there is probably an implicit obligation to do so in good faith. NADRAC considers that the integrity of ADR is supported by these obligations, to ensure that disputants are clear about what ADR involves. Also, NADRAC considers that the public interest in the administration of justice is best served by *expressly* recognising that participation in mandatory ADR should be undertaken in good faith.

However, NADRAC has not reached a consensus view on a preferred formulation for a conduct obligation. There are two sound alternatives: good faith and genuine effort. 'Good faith' appears to be the most widely prescribed conduct obligation in existing legislation (both in federal and in state/territory jurisdictions). Examples of its use can be found in the Native Title Act, the *Administrative Appeals Tribunal Act 1975* and the *Civil Procedure Act 2005* (NSW). There is extensive and authoritative case law interpreting 'good faith' standards, in a range of contexts, supporting the view that this standard appears to be working satisfactorily. Equally, however, 'genuine effort' (which is the standard applying under the *Family Law Act*) appears to have worked well in that jurisdiction. It has appeal as a standard that focuses on subjective behaviour, and may therefore be particularly suited to the nuances of ADR processes.

Ultimately, the majority view of NADRAC was slightly in favour of good faith.

As previously discussed, a common concern about statutory conduct obligations is the difficulty of developing, and consistently applying, a precise definition. To overcome this problem, some commentators have offered solutions such as a list of objective criteria or a list of 'bad faith' behaviour.⁸⁰ However, others argue that there is inevitably an element of subjectivity which prevents any standard from being precisely defined. NADRAC takes the view that it is not necessary for a statutory conduct obligation to be exhaustively defined in legislation. Indeed, NADRAC considers that any definition should be inclusionary.

One option is to define 'good faith' in terms which also capture the essence of 'genuine effort'. For instance, 'good faith' could be defined as including genuine effort to uphold various enumerated principles, such as:⁸¹

1. People have a responsibility to take steps to resolve or clarify disputes
2. Disputes should be resolved in the simplest and most cost-effective way
3. People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.

The primary function of a stipulated conduct obligation would be to make clear and remind ADR participants of the behaviour that is expected of them. Accordingly, a degree of flexibility in the content of the standard would enhance the integrity of ADR processes, and allow ADR practitioners to tailor the 'how' of good faith participation according to the circumstances of each dispute and its participants.

The Federal Court's submission noted that its Registrar mediators (all accredited under NMAS) rely on the flexibility provided by the current wording of the *Federal Court Act* and Rules to craft mediation processes that best suit the needs of the particular case.

Another significant concern about statutory conduct obligations is the difficulty associated with enforcement. Enforcing conduct obligations against either the participants or the ADR practitioner will inevitably require evidence to be given of who said what to whom in the ADR process. NADRAC agrees with submissions which suggest that this could be counterproductive and open the ADR process up to adversarial game-playing. It could also compromise the confidentiality of ADR processes and generate satellite litigation.

80 Sourdin notes that it may be easier to define 'bad faith' rather than good faith behaviour – See E Peden, 'The Meaning of Contractual 'Good Faith'' (2002) 22(3) *Australian Bar Review*, referring to *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 266. Astor has proposed a 'genuine effort' test – H Astor, 'Making a "Genuine Effort" in Family Dispute Resolution: What Does it Mean?' (2008) 22 *AJFL* 102. Academics in the USA have suggested that a definition of good faith should be based on objective standards, rather than on a participant's state of mind. Such standards would reflect the minimal criteria constituting good faith participation. These may include arriving at the mediation with an understanding of the issues, complying with procedural requirements and not lying when asked a specific question. See K Kovach, 'Good Faith in Mediation--Requested, Recommended, or Required? A New Ethic,' (1997) 38 *South Texas Law Review* 575, 615 and M Weston, 'Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality,' (2001) 76 *Indiana Law Journal* 591, 628.

81 Based on NADRAC's *National Principles for Resolution of Disputes* can be accessed on its website at <http://www.nadrac.gov.au>.

In recognition of these potential problems, NADRAC considers that any prescribed conduct obligations should ensure that enforcement, including determination of sanctions, is left to the discretion of the relevant court or tribunal. Indeed, NADRAC considers that:

- before any evidence is admitted for the purpose of enforcing a conduct standard, the party seeking its admission should be required to obtain the leave of the relevant court or tribunal, and
- in deciding whether to grant leave to admit evidence of this kind, the court or tribunal should be required to take into account the public interest in the confidentiality of ADR processes, and should only make an order if satisfied that it is in the interests of the administration of justice to do so.⁸²

These constraints, which are dealt with in more detail in other chapters of this report, would minimise any potential side effects of adversarial game-playing and satellite litigation, and help ensure the integrity of ADR processes. NADRAC considers that it is undesirable to allow participants to invoke confidentiality and inadmissibility in respect of conduct which, when measured against the public interest (and/or the administration of justice), should be the subject of consideration by the relevant court or tribunal.

NADRAC also considers that the proposed statutory conduct obligation should apply to disputants, representatives (eg lawyers), experts, and other people participating in ADR processes.

2.5.2 Conduct of disputants and their representatives in private ADR processes

The benefits of statutory conduct obligations must be carefully balanced against their potential side effects, particularly when the ADR is wholly private and consensual. In NADRAC's view, the balance in private ADR processes should be struck differently from that which NADRAC favours for mandatory ADR processes.

In contrast to mandatory ADR processes, there is widespread recognition that people who enter into private ADR processes are more likely to do so freely, and in a constructive manner. However, this is not always so. For example, many who attend ADR in industry-based external dispute resolution (EDR) schemes may not do so voluntarily – these schemes require banks and others to use the schemes, but not consumers. In addition, the emphasis on taking genuine steps to resolve disputes, which is likely to be introduced with the passage of the Civil Dispute Resolution Bill 2010 (Cth), may also have implications for disputants' conduct when undertaking ADR at the pre-filing stage. Nevertheless, NADRAC considers that freedom and flexibility should be preserved in this area. Mandating participant conduct in private ADR processes would be counter-productive. In light of this, NADRAC does not, at this time, recommend imposing statutory conduct obligations on participants in private ADR processes.

⁸² Other possibilities are to require the court/tribunal to be satisfied that it is in the public interest to grant leave to admit evidence, or to require the court/tribunal to apply a two-fold test that would allow leave to be granted only if it is both in the public interest *and* in the interests of the administration of justice to do so.

It may be helpful to develop and publish other non-legislative, standard-setting documents such as national principles, service charters and codes of conduct. These could help to clarify participants' expectations and encourage them to aspire to an appropriate standard of conduct. It could also serve as a useful tool in assisting ADR practitioners to manage participants' conduct. In addition, legal practitioner conduct may be more effectively regulated by a closer examination by professional bodies of appropriate conduct in all ADR processes (rather than by distinguishing between private and mandatory ADR processes).⁸³

Principle 3 of NADRAC's 'National Principles for Resolving Disputes'⁸⁴ states that 'People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.' NADRAC will develop a supporting guide for the Principles which will further set out expected conduct of professionals and participants in ADR processes. These principles are intended to be published widely to stakeholders in the civil justice system. Accordingly, NADRAC recommends that the Attorney-General write to government agencies, legal professional bodies and ADR accreditation bodies to encourage them to incorporate the Principles in all training and accreditation materials.

2.5.3 Conduct of ADR practitioners in private ADR processes

NADRAC does not consider any further statutory prescription of conduct obligations for ADR practitioners to be necessary. For similar reasons as explained above, NADRAC believes that such conduct obligations would restrict freedom and flexibility in ADR processes and open these processes up to adversarial game-playing. Instead, NADRAC sees greater benefit in regulating ADR practitioners through professional codes of conduct, such as the existing NMAS approach that applies to mediators. NADRAC encourages accreditation of all ADR practitioners, and recommends the development of professional codes of conduct for all other ADR practitioners.

2.5.4 Conduct of legal practitioners in private ADR processes

NADRAC noted in its 2009 'Resolve to resolve' report that 'where concerns have been raised about the conduct of participants in ADR, they seem most often to be about the conduct of some lawyers.'⁸⁵ The report further observed that some lawyers are alleged to exhibit undesirable behaviours in ADR processes, such as tightly controlling the communication processes, limiting the disputants' direct participation and unduly focussing on legal argument and issues. Such behaviours reflect and promote an adversarial culture and a lack of understanding of ADR. In NADRAC's view, these behaviours are most effectively addressed through further training and education for legal practitioners and law students.

⁸³ See section 2.5.4.

⁸⁴ See section 2.5.1.

⁸⁵ NADRAC, *The resolve to resolve: embracing ADR to improve access to justice in the federal jurisdiction*, Report 2009, 136.

NADRAC considers that further training of lawyers would be desirable to change thinking from a rights-based to an interest-based approach when participating in ADR, and to remind lawyers to advise clients:

- of available ADR options, their respective benefits and consequences
- that ADR processes, such as mediation, do not determine rights
- that, even if the process is required by legislation or an order of a court or tribunal, a resolution cannot be mandated (ie the parties retain the decision-making role), and
- of any relevant conduct obligations.

It may also be desirable for legal professional bodies to amend their codes of conduct or issue guidelines to define standards of practice for lawyers participating in ADR. For example, the Law Council of Australia and Law Society of NSW have already issued guidelines for lawyers involved in mediation.⁸⁶ It is important that the national reform of the legal profession does not omit or minimise the responsibility of lawyers to assist their clients to resolve disputes and maximise their use of ADR.

2.6 Recommendations

2.6.1 Where such a requirement does not already exist, legislation should be introduced which requires participants (disputants and their representatives) in mandatory ADR processes to participate in those processes in good faith.

2.6.2 The legislation should define ‘good faith’ inclusively, and capture the concept of a genuine effort to abide by enumerated ADR principles.

2.6.3 The legislation should explicitly require ADR practitioners in mandatory ADR processes to support ADR participants to comply with conduct standards.

2.6.4 Participants in private ADR processes should not be required, through legislation, to adhere to any prescribed conduct standard. Instead, consensual adherence to appropriate conduct standards in private ADR should be encouraged in other ways, such as through codes of conduct, industry standards, and community education.

2.6.5 Consistent with recommendations 6.5 and 6.6 of NADRAC’s ‘Resolve to resolve’ report, accreditation of ADR practitioners within the federal civil justice system should be encouraged by the federal government, and there should be professional codes of conduct developed in ADR areas where accreditation and standards have not yet been developed.

2.6.6 The federal government should encourage legal practitioners participating in ADR in the federal civil justice system to undertake further education and training about ADR.

2.6.7 The conduct of legal practitioners involved in ADR should be further promoted as part of ongoing reforms to the legal profession across Australia.

⁸⁶ See <http://www.nswbar.asn.au/docs/professional/adr/documents/LAWCOUNCILGUIDELINESFORLAWYERSINMEDIATIONS.pdf>

2.6.8 The Attorney-General should write to government agencies, legal professional bodies and ADR accreditation bodies to encourage them to incorporate the NADRAC Principles in training and accreditation materials (for instance, in compulsory ethics education).

Chapter 3: Confidentiality

3.1 Introduction

Confidentiality is regarded as an important, and sometimes defining, feature of many ADR processes.⁸⁷ Confidentiality of process is an important differential between ADR and judicial determination of disputes. Further, an assurance of confidentiality encourages meaningful participation and promotes good ADR outcomes. It can arise:

- by contractual arrangement between disputants (for example, in agreements to arbitrate or mediate)
- by operation of the common law or equity
- through legislation, or
- from professional codes of conduct for ADR practitioners.⁸⁸

The confidentiality of communications and documents⁸⁹ exchanged in the course of an ADR process may become an issue when an ADR participant⁹⁰ discloses to other parties information, documents or things discussed or exchanged during the ADR process. There are two main categories of such disclosure:

- disclosures made to third parties and to the world at large (discussed in this Chapter), and
- disclosures that occur in the course of litigation (discussed in Chapter 4 (Inadmissibility)).

As foreshadowed in the Introduction to this Report, the scope of confidentiality tends to be most at issue in mediation processes. Such questions are not, however, exclusive to mediation, and many of the principles discussed in this Chapter also apply to other ADR processes.

A further preliminary point to make is that the term ‘confidentiality’ is generally understood to refer to protection from disclosure, rather than from use. While many confidentiality clauses do deal with both disclosure and use, in the absence of specific provision, a confidentiality clause generally only operates to preclude disclosure of information.

⁸⁷ However, some ADR processes are non-confidential in their nature (eg early neutral evaluation).

⁸⁸ Hanger I, *Confidentiality and Admissibility of Communications Made in the Course of a Mediation*, paper delivered to Queensland Bar.

⁸⁹ Confidentiality prohibits disclosure or communication, not necessarily use of information as such – see *789TEN v Westpac Banking Corporation* [2004] NSWSC 594 (28 July 2004) and *Poulet Frais Pty Ltd v Silver Fox Company Pty Ltd* [2005] FCAFC 131. Even if parties have contracted for confidentiality, this will not necessarily prevent information being used.

⁹⁰ Including an expert witness, or other individuals present or ADR practitioner.

3.1.1 Aims of Chapter 3

This Chapter:

- identifies the sources and likely scope of confidentiality protections available in relation to information disclosed in ADR processes, and
- considers whether federal legislative intervention is warranted to better protect the integrity of ADR processes and, if so, what should be the scope of that intervention.

3.1.2 Structure of Chapter 3

Section 3.2 of this Chapter canvasses some key issues relating to the protection of confidentiality in mediation processes.

Section 3.3 describes the kinds of communications that may be protected.

Sections 3.4 to 3.7 describe the potential sources of confidentiality obligations.

Against that background, section 3.8 then examines the pivotal issue of whether federal legislative intervention is warranted to better protect the integrity of ADR processes.

Finally, section 3.9 sets out NADRAC's recommendations.

3.2 Issues

3.2.1 Lack of certainty about sources, application and scope of confidentiality obligations

Common circumstances in which the confidentiality of ADR communications can become an issue for ADR participants and practitioners (and thus put at risk the integrity of the process) include:

- where a participant wishes to challenge the fairness of an ADR process
- where a participant wants to disclose information gathered in an ADR process for commercial or other advantage not contemplated by the parties
- where a participant discloses information to the detriment of one of the parties or the practitioner in an ADR process
- where a participant wishes to challenge the professional judgement of a practitioner
- where a participant seeks to rely upon or use an expert who may have been involved in the ADR process, and who may be bound by an agreement that includes terms imposing confidentiality obligations⁹¹
- where a participant wishes to review the outcome of an ADR process or the ADR settlement agreement, and

⁹¹ For example, in a mediation or collaborative practice agreement which specifically excludes the ADR practitioners from future involvement.

- where an ADR participant alleges that an ADR practitioner is in breach of their ethical responsibilities, or is guilty of misconduct, and wants to make a complaint.

Confidentiality issues can also arise when a party wishes to refer to ADR processes in court proceedings. Issues arising in that context are discussed in Chapter 4 (Inadmissibility).

A significant and widespread issue that can adversely affect the integrity of ADR in Australia is the lack of certainty surrounding confidentiality. Uncertainty arises from, for example:

- the various possible sources of confidentiality obligations
- inconsistencies in the scope of confidentiality protection afforded by these sources, and
- uncertainty among practitioners and participants about the existence and scope of confidentiality obligations in particular circumstances.

Because confidentiality can arise from one or more sources, there is the potential for confusion among ADR participants, and for the imposition of conflicting obligations on ADR practitioners. For instance, reporting by mediators of criminal activities (or planned criminal activities) disclosed in the course of mediation may receive differing levels of protection, depending on which jurisdiction's laws apply.⁹² This variability of protection potentially, and unfairly, exposes ADR practitioners and participants to uncertainty, in circumstances where unauthorised disclosures can have grave consequences for the discloser, those to whom the information relates, and the confider of the information. Further, as Alexander observes, 'a false sense of confidentiality may not only cause damage to a party, it may impair the credibility of the mediation system in general.'⁹³

Legislative exceptions to confidentiality protection are also unclear and can vary greatly. For example, a common exception appears to be 'consent', allowing participants to agree to limit – or even waive – confidentiality. However, relevant provisions do not consistently specify whose consent is required and, furthermore, whether ADR practitioners can 'veto' a waiver of confidentiality.

3.2.2 Distinguishing between privacy of process and confidentiality of information

There is an important distinction to be made between the privacy of an ADR process and the confidentiality of ADR communications. The High Court made this distinction in *Esso Australia Resources Ltd v Plowman*.⁹⁴ The Court held that, while confidentiality is not an essential element of a private arbitration, the efficacy of arbitration depends in part on its private nature. However, a strong element of the appeal of ADR processes may lie in their confidentiality, relative to the public nature expected of adjudicative processes.

92 T Sourdin, 'Confessions, confessions... mediator obligations when someone fesses up' (2005) 7(6) *ADR Bulletin*, 1-2.

93 N Alexander, *International and comparative mediation: legal perspectives* (2009) 247.

94 *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 183 CLR 10. This case dealt principally with arbitration, and held that confidentiality was not an inherent feature of arbitration (and needed to be specifically provided for), although it acknowledged that confidentiality of arbitration plays an important role in the efficacy of arbitration. Equally, confidentiality is likely to play an important role in the efficacy of other forms of ADR, and can be strongly appealing to potential ADR participants.

Boulle summarises the distinction made by the High Court in *Esso*. According to Boulle, privacy refers to the physical and structural circumstances under which an ADR process is conducted, its security from external access and the extent to which members of the public can observe it.⁹⁵ Confidentiality refers to the subsequent access to, or exposure of, what transpired in the ADR process.⁹⁶ NADRAC's reference is concerned with the latter.

3.3 What communications are protected by confidentiality?

In addition to participants' disclosures and admissions, confidentiality may attach to a range of communications and documents created or shared in the course of ADR processes. As Alexander observes, in the context of mediation, confidentiality may extend to various aspects of the mediation process, including:

- information created or shared in a mediation joint session, such as the mediator's notes, and documents and visual material prepared for the purpose of mediation
- information provided to the mediator in a private session, phone call or email with one of the parties
- ideas for resolution, offers or settlement agreements
- observations of the behaviour and conduct of parties in mediation, and
- the reasons for failure to reach agreement at mediation.⁹⁷

3.4 Confidentiality protection through contractual arrangement

3.4.1 General

It is common for parties to mediations to enter into an agreement which stipulates the terms on which the process will be undertaken. In many cases, these agreements contain clauses that prevent participants and practitioners from disclosing to third parties information and documents that are used in an ADR session. In other instances, the confidentiality provision may be a stand-alone agreement. Such confidentiality agreements can bind both participants and, potentially, third parties who have notice of the agreement. Some clauses, however, do permit participants to discuss the ADR process with those directly affected by the process.⁹⁸

3.4.2 Express clauses to protect confidentiality in mediation

Confidentiality clauses in mediation contracts are typically drafted very broadly to 'reassure the parties that confidential information relating to the ADR process will be protected from disclosure outside of the process.'⁹⁹

95 L Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 542.

96 L Boulle, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 542.

97 N Alexander, *International and comparative mediation: legal perspectives* (2009) 248.

98 For example, the NSW Fair Trading, Retail Tenancy Unit Mediation Agreement.

99 G Hurley, 'Mediation where a Party Represents the Australian Government: Are there Limits to Confidentiality' (2006) 17 *Alternative Dispute Resolution Journal* 29.

Such clauses aim to protect information disclosed in mediation more completely than reliance on common law or statutory rules dealing with inadmissibility might allow. Confidentiality clauses are intended to ensure not only non-disclosure in court, but also non-disclosure by mediation participants to all third parties. Some clauses also seek to bind third parties who have notice of them, preventing them from making disclosures.

Some ADR participants are required to disclose information gained during an ADR process to their company manager, auditor, employer etc. Because of this, it is common for contracts to contain a term that permits participants to discuss ADR agreements and proposals with those directly affected by the process. Indeed, it is possible for such a contractual clause to enumerate matters to which confidentiality does not apply.¹⁰⁰

The enforceability of express confidentiality clauses has not yet been extensively considered by Australian courts. The circumstances in which courts will uphold such provisions, the extent of protection offered by such clauses, and the remedies a court will grant to remedy breaches, are all issues on which there does not yet seem to be a cohesive jurisprudence. At this point, litigation about these clauses is likely to be decided by courts according to their particular facts, the precise wording of the terms and conditions of the contract, and the applicable law.¹⁰¹

Express confidentiality clauses will not override statutory laws permitting disclosure or requiring confidentiality unless the operation of those clauses is preserved under the relevant statute.

3.4.3 Implying obligations of confidentiality in mediation contracts

Courts may be willing to imply confidentiality into contracts for mediation, if to do so would reflect the parties' intentions and implication of a confidentiality obligation is necessary to give business efficacy to a contract.¹⁰²

The analogy with 'without prejudice' privilege under the common law

The common law has traditionally recognised that statements made during genuine negotiations to settle a dispute cannot be put in evidence in subsequent proceedings without the consent of both parties.¹⁰³ This privilege may attach to communications in the absence of formal proceedings between the parties regarding the dispute. By analogy, confidentiality may therefore apply to mediation or other ADR processes, whether or not related litigation is on foot.¹⁰⁴

100 H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) 179.

101 This issue may become more relevant in emerging ADR processes such as collaborative practice, where there is no statutory framework.

102 This may be contrasted with the High Court position declining to imply contractual confidentiality protection into arbitration contracts: see the discussion of *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 183 CLR 10, below.

103 *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285. See also J D Heydon, *Cross on Evidence* (4th Aust ed, 2009) para [25350].

104 S McNicol, *Law of Privilege* (1992) 445.

There is a narrow view that without prejudice privilege under the common law only applies to communications relied on as admissions.¹⁰⁵ However, several more contemporary decisions have extended the scope of the privilege, reflecting evolving public policy which promotes the avoidance of litigation, or at least actions taken by parties to narrow down disputed issues as early as possible in proceedings. In *Lukies v Ripley*,¹⁰⁶ the New South Wales Supreme Court held that a conference conducted to settle only one aspect of a dispute attracts the privilege. In the *AWA* litigation,¹⁰⁷ it was confirmed that without prejudice privilege can apply to mediation. The House of Lords has also held that, to safeguard the public interest in protecting genuine negotiations, without prejudice privilege can extend to documents that would not be admissible in court.¹⁰⁸ These authorities tend to support the proposition that, while contractual provision may be necessary to support the existence of obligations of confidentiality in an arbitration, courts will be more likely to recognise the existence of such obligations in mediations and other non-adjudicative forms of ADR.¹⁰⁹

It is important to emphasise that without prejudice privilege under the common law only prohibits *testamentary* (ie evidentiary) reliance on communications made for the purpose of settling a dispute. Without prejudice privilege, when it applies, does not prohibit non-testamentary disclosures of ADR communications – such as disclosures to third parties or to the public at large. In short, without prejudice privilege is a common law evidentiary rule relating to the admissibility of communications to which it applies.

The different position in relation to contracts for arbitration

In *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)*,¹¹⁰ the High Court was invited to find that an arbitration contract contained an implied obligation of confidentiality. It declined to do so. This case involved the question of whether an arbitration participant was permitted to disclose to third parties documents which were disclosed to the participant in an arbitration, or whether an implied obligation of confidence precluded such disclosure. Some of the disclosed documents were commercially sensitive. There was no express provision for confidentiality in the arbitration agreement, nor was there a clause asserting that the arbitration was a private process. By majority, the High Court declined to imply a term that disclosure of documents and information communicated in arbitration was precluded. The Court rejected the argument that such a term could be implied into an arbitration agreement on the basis of custom or business efficacy.

In rejecting the argument for implied confidentiality, the High Court seemed to accept that an *express* contractual term creating an obligation of confidence would be enforceable.¹¹¹

105 *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285, 291.

106 *Lukies v Ripley* (1994) 35 NSWLR 283.

107 *AWA Ltd v Daniels (t/a Deloitte Haskins and Sells)* (1992) 7 ACSR 463 (Comm Div).

108 *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280. See also *Austotel Management Pty Ltd v Jamieson* (unreported, FCA, 7 June 1995).

109 However, where legal proceedings are not contemplated, or current, the position is less clear: see, for example, the discussion in *AWA Ltd v Daniels* (unreported, NSWSC, Rolfe J, 18 March 1992).

110 (1995) 183 CLR 10.

111 D Spencer and T Altobelli, *Dispute Resolution in Australia: cases, commentary and materials* (2005) 271.

Brennan and Toohey JJ, in dissent, also accepted that express confidentiality clauses would be enforceable.¹¹²

As discussed above, there is a line of authority suggesting that this restrictive approach may not apply to other ADR processes, such as mediation. Indeed, in *Esso*, Brennan and Toohey JJ favoured the implication of confidentiality obligations in mediation agreements.¹¹³ Further, before the decision in *Esso*,¹¹⁴ confidentiality of arbitration proceedings had been assumed.

3.5 Sources of confidentiality protection through equitable remedies

3.5.1 General

Equitable duties of confidentiality may arise in the context of someone receiving information which they know, or should know, is confidential. These obligations arise independently of contractual or statutory obligations.¹¹⁵ It has been suggested that a similar duty may apply in common law jurisdictions to communications in the course of mediation.¹¹⁶

3.5.2 Breach of confidence

ADR participants and practitioners may have recourse to equitable remedies for breach of confidence in relation to information or documents received in an ADR process. Equity will only recognise and enforce an obligation of confidence if each of the following conditions is satisfied:

1. The information must possess the ‘necessary quality of confidence about it’.
For the information to possess the necessary quality of confidence, it must not:
 - (a) be common knowledge, public property, or be in the public domain;¹¹⁷ and
 - (b) have lost its confidential status at any point up until the unauthorised use.¹¹⁸
2. The information must have been communicated in circumstances importing an obligation of confidence, and
3. There must have been an actual or threatened unauthorised disclosure of that information.¹¹⁹

112 *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 183 CLR 10.

113 *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 183 CLR 10.

114 (1995) 183 CLR 10.

115 See *Doe v ABC* [2007] VCC 281.

116 See Ramsay J in *Farm Assist Limited (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (N^o 2)* [2009] EWHC 1102 (TCC). There, it was held that, because there was an express agreement to confidentiality not only between the disputants, but also between the disputants and the mediator, the mediator’s consent was required before confidentiality could be waived.

117 Difficult questions can arise as to the point at which information can be said to have entered the public domain.

118 Equity may still intervene if the loss of confidentiality is solely attributable to the conduct of a person disclosing information in breach of a duty of confidence.

119 *Megarry J in Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47.

The law is unsettled as to whether damage or detriment to the confider, caused by disclosure or use of information, is an element of the equitable action, or whether breach of an equitable duty of confidence is actionable *per se* (that is, whether a claim may be made even without proof of loss or damage). In any event, it is likely that the establishment of detriment would be relevant to the discretion to grant relief.¹²⁰

There is a strong case for suggesting that a court of equity would take the view that communications made on a confidential basis, in an ADR process, would satisfy the necessary preconditions for the grant of relief.

3.6 Legislative sources of confidentiality protection

3.6.1 Legislation imposing obligations of confidentiality

General

Protection of confidentiality is afforded in a range of legislative schemes, indicating broad acceptance by Parliament that such protection plays an important role in encouraging disputants to engage in effective dispute resolution.¹²¹ However, there are no general, comprehensive federal statutory provisions preventing participants and practitioners from disclosing matters that are discussed during ADR processes. In addition, though various federal statutes prohibit the use of ADR communications as evidence (discussed in the Chapter 4 (Inadmissibility)), there are few provisions that protect the confidentiality of ADR communications in general by prohibiting disclosure to third parties.

Two areas of federal legislation that specifically provide for confidentiality can usefully be considered in this context. They are native title and family law.

120 L Boule, *Mediation: Principles, Process, Practice* (2nd ed, 2005) 552.

121 Examples include: *Family Law Act 1975* (Cth), s19N (no exceptions); *Federal Court of Australia Act 1976* (Cth), s53B (no exceptions); *Community Land Management Act 1989* (NSW), s70 (non-disclosure unless consent, necessary to administer legislation, to prevent danger/injury to person/property, for further referral, other law); *District Court Act 1973* (NSW), s164G (non-disclosure unless consent, necessary to administer legislation, necessary to prevent danger/injury to person/property, for further referral, other law); *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s89(2) (conciliator competent, not compellable); *Children Services Tribunal Act 2000* (Qld), s87 (no disclosure by ADR practitioner unless consent of all parties; risk of harm to child, injury to person or damage to property; and names of participants, details when and where ADR took place); *Magistrates Court Act 1991* (SA), s27 (mediator may not disclose except by law; statements 'in attempt to settle' inadmissible in 'the proceedings or related proceedings'); *Environment Resources and Development Court Act 1993* (SA), s28B (inadmissible in proceedings before courts); *Dispute Resolution Centres Act 1990* (Qld), s37(6) (inadmissible except consent, to prevent or minimise danger of injury to any person or damage to property, for further referral, for non party identifiable research, other law); *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s83 (conference held 'in private'; s85 (compulsory conference; anything said/done inadmissible unless contempt, perjury, sanctions for non-cooperation); s92 (mediation; inadmissible unless consent); Sch 1 (variations for various proceedings for specific acts, eg *Equal Opportunity Act*, inadmissible even if parties agree).

Native Title Act 1993

The *Native Title Act 1993* prescribes confidentiality obligations for those participating in mediations under the Act.¹²² Section 94L provides that the mediator *may* direct that:

- any information given or statements made at a conference, or
- the contents of any document produced at a conference,

must not be disclosed, except in such manner and to such other persons as the mediator specifies. However, if the parties agree, the mediator may, despite the direction, disclose such things.¹²³ This provision also has the effect of prohibiting the production of documents in a court, if the production would be contrary to such a direction or if a relevant application for a direction is still on foot.¹²⁴

Family Law Act 1975

Section 10H of the *Family Law Act 1975* imposes requirements on family dispute resolution practitioners to not disclose communications made during family dispute resolution, unless specific exceptions apply. This provision will be discussed in detail later in the report.¹²⁵

3.6.2 State/territory legislation

Various state/territory statutes afford confidentiality protection to communications made in ADR processes. The table at Appendix 3.2 sets out a selection of these statutory provisions and the scope of their confidentiality protection. As can be seen from the table, the levels of confidentiality protection/obligations prescribed by these provisions vary considerably.

3.7 ADR practitioners' codes of conduct

Practice standards impose on mediators a professional obligation to maintain the confidentiality of information obtained through mediation processes, subject to limited exceptions. These include:

- the Australian National Mediator Standards for mediators operating under the NMAS¹²⁶
- the Law Council of Australia, *Ethical guidelines for mediators*¹²⁷
- the NSW Law Society, *Guidelines for those involved in mediation*,¹²⁸ and
- the Law Council of Australia, *Australian Collaborative Practice Guidelines for Lawyers*.¹²⁹

122 *Native Title Act 1993*, s94L.

123 *Native Title Act 1993*, subs94L(3).

124 Submission – National Native Title Tribunal.

125 See Chapter 6 (Family Dispute Resolution).

126 The NMAS commenced in January 2008, and is a voluntary, industry-based scheme. It establishes minimum standards for all Australian mediators in relation to accreditation and practice irrespective of the nature of the dispute. Further information is available at: <http://www.msb.org.au/>

127 Available at: <http://www.nswbar.asn.au/docs/professional/adr/documents/LawCouncilEthicalGuidelinesforMediators.pdf>

128 Available at: <http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026438.pdf>

129 These guidelines will be launched by the Commonwealth Attorney-General in March 2011 and will be available, soon after, on the Law Council's website: <http://www.lawcouncil.asn.au/>.

3.8 Should parliament legislate for greater confidentiality protection in ADR processes?

NADRAC's view is that the Federal Parliament should legislate to expressly confer confidentiality on mandatory ADR processes in the federal civil justice system, clearly defining the scope and application of the obligation, the persons bound by it, and specifying the exceptions to the obligation.

NADRAC's view is that legislative provision is not warranted in relation to private ADR processes. Constitutional limits would be encountered with respect to legislation about ADR processes not connected to federal courts or tribunals, or which do not take place under federal laws. However, the proposed federal legislative provisions could usefully inform clauses for confidentiality protection included in ADR contracts, or be taken into account by state and territory legislatures in relation to ADR processes not connected to federal courts and tribunals.

This section canvasses the issue of further legislative intervention in detail, describing the views put to NADRAC during this reference, in submissions and through consultations, and explaining the basis on which the Council has developed its recommendations.

The submissions NADRAC received unanimously acknowledged that there are benefits in protecting the confidentiality of ADR communications. They supported the view that confidentiality not only provides an incentive for disputants to participate in ADR, but also encourages participants to engage in full and frank discussion during ADR processes. There was strong support for the statutory protection of confidentiality in ADR processes, subject to appropriate exceptions.

However, there was no agreement on the extent to which enhanced legislative protection is necessary, or on the precise form of further protection required. Accordingly, NADRAC has canvassed the arguments supporting, and those opposing, further legislative action by the Commonwealth.

3.8.1 Submissions supporting further legislative action

Several submissions observed that there are various sources of confidentiality protection and that the levels of existing statutory confidentiality protection in federal and state legislation are inconsistent. Submissions suggested that, for instance, legislation could better define the scope of confidentiality protection, reducing the ambiguity and uncertainty that currently exists,¹³⁰ and which arises from a range of factors.¹³¹ Several submissions also considered that uniform statutory confidentiality provisions would enhance participant confidence in ADR processes.¹³² This would offer additional assurances about confidentiality and, at the same time, strike a fair balance between legitimate competing public policy considerations.¹³³

130 For example, submissions from ADRA, NSW Department of Justice and Attorney General, Robyn Carroll, Queensland Law Society.

131 For example, the submission from the Health Services Commissioner, Victoria.

132 Submission – ADRA.

133 Submission – Public Transport Ombudsman Victoria.

A potential remedy for this inconsistency would be, it was suggested, uniform statutory arrangements providing for confidentiality and specifying allowable disclosures.¹³⁴

In framing a potential model provision, the ADR Directorate of the Victorian Department of Justice suggested that the provision should apply broadly to all ADR processes and considered that:

...introducing different confidentiality provisions for each separate ADR process may create confusion. The various types of ADR processes exist along a 'process continuum' and the differences between them are not always clear-cut.

3.8.2 Submissions opposing further legislative action

A range of submissions argued that existing legislative arrangements were adequate. They argued that legislation may lead to unintended consequences that undermine the desired policy outcomes,¹³⁵ and there is no empirical evidence supporting a need for further legislative action.¹³⁶

3.8.3 Suggested exceptions to legislated obligations of confidentiality

If Parliament were to legislate to confer express confidentiality on ADR communications, it would be necessary to consider what exceptions should apply. There is undoubtedly a compelling public policy interest in protecting the integrity of ADR processes by recognising that most communications in that context should be confidential. But other, equally compelling, public policy considerations are brought into play during and after ADR processes. These considerations support the recognition of carefully calibrated exceptions to enable ADR communications to be conveyed to appropriate third parties (for example, employers or law enforcement agencies).

Many submissions offered suggestions on the circumstances in which ADR participants should be allowed to disclose ADR communications to a third party. One submission suggested that, as an overarching consideration, legislated confidentiality obligations should not impinge on participants' and practitioners' ability to take action (ie, make disclosures) where public interest requirements dictate that action is required.¹³⁷

Participants' consent

Most submissions acknowledge that participants in an ADR process should be able jointly to waive confidentiality. However, views differ as to whether the ADR practitioner's consent should also be required. Some submissions express the view that 'the ADR process is the parties' process'¹³⁸ and that 'ADR is about parties having control over the outcome.'¹³⁹ On this view, confidentiality in the process must necessarily belong to the participants, and its waiver should not require the practitioner's agreement.

134 Submissions – ADRA, NSW Department of Justice and Attorney General, Robyn Carroll.

135 Submission – Federal Court of Australia.

136 Submission – Administrative Appeals Tribunal.

137 Submission – Department of Human Services.

138 Submission – Law Council of Australia.

139 Submission – Top End Women's Legal Services.

Others, however, argue that participants should not be able to waive confidentiality without the consent of the ADR practitioner.¹⁴⁰ One argument supporting this position is that, where there is a clear power imbalance between participants, the ADR practitioner's veto may be a necessary safeguard of the interests of the weaker participant.¹⁴¹

To protect the safety of a participant or third party

Several submissions noted that disclosure of information that should otherwise be confidential may be necessary to protect the safety of an ADR participant or a third party. Therefore, any legislative confidentiality provisions should include exceptions that allow disclosures in relevant (prescribed) circumstances. Suggested formulations of such an exception included:

- where there is a risk to the safety of a party or a member of the public, and disclosure is likely to reduce that risk¹⁴²
- to address 'violence or threats of violence'¹⁴³
- to protect 'public safety',¹⁴⁴ and
- to prevent the commission of an offence.¹⁴⁵

To report the commission of a criminal offence

Some submissions went further, and canvassed exceptions underpinned by broader public policy interests in upholding the law. Some submissions, for example, suggest that another exception should be where serious criminal offences are committed or disclosed during an ADR process.¹⁴⁶ Similarly, there were submissions suggesting that, where fraud or other serious misconduct takes place during an ADR process, disclosure to a relevant authority should be permitted.¹⁴⁷

As required by law

Another suggested exception would give explicit statutory authorisation for any disclosure that is required by law. Some submissions observed that some matters revealed during ADR processes may already be subject to specific disclosure obligations under other laws.¹⁴⁸ Any proposed confidentiality provision should afford explicit protection to disclosure in these circumstances.

A specific example given in the Department of Human Services' submission was that Commonwealth government agencies are bound by certain reporting and disclosure

140 Submission – NSW Bar Association.

141 Submission – Health Services Commissioner Victoria.

142 Submission – Health Services Commissioner Victoria.

143 Submission – Victorian Civil and Administrative Tribunal.

144 Submission – Health Services Commissioner Victoria.

145 Submission – Victorian Bar.

146 Submissions – ADR Directorate of Victorian Department of Justice, Health Services Commissioners, Queensland Law Society, Australian Customs Service.

147 Submission – ADR Directorate of Victorian Department of Justice.

148 Submissions – Victorian Civil and Administrative Tribunal, Queensland Law Society.

obligations. Such agencies will not be able to guarantee that ADR communications will not be disclosed to third parties, such as the Office of Legal Services Coordination when investigating a breach of the *Legal Services Directions 2005*, or the Ombudsman conducting a review.

Establishing misconduct by an ADR practitioner

Several submissions observed that it would be undesirable for confidentiality provisions to shield ADR practitioners from complaints of misconduct or fraud (at least where such conduct results in outcomes that are harsh, unconscionable or unjust).¹⁴⁹ These submissions suggested that there should be an exception to allow the substantiation or determination of a complaint against an ADR practitioner.

Enforcement of an agreement

The ADR Directorate of the Victorian Department of Justice submitted that, where an agreement has been reached as a result of an ADR process, disclosure to a court of the terms of the agreement should be permissible. In the absence of such disclosure, it may become impossible to enforce an agreement. However, this is more an issue of admissibility, which is dealt with in Chapter 4.

3.8.4 NADRAC'S view on the need for further legislative action

General

A general, consistent standard of confidentiality protection in the federal civil justice system would be desirable. As discussed below, however, NADRAC draws a distinction between mandatory and private ADR for these purposes.

In respect of mandatory ADR, an assurance of confidentiality may encourage participants to engage in full and frank discussion. Ensuring that the public, particularly ADR participants, have a clear understanding of the law of confidentiality as it applies to ADR communications is a prerequisite for achieving both realistic expectations of the process and effective, constructive outcomes. To achieve this understanding, consistent laws are needed to define the existence and scope of confidentiality obligations owed by participants and third parties in respect of communications in mandatory ADR processes.

Mandatory processes

NADRAC therefore considers that a uniform legislative provision should be introduced to confirm the existence, and prescribe the scope, of confidentiality within mandatory ADR processes. This would provide a clear direction to participants in these ADR processes as to what is expected of them and of others involved in the processes.

NADRAC further considers that confidentiality obligations should extend to both practitioners and participants. Unless participants can be assured that their ADR communications will not be used against them, they will be reluctant to engage in full and frank discussions.

¹⁴⁹ Submission – ADR Directorate of Victorian Department of Justice.

Statutory protection could take the form of a general legislative provision with wide application, subject only to express legislative exceptions. NADRAC does not recommend that any specific penalty be attached to the proposed confidentiality provision. Penalty provisions in this context run the risk of generating satellite litigation. Enforcement can be left to courts' discretion (for example, courts can issue an injunction to stop parties going to the media or to the general public). Legislation in this area should permit courts to make such orders as they think fit in respect of breaches and apprehended breaches of confidentiality obligations.

Exceptions to legislative confidentiality protection

NADRAC acknowledges that any statutory confidentiality protection must allow exceptions to accommodate the legitimate needs of the participants, and public interests. Principled exceptions would enhance the integrity, credibility and desirability of ADR processes.

Application of the proposed provisions

The provision would need to acknowledge existing, more specific legislation regarding confidentiality. As noted above, comprehensive bodies of legislation and dispute resolution regimes are already in place in family law and native title. Any general statutory protection for confidentiality should be expressed so as not to displace these more specific provisions.

Private ADR – why further legislative intervention is not warranted

There are four principal reasons why NADRAC does not consider federal legislative intervention, in respect of private ADR processes, to be justified. These are:

1. Unlike mandatory ADR processes, there is widespread recognition that people who enter into private ADR processes do so voluntarily. Therefore, a level of freedom and flexibility should be preserved, and participants should be able to agree to the level of confidentiality they wish to adopt.
2. There is no conclusive evidence that contractual protection of confidentiality in private ADR processes is unsatisfactory, and that legislative intervention is therefore justified.
3. There are issues in identifying a constitutional head of power to support a general Commonwealth provision encompassing all private ADR processes.
4. Legislative intervention may impose a static formulation on private ADR. Key characteristics of private ADR are its voluntariness and flexibility – its ability to transform and evolve over time, and to accommodate individual circumstances. Legislative intervention may undermine these characteristics, and damage the capacity of private ADR to meet the needs of disputants.

Nevertheless, NADRAC considers it beneficial to develop, and promote the use of, non-binding and standard-setting principles about confidentiality. These principles would mirror the statutory formulation proposed for mandatory ADR processes, and could be incorporated into ADR contracts.

3.9 Recommendations

3.9.1 Legislation should be introduced which expressly protects the confidentiality of mandatory ADR processes in the federal civil justice system, unless those processes are intended to be conducted on an ‘open’ basis (eg ‘town-hall’ type ADR processes). The legislation should apply both to participants and ADR practitioners engaging in mandatory ADR processes in the federal civil justice system.

In particular, the legislation should provide that no communications in the course of such ADR processes can be disclosed to non-participants, subject to specified exceptions that reflect countervailing interests of participants, third parties, or the community generally.

Legislation in this area should permit courts to make such orders as they think fit in respect of breaches and apprehended breaches of confidentiality obligations.

3.9.2 Legislation should also specify a range of exceptions, to allow disclosure of communications within a mandatory ADR process in the federal civil justice system:

- to lessen or prevent a serious and imminent threat to an individual’s life, health or safety (whether or not the individual is a participant in the ADR process)
- to lessen or prevent a serious threat to public health or public safety
- to lessen or prevent a serious threat of damage to property
- with the consent of all persons in dispute
- when required to do so by law
- to enable ADR practitioners and participants to obtain legal, medical or psychological advice
- to report professional misconduct to the relevant regulating or accrediting body (eg lawyers, ADR practitioners)
- to inform those with a legitimate and direct interest in the process (for example, family members of disputants, Cabinet (if the Federal Government is a disputant), company officers and employers)
- to enforce an outcome of an ADR process
- to provide de-identified information for necessary administrative, research, supervisory or educational purposes, and
- by leave of a court or tribunal, if the court or tribunal is satisfied that disclosure is necessary to protect the administration of justice or the public interest (for example, where it is alleged on reasonable grounds that the outcome of an ADR process was materially affected by fraud, or by misleading or unconscionable conduct, and where that conduct has caused damage to a disputant).

Confidentiality obligations under this legislation should apply to ADR practitioners and participants. The legislation should not override existing, more specific legislation (eg in family law and native title). However, if NADRAC’s recommendation is adopted, NADRAC recommends a review of relevant provisions in the Family Law Act and Native Title Act to achieve as much consistency as possible.

3.9.3 The Federal Government should encourage the incorporation of similar protections in private ADR contracts.

NADRAC does not recommend statutory intervention to prescribe confidentiality protections for private ADR. It is important to protect the flexibility and participant self-determination of private ADR; legislating in this area has the potential to undermine these important characteristics. Further, constitutional limits would impinge on any federal legislation directed to ADR processes unconnected to proceedings before federal courts and tribunals.

Instead, participants in private ADR processes should be encouraged to agree on confidentiality protections between themselves. However, the legislative formulation described in Recommendation 3.9.1 could usefully be drawn on as a model for such agreements, and could prompt careful consideration by parties of confidentiality issues in the context of resolving their disputes. Moreover, if Recommendation 3.9.1 is adopted, NADRAC could draft a contract clause that is consistent with the legislation.

Chapter 4: Inadmissibility

4.1 Introduction

The term ‘admissibility’ relates to whether evidence of things said or done, or admissions made, can be admitted into evidence in legal proceedings and relied on by parties to the proceedings.¹⁵⁰

As noted in Chapter 2 (Conduct), confidentiality and admissibility are two different things. Confidentiality, if it applies, operates to prohibit disclosure of information to any person for any unauthorised purpose. Admissibility is only concerned with evidentiary reliance on information before court and tribunals.

The concept of ‘admissibility’ applies, strictly speaking, to legal proceedings before courts to which the rules of evidence apply. However, it is common to also refer to tribunals receiving ‘evidence’, even though the rules of evidence do not apply to constrain the information or material to which a tribunal is permitted to have regard. Where the term ‘admissibility’ is used in this Report, it is intended to refer to evidentiary reliance upon information before a court or tribunal, regardless of whether the rules of evidence apply.

As is the case in relation to confidentiality, the rules governing what is admissible, and the exceptions to those rules, derive from diverse common law principles and legislative provisions. Potential inconsistencies and confusion arising from this circumstance may harm the integrity of ADR processes, and undermine existing policy directions to have disputes resolved as early as possible and, if practicable, without (or with minimum) recourse to litigation.

As outlined in Chapter 3 (Confidentiality), arbitration is subject to its own schemes covering admissibility and confidentiality and therefore does not form a part of this Reference. Thus, ADR processes that are discussed in this Chapter should not be read to include arbitration.

4.1.1 Aims of Chapter 4

The aim of this Chapter is to consider whether, having regard to the existing admissibility rules that relate to ADR processes, there is merit in the Commonwealth legislating to introduce uniform or consistent provisions to establish what things or matters arising in ADR are admissible or inadmissible. NADRAC has considered the implications of such legislative reform on practitioners’ and participants’ conduct during ADR processes. The recommendations emerging from NADRAC’s investigation of these questions are set out at the end of this Chapter.

¹⁵⁰ Inadmissibility of ADR material does not mean that ADR communications (eg material held by ADR practitioners) cannot be subpoenaed. It means that a court cannot take material into account.

4.1.2 Structure of Chapter 4

Section 4.2 of this Chapter considers common law rules against admissibility – the so-called ‘without prejudice’ privilege – and how these rules may apply to ADR communications.

Section 4.3 of this Chapter examines relevant statutory modifications of common law rules.

Section 4.4 considers the compellability of ADR practitioners as witnesses, as well as the admissibility of their evidence in circumstances where practitioners are compellable.

Section 4.5 summarises key points arising from submissions received by NADRAC about admissibility, and section 4.6 sets out NADRAC’s views, from which emerge the recommendations described in section 4.7.

4.2 Common law privilege precluding admissibility

4.2.1 General

What is a privilege?

A privilege is a right to resist disclosing communications and documents that could otherwise be ordered to be disclosed in a court or tribunal and relied on as evidence in the adjudication of a dispute. An ADR participant may seek to rely on a privilege to preclude admission into evidence of a communication made (or document created) for the purpose of an ADR process.

Communications and documents that are disclosed in the course of, or created in preparation for, an ADR process may be inadmissible if a party to the ADR process can claim a privilege over the communications or documents, in accordance with the common law or legislation.

Privilege may also apply at a point in time before adducing evidence (eg to resist production of documents before a trial on subpoena/summons, by way of discovery or answering interrogatories).¹⁵¹

What privileges may be relied on to protect ADR communications?

The two main relevant bases that may protect ADR communications from admissibility are:

- without prejudice privilege under the common law, and
- provisions such as s131 of the *Evidence Act 1995* (Cth) which, where it applies, displaces the common law in favour of a statutory code.¹⁵²

Legal professional privilege *may* have some application to confidential disclosures to an ADR practitioner, but that topic is outside the scope of this Report. It is clear that, if legal professional privilege applies to a communication, it operates as a substantive rule of law

¹⁵¹ Australian Law Reform Commission, *Review of the Uniform Evidence Acts – s.13 privilege*, Discussion Paper 69, paragraph 13.1.

¹⁵² This legislation has been reflected in whole, or at least partially, in state and territory jurisdictions.

which, among other things, precludes evidentiary reliance on a communication (unless the privilege is waived).¹⁵³

4.2.2 Without prejudice privilege

Without prejudice privilege renders inadmissible oral and written communications (including admissions) made in good faith for the purpose of settling a dispute. Such communications will be inadmissible in subsequent court proceedings, unless consent to the disclosure has been given by both parties.¹⁵⁴

Young J offered a formulation of the privilege in *Lukies v Ripley (No.2)*:¹⁵⁵

If parties have attempted to settle the whole or part of litigation and if they have agreed between themselves expressly or impliedly that they will not give in evidence any communication made during those discussions, then public policy makes those discussions privileged from disclosure in a court of law or equity.¹⁵⁶

The relevant public policy is that which encourages full and frank participation in good faith attempts to settle a dispute and avoid litigation.

It is generally thought that the privilege applies only to civil proceedings and does not extend to criminal conduct, breaches of certain legislation, such as the *Trade Practices Act 1974* (Cth), or representations ‘that are not objectively part of, nor reasonably incidental to, the settlement negotiations.’¹⁵⁷

Application to ADR of without prejudice privilege – scope and limitations

Where participants have entered into an ADR process to negotiate a settlement, then without prejudice privilege may protect from admissibility the confidential information exchanged within, or for the purposes of, that ADR process.

Without prejudice privilege has been expressly held to apply to mediation,¹⁵⁸ consistent with the public policy that litigants should be encouraged to settle their disputes.¹⁵⁹ There appears to be no basis for doubting the application of the privilege to other ADR processes.

It has also been held that the privilege is available for mediation, and potentially other ADR processes, that aim simply to reduce the ambit of the litigation, rather than being aimed at settling the entire dispute.¹⁶⁰

153 It is unlikely that a communication made to an opposing disputant in an ADR process would attract the application of legal professional privilege. While that privilege would apply to communications between a lawyer and client for the purpose of an ADR process, once information is communicated to an opposing disputant – whether in an ADR process, or by filing and serving a statement in legal proceedings, legal professional privilege is likely to cease to apply. See, for example, *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32.

154 *Field v Commissioner for Railways* (NSW) (1957) 99 CLR 285.

155 *Lukies v Ripley* (No 2) (1994) 35 NSWLR 283.

156 *Lukies v Ripley* (No 2) (1994) 35 NSWLR 283, 287 per Young J.

157 G Hurley, ‘Mediation where a party represents the Australian Government: are there limits to confidentiality?’ (2006) 17 *Australian Dispute Resolution Journal* 29 at 31.

158 *AWA Limited v Daniels (t/a Deloitte Haskins & Sells)* (1992) 7 ACSR 463.

159 See *Rush and Tompkins Ltd v Greater London Council* (1989) AC 1280.

160 *Lukies v Ripley* (No 2) (1994) 35 NSWLR 283 at 287 per Young J.

Specific legislation relating to confidentiality in mediation, or indeed any other ADR process, will override common law rules about admissibility.

Courts have considered limitations on, and exceptions to, application of without prejudice privilege to mediation processes which are likely to also apply to other ADR processes.

The privilege only operates to protect oral or written *communications* made in, or for the purpose of, an attempt to settle all or part of a dispute. It does not attach to the underlying information itself. This distinction between communications, and the information contained in those communications,¹⁶¹ was conceptualised by Rolfe J in *Field v Commissioner for Railways (NSW)* and elucidated by McDougall J in *789TEN v Westpac*.¹⁶²

Generally, a party will not be prevented from leading evidence of a fact or matter merely because it was first learned of during mediation if there is available admissible evidence of that fact or matter which exists independent of the mediation process.¹⁶³ Parties may therefore follow a line of inquiry about which they learned at mediation, but may not prove an admission or statement made at mediation. For example, if during mediation a party shows another party a document that is not otherwise privileged, then that document does not attract without prejudice privilege simply because it was disclosed during the mediation. What may be privileged, however, is the fact that it was communicated during the mediation.

In Australia, an exception to the privilege exists where a party is seeking to rely on the privilege to escape liability for unlawful conduct. For example, in *Quad Consulting Pty Ltd v David R Bleakly and Associated Pty Ltd*,¹⁶⁴ it was held that notes exchanged at a settlement meeting were discoverable because the notes referred to allegations of deceptive and misleading conduct on the part of the person claiming the privilege.

Further exceptions have been upheld by Australian courts, to allow the admission of evidence:¹⁶⁵

- to prove cost determinations¹⁶⁶ or that a settlement was reached¹⁶⁷
- to prove misrepresentation,¹⁶⁸ oppression,¹⁶⁹ or unconscionable conduct by a party¹⁷⁰
- to have a settlement set aside on grounds of misleading conduct¹⁷¹

161 A distinction drawn also in relation to the protection conferred by obligations of confidentiality: see Chapter 3 (Confidentiality).

162 *789Ten v Westpac* [2005] NSWSC 404.

163 *AWA Ltd v Daniels (t/as Deloitte Haskins & Sells)* (1992) 7 ACSR 463.

164 *Quad Consulting Pty Ltd v David R Bleakly and Associated Pty Ltd* (1990) 98 ALR 659.

165 As set out by N Alexander, *International Comparative Mediation: Comparative Perspectives* (2009) 270 and A Limbury, 'Should there be a distinct 'Mediation Privilege'?' (2007) *LEADR Update*, 3. Viewed 10 January 2011, <www.leadr.com.au/update/update14sept07.htm>.

166 *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137.

167 *Barry v City West Water Ltd* [2002] FCA 1214.

168 *Williams v Commonwealth Bank* [1999] NSWCA 345.

169 *Abriel v Australian Guarantee Corporation Ltd* [2000] FCA 1198.

170 *Pittorino v Meynert* [2002] WASC 76.

171 *Quad Consulting Pty Ltd v David R Bleakly and Associates Pty Ltd* (1990–1991) 98 ALR 659.

- where a party issues legal proceedings against their solicitor in relation to professional misconduct, or where defendant solicitors in such cases join counsel and the mediator, seeking contributions as joint tortfeasors¹⁷²
- to prove admissions or statements relating to criminal conduct¹⁷³
- where specifically provided for by statute to prove breaches of particular legislation such as the *Trade Practices Act 1974* (Cth),¹⁷⁴ and
- to lead in evidence representations that are not objectively part of, or not reasonably incidental to, the settlement negotiations.¹⁷⁵

Does communication to an ADR practitioner amount to waiver of a privilege?

Waiver is constituted by conduct which amounts to the forgoing of a right to keep certain information confidential.¹⁷⁶ Waiver can be express, or can be implied from the participant's conduct.¹⁷⁷ The issue of whether disclosure of legal advice by a disputant to an ADR practitioner constitutes a waiver of the legal professional privilege raises the further issue of whether, after this has happened, the other party may compel the production of such advice in subsequent litigation.¹⁷⁸ There has been no conclusive judicial decision on this point in Australia. Some guidance has been given in two cases which seem to suggest that a court would likely find the privilege is not waived where a client discloses privileged information to an ADR practitioner.¹⁷⁹ This position is consistent with the public policy of encouraging effective ADR by assuring participants that their full engagement in the process, and with the practitioner, will not prejudice them in subsequent litigation.

4.3 Statutory privileges

Communications made in an ADR process may also be inadmissible in subsequent legal proceedings on the basis of statutory inadmissibility provisions. These provisions override common law privileges to the extent of any inconsistency. Statutory privileges may be found in specific provisions, such as those dealing with ADR processes ordered by courts and tribunals, or they may be in the form of general provisions in Evidence Acts. Specific provisions will usually override general provisions contained in Evidence Acts.

172 *Tapoohi v Lewenberg and Ors* (N° 2) [2003] VSC 410 (21 October 2003).

173 Law Institute of Victoria, *Mediation – A Guide for Victorian Solicitors* (1995) 41.

174 G Hurley, 'Mediation where a party represents the Australian Government: are there limits to confidentiality' (2006) 17 *Australian Dispute Resolution Journal* 29, 31.

175 Law Institute of Victoria, *Mediation – A Guide for Victorian Solicitors* (1995) 41.

176 *Re Stanhill Consolidated Ltd* [1967] VR 749, 752.

177 *Attorney-General (Northern Territory) v Maurice* (1986) 69 ALR 31, 39.

178 See F Crosbie, 'Aspects of confidentiality in mediation: a matter of balancing competing public interests' (1995) 2 *Commercial Dispute Resolution Journal* 51, 62.

179 *Buttes Gas and Oil Co v Hammer (No 3)* [1980] 3 All ER 475 and *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 289; *Szhy v Minister for Immigration and Citizenship* [2007] FCAFC 64.

4.3.1 Federal legislation

There is a range of federal legislation affording statutory privilege to things said or done during ADR processes. Some of the most significant include s131 of the *Evidence Act 1995* (Cth), s53B of the *Federal Court of Australia Act 1976* (Cth), s34E of the *Administrative Appeals Tribunal Act 1975* (Cth), and s94D of the *Native Title Act 1993* (Cth). Some aspects of these provisions, and case law concerning them, are canvassed below. A more comprehensive list of relevant federal legislation is in Appendix 4.1.

Evidence Act, s131

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. It is a provision of general application to proceedings in federal courts, unless its operation is excluded by a more specific admissibility provision. Section 131 provides a substantial number of exceptions (see Appendix 4.1). Many of the exceptions have a basis in common law (eg ‘without prejudice’ privilege), but some exceptions modify the common law. Where it applies, s131 has been held to leave no room for the application of without prejudice privilege under the common law.

Section 131 was considered by the Federal Court in *Silver Fox Co Pty Ltd v Lenard's Pty Ltd*.¹⁸⁰ There, the Court admitted into evidence a mediation agreement which contained several express confidentiality clauses. The agreement was admitted because it was held to fall within the exception to inadmissibility set out at paragraph 131(2)(h). That exception permits admission into evidence of communications or documents that are relevant to determining liability for costs. The decision confirmed that paragraph 131(2)(h) overrides any confidentiality clauses in an ADR agreement, no matter how unambiguous the agreement. Mansfield J took the view that the public policy justification for ss131(1) of the Evidence Act is to prevent communications about settlement negotiations being adduced into evidence ‘for the purpose of influencing the outcome on the primary matters in issue,’¹⁸¹ and that:

The effect of s131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved....There is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communications, whether by the use of the expression ‘without prejudice’ or by a mediation agreement.¹⁸²

Thus, once the substantive issues in dispute have been determined by a court, it was held that there is no public policy reason why documents and communications could not then be admitted for the purpose of determining liability for costs.

NADRAC does not think there should be a blanket, unqualified exception to the inadmissibility of ADR communications simply because, for example, a dispute relates to a question of costs. For that reason, NADRAC prefers a more restrictive approach to exceptions to the general rule.¹⁸³

180 *Silver Fox Co Pty Ltd v Lenard's Pty Ltd* [2004] FCA 1570.

181 *Silver Fox Co Pty Ltd v Lenard's Pty Ltd* [2004] FCA 1570, 36.

182 *Silver Fox Co Pty Ltd v Lenard's Pty Ltd* [2004] FCA 1570.

183 See the discussion at section 4.6.2, under ‘Exceptions.’ Further, in NADRAC’s view, the costs exception in s131 is undesirably broad.

Federal Court Act, s53B – and its relationship to without prejudice privilege

In *Pinot Nominees Pty Ltd v Commissioner of Taxation*,¹⁸⁴ the Federal Court dealt with the interaction between the inadmissibility provisions of the Federal Court Act and s131 of the Evidence Act. The case concerned the admissibility of evidence of offers of compromise exchanged during court-referred mediation. A party sought to lead evidence of these exchanges on the question of costs. The Court held that, because the mediation was court-referred under s53A of the Federal Court Act, s53B of that Act prevented the admission of the evidence. The Court further held that a party could rely on an offer of compromise made in a ‘without prejudice’ letter sent to the other party after the mediation. The effect of this decision is to:

- reduce the chances of a mediator becoming involved in a dispute about a party’s conduct at the mediation, appropriately separating the mediation from the actual court proceeding
- diminish any expectations that it is the mediator’s role to sanction bad conduct by a disputant (while recognising that it is the mediator’s role to assess the conduct of parties to ensure the effectiveness of the mediation). This allows the mediator to preserve the integrity of their particular role, and to be perceived by the parties as doing so, while also preserving the possibility of adverse consequences for a party’s unreasonable conduct, and
- properly position with the aggrieved party responsibility for seeking redress for another disputant’s poor conduct during ADR.¹⁸⁵

Native Title Act, ss94D(4)

Subsection 94D(4) of the Native Title Act provides that 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 on referral from the Court. This is, however, subject to the parties’ agreement to the contrary unlike the provisions of the Federal Court Act, discussed above. The provision only deals with admissibility in the Federal Court. In its submission to this reference, the National Native Title Tribunal observed that the Act provides for several statutory exceptions to the conferral of inadmissibility:

First, if the Tribunal member conducting the mediation considers that a party to a proceeding does not have a relevant interest in the proceeding, the member may refer to the Court the question of whether the party should cease to be a party to the proceeding. The ‘without prejudice’ restriction does not apply to the extent that words spoken or acts done at a mediation conference relate to that question....

Second, subsection 94P(4) also provides that the ‘without prejudice’ principle does not apply where the member conducting the mediation reports to the Court what he or she considers to be a breach of the requirement for parties and their representatives to act in good faith in relation to the conduct of mediation. This is discussed further under ‘conduct obligations’ below.¹⁸⁶

¹⁸⁴ *Pinot Nominees Pty Ltd v Commissioner of Taxation* [2009] FCA 1508.

¹⁸⁵ Submission – Federal Court of Australia, 3-4.

¹⁸⁶ Submission – National Native Title Tribunal, 4.

4.3.2 State and territory legislation

Each state and territory has legislative provisions preventing verbal or documentary communications made in an ADR process from being admissible in subsequent litigation. These provisions also contain extensive exceptions. Some of the provisions are cast broadly enough to relate to all ADR processes, while others refer to specific ADR processes, such as mediation. Very few of these statutory arrangements have been judicially considered. However, there is extensive discussion of some of these provisions in some New South Wales cases.¹⁸⁷

The table in Appendix 4.2 sets out a selection of these provisions. As with state and territory legislation regarding the confidentiality of ADR communications (considered in Chapter 3 (Confidentiality)), the scope of protection against admissibility varies greatly.

4.4 ADR practitioners as witnesses

The law of inadmissibility in relation to ADR communications encompasses, albeit indirectly, the issue of the compellability of ADR practitioners as witnesses in subsequent legal proceedings. In the absence of a statutory privilege against compellability, there is no common law principle that would lead to ADR practitioners not being compellable.

Currently, no federal legislation affords ADR practitioners a general exemption from compellability. However, it is unlikely that, in practice, ADR practitioners would be called to give evidence in circumstances where the statutory privileges in section 4.3 apply. Further, parties may agree not to call their ADR practitioner as a witness.

4.5 Views expressed in submissions

Few submissions commented specifically on the merits of further legislative action regarding the inadmissibility of ADR communications. Some did, however, support a consistent legislative approach to the admissibility of things said or done during an ADR process. It was further suggested that statutory rules regarding non-admissibility should not differentiate in their application between mandatory and private ADR processes.

A majority of the submissions agreed that, similar to confidentiality, inadmissibility of ADR communications promotes full and frank discussions in the course of ADR processes, and that candid discussion is a prerequisite for effective ADR. Many also acknowledged that, in some instances, competing interests require that certain ADR communications should be admissible. Accordingly, several submissions suggested exceptions that should be included in a statutory inadmissibility provision.

¹⁸⁷ See *State Bank of New South Wales v Freeman* (unreported, NSWSC, Badgery-Parker J, AL No 30101 of 1995, 31 January 1996); *Rajski v Tetran Corp Pty Ltd* [2003] NSWSC 476; *Wentworth v Rogers* [2004] NSWCA 109.

These included:

- *with the consent of the participants*¹⁸⁸ – similar to the proposed exception canvassed in Chapter 3 (Confidentiality), this proposed exception would recognise that ADR processes belong to the participants. However, the NSW Bar Association pointed out that ‘admissibility is a legal principle and not a matter of interparty agreement’ and therefore admissibility cannot be determined by the participants. It nevertheless considered that ‘the fact that all parties, including the mediator, agree may be a matter that the court takes into account in exercising its discretion to admit or reject evidence’¹⁸⁹
- *where the conduct of parties is being investigated*¹⁹⁰ – for example, where a disputant seeks to show that another disputant failed to attend an ADR process.¹⁹¹ The NSW Department of Justice and Attorney General, however, considered that admitting evidence from mediation to prove that a party had failed to participate in ‘good faith’ (on a question of costs) could raise more complex issues, particularly where participants are required by legislation to participate in the mediation in good faith¹⁹²
- *where the conduct of practitioners is being investigated*¹⁹³ – though it is not clear whether the submissions contemplated admissibility in court proceedings, or simply that such communications should be made available to professional bodies investigating the alleged misconduct
- to prove *terms of settlement*¹⁹⁴
- admissions relevant to *criminal offences*¹⁹⁵
- *disclosure required by law* – in some instances, criminal law offence provisions or anti-terrorism legislation may allow or require communications from ADR processes to be led in evidence¹⁹⁶
- to prevent *harm* to a person, and
- other limited circumstances, such as the exceptions included in s131 of the Evidence Act, not referred to above.

Several submissions also discussed the appropriateness of ADR practitioners giving evidence. There was no consensus on this issue. However, many submissions considered that ADR practitioners should have the benefit of protection from compellability.

188 Submissions – NSW Department of Justice and Attorney General, Law Council of Australia, Health Quality and Complaints Commission.

189 Submission – NSW Bar Association, 5.

190 Submission – Health Services Commissioner.

191 Submission – Victorian Civil and Administrative Tribunal.

192 Submission – NSW Department of Justice and Attorney General.

193 Submissions – Health Services Commissioner and NSW Law Society.

194 Submission – Victorian Civil and Administrative Tribunal.

195 Submission – Australian Customs Service.

196 Submission – Law Society of NSW.

One submission explained the reason for this:

The ADR practitioner could find themselves in a very awkward position having to be a witness in court which would impact on their ability to get on with their work. It might also damage their image as confidential ADR practitioners so that future clients may lose faith in them.¹⁹⁷

4.6 NADRAC's view

4.6.1 Admissibility of ADR communications

NADRAC considers that disclosures made in ADR processes should generally be inadmissible in evidence in proceedings. Inadmissibility is an important legal protection of the ADR process.

Inadmissibility of ADR processes encourages frank discussions and meaningful negotiations during ADR processes. 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. For disputants to continue to have faith in ADR processes and to continue to freely and meaningfully participate in them, it must not be possible for admissions or apologies made in such processes to be used against them later (except in limited circumstances). The inadmissibility of ADR communications potentially allows for more flexible and creative solutions to a dispute.

Inadmissibility can help to prevent ADR processes from being used as fishing expeditions. Inadmissibility can also help to prevent courts being used as a further battleground to pursue disputes previously vented during ADR processes.

Admitting evidence of ADR sessions into court proceedings could also undermine the conceptually 'alternative' nature of ADR. If inadmissibility were not the default position, ADR might come to be viewed as just another component of, or step in, litigation.¹⁹⁸

4.6.2 Should federal parliament enact uniform admissibility provisions?

All Commonwealth legislation must be supported by a head of power under the Constitution. The Commonwealth can enact legislation dealing with the admissibility of evidence of ADR communications in proceedings before:

- federal courts and tribunals, whether or not the evidence relates to:
 - private ADR processes
 - ADR processes connected to proceedings before state or territory courts and tribunals, or
 - ADR processes connected to proceedings before federal courts and tribunals, and
- state and territory courts and tribunals where an ADR process is undertaken pursuant to an order of a federal court or tribunal.

¹⁹⁷ Submission – Health Services Commissioner.

¹⁹⁸ NADRAC, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*, Report 2006, also noted that what happens in an ADR session may be of no relevance to the dispute itself. This strengthens the argument against admissibility.

Beyond these two broad categories, Commonwealth legislation is likely to encounter ‘head of power’ difficulties.

There would be significant benefit in having uniform federal, state and territory legislation that clearly provides for the inadmissibility of ADR communications as the general rule, subject to leave being granted by a court in the public interest. In deciding whether leave should be given, a court or tribunal should be required to take into account:

- the general public interest in favour of preserving the confidentiality of ADR communications, and
- whether leave is being sought to advance a party’s interests or rights with respect to a matter falling within an exception to confidentiality.

This is consistent with the recommendations made in Chapter 3 (Confidentiality). Essentially, the same considerations apply. Currently, arrangements for both confidentiality and admissibility exist across a patchwork of (sometimes) overlapping common law principles and statutory provisions. This can lead to uncertainty and confusion among disputants and practitioners, placing at risk the integrity of ADR processes. NADRAC’s approach would closely align the question of inadmissibility with the issue of confidentiality.

However, in view of the constitutional constraints, NADRAC has confined its specific legislative recommendations to the two broad areas of admissibility identified above, other areas being matters for the states and territories to address. NADRAC nevertheless recommends that liaison take place with the states and territories about introducing standardised admissibility provisions across Australia.

Exceptions

Provisions precluding admissibility of ADR communications should include an exception, based on a court or tribunal granting leave.

NADRAC does not support the enumeration of unqualified exceptions to inadmissibility, along the lines of the approach taken in s131 of the Evidence Act. Unqualified exceptions allow ADR processes to be opened up for public ventilation in circumstances which may too readily be justified. Examples might include: to agitate a minor or ill-conceived complaint or claim, to bully or harass another party or the mediator, to embarrass a public figure or for some other ulterior motive. This undermines the integrity of ADR.

Accordingly, Parliament should confirm inadmissibility as the general rule for ADR communications and permit only one exception: in circumstances where a court or tribunal gives leave for ADR communications to be admitted or disclosed. Further, Parliament should require that discretion be exercised by a court or tribunal only after taking into account:

- whether any of the exceptions to confidentiality described in Chapter 3 (Confidentiality) are present, and
- the administration of justice.

This would have the effect of displacing s131 of the Evidence Act in relation to limited categories of ADR communications (discussed above in section 4.2.3). Parties should not be able to lead evidence of ADR communications merely on the basis that they successfully ‘tick a box’ in the form of a legislated exception and, in doing so, undermine a key characteristic of ADR. NADRAC would therefore recommend a policy-based approach rather than rights-based exceptions to admissibility. Furthermore, this approach is reflected in Recommendation 4.7.1, which is dependent on the implementation of Recommendation 3.9.1 in Chapter 3 (Confidentiality).

The principal purpose of inadmissibility provisions should be to protect the participants in the ADR processes, and not the ADR practitioner. Accordingly, rules about inadmissibility should be framed to ensure that they do not protect ADR practitioners from the consequences of misconduct.¹⁹⁹ Conversely, however, if there is a complaint or suit against an ADR practitioner, inadmissibility rules should not prevent the practitioner from mounting a defence.

4.6.3 ADR practitioners as witnesses

Generally, ADR practitioners should not be compellable witnesses. If ADR practitioners could subsequently be called to give evidence about the ADR process, the informality of the ADR process might be compromised, and practitioners may feel reluctant to actively participate in resolving disputes. This could also reduce participants’ trust in ADR practitioners and processes.

However, NADRAC recognises that it may be appropriate to allow ADR practitioners to give evidence in exceptional circumstances. This should, however, require leave of the court, to be granted taking into account:

- the exceptions to confidentiality described in Chapter 3 (Confidentiality)
- whether the parties consent to the ADR practitioner giving evidence, and
- whether compelling the ADR practitioner is necessary for the administration of justice.

Requiring leave of the court would still allow for the maintenance of ADR practitioners’ impartiality and participants’ confidence in the practitioner during the ADR process.

4.7 Recommendations

Admissibility of communications in ADR required by federal legislation, or ordered by a federal court or tribunal (ie ‘federally-mandated ADR’)

4.7.1 In implementing the recommendations made in Chapter 3 of this Report, Parliament should also legislate to clarify the circumstances in which ADR communications occurring in, or for the purposes of, ADR required by federal legislation, or by an order of a federal court or tribunal, can be:

¹⁹⁹ Thus avoiding the outcome of *Cassel v The Superior Court of Los Angeles County (Wasserman, Comden, Casselman, & Person, LLP – Real Parties in Interest)* Case No. B215215.

- admitted into evidence in any proceedings before any court (whether the court is a federal, state or territory court), or
- disclosed in any proceedings before any tribunal (whether the tribunal is a federal, state or territory tribunal).

To some extent, implementing this Recommendation would, in the context of federally-mandated ADR, displace both s131 of the Evidence Act and s53B of the Federal Court Act.

4.7.2 The general rule should be that such ADR communications cannot be admitted or disclosed, as the case may be, without the consent of the disputants.

4.7.3 The legislation should, however, allow a court or tribunal to give leave to admit or disclose ADR communications, taking into account:

- whether leave is sought to enable a party to protect a right or interest which is reflected in any exception to confidentiality recommended in Chapter 3
- the general public interest served by maintaining the confidentiality of the communications, and
- whether admission or disclosure would serve the administration of justice.²⁰⁰

Admissibility and disclosure of other ADR communications before a federal court or tribunal

4.7.4 Parliament should also legislate to provide that communications which occur in the course, or for the purposes, of any other form of confidential ADR processes cannot, without the disputants' consent, be admitted or disclosed, as the case may be, in proceedings before a federal court or a federal tribunal.

4.7.5 The general provision described in Recommendation 4.7.4 should be subject to allowing admission or disclosure for the purposes of seeking the leave of a federal court or tribunal to admit or disclose evidence of such ADR communications.

4.7.6 The legislation should allow a federal court or tribunal to give leave to admit or disclose ADR communications, taking into account:

- whether leave is sought to enable a party to protect a right or interest which is reflected in any exception to confidentiality recommended in Chapter 3
- the general public interest served by maintaining the confidentiality of the communications, and
- whether admission or disclosure would serve the administration of justice.

²⁰⁰ This would, for example, allow admission or disclosure of evidence for the purposes of enforcing an outcome of ADR. Thus, evidence of the making of an agreement, and of the terms of that agreement, could be admitted or disclosed with the leave of a court or tribunal. For discussion of the desirability of allowing admission or disclosure of such evidence, see, for example, *Al-Hakim v Monash University and Others* [1999] VCS 511.

ADR practitioners as potential witnesses

4.7.7 The legislation should provide for a general rule that ADR practitioners are not compellable to give evidence of ADR communications before federal courts and tribunals, subject only to the leave of a court or tribunal. In considering whether to grant leave, federal courts or tribunals must take into account the factors enumerated in Recommendation 4.7.6.

Further national reforms

4.7.8 The Attorney-General should liaise with state and territory counterparts to encourage them to consider introducing uniform admissibility provisions across Australia.

Chapter 5: Practitioner immunity

5.1 Introduction

Debate about whether ADR practitioners should have the benefit of immunity from being sued²⁰¹ is not new. NADRAC considered aspects of this issue in its 2005 joint advice with the Family Law Council on practitioner immunity under the *Family Law Act 1975* (Cth)²⁰² and its 2006 report *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*.²⁰³ NADRAC has now been asked to specifically consider this question.

At the outset of this Chapter, it is important to recognise that the policy arguments for and against the conferral of immunity differ depending upon whether an ADR process is conducted by a private practitioner or by court staff.

5.2 Sources of immunity for ADR practitioners

There is no general immunity from legal action for ADR practitioners. However, immunity from liability 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.²⁰⁴

5.2.1 Common law

The common law extends immunity to judges, other participants in the judicial system, quasi-judicial officers, and to bodies such as tribunals. In very limited circumstances, this immunity may extend to ADR practitioners, particularly those engaged in determinative roles.²⁰⁵

201 The term 'immunity' is used in various areas of the law to indicate an immunity to civil action in respect of rights and duties which otherwise exist in the law: *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 555-556. In other words, immunity provides protection from suit, including from civil liability. See also D I Bristow QC, 'The gathering storm of arbitrators' and mediators' liability' (2000) *The Arbitration and Dispute Resolution Law Journal* 312, 315.

202 A copy can be obtained at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_JointLetterofAdviceonImmunityforFamilyCounsellorsandFamilyDisputePractitioners

203 A copy can be obtained at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_Legislatingforalternativedisputeresolution

204 NADRAC, *Legislating for alternative dispute resolution: A guide for government policy-makers and legal drafters*, Report 2006, 63.

205 In *Najjar v Haines* (1991) 25 NSWLR 224, it was held that a referee appointed under Pt 72 of the *Supreme Court Rules 1970* (NSW) had judicial immunity. The referee had failed to disclose his interest in one of the parties to the action and this founded a claim of apprehended bias. The referee was sued for costs of the lost hearing. The role of the referee was compared to that of arbitrators and others involved in judicial proceedings. The judge concluded that public policy required a grant of judicial immunity taken from R Carroll, 'Mediator immunity in Australia' (2001) 23 *Sydney Law Review* 185, 197.

However, it is widely accepted that common law immunity does not generally apply to ADR practitioners.²⁰⁶

5.2.2 Statute

There are two kinds of statutory immunity.

Absolute immunity gives unconditional protection to those persons or classes of persons to whom it applies (eg judges). Actions cannot be brought against persons who have absolute immunity.

Qualified immunity gives protection in respect of a specific duty or liability. Additionally, or in the alternative, the protection may be conditional. If conferred upon ADR practitioners, qualified immunity may require ADR practitioners to prove they acted in good faith, without fraud, or were carrying out the statutory purposes of the legislation. This will generally require the person relying on qualified immunity to defend the claim in court, and bear the onus of proving that they acted within the conditions of the immunity

There are currently no immunity provisions of general application in relation to ADR practitioners. However, there are specific statutory arrangements that provide immunity for some ADR practitioners. Some provide the same immunities as those given to a judge. Some ADR practitioners who are employed by government (including courts) will be protected to the extent that they act within the normal course of their duties.

Various federal, state and territory laws confer immunity on ADR practitioners.²⁰⁷ However, there is no cohesive approach to the conferral of immunity upon ADR practitioners in federal legislation. As NADRAC observed on mediator immunity:

The position around the country on the immunity of mediators is a varied one. There is no general statute at state or federal level that confers immunity on all mediators working within the jurisdiction. However, under some specific statutes, mediators have an absolute immunity in relation to work done in relation to mediation associated with that legislation.²⁰⁸

Most federal legislation in this area relates to mandatory ADR processes. These processes can be conducted either by court-employed staff or private practitioners. The constitutional limitation on Commonwealth legislative power probably explains confinement of immunity provisions to ADR practitioners conducting mandatory ADR processes.

Appendix 5.1 gives an overview of some of the relevant federal legislative provisions.

Various state and territory statutes also confer immunity on ADR practitioners. Appendix 5.2 summarises some relevant legislative provisions.

206 R Carroll, 'Mediator immunity in Australia' (2001) 23 *Sydney Law Review* 185, pp 185 and 186. 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 to claim the immunity.

207 See also *Federal Court of Australia Act 1976* (Cth), *Federal Magistrates Act 1999* (Cth), *Administrative Appeals Tribunal Act 1975* (Cth), *Civil Procedure Act 2005* (NSW), *Supreme Court of Queensland Act 1991* (Qld) and *Legal Profession Act 2007* (Tas).

208 NADRAC and Family Law Council, *Joint Letter of Advice on Immunity for Family Counsellors and Family Dispute Practitioners*, 2005, 2.

5.2.3 Contract

Immunity from liability may be conferred by contractual agreement between the participants of an ADR process and the ADR practitioner. The conferral of immunity through contractual clauses is common in private ADR contracts, and is frequently relied on by ADR practitioners both in Australia and internationally.

Depending on the participants' intentions, these clauses may take the form of an absolute or qualified immunity.²⁰⁹ The validity of these clauses depends on the nature of the liability sought to be excluded, and the applicable law.²¹⁰ Because such clauses limit liability, they are generally construed strictly against an ADR practitioner.

Some examples of contractual immunity clauses can be found at Appendix 5.5.

5.2.4 Other sources of immunity

Statutory complaints handling and ombudsman schemes typically provide immunity for those administering the schemes. To some extent, the schemes overlap with the scope of NADRAC's reference – as ADR processes are often conducted as part of these schemes. However, as the schemes are broader than ADR processes and those administering the schemes have broader functions than conducting ADR, the immunity granted under those schemes has not been examined for this reference.

5.3 Potential circumstances that could give rise to ADR practitioner liability

Complaints against ADR practitioners that could raise liability issues include:

- parties being misled about the purpose or nature of an ADR process
- breaches of confidentiality
- qualifications or suitability of an ADR practitioner
- appropriateness of ADR for the dispute (eg in cases involving violence)
- duress, undue influence or undue pressure by an ADR practitioner
- if parties feel they could have achieved a substantially better outcome other than through the ADR process
- negligence in drafting the settlement agreement
- defamation
- incorrect legal advice offered by an ADR practitioner
- bias of an ADR practitioner, and
- ADR practitioners failing to disclose conflicts of interest.

²⁰⁹ T Sourdin, *Alternative Dispute Resolution* (2008) 236.

²¹⁰ A contract may apply the law of a jurisdiction other than that in which the contract is made.

5.4 Potential causes of action against ADR practitioners

In the absence of immunity, civil actions that may be brought against an ADR practitioner could include:

- breach of contract²¹¹
- tort (such as negligence)
- breach of professional obligations, discrimination and harassment
- breach of fiduciary duty (this may involve determining whether the ADR practitioner had a position of power and influence that would warrant fiduciary status),²¹² and
- misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth) or state/territory fair trading laws.²¹³

In facilitative ADR processes, such as mediation, practitioners make procedural (not substantive) decisions. They do not perform judicial or quasi-judicial functions. As a result, there are limited avenues under which a participant can bring a cause of action against the practitioner.

In advisory ADR processes, practitioners give advice and may be more susceptible to claims of negligence, bias and fraud. However, immunity cannot be justified on that basis alone, as many other professionals who provide advice, such as legal and medical practitioners, engineers and accountants, are not immune from suit.

Few ADR practitioners have been sued in Australia. However, action has been taken against a mediator on the basis that the mediator applied undue pressure on the parties to agree and breached a duty of care owed to the client.²¹⁴ As the use of ADR has increased, so too does the likelihood of legal action being taken against ADR practitioners.²¹⁵

211 NADRAC has noted that an action for breach of contract could include a breach of implied conditions. For example, the *Fair Trading Act 1987* (NSW), s40S (which is based on the *Trade Practices Act 1974* (Cth), s74(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 the *Civil Liability Act 2002* (NSW), s5O(1) and the *Wrongs Act 1958* (Vic), s59(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.

212 See also R Clark, 'The writing on the wall: the potential liability of mediators as fiduciaries' (2006) *Brigham Young University Law Review*, 113, and R Fisher, 'Mediation and the fiduciary relationship' (1997) *Australian Bar Review*, 16, 25.

213 R Carroll, 'Mediator immunity in Australia' (2001) 23 *Sydney Law Review* 185, 189.

214 *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. The Court concluded that there was an arguable case against the mediator and refused to grant the application for summary judgment.

215 In the USA between 1999 and 2003, there were four cases where a mediator was named as a defendant. This is in contrast to a 95% increase in 'mediation litigation' over the same period. See DVC McMeekin, *Suing Mediators – A Gathering Storm*, paper delivered at the Janus Club Meeting, July 2007, paragraph 3.

Even where immunity is not provided for by contract or legislation, it is difficult to bring an action against an ADR practitioner. The confidentiality of ADR processes and the general inadmissibility of anything said or done in ADR processes²¹⁶ make it difficult to lead the evidence necessary to justify an action against a practitioner.²¹⁷

5.4.1 Liability in contract

In private ADR processes, ADR practitioners are retained on the basis of agreements setting out the rights and obligations of the participants and the ADR practitioner. In general, the obligations imposed on ADR practitioners tend to be about:

- the exercise of reasonable care and skill in the performance of their role
- impartiality, and
- confidentiality.

Non-fulfilment of these obligations may result in liability for breach of contract, even though such claims are difficult to establish and the legal consequences are compensatory, not punitive. ADR practitioners may also owe the participants some duty of care if a provision to that effect is agreed under the contract. Liability may arise where the ADR practitioner falls short of the agreed standard. However, the standard of care required by the contract may be difficult to determine, because ADR agreements can contain a variety of terms and expressions that can be written, implied or orally agreed. This is especially the case for agreements that commonly refer to external ADR rules or codes.

5.4.2 Liability in tort

ADR practitioners may also be liable in tort. Such claims include negligence, defamation or 'statutory torts' arising out of anti-discrimination legislation. In the case of negligence, for example, plaintiffs must show that:

- they were owed a duty of care by the ADR practitioner – depending on how an ADR process is conducted, and the kind of ADR in question, a participant may have a special vulnerability to an ADR practitioner
- the duty of care was breached, and
- the breach caused foreseeable losses to the client. This includes showing that the participant has genuinely suffered damage²¹⁸ and that the practitioner's conduct²¹⁹ caused that damage.

216 See Chapter 2 (Conduct) and Chapter 3 (Confidentiality).

217 See, for example, *State Bank of NSW v Freeman* (NSW Supreme Court, Badgery-Parker J, 31 January 1996), where the defendant argued that, despite engaging in mediation that resulted in an executed agreement, a certificate issued under the *Farm Debt Mediation Act 1994*, certifying that a satisfactory mediation had taken place, should be set aside and the mediation reconvened. The defendant argued that the mediator had exceeded his proper functions and subjected the defendant to 'sustained and unconscionable duress'. The Court said that 'section 15 would prevent a court from embarking upon an examination of what took place in the course of a mediation session' and that the matter would be 'hamstrung to the point of impossibility'. See R Carroll, 'Mediator immunity in Australia' (2001) 23 *Sydney Law Review* 185, 212.

218 The precise form of which need not be foreseen.

219 Not the conduct of the participants.

In mediation, where the parties are responsible for making the final decisions, it will be difficult to establish a causal link between the actions of the mediator and any losses to the participant.

5.4.3 Liability for breach of fiduciary obligations

There is significant debate over whether an ADR practitioner could be liable for a breach of fiduciary obligations. Broadly, fiduciary obligations are obligations of trust and confidence that arise in certain relationships that can be described as ‘fiduciary relationships.’²²⁰ The essence of a fiduciary relationship has been described in reciprocal terms as ‘seen in the power the fiduciary holds to influence the affairs of the principal for good or ill and the trust which the principal places in the fiduciary to use that power for the principal’s benefit.’²²¹ Further, P D Finn (as he then was) explained that in a fiduciary relationship, ‘the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship.’²²²

Academic commentators continue to disagree over whether ADR participants have such expectations of ADR practitioners. Moffitt considers it highly unlikely.²²³

...there would need to be a degree of judicial adaptation which was unlikely to be forthcoming to extend fiduciary obligations into the realm of mediation, and that there is the structural difficulty of asserting that a mediator owes simultaneous fiduciary obligations to participants with opposing interests.²²⁴

In contrast, Clark argues that:

In at least some mediation proceedings a strong argument could be made that mediators owe some degree of fiduciary obligations to the parties – primarily confidentiality, disclosure of conflicts of interest, and good faith.²²⁵

The trust and reliance placed in a mediator by participants, the confidentiality requirements and the increasing professionalism and accreditation of mediators, are all factors which may support the fiduciary argument, at least in respect of particular ‘duties’ owed to all participants in the ADR process.

While there are American cases which have accepted that fiduciary obligations are owed,²²⁶ this issue is yet to be determined in Australia.

220 *Bristol & West Building Society v Mothew* [1998] Ch 1, 18.

221 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, per Mason J.

222 P D Finn, *The Fiduciary Principle*, in T G Youdan (ed), *Equity Fiduciaries and Trusts*, 1989, 46-47.

223 M Moffitt, *Suing Mediators*, Boston University Law Review (2003) Vol 83 147, 167, as quoted in DVC McMeekin, *Suing Mediators – A Gathering Storm*, paper delivered at the Janus Club Meeting, July 2007.

224 DVC McMeekin, *Suing Mediators – A Gathering Storm*, paper delivered at the Janus Club Meeting, July 2007, paragraph 30.

225 R Clark, ‘The writing on the wall: the potential liability of mediators as fiduciaries’ (2006) *Brigham Young University Law Review*, 135.

226 See, for example, *Furia v Helm* 4 Cal. Rptr. 3d 357, 363-64 (Court of Appeal 2003).

5.5 The arguments for and against conferring general statutory immunity

Views expressed in submissions to NADRAC were divided on this issue – they ranged from supporting immunity for all ADR practitioners, (except in the case of fraud),²²⁷ irrespective of the kind of ADR process or whether it is mandatory or private, to complete removal of immunity for all ADR practitioners.²²⁸ It is almost certainly beyond the constitutional power of the Commonwealth to achieve such an outcome.

Some themes can be identified in the submissions NADRAC received about practitioner immunity. These include:

- recognition that there should be limits on immunity, and that other mechanisms should exist to address practitioner conduct, such as codes of conduct, professional boards, appraisal systems etc, and
- a distinction being drawn between private and mandatory ADR processes.²²⁹

5.5.1 Practitioner immunity in private ADR processes

Many submissions considered that practitioners in private ADR processes should not have the benefit of statutory immunity. This view was generally based on the following considerations:

- private ADR practitioners can limit their liability through other means, such as contractual indemnity and liability insurance
- a lack of immunity does not appear to have had any impact on users of ADR services, and
- there should be a means by which ADR practitioners who behave inappropriately are held accountable for their actions.

For example, the Top End Women's Legal Service suggested that:

It is important that ADR practitioners are not immune from suit. Practitioner immunity is particularly problematic in smaller towns, where there are fewer practitioners to choose from. This is further exacerbated if the practitioner is a contractor, and is not subject to the usual controls and reviews an employer has over behaviour.

However, several submissions saw clear benefits for statutory ADR practitioner immunity to be maintained, or even broadened. Reasons for this included that:

- indemnity insurance could force up the cost of ADR, which is not in the public interest

227 Submission – Law Council of Australia, ADR Committee.

228 Submission – Top End Women's Legal Service.

229 For example, the ADR Directorate of the NSW Department of Justice and Attorney General suggested that it may be worthwhile for NADRAC to examine 'whether it would be appropriate in court-ordered mediations to provide a greater degree of protection for court officials conducting mediations, compared to the protection for private practitioners conducting court-ordered mediations.'

- immunity may encourage clients to fully engage with the process without fear that the end result will be challenged at a later date on the basis of an ADR practitioner's conduct, and
- even private ADR can be characterised as a step in the courts' case management processes, and practitioners in private ADR processes should enjoy immunity comparable to that enjoyed by ADR practitioners engaged in mandatory ADR.

These considerations are canvassed further below.

Contractual immunity and indemnity

The Victorian Civil and Administrative Tribunal submitted that 'private ADR practitioners can regulate their liability to some degree in their engagement agreements and indemnity insurance'. The Victoria Department of Justice, ADR Directorate agreed:

In relation to other (private) ADR practitioners, Victorian Government policy is that they should not be given judicial immunity. It is expected that ADR practitioners will have their own professional indemnity insurance cover and should not be given any special statutory immunity.

Similarly, the NSW Bar Association observed that in private mediations, mediators commonly include a term in their mediation agreements giving them the same immunity as they would have under statute. The Association further observed that immunity does not appear to have had any impact on users of ADR services at this stage. It also reasoned that, in private ADR processes, immunity is a matter of agreement between ADR practitioners and disputants. Hence, ADR practitioners can adequately limit their risk by obtaining appropriate insurance.

The Public Transport Ombudsman Victoria provided an example where it asked parties to agree to indemnify its conciliators through contract. It also has comprehensive insurance in place. Overall the PTO has found that these arrangements work well.

Other submissions were less certain about the effectiveness of liability insurance. Australian Dispute Resolution Association (ADRA) submitted that 'liability insurance is not well tested in the courts and it is not clear whether practitioners can achieve adequate protection via this method.' ADRA suggested that it was appropriate to confer immunity on all ADR practitioners who opt to conform to an industry code of standard (which provide for competency standards and complaint mechanism). In this way, consumers can be adequately protected as they can opt for practitioners operating within the code.

Other submissions suggested that ADR practitioners employed by government organisations typically have the benefit of Crown indemnity (NADRAC notes that neither the Commonwealth itself nor its officials enjoy Crown immunity). The Health Quality and Complaints Commissioner Qld, for instance, does not consider that a conciliator acting under the *Health Quality and Complaints Commission Act (2006)* requires statutory immunity. A conciliator is an employee of HQCC, and thus a public servant, afforded the protection of Crown indemnity when acting diligently and conscientiously in carrying out the duties of employment.

Is there an empirically verifiable need for immunity to protect and preserve the integrity of ADR?

In her submission, Robyn Carroll noted, ‘There does not appear to be any pressing need to confer immunity on ADR practitioners in the community and private sectors.’ Others consulted suggested that statutory immunity should only be conferred where there are strong public policy grounds for doing so, and queries were raised as to whether those grounds exist in the context of private ADR processes, especially given the availability of contractual immunity and professional indemnity insurance.

In its submission, VCAT acknowledged that there are risks associated with the lack of immunity protection for private ADR practitioners, such as ADR practitioners being drawn into the dispute (eg by unreasonable parties), and the threat of suit that can be used tactically to influence the ADR practitioner or to derail the process. However, it considered these risks to be small.

ADRA considered that in providing dispute resolution services, practitioners are engaged in processes that can be characterised as a first step in a court’s case management processes, and often at no cost to the public purse. ADRA considered it appropriate to confer immunity on ADR practitioners, provided there are other quality assurance mechanisms in place.

Similarly, the Law Council of Australia submitted that ‘for ADR practitioners to be effective and to engage in the processes and with the parties, it will be important to provide immunity (subject to fraud) to ADR practitioners in any legislative provisions to be implemented.’

The Dispute Resolution Committee of the Law Society of NSW submitted that broad immunity for practitioners is necessary to ensure a free and uninhibited exchange of ideas and aspirations during all stages of the mediation and other ADR processes. In the absence of statutory protection, indemnity insurance would force up the cost of ADR which is not in the public interest. The Committee further pointed out that, although its current model mediation agreement contains an ‘exclusion of liability and indemnity’ clause which is being used by many ADR practitioners, the entrenchment of immunity in legislation would improve the position. The Committee argued that such protection should extend to practitioners (and indeed participants) in all ADR processes, whether it is mediation, conciliation or arbitration. The National Legal Aid expressed similar views, and indicated a preference for participants in an ADR process to complain to an ethics or professional standards body.

Is immunity necessary to ensure accountability of ADR practitioners?

The Queensland Department of Justice and Attorney-General expressed concern that by having immunity, ADR practitioners who behave inappropriately are not held accountable for their actions. It considers that immunity removes an important avenue of redress for clients where there has been an actionable civil wrong. However, the Department also acknowledged that immunity may encourage clients to fully engage with the process without fear that the end result will be challenged at a later date on the basis of the ADR practitioner’s conduct.

5.5.2 Practitioner immunity in mandatory ADR processes

Submissions received by NADRAC agreed that judicial officers, or court/tribunal retained staff, conducting ADR processes should retain statutory immunity. The Federal Court of Australia, National Native Title Tribunal and VCAT acknowledged in their submissions that their staff have the protection of judicial immunity while conducting mediation and other ADR processes, and consider this to be appropriate. The ADR Directorate of the Department of Justice also noted that the Victorian Government has taken the view that judicial officers who are conducting ADR processes should retain their judicial immunity.

The Federal Court of Australia acknowledged that immunity from prosecution for ADR practitioners is a privilege that attaches considerable responsibility to ensure practitioners meet appropriate skill and conduct standards.²³⁰ Similarly, the NNTT outlined the quality assurance processes it has in place to ensure the quality of its services, for example qualification for appointment to the Tribunal, accreditation of mediators, code of conduct for members and complaints handling processes.

Several submissions expressed the view that it is appropriate for private ADR practitioners conducting mandatory ADR processes, ordered by a court or tribunal, to have the benefit of statutory immunity. The premise of this view is that these processes are part of a continuum of the courts' case management strategies and are conducted under the courts' overarching supervision.

ADR practitioners conducting mediations referred by the Court under s86B of the Native Title Act have, in the performance of their mediation duties, the same protection and immunity as a Justice of the High Court.²³¹ This applies irrespective of whether the mediator is a Tribunal member or not. The NNTT considered that this is 'justified because the work of all persons mediating under the Native Title Act is closely integrated with judicial proceedings'. The NSW Bar Association also submitted that it is appropriate for statutory immunity to extend to ADR processes ordered by a court.

5.6 Absolute or qualified immunity?

A majority of the submissions considered that where statutory immunity is conferred on ADR practitioners, it should be a qualified immunity.²³² In particular, this should apply to non-judicial officers within court and tribunal systems.²³³ Suggestions for the qualification include 'good faith' or 'bona fide', or immunity that does not extend to allegations of fraud. The Queensland Department of Justice and Attorney-General submitted that,

230 The Federal Court of Australia submitted that: 'The Court as an institution has a particularly strong interest, arguably greater than other non-court employers, in ensuring the good quality of its mediators. The Court is a Recognised Mediator Accreditation Body under the National Mediator Accreditation Scheme and thus has the responsibility of ensuring that the mediators it accredits have the knowledge and skills required by the National Mediator Approval and Practice Standards and that they maintain the prescribed hours of professional development. The Court has a complaints process in place to deal with complaints about the Court's services, including its mediation services.'

231 *Native Title Act 1993* (Cth), s94R.

232 For example, submissions from Health Insurance Commissioner Victoria.

233 Submission – R Carroll.

given the potential for misuse of power, absolute immunity should only be conferred for ADR processes where strong public policy grounds exist to do so. The Health Insurance Commissioner Victoria also submitted that absolute immunity is not necessary for ADR practitioners, who need to be accountable if they behave inappropriately or unlawfully.

5.7 Immunity and the operation of rules about confidentiality and inadmissibility

National Legal Aid pointed out in its submission that immunity aside, it would be difficult in any event to bring a negligence claim against a practitioner, due to the obligations of the parties and the practitioners to maintain confidentiality, non-admissibility provisions, and the difficulty of establishing that any loss had been caused as a consequence of the practitioner's conduct.

The NSW Bar Association expressed concern that the removal of practitioner immunity would compromise the confidentiality of ADR processes. This issue is considered in more detail in Chapter 3 (Confidentiality), which deals more comprehensively with confidentiality issues in ADR processes.

5.8 NADRAC's view on conferring further statutory immunity

5.8.1 Previous consideration by NADRAC

Practitioner immunity requires continual re-examination. The merits of conferring protection are dependent on the broader, and rapidly-evolving, ADR landscape. NADRAC has previously considered ADR practitioner immunity in several past reports. Most recently, NADRAC's 2009 'Resolve to resolve' report recommended that the Attorney-General ask NADRAC to report on the need for immunity for ADR practitioners.²³⁴ Other relevant NADRAC publications include the 'Legislating for ADR' Report,²³⁵ the joint letter of advice with the Family Law Council,²³⁶ and the Federal Magistracy report.²³⁷

5.8.2 Immunity needs to be strongly justified

NADRAC maintains its previous position that any immunity must be strongly justified as a matter of public policy. However, since the release of the joint advice and the 'Legislating for ADR' Report of 2006, several significant changes have taken place in ADR, and NADRAC therefore considers it timely to reassess whether there is now a sufficient public policy justification for conferral of statutory immunity on ADR practitioners, to promote and preserve the integrity of ADR.

²³⁴ Recommendation 6.7

²³⁵ NADRAC, *Legislating for Alternative Dispute Resolution: A guide for Government policy-makers and legal drafters*, Report 2006.

²³⁶ NADRAC and Family Law Council, *Joint letter of advice on immunity for family counsellors and Family Dispute Practitioners under the Family Law Act 1975*, 2005.

²³⁷ NADRAC, *The use of Alternative Dispute Resolution in a Federal Magistracy*, Report 1999.

5.8.3 Can immunity be justified in current circumstances?

Relevant considerations include:

- the greater availability and affordability of professional indemnity insurance for ADR practitioners
- the establishment of the NMAS
- the increasing number of court or tribunal referrals to ADR (eg native title mediation now can be referred to private practitioners)
- no other professions enjoy immunity, except in extremely limited circumstances (eg barristers in the conduct of litigation), and
- consultations leading up to the joint letter of advice with the Family Law Council yielded no evidence that the lack of statutory immunity for private ADR processes adversely affected the availability of competent ADR practitioners, or the take-up of opportunities to pursue a profession in ADR.

NADRAC's current view reflects the reality that ADR practitioners work across a broad range of activities, and that stakeholders' views on the merits of immunity canvass the entire continuum of possibilities – from absolute immunity for all, to no immunity for any ADR practitioners. Given the lack of a clear consensus view on the question, NADRAC considers that a more nuanced approach is required.

NADRAC has undertaken its analysis by reference to the following categories of ADR practitioners, and the circumstances in which they are operating, from time to time:

- ADR practitioners conducting private ADR processes unrelated to courts or tribunals
- ADR practitioners (other than staff retained by courts and tribunals) conducting court-ordered ADR processes²³⁸
- staff retained by courts and tribunals conducting ADR processes, and
- judicial officers²³⁹ conducting ADR processes.

Immunity for judicial officers has a relatively long history (dating back to the 17th century) and is supported by a range of considerations, for example:

- bringing litigation to an end
- protecting judicial independence, and
- protecting public confidence in the courts.

NADRAC considers that public policy does not currently justify removing immunity for judges conducting ADR processes. Therefore, NADRAC accepts the status quo with respect to judicial officers. Analysis is therefore confined to the first three categories.²⁴⁰

238 In this Chapter, 'court-ordered', and 'court staff' should be read as including orders made by tribunals, and staff employed by tribunals.

239 Including judges and tribunal members.

240 However, NADRAC considers that there is no difference in legal principle that supports drawing a distinction between an ADR practitioner retained by a court or tribunal and an ADR practitioner in private practice. Indeed, there is sometimes a competitive choice between an officer of a court or tribunal (eg a Federal Court Registrar) and a private ADR practitioner.

Appendix 5.3 outlines considerations relevant for each of these categories. In considering these various options, NADRAC was unable to reach a unanimous position.

5.8.4 Considerations supporting and opposing statutory immunity

Appendix 5.4 summarises the considerations taken into account by NADRAC in developing its recommendations. They are discussed in detail in the following sections of this Chapter.

Detailed consideration – ADR practitioners in private ADR processes

Role of the ADR practitioner

The specific functions undertaken by ADR practitioners do not, by themselves, provide sufficient justification for statutory immunity.

It has been suggested that ADR practitioners undertake the same, or at least a substantially similar, role or function to that of judges.²⁴¹ This analogy, however, usually emerges from a high-level analysis of the respective roles, leading to the conclusion that both ADR practitioners and judges are concerned broadly with the resolution of disputes. It is argued that, therefore, ADR practitioners should be extended similar immunity to that conferred on judges. However, the roles and functions of ADR practitioners and judges are fundamentally different. A comparison of the actual processes, procedures and the decision-makers' general approaches to resolving disputes leads to the conclusion that a general conferral of immunity on ADR practitioners is unwarranted. Distinguishing features include:

- ADR processes are generally private and confidential in nature
- ADR practitioners do not determine existing rights and obligations and the resolution reached through ADR by participants is generally not subject to appeal or review
- private ADR practitioners can decline to be engaged by a particular client, or can agree to provide ADR services to participants only on terms that are acceptable to the practitioner
- ADR practitioners do not make substantive decisions for parties to a dispute
- ADR processes are, to some extent, subject to law and court processes, whereas a judicial determination when made (except for review on appeal) is not subject to any 'supervision' by an institution, courts being separate from other areas of Government
- parties to ADR processes are generally free to end the process when they wish, and
- ADR processes are generally far less formal than court processes.²⁴²

²⁴¹ See, for example, *Imbler v Pachtman* (1976) 424 U.S. 409, 423.

²⁴² S D Franck, 'The liability of international arbitrators: a comparative analysis and proposal for qualified immunity' (2000) 20 *New York School Journal of International and Comparative Law* 1, 23-24.

Independence of practitioners and quality control

Another justification put forward for the conferral of immunity upon ADR practitioners is that immunity can help to protect the independence of the ADR practitioner. It is suggested that immunity ensures that the ADR practitioner can be completely impartial and independent. While this reasoning has some merit, there must, in the interests of disputants and in the broader public interest, be appropriate scrutiny and quality control of ADR practitioners. ADR practitioners are more likely to improve their quality of service if their actions can be reviewed by courts.

Other options to ensure quality control include the establishment of industry standards, professional codes of conduct and complaint mechanisms. NADRAC is a strong supporter of those mechanisms to create standards and provide areas of redress. However, they are not substitutes for the moderating influence created by the scrutiny of the courts. Indeed, many other professions with well-established industry standards and complaint mechanisms (eg medical practitioners, legal practitioners and psychologists) are not shielded by immunity. Further, the only established national ADR standard in Australia at the time of this Report is the NMAS, which is a voluntary scheme. While many large ADR service providers have internal guidelines and complaints systems in place, there are also many private ADR practitioners who are unregulated.²⁴³

By themselves, existing industry standards, codes of conduct and complaints mechanisms are not an effective and comprehensive approach to quality control. This means that the integrity of ADR may be at risk. One way to mitigate that risk would be through the establishment of a government-sponsored scheme of accreditation, together with a requirement that ADR practitioners be accredited under that scheme. However, NADRAC does not support a scheme because it would:

- be expensive for government
- be unlikely to be effective in regulating all dispute resolution providers, and
- inhibit creativity and innovation, a valuable feature of the private dispute resolution world.

Maintaining the integrity of the ADR process while allowing for legitimate claims

It has been suggested that immunity would also assist in ensuring the integrity of the ADR process, and contribute to ‘maintaining public confidence in the security and integrity of the system’.²⁴⁴ Conferring absolute immunity would also assist in protecting the confidentiality of ADR processes. A hearing about the conduct of the ADR practitioner would inevitably involve the gathering and adducing of evidence concerning the ADR process. Preserving the finality of ADR processes and their outcomes (including mediation agreements and arbitral awards) would also favour granting immunity to ADR practitioners. In this sense, immunity would be a safety net for finality of outcomes,

243 NADRAC does acknowledge that the Federal Court, as a Recognised Mediator Accreditation Body under the NMAS, has ensured that the mediators it accredits have the knowledge and skills required by the *National Mediator Approval and Practice Standards*.

244 L Boule, *Mediation: Principles, Process, Practice* (2005) 525.

preventing participants from collaterally attacking ADR practitioners, and leading to a perpetuation of the dispute.²⁴⁵

NADRAC acknowledges the gravity of these considerations, but also considers that the effect of immunity on participants, and its consequent affect on the credibility of ADR processes, is the overriding concern. This consideration suggests that, rather than supporting the integrity of ADR, conferral of immunity could pose a risk for the credibility of ADR, and the regard in which it is held by participants and the broader community. If disputants cannot hold practitioners accountable, this may:

- lead to a loss of confidence by disputants and the community in the value of ADR
- drive disputants to other processes, and
- create a view that ADR only provides ‘second class justice’ as a confidential, unaccountable process with no appeal rights, and which is only supported by government to assist in reducing court costs.

There is, for example, a valid concern that conferring immunity on ADR practitioners would deny participants’ legitimate claims to compensation for misconduct or harm done by ADR practitioners.²⁴⁶ Immunity would limit or even wholly deny participants opportunities to scrutinise the conduct of an ADR practitioner. Further, conferral of immunity could remove incentives for ADR practitioners to uphold acceptable standards of care, and could encourage carelessness in ADR practitioners’ conduct.

The pivotal consideration for NADRAC is that the nature of ADR, unlike litigation, already presents an issue for accountability, because the process takes place in private with ‘the potential to shield malpractice and unfairness unless... [ADR practitioners] can be held liable.’²⁴⁷ For example, there would be no possibility of sanction if an ADR practitioner is alleged to have coerced a disputant into an inappropriate settlement. If people think that ADR practitioners will not be liable for improper conduct, this may result in fewer participants being willing to engage in ADR processes, and in a loss of credibility for ADR overall.

Supporting and encouraging ADR – maintaining a pool of ADR practitioners

Conferring immunity is also suggested as a way to support and encourage the use of ADR by professionals as an alternative option to litigation. Some contend that many ADR practitioners would not have the capacity or willingness to become practitioners without explicit immunity provisions in legislation. However, as NADRAC noted in its 2005 joint advice with the Family Law Council, consultation indicated that immunity from liability for negligence was not an issue of great importance to ADR practitioners (at least among the family dispute resolution practitioners at the time).²⁴⁸ NADRAC has not detected any significant or consistent concern during its consultation for this reference. In any event,

245 *Agnew v Ontario Association of Architects* (1987) 64 O.R. 2(d) 354. See also D I Bristow QC, ‘The Gathering Storm of Arbitrators’ and Mediators’ Liability’ (2000) *The Arbitration and Dispute Resolution Law Journal* 312, 314 – 315.

246 R Carroll, ‘Mediator immunity in Australia’ (2001) 23 *Sydney Law Review* 185, 211.

247 L Boulle, *Mediation: Principles, Process, Practice* (2005) 535.

248 NADRAC and Family Law Council, *Joint letter of advice on immunity for family counsellors and Family Dispute Practitioners under the Family Law Act 1975*, 2005, 4.

the purpose of statutory immunity is not to create an economic incentive to undertake an activity by transferring risk from a service provider to a service receiver. Indeed, it would be a perverse outcome if the protection of immunity were to make ADR more attractive for less qualified and skilled practitioners with no accountability.

Availability of other forms of liability protection

NADRAC also considered the availability and effectiveness of non-statutory means of limiting the liability of ADR practitioners. Private ADR practitioners can adequately limit liability through contractual terms at the outset of ADR processes. They can also minimise their risks by purchasing professional indemnity insurance, which has become more readily available and affordable. The recently introduced NMAS require accredited mediators to be covered by insurance (if they do not already operate under statutory or other immunity).²⁴⁹ Views expressed in the submissions received by NADRAC indicate that contractual immunity and indemnity insurance are working well. Given the availability of other suitable means to limit liability,²⁵⁰ it is difficult to justify the conferral of statutory immunity upon private ADR practitioners.

Statutory immunity needs to be justified by robust evidence

Virtually no other profession has the benefit of statutory immunity. Immunity is an exceptional privilege, and should only be granted when the need for it is confirmed by robust evidence.²⁵¹ It must be demonstrated that the lack of immunity would actually harm the integrity of ADR. To date, NADRAC has not identified any such evidence. NADRAC acknowledges that this may be because statutory immunity already exists in many areas, or because the inadmissibility of evidence of things occurring in ADR has meant that few actions have been taken against ADR practitioners.

NADRAC acknowledges that there are benefits in providing protection to ADR practitioners as a support for the fundamental role of ADR. ADR provides a mechanism for disputants to express views freely, explore options fully, and accept resolutions that satisfy the participants. Nevertheless, ADR outcomes may be – or may be perceived to be – less advantageous than those which might be achieved through court proceedings. This may lead to disappointed participants seeking redress of some kind, and exposing ADR practitioners to being pursued for such redress. This does not, of itself, justify legislative intervention to confer immunity. ADR practitioners in private ADR processes appear to be adequately protected by contractual immunity and professional indemnity insurance.

249 NADRAC, *National Practice Standards, National Mediation Accreditation System*, September 2007, viewed 22 February 2010, <www.nadrac.gov.au>.

250 For example, indemnity insurance is available for members of LEADR, covering sole practitioners who operate under a company name or operate individually. For an annual fee of \$335 at the time of writing, this insurance covers up to \$10,000,000 for any claim and \$30,000,000 in the aggregate with an excess of \$2,500 for professional indemnity claims and \$500 for professional indemnity claims.

251 A Chaykin, 'The liabilities and immunities of mediators: a hostile environment for model legislation' (1986) 2 *Journal of Dispute Resolution*, 47, discussed in R Carroll, 'Mediator immunity in Australia' (2001) 23 *Sydney Law Review* 185, 217.

Given the analysis outlined above, and in the absence of any evidence suggesting a clear problem warranting legislative intervention, NADRAC considers that ADR practitioners in private ADR processes should not be afforded statutory immunity.

Immunity of private practitioners conducting court-ordered ADR²⁵²

There is a significant body of federal, state and territory legislation that confers statutory immunity on practitioners who conduct court-ordered ADR.²⁵³ A rationale often cited to justify immunity for this form of ADR is that it is on a continuum of courts' case management strategies aimed at resolving disputes and, for that reason, may be characterised as an extension of the judicial function. This seems to be a fairly entrenched view within the ADR sector and, indeed, is a view that NADRAC has previously supported.²⁵⁴ However, in light of recent developments in ADR and the considerations outlined above relating to ADR practitioners conducting private ADR processes, NADRAC has re-evaluated its position.

Aside from the fact that such ADR processes originate with a court order, there is little to distinguish these processes from other private ADR processes. Much of the court-ordered ADR is conducted by private practitioners in a private setting, and is confidential, with no or very limited reporting back to a court, beyond advising of the outcome. Courts do not generally exercise any supervisory role over the conduct of such ADR processes. In this sense, these ADR processes are only very loosely, if at all, connected to judicial case management.

Advocates of immunity for ADR practitioners conducting court-ordered ADR argue that participants are often made to attend such processes against their will. This could imply that participants would tend to be more uncooperative or difficult, and hence ADR practitioners conducting such processes would require greater protection from disgruntled participants. This argument, however, has little evidentiary support. Available data indicates that the average settlement rate of court-ordered ADR is quite high,²⁵⁵ and does not differ greatly from that of private ADR processes. This suggests that participants in court-ordered ADR do not exhibit more significant behavioural problems than participants in private ADR.

More similarities than differences exist between court-ordered ADR processes conducted by private ADR practitioners and private ADR processes. For example, ADR practitioners:

252 References in this section includes tribunal ordered or referred ADR.

253 See, for example, the *Federal Court Act 1976* (Cth), *Federal Magistrates Act 1999*, *Administrative Appeals Tribunal Act 1975* (Cth) and the *Native Title Act 1993* (Cth). Examples from state and territory legislation include the *Civil Procedure Act 2005* (NSW), *Retail Leases Act 1994* (NSW), *Supreme Court of Queensland Act 1991* (Qld), *Dispute Resolution Centres Act 1990* (Qld), *Supreme Court Act 1935* (SA), *Alternative Dispute Resolution Act 2001* (Tas), *Legal Profession Act 2007* (Tas), *Supreme Court Act 1986* (Vic), and *Supreme Court Act 1935* (WA).

254 NADRAC and Family Law Council, *Joint letter of advice on immunity for family counsellors and Family Dispute Practitioners under the Family Law Act 1975, 2005* and NADRAC, *Legislating for Alternative Dispute Resolution: A guide for Government policy-makers and legal drafters*, Report 2006.

255 See, for example, on farm debt mediation: University of Western Sydney, *University of Western Sydney Macarthur Report: Research into Farm Debt Mediation Act 1994, 2000*, p 10, reporting a settlement rate of 79%. See also Department of State and Regional Development, *Retail Tenancy Unit: Dispute Resolution Kit*, no date given, p 21, indicating settlement rates of 75-80% when mediated by Retail Tenancy Unit panel mediators.

- can generally choose whether to accept clients
- may contract with clients about the basis on which services are provided, and
- are paid.

In the absence of a clear connection with the exercise of a court's function, there is little public interest justification for conferring statutory immunity on private ADR practitioners conducting court-ordered ADR processes. Instead, these practitioners can adequately limit their liability through contractual immunity and professional indemnity insurance.

Immunity of court-retained practitioners conducting mandatory ADR processes²⁵⁶

NADRAC considers that there are factors that support statutory immunity for court-retained ADR practitioners, but that these are largely pragmatic in nature and, as a matter of principle, there is little distinction between these practitioners and private ADR practitioners (for whom NADRAC does not recommend immunity). NADRAC acknowledges the commercial and historic reasons for having previously conferred immunity. Further, it is difficult to foresee the ramifications of an abrupt transition from complete immunity to removal of that immunity.

Nevertheless, NADRAC considers that ADR processes conducted by court staff are more closely aligned with the exercise of judicial power and court process than are processes conducted by private ADR practitioners following a court order.²⁵⁷ Some commentary observes that the role of court-appointed ADR practitioners is more closely analogous to that of a judge, and the conferral of a qualified immunity upon court-appointed ADR practitioners can be justified to ensure the effective administration of justice.²⁵⁸ Effective administration of justice requires that this kind of ADR may support 'the same protections as courts for its independence and finality.'²⁵⁹ A suit against a court official conducting ADR as part of the court process is thus perceived as an attack on the judicial process.

On a practical level, the conduct of ADR processes by court staff differs significantly from the conduct by private ADR practitioners of court-ordered ADR. For example, court staff:

- do not have a choice whether to accept the participants
- do not receive a fee from participants
- cannot limit their liability through contractual immunity (although they are indemnified by their employer under certain conditions)
- may be required to conduct the mediation within a limited timeframe

256 References to court-employed or court-retained practitioners also include tribunal-employed or tribunal-retained practitioners.

257 This is consistent with NADRAC's position on family consultants, articulated in NADRAC and Family Law Council, *Joint letter of advice on immunity for family counsellors and Family Dispute Practitioners under the Family Law Act 1975*, 2005.

258 Law Reform Commission NSW, *Training and accreditation of mediators report no 67*, 1991, paragraph 5.28, viewed 14 February 2001, <<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R67CHP5>>. See also R Carroll, 'Mediator immunity in Australia' (2001) 23 *Sydney Law Review*, 207.

259 L Boule, *Mediation: Principles, Process, Practice* (2005) 530.

- must comply with comprehensive rules (set out in codes of conduct and legislation), and
- are subject to disciplinary action under legislative arrangements.

Accordingly, NADRAC considers that there are pragmatic considerations supporting a qualified statutory immunity of court staff who act in 'good faith'. NADRAC also recommends that Parliament consider amending s53C of the *Federal Court of Australia Act 1976* to remove references to the mediator having the same protections as a judge. Instead, court-retained mediators should be granted immunity qualified by the 'good faith' requirement.

The desirability of immunity of court staff conducting ADR processes should be reviewed in the next three to five years. Its merits could be assessed against criteria such as:

- the number and nature of complaints about the conduct of such ADR processes
- the take-up by court staff of appropriate ADR accreditation and training by court staff²⁶⁰
- the compliance by court staff with industry professional standards, and
- findings from any evaluation processes undertaken regarding court-provided ADR generally.

This is consistent with NADRAC's recommendation that 'federal courts, tribunals and other bodies funded to provide ADR services evaluate their ADR services including periodic independent review'.²⁶¹

Finally, NADRAC considers that there is a risk that disputants may be aggrieved by, and complain about, the conduct of a court-retained ADR provider occurring in a court-mandated ADR process that is not open to the public. Because of the operation of qualified immunity, disputants may be left with no remedy. Materialisation of such a risk may damage the integrity of ADR processes, and the reputation of the courts.

5.9 Recommendations

This Chapter makes clear that the question of whether ADR practitioners should be immune from suit and, if so, to what extent and under what conditions, is highly contested. NADRAC members did not reach a consensus, and the following recommendations represent a majority view.

5.9.1 ADR practitioners conducting private ADR processes should not have the benefit of statutory immunity.

5.9.2 Private ADR practitioners conducting court-ordered ADR should not have the benefit of statutory immunity.

²⁶⁰ If privilege is to be retained, it could be made conditional on court staff being accredited under NMAS.

²⁶¹ NADRAC, *The resolve to resolve: embracing ADR to improve access to justice in the federal jurisdiction*, Report 2009, Recommendation 6.3.

5.9.3 Court and tribunal staff conducting ADR processes should have the benefit of qualified statutory immunity. The immunity should be conditional on their having acted in good faith and within the terms of their employment. Immunity should not preclude accountability for misconduct under applicable public sector disciplinary regimes.

5.9.4 Parliament should consider introducing legislation to amend s53C of the *Federal Court Act 1976* so that it only applies to court-retained mediators, and is consistent with recommendation 5.9.3.

5.9.5 A review should be conducted in the next three to five years to assess whether immunity should be preserved for court and tribunal staff who conduct ADR processes.

Chapter 6: Family dispute resolution

6.1 Introduction

ADR processes are used extensively in the context of family disputes. The *Family Law Act 1975* (Cth)²⁶² sets out arrangements relating to matters, including divorce and matrimonial causes, parental responsibility for children, and financial matters arising out of the breakdown of *de facto* relationships. In particular, the Act prescribes specialised arrangements for ADR processes conducted in connection with matters falling within its ambit.²⁶³

In this Chapter, NADRAC considers these arrangements, and how the issues described elsewhere in this Report intersect with them. Specifically, NADRAC considers whether legislative amendment is required to protect the integrity of ADR processes conducted in the family dispute context. Accordingly:

- section 6.2 considers whether obligations relating to the conduct of family dispute resolution practitioners (FDRPs) give sufficient protection to family dispute resolution (FDR) participants and procedural fairness to practitioners
- section 6.3 considers whether the Family Law Act provides sufficient protection for the confidentiality of FDRPs
- section 6.4 considers whether current Family Law Act provisions about admissibility of things said or admissions made during ADR processes appropriately balance competing interests and values within the family law system, and
- section 6.5 considers whether statutory immunity should be conferred on FDRPs in respect of their conduct in FDR processes.

NADRAC is aware of extensive work being done by the Family Law Council and the Australian Law Reform Commission about how issues canvassed in this Report play out in the context of family disputes. This Chapter does not seek to duplicate or cut across this work. NADRAC has consulted directly with the Family Law Council on the matters raised in this Chapter and, where the views of NADRAC and the Family Law Council are consistent, recommendations have been made. In other matters, NADRAC has chosen to make observations, rather than recommendations, with a view to assisting further consideration of issues relating to the integrity of FDR. In addition, NADRAC is aware of, and has been involved in, making recommendations about collaborative practice, which is now used in a range of family disputes. Issues of confidentiality and admissibility arise in the collaborative practice context.²⁶⁴

²⁶² Throughout this Chapter, all legislative references are to the *Family Law Act 1975* (Cth) unless otherwise specified.

²⁶³ NADRAC notes that, apart from ADR processes that are prescribed in the Act, processes such as collaborative law and mediation may be used, based on private contractual arrangements between participants in the FDR area.

²⁶⁴ See Family Law Council, *Collaborative Practice in Family Law* (2006), which involved co-opted NADRAC members.

6.2 Conduct obligations

6.2.1 Legislation imposing obligations on disputants

Section 60I of the Family Law Act requires disputants engaged in parenting disputes to make a genuine effort at resolution before commencing court proceedings.²⁶⁵ There are several exceptions to this requirement, set out in subs60I(9), which are intended to ensure that people will not be required to attend FDR in a limited range of circumstances.²⁶⁶ They include urgency,²⁶⁷ inability to participate effectively,²⁶⁸ family violence or child abuse,²⁶⁹ and where the order sought is a consent order.²⁷⁰

The object of s60I is to ensure that all persons who have a parenting dispute make a genuine effort to resolve that dispute by FDR before applying for a Part VII order.²⁷¹ It is hoped that this will help people to resolve family relationship issues outside of the court system, which can be costly and lead to entrenched conflict.²⁷²

Subsection 60I(7) provides that a court cannot hear an application for an order under Part VII unless the applicant has also filed a certificate from a FDRP. Subsection 60I(8) prescribes the kinds of certificates that may be given. The categories set out in subs60I(8) relate to disputants' participation, or non-participation, in FDR.

If a person does not attend FDR in accordance with s60I before applying for a Part VII order, for whatever reason, subs60I(10) provides that the court must consider making an order that the person attend such a process. This decision will be at the court's discretion. For example, an applicant may claim that the application was urgent and fell within the exception in paragraph 60I(9)(d). If the court considers that it was not urgent, the court may order the parties to attend FDR before it will deal with the matter. The court could also make costs orders. This is intended to discourage parties from trying to avoid FDR, and ensure that the court turns its mind to the reasons claimed for non-participation.²⁷³

There is a significant amount of private FDR occurring in the family law system – most notably in property and spousal maintenance matters. These do not fall within s60I and, therefore, parties are not required to make a genuine effort to resolve a dispute before starting proceedings. In a speech at the launch of National Law Week on 17 May 2010,²⁷⁴

265 In addition to mandated FDR, parties to family law disputes relating to property and spousal maintenance often undertake private ADR.

266 Explanatory Memorandum, Family Law (Shared Parental Responsibility) Amendment Bill 2006 (Cth), 21.

267 *Family Law Act 1975* (Cth), paragraph 60I(9)(d).

268 *Family Law Act 1975* (Cth), paragraph 60I(9)(e). This exception contemplates a range of circumstances that could establish inability to participate effectively.

269 *Family Law Act 1975* (Cth), paragraph 60I(9)(b).

270 *Family Law Act 1975* (Cth), subparagraph 60I(9)(a)(i).

271 Part VII orders include parenting orders and child maintenance orders.

272 Explanatory Memorandum, Family Law (Shared Parental Responsibility) Amendment Bill 2006 (Cth), 19.

273 Explanatory Memorandum, Family Law (Shared Parental Responsibility) Amendment Bill 2006 (Cth), 23.

274 Commonwealth Attorney-General, *Improving Access to Justice*, speech delivered at the Launch of National Law Week, 17 May 2010, viewed 10 October 2010, <http://www.attorneygeneral.gov.au/www/ministers/mccllelland.nsf/Page/Speeches_2010_17May2010-SpeechattheLaunchofNationalLawWeek-ImprovingAccessToJustice>.

the Attorney-General indicated that he intends to extend the requirement to attend FDR beyond parenting disputes to include property and spousal maintenance matters. If this were to occur, it would be likely that a similar genuine effort requirement would be applied.²⁷⁵

6.2.2 Key issue – what constitutes ‘genuine effort’?

‘Genuine effort’ is not defined in the Family Law Act or in the Family Court Rules. There has been no case law on the meaning of ‘genuine effort’ in the dispute resolution context.²⁷⁶ The website of the Attorney-General’s Department provides an interpretation of ‘genuine effort’. Though not determinative, the Department’s view offers some guidance for FDRPs in assessing ‘genuine effort’:

The Attorney-General’s Department has received legal advice that ‘genuine effort’ should be given its ordinary meaning in the context of Part VII of the Family Law Act which deals with children.

A genuine effort involves a real, honest exertion or attempt. It must be more than a superficial or token effort, or one that is false, or is pretence. The effort must be one that is realistically directed at resolving the issues that are the subject of the application for a court order.

The question about whether a genuine effort has been made to resolve issues in a particular case will depend on the circumstances of the case. It is a matter for the professional judgment of the family dispute resolution practitioner. Both objective matters (such as a refusal to engage in discussion) and subjective matters arising from the circumstances of the case (for example, the health of the people involved) may be relevant to the opinion of the practitioner.

Whether the issue in dispute is resolved or not, it will not necessarily be because one or more people did not make a genuine effort. There may be valid reasons why people have differing views on an issue.²⁷⁷

This advice has attracted some criticism, and alternative approaches have been suggested.²⁷⁸

275 It should be noted that the Attorney-General also indicated in his speech that: ‘The Government will also introduce amendments giving parties more options for resolving their issues outside of the courts. Parties will be able to choose mediation, conciliation or arbitration or some combination of these rather than being limited to mediation or the family courts.’

276 The phrase ‘genuine effort’ has, however, been considered by the Administrative Appeals Tribunal in the context of the *Migration Act 1958* (Cth). In *Re Yam and Minister for Immigration and Multicultural and Indigenous Affairs* [2004] AATA 283, the AAT indicated that ‘the degree of effort made must be beyond that which is purely superficial or token.’ In *Re Teo and Minister for Immigration and Citizenship* [2007] AATA 1118, the Tribunal noted that ‘the phrase “genuine effort” is an ordinary English phrase and that, in its opinion, the appropriate ordinary meaning of that phrase for present purposes is “real and sincere endeavour or strenuous attempt.”’

277 Commonwealth Attorney-General’s Department, *Frequently Asked Questions, Family Dispute Resolution Certificates*, Canberra, 2008, viewed 10 October 2010, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ForFamilyRelationshipServicesPractitioners_FamilyDisputeResolutionFAQandResourcesDownloads>.

278 See, for example, H Astor, ‘Making a “Genuine Effort” in Family Dispute Resolution: What Does It Mean?’ (2008) 22 *Australian Journal of Family Law* 102, 3-4.

Role of the family dispute resolution practitioner in establishing genuine effort

As ‘genuine effort’ is not defined by legislation, it is for the FDRP to exercise discretion and professional judgement to determine whether disputants have made a ‘genuine effort’. Some argue that this undermines the neutrality of the FDRPs and potentially damages the integrity of the process.²⁷⁹

Further, FDRPs’ decisions in issuing the certificates can become public and open to challenge. Though communications in FDR are generally not admissible, there is an exception relating to ‘information necessary for the practitioner to give a certificate under subs60I(8)’.²⁸⁰ In addition to the threat to their perceived neutrality, it has been noted that this provision may open up FDRPs to questioning about the basis of their decision to grant a particular certificate.²⁸¹

6.2.3 Legislation imposing obligations on practitioners

The *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) impose a range of obligations on FDRPs, including obligations to give certain information and avoid conflicts of interests, as well as other, general obligations. The Regulations also provide for a FDRP accreditation scheme.

There are few national industry accreditation schemes for ADR practitioners, other than the NMAS, the FDRP accreditation scheme, and the accreditation scheme available for collaborative practitioners, under the auspices of the Law Council of Australia.

6.2.4 Consultation outcomes

NADRAC conducted extensive consultation for this reference. This included face to face meetings, roundtable discussions and the consideration of written submissions.

Relationships Australia Victoria supports the principle of requiring disputants to make a ‘genuine effort’ to resolve their parenting disputes, and considers that the requirement should remain in the Act ‘as it [is] helpful in continuing to promote attitudinal change towards dispute resolution.’²⁸² On the other hand, it considers it very difficult for a FDRP to make an assessment about genuine effort, and suggests that the ‘genuine effort’ paragraphs of the s60I certificates should be abolished:

For a number of reasons, the genuine effort/no genuine effort certificate is not helpful or workable. First, it is very difficult for a practitioner to make an assessment about genuine effort; there are no criteria for that assessment. Amongst practitioners, there would be considerable difference of opinion about what those criteria should be.

279 H Astor, ‘Genuine Effort in Family Dispute Resolution’ (2010) 84 *Family Matters* 61, 62.

280 H Astor, ‘Making a “Genuine Effort” in Family Dispute Resolution: What Does It Mean?’ (2008) 22 *Australian Journal of Family Law* 102, 103-104.

281 NADRAC is aware of an apparent anomaly in relation to the use, by disputants in family law disputes, of collaborative practice processes. Although these processes are generally effective, no certificate can be issued to satisfy the requirements of the Family Law Act.

282 Submission – Relationships Australia Victoria.

Secondly, some clients complain about the issue of a ‘genuine effort’ certificate when they feel the other party has not made a genuine effort; that leads the practitioner into conflict with them. Thirdly, it is very doubtful if many registered FDR practitioners are, in fact, certifying that a party has not made a genuine effort. Fourthly, it is doubtful whether Federal Magistrates and Judges are, in fact, giving any regard to certificates once the matter is before them in Court. Understandably, they are not concerned about what a party alleges to have happened at FDR; they are concerned about applying the law to the facts of the case before them and making orders that are in the best interests of the child(ren). What good purpose, therefore, is served by this certificate? Ultimately, parties in FDR will make whatever effort they want to make and are capable of making. It is sufficient for the Court to know that parties have attempted FDR (where appropriate to do so) and that the dispute has not been settled.²⁸³

Relationships Australia Northern Territory commented that the ‘genuine effort’ requirement is:

...unworkable and needs to be altered. It places an unwieldy and difficult burden on practitioners, who are charged with an impossible task. Making a judgment about a participant’s ability and willingness to make a genuine effort is beyond the scope of the practitioner within the process. Such a judgment also steps outside of the neutrality that is an essential tenet of the mediator’s role. Therefore the benchmark for “genuineness” is very low, so that attendance and some level of participation can amount to a genuine effort.

It is generally recognised by practitioners that clients who present to lawyers and other professionals as “non genuine” may in fact be genuinely unable to participate to the required standard due to personal or other factors largely beyond their control or awareness. Practitioners also see the issuing of such a certificate as punitive, harsh and unhelpful in an arena intended to support individuals and their children to achieve workable, liveable parenting agreements.²⁸⁴

The submission also suggested that the ‘genuine effort’ requirement needs to be altered because:

It has created a situation of uncertainty for practitioners and clients. In addition, our experience has been that a very inconsistent application of the criteria for genuine effort exists across services.

The choice of issuing a “non-genuine” effort certificate has led to a general unwillingness of practitioners to issue such certificates and rendered the issuing of such a certificate unlikely. It has also caused misunderstanding by clients and other professionals as to what the criteria for such a judgment might be, and different interpretations across jurisdictions and individual practitioners have led to inconsistent and unpredictable outcomes for clients.

Further it is respectfully perceived that the Court’s treatment of certificates generally amounts to a “leave pass” to litigation, not requiring a “genuine” or otherwise assessment by practitioners.²⁸⁵

283 Submission – Relationships Australia Victoria.

284 Submission – Relationships Australia Northern Territory.

285 Submission – Relationships Australia Northern Territory.

Similarly, during NADRAC's consultation session of family law stakeholders at the recent Family Law System Conference,²⁸⁶ many FDRPs expressed the view that the 'genuine effort' requirement is problematic and should be removed. From their experience, there have been very rare occasions where FDRPs actually issued 'no genuine effort' certificates, and those who have done so have attracted a great deal of complaints. They commented that FDRPs do not feel comfortable about making decisions that could result in someone being penalised.

In contrast to the views expressed above, the Family Law Council submitted that the current 'genuine effort' requirement, together with exceptions, is appropriate and workable, and does not consider that any changes are required.²⁸⁷ The Council also considers that the current regulation of FDRPs is appropriately dealt with under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* and practitioners therefore do not need to be subject to further conduct obligations.²⁸⁸

The Alternative Dispute Resolution Association is also of the view that the current 'genuine effort' standard is appropriate and workable, and considers that it assists the dispute resolution process by creating parameters in which the parties are free to resolve their dispute. The Association's submission suggested that subjecting the participants to any further conduct obligation is unnecessary.²⁸⁹

6.2.5 Recommendations

NADRAC does not recommend legislative amendment of the conduct obligations imposed on FDRPs, beyond what is contemplated by the Family Law Amendment (Family Violence) Bill 2010 (Cth).²⁹⁰ The provisions in this Bill are intended to strengthen the obligations of, among others, FDRPs. Taking this into account, NADRAC does not see a need to recommend additional expansion of the conduct obligations of FDRPs. Nevertheless, NADRAC would offer the following observations on this aspect of FDR.

NADRAC's view is that the 'genuine effort' requirement under s60I of the Act does not require amendment. While FDRPs appear not to issue certificates stating that a party did not make a 'genuine effort', the requirement can nevertheless influence the attitudes and participation of disputants. In practice, it has served not as an enforcement tool, but as a statement of expectations through which the FDRP can set out the ground rules for the dispute resolution and, where necessary, gently remind participants of the standards of conduct expected of them. It also serves as a reminder that disputants are obliged, under the Act, to attempt to resolve matters in FDR, and that the courts will expect them to have made a genuine effort before allowing them to avail themselves of court resources.

NADRAC also considers that the current exceptions to the requirement to attempt FDR are sufficient.

286 Organised by the Attorney-General's Department, held in Canberra in July 2010.

287 Submission – Family Law Council.

288 Submission – Family Law Council.

289 Submission – Alternative Dispute Resolution Association.

290 Commonwealth Attorney-General's Department, *Family Law Amendment (Family Violence) Bill 2010 – Exposure Draft*, Canberra, 2010, viewed 10 January 2011, <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_FamilyLawLegislationAmendment\(FamilyViolence\)Bill2010-ExposureDraft](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_FamilyLawLegislationAmendment(FamilyViolence)Bill2010-ExposureDraft)>.

6.3 Confidentiality of family dispute resolution communications

6.3.1 Current legislation

The Family Law Act imposes confidentiality obligations on FDRPs (s10H). Similar provisions also apply to family counsellors (s10D).

The general rule is that communications emerging in FDR, or in family counselling, are confidential, unless the disclosure is required or authorised by the Act. The circumstances in which disclosure is required or authorised are broadly similar between the two provisions.

Disclosure is *mandatory* if the FDRP reasonably believes that the disclosure is necessary for the purpose of complying with a law of the Commonwealth, or of a state or territory (subs10H(2)). The term ‘reasonable belief’ is not defined in the Act, nor has it yet been judicially considered in relation to s10H.

Disclosure is *permitted* with the consent of the person who made the communication (the discloser) or, if the discloser is under 18, with the consent of either the court or of each person with parental responsibility for the discloser (subs10H(3)).

Section 10H lists circumstances in which the practitioner *may* disclose a communication, including:

- to protect a child from risk of harm (physical or psychological)
- to prevent or lessen a serious and imminent threat to the life or health of a person
- to report the commission, or prevent the likely commission, of an offence involving violence or a threat of violence to a person
- to prevent or lessen a serious and imminent threat to the property of a person
- to report the commission, or prevent the likely commission, of an offence involving intentional damage to property or a threat of damage to property
- if a lawyer independently represents a child’s interests in an order under s68L – to assist the lawyer to do so properly
- if the disclosure of information is necessary to provide a certificate for the purposes of s60I of the Family Law Act, and
- with the consent of the person who made the communication (the discloser) or, if the discloser is under 18, with the consent of either the court or of each personal with parental responsibility for the discloser.

These provisions do not apply to participants.

Communications with arbitrators are also not confidential, and may be admissible, under the Family Law Act.²⁹¹

²⁹¹ *Family Law Act 1975 (Cth)* s10P.

6.3.2 Key issue – sharing information between FDRPs and courts

One of the exceptions to the confidentiality obligation, prescribed by s10H, is where disclosure is necessary for the practitioner to give a certificate under subs60I(8) of the Act. As discussed in section 6.2.1, disputants in parenting disputes are required by s60I of the Act to attend FDR before applying for a Part VII order relating to children. They are also required to have made a ‘genuine effort’ to resolve their issues during the family dispute resolution process. Subsection 60I(8) further stipulates that a FDRP may give a certificate that:

- a person did not attend FDR due to the refusal or failure of the other party to attend (paragraph 60I(8)(a))
- a person did not attend FDR because the practitioner considers FDR would be inappropriate (paragraph 60I(8)(aa))
- a person attended FDR and made a ‘genuine effort’ to resolve the issues (paragraph 60I(8)(b))
- a person attended FDR but did *not* make a ‘genuine effort’ to resolve the issues (paragraph 60I(8)(c)), or
- a person began attending FDR but the practitioner considers it would not be appropriate to continue the FDR (paragraph 60I(8)(d)).

One prominent issue arising from NADRAC’s consultation of the family law sector concerns sharing information between FDRPs and courts. More specifically, there are questions about whether (and how) these practitioners may flag potential problems such as family violence, to facilitate risk assessment and case management.²⁹² Courts with large caseloads may not be in a position to identify important issues such as the existence of family violence until relatively late in the process. The introduction of some early indicators may alert the courts to these issues sooner. One option that has received significant support is that the information contained in a subs60I(8) certificate could be expanded to allow FDR practitioners to alert the court to potential issues.

Separate from NADRAC’s reference, this issue has been raised in several recent reports (referred to below), and is the subject of current reviews into family violence conducted by the Australian Law Reform Commission and the Family Law Courts’ Joint Committee on Family Violence.

Chisholm Report

In 2009, Professor Richard Chisholm conducted a review of the practices, procedures and laws that apply in the federal family law courts in the context of family violence (the ‘Family Courts Violence Review’). The review considered whether improvements could be made to ensure that the federal family law courts provide the best possible support to families who have experienced, or are at risk of, violence. Professor Chisholm’s report, released on 27 November 2009, identified the issue of potential information sharing between FDRPs and the family law courts. However, this was not discussed in detail as it was considered to be outside the scope of the review. Professor Chisholm noted that:

²⁹² This issue has been a focus of discussion at both NADRAC’s Family Dispute Resolution Roundtable in May 2010 and at NADRAC’s session on the ‘Integrity of FDR processes’ at the Family Law System Conference in July 2010.

...in my view the court's ability to conduct a risk assessment process, and its capacity to protect the children and families that come before it, would almost certainly be enhanced if it had access to relevant information held by external agencies, including dispute resolution agencies.²⁹³

In addition, the report recommended:

That the Government consider amending provisions of the [Family Law] Act relating to the confidentiality of information held by agencies outside the court, including dispute resolution agencies, so that information relevant to the assessment of the risks from violence or other causes could be more readily available to the courts.²⁹⁴

Family Violence Report (Family Law Council)

The Family Law Council's 2009 *Family Violence Report*²⁹⁵ observed that there is a tension 'in the perceived restriction on the family dispute resolution practitioner providing to the Court some guidance as to what intervention would best suit the needs of the family.' However, through its consultation of family law stakeholders, the Council:

was not able to ascertain a consensus across all of the relevant agencies as to whether Family Relationship Centres could have some responsibility for communicating relevant information to the court without it compromising the inadmissibility of the intervention, or the anonymity of a violence allegation thereby placing a victim at risk.²⁹⁶

The Family Law Council also noted the many unintended consequences that are likely to flow from changing the status of the FDRP, from a practitioner delivering a privileged intervention, to that of a 'family consultant' style expert witness for the court system. These consequences include:

- the need for increased funding to further train FDRPs
- FDRPs being subpoenaed to testify about their processes, and
- the potential for violent persons to develop strategies to avoid attending FDR processes.²⁹⁷

The Family Law Council recommended that an options paper be written for comment by interested groups.²⁹⁸

6.3.3 Consultation outcomes

Consultation indicated broad support for maintaining the legislated confidentiality protection of FDR processes. Many stakeholders also acknowledged that it may be necessary to allow limited ways to flag important issues with courts. However, there was significant disagreement about how this could be achieved without damaging the integrity of FDR processes.

293 Professor R Chisholm, *Family Courts Violence Review*, Report 2009, 79.

294 Submission – Family Law Council, Recommendation 2.5.

295 Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, 2009.

296 Submission – Family Law Council, 86.

297 Submission – Family Law Council.

298 Submission – Family Law Council, 87.

NADRAC has also received some feedback that the status quo should be maintained, and that there is no need for FDRPs to provide further information to courts. Some submissions suggest alternative means to enable courts to be alerted to possible issues or concerns, without impinging on the integrity of FDR processes (such as strengthening child protection legislation or increasing court resources).

Several submissions argued that, overall, the confidentiality protection afforded by s10H of the Family Law Act is adequate.²⁹⁹ However, Relationships Australia Victoria suggested amendments to s10H, to clarify:

- that the duty of confidentiality extends not only to FDR sessions but also to assessment sessions (subs10H(1)),³⁰⁰ and
- the scope of the practitioner's duty of confidentiality (for example, add at the end of subs10H(2) 'that requires disclosure by the practitioner').

The Family Law Council also suggested that the exceptions be clarified to better facilitate dealing with complaints about an FDR practitioner's conduct:

An FDR practitioner's role involves a level of trust by the parties and if, for example he/she engages in conduct that concerns fraud, negligence or any other malpractice, the practitioner should be subject to investigation and action in relation to such conduct.³⁰¹

Relationships Australia Northern Territory (RANT) noted that the use of the word 'may' in subs10H(4) is inconsistent with Northern Territory legislation that imposes mandatory reporting obligations on practitioners, which could cause confusion for FDRPs. RANT submitted that it ought to be mandatory for all Australian FDRPs to disclose such matters to authorities in the best interests of children and families.

Further submissions on confidentiality canvassed concerns about information sharing between FDRPs and the courts. However, as noted by the Family Law Council, most of the issues surrounding courts' access to information obtained during the FDR process arise not from the operation of the confidentiality provisions, but rather from the functionality of the inadmissibility provisions under the Act. They are therefore considered in greater detail in section 6.4 (Inadmissibility). Some concerns, though, related to information sharing between FDRPs and courts other than by tendering material in evidence; that is, to less formal information sharing, to facilitate courts' assessment of risk and case management. These concerns are discussed in the following sections.

During NADRAC's face-to-face consultations, a general sense emerged that it would be desirable to establish enhanced 'flagging' mechanisms by which FDRPs could alert courts to potential problems (such as the existence of family violence). The family law courts, in particular, supported this, and would welcome more information about the potential risks faced by participants earlier in proceedings. Other stakeholders, however, raised concerns about how this could be achieved without inadvertent and undesirable consequences, including that:

²⁹⁹ Submissions – Family Law Council, Relationships Australia Victoria, Relationships Australia Northern Territory.

³⁰⁰ See discussion below (Recent case law) which considers *Rastall v Ball* [2010] FMCAfam 1290.

³⁰¹ Submission – Family Law Council.

- information provided on the s60I certificates can be unreliable and even misleading (as they are unsubstantiated allegations)
- disclosing information such as reasons why FDR was unsuccessful or not attempted could increase acrimony between parties
- the inclusion of further information on s60I certificates (such as the existence of family violence) may pose risks to the safety of those who are subject to family violence and who disclose that fact during FDR
- FDRPs may be expected to take on additional roles, such as investigators (or potential witnesses), and
- it may be dangerous for FDRPs to draw ‘conclusions’, given limited context.

Recent case law

Since the above consultations were undertaken, the decision of Federal Magistrate Riethmuller in *Rastall v Ball*³⁰² was delivered (22 November 2010). It enlivened the question of when the confidential protection, provided under s10H of the Family Law Act, commences. There, the mediator assessed that it would not be appropriate to conduct the proposed FDR, and purported to issue a s60I certificate to this effect. The Court found that, in these circumstances, FDR had not commenced and the participants had only engaged in the intake and assessment processes. The evidence of the assessment was held to be neither confidential under s10H nor inadmissible under s10J of the Act.

Although unreported, this decision potentially has significant ramifications for the practice of FDR because, until this decision, it was thought that the content of assessments were confidential. If matters disclosed in an assessment session can be used in evidence in subsequent court proceedings, this will potentially increase the amount of information sharing that can occur between FDRPs and courts without the need for legislative intervention. This is particularly the case where a paragraph 60I(8)(aa) certificate is issued.

6.3.4 Options to facilitate information sharing between FDRPs and the courts

There was no clear consensus among stakeholders in support of a particular preferred option for improved information sharing between FDRPs and the courts. However, numerous options were raised and these are canvassed below.

Changes to the section 60I certificate

Several suggestions advocated changing the s60I certificate. These included options such as:

- reducing the categories of s60I certificates to non-attendance, not resolved, or not suitable. ‘Not suitable’ would replace the current term ‘not appropriate’ and should provide a sufficient flag for courts. The courts can then perform their own risk assessments

³⁰² *Rastall v Ball* [2010] FMCAfam 1290.

- including a more detailed tick box system on s60I certificates, allowing FDRPs to specify why a matter is unsuitable for FDR (for example, where there are problems with alcohol/drugs or family violence)
- including an extra box that FDRPs could tick, to specify that a matter ‘may need further assessment’. This would distinguish those cases in which there was a perceived risk, from cases where participants were simply being adversarial or were not otherwise participating in FDR. Family consultants in the court, when alerted by such an indication on the certificate, could then call the FDRP and have a confidential and inadmissible discussion for case management purposes
- an alternative to the above two options would be to create a second tick box certificate that would only go to court and not to the participants. Courts could then be triggered to conduct further risk assessment without the FDRP alerting the participants and creating additional acrimony, and
- building a risk assessment framework into the s60I certificate process. The framework would be agreed between the FDRP and the court, and would include recommendations on how the court could manage the case. The information in the framework would not be admissible.

As highlighted in section 6.3.3, stakeholders expressed significant concerns about including additional information in s60I certificates. In particular, stakeholders were concerned that this could expose some clients to additional risk (for example, clients who are victims of family violence or by triggering an incident related to mental health). This is because participants, not courts, receive the certificates. It is then the participants’ responsibility to file these certificates with the court when applying for a Part VII order.

The alternative of providing a separate certificate directly to the court also received criticism. Practitioners were uncomfortable with giving information on their observations to courts without the participants’ knowledge. It was felt that this would fundamentally alter the role of the FDRPs. This information could be unreliable and misleading, because they are unsubstantiated allegations that, in any event, only give a snapshot of the participants’ circumstances at the time of the FDR assessment process. It may be many months before the participant files with the court for a Part VII order. During this time, participants’ circumstances may have changed quite considerably. Having courts conduct their own assessment after the filing of the s60I certificate offers a more up-to-date perspective, and maintains the Act’s separation between FDRPs and the court system.

Many stakeholders were of the view that the existing ‘not appropriate’ requirement should be sufficient to flag that there is a problem. When FDRPs tick the box ‘not appropriate for mediation’, signal to the court that further assessment is required. However, stakeholders advised that, in practice, this indicator is not always being picked up by courts because there are too many perceptions of what ‘not appropriate’ may indicate. Because of this, it was questioned whether changing the term to ‘not suitable’ would have any impact.

Others argued that it would be inappropriate to provide a more detailed indicator to the courts. There were concerns that providing additional guidance to the court could lead to courts being disproportionately reliant on FDRPs’ assessments (which may have been

overtaken by time), or a feeling that FDRPs are telling the courts what to do. Apart from potentially undermining the confidence participants have in FDRPs, this could diminish the courts' responsibility to undertake their own risk assessment. This would be an undesirable outcome.

The option of family consultants having a confidential and inadmissible discussion with FDRPs for case management purposes would fundamentally alter the respective roles of FDRPs and family consultants, by re-conferring confidentiality and inadmissibility on family consultants for case management. An alternative, which would preserve the respective roles in their current form, could be for such information to be provided to 'case coordinators' currently employed by the Family Court.

Other reporting mechanisms

Options were also put forward for new reporting mechanisms. Particular focus was on establishing a process to ensure that the court can identify when an FDRP has specific information about child abuse or serious family violence in a particular case.

FDRP entering information into a database or portal

One way of doing this would be for the FDRP to enter this information on a court database or portal, which court personnel can access to check whether an FDRP has flagged information that could potentially be made available. Under current legislation, the FDRP would only be able to enter this information where an exception to confidentiality applies in s10H. There would also need to be some mechanism allowing information to be categorised by seriousness so that those matters most urgently needing assistance are dealt with quickly and resources are not taken up by less serious cases. NADRAC notes that the development and costing of such a database or portal would need to be negotiated between the Attorney-General's Department and the courts.

FDRP giving written advice to disputants

It was also suggested that the FDRP could give written advice to disputants that would narrow down the contested issues. This advice could be available to the court and the court would decide whether to act on the advice or recommendations provided. This information would only be used to decide how to manage the case; it would not be admissible and therefore would not affect the merit of the case.

Implementing this option would also have the potential, like other options canvassed above, to fundamentally change the role of FDRPs. In many instances, it will not be appropriate for the FDRP to give advice as the participants would not have progressed beyond intake and assessment. Any information that the FDRP could provide would also only be relevant to that point in time. As noted above, it may be many months before the participant applies for a Part VII order. During this time, disputants' circumstances may have changed quite considerably.

Validated self-reporting risk assessment

A validated self-reporting risk assessment instrument was also canvassed as an option.

Individuals would be responsible for undertaking their own risk assessment, with assistance from the FDRP, and could choose to give it to the court.

Concern was expressed that a self-reporting approach may not work for people who come from disadvantaged backgrounds and may not be able to take full advantage of it.

In addition, the initiating application form for family law proceedings gives parties opportunities to acknowledge that they have received advice from a family counsellor or a FDRP about the services and options (including alternatives to court action) available in circumstances of abuse or violence.³⁰³ A party can also indicate where there are ongoing cases about family violence or child welfare issues that involve any of the parties or children listed in the application.

While it is recognised that many parties do not include information about family violence on these forms or in supporting affidavits, many stakeholders do not support transferring to FDRPs the responsibility for disclosure of these issues. They would prefer that consideration be given to improving the assessment of cases performed once an initiating application has been filed. One suggestion to facilitate this was to establish a shared administration for both the Family and Federal Magistrates Courts so that an assessment could be done up front for case management purposes.

Proposed amendments to the Family Law Act 1975 (Cth)

In November 2010, the Attorney-General's Department released the Exposure Draft Family Law Amendment (Family Violence) Bill 2010 (Cth) for public consultation.³⁰⁴ The Bill proposes to change the meaning of 'family violence' and 'abuse' to better capture harmful behaviour; strengthen obligations on FDRPs; and ensure that courts have better access to evidence of family violence and abuse.

The amended definitions will help to clarify (and potentially extend) the circumstances in which an FDRP can disclose a communication under s10H or a communication will be admissible under s10J (discussed below in section 6.4).

The strengthened obligations on FDRPs do not affect their ability to keep information confidential or require information sharing between FDRPs and the courts. Rather, they reinforce the importance of the best interests of the child.

The amendments will also require parties to disclose family violence and involvement with child welfare authorities. Similarly, there will be an obligation on courts to inquire about family violence and abuse.

303 See *Family Law Act 1975 (Cth)* s60J. For the initiating application see Family Law Courts, *Notice of Child Abuse or Family Violence – Form 4*, Canberra, 2008, viewed 10 October 2010, <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA_form_NChild_Abuse>.

304 Commonwealth Attorney-General's Department, *Family Law Amendment (Family Violence) Bill 2010 – Exposure Draft*, Canberra, 2010, viewed 10 January 2011, <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_FamilyLawLegislationAmendment\(FamilyViolence\)Bill2010-ExposureDraft](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_FamilyLawLegislationAmendment(FamilyViolence)Bill2010-ExposureDraft)>.

6.3.5 Recommendations

NADRAC does not recommend amendments of the confidentiality protection afforded by the Family Law Act.

NADRAC's assessment is that, overall, the confidentiality protection afforded by the Family Law Act properly balances the disparate policy objectives and stakeholder interests.³⁰⁵ NADRAC also considers the exceptions to the confidentiality protection to be largely adequate to protect and advance policy interests in the disclosure of certain kinds of information to relevant parties and authorities. The proposed amendments in the Exposure Draft Family Law Amendment (Family Violence) Bill 2010 will also help to clarify what constitutes violence and abuse, and should be disclosed. However, NADRAC observes that there may be merit in amending the Act to include an exception where there is an allegation of professional misconduct against the FDRP.

NADRAC is also mindful of the recommendations made by the Australian Law Reform Commission in its 2010 report, *Family Violence – A National Legal Response*. Recommendation 22-1 was that paragraph 10H(4)(b) of the Family Law Act be amended to permit FDRPs:

to disclose communications made during FDRP, where practitioners reasonably believe that disclosure is necessary to prevent or lessen a serious threat to a person's life, health or safety.³⁰⁶

Further, NADRAC is not opposed to the principle of further information sharing between FDRPs and courts to protect families from violence. This issue has generated much thought and debate in the family law sector, and requires the balancing of varied considerations. NADRAC agrees that a paramount concern in FDR, and the family law system in general, should be to ensure participants' safety. At the same time, NADRAC is concerned about a range of potential implications, such as a risk to the integrity of FDR processes, and is not convinced that any of the options canvassed in section 6.3.4 strike the right balance. A significant part of a FDRP's role is to elicit statements that would otherwise incriminate a participant, so that a proper and safe resolution of the issues can be reached. Participants will be less likely to disclose this information if it will not be confidential.

In light of these factors, NADRAC considers that it is not useful, at this time, for it to recommend a mechanism to address this issue; especially in light of the more detailed review of the family law system conducted by ALRC and family law courts.³⁰⁷ Nevertheless, NADRAC trusts that the analysis provided in this Report will contribute to the debate and outline useful considerations for policy makers.

³⁰⁵ NADRAC notes that the Family Law Council, in its report *Collaborative Practice in Family Law* (2006), 2, recommended that the '...Family Law Act should be amended to provide confidentiality of communications in the collaborative process similar to the protections provided to communications made in family dispute resolution by sections 10H and 10J of the Act'.

³⁰⁶ This recommendation also suggested a similar amendment be made to paragraph 10D(4)(b) of the Family Law Act, which relates to family counselling.

³⁰⁷ NADRAC is also mindful of Australian Law Reform Commission, *Family Violence – A National Legal Response*, report 114, (2007), Recommendation 22-5 which states that the Commonwealth Attorney-General's Department should coordinate education and training for various persons engaged in the family law sector, about the need for screening and risk assessment where a section 60I certificate has been issued.

6.4 Inadmissibility

6.4.1 Legislation

Section 10J of the Family Law Act provides that evidence of anything said, or any admission made, by or in the company of a FDRP (or a ‘professional’ to whom the FDRP refers a person for consultation) is not admissible in any court, or in any proceedings before a person authorised to hear evidence.³⁰⁸

This rule does not extend to admissions made which indicate that a child under 18 has been abused or is at risk of abuse (subs10J(2)).³⁰⁹ In addition, information may be disclosed as is necessary to provide a certificate for the purposes of s60I of the Act.

Similar to confidentiality protection under the Act, this privilege does not attach to arbitration processes or processes conducted by family consultants.

6.4.2 Key issue – adequacy of existing exceptions to inadmissibility

The key issue canvassed through consultation was the adequacy of existing exceptions to inadmissibility of communications during FDR, which relate to admissions or disclosures of abuse, or risk of abuse, of a child under 18.³¹⁰

6.4.3 Consultation outcomes

Several submissions commented that the current inadmissibility provisions under the Family Law Act are adequate,³¹¹ and that changes to or extensions of existing exceptions are not necessary. For example, Relationships Australia Victoria (RAV) argued that the existing provisions around confidentiality and disclosure provide sufficient scope for FDR practitioners to protect children and families. RAV also opposed another exception being added to facilitate the making of complaints against FDRPs. Instead, it considered such complaints should be investigated by a body charged with responsibility for ensuring competent practice.

Relationships Australia Victoria further submitted that paragraph 10J(1)(a) does not make it clear whether the inadmissibility extends to information obtained at assessment sessions. It considered that it is important for this information to be expressly mentioned in subs10J(1), so that there is no room for argument about whether this information is, or is not, admissible.³¹²

308 For similar provisions relating to family counselling, see *Family Law Act 1975* (Cth) s10E.

309 Note the proposed amendments in the Exposure Draft Family Law Amendment (Family Violence) Bill 2010 discussed in section 6.3.4.

310 NADRAC is aware of a further issue raised in this context. The ALRC has recommended that s10J of the Family Law Act be amended to apply expressly to state and territory courts not exercising family law jurisdiction. See Australian Law Reform Commission, *Family Violence – A National Legal Response, report 114*, (2007), Recommendation 22-5.

311 Submissions – Family Mediation Centre, Relationships Australia Victoria.

312 See discussion of *Rastall v Ball* [2010] FMCAfam 1290 in section 6.3.3. This case was delivered after consultation was completed.

Other submissions, however, expressed the view that the current exceptions specified in subs10J(2) of the Act are not adequate.³¹³

The Women's Legal Services Australia would support amending s10J to allow FDRPs and counsellors to make disclosures where there is a serious risk or threat to life. Caution would need to be exercised to balance competing interests and ensure that there is retention of the basic tenet of inadmissibility that makes dispute resolution processes so effective, while at the same time protecting victims of family violence.

The Shoalcoast Community Legal Centre submitted that subs10J(2) does not go far enough to protect the best interests of the child, or other victims of family violence. The Centre supports recommendations made in the Chisholm Report and the ALRC Consultation Paper on Family Violence: that the Family Law Act be amended to allow FDRPs to give additional information to the courts to assist with case management and risk assessment. In addition, this submission supported recommendations that admissibility provisions be amended to ensure adequate protection of children and families from physical and psychological harm.

The Family Law Council submitted that the Family Law Act should continue to have an inadmissibility provision to ensure that FDR communications are protected where justified. However, it advocated several amendments of the current exceptions to the inadmissibility provision:

Sub-section 10J(2) of the Act specifies that the inadmissibility requirement does not apply to an admission by an adult that indicates that a child under 18 has been '*abused*' or '*is at risk of abuse*' or a disclosure by a child under 18 that indicates that the child has been '*abused*' or '*is at risk of abuse*.'

The Council considers that the exceptions contained in subs10J(2) allow for narrow interpretation only. In particular, the provision only covers 'abuse' and not 'family violence.'

Council considers that the exceptions should reflect the different categories of family violence. In this regard, the Council recommends that subs10J(2) could be amended along similar but not identical lines to those exceptions specified in subs10H(4) for confidentiality – in particular, in addition to the current exceptions:

- (a) protecting a child from the risk of physical harm and serious psychological harm; or
- (b) preventing or lessening a serious and imminent threat to the life or health of a person;
or
- (c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or
- (d) preventing or lessening a serious offence relating to the property of a person.

The amended provision would still allow for admissions and disclosures by an adult or a child that fall under the categories specified above unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

313 Submissions – Women's Legal Services Australia, Shoalcoast Community Legal Centre, Family Law Council.

The Council considers that there should be another exception to the confidentiality and inadmissibility requirements in order to investigate and permit evidence of fraud, negligence or other malpractice by FDR practitioners.

6.4.4 Recommendations

General rule of inadmissibility

NADRAC considers that expressly providing for the inadmissibility of FDR processes, as the Family Law Act does, encourages frank discussions and meaningful negotiations during FDR processes, and protects the integrity of such processes. Further, exceptions to inadmissibility should exist in appropriate circumstances.

Extension of general rule to communications during intake processes

6.4.4.1 NADRAC recommends that the Family Law Act should be amended to provide expressly for the inadmissibility of ADR communications made during intake and assessment processes. This would encourage participants to be frank about their circumstances during these early stages, and thus facilitate appropriate risk identification.

NADRAC acknowledges that this position contrasts with the recent decision of Riethmuller FM in *Rastall v Ball*,³¹⁴ delivered on 22 November 2010, where it was held that communications made during the intake assessment were neither confidential under s10H nor inadmissible under s10J of the Act.

Should exceptions from confidentiality obligations and inadmissibility be reconciled?

6.4.4.2 NADRAC recommends a detailed review of ss10H and 10J of the Family Law Act, noting that subs10J(2) provides much narrower exceptions to inadmissibility than those provided for in s10H (which protects confidentiality). A review of these provisions would be useful to assess whether there is a principled differentiation between these criteria, or whether the scope of exceptions in each provision should be made uniform. NADRAC would support the inclusion of exceptions which:

- protect a child from risk of harm (physical or psychological) (paragraph 10H(4)(a)), or
- prevent or lessen a serious and imminent threat to the life or health of a person (paragraph 10H(4)(b)).

However, inclusion of the paragraph 10H(4)(a) criteria may not be necessary in the event of enactment of the definition of ‘abuse’ proposed in the Exposure Draft Family Law Amendment (Family Violence) Bill 2010 (Cth) released in November 2010.³¹⁵ The Bill proposes to expand the meaning of ‘abuse’ to better capture harmful behaviour in the following terms:

³¹⁴ *Rastall v Ball* [2010] FMCAfam 1290.

³¹⁵ Commonwealth Attorney-General’s Department, *Family Law Amendment (Family Violence) Bill 2010 – Exposure Draft*, Canberra, 2010, viewed 10 January 2011, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_FamilyLawLegislationAmendment\(FamilyViolence\)Bill2010-ExposureDraft](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_FamilyLawLegislationAmendment(FamilyViolence)Bill2010-ExposureDraft).

abuse, in relation to a child, means:

- (a) an assault, including a sexual assault, of the child; or
- (b) a person (the **first person**) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
- (c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
- (d) serious neglect of the child.

Any review should also consider the general recommendations on confidentiality and inadmissibility in the non-FDR context made by this Report and determine whether these recommendations should also be applied in the FDR context.

Finally, NADRAC acknowledges that broad agreement may emerge for more extensive information-sharing,³¹⁶ to better support courts in undertaking assessment and case management. This may particularly be the case where issues of safety are involved, and may lead to amendments of s10H of the Family Law Act (which provides for confidentiality of FDR communications). If this is so, then it will be necessary to consider whether the kind of information to be disclosed to support effective case management should also be made subject to an exception to the general rule against inadmissibility, as provided for in s10J of the Act.

Inadmissibility and the adjudication of complaints of professional misconduct by practitioners

Despite the removal of FDRP immunity in 2006, the operation of the inadmissibility provisions of the Family Law Act means that, in effect, it may not be possible to lead evidence of professional misconduct by a FDRP. NADRAC does not support provisions that have the effect of protecting ADR practitioners from the consequences of misconduct. Consistent with its observation in section 6.3.5 (confidentiality), NADRAC observes that, subject to wider consultation with the family law sector, it may be desirable to amend the inadmissibility provision of the Act to expressly permit evidence of professional misconduct by FDRPs.

6.5 Practitioner immunity

6.5.1 Legislation

Before 1 July 2006, the Family Law Act conferred immunity on family mediators (now FDRPs). The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) removed this immunity, following joint advice from NADRAC and the Family Law Council.

³¹⁶ Although there is disagreement about the mechanism by which to achieve this.

As outlined in Chapter 5 (Practitioner Immunity), the Councils gave several reasons for this, including that any immunity from suit for negligence or other civil wrong must be strongly justified as a matter of public policy.

6.5.2 Key issue – evidence of professional misconduct

Despite the removal of immunity, the operation of the inadmissibility provisions of the Family Law Act means that, in effect, it may not be possible to present evidence of professional misconduct by a FDRP.³¹⁷

6.5.3 Consultation outcomes

NADRAC's consultation processes yielded a consensus that the removal of FDRP immunity does not appear to have affected FDRPs in any significant way (possibly due to the broad inadmissibility provisions in the Family Law Act). This consensus was apparent both in submissions and in NADRAC's face-to-face consultation sessions with family law stakeholders.

However, opinions were divided on whether FDRPs should be afforded the benefit of an express statutory immunity protection. While some commented that they considered the current position with respect to immunity under the Family Law Act to be appropriate,³¹⁸ others contended that FDRPs should be entitled to statutory immunity protection.³¹⁹

ADRA submitted that, in circumstances where the legislation is dictating the actions of practitioners, FDRPs should have the benefit of statutory immunity. It observed that FDR is a highly emotional area, and the lack of statutory immunity could be a disincentive for practitioners to enter the field. It also noted that, as FDRPs engage in court-related matters, they should receive the benefit of immunities that are inherent in the court process.

Relationships Australia Victoria submitted that, while the removal of immunity does not appear to have had any significant impact on FDR services within its organisation, if evidence of fraud, negligence or other malpractice were admissible, FDR services would be adversely affected. This is not because such behaviours are presently occurring, 'but because it would compromise the ability of FDR practitioners to do their job in a robust and effective way without the possible threat of litigation'.

Relationships Australia Northern Territory submitted that FDRP's should be protected from suit for fraud or negligence. There would be a potentially negative impact on the profession generally if provisions permitted evidence of fraud, negligence or other malpractice by FDRPs. It may be that practitioners would be less likely to seek employment in the area of family law due to a perception of a greater likelihood of litigation or complaints against practitioners.

317 Arbitrators still have the same protection and immunity that a judge of the Family Court has in performing the functions of a judge (*Family Law Act 1975 (Cth)* s10P).

318 Submission – Family Mediation Centre (Victoria).

319 Submissions – Alternative Dispute Resolution Association, Relationships Australia Victoria, Relationships Australia Northern Territory.

In its submission, the Family Law Council noted its 2005 joint advice with NADRAC and stated that the Council maintains its position that statutory immunity for FDRPs (and family counsellors) is not necessary. Practising FDRPs must have professional indemnity insurance to be accredited. In addition, the Family Law Council considered that there should be another exception made to the current inadmissibility provision to permit evidence of fraud, negligence or other malpractice by FDR practitioners, so that practitioners can be held accountable for such conduct.

6.5.4 Recommendations

NADRAC does not recommend changes to the current position.

NADRAC maintains the view expressed in its 2005 joint letter of advice with the Family Law Council, and does not support the conferral of statutory immunity on FDRPs. Many of the arguments set out in Chapter 5 (Practitioner Immunity) regarding private ADR practitioners in general apply equally to FDRPs. NADRAC considers that FDRPs can adequately limit their liability by appropriate contractual arrangements with disputants, and through liability insurance. Further, neither the FDRP's role nor the FDR processes offer any compelling justification for statutory immunity.

Finally, NADRAC observes that, to offer effective redress against fraud or negligence by FDRPs, it may be desirable to amend the relevant provision of the Family Law Act (s10J) to include an exception to permit evidence of professional misconduct by FDRPs. However, the merits of doing this would be subject to wider consultation with the family law sector. This approach is consistent with NADRAC's observations in section 6.4.4 (inadmissibility).

Appendices

Appendix 1.1 – Differences between private ADR and mandatory ADR

Private ADR	Mandatory ADR
<ul style="list-style-type: none"> • Is wholly voluntary • Often referred to as mediation, although many advisory and determinative forms of ADR also exist • Not regulated by legislation • May be subject to standards that support quality (eg NMAS for mediators) • Subject to contractual agreement • Subject to various confidentiality and reporting obligations • Not the subject of a large amount of research • Participants are not subject to conduct obligations 	<ul style="list-style-type: none"> • Is compulsory (even where consent orders are made, because such orders have coercive effect) • Can include facilitative and advisory ADR, and determinative ADR, with participants' consent • Can extend to judicial dispute resolution (as in Victoria) • Is the subject of various legislative provisions that differ considerably as to confidentiality and admissibility • May be explicitly linked to case management functions • Commonly conducted by court or tribunal staff, but sometimes conducted by private ADR practitioners • Subject to varying conduct requirements

Appendix 1.2 – National Principles for Resolving Disputes (NADRAC)

1. People have a responsibility to take genuine steps to resolve or clarify disputes and should be supported to meet that responsibility.
2. Disputes should be resolved in the simplest and most cost-effective way. Steps to resolve disputes including using ADR processes, wherever appropriate, should be made as early as possible and both before and throughout any court or tribunal proceedings.
3. People who attend a dispute resolution process should show their commitment to that process by listening to other views and by putting forward and considering options for resolution.
4. People in dispute should have access to, and seek out, information that enables them to choose suitable dispute resolution processes and informs them about what to expect from different processes and service providers.
5. People in dispute should aim to reach an agreement through dispute resolution processes. They should not be required or pressured to do so if they believe it would be unfair or unjust. If unable to resolve the dispute people should have access to courts and tribunals.
6. Effective, affordable and professional ADR services which meet acceptable standards should be readily available to people as a means of resolving their disputes.
7. Terms describing dispute resolution processes should be used consistently to enhance community understanding of, and confidence in, them.

Appendix 1.3 – Submissions received

1. Administrative Appeals Tribunal
2. ADR Directorate, Victorian Department of Justice
3. Australian Customs and Border Protection Service
4. Australian Dispute Resolution Association
5. Australian Institute of Family Studies
6. Community Justice Centre, Northern Territory Department of Justice
7. Consumer Credit Legal Centre (New South Wales)
8. Department of Human Services
9. Department of Justice and Attorney-General (Queensland)
10. Department of Veterans' Affairs
11. Energy and Water Ombudsman (Victoria)
12. Family Law Council
13. Family Law Section of the Law Council of Australia
14. Family Mediation Centre
15. Federal Court of Australia
16. Financial Ombudsman Service
17. Health Quality and Complaints Commission (Queensland)
18. Health Services Commissioner (Victoria)
19. Law Council of Australia
20. Law Society of New South Wales
21. Lyndon White, Nationally Accredited Mediator
22. National Legal Aid
23. National Native Title Tribunal
24. New South Wales Bar Association
25. New South Wales Department of Justice and Attorney General
26. New South Wales Physiotherapists Registration Board
27. Ombudsman Victoria
28. Public Transport Ombudsman (Victoria)
29. Queensland Law Society
30. Relationships Australia Northern Territory
31. Relationships Australia Victoria
32. Robyn Carroll, Associate Professor, Law School, University of Western Australia

33. Shoalcoast Community Legal Centre
34. Social Security Appeals Tribunal
35. Toni Bauman, Australian Institute of Aboriginal and Torres Strait Islander Studies
36. Top End Women's Legal Service
37. University of Western Australia
38. Victorian Bar
39. Victorian Civil and Administrative Tribunal
40. Women's Legal Centre (Australian Capital Territory & Region)
41. Women's Legal Services Australia
42. Workers Compensation Commission (New South Wales)

A small number of confidential submissions were also received.

Appendix 2.1 – Federal legislation prescribing conduct obligations in ADR

Legislation	When it applies	Whose conduct	Conduct prescribed
<i>Administrative Appeals Tribunal Act 1975</i> , ss34A and 34B	After the AAT has referred a matter to an ADR process	Each party	‘act in good faith in relation to the conduct of the ADR processes concerned’
<i>Family Law Act 1975</i> , s60I	Before applying for a Part VII order relating to children	Attendees of family dispute resolution who wish to apply for a Part VII order	‘make a genuine effort to resolve that dispute by family dispute resolution’
<i>Native Title Act 1993</i> , ss 94E(5)	After the Federal Court has referred a native title application for mediation	‘each party and their representative’	‘act in good faith in relation to the conduct of the mediation’
<i>Legal Services Directions 2005</i> , Appendix B	When participating in ADR processes	Commonwealth government agencies and their representatives	Participate ‘fully and effectively’ and have authority to settle the matter (subject to narrow exceptions). Further, as ‘litigation’ is defined to include ADR processes, the model litigant standards apply to those processes.

Appendix 2.2 – Case study: *Native Title Act 1993*

Case study: requirement to mediate in good faith – *Native Title Act 1993*

Under the *Native Title Act 1993*, the Federal Court is required to refer all native title applications to an ‘appropriate person or body’ for mediation unless the Court determines that mediation will be unnecessary or there is no likelihood of the parties reaching an agreement.³²⁰ This case study explains the participant conduct requirement in the native title mediation scheme.

Subsection 94E(5) of the Act imposes an obligation on each party and their representative to ‘act in good faith in relation to the conduct of the mediation.’ This obligation extends to both disputing parties and their representatives. As a result, lawyers representing parties at a mediation conference must also act in good faith and cannot engage in actions which may fall below that standard on the basis that he or she is ‘acting on instructions’ or ‘cannot obtain instructions’.

Before the introduction of this requirement in 2007, there had already been an obligation on parties to negotiate in good faith.³²¹ However, this obligation was restricted to a limited number of ‘future acts,’ almost always the grant of a right to mine or conduct high impact explorations.³²² The meaning of the obligation to negotiate in good faith has been the subject of numerous Federal Court decisions and National Native Title Tribunal determinations, most notably *Western Australia v Taylor*³²³ (discussed in section 2.2.2).

The 2007 introduction of the ‘good faith requirement’ stemmed from recommendations from the *Native Title Claims Resolution Review* (2006). According to the review, ‘there is a growing tendency for parties to mediation to exhibit a lack of good faith during mediation.’ The report suggested that one option to increase the effectiveness of mediation would be to impose a requirement that those formally participating in mediation act in good faith.³²⁴ To assist in ensuring that parties understand what is required of them, the report also recommended that a code of conduct for everyone involved in mediation, including legal practitioners, be formulated.

The Act does not provide any specific penalties for non-compliance with the good faith requirement, rather it offers redress through other means. If the person conducting the mediation considers that a party has breached the good faith requirement, the Act provides mechanisms for the mediator to report such breaches.³²⁵

320 *Native Title Act 1993* (Cth) s86B.

321 *Native Title Act 1993* (Cth) s31.

322 John Sosso, ‘Good Faith Mediation in the National Native Title Tribunal’ 9(8) 2007 *ADR Bulletin* 144, 145.

323 *Western Australia v Taylor* (1996) 134 FLR 211.

324 *Native Title Claims Resolution Review* (2006), 23.

325 *Native Title Act 1993* (Cth) s94P.

The breach can be reported to a number of bodies³²⁶ depending on the classes of persons and/or entities that are alleged to have perpetrated the breach.

The introduction of the good faith obligation in native title mediation has been found to have made a difference in the way parties engage in these court referred mediation processes. In its submission to NADRAC's 'Resolve to resolve' report in 2008/9, the National Native Title Tribunal submitted that 'a gentle reminder about the 'good faith' provision in the Act was sufficient to change parties' behaviour.'³²⁷

Though the above example provides a useful point of reference, the conduct obligation in the native title mediation regime may need to be viewed within its own context. Sosso notes that just as the legal concept of native title is *sui generis*, native title mediation has unique elements that differentiate it from mediation in other contexts.³²⁸ Native title mediations can involve numerous parties, sometimes numbering in the hundreds, many of whom have totally different interests and perspectives. The parties to the mediation are usually not only strangers but have different 'world views' and approach issues from different cultural perspectives. Proceedings also often involve different states and territories with each government bringing its own distinct policy agendas.³²⁹

326 Such as the Federal Court, the Attorney-General, a Commonwealth Minister, a state/territory Minister, heads of government agencies and legal professional bodies.

327 NADRAC's Report to the Attorney-General, *The Resolve to Resolve – Embracing ADR to improve access to justice in the federal jurisdiction* (2009), 136.

328 John Sosso, 'Good Faith Mediation in the National Native Title Tribunal' 9(8) 2007 *ADR Bulletin* 144, 145.

329 John Sosso, 'Good Faith Mediation in the National Native Title Tribunal' 9(8) 2007 *ADR Bulletin* 144, 145.

Appendix 2.3 – Views supporting statutory imposition of conduct obligations

<p>Encourages fuller participation</p>	<p>Imposing statutory conduct obligations on participants:</p> <ul style="list-style-type: none"> • encourages good conduct • ensures that participation is real and not tokenistic, and • helps participants to get the full benefit of ADR. <p>There is a particular need for conduct regulation in mandatory ADR, to:</p> <ul style="list-style-type: none"> • support civil dispute resolution objectives by encouraging effective dispute resolution, and • support fair and just procedures.
<p>Deters and addresses bad behaviour</p>	<p>Bad behaviour could have serious consequences and threaten public confidence in ADR. Examples of bad behaviour include:</p> <ul style="list-style-type: none"> • using ADR for the sole purpose of discovery • using ADR to outspend or harass the other party • using ADR to mislead the other party, and • other coercion or pressure tactics. <p>These behaviours could result in unnecessary interlocutory disputes, longer hearings, duplication of effort and wasted time, increased costs, non-consensual and non-enduring ADR outcomes.</p> <p>The imposition of an explicit conduct standard, and/or the threat of sanctions or liability for non-observance, may deter abuse of ADR processes and provide meaningful redress for misconduct. This could protect the integrity of ADR processes. Consistent with the protective purposes underpinning a conduct standard, any sanctions imposed should be directed to securing compliance, rather than punishing disobedience.³³⁰</p> <p>Prescribed conduct standards could also help to educate participants about conduct requirements and result in the development of clearer guidelines and commonly shared expectations.</p>

330 Roger L Carter, 'Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations' (2002) 2002 *JDR* 367, p23.

<p>Enhances objectives of ADR</p>	<p>Conduct standards could promote ADR objectives such as efficiency, effectiveness, party satisfaction and fairness, including by:</p> <ul style="list-style-type: none"> • addressing power imbalances, and • providing safeguards against power imbalances being exploited. <p>An objective of ADR is to enable disputants to make well-informed decisions, and to give them confidence to reach their own resolution. An explicit and informative conduct could inspire confidence in the process.</p> <p>Although prescribed conduct obligations could bring about unintended side effects, such as the encroachment on parties' self-empowerment, the benefits of providing some assurance of fairness outweigh potential drawbacks.³³¹</p>
<p>Supports practitioner independence</p>	<p>Practitioners can refer to the stipulated conduct standard and reduce poor behaviour.</p> <p>Prescribed conduct standards could support and nurture a culture of dispute resolution and interest-based engagement.</p>
<p>Supports a seamless and consistent civil justice system across litigation and ADR contexts</p>	<p>The absence of any explicit conduct standard in the context of mandatory ADR sits uncomfortably with civil procedure reforms which require parties to observe overarching obligations in the conduct of litigation.</p> <p>In the context of mandatory ADR, an explicit conduct standard better reflects the intention of legislatures and courts. It makes explicit what is otherwise necessarily implicit, and therefore helps to ensure participants are properly informed of what is expected of them.</p>
<p>Some empirical evidence supports prescribed conduct standards</p>	<p>Some empirical evidence demonstrates legitimate concern with participant conduct in ADR processes (eg information provided by the National Native Title Tribunal). This is particularly the case in mediation processes.³³²</p> <p>It has been suggested that an obligation to participate in good faith will increase ADR participation rates.³³³</p>

331 Maureen A Weston, 'Checks on Participant Conduct in Compulsory ADR: Reconciling Tension in the Need for Good-faith Participation, Autonomy, and Confidentiality' (2001) 76 *Ind.L.J.* 591.

332 T Sourdin, 'Mediation in the Supreme and County Courts of Victoria', Department of Justice Commissioned (2009) pp 66-68, 124 – 126, 173 – 174.

333 Submission – Robyn Carroll, 15-16.

Problems with definition and enforcement are overstated	<p>Conduct standards such as ‘good faith’, ‘reasonable steps’ and ‘genuine effort’ are resonant and meaningful in the vast majority of cases, even if attended by some doubt at the outer margins.³³⁴</p> <p>Courts and tribunals have enormous experience and expertise in dealing with problems of enforcement.</p> <p>If admissibility is dependent upon leave of the relevant court or tribunal, the frequency of satellite litigation should be well-controlled.</p>
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334 Judicial interpretation of the concept of ‘good faith’ has developed over recent years. See, for example, *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177, at [73-81]. ‘Good faith’ has also been considered by courts in contexts outside ADR (see, for example, *Strzlecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222, at [45-47]). Such decisions may also give useful guidance on how courts are likely to further develop the concept of ‘good faith’ within the ADR context.

Appendix 2.4 – Views opposing statutory imposition of conduct obligations

<p>Definition</p>	<p>It is difficult to develop clear conduct standards:³³⁵</p> <ul style="list-style-type: none"> • there does not appear to be a uniform Australian approach to framing conduct obligations, and • there is little legislative guidance on the meaning of the various conduct obligations currently prescribed. <p>Conduct obligations that are difficult to clearly and comprehensively define, such as ‘good faith’, may cause confusion for participants about the nature and extent of their obligations.</p> <p>There is a risk that participants may be confused about the precise nature and ambit of their obligations, and decision-makers may be reluctant to enforce the standards or to do so inconsistently, possibly leading to satellite litigation.</p> <p>Disputants can sometimes behave irrationally, due to fear, frustration or inexperience. Behaviour of this kind can be misinterpreted.</p>
<p>Enforcement</p>	<p>Difficulties with enforcement include:</p> <ul style="list-style-type: none"> • rules setting out conduct obligations and threatening sanctions could inhibit the ADR process and be contrary to the aims of ADR (ie providing an open and safe environment where disputants can freely and comfortably discuss their issues) • confidentiality protection may be compromised by enforcement action, potentially deterring participants’ from engaging in full and frank discussion within ADR processes • satellite litigation may increase, because an allegation of non-compliant conduct in a mediation can only be substantiated through judicial determination (as mediators have no authority to impose sanctions) • non-enforcement may risk a loss of credibility for ADR – participants may not readily abide by rules where there is no real sanction • persons who are prone to behave inappropriately are not necessarily deterred by consequences, rules or regulations, and • non-enforcement in the context of court/tribunal ordered ADR could undermine the authority and standing of the court/tribunal.³³⁶

335 Submission – Relationships Australia Victoria.

336 NADRAC, *The resolve to resolve: embracing ADR to improve access to justice in the federal jurisdiction*, Report 2009, 133.

<p>Detracts from original benefits of ADR</p>	<ul style="list-style-type: none"> • attempts to regulate or define standards of conduct in ADR are incompatible with the flexibility inherent in the ADR philosophy³³⁷ • imposition of conduct standards may be a ‘trojan horse’ which leads to micro-management of ADR³³⁸ • mediators, if bound by confidentiality and statutory admissibility requirements, may have limited options available to address extreme uncooperative behaviour. Litigation may follow such behaviour, resulting in additional litigation that incurs extra cost. Ultimately, this would detract from the original benefits of ADR • conduct obligations may themselves be used to coerce if threats of legal enforcement are made • lazy or incompetent mediators may use conduct obligations to coerce parties to reach a resolution, and • prescribing conduct standards may encourage surface bargaining and frivolous claims of bad faith, or threats to make such claims.
<p>Threat to ADR practitioner impartiality</p>	<p>A requirement for ADR practitioners to judge participant behaviour, report on it and potentially testify against it, would distort the role of practitioners, and compromise their neutrality. This could harm the development of relationships of trust between participants and practitioners.</p>
<p>Availability of other means for dealing with conduct</p>	<p>Participant conduct is adequately managed in various ways, including:</p> <ul style="list-style-type: none"> • by ADR practitioners, who can manage conduct within the process, and terminate the process if necessary • through use of private ADR contracts setting out conduct obligations and guidelines • by legal representative input • by professional guidelines and codes of conduct regarding lawyers’ behaviour in ADR • by educating disputants, lawyers and the general public about ADR, and • by practice directions and other guidelines issued by courts and tribunals to clarify their expectation of participant conduct in ADR processes ordered by courts and tribunals. <p>Further, offering mediators the comparatively blunt tool of good faith sanctions may inhibit learning other, more broadly effective, skills.</p>

337 Maureen A Weston, ‘Checks on Participant Conduct in Compulsory ADR: Reconciling Tension in the Need for Good-faith Participation, Autonomy, and Confidentiality’ (2001) 76 *Ind.L.J.* 591, 643.

338 Submission – Department of Veterans’ Affairs. Concerns were expressed that legislated conduct standards could detract from the essential nature of ADR, and render those processes more ‘court-like’.

Appendix 2.5 – State and territory legislation prescribing conduct obligations in ADR

The table below lists a selection of state/territory legislation prescribe conduct obligations on participants in ADR processes.

Juris-diction	Legislation	When it applies	Whose conduct	Conduct prescribed
NSW	<i>Farm Debt Mediation Act 1994</i> (s11)	before the creditor can take enforcement action against the farmer who is in default of a farm mortgage	the creditor	to mediate in good faith 'satisfactory mediation'
	<i>Civil Procedure Act 2005</i> (s27)	each party to proceedings that have been referred for mediation to participate	each party to the proceedings	participate, in good faith, in the mediation
	<i>Land and Environment Court Act 1979</i> (s34)	conciliation conferences that have been arranged by the court	parties to conciliation conferences	participate in good faith
ACT	<i>Civil Law (Wrongs) Act 2002</i> (s196)	when the tribunal refers matters for mediation or neutral evaluation	parties referred to mediation or neutral evaluation	obligation to take part, 'genuinely and sincerely', in the mediation or neutral evaluation
	<i>Court Procedures Rules 2006</i> (Rule 1180)	each party to a proceeding, or part of a proceeding, referred for mediation or neutral evaluation	on parties referred to mediation or neutral evaluation	obligation to take part, 'genuinely and constructively', in the mediation or neutral evaluation

Juris-diction	Legislation	When it applies	Whose conduct	Conduct prescribed
WA	<i>Family Court Act 1997</i> (s66H)	all persons who have a dispute about matters that may be dealt with by a Part 5 Order (ie, relating to children)	all persons who have a dispute	make a 'genuine effort' to resolve the dispute
SA	<i>Environment, Resources and Development Court Rules 2003</i> (Rule 8.4.1) and <i>Environment, Resources and Development Court (Native Title) Rules 2001</i>	All matters referred to a conference under certain subsections	the party or his, her or its representative(s) attending the conference similar as above	attend in good faith the issues or matters in dispute ... will be aired and discussed openly at the conference, with a view to a fair and reasonable exchange of views in good faith similar as above

Jurisdiction	Legislation	When it applies	Whose conduct	Conduct prescribed
Qld	<i>Supreme Court of Queensland Act 1991</i> (s103)	when a Supreme Court order has been made	parties attending ADR processes ordered by the Queensland Supreme Court	<p>must not impede the ADR convenor in conducting and finishing the ADR process within the time allowed under the referring order</p> <p>and must attend, participate and pay the amount required under the referring order (Rule 322, Uniform Civil Procedure Rules 1999)</p>
	<i>Uniform Civil Procedure Rules 1999</i> (Rule 325)	if a dispute in a proceeding is referred to an ADR process	Parties to mediation	must 'act reasonably and genuinely' in the mediation and help the mediator to start and finish the mediation within the time estimated or set in the referring order

Appendix 3.1 – Examples of confidentiality clauses in mediation

Example 1: Confidentiality clause in mediation³³⁹

An example of a confidentiality clause for mediation processes is contained in the LEADR Standard Mediation Agreement. It states:

The Parties and the Mediator will not unless required by law to do so, disclose to any person not present at the Mediation, nor use, any confidential information furnished during the Mediation unless such disclosure is to obtain professional advice or is to a person within that Party's legitimate field of intimacy, and the person to whom the disclosure is made is advised that the confidential information is confidential.

The Mediator agrees:

- i. to keep confidential all information furnished by a Party to the Mediator on a confidential basis;
- ii. save with the consent of the Party who furnished such information not to disclose the information to any other Party.³⁴⁰

Example 2: Confidentiality clause in mediation

Clause 6 of the NMAS Practice Standards sets out requirements regarding mediator confidentiality. It states:

A mediator should respect the confidentiality of the participants.

- 1) A mediator shall not voluntarily disclose to anyone who is not a party to the mediation any information obtained except:
 - (a) non-identifying information for necessary administrative, research, supervisory or educational purposes; or
 - (b) with the consent of the participants to the mediation process; or
 - (c) when required to do so by law; or
 - (d) where permitted by existing ethical guidelines or requirements and the information discloses an actual or potential threat to human life or safety.

³³⁹ For examples of institutional rules about confidentiality in arbitration, see M Hwang SC and K Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' (2009) 26(5) *Journal of International Arbitration* 609, 637ff. The article notes that, in the field of arbitration, the state of common law protections is less relevant, because most arbitrations are institutional, and governed by the particular rules of that institution. The authors also argue that arbitration clauses should deal with confidentiality by having a broad confidentiality protection but, instead, of specifying exceptions, allowing the arbitration body an ongoing discretion to allow exceptions. They point to the *Arbitration Act 1996* (NZ) as a potential model (at 642ff).

³⁴⁰ LEADR Standard Mediation Agreement, available at: <http://www.leadr.com.au/resources.htm>, accessed 17 February 2010.

- 2) The mediator will clarify the participants' expectations of confidentiality before undertaking the mediation process. Any written agreement to enter into the process should include provisions concerning confidentiality.
- 3) Before undertaking the mediation process, the mediator will inform the participants of the limitations of confidentiality, such as statutory, judicially or ethically mandated reporting, such as any reporting required pursuant to professional ethical requirements.
- 4) If the mediator holds separate sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon before the sessions.
- 5) If subpoenaed, or otherwise notified to testify or to produce documents, the mediator should attempt to inform the participants as soon as reasonably practicable. The mediator should not give evidence without an order of the Court or Tribunal if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants. The mediator may include indemnification provisions in relation to costs incurred (see Section 3(2)(f)).
- 6) With the participants' consent, the mediator may discuss the mediation process with the participants' lawyers and other expert advisors where such advisors have not attended all or part of the actual mediation session.
- 7) Where the participants reach an agreement in a mediation process, the substance of the proposed agreement may, with the permission of participants, be disclosed to their respective representatives, advisors or others and may be used in a de-identified form for debriefing, research processes and discussion purposes.

The mediator should maintain confidentiality in the storage and disposal of client records and must ensure that office and administrative staff maintain such confidentiality. Overall, mediators are not required to retain documents relating to a dispute although they may retain any written agreement to enter into the mediation process and any written agreement as to outcomes. Some mediators may also choose to retain notes relating to the content of the dispute particularly where duty-of-care or duty-to-warn issues are identified.

Appendix 3.2 – State and territory legislation

Jurisdiction	Legislation	To whom it applies	Confidentiality protection or obligation	Exceptions
NSW	<i>Civil Procedure Act 2005</i> (NSW) (s31)	A mediator	...mediator may disclose information... only in one or more of the following circumstances...	<p>(a) with the consent of the person from whom the information was obtained</p> <p>(b) in connection with the administration or execution of this Part, including subsection 29 (2)</p> <p>(c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property</p> <p>(d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner</p> <p>(e) in accordance with a requirement imposed by or under a law of the state (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.</p>

Jurisdiction	Legislation	To whom it applies	Confidentiality protection or obligation	Exceptions
	<p><i>Farm Debt Mediation Act 1994</i> (NSW) (s16)</p>	<p>A person</p>	<p>...must not disclose any information obtained in a mediation session or in connection with the administration or execution of this Act unless the disclosure is made...</p>	<p>(a) with the consent of the person from whom the information was obtained, or (b) in connection with the administration or execution of this Act, or (c) as reasonably required for the purpose of referring any party or parties to mediation to any person, agency, organisation or other body and, with the consent of the parties to the mediation, for the purpose of aiding in the resolution of an issue between those parties, or (d) in accordance with a requirement imposed by or under a law of the state (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth, or (e) with other lawful excuse.</p>
	<p><i>Commercial Arbitration Act 2010</i> (NSW) (s27E)</p>	<p>The parties An arbitral tribunal</p>	<p>...must not disclose confidential information in relation to the arbitral proceedings unless...</p>	<p>(a) the disclosure is allowed under section 27F, or (b) the disclosure is allowed under an order made under section 27G and no order is in force under section 27H prohibiting that disclosure, or (c) the disclosure is allowed under an order made under section 27I.</p>

Jurisdiction	Legislation	To whom it applies	Confidentiality protection or obligation	Exceptions
	<i>Workplace Injury Management and Workers Compensation Act 1998 (NSW) (s318E)</i>	The court		The amount of any offer of settlement made by a party in the course of mediation of a claim is not to be specified in any pleading, affidavit or other document filed in or in connection with court proceedings on the claim, and is not to be disclosed to or taken into account by the court, before the court's determination of the amount of damages in the proceedings.
	<i>Retail Leases Act 1994 (NSW) (s69)</i>			Any statement or admission made in the course of the mediation of a retail tenancy dispute or other dispute or matter referred to in section 65 (1) (a1) pursuant to arrangements made by the Registrar under this Part is not admissible at a hearing of a claim under Division 3 or in any other legal proceeding.

Jurisdiction	Legislation	To whom it applies	Confidentiality protection or obligation	Exceptions
ACT	<i>Civil Law (Wrongs) Act 2002</i> (s200)	An evaluator	...may disclose information obtained in relation to the administration or execution of this part only in the following circumstances...	<ul style="list-style-type: none"> (a) with the consent of the person from whom the information was obtained (b) for the administration or execution of this part (c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of death or injury to anyone or damage to any property (d) if the disclosure is reasonably required for the purpose of referring any party to a neutral evaluation session to any entity and the disclosure is made with the consent of the parties to the neutral evaluation session for the purpose of aiding in the resolution of a dispute between the parties or assisting the parties in any other way, or (e) in accordance with a requirement imposed under a law of the Territory or the Commonwealth (other than a requirement imposed by a subpoena or other compulsory process).

Jurisdiction	Legislation	To whom it applies	Confidentiality protection or obligation	Exceptions
	<i>Mediation Act 1997 (ACT)</i> (s10)	Registered mediator	...shall not disclose any information obtained in a mediation session.	...does not apply if: (a) the disclosure is required by or under a ACT or Commonwealth law; or (b) the disclosure is made with the consent of the parties; or (c) the disclosure is made with the consent of the person who gave the information; or (d) the person referred to in subsection (1) believes on reasonable grounds that: (i) a person's life, health or property is under serious and imminent threat and the disclosure is necessary to avert, or mitigate the consequences of, its realisation; or (ii) the disclosure is necessary to report to the appropriate authority the commission of an offence or prevent the likely commission of an offence.

Jurisdiction	Legislation	To whom it applies	Confidentiality protection or obligation	Exceptions
WA	<i>Family Court Act 1997</i> (WA) (s53)	Family dispute resolution practitioner	<p>...must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution, unless the disclosure is required or authorised by this section.</p> <p>...A family dispute resolution practitioner must disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory</p>	<p>(3) A family dispute resolution practitioner may disclose a communication if consent to the disclosure is given by:</p> <ul style="list-style-type: none"> (a) if the person who made the communication has attained the age of 18 years, that person, or (b) if the person who made the communication is a child who has not attained the age of 18 years: <ul style="list-style-type: none"> (i) each person who has parental responsibility for the child, or (ii) a court. <p>(4) A family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary for the purpose of:</p> <ul style="list-style-type: none"> (a) protecting a child from the risk of harm (whether physical or psychological), or (b) preventing or lessening a serious and imminent threat to the life or health of a person, or (c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person, or (d) preventing or lessening a serious and imminent threat to the property of a person, or (e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property, or

Jurisdiction	Legislation	To whom it applies	Confidentiality protection or obligation	Exceptions
				<p>(f) if an independent children's lawyer is representing a child's interests, assisting the lawyer to do so properly.</p> <p>(5) A family dispute resolution practitioner may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the <i>Privacy Act 1988</i> of the Commonwealth) for research relevant to families.</p> <p>(6) A family dispute resolution practitioner may disclose information necessary for the practitioner to give a certificate under subsection 66H(7).</p>
	<p><i>Supreme Court Act 1935</i> (WA) (s72)</p>	<p>A mediator</p>	<p>...must not disclose any information obtained in the course of or for the purpose of carrying out mediation under direction.</p>	<p>(a) the disclosure is made for the purpose of reporting under the rules of court on any failure of a party to cooperate in a mediation</p> <p>(b) the disclosure is made with the consent of the parties</p> <p>(c) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to any person or damage to any property, or</p> <p>(d) the disclosure is authorised by law or the disclosure is required by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.</p>

Jurisdiction	Legislation	To whom it applies	Confidentiality protection or obligation	Exceptions
Tas	<i>Alternative Dispute Resolution Act 2001 (TAS)</i> (s11)	A mediator or evaluator	...may disclose information obtained in connection with a mediation session or neutral evaluation session only in any one or more of the following circumstances...	<p>(a) with the consent of the person from whom the information was obtained</p> <p>(b) in connection with the administration or execution of this Act or any other Act under which a mediation session or neutral evaluation session is conducted</p> <p>(c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property</p> <p>(d) if the disclosure is reasonably required for the purpose of referring any party or parties to a mediation session or neutral evaluation session to any person, agency, organisation or other body and the disclosure is made with the consent of those parties for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner</p> <p>(e) in accordance with a requirement imposed by or under a law of Tasmania (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth</p> <p>(f) for the purpose of statistical analysis or evaluating the operation and performance of mediation and neutral evaluation processes.</p>

Jurisdiction	Legislation	To whom it applies	Confidentiality protection or obligation	Exceptions
SA	<i>Supreme Court Act 1935</i> (SA) (s65)	A mediator	...must not, except as required or authorised to do so by law, disclose to another person any information obtained in the course or for the purposes of the mediation.	
	<i>Environment, Resources and Development Court Act 1993</i> (SA) (s28B)	Not specified	...any processes of mediation on conciliation under this section will be conducted in private.	Except with the consent of the parties ...
Qld	<i>Supreme Court of Queensland Act 1991</i> (s112)	An ADR convenor	...must not, without reasonable excuse, disclose information coming to the convenor's knowledge during an ADR process.	... if the disclosure is made: (a) with the agreement of all the parties to the ADR process, or (b) for this part, or (c) for statistical purposes without revealing, or being likely to reveal, the identity of a person about whom the information relates, or (d) for an inquiry or proceeding about an offence happening during the ADR process, or (e) for a proceeding founded on fraud alleged to be connected with, or to have happened during, the ADR process, or (f) under a requirement imposed under an Act.

Appendix 4.1 – Federal legislation

Legislation	Inadmissibility protection or obligation	Exceptions
<p><i>Federal Court of Australia Act 1976</i> (Cth) (s53B)</p>	<p>Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:</p> <p>(a) in any court (whether exercising federal jurisdiction or not), or</p> <p>(b) in any proceedings before a person authorised by a law of the Commonwealth or of a state or territory, or by the consent of the parties, to hear evidence.</p>	
<p><i>Evidence Act 1995</i> (Cth) (s131)</p>	<p>(1) Evidence is not to be adduced of:</p> <p>(a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute, or</p> <p>(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.</p>	<p>(2) Subsection (1) does not apply if:</p> <p>(a) the persons in dispute consent to evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another Australian or overseas proceeding, all the other persons so consent, or</p> <p>(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute, or</p> <p>(c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced, or</p> <p>(d) the communication or document included a statement to the effect that it was not to be treated as confidential, or</p>

Legislation	Inadmissibility protection or obligation	Exceptions
		<p>(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute, or</p> <p>(f) the proceeding 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, or</p> <p>(g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence, or</p> <p>(h) the communication or document is relevant to determining liability for costs, or</p> <p>(i) making the communication, or preparing the document, affects a right of a person, or</p> <p>(j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty, or</p> <p>(k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.</p>

Legislation	Inadmissibility protection or obligation	Exceptions
<p><i>Native Title Act 1993</i> (Cth) (s94L)</p>	<p>(1) The person conducting the mediation may direct that:</p> <p>(a) any information given, or statements made, at a conference, or</p> <p>(b) the contents of any document produced at a conference,</p> <p>must not be disclosed, or must not be disclosed except in such manner, and to such other persons, as the person specifies.</p>	<p>(3) If the parties agree, the person conducting the mediation may, despite the direction, disclose things of the kind mentioned in paragraph (1)(a) or (b).</p>
<p><i>Administrative Appeals Tribunal Act 1975</i> (Cth) (s34E)</p>	<p>(1) Evidence of anything said, or any act done, at an alternative dispute resolution process under this Division is not admissible:</p> <p>(a) in any court; or</p> <p>(b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence, or</p> <p>(c) in any proceedings before a person authorised by the consent of the parties to hear evidence.</p>	<p>(2) Subsection (1) does not apply so as to prevent the admission, at the hearing of a proceeding before the Tribunal, of particular evidence if the parties agree to the evidence being admissible at the hearing.</p> <p>(3) Subsection (1) does not apply so as to prevent the admission, at the hearing of a proceeding before the Tribunal, of:</p> <p>(a) a case appraisal report prepared by a person conducting an alternative dispute resolution process under this Division, or</p> <p>(b) a neutral evaluation report prepared by a person conducting an alternative dispute resolution process under this Division,</p> <p>unless a party to the proceeding notifies the Tribunal before the hearing that he or she objects to the report being admissible at the hearing.</p>

Legislation	Inadmissibility protection or obligation	Exceptions
<p><i>The Family Law Act 1975</i> (Cth) (s10J)</p>	<p>(1) Evidence of anything said, or any admission made, by or in the company of:</p> <p>(a) a family dispute resolution practitioner conducting family dispute resolution, or</p> <p>(b) a person (the professional) to whom a family dispute resolution practitioner refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person,</p> <p>is not admissible:</p> <p>(c) in any court (whether or not exercising federal jurisdiction), or</p> <p>(d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).</p>	<p>(2) Subsection (1) does not apply to:</p> <p>(a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse, or</p> <p>(b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse,</p> <p>unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.</p> <p>(3) Subsection (1) does not apply to information necessary for the practitioner to give a certificate under subsection 60I(8).</p>

Appendix 4.2 – State and territory legislation

Jurisdiction	Legislation	Inadmissibility protection or obligation	Exceptions
NSW	<i>Civil Procedure Act 2005</i> (NSW) (s30)	(4) (a) evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body, and (b) a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body.	(5) (a) if the persons in attendance at, or identified during, the mediation session and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or (b) in proceedings commenced with respect to any act or omission in connection with which a disclosure has been made as referred to in paragraph 31(c).
	<i>Farm Debt Mediation Act 1994</i> (NSW) (s15)	...Evidence of anything said or admitted during a mediation session ... are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.	...does not apply to the following documents: (a) heads of agreement, (b) a contract, deed, mortgage or other instrument entered into as a result of, or pursuant to, Heads of Agreement, (c) a summary of mediation under s18A.

Jurisdiction	Legislation	Inadmissibility protection or obligation	Exceptions
	<p><i>Land and Environment Court Act 1979 (NSW)</i> (s34)</p>	<p>(10) If an agreement is reached between the parties and proceedings are being dealt with under subsection (3), any document signed by the parties is admissible as to the fact that such an agreement has been reached and as to the substance of the agreement.</p>	<p>(11) Subject to subsections (10) and (12):</p> <p>(a) evidence of anything said or of any admission made in a conciliation conference is not admissible in any proceedings before any court, tribunal or body, and</p> <p>(b) a document prepared for the purposes of, or in the course of, or as a result of, a conciliation conference, or any copy of such a document, is not admissible in evidence in any proceedings before any court, tribunal or body.</p> <p>(12) Subsection (11) does not apply with respect to any evidence or document if the parties consent to the admission of the evidence or document.</p>
<p>ACT</p>	<p><i>Civil Law (Wrongs) Act 2002</i> (s199)</p>	<p>(3) Evidence of anything said, or of any admission made, in a neutral evaluation session is not admissible in a proceeding before a court, tribunal or other entity.</p> <p>(4) A document prepared for, in the course of, or because of, a neutral evaluation session, or any copy of the document, is not admissible in evidence in any civil proceeding before a court, tribunal or other entity.</p>	<p>(5) Subsections (3) and (4) do not apply to any evidence or document:</p> <p>(a) for evidence—if the people in attendance at, or identified during, the neutral evaluation session consent to the admission of the evidence, or</p> <p>(b) for a document—if the people in attendance at, or identified during, the neutral evaluation session and all people identified in the document, consent to the admission of the document, or</p> <p>(c) in a proceeding (including a criminal proceeding) brought in relation to an act or omission in relation to which a disclosure has been made under paragraph 200(c).</p>

Jurisdiction	Legislation	Inadmissibility protection or obligation	Exceptions
	<p><i>Mediation Act 1997 (ACT)</i> (s9)</p>	<p>Evidence of: (a) a communication made in a mediation session; or (b) a document, whether delivered or not, prepared: (i) for the purposes of, or (ii) in the course of, or (iii) pursuant to a decision taken or undertaking given in, a mediation session; is not admissible in any proceedings except in accordance with the <i>Evidence Act 1995 (Cth)</i>, section 13.</p>	
<p>Vic</p>	<p><i>Supreme Court Act 1986 (Vic)</i> (s24A)</p>	<p>Where the Court refers a proceeding or any part of a proceeding to mediation, other than judicial resolution conference, unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation.</p>	
	<p><i>Supreme Court (General Civil Procedure) Rules 2005 (Vic)</i> (Order 50.07)</p>	<p>(6) Except as all the parties who attended the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation.</p>	<p>(4) The mediator may and shall if so ordered report to the Court or the Costs Court, as the case requires, whether the mediation is finished.</p>

Jurisdiction	Legislation	Inadmissibility protection or obligation	Exceptions
	<p><i>Victorian Civil and Administrative Tribunal Act 1998 (Vic)</i> (s85)</p>	<p>Evidence of anything said or done in the course of a compulsory conference is not admissible in any hearing before the Tribunal in the proceeding.</p>	<p>... except:</p> <ul style="list-style-type: none"> (a) where all parties agree to the giving of the evidence; or (b) evidence of directions given at a compulsory conference or the reasons for those directions; or (c) evidence of anything said or done that is relevant to- <ul style="list-style-type: none"> (i) a proceeding for an offence in relation to the giving of false or misleading information; or (ii) a proceeding under section 137 (contempt); or (iii) a proceeding in relation to an order made under subparagraph 87(b)(i).
	<p><i>Victorian Civil and Administrative Tribunal Act 1998 (Vic)</i> (s92)</p>	<p>Evidence of anything said or done in the course of mediation is not admissible in any hearing before the Tribunal in the proceeding,</p>	<p>... unless all parties agree to the giving of the evidence.</p>

Jurisdiction	Legislation	Inadmissibility protection or obligation	Exceptions
WA	<p><i>Family Court Act 1997</i> (WA) (s54)</p>	<p>Evidence of anything said, or any admission made, by or in the company of...a family dispute resolution practitioner...a person (the professional) to whom a family dispute resolution practitioner refers a person for medical or other professional consultation is not admissible:</p> <p>in any court; or...in any proceedings before a board, tribunal or person authorised to hear evidence.</p>	<p>...does not apply to:</p> <p>(a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse, or</p> <p>(b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse, unless, in the opinion of the Court, board, tribunal or person authorised to hear evidence referred to in subsection (1), there is sufficient evidence of the admission or disclosure available to the court from other sources.</p> <p>(3) Subsection (1) does not apply to information necessary for a practitioner to give a certificate under subsection 66H(7).</p>
	<p><i>Supreme Court Act 1935</i> (WA) (s71)</p>	<p>...evidence of:</p> <p>(a) anything said or done</p> <p>(b) any communication, whether oral or in writing, or</p> <p>(c) any admission made</p> <p>is to be taken to be in confidence and is not admissible in any proceedings before any court, tribunal or body.</p>	<p>(a) the parties to the mediation consent to the admission of the evidence or document in the proceedings,</p> <p>(b) there is a dispute in the proceedings as to whether or not the parties to the mediation entered into a binding agreement settling all or any of their differences and the evidence or document is relevant to that issue,</p> <p>(c) the proceedings relate to a costs application and, under the rules of court, the evidence or document is admissible for the purposes of determining any question of costs, or</p> <p>(d) the proceedings relate to any act or omission in connection with which a disclosure has been made under paragraph 72(2)(c).</p>

Jurisdiction	Legislation	Inadmissibility protection or obligation	Exceptions
Tas	<i>Alternative Dispute Resolution Act 2001</i> (Tas) (s10)	<p>(4) Evidence of anything said or of any admission made in a mediation session or neutral evaluation session is not admissible in any proceedings before any court, tribunal or body.</p> <p>(5) A document prepared for the purposes of, in the course of or as a result of a mediation session or neutral evaluation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court, tribunal or body.</p>	<p>(a) if the persons in attendance at, or identified during, the mediation session or neutral evaluation session and, in the case of a document, all persons identified in the document consent to the admission of the evidence or document, or</p> <p>(b) in proceedings instituted with respect to any act or omission in connection with which a disclosure has been made under s11, or</p> <p>(c) in proceedings instituted in respect of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty, or</p> <p>(d) in any circumstances where all parties involved in the relevant mediation session or neutral evaluation session agree to the waiver of the privilege, or</p> <p>(e) if the document was prepared to give effect to a decision taken or an undertaking given in a mediation session or neutral evaluation session.</p>
	<i>Legal Profession Act 2007</i> (Tas) (s438)	<p>(1) The following are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence:</p> <p>(a) evidence of anything said or admitted during a mediation or attempted mediation under this Part of the whole or a part of the matter that is the subject of a complaint,</p> <p>(b) a document prepared for the purposes of the mediation or attempted mediation.</p>	<p>(2) Subsection (1) does not apply to an agreement reached during mediation.</p>

Jurisdiction	Legislation	Inadmissibility protection or obligation	Exceptions
SA	<p><i>Supreme Court Act 1935</i> (SA) (s65)</p>	<p>Evidence of anything said or done in an attempt to settle a proceeding by mediation under this section is not subsequently admissible in the proceeding or in related proceedings.</p>	
	<p><i>Environment, Resources and Development Court Act 1993</i> (SA) (s28B)</p>	<p>Evidence of anything said or done in the course of processes under this section is inadmissible in proceedings before the Court except by consent of all parties to the proceedings.</p>	<p>(5) Subject to subsection (7), the Court may record any settlement reached under this section [mediation and conciliation] and make a determination or order (including an order under, or for the purposes of, a relevant Act) necessary to give effect to a settlement.</p> <p>(7) The Court:</p> <p>(a) must not accept a settlement that appears to be inconsistent with a relevant Act (but may adjourn the proceedings to enable the parties to explore the possibility of varying the settlement to comply with a relevant Act), and</p> <p>(b) may decline to accept a settlement on the basis that the settlement may materially prejudice any person who was not a participant in the processes leading to the settlement but who has a direct or material interest in the matter.</p>

Jurisdiction	Legislation	Inadmissibility protection or obligation	Exceptions
Qld	<i>Supreme Court of Queensland Act 1991</i> (Qld) (s114)	(1) Evidence of anything done or said, or an admission made, at an ADR process about the dispute is admissible at the trial of the dispute or in another civil proceeding before the Supreme Court or elsewhere only if all parties to the dispute agree.	(2) In subsection (1)— <i>civil proceeding</i> does not include a civil proceeding founded on fraud alleged to be connected with, or to have happened during, the ADR process.

Appendix 5.1 – Federal legislation

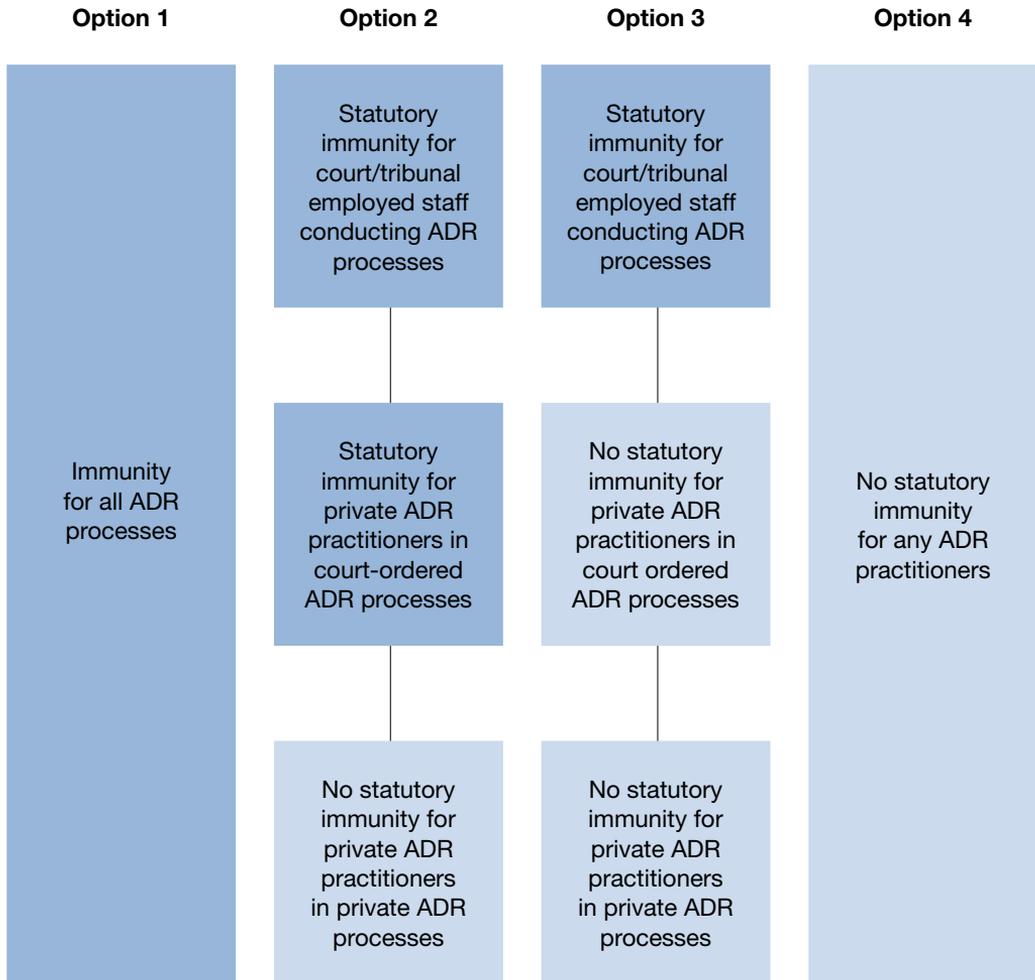
Legislation	Relevant section/s	Summary of provision
<i>Federal Court of Australia Act 1976</i> (Cth)	Section 53C	<p>A mediator or an arbitrator, in mediating or arbitrating anything referred by the Court in accordance with the Rules of Court, has the same protection and immunity as a judge has in performing the function of a judge.</p> <p>The Act allows the Court to refer a matter to a 'suitable person' for resolution.</p>
<i>Federal Magistrates Act 1999</i> (Cth)	Sections 34 and 35	<p>A mediator or arbitrator appointed by the Federal Magistrates Court is given the same protection and immunity as a Federal Magistrate has in performing the functions of a Federal Magistrate.</p>
<i>Administrative Appeals Tribunal Act 1975</i> (Cth)	Section 60	<p>An ADR practitioner has, in the performance of their duties as an ADR practitioner under the Act, the same protection and immunity as a Justice of the High Court.</p> <p>Under this Act the person conducting ADR must be a member or officer of the Tribunal or as otherwise appointed by the Registrar (see ss34C and 34H).</p>
<i>Native Title Act 1993</i> (Cth)	Section 94R	<p>Persons conducting mediation subject to a referral from the Federal Court under s86B (Tribunal members or otherwise) have, in the performance of their mediation duties, the same protection and immunity as a Justice of the High Court.</p> <p>Subsection 86B(1) allows the Federal Court to refer an 'appropriate person or body' for mediation.</p>
<i>International Arbitration Act 1974</i> (Cth)	Section 28	<p>An arbitrator is not liable for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as arbitrator.</p>

Appendix 5.2 – State and territory legislation

Juris-diction	Legislative provision	Summary of provision
ACT	<i>Mediation Act 1997</i> (ACT), s12	Registered mediators have the same protection and immunity as a Judge of the Supreme Court in the exercise in good faith of his or her functions as mediator. A ‘registered mediator’ is a person who is registered with an ‘approved agency’ (s5). ‘Approved agencies’ may be declared by the Minister in writing (s4).
NSW	<i>Civil Procedure Act 2005</i> (NSW), s33	Mediators enjoy the same protection and immunity as a Judge when mediating <i>proceedings referred to them by the court</i> , and in the exercise of his or her functions as a mediator in relation to those proceedings.
	<i>Retail Leases Act 1994</i> (NSW), subs66(3)	A mediator has, in the exercise of functions performed as a mediator under this Act, the same protection and immunities as a Judge of the Supreme Court. Parties to a tenancy dispute are required under the Act to apply to the Retail Tenancy Unit of NSW Fair Trading for mediation before proceedings can commence in the Administrative Decisions Tribunal (ss65 and 68).
	<i>Community Justice Centres Act 1983</i> (NSW), s27	Nothing done or omitted to be done by a mediator shall (if the matter or thing was done in good faith for the purpose of executing the Act) subject them to any action, liability, claim or demand.
	<i>Farm Debt Mediation Act 1994</i> (NSW), s18	Nothing done or omitted to be done by a mediator shall (if the matter or thing was done in good faith for the purpose of executing the Act) subject them to any action, liability, claim or demand.
NT	There are no immunity provisions for mediators in the Northern Territory.	
Qld	<i>Supreme Court of Queensland Act 1991</i> (Qld), subs113(1)	In performing the functions of mediator or case appraiser, an ADR convenor has the same protection and immunity as a Judge performing the functions of a judge.
	<i>Dispute Resolution Centres Act 1990</i> (Qld), paragraph 35(1)(c)	No matter or thing done or omitted to be done by a mediator, if the matter or thing is done in good faith for the purpose of executing this Act, subjects any of them to any action, liability, claim or demand.

Jurisdiction	Legislative provision	Summary of provision
SA	<i>Supreme Court Act 1935 (SA)</i> , subs65(2)	A mediator appointed by the Court under the Act has the privileges and immunities of a Judge and such of the powers of the Court as the Court may delegate.
Tas	<i>Alternative Dispute Resolution Act 2001 (Tas)</i> , s12	No matter or thing done or omitted to be done by a mediator or evaluator subjects the mediator or evaluator to any action, liability, claim or demand if the matter or thing was done in good faith for the purposes of a mediation session or neutral evaluation session under this Act.
	<i>Legal Profession Act 2007 (Tas)</i> , s439	(1) A mediator has, in the performance of his or her duties under this Part, the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge. (2) No matter or thing done or omitted to be done by a mediator subjects the mediator to any action, liability, claim or demand if the matter or thing was done in good faith for the purposes of mediation under this Part.
Vic	<i>Supreme Court Act 1986 (Vic)</i> , s27A	Special referees, mediators and arbitrators enjoy the same protection and immunity as a Judge when mediating <i>proceedings referred to them by the court</i> , and in the exercise of his or her functions as a mediator in relation to those proceedings. This applies despite anything to the contrary in the <i>Commercial Arbitration Act 1984</i> .
	<i>Civil Procedure Act 2010 (Vic)</i> , s68	A judicial officer performing duties in connection with any judicial resolution conference has the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge.
WA	<i>Supreme Court Act 1935 (WA)</i> , s70	A mediator carrying out mediation under direction has the same privileges and immunities as a Judge of the Court has in the performance of judicial duties as a Judge.

Appendix 5.3 – Potential recommendations



Appendix 5.4 – Considerations relating to the conferral of immunity

Options from Appendix 5.3	Arguments supporting statutory immunity	Arguments opposing statutory immunity
<p>Statutory immunity for ADR practitioners in private ADR processes</p>	<p>There are similarities between ADR practitioners and judges in terms of resolving disputes between parties in conflict with each other.</p>	<p>ADR practitioners and judges perform different roles and functions. Judges’ decisions are usually public and open to appeal, whereas ADR generally occurs in private.</p>
	<p>Statutory immunity would preserve the independence of ADR practitioners.</p>	<p>It is important for ADR practitioners to be subject to appropriate scrutiny and quality control.</p>
	<p>Statutory immunity would maintain the integrity of ADR processes by protecting the confidentiality of ADR processes and ensuring finality of outcomes.</p>	<p>Immunity would prevent the making of legitimate claims against ADR practitioners. ADR practitioners who behave inappropriately should be held accountable for their actions. This is a particularly acute consideration because ADR processes occur in private.</p>
	<p>Statutory immunity may encourage participants to fully engage with the process without fear that the end result will be challenged at a later date on the basis of the ADR practitioner’s conduct.</p>	<p>Absence of immunity does not appear to have had any adverse impact on users of ADR services.</p>
	<p>Statutory immunity will support and encourage greater use of ADR.</p>	<p>There is no clear evidence of the availability of statutory immunity being a deterrent for those taking up the profession.</p> <p>In any event, the purpose of statutory immunity is not to create a commercial incentive to undertake an activity by transferring risk from a service provider to a service receiver.</p>
	<p>Indemnity insurance would force up the cost of ADR. This would not be in the public interest.</p>	<p>Other forms of liability protection, such as contractual immunity and professional indemnity insurance, are available and effective.</p>

Options from Appendix 5.3	Arguments supporting statutory immunity	Arguments opposing statutory immunity
<p>Statutory immunity for private ADR practitioners conducting court-ordered ADR</p>	<p>ADR processes sit on a continuum of case management strategies – ADR can be characterised as a first step in the courts’ case management processes.</p>	<p>ADR processes in this context are only loosely connected to courts’ case management, and more analogous to private ADR processes: there is no reporting back to courts beyond the final outcome and courts have no supervisory role.</p>
	<p>ADR practitioners conducting such processes require greater levels of liability protection because participants are often attending against their will.</p>	<p>Practitioners have a choice about accepting clients and, in any event, can effectively limit their liability through contractual arrangements with clients and the purchase of indemnity insurance.</p>
		<p>There is a lack of robust evidence to suggest that participants in court-ordered ADR exhibit a higher frequency or severity of behavioural problems.</p>
<p>Statutory immunity for court or tribunal retained staff conducting ADR</p>	<p>These ADR processes are closely integrated with the exercise of judicial power and court processes. Immunity therefore should be conferred because of the analogy to immunity enjoyed by judicial officers.</p>	<p>Participants in ADR processes can end the process at any time, even if it is being conducted by a court officer.</p>
	<p>ADR services provided by staff retained by courts or tribunals differ from private ADR in several practical ways: court staff do not have a choice about whether to accept the clients, do not receive a fee from the clients and cannot limit liability through contract or individually purchase indemnity insurance.</p>	<p>There is a lack of robust evidence to suggest that participants in court-ordered ADR exhibit a higher frequency or severity of behavioural problems.</p>
		<p>Court and tribunal staff who act in good faith are likely to be indemnified by the Commonwealth in respect of any liability.</p>

Options from Appendix 5.3	Arguments supporting statutory immunity	Arguments opposing statutory immunity
	<p>Court staff must comply with rules set out in codes of conduct and legislation, and may be subject to disciplinary action. Therefore, litigation against these ADR providers is not necessary to provide either accountability or quality control.</p>	<p>Public servants are often required to perform roles in fraught circumstances, without profit or insurance.</p>
	<p>It is difficult to foresee the consequences that will flow from a change in the law that removes immunity from court or tribunal retained staff conducting ADR. The Government needs to be able to provide ADR services to those who could otherwise not afford it. The issue is therefore a matter of resource allocation that can have broader policy implications beyond ADR.</p>	

Appendix 5.5 – Examples of immunity clauses

Exclusion of Liability and Indemnity

1. The Mediator will not be liable to a Party for any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement unless the act or omission is fraudulent.
2. Each party indemnifies the Mediator against all claims by that Party or anyone claiming under or through that Party, arising out of or in any way referable to any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement, unless the act or omission is fraudulent.
3. No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded as a bar to any such action.

Sample Mediation Agreement, LEADR

Indemnity and Exclusion of Liability

1. The Mediator will not be liable to any Party or to any person participating in or present at the mediation for any views or opinions expressed by the Mediator nor for any act or omission in the performance of the Mediator's duties and obligations under this agreement, unless the act or omission is fraudulent.
2. The Parties, together and separately, indemnify the Mediator against any claim for any act or omission in the performance of the Mediator's duties under this agreement, unless the act or omission is fraudulent.
3. The Parties agree that the Mediator shall at least have the same protection and immunity from suit as the Mediator would have under Section 27A(1) of the *Supreme Court Act 1986* as if he or she had been appointed by an order of the Supreme Court under that Section.

Victorian Bar Association model agreement

Mediation Agreement

1. The making or using of any statement or comment, whether written or oral, by the parties or their representatives or the Mediator within the mediation shall not be relied upon to found or maintain, or be used in any way in, any action for defamation, libel, slander or any related complaint. This clause can be pleaded in bar to any such action.
2. The parties jointly and severally release, discharge and indemnify the Mediator in respect of all liability of any kind whatsoever (whether involving negligence or not) which may be alleged to arise in connection with or to result from or to relate in any way to this mediation.

Sir Laurence Street, *Mediation, A Practical Outline* (2003) 10